CYCLOPEDIA

OF

LAW AND PROCEDURE

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EDITOR-IN-CHIEF

VOLUME XIII

NEW YORK

THE AMERICAN LAW BOOK COMPANY

LONDON: BUTTERWORTH & CO., 12 Bell Yard

1904

J. B. LYON COMPANY
PRINTERS AND BINDERS
ALBANY, N. Y.

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I. GENERAL NATURE AND THEORY OF DAMAGES.

As a general rule the theory upon which the law allows damages for the violation of a civil right is based upon the doctrine that where a civil injury has been sustained the law provides a remedy that should be commensurate to the injury sustained.[1] The inquiry must always be, What is an adequate remedy to the party injured? and the answer to that inquiry cannot be affected by the form of the action in which the remedy is sought.[2]

II. PRESUMPTION OF DAMAGES.

Where the evidence shows the violation or infringement of a legal right the

1. Rockwood *v.* Allen, 7 Mass. 254; Schenectady First Baptist Church *v.* Schenectady, etc., R. Co., 5 Barb. (N. Y.) 79; Bartholomew *v.* Bently, 15 Ohio 659, 45 Am. Dec. 596; Smith *v.* Sherwood, 2 Tex. 460. See also Bussy *v.* Donaldson, 4 Dall. (Pa.) 206, 1 L. ed. 748; Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 489, 23 L. ed. 374. In Finch *v.* Heermans, 5 Luz. Leg. Reg. (Pa.) 125, "damage" was defined to be the loss caused by one person to another, either to his person, property, or relative rights, through design, carelessness, or default, and damages are the indemnity recoverable by the injured party from the party who has caused the injury. And see *infra*, VI.

De minimis non curat lex.— In Fullam *v.* Stearns, 30 Vt. 443, which was an action for trespass committed while levying execution, it appeared that defendant, in removing machinery from a building which did not belong to the execution debtor, cut certain thongs which belonged to the building. These thongs were of small value but could have been easily untied. It was held that the maxim "*de minimis non curat lex*" did not apply to preclude the plaintiff from recovering, since it is not applicable because the damage is small, but only where the wrong itself is slight.

2. Baker *v.* Drake, 53 N. Y. 211, 13 Am. Rep. 507; Griffin *v.* Colver, 16 N. Y. 489, 69

law will presume damages sufficient to sustain an action,[3] even though such damages may be only nominal,[4] and not capable of exact measurement.[5]

III. Damnum Absque Injuria.

While the law as a general rule allows damages for the violation of civil rights, it does not always follow that every civil right invaded will be compensated in damages. There are cases classified under the legal maxim *damnum absque injuria* where, although a right may be infringed, no damages will be implied.[6]

IV. General Damages.

General damages are such as the law implies and presumes to have occurred from the wrong complained of.[7]

V. Special Damages.

Special damages are such as actually result from the commission of the wrong, but are not such a necessary result that they will be implied by law.[8] It

Am. Dec. 718; Smith *v.* Sherwood, 2 Tex. 460; Dexter *v.* Spear, 7 Fed. Cas. No. 3,867, 4 Mason 115.

3. *Alabama.*— Adams *v.* Robinson, 65 Ala. 586.

Arkansas.— Barlow *v.* Lowder, 35 Ark. 492.

California.— Hancock *v.* Hubbell, 71 Cal. 537, 12 Pac. 618; Attwood *v.* Fricot, 17 Cal. 37, 76 Am. Dec. 567; Browner *v.* Davis, 15 Cal. 9.

Georgia.— Kenny *v.* Collier, 79 Ga. 743, 8 S. E. 58.

Illinois.— McConnel *v.* Kibbe, 33 Ill. 175, 85 Am. Dec. 265; Plumleigh *v.* Dawson, 6 Ill. 544, 41 Am. Dec. 199; Van Velsor *v.* Seeberger, 35 Ill. App. 598; Blanchard *v.* Burbank, 16 Ill. App. 375; Merrill *v.* Dibble, 12 Ill. App. 85.

Iowa.— Foster *v.* Elliott, 33 Iowa 216.

Louisiana.— Dudley *v.* Tilton, 14 La. Ann. 283.

Maine.— Munroe *v.* Stickney, 48 Me. 462; Seidensparger *v.* Spear, 17 Me. 123, 35 Am. Dec. 234; Butman *v.* Hussey, 12 Me. 407.

Massachusetts.— Appleton *v.* Fullerton, 1 Gray 186.

Missouri.— Jones *v.* Hannovan, 55 Mo. 462.

New York.— Pierce *v.* Hosmer, 66 Barb. 345.

Pennsylvania.— Graver *v.* Sholl, 42 Pa. St. 58.

Texas.— Champion *v.* Vincent, 20 Tex. 811.

Vermont.— Fullam *v.* Stearns, 30 Vt. 443; Paul *v.* Slason, 22 Vt. 231, 54 Am. Dec. 75.

United States.— Webb *v.* Portland Mfg. Co., 29 Fed. Cas. No. 17,322, 3 Sumn. 189; Whipple *v.* Cumberland Mfg. Co., 29 Fed. Cas. No. 17,516, 2 Story 661.

England.— Barker *v.* Green, 2 Bing. 317, 9 E. C. L. 596; Embrey *v.* Owen, 6 Exch. 353, 15 Jur. 633, 20 L. J. Exch. 212; Ashby *v.* White, 2 Ld. Raym. 938, 3 Ld. Raym. 320, 1 Salk. 19.

See 15 Cent. Dig. tit. "Damages," § 3; and, generally, Actions.

4. Adams *v.* Robinson, 65 Ala. 586; Merrill *v.* Dibble, 12 Ill. App. 85; Foster *v.* Elliott, 33 Iowa 216; Fullam *v.* Stearns, 30 Vt. 443. And see *infra*, VI; and, generally, Actions.

5. Birmingham *v.* Lewis, 92 Ala. 352, 9 So. 243; Alfaro *v.* Davidson, 40 N. Y. Super. Ct. 87; Fitch *v.* Fitch, 35 N. Y. Super. Ct. 302. If they cannot be measured by a fixed rule all facts and circumstances tending to show what they are should be submitted to the jury. Gilbert *v.* Kennedy, 22 Mich. 117. In Katz *v.* Wolf, 16 Misc. (N. Y.) 82, 37 N. Y. Suppl. 648, it was held, however, that no damages could be measured for breach of a contract to deposit money with another on furniture which the depositor was to purchase when he got married, the event not having occurred.

6. *Louisiana.*—Donovan *v.* New Orleans, 11 La. Ann. 711.

Maryland.— Steuart *v.* State, 20 Md. 97.

Massachusetts.— Howland *v.* Vincent, 10 Metc. 371, 43 Am. Dec. 442.

New York.— Gardner *v.* Heartt, 2 Barb. 165; Mayhan *v.* Brown, 13 Wend. 261, 28 Am. Dec. 461.

England.— Davies *v.* Jenkins, 1 D. & L. 321, 7 Jur. 801, 12 L. J. Exch. 386, 11 M. & W. 745; Ashby *v.* White, 2 Ld. Raym. 938, 3 Ld. Raym. 320, 1 Salk. 19; Paslev *v.* Freeman, 3 T. R. 51, 1 Rev. Rep. 634.

And see, generally, Actions.

No legal right invaded.— Where the extension of a cemetery was duly authorized by law, although such extension was prejudicial to the interests of the owner of land adjoining the cemetery, and depreciated the value of said land, he could not recover damages therefor in the absence of evidence that any legal or conventional right pertaining to him had been invaded. Robert *v.* Les Cure et Marguilliers, etc., de Montreal, 9 Quebec Super. Ct. 489.

7. Kenny *v.* Collier, 79 Ga. 743, 8 S. E. 58; Olmstead *v.* Burke, 25 Ill. 86; Chamberlain *v.* Porter, 9 Minn. 260.

8. Tomlinson *v.* Derby, 43 Conn. 562; Olmstead *v.* Burke, 25 Ill. 86; Chamberlain *v.* Porter, 9 Minn. 260; Lawrence *v.* Porter, 63 Fed. 62, 11 C. C. A. 27, 26 L. R. A. 167. See also *infra*, XII, A.

is often a very difficult matter to distinguish general damages from special damages.[9]

VI. NOMINAL DAMAGES.[10]

A. In General. Although the common law only gave actual damages where an actual loss had been sustained, yet the law is now well settled that where a legal right has been invaded the plaintiff may recover nominal damages, although there may be no evidence of actual damages sustained;[11] for a damage is not

Aggravation of damages sued for.— Special damage is that which may be given in evidence to aggravate the damages sued for in an action already pending, or which may be itself a distinct cause of action. Smith *v.* Sherman, 4 Cush. (Mass.) 408.

9. The necessary result of an injury is often and easily confounded with the general and proximate result, and all legal damage, whether general or special, must naturally and proximately result from the act or default complained of. It is difficult to lay down any general rule by which to determine when the law implies the damage and when it does not. It would seem, however, that when the consequences of an injury are peculiar to the circumstances and condition of the injured party, the law could not imply the damage simply from the act causing the injury. Tomlinson *v.* Derby, 43 Conn. 562.

Wrongful act proximate cause of both.— All damage of which the law takes notice must be the natural and proximate effect of the wrongful act charged, and the only difference between general and special damage is that the former necessarily results from the wrongful act, while the latter does not; the wrongful act being still the natural and proximate cause of both. Bristol Mfg. Co. *v.* Gridley, 28 Conn. 201.

10. In treating of nominal damages a class of cases also arises where substantial damages are claimed and the defendant seeks, not to defeat the action altogether but desires to reduce the damages claimed by showing that they are in fact nothing more than nominal. This class of cases is merely a question of compensation or measure of damages and will be treated under those respective heads. See *infra*, VII; XI.

11. *Alabama.*— Drum *v.* Harrison, 83 Ala. 384, 3 So. 715; Stein *v.* Burden, 24 Ala. 130, 60 Am. Dec. 453; Bagby *v.* Harris, 9 Ala. 173; Oden *v.* Stubblefield, 2 Ala. 684.

Arkansas.— Warner *v.* Capps, 37 Ark. 32; Barlow *v.* Lowder, 35 Ark. 492; Belfour *v.* Raney, 8 Ark. 479.

California.— Hancock *v.* Hubbell, 71 Cal. 537, 12 Pac. 618; Creighton *v.* Evans, 53 Cal. 55; Browner *v.* Davis, 15 Cal. 9.

Colorado.— Hammond *v.* Solliday, 8 Colo. 610, 9 Pac. 781.

Connecticut.— Parker *v.* Griswold, 17 Conn. 288, 42 Am. Dec. 739.

Georgia.— Foote *v.* Malony, 115 Ga. 985, 42 S. E. 413; Greensboro *v.* McGibbony, 93 Ga. 672, 20 S. E. 37; Kenny *v.* Collier, 79 Ga. 743, 8 S. E. 58.

Illinois.— Williamson County *v.* Farson, 199 Ill. 71, 64 N. E. 1086; Radloff *v.* Haase, 196 Ill. 365, 63 N. E. 729; Aurora *v.* Hillman, 90 Ill. 61; Brent *v.* Kimball, 60 Ill. 211, 14 Am. Rep. 35; McConnel *v.* Kibbe, 33 Ill. 175, 85 Am. Dec. 265; Van Velsor *v.* Seeberger, 35 Ill. App. 598.

Indiana.— Cardwill *v.* Gilmore, 86 Ind. 428; Robinson *v.* Statzley, 75 Ind. 461; Cory *v.* Silcox, 6 Ind. 39; Browning *v.* Simons, 17 Ind. App. 45, 46 N. E. 86.

Iowa.— Foster *v.* Elliott, 33 Iowa 216; Plummer *v.* Harbut, 5 Iowa 308.

Kentucky.— Diers *v.* Edwards, 63 S. W. 276, 23 Ky. L. Rep. 500.

Louisiana.— Bourdette *v.* Sieward, 107 La. 258, 31 So. 630.

Maine.— Webb *v.* Gross, 79 Me. 224, 9 Atl. 612; Butman *v.* Hussey, 12 Me. 407.

Massachusetts.— Todd *v.* Keene, 167 Mass. 157, 45 N. E. 81; Hooten *v.* Barnard, 137 Mass. 36; Whitman *v.* Merrill, 125 Mass. 127.

Michigan.— Detroit Gas Co. *v.* Moreton Truck, etc., Co., 111 Mich. 401, 69 N. W. 659.

Minnesota.— Sloggy *v.* Crescent Creamery Co., 72 Minn. 316, 75 N. W. 225; Oleson *v.* Newell, 12 Minn. 186.

Mississippi.— Thompson *v.* New Orleans, etc., R. Co., 50 Miss. 315, 19 Am. Rep. 12.

Missouri.— McCutchin *v.* Batterton, 1 Mo. 342; Cravens *v.* Hunter, 87 Mo. App. 456; Weber *v.* Squier, 51 Mo. App. 601; Fulkerson *v.* Eads, 19 Mo. App. 620.

New Hampshire.— Blodgett *v.* Stone, 60 N. H. 167; Amoskeag Mfg. Co. *v.* Goodale, 46 N. H. 53; Tillotson *v.* Smith, 32 N. H. 90, 64 Am. Dec. 355.

New Jersey.— New Jersey School, etc., Furniture Co. *v.* Board of Education, 58 N. J. L. 646, 35 Atl. 397.

New York.— New York Rubber Co. *v.* Rothery, 132 N. Y. 293, 30 N. E. 841, 28 Am. St. Rep. 575; Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618; Pickett *v.* West Monroe, 47 N. Y. App. Div. 629, 63 N. Y. Suppl. 30; Niendorf *v.* Manhattan R. Co., 4 N. Y. App. Div. 46, 38 N. Y. Suppl. 690; Gill *v.* New York Cab Co., 48 Hun 524, 1 N. Y. Suppl. 202; Pierce *v.* Hosmer, 66 Barb. 345; Devendorf *v.* Wert, 42 Barb. 227; Butts *v.* Edwards, 2 Den. 164; Allaire *v.* Whitney, 1 Hill 484.

North Carolina.— White *v.* Griffin, 49 N. C. 139.

Ohio.— Tootle *v.* Clifton, 22 Ohio St. 247, 10 Am. Rep. 732; Hough *v.* Young, 1 Ohio 504.

merely pecuniary, but an injury imports a damage where a man is thereby hindered of his right.[12] Where the evidence shows the violation of a legal right the claim to damages accrues, and the fact that the precise nature and extent of the damage is not capable of being exactly ascertained will not serve to divest the right of recovery;[13] nor will such recovery be barred by the fact that the dam-

Pennsylvania.—Humphrey *v.* Irvin, (1886) 6 Atl. 479; Bash *v.* Bash, 9 Pa. St. 260; Williams *v.* Esling, 4 Pa. St. 486, 45 Am. Dec. 710; Pastorius *v.* Fisher, 1 Rawle 27; Cronin *v.* Sharp, 16 Pa. Super. Ct. 76.

Utah.— Stevens *v.* Rogers, 16 Utah 105, 51 Pac. 261.

Vermont.— Fullam *v.* Stearns, 30 Vt. 443; Brown *v.* Richmond, 27 Vt. 583.

Wisconsin.— Thomas *v.* Wiesmann, 44 Wis. 339.

United States.— Watts *v.* Phœnix Mut. L. Ins. Co., 29 Fed. Cas. No. 17,294, 16 Blatchf. 228; Whipple *v.* Cumberland Mfg. Co., 29 Fed. Cas. No. 17,516, 2 Story 661; Whittemore *v.* Cutter, 29 Fed. Cas. No. 17,600, 1 Gall. 429. And see Lonsdale Co. *v.* Moies, 15 Fed. Cas. No. 8,497, 2 Cliff. 538.

England.— Taylor *v.* Henniker, 12 A. & E. 488, 9 L. J. Q. B. 383, 4 P. & D. 243, 40 E. C. L. 245; Blofeld *v.* Payne, 4 B. & Ad. 410, 2 L. J. K. B. 68, 1 N. & M. 353, 24 E. C. L. 183; Marzetti *v.* Williams, 1 B. & Ad. 415, 20 E. C. L. 541; Nosotti *v.* Page, 10 C. B. 643, 20 L. J. C. P. 81, 2 L. M. & P. 8, 70 E. C. L. 643; Johnson *v.* Stear, 15 C. B. N. S. 330, 10 Jur. N. S. 99, 33 L. J. C. P. 130, 9 L. T. Rep. N. S. 538, 12 Wkly. Rep. 347, 109 E. C. L. 330; Pindar *v.* Wadsworth, 2 East 154, 6 Rev. Rep. 412; Chandler *v.* Doulton, 3 H. & C. 553, 11 Jur. N. S. 286, 34 L. J. Exch. 89, 11 L. T. Rep. N. S. 639; Feize *v.* Thompson, 1 Taunt. 121; Weller *v.* Baker, 2 Wils. C. P. 414. But *compare* Beaumont *v.* Greathead, 2 C. B. 494, 3 D. & L. 631, 15 L. J. C. P. 130, 52 E. C. L. 494.

Canada.— Collette *v.* Lasnier, 13 Can. Supreme Ct. 563; Lebeau *v.* Turcotte, 7 Montreal Leg. N. 259; Clarry *v.* Grand Trunk R. Co., 29 Ont. 18; Kennin *v.* Macdonald, 22 Ont. 484; Canada Paint Co. *v.* Johnston, 4 Quebec Super. Ct. 255; McQuarrie *v.* Fargo, 21 U. C. C. P. 478; Doan *v.* Warren, 11 U. C. C. P. 423; Warren *v.* Deslippes, 33 U. C. Q. B. 59; Plumb *v.* McGannon, 32 U. C. Q. B. 8; Mitchell *v.* Barry, 26 U. C. Q. B. 416; McLeod *v.* Boulton, 3 U. C. Q. B. 84.

See 15 Cent. Dig. tit. "Damages," § 7; and, generally, ACTIONS.

12. Per Lord Holt in Ashby *v.* White, 2 Ld. Raym. 938, 3 Ld. Raym. 320, 1 Salk. 19.

13. *Alabama.*— Howard *v.* Taylor, 99 Ala. 450, 13 So. 121; Seaboard Mfg. Co. *v.* Woodson, 98 Ala. 378, 11 So. 733; Drum *v.* Harrison, 83 Ala. 384, 3 So. 715; Bagby *v.* Harris, 9 Ala. 173.

Arkansas.— St. Louis, etc., R. Co. *v.* Graham, 55 Ark. 294, 18 S. W. 56; Belfour *v.* Raney, 8 Ark. 479.

Colorado.— Patrick *v.* Colorado Smelting Co., 20 Colo. 268, 38 Pac. 236.

Georgia.— Greensboro *v.* McGibbony, 93 Ga. 672, 20 S. E. 37.

Illinois.— Chicago, etc., R. Co. *v.* Cicero, 157 Ill. 48, 41 N. E. 640; Peoria, etc., R. Co. *v.* Peoria, etc., Union R. Co., 105 Ill. 110; Hair *v.* Barnes, 26 Ill. App. 580.

Indiana.— Fox *v.* Wray, 56 Ind. 423.

Iowa.— Williams *v.* Brown, 76 Iowa 643, 41 N. W. 377.

Louisiana.— Wilde *v.* New Orleans, 12 La. Ann. 15.

Massachusetts.— McAneany *v.* Jewett, 10 Allen 151.

Missouri.— Brown *v.* Emerson, 18 Mo. 103; McCutchin *v.* Batterton, 1 Mo. 342; Cravens *v.* Hunter, 87 Mo. App. 456; Weber *v.* Squier, 51 Mo. App. 601; Barrie *v.* Seidel, 30 Mo. App. 559; Sheedy *v.* Union Press Brick Works, 25 Mo. App. 527.

New York.— Taylor *v.* Bradley, 39 N. Y. 129, 100 Am. Dec. 415; United Press *v.* New York Press Co., 35 N. Y. App. Div. 444, 54 N. Y. Suppl. 807; Niendorff *v.* Manhattan R. Co., 4 N. Y. App. Div. 46, 38 N. Y. Suppl. 690.

Pennsylvania.— Smith *v.* Loag, 132 Pa. St. 301, 19 Atl. 137; Humphrey *v.* Irvin, (1886) 6 Atl. 479.

South Dakota.— Hudson *v.* Archer, 9 S. D. 240, 68 N. W. 541.

Texas.— Laredo *v.* Russell, 56 Tex. 398.

Washington.— American Bldg., etc., Assoc. *v.* Hart, 2 Wash. 594, 27 Pac. 468.

United States.— Watts *v.* Weston, 62 Fed. 136, 10 C. C. A. 302.

England.— Feize *v.* Thompson, 1 Taunt. 121.

Canada.— Kelly *v.* Jones, 7 N. Brunsw. 465; Kennin *v.* Macdonald, 22 Ont. 484; Mallet *v.* Martineau, 13 Quebec Super. Ct. 510.

See 15 Cent. Dig. tit. "Damages," § 7 *et seq.*

Contract for services.— Only nominal damages can be recovered by an employee for the breach of a contract of employment for an indefinite time. Atkins *v.* Van Buren School Tp., 77 Ind. 447. So in an action for services rendered plaintiff can only recover nominal damages, where there is no proof of what the services are worth. Gill *v.* New York Cab Co., 48 Hun (N. Y.) 524, 1 N. Y. Suppl. 202. See also Bash *v.* Bash, 9 Pa. St. 260.

In an action of trespass for wrongfully killing plaintiff's dog, an instruction that it is incumbent on plaintiff to show by a preponderance of the evidence that the dog was of some pecuniary value is properly refused, as the law recognizes the right of property in a dog, and if it is destroyed without legal justification the owner is entitled to at least nominal damages. Brent *v.* Kimball, 60 Ill. 211, 14 Am. Rep. 35.

The opening of a private letter by a person

ages claimed are so small that they cannot be readily estimated.[14] In such cases if the plaintiff has evidently sustained some damage and the jury being unable to ascertain the amount finds a verdict for the defendant, the court will permit the plaintiff to enter a verdict for nominal damages.[15]

B. Benefit Resulting From Wrong. Even where a benefit has resulted from the wrong done or the right violated the plaintiff can recover nominal damages,[16] as such fact should be rightly considered by the jury in estimating the amount to which he is entitled.[17]

C. Loss Subsequently Repaired. So where the loss for which the action is brought has been subsequently repaired the plaintiff is entitled to nominal damages upon proof of the invasion of some legal right on the part of the defendant.[18]

D. In Actions For Torts. In actions for torts the law does not regard trifling and small inconveniences, but regards only sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment, or value of life, limb, or property.[19] In the absence of proof of actual injury a party may at times recover nominal damages for the infringement of a legal right;[20] but where a

to whom it was not addressed and for whom it was not intended, and voluntarily perusing and copying such letter, renders the person who thus violates the sanctity of private correspondence answerable in damages. Cordingly *v.* Nield, 18 L. C. Jur. 204.

14. Glass *v.* Garber, 55 Ind. 336; Seneca Road Co. *v.* Auburn, etc., R. Co., 5 Hill (N. Y.) 170; Fullam *v.* Stearns, 30 Vt. 443. Where it appeared that the sum demanded by plaintiff was so small that the plaintiff, if he recovered, would be obliged to pay the costs, the court refused to grant a venire. Brown *v.* Clark, 3 Johns. (N. Y.) 443.

Omission to present contribution box in church.— A person performing a voluntary and gratuitous service, such as the collection of the offertory in a church, will not be permitted to make use of his office to offend and humiliate a member of the congregation, and an action of damages will lie for such offense. A wilful and marked omission to present the plate to a member of the congregation was held to be an offense for which an action at law would lie. Lebeau *v.* Turcotte, 7 Montreal Leg. N. 259.

15. Feize *v.* Thompson, 1 Taunt. 121.

16. Excelsior Needle Co. *v.* Smith, 61 Conn. 56, 23 Atl. 693; Jewett *v.* Whitney, 43 Me. 242; Newcomb *v.* Wallace, 112 Mass. 25; Hibbard *v.* Western Union Tel. Co., 33 Wis. 558, 14 Am. Rep. 775. In Pond *v.* Merrifield, 12 Cush. (Mass.) 181, the defendant having contracted to have a building erected for himself within a certain time, and according to certain specifications, borrowed money from plaintiff for the purpose of completing it and secured the loan by a mortgage thereon, and also gave plaintiff a penal bond to complete said building by a certain time and according to the contract. The work was not done exactly according to the time or terms of the contract, and plaintiff was compelled to pay extra insurance on the building; but the extra work of defendant on the building increased its value as a security to plaintiff to an amount more than all the deficiencies and delay in not exactly complying with the contract, including also the extra insurance. Under such circumstances it was held that the plaintiff could recover only nominal damages for breach of the bond.

For a trespass in putting dirt on plaintiff's lot, where the lot was benefited thereby, he is not entitled to damages "equal to the cost of removing the dirt," but is only entitled to nominal damages. Murphy *v.* Fond du Lac, 23 Wis. 365, 99 Am. Dec. 181.

In an action for unlawful flowage of plaintiff's land it is no defense that such flowage has resulted beneficially to him, and notwithstanding such benefits he is entitled to recover nominal damages. Mize *v.* Glenn, 38 Mo. App. 98. See also Johnson *v.* Conant, 64 N. H. 109, 7 Atl. 116; Murphy *v.* Fond du Lac, 23 Wis. 365, 99 Am. Dec. 181.

17. See *infra*, VII, J.

18. Dow *v.* Humbert, 91 U. S. 294, 23 L. ed. 368. In Murphy *v.* Jarvis, 1 Phila. (Pa.) 84, subsequent to the commencement of an action, the debt was paid, but the plaintiff claimed for costs and expenses at law and in equity, counsel fees, etc. It was held under the charge of the court that a verdict for only nominal damages was proper, and a motion for a new trial was refused.

Satisfaction of mortgage.— In an action by a grantor against a grantee in a deed on an agreement therein by which the grantee assumed and agreed to pay a mortgage on the land, nominal damages only can be recovered after the mortgage has been satisfied out of the land or extinguished by the act of the mortgagee. Muhlig *v.* Fiske, 131 Mass. 110.

19. Young *v.* Spencer, 10 B. & C. 145, 8 L. J. K. B. O. S. 106, 5 M. & R. 47, 21 E. C. L. 70; St. Helen's Smelting Co. *v.* Tipping, 11 H. L. Cas. 642, 35 L. J. Q. B. 66, 12 L. T. Rep. N. S. 776, 13 Wkly. Rep. 1083.

20. Havens *v.* Hartford, etc., R. Co., 28 Conn. 69; Wilde *v.* Orleans, 12 La. Ann. 15;

slight injury results from the lawful use of property even nominal damages will be denied.[21] In case of personal injury, where there is no evidence of appreciable injury, a party is at least entitled to nominal damages.[22]

E. In Actions of Contract. The right to nominal damages has also been held to relate to violations or breaches of contract where there has been no proof of actual damage, but where a right of action exists in the injured party.[23] This

Custard *v.* Burdett, 15 Tex. 456; Howe *v.* Stevens, 47 Vt. 262. Where B unnecessarily throws cotton left on his land by A without his consent into the water, A can recover nothing or only nominal damages against B, if the evidence shows that it belonged to C, and that C afterward got possession without any expense or trouble to A. Grier *v.* Ward, 23 Ga. 145.

21. St. Helen's Smelting Co. *v.* Tipping, 11 H. L. Cas. 642, 35 L. J. Q. B. 66, 12 L. T. Rep. N. S. 776, 13 Wkly. Rep. 1083. And see *supra*, III.

22. *Arkansas.*— Barlow *v.* Lowder, 35 Ark. 492.

Delaware.— Tatnall *v.* Courtney, 6 Houst. 434.

Hawaii.— Coffin *v.* Spencer, 2 Hawaii 23.

Indiana.— Lewis *v.* Hoover, 3 Blackf. 407.

Minnesota.— Crosby *v.* Humphreys, 59 Minn. 92, 60 N. W. 843.

New York.— Bates *v.* Loomis, 5 Wend. 134.

Pennsylvania.— Moses *v.* Bradley, 3 Whart. 272.

Texas.— Flanagan *v.* Womack, 54 Tex. 45; Leach *v.* Leach, 11 Tex. Civ. App. 699, 33 S. W. 703.

While in an action for personal injuries the absence of evidence of the value of plaintiff's earnings precludes a recovery of substantial damages for loss thereof, he is nevertheless entitled to nominal damages on that account, and to make an objection to a recovery of more than nominal damages for such loss available to defendant a specific request that nominal damages could only be recovered for loss of wages is necessary. Seitz *v.* Dry-Dock, etc., R. Co., 16 Daly (N. Y.) 264, 10 N. Y. Suppl. 1.

23. *Alabama.*— Adams *v.* Robinson, 65 Ala. 586. And see Howard *v.* Taylor, 99 Ala. 450, 13 So. 121.

California.— Hancock *v.* Hubbell, 71 Cal. 537, 12 Pac. 618; Browner *v.* Davis, 15 Cal. 9; McCarty *v.* Beach, 10 Cal. 461.

Georgia.— Addington *v.* Western, etc., R. Co., 93 Ga. 566, 20 S. E. 71; Kenny *v.* Collier, 79 Ga. 743, 8 S. E. 58; Green *v.* Weaver, 63 Ga. 302. And see Irwin *v.* Askew, 74 Ga. 581.

Illinois.— Radloff *v.* Haase, 196 Ill. 365, 63 N. E. 729; Wilcus *v.* Kling, 87 Ill. 107; Olmstead *v.* Burke, 25 Ill. 86; Jarrot *v.* Jarrot, 7 Ill. 1; Buckley *v.* Holmes, 19 Ill. App. 530; Stock Quotation Tel. Co. *v.* Board of Trade, 44 Ill. App. 358.

Indiana.— Turpie *v.* Lowe, 114 Ind. 37, 15 N. E. 834; Rhine *v.* Morris, 96 Ind. 81; Atkins *v.* Van Buren School Tp., 77 Ind. 447; Jones *v.* Noe, 71 Ind. 368; Rosenbaum *v.* McThomas, 34 Ind. 331; Freese *v.* Crary, 29 Ind. 524; Tate *v.* Booe, 9 Ind. 13; Schooley *v.* Stoops, 4 Ind. 130; Browning *v.* Simons, 17 Ind. App. 45, 46 N. E. 86. And see Reeves *v.* Andrews, 7 Ind. 207.

Iowa.— Carl *v.* Granger Coal Co., 69 Iowa 519, 29 N. W. 437; Sweem *v.* Steele, 5 Iowa 352.

Kansas.— Missouri Valley L. Ins. Co. *v.* Kelso, 16 Kan. 481.

Kentucky.— Bell *v.* Truit, 9 Bush 257; Wilson *v.* Barnes, 13 B. Mon. 330; Diers *v.* Edwards, 63 S. W. 276, 23 Ky. L. Rep. 500.

Maine.— Burbank *v.* Gould, 15 Me. 118.

Maryland.— Howard *v.* Wilmington, etc., R. Co., 1 Gill 311.

Massachusetts.— Todd *v.* Keene, 167 Mass. 157, 45 N. E. 81; Tufts *v.* Bennett, 163 Mass. 398, 40 N. E. 172; Noble *v.* Hand, 163 Mass. 289, 39 N. E. 1020; Hagan *v.* Riley, 13 Gray 515; Pollard *v.* Porter, 3 Gray 312; Leland *v.* Stone, 10 Mass. 459.

Michigan.— Wilson *v.* Wagar, 26 Mich. 452; Mitchell *v.* Shuert, 16 Mich. 444; Dye *v.* Mann, 10 Mich. 291.

Minnesota.— Cowley *v.* Davidson, 10 Minn. 392.

Mississippi.— Whitehead *v.* Ducker, 11 Sm. & M. 98.

Missouri.— Dulaney *v.* St. Louis Sugar Refining Co., 42 Mo. App. 659; Abeles *v.* Western Union Tel. Co., 37 Mo. App. 554; Middleton *v.* Moore, 36 Mo. App. 627; Breen *v.* Fairbank, 35 Mo. App. 212; Barrie *v.* Seidel, 30 Mo. App. 559; Gibson *v.* Whip Pub. Co., 28 Mo. App. 450; Haynes *v.* Connelly, 12 Mo. App. 595.

Nebraska.— Uhlig *v.* Barnum, 43 Nebr. 584, 61 N. W. 749.

Nevada.— Truckee Lodge No. 14, I. O. O. F. *v.* Wood, 14 Nev. 293; Richardson *v.* Jones, 1 Nev. 405.

New Hampshire.— French *v.* Bent, 43 N. H. 448.

New Jersey.— Jurnick *v.* Manhattan Optical Co., 66 N. J. L. 380, 49 Atl. 681; New Jersey School, etc., Furniture Co. *v.* Board of Education, 58 N. J. L. 646, 35 Atl. 397; Gerli *v.* Poidebard Silk Mfg. Co., 57 N. J. L. 432, 31 Atl. 401, 51 Am. St. Rep. 611, 30 L. R. A. 61; Shaw *v.* Wallace, 25 N. J. L. 453.

New York.— Barnes *v.* Brown, 130 N. Y. 372, 29 N. E. 760 [*modifying* 55 Hun 339, 8 N. Y. Suppl. 834]; Horton *v.* Bauer, 129 N. Y. 148, 29 N. E. 1 [*affirming* 13 N. Y. Suppl. 773]; Cockcroft *v.* New York, etc., R. Co., 69 N. Y. 201; Chamberlain *v.* Parker, 45 N. Y. 569; Conger *v.* Weaver, 20 N. Y. 140; Horton *v.* Childs, 13 N. Y. Suppl. 773; Devendorf *v.* Wert, 42 Barb. 227; Dart *v.* McAdam, 27 Barb. 187; Derleth *v.* Degraaf, 51 N. Y. Super. Ct. 369; Importers, etc.,

rule has been held to apply even where there is a finding that the plaintiff was benefited by the breach complained of, or the evidence shows that the performance of the contract would result in an actual injury.[24] To entitle a plaintiff, in an action on a contract, to recover more than nominal damages for its breach, there must be evidence that an actual, substantial loss or injury has been sustained, unless the contract itself furnish a guide for the measurement of damages.[25]

F. Actions Involving Personal Property. Nominal damages may also be recovered for the conversion or detention of personal property in the absence of proof that actual damages have been sustained.[26] And this has been held to be

Ins. Co. *v.* Christie, 5 Rob. 169; Clarke *v.* Meigs, 10 Bosw. 337; Cantor *v.* Tattersalls, 13 Misc. 17, 34 N. Y. Suppl. 96; Allaire *v.* Whitney, 1 Hill 484.

North Carolina.— Anders *v.* Ellis, 87 N. C. 207; Bond *v.* Hilton, 47 N. C. 149; Clinton *v.* Mercer, 7 N. C. 119.

Ohio.— Barnesville First Nat. Bank *v.* Western Union Tel. Co., 30 Ohio St. 555, 27 Am. Rep. 485; Fosdick *v.* Greene, 27 Ohio St. 484, 22 Am. Rep. 328.

Pennsylvania.— Smith *v.* Loag, 132 Pa. St. 301, 19 Atl. 137; Wilson *v.* Whitaker, 49 Pa. St. 114; Cronin *v.* Sharp, 16 Pa. Super. Ct. 76.

Tennessee.— State *v.* Ward, 9 Heisk. 100; Seat *v.* Moreland, 7 Humphr. 575.

Texas.— Laredo *v.* Russell, 56 Tex. 398; Moore *v.* Anderson, 30 Tex. 224; Hope *v.* Alley, 9 Tex. 394.

Washington.— American Bldg., etc., Assoc. *v.* Hart, 2 Wash. 594, 27 Pac. 468.

West Virginia.— Douglass *v.* Ohio River R. Co., 51 W. Va. 523, 41 S. E. 911.

Wisconsin.— Hibbard *v.* Western Union Tel. Co., 33 Wis. 558, 14 Am. Rep. 775.

United States.— Troy Laundry Mach. Co. *v.* Dolph, 138 U. S. 617, 11 S. Ct. 412, 34 L. ed. 1083; Western Union Tel. Co. *v.* Hall, 124 U. S. 444, 8 S. Ct. 577, 31 L. ed. 479; Baird *v.* Winchester, 72 Fed. 755, 19 C. C. A. 172; Hemingway Mfg. Co. *v.* Council Bluffs Canning Co., 62 Fed. 897; Watts *v.* Weston, 62 Fed. 136, 10 C. C. A. 302; Oh Chow *v.* Hallett, 19 Fed. Cas. No. 10,469, 2 Sawy. 259; Rosenfield *v.* Express Co., 20 Fed. Cas. No. 12,060, 1 Woods 131; Watts *v.* Phœnix Mut. L. Ins. Co., 29 Fed. Cas. No. 17,294, 16 Blatchf. 228.

Canada.— Ottawa County *v.* Montreal, etc., R. Co., 14 Can. Supreme Ct. 193 [*affirming* 28 L. C. Jur. 29, 6 Montreal Leg. N. 382, 1 Montreal Q. B. 46 (*affirming* 26 L. C. Jur. 148, 5 Montreal Leg. N. 132)]; McQuarrie *v.* Fargo, 21 U. C. C. P. 478.

See 15 Cent. Dig. tit. "Damages," § 8.

Breach of condition of bond.— In an action against an administrator for a breach of the condition of his bond in failing to make a settlement of his accounts annually, if no specific damage is shown nominal damages only can be recovered. Scarborough *v.* State, 24 Ark. 20. See also Schooley *v.* Stoops, 4 Ind. 130.

Special damages too remote.— On proof of a breach of contract plaintiffs are entitled to recover nominal damages at least, although the special damages claimed are too remote and speculative to be considered. Treadwell *v.* Tillis, 108 Ala. 262, 18 So. 886.

24. Excelsior Needle Co. *v.* Smith, 61 Conn. 56, 23 Atl. 693. And see *supra*, VI, B.

Damages under injurious agreement.— Where defendant agreed to employ plaintiff as an actress, her compensation to be one-half the profits, and on the enterprise proving a failure broke the agreement, plaintiff is entitled to recover nominal damages, although the performance of the agreement by defendant would have been a positive injury to her. Ellsler *v.* Brooks, 54 N. Y. Super. Ct. 73.

25. Adams Express Co. *v.* Egbert, 36 Pa. St. 360, 78 Am. Dec. 382. And see *infra*, XI, D.

Depreciation in value of land.— Where a vendor breaks a contract for the conveyance of land because it has depreciated in value since the making of the contract, more than nominal damages may be recovered by the purchaser. Morgan *v.* Stearns, 40 Cal. 434.

In an action on an instrument under seal a court of law will only give nominal damages where the presumption of valuable consideration is negatived by something appearing on the face of the paper. Cox *v.* Hill, 6 Md. 274.

26. *Alabama.*— Miller *v.* Jones, 26 Ala. 247; Oden *v.* Stubblefield, 2 Ala. 684.

Colorado.— Hammond *v.* Solliday, 8 Colo. 610, 9 Pac. 781.

Connecticut.— Rose *v.* Gallup, 33 Conn. 338.

Indiana.— Robinson *v.* Shatzley, 75 Ind. 461.

Maine.— Jones *v.* Cobb, 84 Me. 153, 24 Atl. 798.

Massachusetts.— Whitman *v.* Merrill, 125 Mass. 127.

Michigan.— Grinnell *v.* Bebb, 126 Mich. 157, 85 N. W. 467; Chicago, etc., R. Co. *v.* Reid, 74 Mich. 366, 41 N. W. 1083; Mears *v.* Cornwall, 73 Mich. 78, 40 N. W. 931; Brady *v.* Whitney, 24 Mich. 154; Phenix *v.* Clark, 2 Mich. 327.

Missouri.— Niemetz *v.* St. Louis Agricultural, etc., Assoc., 5 Mo. App. 59.

New York.— Whitmark *v.* Lorton, 15 Daly 548, 8 N. Y. Suppl. 480.

Tennessee.— Lay *v.* Bayless, 4 Coldw. 246.

Vermont.— Rutland, etc., R. Co. *v.* Middlebury Bank, 32 Vt. 639; Pratt *v.* Battels, 28 Vt. 685.

England.— Hiort *v.* London, etc., R. Co., 4 Ex. D. 188, 48 L. J. Exch. 545, 40 L. T. Rep. N. S. 674, 27 Wkly. Rep. 778.

See 15 Cent. Dig. tit. "Damages," § 11.

the rule even in cases where such property is returned by the wrong-doer to the owner thereof.[27]

G. In Actions Involving Real Property — 1. In General. The right to nominal damages in case of injury to real property is especially applicable.[28] In such cases, while no actual damages may result, the question of the title may be involved and the decision of such question rests upon the recovery or non-recovery of damages for the injury complained of.[29] It is the invasion of the right which gives the action, and the law in the absence of any special injury gives nominal damages on the ground that the undisturbed enjoyment or continuation of such acts without the consent of the owner would ripen into evidence of title.[30]

Stock certificates.— If the transfer of a certificate of stock is void, so as to render the holder liable in trover for the sale of the stock, it is the shares of stock that he is to be considered as having converted, and not merely the paper certificate, so as to render him liable only for nominal damages. Morton *v.* Preston, 18 Mich. 60, 100 Am. Dec. 146. But the conversion of an unindorsed certificate of stock, not being a conversion of the stock itself, justifies only nominal damages. Daggett *v.* Davis, 53 Mich. 35, 18 N. W. 548, 51 Am. Rep. 91.

27. *Arkansas.*— Warner *v.* Capps, 37 Ark. 32.

California.— Conroy *v.* Flint, 5 Cal. 327.

Illinois.— Perkins *v.* Freeman, 26 Ill. 477.

Indiana.— Cardwill *v.* Gilmore, 86 Ind. 428; Stevens *v.* McClure, 56 Ind. 384.

Maine.— Robinson *v.* Barrows, 48 Me. 186.

Minnesota.— Oleson *v.* Newell, 12 Minn. 186.

Wisconsin.— Cernahan *v.* Chrisler, 107 Wis. 645, 83 N. W. 778; Farr *v.* Phillips State Bank, 87 Wis. 223, 58 N. W. 377, 41 Am. St. Rep. 40; Churchill *v.* Welsh, 47 Wis. 39, 1 N. W. 398; Thomas *v.* Wiesman, 44 Wis. 339.

England.— *Compare* Thame *v.* Boast, 12 Q. B. 808, 12 Jur. 1024, 17 L. J. Q. B. 339, 64 E. C. L. 808 [*following* Beaumont *v.* Greathead, 2 C. B. 494, 5 D. & L. 631, 15 L. J. C. P. 130, 52 E. C. L. 494].

See 15 Cent. Dig. tit. "Damages," § 12.

28. *Arkansas.*— St. Louis, etc., R. Co. *v.* Graham, 55 Ark. 294, 18 S. W. 56; Brock *v.* Smith, 14 Ark. 431.

California.— Empire Gold Min. Co. *v.* Bonanza Gold Min. Co., 67 Cal. 406, 7 Pac. 810.

Georgia.— Swift *v.* Broyles, 115 Ga. 885, 42 S. E. 277, 58 L. R. A. 390.

Illinois.— Johnson *v.* Stinger, 39 Ill. App. 180; Merrill *v.* Dibble, 12 Ill. App. 85.

Kansas.— Hefley *v.* Baker, 19 Kan. 9.

Massachusetts.— Hooton *v.* Barnard, 137 Mass. 36; Brown *v.* Perkins, 1 Allen 89.

Mississippi.— Keirn *v.* Warfield, 60 Miss. 799.

New Jersey.— Bruch *v.* Carter, 32 N. J. L. 554.

New York.— O'Horo *v.* Kelsey, 60 N. Y. App. Div. 604, 70 N. Y. Suppl. 14; Pierce *v.* Hosmer, 66 Barb. 345.

North Carolina.— White *v.* Griffin, 49 N. C. 139.

Ohio.— Besuden *v.* Hamilton County, 7 Ohio Cir. Ct. 237.

Pennsylvania.— Pastorius *v.* Fisher, 1 Rawle 27.

South Carolina.— Bradley *v.* Flewitt, 6 Rich. 69; Norvell *v.* Thompson, 2 Hill 470; Caruth *v.* Allen, 2 McCord 226.

Vermont.— Fullam *v.* Stearns, 30 Vt. 443.

See 15 Cent. Dig. tit. "Damages," § 7 *et seq.*

29. Stein *v.* Burden, 24 Ala. 130, 60 Am. Dec. 453; Chapman *v.* Thames Mfg. Co., 13 Conn. 269, 33 Am. Dec. 401; Whipple *v.* Cumberland Mfg. Co., 29 Fed. Cas. No. 17,516, 2 Story 661. In Hathorne *v.* Stinson, 12 Me. 183, 28 Am. Dec. 167 [*quoted* in Seidensparger *v.* Spear, 17 Me. 123, 128, 35 Am. Dec. 234], the court said: "Generally when one encroaches upon the inheritance of another, the law gives a right of action, and even if no actual damages are found, the action will be sustained, and nominal damages recovered, because, unless that could be done, the encroachments acquiesced in might ripen into legal right, and the trespasser, by a continuance of his encroachments, acquire a perfect title. But in the case of flowing, the owner of the land flowed can maintain no process, unless he has sustained damages in his lands by their being flowed. The common law remedy is taken away and the only remedy for redress is by this process of complaint. The owner's hands are tied. The flowing may continue without license, till damage is suffered."

30. Ulbricht *v.* Eufaula Water Co., 86 Ala. 587, 6 So. 78, 11 Am. St. Rep. 72, 4 L. R. A. 572; Stein *v.* Burden, 24 Ala. 130, 60 Am. Dec. 453; Plumleigh *v.* Dawson, 6 Ill. 544, 41 Am. Dec. 199; Lund *v.* New Bedford, 121 Mass. 286; Newhall *v.* Ireson, 8 Cush. (Mass.) 595, 54 Am. Dec. 790; Whipple *v.* Cumberland Mfg. Co., 29 Fed. Cas. No. 17,516, 2 Story 661; Webb *v.* Portland Mfg. Co., 29 Fed. Cas. No. 17,322, 3 Sumn. 189.

Diversion of water.— Where the plaintiff is entitled to the use of a spring of water on the land of the defendant, although until he has appropriated the water himself he may not maintain an action for transitory acts of the defendant in using the water, he is entitled to recover nominal damages for the acts of the latter in laying an aqueduct and diverting the water, which acts amount to an open denial of the plaintiff's right, and

2. Trespass to Land. In the case of trespass to land nominal damages may be recovered, even though no actual damage is shown in evidence,[31] and the party complaining may have benefited by the alleged trespass.[32]

3. Overflow of Land — Riparian Owners. In considering the question of injury caused by the overflow of lands or injury to riparian rights, the question of damages is frequently very hard to determine in the absence of any special damages proved, but in all such cases the complainant is at least entitled to nominal damages,[33] even though the land may have benefited by the overflow.[34]

H. Reversal For Failure to Assess — 1. In General. As a general rule a

would extinguish it in twenty years, to the extent of the water withdrawn. Peck *v.* Clark, 142 Mass. 436, 8 N. E. 335.

Flowage of land.— Nominal damages may be recovered by plaintiff in an action for flowing land, where there is an infringement of his right, although no actual damages are sustained, especially where the continuance of the flowage might result in an easement on his land. Amoskeag Mfg. Co. *v.* Goodale, 46 N. H. 53; Tillotson *v.* Smith, 32 N. H. 90, 64 Am. Dec. 355; Bassett *v.* Salisbury Mfg. Co., 28 N. H. 438.

31. *Connecticut.*— Merriam *v.* Meriden, 43 Conn. 173.

Illinois.— Kurrus *v.* Seibert, 11 Ill. App. 319.

Massachusetts.— Spear *v.* Hubbard, 4 Pick. 143.

Mississippi.— Clark *v.* Hart, (1887) 3 So. 33.

Missouri.— Flynt *v.* Chicago, etc., R. Co., 38 Mo. App. 94; Ross *v.* New Home Sewing Mach. Co., 24 Mo. App. 353.

New York.—Butts *v.* Edwards, 2 Den. 164; Dixon *v.* Clow, 24 Wend. 188; Rich *v.* Rich, 16 Wend. 663.

North Carolina.— Harris *v.* Sneeden, 104 N. C. 369, 10 S. E. 477.

Texas.— Carter *v.* Wallace, 2 Tex. 206.

Vermont.— Kidder *v.* Kennedy, 43 Vt. 717.

Wisconsin.— Benson *v.* Waukesha, 74 Wis. 31, 41 N. W. 1017.

England.— Taylor *v.* Henniker, 12 A. & E. 488, 9 L. J. Q. B. 383, 4 P. & D. 243, 40 E. C. L. 245 [*overruling* Avenell *v.* Croker, M. & M. 172, 22 E. C. L. 499; Wilkinson *v.* Terry, 1 M. & Rob. 377].

Canada.— Warren *v.* Deslippes, 33 U. C. Q. B. 59. See also Coffey *v.* Seane, 25 Ont. 22 [*affirmed* in 22 Ont. App. 269]; Taylor *v.* Massey, 20 Ont. 429.

See 15 Cent. Dig. tit. "Damages," § 23.

No damages will be given for a trespass to personal property when no unlawful intent or disturbance of a right or possession is shown, and when the property sustains no injury. Paul *v.* Slason, 22 Vt. 231, 54 Am. Dec. 75.

Not restricted to nominal damages.— In Ketcham *v.* Cohn, 2 Misc. (N. Y.) 427, 22 N. Y. Suppl. 181, defendant employed a contractor to shore up plaintiff's wall, to prevent it from falling into an excavation which defendant was making on an abutting lot. The contractor's employees, without permission from plaintiff, entered plaintiff's premises, and put beams through the wall, whereby plaintiff's property was injured. It was held that plaintiff would not be restricted to nominal damages because defendant was not obliged to shore up the wall, and his doing so saved plaintiff from greater damages.

32. Jewett *v.* Whitney, 43 Me. 242. See also Jones *v.* Hannovan, 55 Mo. 462; Murphy *v.* Fond du Lac, 23 Wis. 365, 99 Am. Dec. 181.

33. *Alabama.*— Ulbricht *v.* Eufaula Water Co., 86 Ala. 587, 6 So. 78, 11 Am. St. Rep. 72, 4 L. R. A. 572; Eagle, etc., Mfg. Co. *v.* Gibson, 62 Ala. 369; Stein *v.* Burden, 24 Ala. 130, 60 Am. Dec. 453.

California.— Creighton *v.* Evans, 53 Cal. 55.

Connecticut.—Parker *v.* Griswold, 17 Conn. 288, 42 Am. Dec. 739; Chapman *v.* Thames Mfg. Co., 13 Conn. 269, 33 Am. Dec. 401.

Illinois.— Plumleigh *v.* Dawson, 6 Ill. 544, 41 Am. Dec. 199.

Indiana.— Cory *v.* Silcox, 6 Ind. 39.

Iowa.— McCormick *v.* Winters, 94 Iowa 82, 62 N. W. 655.

Maine.— Munroe *v.* Gates, 48 Me. 463; Munroe *v.* Stickney, 48 Me. 462; Seidensparger *v.* Spear, 17 Me. 123, 35 Am. Dec. 234; Butman *v.* Hussey, 12 Me. 407.

Massachusetts.— Lund *v.* New Bedford, 121 Mass. 286; Newhall *v.* Ireson, 8 Cush. 595, 54 Am. Dec. 790.

Minnesota.— Dorman *v.* Ames, 12 Minn. 451.

Missouri.— Jones *v.* Hannovan, 55 Mo. 462.

New Hampshire.— Blodgett *v.* Stone, 60 N. H. 167.

New York.— New York Rubber Co. *v.* Rothery, 132 N. Y. 293, 30 N. E. 841, 28 Am. St. Rep. 575.

North Carolina.— Little *v.* Stanback, 63 N. C. 285.

Ohio.— Tootle *v.* Clifton, 22 Ohio St. 247, 10 Am. Rep. 732.

Pennsylvania.— Graver *v.* Sholl, 42 Pa. St. 58; Humphrey *v.* Irwin, (1886) 6 Atl. 479; Ripka *v.* Sergeant, 7 Watts & S. 9, 42 Am. Dec. 214; Pastorius *v.* Fisher, 1 Rawle 27.

Texas.— Champion *v.* Vincent, 20 Tex. 811.

Vermont.— Fullam *v.* Stearns, 30 Vt. 443; Chatfield *v.* Wilson, 27 Vt. 670.

United States.— Whipple *v.* Cumberland Mfg. Co., 29 Fed. Cas. No. 17,516, 2 Story 661.

Canada.— Dunning *v.* Gironard, 9 Rev. Lég. 177; Mitchell *v.* Barry, 26 U. C. Q. B. 416.

See 15 Cent. Dig. tit. "Damages," §§ 13, 24.

34. Jones *v.* Hannovan, 55 Mo. 462.

judgment will not be reversed[35] or a new trial granted to enable a party to recover nominal damages only.[36] Especially is this the case where no permanent legal right is involved.[37] Where, however, a permanent right is at issue and a judgment entered thereon would be conclusive and binding upon the rights of the parties, the appellate court will reverse or set aside an erroneous judgment, although no actual damages are proved.[38] A reversal or new trial will sometimes also be allowed where only nominal damages have been allowed in cases of tort.[39]

2. Effect of Carrying Costs. In some states an award of nominal damages has the effect of carrying the costs of the action, and in such cases where a judgment is erroneously awarded it should be reversed;[40] and the court may add nominal damages to the verdict of the jury when such course is necessary to protect the rights of the plaintiff in this regard.[41] On the other hand where the recovery of nominal damages does not have the effect of carrying the costs of the action, an omission to assess the same will not be ground for reversing

35. See Appeal and Error, 3 Cyc. 446.

36. See Appeal and Error, 3 Cyc. 446.

Nonsuit.— For the bare breach of a contract, unaccompanied by proof by which actual damage may be inferred or measured, a recovery for nominal damages may be had. Hence in such case it is error to nonsuit the plaintiff. New Jersey School, etc., Furniture Co. *v.* Board of Education, 58 N. J. L. 646, 35 Atl. 397.

Suit dismissed on appeal.—Where one himself creates a state of things entitling him to but nominal damages, and these are not in amount within the lower court's jurisdiction, his suit on an appeal by the other party to the supreme court will be dismissed. Patterson *v.* Spaulding, 5 La. Ann. 171.

37. A judgment will not be set aside for failure to assess merely nominal damages, where no question of permanent legal right is involved. Lewis *v.* Flint, etc., R. Co., 56 Mich. 638, 23 N. W. 469; Knowles *v.* Steele, 59 Minn. 452, 61 N. W. 557; Roberts *v.* Minneapolis Threshing Mach. Co., 8 S. D. 579, 67 N. W. 607, 59 Am. St. Rep. 777.

38. *Connecticut.*— Ely *v.* Parsons, 55 Conn. 83, 10 Atl. 499.

Illinois.— Merrill *v.* Dibble, 12 Ill. App. 85.

Missouri.— See Bungenstock *v.* Nishnabotna Drainage Dist., 163 Mo. 198, 64 S. W. 149.

New York.— Skinner *v.* Allison, 54 N. Y. App. Div. 47, 66 N. Y. Suppl. 288.

South Dakota.— Olson *v.* Huntimer, 8 S. D. 220, 66 N. W. 313.

Canada.— Beatty *v.* Oille, 12 Can. Supreme Ct. 706.

39. Moore *v.* New York El. R. Co., 4 Misc. (N. Y.) 132, 23 N. Y. Suppl. 863, 30 Abb. N. Cas. (N. Y.) 306. The rule that in an action of tort a new trial will be granted for improperly disallowing nominal damages does not prevail in all its strictness in cases of contract; and in such a case a reviewing court will not constrain the court below to grant a new trial, in order that mere nominal damages may be recovered. Eiswald *v.* Southern Express Co., 60 Ga. 496.

Action of trespass.— Judgment rendered on a verdict of a jury for defendant in an action of trespass will be reversed on appeal, although it appears that the plaintiff would be entitled to nominal damages only. Searles *v.* Cronk, 38 How. Pr. (N. Y.) 320.

Overflow of land.— Where plaintiffs were largely and seriously damaged by water flowing on their land, a large part of which was caused to flow there by defendants, although a larger part came from other sources, a finding that plaintiffs' damage from the acts of defendants was but one dollar cannot be sustained. Learned *v.* Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11.

40. Potter *v.* Mellen, 36 Minn. 122, 30 N. W. 438; Sayles *v.* Bemis, 57 Wis. 315, 15 N. W. 432; Enos *v.* Cole, 53 Wis. 235, 10 N. W. 377; Eaton *v.* Lyman, 30 Wis. 41.

Damages covering costs.— In Hickey *v.* Baird, 9 Mich. 32, the plaintiff agreed to find property on which defendant could satisfy a judgment for one-third the amount collected thereon. He pointed out property which was levied on. Subsequently defendant discharged the judgment on receiving a conveyance of lands which were of no value. Plaintiff sued to recover one-third the amount of the judgment. There was no proof of the value of the property levied on, and judgment was given for defendant, from which plaintiff brought error, claiming to have been entitled to at least nominal damages. Under such circumstances it was held that as nominal damages are only given for the purpose of carrying costs, and under Mich. Comp. Laws, c. 174, such damages do not entitle plaintiff to costs, nothing could be awarded.

Recovery on two causes of action.— Where a substantial recovery of damages is had on one cause of action, and a nominal recovery on another cause of action in the same case, the judgment will not be reversed for error in the latter recovery, the question of costs not being dependent thereon. Middleton *v.* Jerdee, 73 Wis. 39, 40 N. W. 629.

41. Legelke *v.* Finan, 48 Hun (N. Y.) 310, 1 N. Y. Suppl. 381; Von Schoening *v.* Buchanan, 14 Abb. Pr. (N. Y.) 185; Reg. *v.* Fall, 1 Q. B. 636, 2 G. & D. 803, 13 L. J. Q. B. 187, 41 E. C. L. 706.

the judgment,[42] unless a judgment for nominal damages would not affect such costs.[43]

VII. COMPENSATORY DAMAGES.

A. In General. It is always the object of the law in the absence of any evidence of fraud, malice, or oppression, to award compensatory damages or such damages, as the word employed to characterize them indicates, as make good or replace the loss caused by the wrong or injury.[44] They proceed from a sense of natural justice and are designed to repair that of which one has been deprived by the wrong of another.[45] They are such as indemnify the plaintiff, including injury to property, loss of time, necessary expenses, counsel fees, and other actual losses.[46] To this species of damages the legislature or the courts

42. Kenyon *v.* Western Union Tel. Co., 100 Cal. 454, 35 Pac. 75; Hays *v.* Wheatley, 7 Ky. L. Rep. 660; Wyatt *v.* Herring, 90 Mich. 581, 51 N. W. 684; Mears *v.* Cornwall, 73 Mich. 78, 40 N. W. 931; Haven *v.* Beidler Mfg. Co., 40 Mich. 286; Chambers *v.* Frazier, 29 Ohio St. 362; Hill *v.* Butler, 6 Ohio St. 207.

No costs involved.— In an action for damages for removing cattle from an inclosed tract of pasturage belonging in alternate sections to the government and defendant, when it appears that no injury was done in the removal, and that the land to which they were removed was superior to that inclosed, and plaintiff would not in any event be entitled to more than nominal damages, if any, a judgment for defendant with costs to neither party will not be reversed. Hecht *v.* Harrison, 5 Wyo. 279, 40 Pac. 306.

43. Hibbard *v.* Western Union Tel. Co., 33 Wis. 558, 14 Am. Rep. 775 [*following* Eaton *v.* Lyman, 30 Wis. 41; Laubenheimer *v.* Mann, 19 Wis. 519]; Jones *v.* King, 33 Wis. 422. Where, in a suit for a technical trespass, only nominal damages could be recovered, and plaintiff would have been compelled to pay defendant's costs, under Wis. Rev. St. §§ 2918, 2920, a judgment of nonsuit will not be reversed. Benson *v.* Waukesha, 74 Wis. 31, 41 N. W. 1017.

44. *Alabama.*— Jemison *v.* Governor, 47 Ala. 390.

Connecticut.—Murray *v.* Jennings, 42 Conn. 9, 19 Am. Rep. 527.

Florida.— Smith *v.* Bagwell, 19 Fla. 117, 121, 45 Am. Rep. 12.

Indiana.— Jones *v.* Van Patten, 3 Ind. 107.

Michigan.— Allison *v.* Chandler, 11 Mich. 542.

New York.— Reid *v.* Terwilliger, 116 N. Y. 530, 22 N. E. 1091; Baker *v.* Drake, 53 N. Y. 211, 13 Am. Rep. 507. See also Quinn *v.* Van Pelt, 56 N. Y. 417.

United States.— Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 489, 23 L. ed. 374.

See 15 Cent. Dig. tit. "Damages," § 34 *et seq.*

Compensation under penalty.— In Jemison *v.* Governor, 47 Ala. 390, 406, the court said: "It may, therefore, be laid down as a settled rule, that no other sum can be recovered under a penalty than that which shall compensate the plaintiff for his actual loss."

Fraud without damage gives no cause of action; and the probability that a vendee of lands will not be able to procure a title when the time arrives at which he will be entitled to receive it is not the subject of present compensation in damages. Wiley *v.* Howard, 15 Ind. 169.

The word "damages" may mean, in an action of tort, much more than value, even when the value of property constitutes the principal element of damages. Richardson *v.* Northrup, 66 Barb. (N. Y.) 85.

45. Reid *v.* Terwilliger, 116 N. Y. 530, 22 N. E. 1091. In Henderson *v.* Kentucky Cent. R. Co., 5 S. W. 875, 9 Ky. L. Rep. 625, it was held that the word "reparation" was evidently used in the two sections of the statute in question as the equivalent of compensatory damages which are "those allowed as a recompense for the injury actually received."

46. Bowas *v.* Pioneer Tow Line, 2 Fed. Cas. No. 1,713, 2 Sawy. 21. And see *infra*, VIII *et seq.*

Breach of contract.— The rule is well laid down in Griffin *v.* Colver, 16 N. Y. 489, 494, 69 Am. Dec. 718 [*quoted* in Borries *v.* Hutchinson, 18 C. B. N. S. 445, 11 Jur. N. S. 267, 34 L. J. C. P. 169, 11 L. T. Rep. N. S. 771, 13 Wkly. Rep. 386, 114 E. C. L. 445], as follows: "It is an error to suppose that 'the law does not aim at complete compensation for the injury sustained,' but 'seeks rather to divide than satisfy the loss' (Sedg. on Dam. ch. 3). The broad, general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained."

Personal injuries.— In Bowas *v.* Pioneer Tow Line, 3 Fed. Cas. No. 1,713, 2 Sawy. 21, the court said: "The damages he sues for were the natural and inevitable effects of that injury which would have followed without the intervention of any other cause to enhance or modify them. They necessarily include a compensation for pain and suffering, for loss of time, for medical attendance and support during the time that he has been disabled, and for such permanent injury or continued disability as he has sustained."

Speculation in damages.— La. Code, art. 1928, providing that where the object of the contract is anything but the payment of money, the damages due the creditor for its

have from time to time in certain classes of wrongs added another kind of damage when the wrong complained of was prompted or characterized by motives of malice, cruelty, oppression, wantonness, or recklessness.[47] While it is the theory of the law that compensatory damages are given to indemnify a party for all loss or injury suffered, it does not follow in all cases that "the remedy is commensurate with the injury."[48]

B. Direct Consequences — 1. In General. It may be stated as a general rule that a party is entitled to damages for all actual pecuniary loss or personal injury which may directly result from the wrongful act or omission of another and which are the natural result of the act or omission complained of.[49] In such

breach are the amount of the loss he has sustained, and the profit of which he has been deprived, undertakes merely to secure a full indemnity to the aggrieved party, and does not authorize a speculation upon the default of the other contracting party. Reading *v.* Donovan, 6 La. Ann. 491.

47. Reid *v.* Terwilliger, 116 N. Y. 530, 22 N. E. 1091. See *infra*, IX. In Cole *v.* Tucker, 6 Tex. 266, 268 [*quoted* in Smith *v.* Bagwell, 19 Fla. 117, 125, 45 Am. Rep. 12], the court said: "Compensatory damages are given when the injury is not tainted with fraud, malice, or willful wrong; but where either of these elements intervene another ingredient is added to the ordinary constituents of injury, viz, the sense of wrong and insult, and damages are given as well for compensation to the sufferer as for the punishment of the offender."

Mere accident.— Where the act causing the injury is not accompanied by malice but is contributable to mere accident, the court will only condemn the defendant to damages actually suffered. Shakel *v.* Drapeau, 33 L. C. Jur. 55.

48. To allow the jury to assess damages for all loss sustained, whether directly or indirectly connected with the injury complained of, would in effect allow them a "roving commission" to apply their own measure of damages instead of that provided by law. Camp *v.* Wabash R. Co., 94 Mo. App. 272, 68 S. W. 96. In Sale *v.* Eichberg, 105 Tenn. 333, 59 S. W. 1020, 52 L. R. A. 894, it was held error to charge the jury that a party was entitled to "full and complete and ample compensation," etc.

Interest as compensation.— The general policy of the law forbids that a debtor should be subjected to all the loss consequent on his failure to fulfil a promise to pay a debt. Such breaches are so often the result of events which could neither have been prevented or foreseen by the debtor that interest is generally considered as compensation which must content the creditor. Short *v.* Skipwith, 22 Fed. Cas. No. 12,809, 1 Brock. 103. See also Bender *v.* Fromberger, 4 Dall. (Pa.) 436, 1 L. ed. 898.

49. *Connecticut.*—Wetmore *v.* Lyman, 2 Root 484.

Illinois.— Chapman *v.* Kirby, 49 Ill. 211; Frink *v.* Schroyer, 18 Ill. 416; Lake Erie, etc., R. Co. *v.* Purcell, 75 Ill. App. 573; O'Conner *v.* Nolan, 64 Ill. App. 357.

Indiana.— Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572; Binford *v.* Johnston, 82 Ind. 426, 42 Am. Rep. 508.

Louisiana.— Reading *v.* Donovan, 6 La. Ann. 491.

Maine.— Bishop *v.* Williamson, 11 Me. 495.

Maryland.— Furstenburg *v.* Fawsett, 61 Md. 184; Sloan *v.* Edwards, 61 Md. 89.

Massachusetts.— Hill *v.* Winsor, 118 Mass. 251; Derry *v.* Flitner, 118 Mass. 131; Hoadley *v.* Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; Barnard *v.* Poor, 21 Pick. 378.

Michigan.— Rajnowski *v.* Detroit, etc., R. Co., 74 Mich. 20, 41 N. W. 847; Hopkins *v.* Sanford, 38 Mich. 611; Allison *v.* Chandler, 11 Mich. 542.

Minnesota.— Paine *v.* Sherwood, 19 Minn. 315.

Mississippi.— Leek Milling Co. *v.* Langford, 81 Miss. 728, 33 So. 492.

Missouri.— Forney *v.* Geldmacher, 75 Mo. 113, 42 Am. Rep. 388; Flori *v.* St. Louis, 69 Mo. 341, 33 Am. Rep. 504; Callaway Min., etc., Co. *v.* Clark, 32 Mo. 305; Missouri Edison Electric Co. *v.* M. J. Steinberg Hat, etc., Co., 94 Mo. App. 543, 68 S. W. 383; Hyatt *v.* Hannibal, etc., R. Co., 19 Mo. App. 287.

New Jersey.— Warwick *v.* Hutchinson, 45 N. J. L. 61; Wiley *v.* West Jersey R. Co., 44 N. J. L. 247; Hughes *v.* McDonough, 43 N. J. L. 459, 39 Am. Rep. 603.

New York.— Eten *v.* Luyster, 60 N. Y. 252; People *v.* Albany, 53 N. Y. 629 [*affirming* 5 Lans. 524]; Baker *v.* Drake, 53 N. Y 211, 13 Am. Rep. 507; O'Riley *v.* McChesney, 3 Lans. 278; Stapenhorst *v.* American Mfg. Co., 36 N. Y. Super. Ct. 392, 46 How. Pr. 510; Price *v.* Murray, 10 Bosw. 243; Flynn *v.* Hatton, 43 How. Pr. 333.

North Carolina.— Sharpe *v.* Southern R. Co., 130 N. C. 613, 41 S. E. 799; Chalk *v.* Charlotte, etc., R. Co., 85 N. C. 423.

Ohio.— Daniels *v.* Ballantine, 23 Ohio St. 532, 13 Am. Rep. 264; Dayton *v.* Pease, 4 Ohio St. 80.

Pennsylvania.— Ritter *v.* Sieger, 105 Pa. St. 400; Allegheny *v.* Zimmerman, 95 Pa. St. 287, 40 Am. Rep. 649; Billmeyer *v.* Wagner, 91 Pa. St. 92; Finch *v.* Heermans, 5 Luz. Leg. Reg. 125. See also Eckel *v.* Murphey, 15 Pa. St. 488, 53 Am. Dec. 607.

South Carolina.— Harrison *v.* Berkley, 1 Strobh. 525, 47 Am. Dec. 578.

Tennessee.— Jackson *v.* Nashville, etc., R. Co., 13 Lea 491, 49 Am. Rep. 663.

case a party is entitled to recover substantial damages, commensurate with the loss or injury sustained,[50] and is not confined in his recovery to nominal damages only.[51]

2. Damage Through Agency of Third Party. Damages to be recovered must be both the natural and proximate consequence of the wrong complained of and must not arise from the wrongful act of a third party remotely induced thereby.[52] The intervention of the independent act of a third person between the wrong complained of and the injury sustained, which act was the immediate cause of the injury, is made a test of that remoteness of damage which forbids its recovery.[53]

Texas.— Galveston, etc., R. Co. *v.* Stovall, 3 Tex. App. Civ. Cas. § 251; Galveston, etc., R. Co. *v.* Marsden, 1 Tex. App. Civ. Cas. § 1001.

Vermont.— Dennis *v.* Stoughton, 55 Vt. 371.

Wisconsin.— Cockburn *v.* Ashland Lumber Co., 54 Wis. 619, 12 N. W. 49; Brown *v.* Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; Borchardt *v.* Wausau Boom Co., 54 Wis. 107, 11 N. W. 440, 41 Am. Rep. 12; Holmes *v.* Fond du Lac, 42 Wis. 282; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69.

United States.—Bell *v.* Cunningham, 3 Pet. 69, 7 L. ed. 606.

England.— Randall *v.* Newson, 2 Q. B. D. 102, 46 L. J. Q. B. 259, 36 L. T. Rep. N. S. 164, 25 Wkly. Rep. 313; Collins *v.* Middle Level Com'rs, L. R. 4 C. P. 279, 38 L. J. C. P. 236, 20 L. T. Rep. N. S. 442, 17 Wkly. Rep. 929; Burrows *v.* March Gas, etc., Co., L. R. 7 Exch. 96, 41 L. J. Exch. 46, 26 L. T. Rep. N. S. 318, 20 Wkly. Rep. 493; The City of Lincoln, 15 P. D. 15, 6 Aspin. 475, 59 L. J. P. 1, 62 L. T. Rep. N. S. 49, 38 Wkly. Rep. 345; Williams *v.* Raggett, 46 L. J. Ch. 849, 37 L. T. Rep. N. S. 96, 25 Wkly. Rep. 874; The Gertor, 70 L. T. Rep. N. S. 703, 7 Aspin. 472; Bell *v.* Great Northern R. Co., L. R. 26 Ir. 428. And see Halestrap *v.* Gregory, [1895] 1 Q. B. 561, 64 L. J. Q. B. 415, 72 L. T. Rep. N. S. 292, 15 Reports 306, 43 Wkly. Rep. 507.

Canada.— Fordyce *v.* Kearns, 15 L. C. Jur. 80, 2 Rev. Lég. 623; Grant *v.* Armour, 25 Ont. 7; Grinsted *v.* Toronto R. Co., 21 Ont. App. 578; Bell *v.* Court, 2 Montreal Q. B. 80; Loranger *v.* Dominion Transport Co., 15 Quebec Super. Ct. 195; Belanger *v.* Dupras, 14 Quebec Super. Ct. 193; East Nissouri *v.* Horseman, 16 U. C. Q. B. 556; McCollum *v.* Davis, 8 U. C. Q. B. 150.

See 15 Cent. Dig. tit. "Damages," § 34 *et seq.*

50. Chapman *v.* Kirby, 49 Ill. 211; Speirs *v.* Union Drop Forge Co., 180 Mass. 87, 61 N. E. 825; Baker *v.* Drake, 53 N. Y. 211, 13 Am. Rep. 507; The Steamship Mediana *v.* The Lightship Comet, [1900] A. C. 113, 9 Aspin. 41, 69 L. J. P. 35, 82 L. T. Rep. N. S. 95, 48 Wkly. Rep. 398; Matthews *v.* Discount Corp., L. R. 4 C. P. 228; Rolin *v.* Steward, 14 C. B. 595, 2 C. L. R. 959, 18 Jur. 536, 23 L. J. C. P. 148, 2 Wkly. Rep. 467, 17 E. C. L. 595. See also Phillips *v.* South Western R. Co., 4 Q. B. D. 406.

Continuance of nuisance.— In an action on the case by reversioners for a serious injury to their reversionary interest by the erection of a nuisance in a public highway the jury are not necessarily restricted to a verdict for nominal damages on the first trial, but may give damages commensurate to the injury which the plaintiffs may sustain by the possible continuance of the nuisance. Drew *v.* Baby, 1 U. C. Q. B. 438.

La. Rev. Civ. Code, art. 1934, which provides that "where the object of the contract is anything but the payment of money, the damages due to the creditor for its breach are the amount of the loss he has sustained and the profit of which he has been deprived," merely undertakes to secure full indemnity to the party aggrieved; and under it, as by the rule of the common law, to authorize a recovery of substantial damages there must not only be proof of the breach of the contract, but also of actual damages resulting to the plaintiff. American Surety Co. *v.* Woods, 105 Fed. 741, 106 Fed. 263, 45 C. C. A. 282.

51. Chapman *v.* Kirby, 49 Ill. 211; Speirs *v.* Union Drop Forge Co., 180 Mass. 87, 61 N. E. 825; Ritter *v.* Sieger, 105 Pa. St. 400; Matthews *v.* Discount Corp., L. R. 4 C. P. 228; Manchester, etc., Bank *v.* Cook, 49 L. T. Rep. N. S. 674; Wallace *v.* Swift, 28 U. C. Q. B. 563, 31 U. C. Q. B. 523; Drew *v.* Baby, 1 U. C. Q. B. 438.

Deposit of shares.— Where the defendant, after signing an acknowledgment that scrip had been lodged in his hands by the plaintiff, and was to be redelivered to him on request, wrongfully detained the scrip for a considerable time, so that its market value had been much diminished, and did not redeliver it until after action brought, it was held that the plaintiff was entitled to more than nominal damages. Archer *v.* Williams, 5 C. B. 318, 57 E. C. L. 318, 2 C. & K. 26, 61 E. C. L. 26, 17 L. J. C. P. 82.

52. Hughes *v.* McDonough, 43 N. J. L. 459, 39 Am. Rep. 603; Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; Crain *v.* Petrie, 6 Hill (N. Y.) 522, 41 Am. Dec. 765. See also Neitzey *v.* Baltimore, etc., R. Co., 5 Mackey (D. C.) 34.

A bank that wrongfully refused to honor a check drawn on it by a depositor is not liable in damages for the arrest and imprisonment of the drawer of the check on complaint of the payee, as for issuing a false check, but is only liable for injuries resulting to the drawer's credit. Bank of Commerce *v.* Goos, 39 Nebr. 437, 58 N. W. 84, 23 L. R. A. 190.

53. Stevens *v.* Hartwell, 11 Mete. (Mass.) 542; Hughes *v.* McDonough, 43 N. J. L. 459,

This doctrine, however, does not exclude responsibility when the damage results to the party injured through the intervention of the legal and innocent acts of third parties, for in such instances damage is regarded as occasioned by the wrongful acts.[54] Where the intermediate cause of the damage has resulted from an act of God, the original party cannot be held liable for the loss sustained,[55] as such intervention cannot be considered the natural and proximate cause of the injury inflicted, or to have been within the contemplation of the parties at the time.

C. Proximate and Remote Damages — 1. In General. A proximate loss or injury is usually a consequential loss or injury, but is one so nearly connected with the original wrong that the law concerns itself to award damages therefor.[56] It is a fundamental principle of law, applicable alike to breaches of contract and to torts, that in order to found a right of action there must be a wrongful act done and a loss resulting from that wrongful act; the wrongful act must be the act of the defendant, and the injury suffered by the plaintiff must be the natural and not merely a remote consequence of the defendant's act.[57] While it is the

39 Am. Rep. 603; Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; Crain *v.* Petrie, 6 Hill (N. Y.) 522, 41 Am. Dec. 765; Ward *v.* Weeks, 7 Bing. 211, 9 L. J. C. P. O. S. 6, 4 M. & P. 796, 20 E. C. L. 101; Rich *v.* Basterfield, 4 C. B. 783, 56 E. C. L. 783, 2 C. & K. 257, 61 E. C. L. 257, 11 Jur. 696, 16 L. J. C. P. 273; Hoey *v.* Felton, 11 C. B. N. S. 142, 8 Jur. N. S. 764, 31 L. J. C. P. 105, 5 L. T. Rep. N. S. 354, 10 Wkly. Rep. 78, 103 E. C. L. 42; Toomey *v.* London, etc., R. Co., 3 C. B. N. S. 146, 27 L. J. C. P. 39, 6 Wkly. Rep. 44, 91 E. C. L. 146; Vicars *v.* Wilcocks, 8 East 1; Parkins *v.* Scott, 1 H. & C. 153, 8 Jur. N. S. 593, 31 L. J. Exch. 331, 6 L. T. Rep. N. S. 394, 10 Wkly. Rep. 562; Fitzsimons *v.* Inglis, 5 Taunt. 534, 1 E. C. L. 275.

54. Where the effect could reasonably have been foreseen and where in the usual course of events it was likely to follow from the cause, the person putting such cause in motion will be responsible, even though there may have been many concurring events or agencies between such cause and its consequences. McDonald *v.* Snelling, 14 Allen (Mass.) 290, 92 Am. Dec. 768; Hughes *v.* McDonough, 43 N. J. L. 459, 39 Am. Rep. 603; Bell *v.* Midland R. Co., 10 C. B. N. S. 287, 7 Jur. N. S. 1200, 30 L. J. C. P. 273, 4 L. T. Rep. N. S. 293, 9 Wkly. Rep. 612, 100 E. C. L. 287; Keeble *v.* Hickeringill, 11 East 574 note, 11 Rev. Rep. 273 note; Rigby *v.* Hewitt, 5 Exch. 240, 19 L. J. Exch. 291. The most interesting case on this subject is that of Scott *v.* Shepherd, 2 W. Bl. 892, 3 Wils. K. B. 403. In this case it appeared that the defendant threw a lighted squib in a crowded market house, which fell in the stall of a neighboring seller; he in order to save himself threw it on, and so it was passed from hand to hand until it struck the plaintiff and put out his eye. It was held that the plaintiff could recover from the original wrong-doer, because the natural and probable consequence of his act was to injure someone, and being unlawful he was answerable for the consequences, whether the injury was mediate or immediate.

55. Hoadley *v.* Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; Flori *v.* St. Louis, 69 Mo. 341, 33 Am. Rep. 504; Warwick *v.* Hutchinson, 45 N. J. L. 61; Daniels *v.* Ballantine, 23 Ohio St. 532, 13 Am. Rep. 264.

Act of God.— Where a sewer, built and maintained by a municipal corporation, is free from structural defect and is of sufficient capacity to answer all ordinary needs, the corporation is not liable for damages caused, as a result of an extraordinary rainfall, by water backing into the cellar of a person compelled by by-law to use the sewer for drainage purposes. In such case it was held that an extraordinary rainfall might properly be treated as an act of God, in the technical meaning of that term, although it was not unprecedented, yet if there was nothing in previous experience to point to a probability of recurrence the corporation was not liable. Garfield *v.* Toronto, 22 Ont. App. 128.

Circumstances of an extraordinary nature. —As a general rule one is answerable for the consequences of his fault only so far as they are natural and proximate, and may therefore be foreseen by ordinary forecast; not for those arising from a conjunction of his fault with circumstances of an extraordinary nature. Fairbanks *v.* Kerr, 70 Pa. St. 86, 10 Am. Rep. 664.

56. 1 Sedgwick Dam. § 111.

Proximate or immediate damages are the ordinary, natural, and usual result of an injury. Billman *v.* Indianapolis, etc., R. Co., 76 Ind. 166, 40 Am. Rep. 230.

57. The wrong done and the injury sustained must bear to each other the relation of cause and effect; and the damages, whether they arise from withholding a legal right or the breach of a legal duty, to be recoverable must be the natural and proximate consequence of the act complained of.

Alabama.— Culver *v.* Hill, 68 Ala. 66, 44 Am. Rep. 134; Burton *v.* Holley, 29 Ala. 318, 65 Am. Dec. 401.

Arkansas.— Gerson *v.* Slemons, 30 Ark. 50; McDaniel *v.* Crabtree, 21 Ark. 431.

object of the law to compensate a party for all damages which may result to him from the injury complained of, yet where such injuries are remote, contingent, or speculative, and do not directly follow from the injury or breach, they will be denied.[58] A rule of damages which embraces within its scope all the consequences which might be shown to have resulted from a failure or omission to

California.—Southern California Sav. Bank *v.* Asbury, 117 Cal. 96, 48 Pac. 1081; Anderson *v.* Taylor, 56 Cal. 131, 38 Am. Rep. 52.

Connecticut.— Miller *v.* East School Dist., 26 Conn. 521.

Delaware.— Hysore *v.* Quigley, 9 Houst. 348, 32 Atl. 960.

Illinois.— Chapman *v.* Kirby, 49 Ill. 211; Johnson *v.* Drummond, 16 Ill. App. 641.

Indiana.— Cincinnati, etc., Air Line R. Co. *v.* Rodgers, 24 Ind. 103. See also Coy *v.* Indianapolis Gas Co., 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535.

Iowa.— Georgia *v.* Kepford, 45 Iowa 48.

Kansas.— Topeka *v.* Tuttle, 5 Kan. 311; Union Pac. R. Co. *v.* Shook, 3 Kan. App. 710, 44 Pac. 685.

Kentucky.— Elizabethtown, etc., R. Co. *v.* Pottinger, 10 Bush 185.

Maine.— Thoms *v.* Dingley, 70 Me. 100, 35 Am. Rep. 310; Maxwell *v.* Pike, 2 Me. 8.

Maryland.— Scott *v.* Bay, 3 Md. 431.

Massachusetts.—Noxon *v.* Hill, 2 Allen 215.

Minnesota.— Griggs *v.* Fleckenstein, 14 Minn. 81, 100 Am. Dec. 199; Chamberlain *v.* Porter, 9 Minn. 260.

New Jersey.— Warwick *v.* Hutchinson, 45 N. J. L. 61; Wiley *v.* West Jersey R. Co., 44 N. J. L. 247; Hughes *v.* McDonough, 43 N. J. L. 459, 39 Am. Rep. 603; Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; Crater *v.* Binninger, 33 N. J. L. 513, 97 Am. Dec. 737.

New York.— Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622; Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487; Baker *v.* Drake, 53 N. Y. 211, 13 Am. Rep. 507; Hallock *v.* Belcher, 42 Barb. 199; Newell *v.* Smith, 28 Misc. 182, 58 N. Y. Suppl. 1025.

North Carolina.— Bridgers *v.* Dill, 97 N. C. 222, 1 S. E. 767.

Pennsylvania.— Drake *v.* Kiely, 93 Pa. St. 492; Adams Express Co. *v.* Egbert, 36 Pa. St. 360, 78 Am. Dec. 382.

Tennessee.— Collins *v.* East Tennessee, etc., R. Co., 9 Heisk. 841.

Wisconsin.— Weituig *v.* Millston, 77 Wis. 523, 46 N. W. 879.

United States.— Jones *v.* Allen, 85 Fed. 523, 29 C. C. A. 318; Cahn *v.* Western Union Tel. Co., 46 Fed. 40; Macomber *v.* Thompson, 16 Fed. Cas. No. 8,919, 1 Sumn. 384.

England.— Glover *v.* London, etc., R. Co., L. R. 3 Q. B. 25, 37 L. J. Q. B. 57, 17 L. T. Rep. N. S. 139.

Canada.— O'Byrne *v.* Campbell, 15 Ont. 339.

See 15 Cent. Dig. tit. "Damages," § 37 *et seq.*

This same rule of law is sanctioned and enforced in Rigby *v.* Hewett, 5 Exch. 240, 242 [*quoted* in Hughes *v.* McDonough, 43 N. J. L. 459, 39 Am. Rep. 603], Pollock, C. B., saying: "I am, however, disposed not quite to acquiesce to the full extent in the proposition, that a person is responsible for all the possible consequences of his negligence. I wish to guard against laying down the proposition so universally; but of this I am quite clear, that every person who does a wrong, is at least responsible for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct." In Neal *v.* Atlantic Refining Co., 4 Pa. Dist. 49, 16 Pa. Co. Ct. 241, oil escaped from defendant's oil refinery, without its negligence, to a river, mingled there with other inflammable matter, for the presence of which defendant was not responsible, and was ignited by the act of a third person, whereby plaintiff's boat was burned. It was held that defendant was not liable for the loss, as his permitting the oil to escape to the river was not the proximate cause of the loss.

58. *Alabama.*— Brantley *v.* Gunn, 29 Ala. 387.

Arkansas.— Kelly *v.* Altemus, 34 Ark. 184, 36 Am. Rep. 6.

Connecticut.— Gregory *v.* Brooks, 35 Conn. 437, 95 Am. Dec. 278.

Delaware.— Hysore *v.* Quigley, 9 Houst. 348, 32 Atl. 960.

Georgia.— Clark *v.* Gray, 112 Ga. 777, 38 S. E. 81.

Illinois.— Goodkind *v.* Rogan, 8 Ill. App. 413.

Iowa.— Lee *v.* Burlington, 113 Iowa 356, 85 N. W. 618, 86 Am. St. Rep. 639; Lowenstein *v.* Monroe, 55 Iowa 82, 7 N. W. 406; Bosch *v.* Burlington, etc., R. Co., 44 Iowa 402, 24 Am. Rep. 754.

Kentucky.— Smitha *v.* Gentry, 45 S. W. 515, 20 Ky. L. Rep. 171, 42 L. R. A. 302.

Massachusetts.—Jackson *v.* Adams, 9 Mass. 484, 6 Am. Dec. 94.

Minnesota.— North *v.* Johnson, 58 Minn. 242, 59 N. W. 1012.

Mississippi.— Marqueze *v.* Southeimer, 59 Miss. 430.

Missouri.— Brink *v.* Wabash R. Co., 160 Mo. 87, 60 S. W. 1058, 83 Am. St. Rep. 459, 53 L. R. A. 811.

Nebraska.— Lamb *v.* Baker, 34 Nebr. 485, 52 N. W. 285.

New York.— Kimball *v.* Connolly, 2 Abb. Dec. 504, 3 Keyes 57; Medbury *v.* New York, etc., R. Co., 26 Barb. 564; Brauer *v.* Oceanic Steam Nav. Co., 34 Misc. 127, 69 N. Y. Suppl. 465 [*modified* in 66 N. Y. App. Div. 605, 73 N. Y. Suppl. 291].

Pennsylvania.— Adams Express Co. *v.* Egbert, 36 Pa. St. 360, 78 Am. Dec. 382.

Texas.— Western Union Tel. Co. *v.* Cooper, 71 Tex. 507, 9 S. W. 598; Smith *v.* San Antonio, (Civ. App. 1900) 57 S. W. 881 [*reversed* in 94 Tex. 266, 59 S. W. 1109].

perform a stipulated duty or service would be a serious hindrance to the operations of commerce and to the transaction of the common business of life.[59] The question as to what damages will be considered the natural and proximate consequence of the injury and what damages will be considered remote is one difficult of decision.[60] It may be stated as a general rule, however, that where the result of an unlawful act is a natural one, and one that would naturally flow from the act done, it is not remote but proximate. If upon the contrary the damages complained of would not naturally or usually flow from the negligent act, but were brought about by some unforeseen casualty, then they would be remote.[61] Within the rule which limits a recovery for injury to those damages which are its natural and proximate effects, the natural effects are those which might reasonably be foreseen, those which occur in the ordinary state of things, and proximate effects are those between which and the injury there intervenes no culpable and efficient agency.[62] The matter is usually one of evidence[63] which should be left to the decision of the jury.[64]

Vermont.— Bovee *v.* Danville, 53 Vt. 183; Weeks *v.* Prescott, 53 Vt. 57; Morrison *v.* Darling, 47 Vt. 67.

United States.— Central Trust Co. *v.* Clark, 92 Fed. 293, 34 C. C. A. 354; Cahn *v.* Western Union Tel. Co., 46 Fed. 40; Macomber *v.* Thompson, 16 Fed. Cas. No. 8,919, 1 Sumn. 384; Cumming *v.* U. S., 22 Ct. Cl. 344.

England.— Cobb *v.* Great Western R. Co., [1893] 1 Q. B. 459, 57 J. P. 437, 62 L. J. Q. B. 335, 68 L. T. Rep. N. S. 483, 4 Reports 283, 41 Wkly. Rep. 275; Burton *v.* Pinkerton, L. R. 2 Exch. 340, 36 L. J. Exch. 137, 17 L. T. Rep. N. S. 15, 15 Wkly. Rep. 1139; Sharp *v.* Powell, L. R. 7 C. P. 253, 41 L. J. C. P. 95, 26 L. T. Rep. N. S. 436, 20 Wkly. Rep. 584; Watson *v.* Ambergate, etc., R. Co., 15 Jur. 448; Nicosia *v.* Vallone, 37 L. T. Rep. N. S. 106.

Canada.— Godard *v.* Fredericton Boom Co., 11 N. Brunsw. 448; Tobin *v.* Symonds, 6 Nova Scotia 141; Lewis *v.* Toronto, 39 U. C. Q. B. 343.

See 15 Cent. Dig. tit. "Damages," § 37 *et seq.*

Damages by loss of custom or credit have usually been held too remote for recovery. Lowenstein *v.* Monroe, 55 Iowa 82, 7 N. W. 406; Farrelly *v.* Cincinnati, 2 Disn. (Ohio) 516; Weeks *v.* Prescott, 53 Vt. 57. *Compare* MacVeagh *v.* Bailey, 29 Ill. App. 606.

59. The effect would often be to impose a liability wholly disproportionate to the nature of the act or service which a party had bound himself to perform and to the compensation paid and received therefor. Squire *v.* Western Union Tel. Co., 98 Mass. 232, 93 Am. Dec. 157. See also Fleming *v.* Beck, 48 Pa. St. 309.

A rule to be of practicable value in the administration of the law must be reasonably certain. It is impossible to trace any wrong to all its consequences. They may be connected together and involved in an infinite concatenation of circumstances. As said by Lord Bacon, in one of his maxims (Bacon Max. reg. 1): "It were infinite for the law to judge the cause of causes, and their impulsion one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." Ehrgott *v.* New York, 96 N. Y. 264, 281, 48 Am. Rep. 622.

60. Clemmens *v.* Hannibal, etc., R. Co., 53 Mo. 366, 14 Am. Rep. 460; Scheffer *v.* Washington City Midland, etc., R. Co., 105 U. S. 249, 26 L. ed. 1070 [*citing* Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. ed. 256]; Sneesby *v.* Lancashire, etc., R. Co., L. R. 9 Q. B. 263; Ionides *v.* Universal Mar. Ins. Co., 14 C. B. N. S. 259, 10 Jur. N. S. 18, 32 L. J. C. P. 170, 8 L. T. Rep. N. S. 705, 11 Wkly. Rep. 858, 108 E. C. L. 259; Toms *v.* Whitby Tp., 35 U. C. Q. B. 195 [*affirmed* in 37 U. C. Q. B. 100, and *quoting* Montoya *v.* London Assur. Co., 6 Exch. 451, 20 L. J. Exch. 254].

61. Clemmens *v.* Hannibal, etc., R. Co., 53 Mo. 366, 14 Am. Rep. 460; Corrister *v.* St. Joseph, etc., R. Co., 25 Mo. App. 619.

62. Wiley *v.* West Jersey R. Co., 44 N. J. L. 247; Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. Rep. 205.

63. In an action for the breach of a contract, whether or not the damages claimed were the proximate result of the breach is a question of evidence. Galveston, etc., R. Co. *v.* Stovall, 3 Tex. App. Civ. Cas. § 251.

Personal injuries.— Where, in a suit for injuries by being struck by a stick thrown from a machine, there is evidence that plaintiff before the accident never had symptoms of consumption, and that this disease afterward attacked him, and several physicians testify that the disease might be attributed to such an injury, the question whether the blow was the proximate cause of the disease is properly submitted to the jury. Seckinger *v.* Philibert, etc., Mfg. Co., 129 Mo. 590, 31 S. W. 957.

64. *Alabama.*— East Tennessee, etc., R. Co. *v.* Lockhart, 79 Ala. 315.

California.— Sloane *v.* Southern California R. Co., 111 Cal. 668, 44 Pac. 320, 33 L. R. A. 193.

Illinois.— Chapman *v.* Kirby, 49 Ill. 211.

Maryland.— Baltimore City Pass. R. Co. *v.* Kemp, 61 Md. 619, 48 Am. Rep. 134.

Missouri.— Clemens *v.* Hannibal, etc., R. Co., 53 Mo. 366, 14 Am. Rep. 460.

2. In Actions For Tort — a. In General. The general rule in actions for torts is that the wrong-doer is liable for all injuries resulting directly from the wrongful acts, whether they could or could not have been foreseen by him,[65] provided the particular damages in respect to which he proceeds are the legal and natural consequences of the wrongful act imputed to the defendant, and are such as according to common experience and the usual course of events might reasonably have been anticipated.[66] Remote, contingent, or speculative damages will not be considered in conformity to the general rule above laid down.[67] To render a wrong-doer liable in damages, where the connection is not immediate between the injurious act and the consequence, such nearness in the order of events and closeness in the relation of cause and effect must subsist, as that the influence of the injurious act will predominate over that of

Pennsylvania.— Fairbanks *v.* Kerr, 70 Pa. St. 86, 10 Am. Rep. 664.

Texas.— Gulf, etc., R. Co. *v.* Hayter, 93 Tex. 239, 54 S. W. 944, 77 Am. St. Rep. 856, 47 L. R. A. 856.

See 15 Cent. Dig. tit. "Damages," § 54.

65. *Illinois.*— Chapman *v.* Kirby, 49 Ill. 211; Illinois Cent. R. Co. *v.* Heisner, 45 Ill. App. 143.

Indiana.— Coy *v.* Indianapolis Gas Co., 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Binford *v.* Johnston, 82 Ind. 426, 42 Am. Rep. 508.

Maryland.— Sloan *v.* Edwards, 61 Md. 89.

Massachusetts.— Hill *v.* Winsor, 118 Mass. 251; Derry *v.* Flitner, 118 Mass. 131; Higgens *v.* Dewey, 107 Mass. 494, 9 Am. Rep. 63.

Michigan.— Allison *v.* Chandler, 11 Mich. 542.

Missouri.— Miller *v.* St. Louis, etc., R. Co., 90 Mo. 389, 2 S. W. 439.

New York.— Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622.

South Carolina.— Harrison *v.* Berkley, 1 Strobh. 525, 47 Am. Dec. 578.

Wisconsin.— McNamara *v.* Clintonville, 62 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722; Brown *v.* Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, 41 Am. Rep. 41 note; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69.

United States.— McAfee *v.* Crofford, 13 How. 447, 14 L. ed. 217; Bowas *v.* Pioneer Tow Line, 3 Fed. Cas. No. 1,713, 2 Sawy. 21. See also Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. ed. 256.

See 15 Cent. Dig. tit. "Damages," § 39.

Damages after commencement of suit.— In an action for trespass done by defendant's sheep grazing on plaintiff's lands, evidence of damages which according to plaintiff's evidence ensued directly from the trespass was admissible, although ensuing after the commencement of the suit. Cosgriff *v.* Miller, (Wyo. 1902) 68 Pac. 206.

Direct, although not natural, consequences of tort.— In an action to recover damages for forcible dispossession of the plaintiff, under a warrant in summary proceedings which were afterward reversed, it appeared that a sum of money, kept by the plaintiff in a box in a building on the premises which was destroyed by the defendants in the removal, was lost. It was held that although the money was kept in an unusual place, and defendants may not have suspected its presence, they were still liable for its loss, which was the direct result of their acts. Eten *v.* Luyster, 60 N. Y. 252.

66. Selden *v.* Cashman, 20 Cal. 56, 81 Am. Dec. 93; Lawrence *v.* Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Chapman *v.* Kirby, 49 Ill. 211; Teagarden *v.* Hetfield, 11 Ind. 522; Gamble *v.* Mullin, 74 Iowa 99, 36 N. W. 909; Phyfe *v.* Manhattan R. Co., 30 Hun (N. Y.) 377; Clark *v.* Brown, 18 Wend. (N. Y.) 213. See also English *v.* Missouri Pac. R. Co., 73 Mo. App. 232; Sharon *v.* Mosher, 17 Barb. (N. Y.) 518.

Probable consequences of deceit.— Where a passenger who had purchased passage on defendant's ship, but had determined to forfeit it on the subsequent outbreak of cholera, was induced to take the passage on the false representation of defendant's agent that no steerage passengers would be carried, he may recover from defendant actual damages resulting from the ship being quarantined at the port of destination because of the existence of cholera on board. Beers *v.* Hamburg-American Packet Co., 62 Fed. 469. So where defendant sold plaintiff a stallion by means of false representations as to his breeding abilities, plaintiff, on recovering a verdict in an action for damages, can recover the cost of keeping the stallion a reasonable time for the purpose of testing him. Peak *v.* Frost, 162 Mass. 298, 38 N. E. 518.

67. *Georgia.*— Georgia Cent. R. Co. *v.* Dorsey, 116 Ga. 719, 42 S. E. 1024.

Illinois.— Chapman *v.* Kirby, 49 Ill. 211.

New York.— Jex *v.* Strauss, 55 N. Y. Super. Ct. 52, 18 N. Y. St. 334.

Texas.— Democrat Pub. Co. *v.* Jones, 83 Tex. 302, 18 S. W. 652.

United States.— Gallagher *v.* The Yankee, 9 Fed. Cas. No. 5,196.

See 15 Cent. Dig. tit. "Damages," § 39 *et seq.*; and, generally, *supra*, VII, C, 1.

Deceit.— A contractor who had agreed to build a railroad for a specified sum could not recover from the company, in an action for deceit, for loss resulting to him by reason of a rise in the price of rails during the delay in the work caused by the failure of the

other causes, and concur to produce the consequence, or be traceable to those causes.[68]

b. Injury to Property. The same rule obtaining in actions of tort is applied in cases of injuries to property, the defendant being liable in damages for such faults and omissions as are the natural and proximate result of his wrong[69] and such as might have been foreseen as likely to follow.[70] Remote and contingent damages will not be considered.[71]

company to secure a part of the right of way. Phelps *v.* George's Creek, etc., R. Co., 60 Md. 536.

68. Harrison *v.* Berkley, 1 Strobh. (S. C.) 525, 47 Am. Dec. 578. See also Sledge *v.* Reid, 73 N. C. 440. Where imported wool belonging to plaintiff on which import duties had been paid was injured by reason of negligence of defendant's servants, and in consequence it became necessary to take it out of the original packages, and in a few weeks thereafter congress passed an act under which, if the wool had remained in the original package, plaintiff would have been entitled to a return of the duties which he had paid, plaintiff is not entitled to recover damages on account of being thus deprived of such rebate. Stone *v.* Codman, 15 Pick. (Mass.) 297.

Death from surgical operation.— Where a person who, through the fault of another, has received an injury which, without a surgical operation, would cause death, employs a skilful surgeon, by whose error the operation is unsuccessful, and the patient dies, the wrongdoer cannot avoid liability, although the operation is the immediate cause of the death. Sauter *v.* New York Cent., etc., R. Co., 66 N. Y. 50, 23 Am. Rep. 18.

69. *Alabama.*— Krebs Mfg. Co. *v.* Brown, 108 Ala. 508, 18 So. 659, 54 Am. St. Rep. 188; Gresham *v.* Taylor, 51 Ala. 505.

California.— Durgin *v.* Neal, 82 Cal. 595, 23 Pac. 133, 375; Chidester *v.* Consolidated People's Ditch Co., 53 Cal. 56; Story *v.* Robinson, 32 Cal. 205.

Massachusetts.— Denny *v.* New York Cent. R. Co., 13 Gray 481, 74 Am. Dec. 645.

Missouri.— Miller *v.* St. Louis, etc., R. Co., 90 Mo. 389, 2 S. W. 439; Clemens *v.* Hannibal, etc., R. Co., 53 Mo. 366, 14 Am. Rep. 460.

New Jersey.— Ten Eyck *v.* Delaware, etc., Canal Co., 18 N. J. L. 200, 37 Am. Dec. 233.

North Carolina.—Bridgers *v.* Dill, 97 N. C. 222, 1 S. E. 767.

Pennsylvania.— Brown *v.* Gilmore, 92 Pa. St. 40; Morrison *v.* Davis, 20 Pa. St. 171, 57 Am. Dec. 695.

South Carolina.— Hines *v.* Jarrett, 26 S. C. 480, 2 S. E. 393.

Vermont.— Holmes *v.* Fuller, 68 Vt. 207, 34 Atl. 699.

United States.— Memphis, etc., R. Co. *v.* Reeves, 10 Wall. 176, 19 L. ed. 909; Mould *v.* The New York, 40 Fed. 900; Cornwall *v.* The New York, 38 Fed. 710.

England.— Sneesby *v.* Lancashire, etc., R. Co., 1 Q. B. D. 42, 45 L. J. Q. B. 1, 33 L. T. Rep. N. S. 372, 24 Wkly. Rep. 99.

Loss in market value.—In an action against a railroad company for having negligently blown an engine whistle so as to frighten plaintiff's horses, which ran away, injuring themselves and the hack to which they were harnessed, loss in the market value of such horses is a proximate result of the injury, which plaintiff is entitled to recover. Fritts *v.* New York, etc., R. Co., 62 Conn. 503, 26 Atl. 347. See also Oleson *v.* Brown, 41 Wis. 413. So where the evidence and findings show that defendant, while running its trains and locomotives over a street opposite plaintiff's salt vats, unlawfully cast over and on plaintiff's land and salt vats great quantities of dirt, dust, and cinders, whereby the amount of salt produced by plaintiff was lessened in quantity, deteriorated in quality, and diminished in value, it was held that the damages are not too remote or speculative to justify a recovery. Syracuse Solar Salt Co. *v.* Rome, etc., R. Co., 43 N. Y. App. Div. 203, 60 N. Y. Suppl. 40 [*distinguishing* Fobes *v.* Rome, etc., R. Co., 121 N. Y. 505, 24 N. E. 919, 8 L. R. A. 453].

Where property is lost while in the hands of a carrier the loss or destruction must be the proximate consequence of the negligence or omission of the carrier, and not caused by some intervening influence over which the carrier has no control. Denny *v.* New York Cent. R. Co., 13 Gray (Mass.) 481, 74 Am. Dec. 645; Morrison *v.* Davis, 20 Pa. St. 171, 57 Am. Dec. 695; Memphis, etc., R. Co. *v.* Reeves, 10 Wall. (U. S.) 176, 19 L. ed. 909.

70. Mould *v.* The New York, 40 Fed. 900.

The maxim causa proxima, etc., includes not only liability for all natural and probable injuries having origin in the wrongful act or omission, but such injuries as are likely in ordinary circumstances to ensue from the act or omission in question. So it has been ruled in England that it is not necessary to a defendant's liability, after having established his negligence, to show in addition thereto that the consequences of the negligence could have been foreseen by him. Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69 [*citing* Higgins *v.* Dewey, 107 Mass. 494, 9 Am. Rep. 63; Smith *v.* London, etc., R. Co., L. R. 6 C. P. 14, 40 L. J. C. P. 21, 23 L. T. Rep. N. S. 678, 19 Wkly. Rep. 230, and *quoted* in Miller *v.* St. Louis, etc., R. Co., 90 Mo. 389, 394, 2 S. W. 429].

71. *Illinois.*— Chicago *v.* Huenerbein, 85 Ill. 594, 28 Am. Rep. 626; Chandler *v.* Smith, 70 Ill. App. 658.

Michigan.— Krueger *v.* Le Blanc, 62 Mich. 70, 28 N. W. 757.

Missouri.—Saunders *v.* Brosius, 52 Mo. 50;

c. Personal Injuries — (I) *In General.* In actions for personal injuries the same rule obtains as in tort. It is not necessary that the result of the injury should have been foreseen.[72] A wrong-doer is responsible for the natural and proximate consequences of his misconduct and not for such damages only as might reasonably be supposed to have been in the contemplation of the parties as a probable result of the accident.[73] Where actual damages have been proved in an action for personal injuries, the motive of the defendant will not be considered.[74] It is sufficient if the injury complained of was the natural or proximate consequence of the wrongful act,[75] and is not too remotely connected with the original injury complained of.[76]

(II) *Disease Resulting.* The question of damages for personal injury is sometimes very difficult of solution, where one is injured by the fault or omission of another and in consequence thereof becomes diseased or in delicate health. In such cases, however, the disease is considered the proximate although not the

Shaw *v.* Missouri, etc., Dairy Co., 56 Mo. App. 521.

New York.— Ryan *v.* New York Cent. R. Co., 35 N. Y. 210, 91 Am. Dec. 49; Walrath *v.* Redfield, 11 Barb. 368; Seheneetady First Baptist Chureh *v.* Utiea, etc., R. Co., 6 Barb. 313; Klein *v.* Equitable Gaslight Co., 13 N. Y. St. 736. And see Walrath *v.* Redfield, 11 Barb. 368.

North Carolina.— Jaekson *v.* Hall, 84 N. C. 489; Sledge *v.* Reid, 73 N. C. 440.

Pennsylvania.— Allegheny *v.* Zimmerman, 95 Pa. St. 287, 40 Am. Rep. 649; Yohe's Estate, 6 Phila. 293.

Texas.— Harmon *v.* Callahan, (Civ. App. 1896) 35 S. W. 705; San Antonio *v.* Muhaly, 11 Tex. Civ. App. 596, 33 S. W. 256.

United States.— Mould *v.* The New York, 40 Fed. 900.

England.— Seholes *v.* North London, etc., R. Co., 21 L. T. Rep. N. S. 835.

See 15 Cent. Dig. tit. "Damages," § 44.

72. Yeager *v.* Berry, 82 Mo. App. 534; Crouse *v.* Chicago, etc., R. Co., 104 Wis. 473, 80 N. W. 752; Vosburg *v.* Putney, 80 Wis. 523, 50 N. W. 403, 27 Am. St. Rep. 47, 14 L. R. A. 226.

73. Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622 [*reversing* 66 How. Pr. 161].

74. In such case the plaintiff is entitled to recover whatever amount of damages will compensate him for the injury sustained.

Delaware.— Tatnall *v.* Courtney, 6 Houst. 434.

Illinois.— Jones *v.* Jones, 71 Ill. 562.

Iowa.— Lucas *v.* Flinn, 55 Iowa 9.

Minnesota.— Andrews *v.* Stone, 10 Minn. 72.

Missouri.— Goetz *v.* Ambs, 27 Mo. 28.

North Carolina.— Causee *v.* Anders, 20 N. C. 388.

United States.— Boyle *v.* Case, 18 Fed. 880, 9 Sawy. 386.

See 15 Cent. Dig. tit. "Damages," § 40.

75. *Illinois.*— Brownback *v.* Frailey, 78 Ill. App. 262.

Maine.— Page *v.* Bucksport, 64 Me. 51, 18 Am. Rep. 239.

Maryland.— Sloan *v.* Edwards, 61 Md. 89.

Massachusetts.— Hill *v.* Winsor, 118 Mass. 251; Blake *v.* Lord, 16 Gray 387.

Minnesota.— Shartle *v.* Minneapolis, 17 Minn. 308.

New Jersey.— Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; Kuhn *v.* Jewett, 32 N. J. Eq. 647.

Tennessee.— Hodges *v.* Nanee, 1 Swan 57.

Vermont.— Stickney *v.* Maidstone, 30 Vt. 738.

Wisconsin.— See Holmes *v.* Fond du Lac, 42 Wis. 282.

England.—Gilbertson *v.* Richardson, 5 C. B. 502, 12 Jur. 292, 17 L. J. C. P. 112, 57 E. C. L. 502.

Canada.— McKelvin *v.* London, 22 Ont. 70; Toms *v.* Whitby Tp., 35 U. C. Q. B. 195 [*affirmed* in 37 U. C. Q. B. 100]. See also Toronto R. Co. *v.* Grinsted, 24 Can. Supreme Ct. 570.

Foreseen in light of attending circumstances.—In Seheffer *v.* Washington City Midland, etc., R. Co., 105 U. S. 249, 252. 26 L. ed. 1070 [*citing* Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. ed. 256], the court said: "But it is generally held that, in order to warrant a finding that negligenee or an aet amounting to wanton wrong, is the proximate eause of an injury, it must appear that the injury was the natural and probable consequenee of the negligenee or wrongful aet, and that it ought to have been foreseen in the light of the attending eireumstanees." To the same effeet is the language of the eourt in McDonald *v.* Snelling, 14 Allen (Mass.) 290, 294, 92 Am. Dec. 768.

Injuries resulting from fright.— In Gulf, etc., R. Co. *v.* Hayter, 93 Tex. 239, 242, 54 S. W. 944, 77 Am. St. Rep. 856, 47 L. R. A. 325, the court said: "We eonelude that where a physieal injury results from a fright or other mental shoek, eaused by the wrongful aet or omission of another, the injured party is entitled to reeover his damages, provided the aet or omission is the proximate eause of the injury, and the injury ought, in the light of all the eireumstanees, to have been foreseen as a natural and probable eonsequenee thereof." See *infra*, VII, D, 3, b.

76. Simonson *v.* Minneapolis, etc., R. Co., 88 Minn. 89, 92 N. W. 459; Price *v.* Wright, 35 N. Brunsw. 26.

natural consequence of the injury, and the party may be allowed to recover compensation therefor.[77]

(III) *One Already Diseased.* Where one already diseased has suffered from a personal injury, the mere fact of personal condition will not deny him all the damages suffered from the accident.[78] The rule remains the same whether the injury supervenes and proximately results in the defendant's wrong, or whether the disease existed at the time of the injury and was aggravated by it.[79]

(IV) *Future Consequences.* As a general rule compensation will be awarded only for what a party has actually suffered by reason of his injuries up to the date of trial,[80] and future consequences are not to be considered when no proof of such consequences has been introduced in evidence.[81] While future consequences which are reasonably to be expected to follow an injury may be given in evidence for the purpose of enhancing the damages to be awarded,[82]

77. *Alabama.*— East Tennessee, etc., R. Co. *v.* Lockhart, 79 Ala. 315.

Illinois.— Toledo, etc., R. Co. *v.* Baddeley, 54 Ill. 19, 5 Am. Rep. 71; Mt. Carmel *v.* Howell, 36 Ill. App. 68 [*affirmed* in 137 Ill. 91, 27 N. E. 77].

Indiana.—Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Terre Haute, etc., R. Co. *v.* Buck, 96 Ind. 346, 49 Am. Rep. 168.

Maryland.— Baltimore, etc., R. Co. *v.* Kemp, 61 Md. 74, 619, 48 Am. Rep. 134.

Massachusetts.—McGarrahan *v.* New York, etc., R. Co., 171 Mass. 211, 50 N. E. 610; Coleman *v.* New York, etc., R. Co., 106 Mass. 160.

New York.— Tice *v.* Munn, 94 N. Y. 621.

Pennsylvania.— Dickson *v.* Hollister, 123 Pa. St. 421, 16 Atl. 484, 10 Am. St. Rep. 533.

Texas.— Houston, etc., R. Co. *v.* Leslie, 57 Tex. 83; Missouri, etc., R. Co. *v.* Hannig, 20 Tex. Civ. App. 649, 49 S. W. 116.

See 15 Cent. Dig. tit. "Damages," § 42.

Suicide not natural result.— In Scheffer *v.* Washington City Midland, etc., R. Co., 105 U. S. 249, 26 L. ed. 1070, the plaintiff was injured in a railroad accident and suffered in both body and mind for eight months thereafter. At the end of that time he committed suicide, and it was attempted to hold the railroad company responsible in damages on the ground that the accident was the proximate cause. It was held that his act was not the actual probable consequence and could not have been foreseen in the light of the circumstances attending the negligence, and that his subsequent insanity and suicide were casual and unexpected causes intervening between the act which injured him and his death.

78. *Alabama.*— Montgomery, etc., R. Co. *v.* Mallette, 92 Ala. 209, 9 So. 363; Louisville, etc., R. Co. *v.* Jones, 83 Ala. 376, 3 So. 902.

California.—Campbell *v.* Los Angeles Traction Co., 137 Cal. 565, 70 Pac. 624.

Georgia.— Bray *v.* Latham, 81 Ga. 640, 8 S. E. 64.

Indiana.—Louisville, etc., R. Co. *v.* Snyder, 117 Ind. 435, 20 N. E. 284, 10 Am. St. Rep. 60, 3 L. R. A. 434; Ohio, etc., R. Co. *v.* Hecht, 115 Ind. 443, 17 N. E. 297; Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476; Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Terre Haute, etc., R. Co. *v.* Buck, 96 Ind. 346, 49 Am. Rep. 168.

Iowa.— Allison *v.* Chicago, etc., R. Co., 42 Iowa 274.

Louisiana.— Lapleine *v.* Morgan, etc., Steamship Co., 40 La. Ann. 661, 4 So. 875, 1 L. R. A. 378.

Maryland.— Baltimore, etc., R. Co. *v.* Kemp, 61 Md. 74.

Michigan.— Elliott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668.

Minnesota.— Newhart *v.* St. Paul City R. Co., 51 Minn. 42, 52 N. W. 983; Purcell *v.* St. Paul City R. Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; Shartle *v.* Minneapolis, 17 Minn. 308.

Missouri.— Brown *v.* Hannibal, etc., R. Co., 66 Mo. 588.

New Hampshire.— Jewell *v.* Grand Trunk R. Co., 55 N. H. 84.

New York.— Weber *v.* Third Ave. R. Co., 12 N. Y. App. Div. 512, 42 N. Y. Suppl. 789.

Texas.— Gulf, etc., R. Co. *v.* Reagan, (Civ. App. 1896) 34 S. W. 796.

Virginia.— Shenandoah Valley R. Co. *v.* Moose, 83 Va. 827, 3 S. E. 796.

Washington.— Jordan *v.* Seattle, 30 Wash. 298, 70 Pac. 743.

Wisconsin.— Vosburg *v.* Putney, 86 Wis. 278, 56 N. W. 480; Smalley *v.* Appleton, 75 Wis. 18, 43 N. W. 826; McNamara *v.* Clintonville, 62 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722; Brown *v.* Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, 41 Am. Rep. 41; Stewart *v.* Ripon, 38 Wis. 584; Oliver *v.* La Valle, 36 Wis. 592.

United States.— Crane Elevator Co. *v.* Lippert, 63 Fed. 942, 11 C. C. A. 521.

Canada.— Loranger *v.* Dominion Transport Co., 15 Quebec Super. Ct. 195.

79. Ohio, etc., R. Co. *v.* Hecht, 115 Ind. 443, 17 N. E. 297.

80. Jewell *v.* Union Pass. R. Co., 16 Phila. (Pa.) 64.

81. Crawford *v.* Delaware, etc., Co., 121 N. Y. 652, 24 N. E. 1092; Staal *v.* Grand St., etc., R. Co., 107 N. Y. 625, 13 N. E. 624; Dawson *v.* Troy, 49 Hun (N. Y.) 322, 2 N. Y. Suppl. 137.

82. De Costa *v.* Massachusetts Flat Water, etc., Co., 17 Cal. 613; Fry *v.* Dubuque, etc., R. Co., 45 Iowa 416 [*following* Collins *v.*

yet it is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely to so develop.[83]

3. In Actions on Contract — a. In General. The damages which one party to a contract ought to recover, in respect to a breach of it by the other, are such as either arise in the natural course of things from the breach itself,[84] or such as

Council Bluffs, 32 Iowa 324, 7 Am. Rep. 200]; Cook *v.* New York Cent., etc., R. Co., 119 N. Y. 653, 23 N. E. 1150; Tozer *v.* New York Cent., etc., R. Co., 105 N. Y. 617, 11 N. E. 369; Strohm *v.* New York, etc., R. Co., 96 N. Y. 305; Johnson *v.* Manhattan R. Co., 52 Hun (N. Y.) 111, 4 N. Y. Suppl. 848; Murtaugh *v.* New York Cent., etc., R. Co., 49 Hun (N. Y.) 456, 3 N. Y. Suppl. 483; Bateman *v.* New York Cent., etc., R. Co., 47 Hun (N. Y.) 429; Jewell *v.* Union Pass. R. Co., 16 Phila. (Pa.) 64. In Marvin *v.* Manhattan R. Co., 53 N. Y. Super. Ct. 527, it was held in an action for personal injuries that whatever evidence was relevant in any degree to the certainty of future consequences was competent upon the question of damages, although it did not itself tend to prove a certainty.

83. To entitle the plaintiff to recover present damages for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty, and that they will result from the original injury. Chicago City R. Co. *v.* Henry, 62 Ill. 142; Fry *v.* Dubuque, etc., R. Co., 45 Iowa 416 [*following* Collins *v.* Council Bluffs, 32 Iowa 324, 7 Am. Rep. 200]; Strohm *v.* New York, etc., R. Co., 96 N. Y. 305; Filer *v.* New York Cent. R. Co., 49 N. Y. 42; Curtis *v.* Rochester, etc., R. Co., 18 N. Y. 534, 75 Am. Dec. 258. See also Lincoln *v.* Saratoga, etc., R. Co., 23 Wend. (N. Y.) 425. In an action for personal injuries caused by negligence, it is error to admit medical evidence as to the possibility of insanity as the ulterior consequences which might cause or be apprehended from the injuries received. Tozer *v.* New York, etc., R. Co., 105 N. Y. 617, 11 N. E. 369; Strohm *v.* New York, etc., R. Co., 96 N. Y. 305 [*reversing* 32 Hun 20].

84. *Alabama.*— McCaa *v.* Elam Drug Co., 114 Ala. 74, 21 So. 479, 62 Am. St. Rep. 88; Culver *v.* Hill, 68 Ala. 66, 44 Am. Rep. 134.

California.— Holt Mfg. Co. *v.* Thornton, 136 Cal. 232, 68 Pac. 708; Kenyon *v.* Goodall, 3 Cal. 257.

Florida.— Robinson *v.* Hyer, 35 Fla. 544, 17 So. 745; Brock *v.* Gale, 14 Fla. 523, 14 Am. Rep. 356.

Georgia.— Stewart *v.* Lanier House Co., 75 Ga. 582; Coweta Falls Mfg. Co. *v.* Rogers, 19 Ga. 416, 65 Am. Dec. 602.

Illinois.— O'Connor *v.* Nolan, 64 Ill. App. 357.

Indiana.— Fuller *v.* Curtis, 100 Ind. 237, 50 Am. Rep. 786; Cincinnati, etc., Air Line R. Co. *v.* Rodgers, 24 Ind. 103.

Iowa.— Rule *v.* McGregor, 115 Iowa 323, 90 N. W. 814; Graves *v.* Glass, 86 Iowa 261, 53 N. W. 231.

Kansas.— Union Pac. R. Co. *v.* Shook, 3 Kan. App. 710, 44 Pac. 685.

Kentucky.— Fox *v.* Poor Ridge, etc., Turnpike Road Co., 8 Ky. L. Rep. 427.

Louisiana.— Beck *v.* Fleitas, 37 La. Ann. 492; Reading *v.* Donovan, 6 La. Ann. 491; Porter *v.* Barrow, 3 La. Ann. 140; Williams *v.* Barton, 13 La. 404.

Maryland.— Furstenburg *v.* Fawsett, 61 Md. 184.

Massachusetts.— Smith *v.* Flanders, 129 Mass. 322; Willey *v.* Frederieks, 10 Gray 357.

Michigan.— Wetmore *v.* Pattison, 45 Mich. 439, 8 N. W. 67; Hopkins *v.* Sanford, 38 Mich. 611; Friedland *v.* McNeil, 33 Mich. 40; Clark *v.* Moore, 3 Mich. 55.

Minnesota.— Paine *v.* Sherwood, 19 Minn. 315.

Missouri.— Hyatt *v.* Hannibal, etc., R. Co., 19 Mo. App. 287.

New York.—Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487; People *v.* Albany, 53 N. Y. 629 [*affirming* 5 Lans. 524]; Hamilton *v.* McPherson, 28 N. Y. 72, 84 Am. Dec. 330; Brooke *v.* Tradesmen's Nat. Bank, 69 Hun 202, 23 N. Y. Suppl. 802; Hallock *v.* Beleher, 42 Barb. 199; Esehbaeh *v.* Hughes, 7 Misc. 172, 27 N. Y. Suppl. 320; Flynn *v.* Hatton, 43 How. Pr. 333; Taylor *v.* Read, 4 Paige 561.

North Carolina.—Herring *v.* Armwood, 130 N. C. 177, 41 S. E. 96, 57 L. R. A. 958.

Pennsylvania.— Billmeyer *v.* Wagner, 91 Pa. St. 92; Adams Express Co. *v.* Egbert, 36 Pa. St. 360, 78 Am. Dec. 382; Finch *v.* Heermans, 5 Luz. Leg. Reg. 125.

Tennessee.— Dorris *v.* King, (Ch. App. 1899) 54 S. W. 683.

Texas.— Galveston, etc., R. Co. *v.* Stovall, 3 Tex. App. Civ. Cas. § 251; King *v.* Watson, 2 Tex. App. Civ. Cas. § 283; San Antonio Gas Co. *v.* Harber, 1 Tex. App. Civ. Cas. § 1123.

Wisconsin.— Cockburn *v.* Ashland Lumber Co., 54 Wis. 619, 12 N. W. 49.

United States.— Boutin *v.* Rudd, 82 Fed. 685, 27 C. C. A. 526; Cahn *v.* Western Union Tel. Co., 46 Fed. 40.

England.— Mowbray *v.* Merryweather, [1895] 2 Q. B. 640, 59 J. P. 804, 65 L. J. Q. B. 50, 73 L. T. Rep. N. S. 459, 14 Reports 767, 44 Wkly. Rep. 49; McMahon *v.* Field, 7 Q. B. D. 591, 46 J. P. 245, 50 L. J. Q. B. 852, 45 L. T. Rep. N. S. 381; Lilley *v.* Doubleday, 7 Q. B. D. 510, 44 L. T. Rep. N. S. 814, 46 J. P. 708, 51 L. J. Q. B. 310; Welch *v.* Anderson, 7 Aspin. 177, 61 L. J. Q. B. 167, 66 L. T. Rep. N. S. 442; Wilson *v.* General Iron Screw Colliery Co., 3 Aspin. 536, 47 L. J. Q. B. 239, 37 L. T. Rep. N. S. 789; Portman *v.* Middleton, 4 C. B. N. S. 322, 4 Jur. N. S. 689, 27 L. J. C. P. 231, 6 Wkly. Rep. 598, 93 E. C. L. 322; Hadley *v.* Baxendale, 2 C. L. R. 517, 9

may reasonably be supposed to have been contemplated by the parties, when making the contract, as the probable result of the breach.[85] In other words when two parties have made a contract which has been broken, the damages to be received for the breach should be such as may fairly and reasonably be considered as arising naturally therefrom, that is, according to the usual course of business, or such as may reasonably be supposed to have been in the contemplation of both parties at the time that the contract was made, and as a probable result of its breach.[86]

Exch. 341, 18 Jur. 358, 23 L. J. Exch. 179, 2 Wkly. Rep. 302, 26 Eng. L. & Eq. 398; Fisher *v.* Val de Travers Asphalte Co., 1 C. P. D. 511, 45 L. J. C. P. 479, 35 L. T. Rep. N. S. 366.

See 15 Cent. Dig. tit. "Damages," § 48.

Damages flowing directly from intervening agency of third person.— In an action for damages for failure of defendant to pay to a creditor of plaintiff money intrusted to him for that purpose, damages caused by the sale of plaintiff's property at a sacrifice, in an action against him by the creditor, cannot be shown, unless facts are alleged in the complaint showing that defendant knew that damages would probably flow from a breach of the contract by him greater than would follow from a breach of contract in the usual course of things. Mitchell *v.* Clarke, 71 Cal. 163, 11 Pac. 882, 60 Am. Rep. 529.

85. *Alabama.*— Collins *v.* Stephens, 58 Ala. 543.

Florida.— Brock *v.* Gale, 14 Fla. 523, 14 Am. Rep. 356.

Georgia.— Stewart *v.* Lanier House Co., 75 Ga. 582.

Illinois.— Illinois Cent. R. Co. *v.* Cobb, 64 Ill. 128.

Iowa.— Graves *v.* Glass, 86 Iowa 261, 53 N. W. 231.

Kansas.— Johnson *v.* Mathews, 5 Kan. 118.

Kentucky.— Elizabethtown, etc., R. Co. *v.* Pottinger, 10 Bush 185.

Louisiana.— Dwyer *v.* Tulane Educational Fund, 47 La. Ann. 1232, 17 So. 796.

Michigan.— Hutchings *v.* Ladd, 16 Mich. 493.

Minnesota.— Baldwin *v.* Blanchard, 15 Minn. 489.

Missouri.— Pruitt *v.* Hannibal, etc., R. Co., 62 Mo. 527; Hyatt *v.* Hannibal, etc., R. Co., 19 Mo. App. 287.

New York.— Devlin *v.* New York, 63 N. Y. 8; Starbird *v.* Barrows, 62 N. Y. 615; Hamilton *v.* McPherson, 28 N. Y. 72, 84 Am. Dec. 330; Meyer *v.* Haven, 70 N. Y. App. Div. 529, 75 N. Y. Suppl. 261; Russell *v.* Giblin, 16 Daly 258, 10 N. Y. Suppl. 315 [*affirming* 5 N. Y. Suppl. 545]; Brauer *v.* Oceanic Steam Nav. Co., 34 Misc. 127, 69 N. Y. Suppl. 465 [*modified* in 66 N. Y. App. Div. 605, 73 N. Y. Suppl. 291]; Flynn *v.* Hatton, 43 How. Pr. 333; Taylor *v.* Read, 4 Paige 561.

Oregon.— Blagen *v.* Thompson, 23 Oreg. 239, 31 Pac. 647, 18 L. R. A. 315.

Pennsylvania.— Finch *v.* Heermans, 5 Luz. Leg. Reg. 125.

Tennessee.— State *v.* Ward, 9 Heisk. 100.

Texas.— Fowler *v.* Shook, (Civ. App. 1900) 59 S. W. 282; St. Louis, etc., R. Co. *v.* May, (Civ. App. 1898) 44 S. W. 408; Watkins *v.* Junker, 4 Tex. Civ. App 629, 23 S. W. 802; Galveston, etc., R. Co. *v.* Stovall, 3 Tex. App. Civ. Cas. § 251; Galveston, etc., R. Co. *v.* Marsden, 1 Tex. App. Civ. Cas. § 1001.

Wisconsin.— McNamara *v.* Clintonville, 62 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722; Cockburn *v.* Ashland Lumber Co., 54 Wis. 619, 12 N. W. 49; Brown *v.* Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41.

United States.— Levinski *v.* Middlesex Banking Co., 92 Fed. 449, 34 C. C. A. 452; Boutin *v.* Rudd, 82 Fed. 685, 27 C. C. A. 526; The Henry Buck, 39 Fed. 211; Hunt *v.* Oregon Pac. R. Co., 36 Fed. 481, 13 Sawy. 516, 1 L. R. A. 842.

England.— Mowbray *v.* Merryweather, [1895] 2 Q. B. 640, 59 J. P. 804, 65 L. J. Q. B. 50, 73 L. T. Rep. N. S. 459, 14 Reports 767, 44 Wkly. Rep. 49; Simpson *v.* London, etc., R. Co., 1 Q. B. D. 274, 45 L. J. Q. B. 182, 33 L. T. Rep. N. S. 805, 24 Wkly. Rep. 294; Hadley *v.* Baxendale, 2 C. L. R. 517, 9 Exch. 341, 18 Jur. 358, 23 L. J. Exch. 179, 2 Wkly. Rep. 302, 26 Eng. L. & Eq. 398; Hamilton *v.* Magill, L. R. 12 Ir. 186, 202.

Canada.— Bruhm *v.* Ford, 33 Nova Scotia 323; Kennedy *v.* American Express Co., 22 Ont. App. 278; Belanger *v.* Dupras, 14 Quebec Super. Ct. 193.

See 15 Cent. Dig. tit. "Damages," § 48.

Expenditures made in reliance upon contract.— In an action against the proprietor of a school for breach of a contract to employ plaintiff as a teacher, made for her by her father during her absence in Europe, where she was traveling with her mother, the plaintiff cannot recover, as a part of her damages, the expenses of her journey home, when it does not appear that such expenses were incurred in consequence of the contract, or were in the contemplation of the parties when it was made. Benziger *v.* Miller, 50 Ala. 206.

The rule of the Code Napoleon and of the Louisiana code that the debtor who has been guilty of no bad faith or fraud is liable only for such damages as were contemplated, or may reasonably be supposed to have been contemplated by the parties, has been adopted in recent decisions in England and America. Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718; Bowas *v.* Pioneer Tow Line, 3 Fed. Cas. No. 1,713, 2 Sawy. 21; Fletcher *v.* Taylcur, 17 C. B. 21, 25 L. J. C. P. 65, 84 E. C. L. 21; Hadley *v.* Baxendale, 2 C. L. R. 517, 9 Exch. 341, 18 Jur. 358, 23 L. J. Exch. 179, 2 Wkly. Rep. 302, 26 Eng. L. & Eq. 398.

86. Hadley *v.* Baxendale, 2 C. L. R. 517, 9 Exch. 341, 18 Jur. 358, 23 L. J. Exch. 179, 2 Wkly. Rep. 302, 26 Eng. L. & Eq. 398.

b. Notice of Special Damage. Outside of the general rule for the recovery of damages for breach of contract there has been evolved another rule of general application. Where special circumstances have been communicated to a party at the time of the making of a contract which go to show that its breach will involve special damage, such damage may be recovered, although not the natural result of an ordinary breach.[87] When a contract is made under special circumstances, and those circumstances are communicated by one of the contracting parties to the other, the damages resulting from the breach of the contract which they would reasonably contemplate are the amount of injury which would ordinarily follow from a breach of contract under those special circumstances.[88] Mere notice as such does not have the effect of rendering a party liable to more than ordinary damages; but in order to do so it must be given under such circumstances as to make it a term of the contract that the party will be liable for such damages if the contract is broken.[89] The general rule is that a party who fails to comply with his contract to furnish goods is liable for the value of the goods in the open market at the time of the failure.[90]

The effect of this rule is more often to limit than to extend the liability for a breach of contract, although sometimes, where the special circumstances under which the contract was made have been communicated, damages consequential upon a breach made under those circumstances will be deemed to have been contemplated by the parties and may be recovered of the defendant. Bowas *v.* Pioneer Tow Line, 3 Fed. Cas. No. 1,713, 2 Sawy. 21. And see *infra*, VII, C, 3, b.

87. *Illinois.*— Illinois Cent. R. Co. *v.* Cobb, 64 Ill. 128; Haven *v.* Wakefield, 39 Ill. 509.

Indiana.— Vickery *v.* McCormick, 117 Ind. 594, 20 N. E. 495.

Iowa.— Mann *v.* Taylor, 78 Iowa 355, 43 N. W. 220.

Maine.— Grindle *v.* Eastern Express Co., 67 Me. 317, 24 Am. Rep. 31.

Massachusetts.—Fox *v.* Boston, etc., R. Co., 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702.

Michigan.— Clark *v.* Moore, 3 Mich. 55.

New York.— Hexter *v.* Knox, 63 N. Y. 561; Booth *v.* Spuyten Duyvil Rolling-Mill Co., 60 N. Y. 487; Messmore *v.* New York Shot, etc., Co., 40 N. Y. 422; Jones *v.* National Printing Co., 13 Daly 92.

North Carolina.— Hamilton *v.* Western, etc., Co., 96 N. C. 398, 3 S. E. 164.

Texas.— Ligon *v.* Missouri Pac. R. Co., 3 Tex. App. Civ. Cas. § 2.

Wisconsin.— Hammer *v.* Schoenfelder, 47 Wis. 455, 2 N. W. 1129.

England.— Grébert-Borgnis *v.* Nugent, 15 Q. B. D. 85, 54 L. J. Q. B. 511; Horne *v.* Midland R. Co., L. R. 8 C. P. 131, 42 L. J. C. P. 59, 28 L. T. Rep. N. S. 312, 21 Wkly. Rep. 481; Cory *v.* Thames Ironworks, etc., Co., L. R. 3 Q. B. 181, 37 L. J. Q. B. 68, 17 L. T. Rep. N. S. 495, 16 Wkly. Rep. 457; Borries *v.* Hutchinson, 18 C. B. N. S. 445, 11 Jur. N. S. 267, 34 L. J. C. P. 169, 11 L. T. Rep. N. S. 771, 13 Wkly. Rep. 386, 114 E. C. L. 445; Smeed *v.* Foord, 1 E. & E. 602, 5 Jur. N. S. 291, 28 L. J. Q. B. 178, 7 Wkly. Rep. 266, 102 E. C. L. 602.

Where the vendor contracts with the purchaser for the delivery of building materials at a given time and place, with knowledge of the special circumstances under which the contract is made, the damages resulting from a breach of such contract which the parties would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of the contract under the special circumstances. Shouse *v.* Neiswaanger, 18 Mo. App. 236.

88. But if the special circumstances are unknown to the party breaking the contract, he at the most can only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. Hadley *v.* Baxendale, 2 C. L. R. 517, 9 Exch. 341, 18 Jur. 358, 23 L. J. Exch. 179, 2 Wkly. Rep. 302, 26 Eng. L. & Eq. 398.

89. Horne *v.* Midland R. Co., L. R. 8 C. P. 131, 42 L. J. C. P. 59, 28 L. T. Rep. N. S. 312, 21 Wkly. Rep. 481.

The knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it. Horne *v.* Midland R. Co., L. R. 8 C. P. 131, 42 L. J. C. P. 59, 28 L. T. Rep. N. S. 312, 21 Wkly. Rep. 481; British Columbia, etc., Spar, etc., Co. *v.* Nettleship, L. R. 3 C. P. 499, 37 L. J. C. P. 235, 18 L. T. Rep. N. S. 604, 16 Wkly. Rep. 1046. See also Riley *v.* Horne, 5 Bing. 217, 2 M. & P. 331, 30 Rev. Rep. 576, 15 E. C. L. 549.

90. But when similar goods cannot be purchased in the market, the measure of damages is the actual loss sustained by the purchaser in not receiving the goods according to the contract. Vickery *v.* McCormick, 117 Ind. 594, 20 N. E. 495; Culin *v.* Woodbury Glass Works, 108 Pa. St. 220; Grébert-Borgnis *v.* Nugent, 15 Q. B. D. 85, 54 L. J. Q. B. 511; Hinde *v.* Liddell, L. R. 10 Q. B. 265, 44 L. J. Q. B. 105, 32 L. T. Rep. N. S. 449, 23 Wkly. Rep. 65; Elbinger *v.* Armstrong, L. R. 9 Q. B. 473, 43 L. J. Q. B. 211, 30 L. T. Rep. N. S. 871, 23 Wkly. Rep. 127; Borries *v.* Hutchinson, 18 C. B. N. S. 445, 11

c. Notice of Subcontract. Where a party makes a contract and at the time notifies the defendant that such contract is made with reference to a subcontract already entered into or contemplated, upon the breach of the original contract he will not be confined to nominal damages, but may recover such damages as necessarily result from its breach;[91] and the same rule has been held to apply where the original contract was entered into with notice of a special use for the goods[92] or of resale.[93]

d. Remote Damages. Remote damages[94] not connected directly with the breach of contract and such as cannot be said to have entered into the contemplation of the parties at the time the contract was made will be invariably denied.

Jur. N. S. 267, 34 L. J. C. P. 169, 11 L. T. Rep. N. S. 771, 13 Wkly. Rep. 386, 114 E. C. L. 445.

91. Jordan *v.* Patterson, 67 Conn. 373, 35 Atl. 521; Illinois Cent. R. Co. *v.* Cobb, 64 Ill. 128; Messmore *v.* New York Shot, etc., Co., 40 N. Y. 422; Grébert-Borgnis *v.* Nugent, 15 Q. B. D. 85, 54 L. J. Q. B. 511; Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. D. 670, 27 Wkly. Rep. 221; Hinde *v.* Liddell, L. R. 10 Q. B. 265, 44 L. J. Q. B. 105, 32 L. T. Rep. N. S. 449, 23 Wkly. Rep. 65; Elbinger *v.* Armstrong, L. R. 9 Q. B. 473, 43 L. J. Q. B. 211, 30 L. T. Rep. N. S. 871, 23 Wkly. Rep. 127; Borries *v.* Hutchinson, 18 C. B. N. S. 445, 11 Jur. N. S. 267, 34 L. J. C. P. 169, 11 L. T. Rep. N. S. 771, 13 Wkly. Rep. 386, 114 E. C. L. 445. A contractor who fails to finish a railroad by the time limited in his contract cannot be held for the loss occasioned to the owner of the road by reason of another contract between him and a third party, for the use of the road after the time it should have been completed, even though he may have known of the existence and the terms of such other contract at the time of entering into his own, unless he expressly agrees to such a rule of damages. Snell *v.* Cottingham, 72 Ill. 161.

Collateral undertaking.— In a suit for the rent of a hotel in which the lessee seeks to recoup damages sustained by the lessor's neglect to keep it in repair as agreed, the loss of a contract by which the lessee sublet the hotel is not a proper element of damages, it being a collateral undertaking which the parties could not reasonably have contemplated when they made the contract. Stewart *v.* Lanier House Co., 75 Ga. 582.

92. *Indiana.*— Vickery *v.* McCormick, 117 Ind. 594, 20 N. E. 495.

Maine.— Grindle *v.* Eastern Express Co., 67 Me. 317, 24 Am. Rep. 31.

North Carolina.— Hamilton *v.* Western, etc., Co., 96 N. C. 398, 3 S. E. 164.

Wisconsin.— Hammer *v.* Schoenfelder, 47 Wis. 455, 2 N. W. 1129.

England.—Schulze *v.* Great Eastern R. Co., 19 Q. B. D. 30, 56 L. J. Q. B. 442, 57 L. T. Rep. N. S. 438, 35 Wkly. Rep. 683; Simpson *v.* London. etc., R. Co., 1 Q. B. D. 274, 45 L. J. Q. B. 182, 33 L. T. Rep. N. S. 805, 24 Wkly. Rep. 294; British Columbia, etc., Spar, etc., Co. *v.* Nettleship, L. R. 3 C. P. 499, 37 L. J. C. P. 235, 18 L. T. Rep. N. S. 604, 16 Wkly. Rep. 1046; Smeed *v.* Foord, 1 E. & E. 602, 5 Jur. N. S. 291, 28 L. J. Q. B. 178, 7 Wkly. Rep. 266, 102 E. C. L. 602.

93. Jordan *v.* Patterson, 67 Conn. 473, 35 Atl. 521; Mann *v.* Taylor, 78 Iowa 355, 43 N. W. 220; Hammond *v.* Bussey, 20 Q. B. D. 79, 57 L. J. Q. B. 58.

94. *Alabama.*— Burton *v.* Henry, 90 Ala. 281, 7 So. 925; Culver *v.* Hill, 68 Ala. 66, 44 Am. Rep. 134.

Arkansas.— Collins *v.* Karatopsky, 36 Ark. 316; Gerson *v.* Slemons, 30 Ark. 50.

California.—Southern California Sav. Bank *v.* Asbury, 117 Cal. 96, 48 Pac. 1081; Pendleton *v.* Cline, 85 Cal. 142, 24 Pac. 659.

Colorado.— Lilley *v.* Randall, 3 Colo. 298.

Connecticut.— Lewis *v.* Hartford Dredging Co., 68 Conn. 221, 35 Atl. 1127.

Georgia.— Doyle *v.* Days, 94 Ga. 633, 20 S. E. 133; Willingham *v.* Hooven, 74 Ga. 233, 58 Am. Rep. 435.

Illinois.— Williams *v.* Case, 79 Ill. 356; Rockford, etc., R. Co. *v.* Beckemeier, 72 Ill. 267; O'Conner *v.* Nolan, 64 Ill. App. 357.

Indiana.— Gadbury *v.* Stahl, 41 Ind. 348; Lewis *v.* Lee, 15 Ind. 499.

Iowa.— Prosser *v.* Jones, 41 Iowa 674.

Kansas.— Macy *v.* Peach, 2 Kan. App. 575, 44 Pac. 687.

Maine.— Bridges *v.* Stickney, 38 Me. 361.

Michigan.— Carnegie *v.* Holt, 99 Mich. 606, 58 N. W. 623.

Minnesota.— Loudy *v.* Clarke, 45 Minn. 477, 48 N. W. 25; Osborne *v.* Poket, 33 Minn. 10, 21 N. W. 752.

Missouri.— Wilson *v.* Weil, 67 Mo. 399; Turner *v.* Gibbs, 50 Mo. 556.

Nebraska.— Bridges *v.* Lanham, 14 Nebr. 369, 15 N. W. 704, 45 Am. Rep. 121.

New York.— Dillon *v.* Masterson, 42 N. Y. Super. Ct. 176; Russell *v.* Giblin, 16 Daly 258, 10 N. Y. Suppl. 315 [*affirming* 5 N. Y. Suppl. 545]; Chadwick *v.* Woodward, 12 Daly 399; New York Academy of Music *v.* Hackett, 2 Hilt. 217; Masterton *v.* Brooklyn, 7 Hill 61, 42 Am. Dec. 38; Taylor *v.* Read, 4 Paige 561.

North Carolina.— Ashe *v.* De Rossett, 50 N. C. 299, 72 Am. Dec. 552.

Pennsylvania. — Pennsylvania R. Co. *v.* Titusville, etc., Plank Road Co., 71 Pa. St. 350; Adams Express Co. *v.* Egbert, 36 Pa. St. 360, 78 Am. Dec. 382.

South Carolina.— Sitton *v.* Macdonald, 25

e. Profits. In order to recover profits in case of a breach of contract, such profits must have been within the contemplation of the parties at the time that the contract was made, and where such profits do not enter into the contract itself they will be denied.[95] Anticipated damages, different from those which would ordinarily be sustained, are not always recoverable, but will only be awarded when in view of special circumstances they may be regarded as the natural and direct result of the breach, and are not problematical, but are capable of being foreseen and of being estimated with reasonable accuracy.[96] In all cases the damages claimed should be capable of being definitely ascertained.[97] Where the damages claimed are so speculative and dependent upon numerous and changing contingencies that their amount is not susceptible of actual proof with any reasonable degree of certainty no recovery can be had.[98]

S. C. 68, 60 Am. Rep. 484; D'Orval *v.* Hunt, Dudley 180.

Texas.— Cates *v.* Sparkman, 73 Tex. 619, 11 S. W. 846, 15 Am. St. Rep. 806; Tompkins Co. *v.* Galveston, etc., R. Co., 4 Tex. Civ. App. 1, 23 S. W. 25; Westfall *v.* Perry, (Civ. App. 1893) 23 S. W. 740; San Antonio Gas Co. *v.* Harber, 1 Tex. App. Civ. Cas. § 1123; Haker *v.* Boedeker, 1 Tex. App. Civ. Cas. § 1034; Galveston, etc., R. Co. *v.* Marsden, 1 Tex. App. Civ. Cas. § 1001.

Vermont.— Smith *v.* Smith, 45 Vt. 433.

Wisconsin.— Aultman *v.* Case, 68 Wis. 612, 32 N. W. 772; Hutchinson *v.* Chicago, etc., R. Co., 41 Wis. 541; Brayton *v.* Chase, 3 Wis. 456.

United States.— Cahn *v.* Western Union Tel. Co., 46 Fed. 40.

England.— Hobbs *v.* London, etc., R. Co. L. R. 10 Q. B. 111, 44 L. J. Q. B. 49, 32 L. T. Rep. N. S. 352, 23 Wkly. Rep. 520; Borries *v.* Hutchinson, 18 C. B. N. S. 445, 11 Jur. N. S. 267, 34 L. J. C. P. 169, 11 L. T. Rep. N. S. 771, 13 Wkly. Rep. 386, 114 E. C. L. 445.

Canada.— Fer Grand Tronc Compagnie, etc. *v.* Black, 17 Rev. Lég. 669; Dullea *v.* Taylor, 35 U. C. Q. B. 395.

See 15 Cent. Dig. tit. "Damages," § 37 *et seq.*

95. *Florida.*— Brock *v.* Gale, 14 Fla. 523, 14 Am. Rep. 356.

Georgia.— Sanderlin *v.* Willis, 94 Ga. 171, 21 S. E. 291.

Indiana.— Acme Cycle Co. *v.* Clarke, 157 Ind. 271, 61 N. E. 561.

Kentucky.—Blood *v.* Herring, 61 S. W. 273, 22 Ky. L. Rep. 1725.

Louisiana.— Blymer Ice Mach. Co. *v.* McDonald, 48 La. Ann. 439, 19 So. 459; Vidalat *v.* New Orleans, 43 La. Ann. 1121, 10 So. 175; Williams *v.* Barton, 13 La. 404.

Michigan.— Dykema *v.* Minneapolis, etc., R. Co., 101 Mich. 47, 59 N. W. 447.

New Hampshire.— Salinger *v.* Salinger, 69 N. H. 589, 45 Atl. 558.

New Jersey.—Wolcott *v.* Mount, 36 N. J. L. 262, 13 Am. Rep. 438.

New York.— Messmore *v.* New York Shot, etc., Co., 40 N. Y. 422; Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718; Heineman *v.* Heard, 2 Hun 324.

Pennsylvania.— Adams Express Co. *v.* Egbert, 36 Pa. St. 360, 78 Am. Dec. 382; Finch *v.* Heermans, 5 Luz. Leg. Reg. 125.

South Carolina.— Sitton *v.* McDonald, 25 S. C. 68, 60 Am. Rep. 484.

Wisconsin.— Serfling *v.* Andrews, 106 Wis. 78, 81 N. W. 991.

England.—Schulze *v.* Great Eastern R. Co., 19 Q. B. D. 30, 56 L. J. Q. B. 442, 57 L. T. Rep. N. S. 438, 35 Wkly. Rep. 683; Borries *v.* Hutchinson, 18 C. B. N. S. 445, 11 Jur. N. S. 267, 34 L. J. C. P. 169, 11 L. T. Rep. N. S. 771, 13 Wkly. Rep. 386, 114 E. C. L. 445; Jameson *v.* Midland R. Co., 50 L. T. Rep. N. S. 426.

Canada.— Kennedy *v.* American Express Co., 22 Ont. App. 278.

See 15 Cent. Dig. tit. "Damages," § 72 *et seq.*; and *infra*, XI, D.

96. Kelly *v.* Fahrney, 97 Fed. 176, 38 C. C. A. 103; New York Cent. Trust Co. *v.* Clark, 92 Fed. 293, 34 C. C. A. 354.

97. Hair *v.* Barnes, 26 Ill. App. 580; Western Gravel Road Co. *v.* Cox, 39 Ind. 260; Finch *v.* Heermans, 5 Luz. Leg. Reg. (Pa.) 125. See also Crabbs *v.* Koontz, 69 Md. 59, 13 Atl. 591, which was a suit on a replevin bond.

98. *Alabama.*— Reed Lumber Co. *v.* Lewis, 94 Ala. 626, 10 So. 333; Gunter *v.* Beard, 93 Ala. 227, 9 So. 389; Pollock *v.* Gantt, 69 Ala. 373, 44 Am. Rep. 519.

California.— Friend, etc., Lumber Co. *v.* Miller, 67 Cal. 464, 8 Pac. 40.

Delaware.—Unruh *v.* Taylor, 2 Pennew. 42, 43 Atl. 515.

Georgia.— Harris *v.* Moss, 112 Ga. 95, 37 S. E. 123; Stewart *v.* Lanier House Co., 75 Ga. 582.

Illinois.— Hill *v.* Parsons, 110 Ill. 107; O'Connor *v.* Noland, 64 Ill. App. 357; Koch *v.* Merk, 48 Ill. App. 26; Sawyer *v.* Hazlitt, 37 Ill. App. 474.

Indiana.— Williamson *v.* Brandenburg, 133 Ind. 594, 32 N. E. 834.

Iowa.— Graves *v.* Glass, 86 Iowa 261, 53 N. W. 231; Villisca First Nat. Bank *v.* Thurman, 69 Iowa 693, 25 N. W. 909.

Kansas.— Missouri, etc., R. Co. *v.* Ft. Scott, 15 Kan. 435.

Louisiana.— Rigney *v.* Monette, 47 La. Ann. 648, 17 So. 211.

Maryland.— Bullock *v.* Bergman, 46 Md. 270.

D. Certain and Uncertain Damages — 1. In General. Where a party claims damages by reason of injury inflicted either in actions *ex delicto*[99] or *ex contractu*,[1] he must not only show an injury sustained, but must also show with reasonable certainty the amount of damages he has sustained in consequence thereof.[2] It is not, however, a sufficient reason for disallowing damages claimed that a party can state their amount only proximately; it is enough if from proximate estimates of witnesses a satisfactory conclusion can be reached.[3] The rule of recovery is compensation. Where the loss is pecuniary and is present and actual and can be measured, but no evidence is given showing its extent, or from which it can be inferred, the jury can allow nominal damages only.[4] It is not

Michigan.— Stevens *v.* Yale, 113 Mich. 680, 72 N. W. 5; Fitzsimmons *v.* Chapman, 37 Mich. 139, 26 Am. Rep. 508.

Mississippi. — Vicksburg, etc., R. Co. *v.* Ragsdale, 46 Miss. 458.

New York.—Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487; Brooke *v.* Tradesmen's Nat. Bank, 69 Hun 202, 23 N. Y. Suppl. 802; Bean *v.* Carleton, 58 Hun 611, 12 N. Y. Suppl. 519; Dillon *v.* Masterson, 42 N. Y. Super. Ct. 176.

Pennsylvania.— Shirley *v.* Keagy, 126 Pa. St. 282, 17 Atl. 607; Rankin's Appeal, (1888) 16 Atl. 82; McKnight *v.* Ratcliff, 44 Pa. St. 156; Finch *v.* Heermans, 5 Luz. Leg. Reg. 125.

South Carolina.— Sitton *v.* McDonald, 25 S. C. 68, 60 Am. Rep. 484; Tappan *v.* Harwood, 2 Speers 536.

Tennessee.— Fort *v.* Orndoff, 7 Heisk. 167.

Texas.— Elmendorf *v.* Classen, 92 Tex. 472, 49 S. W. 1043 [*reversing* (Civ. App. 1898) 47 S. W. 1023]; Greer *v.* Varnell, 27 Tex. Civ. App. 255, 65 S. W. 196.

United States.—Bell *v.* Cunningham, 3 Pet. 69, 7 L. ed. 606; New York Cent. Trust Co. *v.* Clark, 92 Fed. 293, 34 C. C. A. 354; Balph *v.* Rathburn Co., 75 Fed. 971, 21 C. C. A. 584; Hunt *v.* Oregon Pac. R. Co., 36 Fed. 481, 13 Sawy. 516, 1 L. R. A. 842; Weibye *v.* Dressel, 2 Fed. 264, 5 Hughes 137.

Canada.— Gilbert *v.* Campbell, 12 N. Brunsw. 474.

A conjectural estimate of the profits which might have been made is not a legitimate basis upon which damages may be fixed. Newbrough *v.* Walker, 8 Gratt. (Va.) 16, 56 Am. Dec. 127 [*quoted* in James *v.* Adams, 8 W. Va. 568].

The question what damages are speculative and therefore not recoverable is for the court and not for the jury. Mississippi, etc., R. Co. *v.* Prince, 34 Minn. 71, 24 N. W. 344.

99. Where from the nature of the case the amount of the damages in an action of tort cannot be estimated with certainty, or only a part of them can be so estimated, all the facts and circumstances of the case having any tendency to show damages or their probable amount may be placed before the jury, so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. Allison *v.* Chandler, 11 Mich. 542.

1. The cardinal principle in relation to the damages to be compensated for on the breach of a contract that the plaintiff must establish the *quantum* of his loss, by evidence from which the jury will be able to estimate the extent of his injury, will exclude all such elements of injury as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty. Wolcott *v.* Mount, 36 N. J. L. 262, 13 Am. Rep. 438.

2. Parke *v.* Frank, 75 Cal. 364, 17 Pac. 427; Wolcott *v.* Mount, 36 N. J. L. 262, 13 Am. Rep. 438; Forrest *v.* Buchanan, 203 Pa. St. 454, 52 Atl. 267.

3. Satchwell *v.* Williams, 40 Conn. 371. In Duke *v.* Missouri Pac. R. Co., 99 Mo. 347, 351, 12 S. W. 636, the court said: "Where there is no evidence showing the amount, or the proximate amount, of expenses incurred for medicines, medical attention or like services, the jury have no basis upon which to form an estimate of the damages that ought to be assessed on account thereof, and damages of this kind cannot be found except upon such proof. Eckerd *v.* Chicago, etc., R. Co., 70 Iowa 353, 30 N. W. 615; Reed *v.* Chicago, etc., R. Co., 57 Iowa 23, 10 N. W. 285; Crowley *v.* St. Louis, etc., R. Co., 24 Mo. App. 119; Shear. & Redf. on Neg. (4th ed.) § 759. Where compensatory damages only are given, the recovery must be confined to the actual damages sustained. Hannibal Bridge Co. *v.* Schaubacher, 57 Mo. 582. And when such damages are susceptible of proof with approximate accuracy, and may be measured with some degree of certainty, they should not be left to the guess of the jury, even in actions *ex delicto*. Parsons *v.* Missouri Pac. R. Co., 94 Mo. 286, 6 S. W. 464; Pritchard *v.* Hewitt, 91 Mo. 547, 4 S. W. 437, 60 Am. Rep. 265." In Leeds *v.* Metropolitan Gaslight Co., 90 N. Y. 26, 29, the court said: "For pain and suffering, or injuries to the feelings, there can be no measure of compensation, save the arbitrary judgment of a jury. But that is a rule of necessity. Where actual pecuniary damages are sought, some evidence must be given showing their existence and extent. If that is not done the jury cannot indulge in an arbitrary estimate of their own."

4. Leeds *v.* Metropolitan Gaslight Co., 90 N. Y. 26 [*citing* New York Dry-Dock Co. *v.* McIntosh, 5 Hill (N. Y.) 290; Brantingham *v.* Fay, 1 Johns. Cas. (N. Y.) 255; Sedgwick Dam. c. 2, p. 47].

necessary to show the exact amount of damages to an absolute certainty;[5] but the amount of damages claimed must be shown with reasonable certainty in order to warrant a recovery.[6]

2. Physical Pain. Physical pain has always been considered an element of damages for which compensation should be allowed.[7] Mental suffering and

5. Hubbard Specialty Mfg. Co. *v.* Minneapolis Wood-Designing Co., 47 Minn. 393, 50 N. W. 349; Barngrover *v.* Maack, 46 Mo. App. 407.

6. *California.*—Parke *v.* Frank, 75 Cal. 364, 17 Pac. 427.

Kansas.— Lyon County School Dist. No. 46 *v.* Lund, 51 Kan. 731, 33 Pac. 595.

Kentucky.— Williams *v.* Hall, 2 Dana 97.

Louisiana.— Minor *v.* Wright, 16 La. Ann. 151; Ranson *v.* Labranche, 16 La. Ann. 121.

Minnesota.— Pullen *v.* Wright, 34 Minn. 314, 26 N. W. 394.

Missouri.— Biglow *v.* Carney, 18 Mo. App. 534.

Pennsylvania.— Forrest *v.* Buchanan, 203 Pa. St. 454, 52 Atl. 267.

Texas.— Western Union Tel. Co. *v.* Brown, 62 Tex. 536.

7. *Alabama.*— Louisville, etc., R. Co. *v.* Binion, 107 Ala. 645, 18 So. 75; South, etc., R. Co. *v.* McLendon, 63 Ala. 266.

Arkansas.— St. Louis, etc., R. Co. *v.* Dobbins, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147; Cameron *v.* Vandegriff, 53 Ark. 381, 13 S. W. 1092; Ward *v.* Blackwood, 48 Ark. 396, 3 S. W. 624.

California.— Malone *v.* Hawley, 46 Cal. 409; Fairchild *v.* California Stage Co., 13 Cal. 599.

Colorado.— Wall *v.* Livezay, 6 Colo. 465.

Connecticut.— Lawrence *v.* Housatonic R. Co., 29 Conn. 390; Masters *v.* Warren, 27 Conn. 293.

Delaware.— Wallace *v.* Wilmington, etc., R. Co., 8 Houst. 529, 18 Atl. 818.

District of Columbia.— Johnson *v.* Baltimore, etc., R. Co., 6 Mackey 232; Larmon *v.* District of Columbia, 5 Mackey 330.

Georgia.— Georgia Southern R. Co. *v.* Neel, 68 Ga. 609; Atlanta, etc., R. Co. *v.* Johnson, 66 Ga. 259; Cooper *v.* Mullins, 30 Ga. 146, 76 Am. Dec. 636.

Illinois.— Central R. Co. *v.* Serfass, 153 Ill. 379, 39 N. E. 119 [*affirming* 53 Ill. App. 448]; St. Louis Consol. Coal Co. *v.* Haenni, 146 Ill. 614, 35 N. E. 162; Chicago, etc., R. Co. *v.* Holland, 122 Ill. 461, 13 N. E. 145; Sheridan *v.* Hibbard, 119 Ill. 307, 9 N. E. 901; Hannibal, etc., R. Co. *v.* Martin, 111 Ill. 219; Chicago, etc., R. Co. *v.* Payzant, 87 Ill. 125; Chicago *v.* Elzeman, 71 Ill. 131; Chicago *v.* Langlass, 66 Ill. 361; Pierce *v.* Millay, 44 Ill. 189.

Indiana.— Wabash, etc., R. Co. *v.* Morgan, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85; Indiana Car Co. *v.* Parker, 100 Ind. 181; Huntington *v.* Breen, 77 Ind. 29; Ohio, etc., R. Co. *v.* Dickerson, 59 Ind. 317; Indianapolis *v.* Gaston, 58 Ind. 224; Chicago, etc., R. Co. *v.* Butler, 10 Ind. App. 244, 38 N. E. 1.

Iowa.— Pence *v.* Wabash R. Co., 116 Iowa 279, 90 N. W. 59; Fleming *v.* Shenandoah, 71 Iowa 456, 32 N. W. 456; Stafford *v.* Oskaloosa, 64 Iowa 251, 20 N. W. 174; Redding *v.* Gates, 52 Iowa 210, 2 N. W. 1079; McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748; Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462.

Kansas.— Missouri, etc., R. Co. *v.* Weaver, 16 Kan. 456; Kansas Pac. R. Co. *v.* Pointer, 9 Kan. 620; Tefft *v.* Wilcox, 6 Kan. 46.

Kentucky.— Kentucky Cent. R. Co. *v.* Ackley, 87 Ky. 278, 8 S. W. '91, 10 Ky. L. Rep. 170, 12 Am. St. Rep. 480; Louisville, etc., R. Co. *v.* Wade, 11 Ky. L. Rep. 904.

Louisiana.— Rutherford *v.* Shreveport, etc., R. Co., 41 La. Ann. 793, 6 So. 644.

Maine.— Mason *v.* Ellsworth, 32 Me. 271; Verrill *v.* Minot, 31 Me. 299.

Maryland.— McMahon *v.* Northern Cent. R. Co., 39 Md. 438; Pittsburg, etc., R. Co. *v.* Andrews, 39 Md. 329, 17 Am. Rep. 568.

Massachusetts.— Hawes *v.* Knowles, 114 Mass. 518, 19 Am. Rep. 383.

Michigan.— Kinney *v.* Folkerts, 84 Mich. 616, 48 N. W. 283; Ross *v.* Leggett, 61 Mich. 445, 8 N. W. 695, 1 Am. St. Rep. 608.

Mississippi.—Memphis, etc., R. Co. *v.* Whitfield, 44 Miss. 466, 7 Am. Rep. 699.

Missouri.—Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; Stephens *v.* Hannibal, etc., R. Co., 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336; Chartrand *v.* Southern R. Co., 57 Mo. App. 425; McMillan *v.* Union Press-Brick Works, 6 Mo. App. 434; Steiner *v.* Moran, 2 Mo. App. 47.

Nebraska.— Chicago, etc., R. Co. *v.* Starmer, 26 Nebr. 630, 42 N. W. 706.

Nevada.— Cohen *v.* Eureka, etc., R. Co., 14 Nev. 376.

New Hampshire.—Holyoke *v.* Grand Trunk R. Co., 48 N. H. 541.

New Jersey.— Klein *v.* Jewett, 26 N. J. Eq. 474.

New York.— Curtis *v.* Rochester, etc., R. Co., 18 N. Y. 534, 75 Am. Dec. 258; Ransom *v.* New York, etc., Co., 15 N. Y. 415; Walker *v.* Erie R. Co., 63 Barb. 260; Swarthout *v.* New Jersey Steamboat Co., 46 Barb. 222; Morse *v.* Auburn, etc., R. Co., 10 Barb. 621; Brignoli *v.* Chicago, etc., R. Co., 4 Daly 182.

North Carolina.— Hinson *v.* Smith, 118 N. C. 503, 24 S. E. 541; Wallace *v.* Western North Carolina R. Co., 104 N. C. 442, 10 S. E. 552.

Oregon.— Oliver *v.* Northern Pac. Transp. Co., 3 Oreg. 84.

Pennsylvania.— Foote *v.* American Product Co., 201 Pa. St. 510, 51 Atl. 364; Schenkel *v.* Pittsburgh, etc., Traction Co., 194 Pa. St. 182, 44 Atl. 1072; Lake Shore, etc., R. Co. *v.* Frantz, 127 Pa. St. 297, 18 Atl. 22, 4 L. R. A. 389; Scott Tp. *v.* Montgomery, 95 Pa. St. 444; McLaughlin *v.* Corry, 77 Pa. St. 109,

physical pain as elements of damages cannot be disassociated, and the law furnishes no standard by which to measure and compensate either in money.[8] The amount recoverable depends upon the nature and extent of the injury as shown by the evidence, and must necessarily be left somewhat to the discretion of the jury, under instructions by the court.[9]

3. MENTAL ANGUISH — a. In General. Mental suffering accompanying personal injury or physical pain is always the subject of compensation.[10] While it is diffi-

18 Am. Rep. 432; Pittsburg, etc., Pass. R. Co. *v.* Donahue, 70 Pa. St. 119; Pennsylvania, etc., Canal Co. *v.* Graham, 63 Pa. St. 290, 3 Am. Rep. 549; Pennsylvania R. Co. *v.* Allen, 53 Pa. St. 276; Dunn *v.* Pennsylvania R. Co., 20 Phila. 258.

Texas.— Houston, etc., R. Co. *v.* Boehm, 57 Tex. 152; Missouri, etc., R. Co. *v.* McGlamory, (Civ. App. 1896) 34 S. W. 359; Galveston, etc., R. Co. *v.* Waldo, (Civ. App. 1895) 32 S. W. 783.

Utah.— Giblin *v.* McIntyre, 2 Utah 384.

Vermont.— Fulsome *v.* Concord, 46 Vt. 135.

Virginia.— Richmond, etc., R. Co. *v.* Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827.

West Virginia.— Riley *v.* West Virginia Cent., etc., R. Co., 27 W. Va. 145.

Wisconsin.— Reinke *v.* Bentley, 90 Wis. 457, 63 N. W. 1055; Goodno *v.* Oshkosh, 28 Wis. 300.

United States.— Wade *v.* Leroy, 20 How. 34, 15 L. ed. 813; The William Branfoot *v.* Hamilton, 52 Fed. 390, 3 C. C. A. 155; Grant *v.* Union Pac. R. Co., 45 Fed. 673; Campbell *v.* Pullman Palace-Car Co., 42 Fed. 484; Carpenter *v.* Mexican Nat. R. Co., 39 Fed. 315; Paddock *v.* Atchison, etc., R. Co., 37 Fed. 841, 4 L. R. A. 231; Anthony *v.* Louisville, etc., R. Co., 27 Fed. 724; Boyle *v.* Case, 18 Fed. 880, 9 Sawy. 386; Secord *v.* St. Paul, etc., R. Co., 18 Fed. 221, 5 McCrary 515; Beardsley *v.* Swann, 2 Fed. Cas. No. 1,187, 4 McLean 333; Hanson *v.* Fowle, 11 Fed. Cas. No. 6,042, 1 Sawy. 539.

England.— Phillips *v.* South Western R. Co., 4 Q. B. D. 406.

Canada.— Auclair *v.* Bastien, 4 Montreal Super. Ct. 74; Pelletier *v.* Bernier, 3 Quebec 94.

See 15 Cent. Dig. tit. "Damages," § 71; and *infra*, XI, B, 2.

In actions predicated on negligence, damages for pain are given, only for the bodily and physical pain of which the mind is conscious. Chicago *v.* Gilfoil, 99 Ill. App. 88.

8. Montgomery, etc., R. Co. *v.* Mallette, 92 Ala. 209, 9 So. 363. See also Braun *v.* Craven, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199; Indianapolis, etc., R. Co. *v.* Stables, 62 Ill. 313.

9. See *infra*, XI, B, 2.

The jury are not necessarily limited to the suffering which is past where the proof rendered is reasonably certain that future pain and suffering is inevitable. Curtis *v.* Rochester, etc., R. Co., 18 N. Y. 534, 75 Am. Dec. 258; Ransom *v.* New York, etc., R. Co., 15 N. Y. 415.

Where plaintiff sues for personal injuries, a judgment on a verdict allowing him the amount of his necessary medical expenses, but nothing for his injuries, will be reversed. Katz *v.* Brooklyn Heights R. Co., 35 Misc. (N. Y.) 302, 71 N. Y. Suppl. 744.

10. *Alabama.*— South, etc., R. Co. *v.* McLendon, 63 Ala. 266.

Arkansas.— Ward *v.* Blackwood, 48 Ark. 396, 3 S. W. 624.

California.— Malone *v.* Hawley, 46 Cal. 409; Jones *v.* The Cortes, 17 Cal. 487, 79 Am. Dec. 142.

Colorado.— Wall *v.* Cameron, 6 Colo. 275.

Connecticut.— Maisenbacker *v.* Society Concordia, 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213; Lawrence *v.* Housatonic R. Co., 29 Conn. 390; Masters *v.* Warren, 27 Conn. 293.

District of Columbia.— Larmon *v.* District of Columbia, 5 Mackey 330.

Georgia.— City, etc., R. Co. *v.* Finley, 76 Ga. 311; Smith *v.* Overby, 30 Ga. 241; Cooper *v.* Mullins, 30 Ga. 146, 76 Am. Dec. 638.

Illinois.— Chicago City R. Co. *v.* Anderson, 182 Ill. 298, 55 N. E. 366 [*affirming* 80 Ill. App. 71]; West Chicago St. R. Co. *v.* Foster, 175 Ill. 396, 51 N. E. 690 [*affirming* 74 Ill. App. 414]; Chicago City R. Co. *v.* Taylor, 170 Ill. 49, 48 N. E. 831 [*affirming* 68 Ill. App. 613]; Sheridan *v.* Hibbard, 119 Ill. 307, 9 N. E. 901; Hannibal, etc., R. Co. *v.* Martin, 111 Ill. 219; Chicago *v.* Langlass, 66 Ill. 361; Chicago *v.* Jones, 66 Ill. 349; Indianapolis, etc., R. Co. *v.* Stables, 62 Ill. 313; Kellyville Coal Co. *v.* Yehonka, 94 Ill. App. 74; North Chicago St. R. Co. *v.* Lehman, 82 Ill. App. 238; Von Reeden *v.* Evans, 52 Ill. App. 209.

Indiana.— Pittsburg, etc., R. Co. *v.* Montgomery, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301; Indianapolis *v.* Gaston, 58 Ind. 224; Wright *v.* Compton, 53 Ind. 337; Taber *v.* Hutson, 5 Ind. 322, 61 Am. Dec. 96.

Iowa.— Watson *v.* Dilts, 116 Iowa 249, 89 N. W. 1068, 93 Am. St. Rep. 239, 57 L. R. A. 559; Kendall *v.* Albia, 73 Iowa 241, 34 N. W. 833; Stafford *v.* Oskaloosa, 64 Iowa 251, 20 N. W. 174; McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748.

Kansas.— Missouri, etc., R. Co. *v.* Weaver, 16 Kan. 456; Kansas Pac. R. Co. *v.* Pointer, 9 Kan. 620.

Kentucky.— Kentucky Cent. R. Co. *v.* Ackley, 87 Ky. 278, 8 S. W. 691, 10 Ky. L. Rep. 170, 12 Am. St. Rep. 480; Alexander *v.* Humber, 86 Ky. 565, 6 S. W. 453, 9 Ky. L. Rep. 734.

Louisiana.— Dirmeyer *v.* O'Hern, 39 La. Ann. 961, 3 So. 132.

cult to differentiate mental suffering from physical pain, the broad, yet perfectly perceptible or tangible principle has been announced that the injury must be physical, as distinguished from one merely imaginative; it must be something that produces real discomfort or annoyance through the medium of the senses, not from delicacy of taste or refined fancy.[11] In most cases, however, the mental anguish should be connected with the bodily injury and be fairly and reasonably

Maryland.— McMahon *v.* Northern Cent. R. Co., 39 Md. 438; Stockton *v.* Frey, 4 Gill 406, 45 Am. Dec. 138.

Massachusetts.— Smith *v.* Holcomb, 99 Mass. 552.

Michigan.—Goucher *v.* Jamieson, 124 Mich. 21, 82 N. W. 663.

Mississippi.—Memphis, etc., R. Co. *v.* Whitfield, 44 Miss. 466, 7 Am. Rep. 699.

Missouri.— Porter *v.* Hannibal, etc., R. Co., 71 Mo. 66, 36 Am. Rep. 454; West *v.* Forrest, 22 Mo. 344; Rawlings *v.* Wabash, etc., Co., 97 Mo. App. 511, 71 S. W. 535; Stuppy *v.* Hof, 82 Mo. App. 272; Hansberger *v.* Sedalia Electric R., etc., Co., 82 Mo. App. 566.

Nebraska.— Omaha St. R. Co. *v.* Emminger, 57 Nebr. 240, 77 N. W. 675.

New Hampshire.— Clark *v.* Manchester, 64 N. H. 471, 13 Atl. 867; Holyoke *v.* Grand Trunk R. Co., 48 N. H. 541.

New Jersey.— Shay *v.* Camden, etc., R. Co., 66 N. J. L. 334, 49 Atl. 547; Consolidated Traction Co. *v.* Lambertson, 59 N. J. L. 297, 36 Atl. 100 [*affirmed* in 60 N. J. L. 457, 38 Atl. 684].

New York.— Williams *v.* Underhill, 63 N. Y. App. Div. 223, 71 N. Y. Suppl. 291; Webb *v.* Yonkers, etc., R. Co., 51 N. Y. App. Div. 194, 64 N. Y. Suppl. 791; O'Flaherty *v.* Nassau Electric R. Co., 34 N. Y. App. Div. 74, 54 N. Y. Suppl. 96; Jones *v.* Brooklyn Heights R. Co., 23 N. Y. App. Div. 141, 48 N. Y. Suppl. 914, 5 N. Y. Annot. Cas. 124; Matteson *v.* New York Cent. R. Co., 62 Barb. 364; Brignoli *v.* Chicago, etc., R. Co., 4 Daly 182.

North Carolina.— Wallace *v.* Western North Carolina Co., 104 N. C. 442, 10 S. E. 552.

Ohio.— Smith *v.* Pittsburg, etc., R. Co., 23 Ohio St. 10.

Pennsylvania.—Scott Tp. *v.* Montgomery, 95 Pa. St. 444; McLaughlin *v.* Corry, 77 Pa. St. 109, 18 Am. Rep. 432; North German Lloyd Steamship Co. *v.* Wood, 18 Pa. Super. Ct. 488; Rockwell *v.* Eldred, 7 Pa. Super. Ct. 95.

South Carolina.— Mack *v.* South Bound R. Co., 52 S. C. 323, 29 S. E. 905, 68 Am. St. Rep. 913, 40 L. R. A. 679.

Texas.— Texas, etc., R. Co. *v.* Curry, 64 Tex. 85; Houston, etc., R. Co. *v.* Boehn, 57 Tex. 152; San Antonio, etc., R. Co. *v.* Weigers, 22 Tex. Civ. App. 344, 54 S. W. 910; Galveston, etc., R. Co. *v.* Clark, 21 Tex. Civ. App. 167, 51 S. W. 276; Gulf, etc., R. Co. *v.* Holzheuser, (Civ. App. 1898) 45 S. W. 188; Missouri, etc., R. Co. *v.* Warren, (Civ. App. 1897) 39 S. W. 652; Fry *v.* Hillan, (Civ. App. 1896) 37 S. W. 359.

Vermont.— Bovee *v.* Danville, 53 Vt. 183.

Virginia.— Richmond, etc., R. Co. *v.* Normant, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827.

Washington.— Gray *v.* Washington Water Power Co., 30 Wash. 665, 71 Pac. 206.

West Virginia.— Riley *v.* West Virginia Cent., etc., R. Co., 27 W. Va. 145; Vinal *v.* Core, 18 W. Va. 1.

Wisconsin.— Gatzow *v.* Buening, 106 Wis. 1, 81 N. W. 1003, 80 Am. St. Rep. 1, 49 L. R. A. 475; Robinson *v.* Superior Rapid Transit Co., 94 Wis. 345, 68 N. W. 961, 59 Am. St. Rep. 897, 34 L. R. A. 205; Stutz *v.* Chicago, etc., R. Co., 73 Wis. 147, 40 N. W. 653, 9 Am. St. Rep. 769; Wilson *v.* Young, 31 Wis. 574; Goodno *v.* Oshkosh, 28 Wis. 300.

United States.— Denver, etc., R. Co. *v.* Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77; Southern Express Co. *v.* Platten, 93 Fed. 936, 36 C. C. A. 46; Carpenter *v.* Mexican Nat. R. Co., 39 Fed. 315; Boyle *v.* Case, 18 Fed. 880, 9 Sawy. 386; Morse *v.* Duncan, 14 Fed. 396; Hanson *v.* Fowle, 11 Fed. Cas. No. 6,042, 1 Sawy. 539.

England.— Dulieu *v.* White, [1901] 2 K. B. 669, 70 L. J. K. B. 837, 85 L. T. Rep. N. S. 126, 50 Wkly. Rep. 76.

Canada.— Auclair *v.* Bastien, 4 Montreal Super. Ct. 74; Vanasse *v.* Montreal, 16 Rev. Lég. 387.

See 15 Cent. Dig. tit. "Damages," § 109 *et seq.*; and *infra*, XI, B, 2.

"Any mental anguish, which may not have been connected with the bodily injury, but caused by some conception arising from a different source, could not properly have been taken into consideration by the jury." Chicago *v.* McLean, 133 Ill. 148, 153, 24 N. E. 527, 8 L. R. A. 765 [*quoted* in Braun *v.* Craven, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199].

11. Westcott *v.* Middleton, 43 N. J. Eq. 478, 11 Atl. 490 [*following* Cleveland *v.* Citizens' Gaslight Co., 20 N. J. Eq. 201]. In Indianapolis, etc., R. Co. *v.* Stables, 62 Ill. 313, 320 [*quoted* in Braun *v.* Craven, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199], it was said: "We cannot readily understand how there can be pain without mental suffering. It is a mental emotion arising from a physical injury. It is the mind that either feels or takes cognizance of physical pain, and hence there is mental anguish or suffering inseparable from bodily injury, unless the mind is overpowered and consciousness is destroyed. The mental anguish which would not be proper to be considered is where it is not connected with the bodily injury, but was caused by some mental conception not arising from the physical injury." In an action for personal injuries mental suffering not connected with the injury, but caused by some conception arising from a different source,

the natural consequence that flows from it,[12] and damages for prospective mental anguish are not recoverable as being too speculative.[13] So the anguish of mind arising as to the safety of others who may be in personal peril from the same cause cannot be taken into consideration.[14] There is a certain line of cases, however, in which recovery may be had for mental anguish, although there is no damage capable of actual proof. Thus a parent may recover for mental anguish for the loss of the possession of his children, however small the value of their services may have been.[15] So a party may recover for the mental anguish experienced in the removal or mutilation of a dead body or any infringement of his rights connected therewith.[16]

b. Accompanying Fright. As a general rule injuries from fright accompanying a physical injury furnish a basis for the recovery of damages.[17] There seems to be some difference of opinion among the courts as to whether fright unaccompanied by personal injury can be compensated in damages.[18] The better rule on

cannot be considered. Pittsburg, etc., R. Co. *v.* Story, 63 Ill. App. 239.

12. *Arkansas.*— Texarkana, etc., R. Co. *v.* Anderson, 67 Ark. 123, 53 S. W. 673.

Connecticut.— Maisenbacker *v.* Society Concordia, 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213.

Illinois.— Chicago City R. Co. *v.* Anderson, 182 Ill. 298, 55 N. E. 366 [*affirming* 80 Ill. App. 71]; Illinois Cent. R. Co. *v.* Cole, 165 Ill. 334, 46 N. E. 275; North Chicago St. R. Co. *v.* Duebner, 85 Ill. App. 602; North Chicago St. R. Co. *v.* Lehman, 82 Ill. App. 238.

Indiana.— Kalen *v.* Terre Haute, etc., R. Co., 18 Ind. App. 202, 47 N. E. 694, 63 Am. St. Rep. 343.

Iowa.— Watson *v.* Dilts, 116 Iowa 249, 89 N. W. 1068, 93 Am. St. Rep. 239, 57 L. R. A. 559.

New Jersey.— Consolidated Traction Co. *v.* Lambertson, 59 N. J. L. 297, 36 Atl. 100 [*affirmed* in 60 N. J. L. 457, 38 Atl. 684].

Pennsylvania.— North German Lloyd Steamship Co. *v.* Wood, 18 Pa. Super. Ct. 488.

Texas.— Gulf, etc., R. Co. *v.* Trott, 86 Tex. 412, 25 S. W. 419, 40 Am. St. Rep. 816; Texas Mexican R. Co. *v.* Douglass, 69 Tex. 694, 7 S. W. 77; Chicago, etc., R. Co. *v.* Hitt, (Civ. App. 1895) 31 S. W. 1084.

Vermont.— Bovee *v.* Danville, 53 Vt. 183.

United States.— Southern Express Co. *v.* Platten, 93 Fed. 936, 36 C. C. A. 46; Morse *v.* Duncan, 14 Fed. 396.

See 15 Cent. Dig. tit. "Damages," § 100 *et seq.*

13. Illinois Cent. R. Co. *v.* Cole, 165 Ill. 334, 46 N. E. 275; Hall *v.* Cedar Rapids, etc., Co., 115 Iowa 18, 87 N. W. 739. So it was held in Texas Mexican R. Co. *v.* Douglass, 69 Tex. 694, 7 S. W. 77, that there could be no recovery for mental anguish arising from a fear as to the future welfare of the plaintiff's family, as such apprehension was not a natural result of the injury. See also Planters' Oil Co. *v.* Mansell, (Tex. Civ. App. 1897) 43 S. W. 913.

14. Wyman *v.* Leavitt, 71 Me. 227, 36 Am. Rep. 303; Keyes *v.* Minneapolis, etc., Co., 36 Minn. 290, 30 N. W. 888.

15. Phillips *v.* Hoyle, 4 Gray (Mass.) 568; Stowe *v.* Heywood, 7 Allen (Mass.) 118; Magee *v.* Holland, 27 N. J. L. 86, 72 Am. Dec. 341.

16. Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26; Meagher *v.* Driscoll, 99 Mass. 281, 96 Am. Dec. 759.

One entitled to damages for being deprived of lateral support for his land, designed for a burial-place, is not entitled to have the injury to his feelings considered when defendant intended no injury thereto, although grossly careless. White *v.* Dresser, 135 Mass. 150, 46 Am. Rep. 454.

17. *Alabama.*— Louisville, etc., R. Co. *v.* Whitman, 79 Ala. 325.

Connecticut.— Masters *v.* Warren, 27 Conn. 293; Seger *v.* Barkhamsted, 22 Conn. 290.

Indiana.— Pittsburgh, etc., R. Co. *v.* Sponier, 85 Ind. 165.

Iowa.— Watson *v.* Dilts, 116 Iowa 249, 89 N. W. 1068, 57 L. R. A. 559.

New Jersey.— Consolidated Traction Co. *v.* Lambertson, 59 N. J. L. 297, 36 Atl. 100.

New York.— O'Flaherty *v.* Nassau Electric R. Co., 34 N. Y. App. Div. 74, 54 N. Y. Suppl. 96; Jones *v.* Brooklyn Heights R. Co., 23 N. Y. App. Div. 141, 48 N. Y. Suppl. 914, 5 N. Y. Annot. Cas. 124.

Pennsylvania.— Ewing *v.* Pittsburg, etc., R. Co., 147 Pa. St. 40, 23 Atl. 340, 30 Am. St. Rep. 709, 14 L. R. A. 666.

South Carolina.— Mack *v.* South Bound R. Co., 52 S. C. 323, 29 S. E. 905, 68 Am. St. Rep. 913, 40 L. R. A. 679.

Vermont.— Godeau *v.* Blood, 52 Vt. 251, 36 Am. Rep. 751.

Wisconsin.— Stutz *v.* Chicago, etc., R. Co., 73 Wis. 147, 40 N. W. 653, 9 Am. St. Rep. 769.

United States.— Denver, etc., R. Co. *v.* Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77.

See 15 Cent. Dig. tit. "Damages," § 100 *et seq.*

18. *Arkansas.*—Peay *v.* Western Union Tel. Co., 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 463.

Illinois.— Lake Erie, etc., R. Co. *v.* Christison, 39 Ill. App. 495.

Maine.— Wyman *v.* Leavitt, 71 Me. 227, 36 Am. Rep. 303.

New Jersey.— Shay *v.* Camden, etc., R. Co.,

the subject would seem to be that in order to warrant a recovery for such cause it must be connected with or flow from some personal injury.[19] It has also been a much mooted question whether a recovery can be had for fright and mental suffering which results in physical injuries, brought about solely by such mental distress. The better rule on this subject seems to be that no such recovery can be had,[20] unless the fright is the proximate result of a legal wrong against the

66 N. J. L. 334, 49 Atl. 547; Consolidated Traction Co. *v.* Lambertson, 59 N. J. L. 297, 36 Atl. 100 [*affirmed* in 60 N. J. L. 457, 38 Atl. 684].

North Carolina.— Watkins *v.* Kaolin Mfg. Co., 131 N. C. 536, 42 S. E. 983.

Texas.— Yoakum *v.* Kroeger, (Civ. App. 1894) 27 S. W. 953; Southern Pac. Co. *v.* Ammons, (Civ. App. 1894) 26 S. W. 135; Ft. Worth, etc., Co. *v.* Smith, (Civ. App. 1894) 25 S. W. 1032.

Wiseonsin.— Gatzow *v.* Buening, 106 Wis. 1, 81 N. W. 1003, 80 Am. St. Rep. 1, 49 L. R. A. 475; Summerfield *v.* Western Union Tel. Co., 87 Wis. 1, 57 N. W. 973, 41 Am. St. Rep. 17.

United States.— Chase *v.* Western Union Tel. Co., 44 Fed. 554, 10 L. R. A. 464.

England.— Dulieu *v.* White, [1901] 2 K. B. 669, 70 L. J. K. B. 837, 85 L. T. Rep. N. S. 126, 50 Wkly. Rep. 76.

See 15 Cent. Dig. tit. "Damages," § 100 *et seq.*

Damages in a case of negligent collision must be the natural and reasonable result of the defendant's act; damages for a nervous shock or mental injury caused by fright at an impending collision are too remote. Victorian R. Com'rs *v.* Coultas, 13 App. Cas. 222, 52 J. P. 500 57 L. J. P. C. 69, 58 L. T. Rep. N. S. 390, 37 Wkly. Rep. 129 [*approving* The Notting Hill, 9 P. D. 105, 5 Aspin. 241, 53 L. J. P. 56, 51 L. T. Rep. N. S. 66, 32 Wkly. Rep. 764].

Where defendant, after an altercation with plaintiff's father, threw a stone through the blinds of one of the windows of his house and greatly frightened plaintiff, although she was not struck or touched, but without intent to injure her, he was not liable for damages caused by her fright. White *v.* Sander, 168 Mass. 296, 47 N. E. 90.

19. *Illinois.*— Braun *v.* Craven, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199; Chicago *v.* McLean, 133 Ill. 148, 24 N. E. 527, 8 L. R. A. 765; Indianapolis, etc., Co. *v.* Stables, 62 Ill. 313; West Chicago St. R. Co. *v.* Liebig, 79 Ill. App. 567.

Kansas.— Atchison, etc., R. Co. *v.* McGinnis, 46 Kan. 109, 26 Pac. 453.

Maine.— Wyman *v.* Leavitt, 71 Me. 227, 36 Am. Rep. 303.

Massachusetts.—Smith *v.* Postal Tel. Cable Co., 174 Mass. 576, 55 N. E. 380, 75 Am. St. Rep. 374, 47 L. R. A. 323; White *v.* Sander, 168 Mass. 296, 47 N. E. 90; Canning *v.* Williamston, 1 Cush. 451.

Michigan.— Nelson *v.* Crawford, 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577.

Minnesota.— Sanderson *v.* Northern Pac. R. Co., 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403; Keyes *v.* Minneapolis, etc., R. Co., 36 Minn. 290, 30 N. W. 888.

Missouri.— Deming *v.* Chicago, etc., R. Co., 80 Mo. App. 152; Strange *v.* Missouri Pac. R. Co., 61 Mo. App. 586.

New Jersey.— Consolidated Traction Co. *v.* Lambertson, 59 N. J. L. 297, 36 Atl. 100 [*affirmed* in 60 N. J. L. 457, 38 Atl. 684].

New York.— Mitchell *v.* Rochester, etc., R. Co., 151 N. Y. 107, 45 N. E. 354, 56 Am. St. Rep. 604, 34 L. R. A. 781.

Ohio.— Ohliger *v.* Toledo Traction Co., 23 Ohio Cir. Ct. 265; Huffman *v.* Toledo, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 748, 7 Ohio N. P. 67; Cleveland City R. Co. *v.* Ebert, 10 Ohio Cir. Dec. 291.

Texas.— Gulf, etc., R. Co. *v.* Trott, 86 Tex. 412, 25 S. W. 419, 40 Am. St. Rep. 866; Southern Pac. R. Co. *v.* Ammons, (Civ. App. 1894) 26 S. W. 135.

Wisconsin.— Stutz *v.* Chicago, etc., R. Co., 73 Wis. 147, 40 N. W. 653, 9 Am. St. Rep. 769.

United States.— Southern Express Co. *v.* Platten, 93 Fed. 936, 36 C. C. A. 46.

England.— Dulieu *v.* White, [1901] 2 K. B. 669, 70 L. J. K. B. 837, 85 L. T. Rep. N. S. 126, 50 Wkly. Rep. 76.

Canada.— Roch *v.* Denis, 16 Rev. Lég. 569 [*affirming* 4 Montreal Super. Ct. 134.

20. *Illinois.*— Braun *v.* Craven, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199; Phillips *v.* Dickerson, 85 Ill. 11, 28 Am. Rep. 607.

Massachusetts.—Smith *v.* Postal Tel. Cable Co., 174 Mass. 576, 55 N. E. 380, 75 Am. St. Rep. 374, 47 L. R. A. 323; Spade *v.* Lynn, etc., R. Co., 168 Mass. 285, 47 N. E. 88, 60 Am. St. Rep. 393, 38 L. R. A. 512.

Minnesota.— Sanderson *v.* Northern Pac. R. Co., 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403; Renner *v.* Canfield, 36 Minn. 90, 30 N. W. 435, 1 Am. St. Rep. 654.

Missouri.— Trigg *v.* St. Louis, etc., R. Co., 74 Mo. 147, 41 Am. Rep. 305; Deming *v.* Chicago, etc., R. Co., 80 Mo. App. 152.

New York.— Mitchell *v.* Rochester R. Co., 151 N. Y. 107, 45 N. E. 354, 56 Am. St. Rep. 604, 34 L. R. A. 781; Lehman *v.* Brooklyn City R. Co., 47 Hun 355.

Pennsylvania.— Ewing *v.* Pittsburg, etc., R. Co., 147 Pa. St. 40, 23 Atl. 340, 30 Am. St. Rep. 709, 14 L. R. A. 666.

See 15 Cent. Dig. tit. "Damages," § 100 *et seq.*

Additional recovery.— In Washington, etc., R. Co. *v.* Dashiell, 7 App. Cas. (D. C.) 507, it was held that the plaintiff could not recover for an impairment of the nervous system resulting from a nervous shock at the time of a collision in addition to damages for physical pain and suffering.

plaintiff by the defendant.[21] In other words in order to warrant a recovery the physical injury must be either contemporaneous with the occasioned fright, or the fright and mental anguish occasioning the injury must have been inflicted in a spirit of wanton disregard or negligence.[22]

c. Resulting From Disfigurement of Person. In considering the question whether a party can recover compensation in damages for mental suffering and distress of mind caused by a disfigurement of his person the courts have not entirely agreed.[23] The rule on this subject would seem to be that the plaintiff is entitled to compensation for mental anguish connected with the disfigurement itself,[24] but the mental anguish that results from the contemplation of a maimed body and the humiliation of going through life in a crippled condition is considered a sentimental state of mind too remote from the original injury to constitute an element of damages.[25]

d. Humiliation or Insult. In case of humiliation or insult, the right of recovery for mental anguish depends somewhat upon the circumstances under which the damages are claimed; but a recovery on such ground will usually be

Miscarriage resulting.— In Nelson *v.* Crawford, 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577, defendant, dressed in woman's clothes, went to the residence of plaintiff, whom he frightened by following her into her house, and striking the floor with his parasol; the fright, as alleged, having the effect of producing a miscarriage on plaintiff. There was no attempt to do bodily injury, and it did not appear that defendant intended any wrong, or contemplated the alleged consequences of his acts. It was held that directing a verdict for defendant, on the ground that the evidence showed no assault, and that fright, unaccompanied by physical injury, is not a basis for damages, is proper. See also Mitchell *v.* Rochester, etc., R. Co., 151 N. Y. 107, 45 N. E. 354, 56 Am. St. Rep. 604, 34 L. R. A. 781.

21. Sanderson *v.* Northern Pac. R. Co., 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403; Purcell *v.* St. Paul City R. Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; Hill *v.* Kimball, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618; Houston, etc., R. Co. *v.* McKenzie, (Tex. Civ. App. 1897) 41 S. W. 831; Bell *v.* Great Northern R. Co., L. R. 26 Ir. 428. See also Gulf, etc., R. Co. *v.* Hayter, (Tex. Civ. App. 1899) 55 S. W. 128.

22. Slingerland *v.* East Jersey Water Co., 58 N. J. L. 411, 33 Atl. 843; Yoakum *v.* Kroeger, (Tex. Civ. App. 1894) 27 S. W. 953; Wilkinson *v.* Downton, 2 Q. B. 57. See also Spade *v.* Lynn, etc., R. Co., 168 Mass. 285, 47 N. E. 88, 60 Am. St. Rep. 393, 38 L. R. A. 512; Nelson *v.* Crawford, 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577.

23. Some of them have attempted the distinction that the disfigurement itself is an element of damage; but annoyance to the plaintiff caused by a contemplation of the disfigurement is too remote to be considered as an element of damage resulting from the personal injury. Giffen *v.* Lewiston, 6 Ida. 231, 55 Pac. 545.

24. *Alabama.*—Alabama Great Southern R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65 [*citing* Birmingham *v.* Lewis, 92 Ala. 352, 9 So. 243].

Arkansas.— St. Louis Southwestern R. Co. *v.* Dobbins, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147.

Georgia.— Central R., etc., Co. *v.* Lanier, 83 Ga. 587, 10 S. E. 279; Western, etc., R. Co. *v.* Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320.

Iowa.— Cameron *v.* Bryan, 89 Iowa 214, 56 N. W. 434.

Michigan.— Sherwood *v.* Chicago, etc., R. Co., 81 Mich. 374, 46 N. W. 773; Power *v.* Harlow, 57 Mich. 107, 23 N. W. 606.

Texas.— Galveston, etc., R. Co. *v.* Clark, 21 Tex. Civ. App. 167, 51 S. W. 276.

Washington.— Gray *v.* Washington Water Power Co., 30 Wash. 665, 71 Pac. 206.

Wisconsin.— Nichols *v.* Brabazon, 94 Wis. 549, 69 N. W. 342; Heddles *v.* Chicago, etc., R. Co., 77 Wis. 228, 46 N. W. 115, 20 Am. St. Rep. 160.

See 15 Cent. Dig. tit. "Damages," § 100 *et seq.*; and *infra*, XI, B, 6, b.

25. Giffen *v.* Lewiston, 6 Ida. 231, 55 Pac. 545; Decatur *v.* Hamilton, 89 Ill. App. 561; West Chicago, etc., R. Co. *v.* James, 69 Ill. App. 609; Chicago, etc., R. Co. *v.* Spurney, 69 Ill. App. 549; Chicago, etc., R. Co. *v.* Caulfield, 63 Fed. 396, 11 C. C. A. 552 [*citing* Bovee *v.* Danville, 53 Vt. 190]. See also Chicago, etc., R. Co. *v.* Hines, 45 Ill. App 299.

The mental pain which comes from the contemplation of a maimed body and the humiliation of going through life in a crippled condition is too remote to be considered an element of damage. The mental pain that may be considered and allowed for in this class of cases is such as is the direct result or concomitant of the physical pain suffered. Mental pain is always an attendant upon severe physical pain — such is the relation of mind and body — and the mental pain that is the direct and necessary result of the physical pain, but not otherwise, is a proper element of damages in personal injury cases. Chicago City R. Co. *v.* Anderson, 80 Ill. App. 71.

allowed,[26] unless the claim is too remotely connected with the injury complained of.[27]

e. In Case of Wilful Torts. While the general rule obtains that a recovery for mental anguish must generally be connected with the personal physical injury, it is also true that where the injury is accompanied by circumstances of malice, insult, or wilfulness, a recovery may be had therefor.[28]

26. *Alabama.*— Louisville, etc., R. Co. *v.* Whitman, 79 Ala. 325.

Connecticut.— Gibney *v.* Lewis, 68 Conn. 392, 36 Atl. 799.

Illinois.— Pennsylvania R. Co. *v.* Connell, 112 Ill. 295, 54 Am. Rep. 238; Chicago, etc., R. Co. *v.* Flagg, 43 Ill. 364, 92 Am. Dec. 133.

Indiana.— Simons *v.* Busby, 119 Ind. 13, 21 N. E. 451; Wolff *v.* Trinkle, 103 Ind. 355, 3 N. E. 110.

Iowa.— Shepard *v.* Chicago, etc., R. Co., 77 Iowa 54, 41 N. W. 564.

Kansas.— Southern Kansas R. Co. *v.* Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766.

Massachusetts.—Hatch *v.* Fuller, 131 Mass. 574.

Michigan.— De May *v.* Roberts, 46 Mich. 160, 9 N. W. 146, 41 Am. Rep. 154; Fay *v.* Swann, 44 Mich. 544, 7 N. W. 215.

Minnesota.— Russell *v.* Chambers, 31 Minn. 54, 16 N. W. 458.

Missouri.—Melcher *v.* Scruggs, 72 Mo. 406; State *v.* Weinel, 13 Mo. App. 583.

New Hampshire.— Lunt *v.* Philbrick, 59 N. H. 59.

New York.— Ford *v.* Jones, 62 Barb. 484.

Oregon.— Breon *v.* Henkle, 14 Oreg. 494, 13 Pac. 289.

Pennsylvania.— Sechrist *v.* Jahn, 11 Pa. Super. Ct. 59.

West Virginia.— Riddle *v.* McGinnis, 22 W. Va. 253.

Wisconsin.— Giese *v.* Schultz, 53 Wis. 462, 10 N. W. 598; Craker *v.* Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504.

United States.— Campbell *v.* Pullman Palace-Car Co., 42 Fed. 484; Barbour *v.* Stephenson, 32 Fed. 66; Boyle *v.* Case, 18 Fed. 880, 9 Sawy. 386; Quigley *v.* Central Pac. R. Co., 20 Fed. Cas. No. 11,510, 5 Sawy. 107.

See 15 Cent. Dig. tit. "Damages," § 100 *et seq.*

In an action by a husband for alienation of the affections of his wife, even where no precise amount of specific damages is proved, the court is justified in awarding substantial damages for the disgrace and humiliation brought upon the plaintiff, and for the deprivation of his wife's society. Hart *v.* Shorey, 12 Quebec Super. Ct. 84.

"Wounding a man's feelings is as much actual damage as breaking his limbs. The difference is, that one is internal and the other external, one mental, the other physical; in either case the damage is not measurable with exactness. There can be a closer approximation in estimating the damage to a limb than to the feelings, but at the last the amount is indefinite. The jury would have a much wider discretion in dealing with feelings than with an external injury. At common law, compensatory damages include, upon principle, and I think upon authority, salve for wounded feelings, and our code has no purpose to deny such damages where the common law allowed them." Head *v.* Georgia Pac. R. Co., 79 Ga. 358, 360, 7 S. E. 217, 11 Am. St. Rep. 434.

27. Gatzow *v.* Buening, 106 Wis. 1, 81 N. W. 1003, 80 Am. St. Rep. 1, 49 L. R. A. 475.

Where plaintiff's check was dishonored by a bank in which she had money on deposit, and was protested and returned to her, the fact that she had a nervous chill when the check was returned is not to be considered in estimating the damage in an action against the bank for the wrongful refusal to honor the check, as the chill was not such a thing as should reasonably have been anticipated from persons of ordinary health and strength. American Nat. Bank *v.* Morey, 69 S. W. 759, 24 Ky. L. Rep. 658, 58 L. R. A. 956.

Worthless stocks.— Plaintiff, before purchasing stock in a mining company, applied to the president and inquired as to the title of the mine and its indebtedness, and on the representations that the title was good and that there was no debt purchased a portion of the stock. It was held that in a suit against the president for damages, on such statements proving false and a loss ensuing, plaintiff could not recover for damages to his feelings, and for his disgrace in the community for having been concerned in the buying of stock of a kind which proved worthless. Cable *v.* Bowlus, 21 Ohio Cir. Ct. 53, 11 Ohio Cir. Dec. 526.

28. Schmitz *v.* St. Louis, etc., R. Co., 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; Trigg *v.* St. Louis, etc., R. Co., 74 Mo. 147, 41 Am. Rep. 305; Rawlings *v.* Wabash R. Co., 97 Mo. App. 511, 71 S. W. 535; Williams *v.* Underhill, 63 N. Y. App. Div. 223, 71 N. Y. Suppl. 291. See also *infra*, IX, E, 1.

In an action of damages for assault and battery, where the act was wantonly done, the plaintiff may recover for the mental anxiety, public degradation, and wounded sensibility which an honorable man would feel, and which he suffered under such a violation of the sacredness of his person. Wadsworth *v.* Treat, 43 Me. 163.

"The case of libel and slander, seduction, and the like," says Shaw, C. J., "are analogous in this; that in general they do not involve a loss of money, time or business, capable of being measured and estimated, but are founded on damages done to one's feelings, reputation, social position, hope of advancement and the like. These are damages not measurable by any standard, but capable, in many instances, of producing the greatest suffering, yet, in other, cause little or no

f. In Case of Breach of Contract. Mental anguish and distress disconnected with physical injury cannot as a general rule be made the basis for a recovery of damages for a breach of contract.[29] An exception to this rule is found, however, in breaches of contract of marriage,[30] and in some exceptional cases of contract where the breach alleged amounts practically to a wilful tort.[31]

g. Failure to Deliver Telegram. As a general rule no damages can be recovered for mental anguish unaccompanied with other injury caused by neglect or failure of a telegraph company to send or deliver a message,[32] although in some states it has been provided by statute or declared the law that recovery can be had in such cases, and it would seem that the object of such statutes is to fix the measure of damages, and also the mode of procedure for their recovery.[33]

h. Injuries to Property. In the absence of personal injury or aggravating circumstances, a party is not entitled to recover damages for mental anguish in connection with injury done to his property;[34] but where the acts complained of

actual injury." Stowe *v.* Heywood, 7 Allen (Mass.) 118, 123; Treanor *v.* Donahoe, 9 Cush. (Mass.) 228.

Illinois statute.— In an action for damages by a coal-miner, under a statute providing for the health and safety of persons employed in coal-mines, compensation for his suffering in mind and body, resulting from injuries in consequence of the failure of the owner or proprietor to furnish timber for props, is a proper element of damages, where the failure is wilful. Kellyville Coal Co. *v.* Yehnka, 94 Ill. App. 74.

29. Russell *v.* Western Union Tel. Co., 3 Dak. 315, 19 N. W. 408; Connell *v.* Western Union Tel. Co., 116 Mo. 34, 22 S. W. 345, 38 Am. St. Rep. 575, 20 L. R. A. 172; Trigg *v.* St. Louis, etc., R. Co., 74 Mo. 147, 41 Am. Rep. 305; McBride *v.* Sunset Telephone Co., 96 Fed. 81; Wilcox *v.* Richmond, etc., R. Co., 52 Fed. 264, 3 C. C. A. 73, 17 L. R. A. 804; Hamlin *v.* Great Northern, etc., R. Co., 1 H. & N. 408, 2 Jur. N. S. 1122, 26 L. J. Exch. 20, 5 Wkly. Rep. 76. See also *infra*, XI, D, 1.

In an action for breach of a contract allowing him to erect and maintain a sawmill and cut timber on land, one may recover special damages for injuries to feelings because of violence in driving off his son and employees. Enders *v.* Skannal, 35 La. Ann. 1000.

30. See BREACH OF PROMISE TO MARRY, 5 Cyc. 1019.

31. Damages for mental suffering of a mother, caused by breach of contract of an express company to ship the corpse of her child, cannot be recovered, the contract having been made in the name of her husband, and her existence not having been disclosed to the company. Wells, etc., Express *v.* Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412.

In an action by a wife for the unlawful mutilation and dissection of her husband's corpse recovery may be had for injury to the feelings and mental suffering resulting directly and proximately from the wrongful act, although no actual pecuniary damage is alleged or proven. Larson *v.* Chase, 47 Minn. 307, 50 N. W. 238, 28 Am. St. Rep. 370, 14 L. R. A. 85.

Undertakers who contract with parents to keep safely the body of their deceased child until they should be ready to inter the same are liable, on breach of such contract, to damages for mental anguish caused thereby. Renihan *v.* Wright, 125 Ind. 536, 25 N. E. 822, 21 Am. St. Rep. 249, 9 L. R. A. 514.

32. *Alabama.*— Blount *v.* Western Union Tel. Co., 126 Ala. 105, 27 So. 779.

Arkansas.— Peay *v.* Western Union Tel. Co., 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 463.

Dakota.— See Russell *v.* Western Union Tel. Co., 3 Dak. 315, 19 N. W. 408.

Kansas.— West *v.* Western Union Tel. Co., 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530.

Missouri.— Connell *v.* Western Union Tel. Co., 116 Mo. 34, 22 S. W. 345, 38 Am. St. Rep. 575, 20 L. R. A. 172.

Ohio.— Kester *v.* Western Union Tel. Co., 8 Ohio Cir. Ct. 236.

Wisconsin.—Summerfield *v.* Western Union Tel. Co., 87 Wis. 1, 57 N. W. 973, 41 Am. St. Rep. 17.

United States.— Chase *v.* Western Union Tel. Co., 44 Fed. 554, 10 L. R. A. 464.

And see, generally, TELEGRAPHS AND TELEPHONES.

33. Russell *v.* Western Union Tel. Co., 3 Dak. 315, 19 N. W. 408; Western Union Tel. Co. *v.* Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728. See So Relle *v.* Western Union Tel. Co., 55 Tex. 308, 40 Am. Rep. 805 [*cited* in Connell *v.* Western Union Tel. Co., 116 Mo. 34, 22 S. W. 345, 38 Am. St. Rep. 575, 20 L. R. A. 172].

34. Wolf *v.* Stewart, 48 La. Ann. 1431, 20 So. 908. See also *infra*, XI, C.

In an action for damages to growing crops by destruction of a fence, where there was no evidence that the fence had been wantonly destroyed, or that defendant had been guilty of outrage or oppression, damages for mental suffering were not recoverable. Missouri Pac. R. Co. *v.* Cox, 2 Tex. App. Civ. Cas. § 288.

In an action for injury to real estate by blasting, the plaintiff's mental anxiety in relation to his own personal safety and that of his family is not, in the absence of personal injury, an element of damage. Wyman *v.* Leavitt, 71 Me. 227, 36 Am. Rep. 303. See also Fox *v.* Borkey, 126 Pa. St. 164, 17 Atl. 604.

are wilful and wanton and the element of malice is apparent, the courts have been inclined to allow damages for injured feelings.[35]

i. Breach of Contract of Carriage. In an action against a carrier for breach of contract, damages for mental anguish or anxiety on the part of a passenger caused by delay or negligence not resulting in personal injury cannot usually be recovered,[36] such damages being considered too remote and not the natural and probable consequences of the injury.[37] It is only where conditions have been made known that may result in mental anguish that there can be a recovery.[38]

E. Loss of Time. In estimating damages the plaintiff is entitled to recover for the reasonable amount of time that may have been lost by him in consequence of the injury complained of.[39] This question when connected with actions for

35. *California.*— Razzo *v.* Varni, 81 Cal. 289, 22 Pac. 848.

Indiana.— Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476.

Massachusetts.— Meagher *v.* Driscoll, 99 Mass. 281, 96 Am. Dec. 759.

New Hampshire.— Kimball *v.* Holmes, 60 N. H. 163.

Texas.— Yoakum *v.* Kroeger, (Civ. App. 1894) 27 S. W. 953.

36. *Arkansas.*— St. Louis, etc., R. Co. *v.* Bragg, 69 Ark. 402, 64 S. W. 226, 86 Am. St. Rep. 206; Hot Springs R. Co. *v.* Deloney, 65 Ark. 177, 45 S. W. 351, 67 Am. St. Rep. 913.

Illinois.— Illinois Cent. R. Co. *v.* Siddons, 53 Ill. App. 607.

Missouri.— Trigg *v.* St. Louis, etc., R. Co., 74 Mo. 147, 41 Am. Rep. 305; Strange *v.* Missouri Pac. R. Co., 61 Mo. App. 586.

South Carolina.—Martin *v.* Columbia, etc., R. Co., 32 S. C. 592, 10 S. E. 960.

Texas.— Jones *v.* Texas, etc., R. Co., 23 Tex. Civ. App. 65, 55 S. W. 371; Texas, etc., R. Co. *v.* Armstrong, (Civ. App. 1897) 41 S. W. 833. *Compare* Texas, etc., R. Co. *v.* Armstrong, 93 Tex. 31, 51 S. W. 835.

Washington.— Turner *v.* Great Northern R. Co., 15 Wash. 213, 46 Pac. 243, 55 Am. St. Rep. 883.

England.—Hamlin *v.* Great Northern, etc., R. Co., 1 H. & N. 408, 2 Jur. N. S. 1122, 26 L. J. Exch. 20, 5 Wkly. Rep. 76.

See 15 Cent. Dig. tit. "Damages," § 100; and, generally, CARRIERS, 6 Cyc. 589.

In an action against a railroad company for breach of contract for special train damages cannot be recovered merely for disappointment and mental suffering resulting from delay in departing to reach the bedside of a sick parent. Wilcox *v.* Richmond, etc., R. Co., 52 Fed. 264, 3 C. C. A. 73, 17 L. R. A. 804.

37. Where plaintiff was delayed eight or ten hours in his journey which he was making to see a sick brother, it was held that mental suffering caused by delay in seeing his brother was too remote to be considered as an element of damage. Hot Springs R. Co. *v.* Deloney, 65 Ark. 177, 45 S. W. 351, 67 Am. St. Rep. 913. In St. Louis, etc., R. Co. *v.* Bragg, 69 Ark. 402, 64 S. W. 226, 86 Am. St. Rep. 206, the plaintiff and two small children were compelled on a dark night to alight from defendant's train away from the station, so that a cattle-guard was between them and the depot, and the brakeman informed plaintiff that she would have to cross the cattle-guard. A friend of plaintiff saw her alight, and when the train passed assisted her across the cattle-guard, and accompanied her to her father's house. Plaintiff was acquainted in the village and knew the location of the depot. It was held that nervous prostration, alleged to have been caused by reason of the fright which plaintiff sustained on discovering that she had to cross the cattle-guard, was not the natural and probable consequence of defendant's negligence.

38. Jones *v.* Texas, etc., R. Co., 23 Tex. Civ. App. 65, 55 S. W. 371 [*citing* Pullman Palace Car Co. *v.* McDonald, 2 Tex. Civ. App. 322, 21 S. W. 945].

39. *Alabama.*— South, etc., R. Co. *v.* McLendon, 63 Ala. 266.

District of Columbia.— Larmon *v.* District of Columbia, 5 Mackey 330.

Illinois.— Chicago, etc., R. Co. *v.* Payzant, 87 Ill. 125; Peoria Bridge Assoc. *v.* Loomis, 20 Ill. 235, 71 Am. Dec. 263.

Indiana.— Indianapolis *v.* Gaston, 58 Ind. 224; Nappanee *v.* Ruckman, 7 Ind. App. 361, 34 N. E. 609.

Iowa.— Stanley *v.* Cedar Rapids, etc., R. Co., 119 Iowa 526, 93 N. W. 489; Lund *v.* Tyler, 115 Iowa 236, 88 N. W. 333; Stafford *v.* Oskaloosa, 64 Iowa 251, 20 N. W. 174.

Kansas.— Missouri, etc., R. Co. *v.* Weaver, 16 Kan. 456; Atchison *v.* King, 9 Kan. 550. And see Kansas Pac. R. Co. *v.* Pointer, 9 Kan. 620.

Kentucky.—Kentucky Cent. R. Co. *v.* Ackley, 87 Ky. 278, 8 S. W. 691, 10 Ky. L. Rep. 170, 12 Am. St. Rep. 480; N——, etc., Co. *v.* Walker, 14 Ky. L. Rep. 175; Louisville, etc., R. Co. *v.* Wade, 11 Ky. L. Rep. 904.

Louisiana.— Rutherford *v.* Shreveport, etc., R. Co., 41 La. Ann. 793, 6 So. 644.

Massachusetts.— Jordan *v.* Middlesex, etc., Co., 138 Mass. 425.

Michigan.— Kinney *v.* Folkerts, 84 Mich. 616, 48 N. W. 283; Hamilton *v.* Smith, 39 Mich. 222.

Mississippi.—Memphis, etc., R. Co. *v.* Whitfield, 44 Miss. 466, 7 Am. Rep. 699.

Missouri.— Stephens *v.* Hannibal, etc., R. Co., 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336; Russell *v.* Columbia, 74 Mo. 480, 41 Am. Rep. 325; Paquin *v.* St. Louis, etc., R. Co., 90 Mo. App. 118.

personal injuries is more specifically treated under the section on impairment of earning capacity;[40] but in all actions where a loss of time has resulted as a direct consequence of the injury inflicted, upon proper evidence thereof the plaintiff is entitled to recover damages therefor.[41] In all cases, however, in order to recover for loss of time the plaintiff must show proof of business, its extent, and the particular part transacted by himself.[42] While there seems to be no distinction between loss of earnings and loss of time in respect to the necessity of making proof as to the time lost, yet in an action for personal injuries it will be held error to award the plaintiff damages for loss of time unless some evidence of the value of the time is introduced.[43]

F. Impairment of Earning Capacity. Under the general rule that the party injuring another by a wrongful act is liable for all the direct injury consequent thereto, although it may not have been contemplated as the probable result, the loss or diminution of capacity to follow one's usual business or employment is a proper subject for compensation.[44] In those cases where the plaintiff

Nebraska.— Sioux City, etc., R. Co. *v.* Smith, 22 Nebr. 775, 36 N. W. 285.

New Hampshire.—Holyoke *v.* Grand Trunk R. Co., 48 N. H. 541.

New York.— Wynne *v.* Atlantic Ave. R. Co., 156 N. Y. 702, 51 N. E. 1094 [*affirming* 14 Misc. 394, 35 N. Y. Suppl. 1034]; Drinkwater *v.* Dinsmore, 16 Hun 250.

North Carolina.— Wallace *v.* Western, etc., Co., 104 N. C. 442, 10 S. E. 552.

Ohio.— Bailly *v.* Cincinnati, 1 Handy 438, 12 Ohio Dec. (Reprint) 225; Walker *v.* Springfield, 3 Ohio Dec. (Reprint) 567.

Oregon.— Oliver *v.* North Pac. Transp. Co., 3 Oreg. 84.

Pennsylvania.— Lake Shore, etc., Co. *v.* Frantz, 127 Pa. St. 297, 18 Atl. 22, 4 L. R. A. 389; Pennsylvania, etc., Canal Co *v.* Graham, 63 Pa. St. 290, 3 Am. Rep. 549; Dunn *v.* Pennsylvania R. Co., 20 Phila. 258.

Texas.— Houston, etc., R. Co. *v.* Harnett, (Civ. App. 1898) 48 S. W. 773; San Antonio, etc., R. Co. *v.* Keller, 11 Tex. Civ. App. 569, 32 S. W. 847; Galveston, etc., R. Co. *v.* Waldo, (Civ. App. 1895) 32 S. W. 783.

Vermont.— Nones *v.* Northouse, 46 Vt. 587.

Virginia.— Richmond, etc., R. Co. *v.* Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827.

West Virginia.— Riley *v.* West Virginia Cent., etc., R. Co., 27 W. Va. 145; Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

Wisconsin.— Ripon *v.* Bittel, 30 Wis. 614.

United States.— Davidson *v.* Southern Pac. Co., 44 Fed. 476; Carpenter *v.* Mexican Nat. R. Co., 39 Fed. 315; Blunk *v.* Atchison, etc., R. Co., 38 Fed. 311; Whelan *v.* New York, etc., R. Co., 38 Fed. 15; Anthony *v.* Louisville, etc., R. Co., 27 Fed. 724; Van de Venter *v.* Chicago City R. Co., 26 Fed. 32; Sunney *v.* Holt, 15 Fed. 880; Fuller *v.* Citizens' Nat. Bank, 15 Fed. 875; Beardsley *v.* Swann, 2 Fed. Cas. No. 1,187, 4 McLean 333; Goble *v.* Delaware, etc., R. Co., 10 Fed. Cas. No. 5,488*a*.

England.— Phillips *v.* South Western R. Co., 4 Q. B. D. 406.

See also *infra*, XI, B, 3.

Not double recovery.—Allowing damages for loss of time, while wholly incapacitated from an injury, and after that for diminished capacity for labor, is not a double recovery. Houston, etc., R. Co. *v.* Hartnett, (Tex. Civ. App. 1898) 48 S. W. 773.

40. See *infra*, VII, F.

41. Richards *v.* Johnston, 46 Mich. 297, 9 N. W. 423; O'Neil *v.* Davis, 1 Tex. App. Civ. Cas. § 415. In Moffett-West Drug Co. *v.* Byrd, 1 Indian Terr. 612, 43 S. W. 864, it was held that for failure to deliver to the buyer drugs shipped to a certain place, there to be delivered to him, damages for loss of time spent by the buyer in preparing for, and awaiting the arrival of, the goods, including the expense of hiring a certain doctor, in preparation therefor, the loss being limited to the time elapsing between the arrival of the goods at the place for their delivery and the beginning of an action to recover therefor, were not too remote.

42. Stoetzle *v.* Sweringen, 96 Mo. App. 592, 70 S. W. 911; Wynne *v.* Atlantic Ave. R. Co., 156 N. Y. 702, 51 N. E. 1094 [*affirming* 14 Misc. 394, 35 N. Y. Suppl. 1034].

Speculative business.— Where plaintiff in an action for damages for assault was engaged in fishing for a living, and testified that he had lost two weeks' time in consequence of his injuries, the business was not of such a speculative character as to render evidence of the reasonable worth of plaintiff's time inadmissible. Lund *v.* Tyler, 115 Iowa 236, 88 N. W. 333.

Value of services.— When the injury occasions loss of time or of business, the value of the plaintiff's service alone fixes the amount he should recover for loss of time or business. Paquin *v.* St. Louis, etc., R. Co., 90 Mo. App. 118.

43. Stoetzle *v.* Sweringen, 96 Mo. App. 592, 70 S. W. 911.

44. The extent and nature of the business or employment of the plaintiff and of his physical capacity to perform the work at the time he was injured may be shown.

Alabama.— Alabama Great Southern R

is a professional man, great difficulty has been experienced in arriving at the amount calculated to compensate him for his impaired earning capacity. It has been held, however, that inability to compute the amount with accuracy is no reason why evidence of all the circumstances and business surroundings of the plaintiff may not be given to the jury, since it is not the plaintiff's fault that the inquiry has become necessary;[45] and where such evidence is capable of being produced it may be shown what his average annual or monthly earnings were.[46] In actions of tort, where the *quantum* of damages is very much within the discretion of the jury,[47] evidence of the nature and extent of the plaintiff's business, and the general rate of profit he has realized therefrom, which has been interrupted by the defendant's wrongful act, is properly received, not on the ground of its furnishing a measure of damages to be adopted by the jury, but to be taken into consideration by the jury, to guide them in the exercise of that discretion which to a certain extent is always vested in them.[48]

Co. *v.* Yarbrough, 83 Ala. 238, 3 So. 447, 3 Am. St. Rep. 715.

Delaware.— Strattner *v.* Wilmington City Electric Co., 3 Pennew. 245, 50 Atl. 57.

Georgia.— Western, etc., R. Co. *v.* Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320.

Illinois.— Fisher *v.* Jansen, 128 Ill. 549, 21 N. E. 598; Chicago, etc., R. Co. *v.* Warner, 108 Ill. 538; Chicago, etc., R. Co. *v.* Otto, 52 Ill. 416; Chicago *v.* Martin, 49 Ill. 241, 95 Am. Dec. 590; Illinois Cent. R. Co. *v.* Read, 37 Ill. 484, 87 Am. Dec. 260; Peoria Bridge Assoc. *v.* Loomis, 20 Ill. 235, 71 Am. Dec. 263; Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 553.

Indiana.— Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

Iowa.— Wilberding *v.* Dubuque, 111 Iowa 484, 82 N. W. 957; Ankrum *v.* Marshalltown, 105 Iowa 493, 75 N. W. 360.

Maryland.—McMahon *v.* Northern Cent. R. Co., 39 Md. 438.

Michigan.— Sherwood *v.* Chicago, etc., R. Co., 82 Mich. 374, 46 N. W. 773.

Missouri.— Whalen *v.* St. Louis, etc., R. Co., 60 Mo. 323.

Nebraska.— Chicago, etc., R. Co. *v.* Starmer, 26 Nebr. 630, 42 N. W. 706.

New Hampshire.—Holyoke *v.* Grand Trunk R. Co., 48 N. H. 541.

New York.— Baker *v.* Manhattan R. Co., 54 N. Y. Super. Ct. 394.

Pennsylvania.— McLaughlin *v.* Corry, 77 Pa. St. 109, 18 Am. Rep. 432.

Texas.— Howard Oil Co. *v.* Davis, 76 Tex. 630, 13 S. W. 665; International, etc., R. Co. *v.* Locke, (Civ. App. 1902) 67 S. W. 1082.

Virginia.— Norfolk, etc., R. Co. *v.* Ormsby, 27 Gratt. 455.

West Virginia.— Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

Wisconsin.—Kinney *v.* Crocker, 18 Wis. 74.

United States.— Wade *v.* Leroy, 20 How. 34, 15 L. ed. 813; Saldana *v.* Galveston, etc., R. Co., 43 Fed. 862; Carpenter *v.* Mexican Nat. R. Co., 39 Fed. 315; Anthony *v.* Louisville, etc., R. Co., 27 Fed. 724.

See also *infra*, XI, B, 5.

45. *Illinois.*— Fisher *v.* Jansen, 128 Ill. 549, 21 N. E. 598.

Indiana.— Indianapolis *v.* Gaston, 58 Ind. 224.

Maine.— Holmes *v.* Halde, 74 Me. 28, 43 Am. Rep. 567.

Michigan.— Welch *v.* Ware, 32 Mich. 77; Allison *v.* Chandler, 11 Mich. 542; Chandler *v.* Allison, 10 Mich. 460.

New York.— Baker *v.* Manhattan R. Co., 54 N. Y. Super. Ct. 394.

Texas.— See Howard Oil Co. *v.* Davis, 76 Tex. 630, 13 S. W. 665.

Wisconsin.— Luck *v.* Ripon, 52 Wis. 196, 8 N. W. 815.

England.— Phillips *v.* London, etc., R. Co., 5 C. P. D. 280, 44 J. P. 217, 49 L. J. C. P. 233, 42 L. T. Rep. N. S. 6.

Physician practising without diploma.— In Holmes *v.* Halde, 74 Me. 28, 43 Am. Rep. 567, it was held that where a physician was receiving a certain amount for his services, that was the measure of the value of his capacity to render them, and might be fairly considered as evidence tending to show that he would receive similar compensation in the future, even though it was shown at the trial that he had no diploma for the practice of his profession. See also McNamara *v.* Clintonville, 62 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722.

46. Collins *v.* Dodge, 37 Minn. 503, 35 N. W. 368; New Jersey Express Co. *v.* Nichols, 33 N. J. L. 434, 97 Am. Dec. 722; Bierbach *v.* Goodyear Rubber Co., 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19; Parshall *v.* Minneapolis, etc., R. Co., 35 Fed. 649. *Compare* Bloomington *v.* Chamberlain, 104 Ill. 268.

47. The law has in this class of cases committed the determination of the amount of damages to be awarded to the experience and good sense of jurors. And where the verdict rendered by them may reasonably be presumed to have resulted from an honest and intelligent exercise of judgment upon their part, the policy of the courts is, and necessarily must be, not to interfere with their conclusion. Walker *v.* Erie R. Co., 63 Barb. (N. Y.) 260; Baker *v.* Manhattan R. Co., 54 N. Y. Super. Ct. 394.

48. New Jersey Express Co. *v.* Nichols, 33 N. J. L. 434, 97 Am. Dec. 722.

G. Loss of Profits — 1. In General. The earlier cases, both English and American, have generally concurred in excluding, as well in actions of tort as in actions on contracts, from the damages recoverable, profits which might have been realized if the injury had not been done or the contract had been performed.[49] Especially did this rule obtain where loss of profits was claimed as damages in case of an interrupted sea voyage.[50] Under the latter-day decisions recovery of profits as damages is not excluded because they are claimed as profits *per se*;[51] but they must be the natural and proximate causes of the acts complained of, and when this can be ascertained without uncertainty the principle of compensation will be adopted.[52] Indeed, whenever profits are rejected as an item of damages it is because they are subject to too many contingencies and are too dependent upon the fluctuations of markets and the chances of business to constitute a safe criterion for an estimate of damages.[53] Expected profits are in their nature contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts with present data for a rational estimate of their amount,[54] and when this is made to appear they may be recoverable as damages.[55] The mere specu-

The general rule has been laid down as follows: "The age and occupation of the injured person, value of his services — that is, the wages he has earned in the past, whether he has been employed at a fixed salary or as a professional man — are proper to be considered. He is entitled to recover for the disabling effect of the injury upon his capacity to earn, not only up to the time of the trial, but for all probable future disability in that respect." Howard Oil Co. *v.* Davis, 76 Tex. 630, 634, 13 S. W. 665.

49. Coweta Falls Mfg. Co. *v.* Rogers, 19 Ga. 416, 65 Am. Dec. 602; Wolcott *v.* Mount, 36 N. J. L. 262, 13 Am. Rep. 438. And see Butler *v.* Collins, 12 Cal. 457; Barnard *v.* Poor, 21 Pick. (Mass.) 378; Callaway Min., etc., Co. *v.* Clark, 32 Mo. 305; Bennett *v.* Drew, 3 Bosw. (N. Y.) 355; Hunt *v.* Hoboken Land Imp. Co., 3 E. D. Smith (N. Y.) 144.

50. Callaway Min., etc., Co. *v.* Clark, 32 Mo. 305 [*citing* and *approving* Taylor *v.* Maguire, 12 Mo. 313]; Hunt *v.* Hoboken Land Imp. Co., 3 E. D. Smith (N. Y.) 144; The Apollon, 9 Wheat. (U. S.) 362, 6 L. ed. 111; La Amistad de Rues, 5 Wheat. (U. S.) 385, 5 L. ed. 115; The Amiable Nancy, 3 Wheat. (U. S.) 546, 4 L. ed. 456; The Lively, 15 Fed. Cas. No. 8,403, 1 Gall. 315.

51. Brigham *v.* Carlisle, 78 Ala. 243, 56 Am. Rep. 28; Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718; Watson *v.* Gray's Harbor Brick Co., 3 Wash. 283, 28 Pac. 527; Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307, 14 L. ed. 157.

Executory contract.—Although profits cannot be recovered unless shown to be the direct fruits of the broken contract, a plaintiff should not be excluded from making such proof of loss of profits as he can, although he has not entered upon the performance of the contract or spent money upon it. Safety Insulated Wire, etc., Co. *v.* Baltimore, 66 Fed. 140, 13 C. C. A. 375.

52. Medbury *v.* New York, etc., R. Co., 26 Barb. (N. Y.) 564. In Morey *v.* Metropolitan Gas Light Co., 38 N. Y. Super. Ct. 185, 188, the court said: "The rule in any action, which allows the loss of profits to be estimated as damages, confines such loss to the immediate cause or breach. If they can not be traced directly to the breach of contract or duty, or are not the immediate result of the breach, then they are regarded as too remote, uncertain and unreliable, to form the basis of damage (Lacour *v.* New York, 3 Duer (N. Y.) 406)." In Armistead *v.* Shreveport, etc., R. Co., 108 La. 171, 32 So. 456, the plaintiff chartered a boat to convey some cotton seed to his mill. Defendant's bridge obstructed the passage of the boat and deprived plaintiff of the profits he expected to realize. It was held that he could recover therefor. In the same case, however, it was held that the party could not recover for profits on seed that he expected to procure.

In an action for tort damages for loss of profits in business may be recovered if they are susceptible of definite ascertainment and are the direct result of the injury. Wolff Shirt Co. *v.* Frankenthal, 96 Mo. App. 307, 70 S. W. 378.

53. Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718. See also Brigham *v.* Carlisle, 78 Ala. 243, 56 Am. Rep. 28. In Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 305, 344, 14 L. ed. 157 [*quoted* in Watson *v.* Gray's Harbor Brick Co., 3 Wash. 283, 28 Pac. 527] the court said: "Wherever profits are spoken of as not the subject of damages, it will be found that something contingent upon future bargains, speculations, or states of the market, are referred to, and not the difference between an agreed price of something contracted for and its ascertainable value, or cost."

54. Central Coal, etc., Co. *v.* Hartman, 111 Fed. 96, 49 C. C. A. 244.

55. *Arkansas.*—Border City Ice, etc., Co. *v.* Adams, 69 Ark. 219, 62 S. W. 591.

California.— Bryson *v.* McCone, 121 Cal. 153, 53 Pac. 637; Shoemaker *v.* Acker, 116

lations and conjectures of witnesses who know no facts upon which a reasonably accurate estimate can be made form no better basis for a judgment than the conjectures of a jury without facts.[56] Where the profits claimed are merely speculative or remote and not capable of being correctly ascertained under the recognized rules of evidence, they have been invariably denied by the courts,[57]

Cal. 239, 48 Pac. 62; Nightingale *v.* Scannell, 18 Cal. 315.

Connecticut.— Gregory *v.* Brooks, 35 Conn. 437, 95 Am. Dec. 278.

Illinois.— Illinois, etc., R., etc., Co. *v.* Decker, 3 Ill. App. 135.

Kansas.— States *v.* Durkin, 65 Kan. 101, 68 Pac. 1091.

Maine.—National Fibre Board Co. *v.* Lewiston, etc., Electric Light Co., 95 Me. 318, 49 Atl. 1095.

Massachusetts.—Speirs *v.* Union Drop Forge Co., 180 Mass. 87, 61 N. E. 825.

Michigan.— Richards *v.* Johnston, 46 Mich. 297, 9 N. W. 423.

Minnesota.— Silberstein *v.* Duluth News-Tribune Co., 68 Minn. 430, 71 N. W. 622; Mississippi, etc., Co. *v.* Prince, 34 Minn. 71, 24 N. W. 344.

Missouri.— Wolff Shirt Co. *v.* Frankenthal, 96 Mo. App. 307, 70 S. W. 378; Stewart *v.* Patton, 65 Mo. App. 21.

Nevada.— Paul *v.* Cragnaz, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983, 47 L. R. A. 540.

New Hampshire.— Crawford *v.* Parsons, 63 N. H. 438.

New York.— Schile *v.* Brokhahus, 80 N. Y. 614; Jones *v.* New York, 47 N. Y. App. Div. 39, 62 N. Y. Suppl. 284; Lakeside Paper Co. *v.* State, 45 N. Y. App. Div. 112, 60 N. Y. Suppl. 1081; Morey *v.* Metropolitan Gas Light Co., 38 N. Y. Super. Ct. 185; Ebenreiter *v.* Dahlman, 19 Misc. 9, 42 N. Y. Suppl. 867; Capel *v.* Lyons, 3 Misc. 73, 22 N. Y. Suppl. 378, license exceeded.

Oklahoma.— Choctaw, etc., R. Co. *v.* Alexander, 7 Okla. 579, 52 Pac. 944.

Pennsylvania.— McKnight *v.* Ratcliff, 44 Pa. St. 156.

Texas.— A. J. Anderson Electric Co. *v.* Cleburne Water, etc., Co., (Civ. App. 1898) 44 S. W. 929; Gulf, etc., R. Co. *v.* Hodge, (Civ. App. 1897) 39 S. W. 986.

Virginia.— Consumers' Ice Co. *v.* Jennings, 100 Va. 719, 42 S. E. 879.

Wisconsin.— Conway *v.* Mitchell, 97 Wis. 290, 72 N. W. 752.

United States.— Anvil Min. Co. *v.* Humble, 153 U. S. 540, 14 S. Ct. 876, 38 L. ed. 814; Farmers' L. & T. Co. *v.* Eaton, 114 Fed. 14, 51 C. C. A. 640; Central Coal, etc., Co. *v.* Hartman, 111 Fed. 96, 49 C. C. A. 244; Prevost *v.* Gorrell, 19 Fed. Cas. No. 11,404, 5 Wkly. Notes Cas. (Pa.) 149.

England.— The Steamship Gracie *v.* The Steamship Argentine, 14 App. Cas. 519, 6 Aspin. 433, 59 L. J. P. 17, 61 L. T. Rep. N. S. 706; Dunlop *v.* Higgins, 1 H. L. Cas. 381, 12 Jur. 295.

Canada.— Kenney *v.* Reg., 1 Can. Exch. 68; Collette *v.* Lewis, 5 Montreal Super. Ct. 107.

See 15 Cent. Dig. tit. "Damages," § 72 *et seq.*

56. Central Coal, etc., Co. *v.* Hartman, 111 Fed. 96, 49 C. C. A. 244.

Reasonable finding.— Prospective profits in mining ore from a certain level at so much per ton are not conjectural and speculative, so as to prevent recovery, when the evidence shows the cost of past mining, the condition in which the mine was left, and, while not showing with certainty the amount of ore remaining in the level, is yet sufficient to enable the jury to make a fair and reasonable finding in regard thereto. Anvil Min. Co. *v.* Humble, 153 U. S. 540, 14 S. Ct. 876, 38 L. ed. 814.

57. *Arkansas.*— McDaniel *v.* Crabtree, 21 Ark. 431.

California.—Giaccomini *v.* Bulkeley, 51 Cal. 260; Butler *v.* Collins, 12 Cal. 457.

District of Columbia.— Washington, etc., R. Co. *v.* American Car Co., 5 App. Cas. 524.

Georgia.— Lightfoot *v.* West, 98 Ga. 546, 25 S. E. 587.

Indiana.— Blair *v.* Kilpatrick, 40 Ind. 312.

Iowa.— Howe Mach. Co. *v.* Bryson, 44 Iowa 159, 24 Am. Rep. 735.

Kentucky.— Asher *v.* Stacy, 65 S. W. 603, 23 Ky. L. Rep. 1586.

Maryland.— Garitee *v.* Baltimore, 53 Md. 422.

Massachusetts.— Barnard *v.* Poor, 21 Pick. 378.

Michigan.— Talcott *v.* Crippen, 52 Mich. 633, 18 N. W. 392.

Missouri.— Callaway Min., etc., Co. *v.* Clark, 32 Mo. 305; Wilson *v.* Russler, 91 Mo. App. 275; Paquin *v.* St. Louis, etc., R. Co., 90 Mo. App. 118.

Nebraska.— Silurian Mineral Spring Co. *v.* Kuhn, (1902) 91 N. W. 508.

New Jersey.—Wolcott *v.* Mount, 36 N. J. L. 262, 13 Am. Rep. 438.

New York.— Phyfe *v.* Manhattan R. Co., 30 Hun 377; Griffin *v.* Colver, 22 Barb. 587; Bennett *v.* Drew, 3 Bosw. 355; Hunt *v.* Hoboken Land Imp. Co., 3 E. D. Smith 144.

Ohio.—Farrelly *v.* Cincinnati, 2 Disn. 516; Gaar *v.* Snook, 1 Ohio Cir. Dec. 142.

Oregon.— Coos Bay, etc., R., etc., Co. *v.* Nosler, 30 Oreg. 547, 48 Pac. 361.

Pennsylvania.—Farmers' Bank *v.* McKee, 2 Pa. St. 318; Coyle *v.* Pittsburg, etc., R. Co., 18 Pa. Super. Ct. 235.

South Carolina.— Livingston *v.* Exum, 19 S. C. 223.

Texas.— Stell *v.* Paschal, 41 Tex. 640.

Washington.— Bingham *v.* Walla Walla, 3 Wash. Terr. 68, 13 Pac. 408.

Wisconsin.— Wright *v.* Mulvaney, 78 Wis. 89, 46 N. W. 1045, 23 Am. St. Rep. 393, 9 L. R. A. 807; Bierbach *v.* Goodyear Rubber

whether such profits are claimed in actions *ex delicto*[58] or whether they are claimed in actions *ex contractu*.[59]

2. In Contract — a. In General. As a general rule a party is entitled to recover the profits that would have resulted from a breach of a contract into which he had entered, where such breach is the result of the fault or omission of the other party.[60] In such case, however, it must be clearly shown that the profits of which he claims to have been deprived are capable of being definitely

Co., 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19.

United States.— The Apollon, 9 Wheat. 362, 6 L. ed. 111; The Amistad de Rues, 5 Wheat. 385, 5 L. ed. 115; The Amiable Nancy, 3 Wheat. 546, 4 L. ed. 456; Loewer *v.* Harris, 57 Fed. 368, 6 C. C. A. 394.

England.— Wilson *v.* Lancashire, etc., R. Co., 9 C. B. N. S. 632, 7 Jur. N. S. 232, 30 L. J. C. P. 232, 3 L. T. Rep. N. S. 859, 9 Wkly. Rep. 635, 99 E. C. L. 632; Priestley *v.* Maclean, 2 F. & F. 288; Fitzgerald *v.* Leonard, L. R. 32 Ir. 675.

Canada.— Brown *v.* Beatty, 35 U. C. Q. B. 328; Ruthven Woollen Mfg. Co. *v.* Great Western R. Co., 18 U. C. C. P. 316.

See 15 Cent. Dig. tit. "Damages," § 72 *et seq.*

58. *Pennsylvania.*—Coyle *v.* Pittsburg, etc., R. Co., 18 Pa. Super. Ct. 235.

Texas.— Stell *v.* Paschal, 41 Tex. 640.

Wisconsin.— Wright *v.* Mulvaney, 78 Wis. 89, 46 N. W. 1045, 23 Am. St. Rep. 393, 9 L. R. A. 807.

England.— Priestley *v.* Maclean, 2 F. & F. 288; Fitzgerald *v.* Leonard, L. R. 32 Ir. 675.

Canada.— Brown *v.* Beatty, 35 U. C. Q. B. 328.

In an action for damages for destroying an inclosure on plaintiff's farm whereby his grass was destroyed, plaintiff cannot recover the profits he might have made from cattle which he did not have, and had made no arrangement to procure. Giaccomini *v.* Bulkeley, 51 Cal. 260.

In a suit for personal injuries which disqualified plaintiff from attending to his business as a manufacturer, it is error to admit proof of the average profits of his business as a basis for estimating his damages, such a basis being of too uncertain and speculative a character. Bierbach *v.* Goodyear Rubber Co., 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19.

59. *District of Columbia.*— Washington, etc., R. Co. *v.* American Car Co., 5 App. Cas. 524.

Indiana.— Blair *v.* Kilpatrick, 40 Ind. 312.

Kentucky.— Asher *v.* Stacy, 65 S. W. 603, 23 Ky. L. Rep. 1586.

Missouri.— Wilson *v.* Russler, 91 Mo. App. 275.

Ohio.— Farrelly *v.* Cincinnati, 2 Disn. 516; Gaar *v.* Snook, 1 Ohio Cir. Dec. 142.

Pennsylvania.— Farmers' Bank *v.* McKee, 2 Pa. St. 318.

South Carolina.— Livingston *v.* Exum, 19 S. C. 223.

England.— Wilson *v.* Lancashire, etc., R. Co., 9 C. B. N. S. 632, 7 Jur. N. S. 232, 30 L. J. C. P. 232, 3 L. T. Rep. N. S. 859, 9 Wkly. Rep. 635, 99 E. C. L. 632.

Canada.— Ruthven Woollen Mfg. Co. *v.* Great Western R. Co., 18 U. C. C. P. 316.

See 15 Cent. Dig. tit. "Damages," § 72 *et seq.*; and *infra*, VII, G, 2.

Where a lessor failed to rebuild a shed on the leased premises which had fallen, and which it was his duty to rebuild, the lessees could not, in an action for rent, set up against plaintiff's demand prospective profits which might have been made had the shed been rebuilt. Lightfoot *v.* West, 98 Ga. 546, 25 S. E. 587.

60. *Arkansas.*— Border City Ice, etc., Co. *v.* Adams, 69 Ark. 219, 62 S. W. 591.

California.— Bryson *v.* McCone, 121 Cal. 153, 53 Pac. 637; Shoemaker *v.* Acker, 116 Cal. 239, 48 Pac. 62.

Colorado.— Rio Grande Western R. Co. *v.* Rubenstein, 5 Colo. App. 121, 38 Pac. 76.

Florida.— Robinson *v.* Hyer, 35 Fla. 544, 17 So. 745.

Georgia.— Fontaine *v.* Baxley, 90 Ga. 416, 17 S. E. 1015.

Illinois.— Alphin *v.* Working, 132 Ill. 484, 24 N. E. 54 [*affirming* 32 Ill. App. 178].

Indiana.— Dunn *v.* Johnson, 33 Ind. 54, 5 Am. Dec. 177.

Iowa.— Hall *v.* Stewart, 58 Iowa 681, 12 N. W. 741; Richmond *v.* Dubuque, etc., R. Co., 33 Iowa 422; Dibol *v.* Minott, 9 Iowa 403.

Kansas.— Arkansas Valley Town, etc., Co. *v.* Lincoln, 56 Kan. 145, 42 Pac. 706.

Kentucky.— Tandy *v.* Hatcher, 9 Ky. L. Rep. 150.

Louisiana.— Findley *v.* Breedlove, 4 Mart. N. S. 105.

Maryland.— Crabbs *v.* Koontz, 69 Md. 59, 13 Atl. 591 [*following* Brown *v.* Werner, 40 Md. 15]; Lawson *v.* Price, 45 Md. 123.

Massachusetts.— Speirs *v.* Union Drop Forge Co., 180 Mass. 87, 61 N. E. 825. And see Dennis *v.* Maxfield, 10 Allen 138; Fox *v.* Harding, 7 Cush. 516.

Michigan.— Fell *v.* Newberry, 106 Mich. 542, 64 N. W. 474; Lee *v.* Briggs, 99 Mich. 487, 58 N. W. 477.

Minnesota.— Silberstein *v.* Duluth News-Tribune Co., 68 Minn. 430, 71 N. W. 622.

New York.— Swain *v.* Schieffelin, 134 N. Y. 471, 31 N. E. 1025, 18 L. R. A. 385; Wakeman *v.* Wheeler, etc., Mfg. Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676; Hexter *v.* Knox, 63 N. Y. 561 [*affirming* 39 N. Y. Super. Ct. 109]; Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487; Jones *v.* New York, 47 N. Y. App. Div. 39, 62 N. Y. Suppl. 284; Capel *v.* Lyons, 20 N. Y. Suppl. 49;

ascertained,[61] although it is not necessary that the profits claimed should be "certain" or "probable"; it is sufficient if they are reasonably "certain" or reasonably "probable."[62] Where there are no rules of evidence or no fixed mode of calculation applicable to the particular state of facts involved it has been the rule to deny them.[63] The broad, general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: The damages must be such as

Bagley *v.* Smith, 19 How. Pr. 1; Skinner *v.* Dayton, 19 Johns. 513, 10 Am. Dec. 286.

Rhode Island.— Simmons *v.* Brown, 5 R. I. 299, 73 Am. Dec. 66.

Texas.— Hunt *v.* Reilly, 50 Tex. 99; Waco Tap R. Co. *v.* Shirley, 45 Tex. 355; A. J. Anderson Electric Co. *v.* Cleburne Water, etc., Co., (Civ. App. 1898) 44 S. W. 929; Gulf, etc., R. Co. *v.* Hodge, (Civ. App. 1897) 39 S. W. 986; Gulf, etc., R. Co. *v.* Dunman, (Civ. App. 1895) 31 S. W. 1070.

Virginia.— Consumers' Ice Co. *v.* Jennings, 100 Va. 719, 42 S. E. 879.

Washington.— Watson *v.* Gray's Harbor Brick Co., 3 Wash. 283, 28 Pac. 527.

West Virginia.— James *v.* Adams, 8 W. Va. 568.

Wisconsin.— Conway *v.* Mitchell, 97 Wis. 290, 72 N. W. 752; Corbett *v.* Anderson, 85 Wis. 218, 54 N. W. 727.

United States.— Philadelphia, etc., R. Co. *v.* Howard, 13 How. 307, 14 L. ed. 157; Safety Insulated Wire, etc., Co. *v.* Baltimore, 66 Fed. 140, 13 C. C. A. 375; Cole *v.* U. S., 23 Ct. Cl. 341.

England.— The Steamship Gracie *v.* The Steamship Argentino, 14 App. Cas. 519, 6 Aspin. 433, 59 L. J. P. 17, 61 L. T. Rep. N. S. 706; McNeill *v.* Reid, 9 Bing. 68, 1 L. J. C. P. 162, 2 Moore & S. 89, 23 E. C. L. 489; Waters *v.* Towers, 20 Eng. L. & Eq. 410; Dunlop *v.* Higgins, 1 H. L. Cas. 381, 12 Jur. 295.

Canada.— Kenney *v.* Reg., 1 Can. Exch. 68.

See 15 Cent. Dig. tit. "Damages," § 74 *et seq.* and *infra*, XI, D.

Exclusive right of sale.— Where defendant had the exclusive right to sell plaintiff's goods in certain territory, and plaintiff made sales in violation of such right, defendant is entitled to the profits that he would have realized on the sales which the violation of such right prevented (Russell *v.* Horn, etc., Mfg. Co., 41 Nebr. 567, 59 N. W. 901); but he cannot be required to pay plaintiff any of the profits of goods sold, but never paid for or delivered (Hall *v.* Stewart, 58 Iowa 681, 12 N. W. 741). In Cincinnati Siemens-Lungren Gas Illuminating Co. *v.* Western Siemens-Lungren Co., 152 U. S. 200, 14 S. Ct. 523, 38 L. ed. 411, however, it was held that an inadvertent sale of a patented article in territory for which the seller had granted an exclusive right to another rendered him liable only for actual damages, represented by the profits actually realized, and not for profits which the grantee would have realized if he himself had made the sale at the higher prices established by him, especially when there was evidence that he could not have effected such a sale.

61. See cases cited *supra*, note 60.

62. Danforth *v.* Tennessee, etc., R. Co., 99 Ala. 331, 13 So. 51.

Profits wholly prospective.— In Ramsey *v.* Holmes Electric Protective Co., 85 Wis. 174, 55 N. W. 391, plaintiffs contracted with defendant to solicit orders for its electric protective system and furnish all necessary appliances for use in connection with such offices of plaintiffs as might be thereafter designated; plaintiffs agreeing to maintain such apparatus and serve defendant's customers according to the contract between defendant and such customers, and to receive as compensation fifty per cent of the rentals. The contract was for three years. It was held that where defendant after procuring several customers refused to go on with the contract, although the profits were wholly prospective, plaintiffs were entitled to damages.

63. *Georgia.*— Butler *v.* Moore, 68 Ga. 780, 45 Am. Rep. 508.

Illinois.— Moline Water Power Co. *v.* Waters, 10 Ill. App. 159.

Kansas.— Carbondale Invest. Co. *v.* Burdick, 58 Kan. 517, 50 Pac. 442.

Kentucky.— Koch *v.* Godshaw, 12 Bush 318.

Louisiana.— Mirandona *v.* Burg, 51 La. Ann. 1190, 25 So. 982; Doriocourt *v.* Lacroix, 29 La. Ann. 286; Dennery *v.* Bisa, 6 La. Ann. 365.

Michigan.—Mason *v.* Howes, 122 Mich. 329, 81 N. W. 111.

Minnesota.— Swanson *v.* Andrus, 83 Minn. 505, 86 N. W. 465; Doud *v.* Duluth Milling Co., 55 Minn. 53, 56 N. W. 463.

Nebraska.— French *v.* Ramge, 2 Nebr. 254.

New Hampshire.—Saddlery Hardware Mfg. Co. *v.* Hillsborough Mills, 68 N. H. 216, 44 Atl. 300, 73 Am. St. Rep. 569.

New York.— Witherbee *v.* Meyer, 155 N. Y. 446, 50 N. E. 58 [*reversing* 84 Hun 146, 32 N. Y. Suppl. 537]; Freeman *v.* Clute, 3 Barb. 424.

North Carolina.— Pender Lumber Co. *v.* Wilmington Iron Works, 130 N. C. 584, 41 S. E. 797.

Ohio.— Davis *v.* Cincinnati, etc., R. Co., 1 Disn. 23, 12 Ohio Dec. (Reprint) 463.

Oregon.— Dose *v.* Tooze, 37 Oreg. 13, 60 Pac. 380; Williams *v.* Island City Milling Co., 25 Oreg. 573, 37 Pac. 49.

Pennsylvania.— Fleming *v.* Beck, 48 Pa. St. 309; Haak *v.* Wise, 2 Wkly. Notes Cas. 689; Hoffman *v.* Kaylor, 2 Lanc. L. Rev. 333.

Tennessee.— Allison *v.* Tennessee Coal, etc., Co., (Ch. App. 1897) 46 S. W. 348.

Texas.— O'Connor *v.* Smith, 84 Tex. 232, 19 S. W. 168; Varner *v.* Dexter Gin, etc., Co-operative Assoc., (Civ. App. 1896) 39 S. W. 206; Stresau *v.* Fidelli, 1 Tex. App. Civ. Cas. § 847.

may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed.[64] It is against the policy of the law to allow profits as damages where such profits are remotely connected with the breach of contract alleged[65] or where they are speculative, resting only upon conjectural evidence or the individual opinion of parties or witnesses.[66]

b. Within Contemplation of Parties. The recovery of profits as in the case of damages for the breach of a contract in general depends upon whether such profits were within the contemplation of the parties at the time the contract was made.[67] If the profits are such as grow out of the contract itself and are the

West Virginia.— Douglass *v.* Ohio River R. Co., 51 W. Va. 523, 41 S. E. 911.

Wisconsin.— Raynor *v.* Valentin Blatz Brewing Co., 100 Wis. 414, 76 N. W. 343; Ramsey *v.* Holmes Electric Protective Co., 85 Wis. 174, 55 N. W. 391.

United States.— Smith *v.* Bolles, 132 U. S. 125, 10 S. Ct. 39, 33 L. ed. 279; De Ford *v.* Maryland Steel Co., 113 Fed. 72, 51 C. C. A. 59; Chapin *v.* Norton, 5 Fed. Cas. No. 2,599, 6 McLean 500. And see Loewer *v.* Harris, 57 Fed. 368, 6 C. C. A. 394.

England.— Thol *v.* Henderson, 8 Q. B. D. 457, 46 J. P. 422, 46 L. T. Rep. N. S. 483; Great Western R. Co. *v.* Redmayne, L. R. 1 C. P. 329, 12 Jur. N. S. 692, 35 L. J. C. P. 123; Cory *v.* Thames Ironworks, etc., Co., L. R. 3 Q. B. 181, 37 L. J. Q. B. 68, 17 L. T. Rep. N. S. 495, 16 Wkly. Rep. 457; Williams *v.* Reynolds, 6 B. & S. 495, 11 Jur. N. S. 973, 34 L. J. Q. B. 221, 12 L. T. Rep. N. S. 728, 13 Wkly. Rep. 940, 118 E. C. L. 495; Tredegar Iron, etc., Co. *v.* Gielgud, 1 Cab. & E. 27.

See 15 Cent. Dig. tit. "Damages," § 74 *et seq.*

Meaning of term "profits."— Where plaintiff, a traveling salesman, received as compensation a certain salary, his railroad expenses, and a certain percentage of the amount of his sales, such percentage is not "profits" in the sense of that word as used in the decisions discussing the right to recover profits as such in actions for breach of contract. Rio Grande Western R. Co. *v.* Rubenstein, 5 Colo. App. 121, 38 Pac. 76.

64. Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718.

65. *California.*— Wallace *v.* Ah Sam, 71 Cal. 197, 12 Pac. 46, 60 Am. Rep. 534.

Illinois.— Consumers' Pure Ice Co. *v.* Jenkins, 58 Ill. App. 519.

Iowa.— Winne *v.* Kelley, 34 Iowa 339.

Maine.— Bridges *v.* Stickney, 38 Me. 361.

Montana.— Loeb *v.* Kamak, 1 Mont. 152.

Ohio.— Seely *v.* State, 11 Ohio 501; Gaar *v.* Snook, 1 Ohio Cir. Ct. 259.

Pennsylvania.— Haak *v.* Wise, 2 Wkly. Notes Cas. 689.

Texas.— De la Zerda *v.* Korn, 25 Tex. Suppl. 188.

See 15 Cent. Dig. tit. "Damages," § 75.

66. *Alabama.*— Young *v.* Cureton, 87 Ala. 727, 6 So. 352; Evans *v.* Cincinnati, etc., R. Co., 78 Ala. 341; Brigham *v.* Carlisle, 78 Ala. 243, 56 Am. Rep. 28; Union Refining Co. *v.* Barton, 77 Ala. 148.

Arkansas.— Goodell *v.* Bluff City Lumber Co., 57 Ark. 203, 21 S. W. 104.

California.— Muldrow *v.* Norris, 2 Cal. 74, 56 Am. Dec. 313.

District of Columbia.— Washington, etc., R. Co. *v.* American Car Co., 5 App. Cas. 524.

Georgia.— Red *v.* Augusta, 25 Ga. 386.

Illinois.— Consumers' Pure Ice Co. *v.* Jenkins, 58 Ill. App. 519; Hair *v.* Barnes, 26 Ill. App. 580.

Indiana.—Montgomery County Union Agricultural Soc. *v.* Harwood, 126 Ind. 440, 26 N. E. 182, 10 L. R. A. 532.

Louisiana.— Bergen *v.* New Orleans, 35 La. Ann. 523; Bohn *v.* Cleaver, 25 La. Ann. 419.

Maine.— Berry *v.* Dwinel, 44 Me. 255; Bridges *v.* Stickney, 38 Me. 361.

Maryland.— Lanahan *v.* Heaver, 79 Md. 413, 29 Atl. 1036; Crabbs *v.* Koontz, 69 Md. 59, 13 Atl. 591; Stern *v.* Rosenheim, 67 Md. 503, 10 Atl. 221, 307.

Michigan.— Allis *v.* McLean, 48 Mich. 428, 12 N. W. 640.

Missouri.— Lewis *v.* Atlas Mut. L. Ins. Co., 61 Mo. 534; Connoble *v.* Clark, 38 Mo. App. 476.

Nebraska.— Denver, etc., R. Co. *v.* Hutchins, 31 Nebr. 572, 48 N. W. 398.

New York.— Bernstein *v.* Meech, 130 N. Y. 354, 29 N. E. 255 [*affirming* 54 Hun 634, 8 N. Y. Suppl. 944]; New York Smelting, etc., Co. *v.* Lieb, 48 N. Y. Super. Ct. 508; Havemeyer *v.* Havemeyer, 45 N. Y. Super. Ct. 464.

North Carolina.— Boyle *v.* Reeder, 23 N. C. 607.

Ohio.— Rhodes *v.* Baird, 16 Ohio St. 573.

Texas.— Fraser *v.* Echo Min., etc., Co., 9 Tex. Civ. App. 210, 28 S. W. 714; Couch *v.* Parker, 1 Tex. App. Civ. Cas. § 436.

West Virginia.—James *v.* Adams, 8 W. Va. 568.

See 15 Cent. Dig. tit. "Damages," § 75 *et seq.*

"It is often much easier to discover when an assumed rule for damages will lead to erroneous results, than to point out in all cases in advance what the true rule should be. But merely speculative profits, supposed to have been lost, has been, I think, universally discarded by this court." McKnight *v.* Ratcliff, 44 Pa. St. 156, 169.

67. *Connecticut.*— Jordan *v.* Patterson, 67 Conn. 473, 35 Atl. 521.

Florida.— Brock *v.* Gale, 14 Fla. 523, 14 Am. Rep. 356.

direct and immediate result of its fulfilment they form a proper item of damages.[68] But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence of the principal contract, they are too uncertain and remote to be considered as part of the damages.[69] Where a party has entered into a contract to perform certain work and is, without fault of his own, prevented from completing the work by a breach of the contract, he is entitled to recover profits which can be readily determined and such as may be reasonably inferred to have been contemplated by the parties to the contract.[70]

c. Notice of Special Damage. The question as to notice of special damage at the time of making a contract has also been applied where profits are claimed after a breach.[71] Thus where goods or property are purchased for the purpose of resale and the vendor is aware of such purpose at the time of the contract, a failure or delay in performing his part of the contract will render him liable in damages for the certain profits that would have accrued.[72] Where goods are

Kentucky.— Elizabethtown, etc., R. Co. *v.* Pottinger, 10 Bush 185; Blood *v.* Herring, 61 S. W. 273, 22 Ky. L. Rep. 1725.

Louisiana.— Blymer Ice Mach. Co. *v.* McDonald, 48 La. Ann. 439, 19 So. 459; Vidalat *v.* New Orleans, 43 La. Ann. 1121, 10 So. 175; Williams *v.* Barton, 13 La. 404.

New Jersey.—Wolcott *v.* Mount, 36 N. J. L. 262, 13 Am. Rep. 438.

New York.— Messmore *v.* New York Shot, etc., Co., 40 N. Y. 422; Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718.

Pennsylvania.— Adams Express Co. *v.* Egbert, 36 Pa. St. 360, 78 Am. Dec. 382; Finch *v.* Heermans, 5 Luz. Leg. Reg. 125.

South Carolina.— See Sitton *v.* MacDonald, 25 S. C. 68, 60 Am. Rep. 484.

See 15 Cent. Dig. tit. "Damages," § 76; and *supra*, VII, C, 3, e.

Contract not to engage in business.— Plaintiffs in an action for breach of a contract not to engage in a business for a certain period are not entitled to recover for loss of profits after the expiration of such period, since such loss could not be said to be within the contemplation of the parties. Salinger *v.* Salinger, 69 N. H. 589, 45 Atl. 558.

Question for jury.— In Dykema *v.* Minneapolis, etc., R. Co., 101 Mich. 47, 59 N. W. 447, plaintiffs operated defendant's elevator under a written contract providing for a compensation to them of half a cent per bushel for all grain transferred by them from defendant's cars to vessels, each party having the right to terminate the contract on giving ninety days' notice. Without giving such notice defendant took possession of the elevator. The previous day defendant had written plaintiffs as to certain grain expected to arrive, directing them what lots to keep separate and requesting them to load certain portions thereof on steamers named. It was held that the jury were properly allowed to consider whether this did not contemplate the immediate handling of the grain in question so that, in estimating damages for defendant's breach of contract, the loss of the profits of such handling might be considered.

68. These are part and parcel of the contract itself and must have been in the contemplation of the parties when the contract was entered into. Elizabethtown, etc., R. Co. *v.* Pottinger, 10 Bush (Ky.) 185; Finch *v.* Heermans, 5 Luz. Leg. Reg. (Pa.) 125; Watson *v.* Gray's Harbor Brick Co., 3 Wash. 283, 28 Pac. 527.

Presumption of consideration.— "Profits or advantages which are the direct or immediate fruits of the contract between the parties . . . are part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement." Dunn *v.* Johnson, 33 Ind. 54, 59, 5 Am. Rep. 177.

69. Finch *v.* Heermans, 5 Luz. Leg. Reg. (Pa.) 125.

70. Elizabethtown, etc., R. Co. *v.* Pottinger, 10 Bush (Ky.) 185; Watson *v.* Gray's Harbor Brick Co., 3 Wash. 283, 28 Pac. 527 [*citing* Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 344, 14 L. ed. 157; Myers *v.* York, etc., R. Co., 17 Fed. Cas. No. 9,997, 2 Curt. 28]. See also Dunn *v.* Johnson, 33 Ind. 54, 5 Am. Rep. 177.

71. See Cory *v.* Thames Ironworks Co., L. R. 3 Q. B. 181, 37 L. J. Q. B. 68, 17 L. T. Rep. N. S. 495, 16 Wkly. Rep. 457; Hadley *v.* Baxendale, 2 C. L. R. 517, 9 Exch. 341, 18 Jur. 358, 27 L. J. Exch. 179, 2 Wkly. Rep. 302 [*quoted* in Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487, 494; Jones *v.* National Printing Co., 13 Daly (N. Y.) 92, 101]. See also *supra*, VII, C, 3, b.

72. Jordan *v.* Patterson, 67 Conn. 473, 35 Atl. 521. In Borries *v.* Hutchinson, 18 C. B. N. S. 445, 453, 11 Jur. N. S. 267, 34 L. J. C. P. 169, 11 L. T. Rep. N. S. 771, 13 Wkly. Rep. 386, 114 E. C. L. 445, the court said: "The question is, not what profit the plaintiff might have made, but what profit he professed to be purchasing. Not what damage he actually suffered, but what the other contemplated, and undertook to pay for. It is quite clear that loss of profits by a resale can

delivered to a common carrier to be delivered at a certain destination and such carrier has notice of the nature of the goods or the purpose for which they are to be transported, it is liable for failure or delay to so deliver them, and expected profits which have been prevented by its negligence may be recovered.[73]

d. Breach of Original Contract as Affecting Subcontracts. As a general rule a breach of the original contract will not entitle the plaintiff to recover as damages the gains or profits of collateral enterprises or subcontracts into which he has been induced to enter, such profits or gains being entirely too speculative and contingent[74] and not the natural and probable consequence of the original

never be contemplated, unless the resale has actually taken place at the time, and is communicated to the other party. The reason is, that such a profit is utterly incapable of valuation. It may depend upon a change of weather, a scientific discovery, an outbreak of war, a workman's strike. It will depend upon the energy and sagacity of the person who purchases the goods, and the solvency of the person to whom he sells them again."

No notice of resale.— Where the state fails to deliver its bonds to a purchaser in accordance with a contract for their sale, and such purchaser has a contract for immediate resale of the bonds to a third person, the state is not liable to him for the amount of his profits on such resale, in the absence of any notice to or knowledge by the state's agents that such purchaser contemplated a resale. Coffin *v.* State, 144 Ind. 578, 43 N. E. 654, 55 Am. St. Rep. 188. See also Wappoo Mills *v.* Commercial Guano Co., 91 Ga. 396, 18 S. E. 308. So in an action for the breach of a bond to convey land, the grantee cannot recover profits which he would have made on a contract of sale by him to a third person unless the grantor had notice of such contract when he made the bond. Sanderlin *v.* Willis, 94 Ga. 171, 21 S. E. 291.

73. In Jameson *v.* Midland R. Co., 50 L. T. Rep. N. S. 426, the plaintiff delivered a parcel at a receiving office of the defendants in London, addressed to "W. H. Moore & Co., Stand 23, Show Grounds, Lichfield, Staffordshire; van train." Nothing was said by the person who delivered the parcel at the receiving office as to the purpose for which it was being sent to Lichfield, or to draw attention to the label. It was held that the label was sufficient notice to the defendants that the goods were being sent to a show, and that the plaintiffs were entitled to recover damages for loss of profits and expenses incurred by the goods being delayed, and not delivered at Lichfield in time for the show. In Schulze *v.* Great Eastern R., 19 Q. B. D. 30, 56 L. J. Q. B. 442, 57 L. T. Rep. N. S. 438, 35 Wkly. Rep. 683 [*following* Wilson *v.* Lancashire, etc., R. Co., 9 C. B. N. S. 632, 7 Jur. N. S. 232, 30 L. J. C. P. 232, 3 L. T. Rep. N. S. 859, 9 Wkly. Rep. 635, 99 E. C. L. 632], a parcel of samples was delivered to the defendants, a railway company, to be forwarded to the plaintiffs. By the negligence of the defendants, who had notice that the parcel contained samples, it was delayed on the way until the season at which the samples could be used for procuring orders had elapsed, and they had in consequence become valueless. The plaintiffs could not have procured similar samples in the market. In an action for the non-delivery in a reasonable time, it was held that the plaintiffs were entitled to recover as damages the value to them of the samples at the time when they should have been delivered.

No notice of purpose.— In a suit against a carrier of passengers upon a steamboat for the loss of baggage, the plaintiff claimed for the loss of a set of dentist's instruments and special damages in the loss of the profits and earnings which he might have made if the instruments had not been lost. It was held upon demurrer that such special damages could not be recovered, but only such damages as were contemplated or might reasonably be supposed to have entered into the contemplation of the parties to the contract of carriage. Brock *v.* Gale, 14 Fla. 523, 14 Am. Rep. 356. So where, in an action against a railroad for negligently failing to deliver machinery, which caused the shutting down of a flouring-mill, the complaint did not allege nor the evidence show that any definite profit was lost, nor that the contract was such as to inform defendant that any loss of special profit would ensue, it was error to admit evidence showing what the special profit would have been during the time the mill was shut down, as the proper measure of damages was the legal interest on the capital invested, and such other damages as were the direct and necessary result of defendant's negligence. Sharpe *v.* Southern R. Co., 130 N. C. 613, 41 S. E. 799.

74. *Alabama.*— Reed Lumber Co. *v.* Lewis, 94 Ala. 626, 10 So. 333.

Indiana.— Dunn *v.* Johnson, 33 Ind. 54, 5 Am. Rep. 177.

Maine.— Bridges *v.* Stickney, 38 Me. 361.

Massachusetts.— Fox *v.* Harding, 7 Cush. 516.

Minnesota.— Cushing *v.* Seymour, 30 Minn. 301, 15 N. W. 249.

New York.— Horner *v.* Wood, 16 Barb. 386; Masterton *v.* Brooklyn, 7 Hill 61, 42 Am. Dec. 38.

See 15 Cent. Dig. tit. "Damages," § 72 *et seq.*; and *supra*, VII, C, 3, c.

On a claim against a chattel mortgagee by the mortgagor for loss caused by the improper seizure of the mortgaged property, a steam threshing machine, the mortgagor is not entitled to damages for the loss of possible profits under threshing contracts. Williams *v.* Wood, 55 Minn. 323, 56 N. W. 1066;

breach.[75] Where, however, the knowledge of the subcontract is within the contemplation of the parties when the original contract is made, and is known to have been made in reference thereto, another rule exists and the anticipated gains or profits may be recovered.[76]

e. From Expected Crops. As a general rule where damages are claimed for the destruction of a growing crop the plaintiff can only recover the value of the crop at the time it was destroyed.[77] Profits expected to be realized from crops that have not matured are too speculative and uncertain to be estimated as damages,[78] and especially is this so where no crop has matured upon which a reasonable estimate may be based.[79] In some cases the courts have allowed damages for the injured crop, based upon estimates of other crops raised in the immediate neighborhood and not affected by the injury complained of.[80]

f. From Use of Money. The actual damages arising out of the breach of a contract for the non-payment of money is usually measured by the interest of the money.[81] Anticipated profits in its use are too speculative to be allowed.[82]

g. Entire Loss. Where there has been an entire loss of the property involved

Cushing *v.* Seymour, 30 Minn. 301, 15 N. W. 249.

75. Bridges *v.* Stickney, 38 Me. 361.

76. Where a vendor sold goods with notice that the buyer was buying for the purpose of fulfilling a contract which he had made with a merchant abroad, and part of the goods was not delivered at all, while the part which was delivered was delayed till after the appointed time, it was held in an action against the seller that the buyer was entitled to recover as damages the profit which he would have made from his subcontract. Borries *v.* Hutchinson, 18 C. B. N. S. 445, 11 Jur. N. S. 267, 34 L. J. C. P. 169, 11 L. T. Rep. N. S. 771, 13 Wkly. Rep. 386, 114 E. C. L. 445.

What necessary to be shown.— To warrant recovery, as damages for breach of an agreement to make a loan, of the profits on a contemplated purchase of land, it would be necessary to show that plaintiff had a binding contract for the purchase; that defendant with knowledge of such fact agreed to make the loan; that after compliance with all the requirements and without fault on his part defendant refused to make the loan; that by reason thereof plaintiff was unable to make the purchase; and that he actually lost the benefits claimed by him. Equitable Mortg. Co. *v.* Thorn, (Tex. Civ. App. 1894) 26 S. W. 276.

77. Richardson *v.* Northrup, 66 Barb. (N. Y.) 85; Texas, etc., R. Co. *v.* Young, 60 Tex. 201 [*following* Sabine, etc., R. Co. *v.* Joachimi, 58 Tex. 456]. See also *infra*, XI, C, 2, g.

78. *Alabama.*— Gresham *v.* Taylor, 51 Ala. 505.

Arkansas.— McDaniel *v.* Crabtree, 21 Ark. 431.

New Jersey.—Wolcott *v.* Mount, 36 N. J. L. 262, 13 Am. Rep. 438.

New York.— See Richardson *v.* Northrup, 66 Barb. 85.

North Carolina.— Sledge *v.* Reid, 73 N. C. 440.

Texas.— Texas, etc., R. Co. *v.* Young, 60 Tex. 201; Jones *v.* George, 56 Tex. 149, 42 Am. Rep. 689.

79. Ferris *v.* Comstock, 33 Conn. 513; Butler *v.* Moore, 68 Ga. 780, 45 Am. Rep. 508; Wolcott *v.* Mount, 36 N. J. L. 262, 13 Am. Rep. 438.

80. Payne *v.* Morgan's Louisiana, etc., R., etc., Co., 38 La. Ann. 164, 58 Am. Rep. 174. In an action by a lessee of farming land to recover for a breach of a covenant in the lease to be let into possession, the court at the request of the plaintiff instructed the jury in effect that the plaintiff was entitled to recover the value of the crop that might have been raised on the land by an average farmer during the term, less the cost of raising it, and that they might consider the fact that the plaintiff had the stock and utensils to work and cultivate the land, without hiring it done. At the request of the defendant the court further instructed the jury that in assessing the plaintiff's damage they could not consider damages resulting from the loss of his labor or of the use of his teams. It was held that the instructions were proper and were not conflicting. Rice *v.* Whitmore, 74 Cal. 619, 16 Pac. 501, 5 Am. St. Rep. 479. In Page *v.* Pavey, 8 C. & P. 769, 34 E. C. L. 1011 [*cited* in Passinger *v.* Thorburn, 34 N. Y. 634, 90 Am. Dec. 753], the plaintiff sued for a breach of warranty in the sale of wheat. The declaration alleged a sale of old cone wheat for seed, with a warranty that it would grow, and a breach that it did not grow, whereby the wheat became of no value to the plaintiff and he was deprived of great gains which would have arisen from the straw and corn which would have been produced if it had grown; and it was held that the plaintiff could give evidence of what the value of the crops might have been, with a view to make out his damages, claimed in his declaration. See also Randall *v.* Raper, E. B. & E. 84, 4 Jur. N. S. 662, 27 L. J. Q. B. 266, 6 Wkly. Rep. 445, 96 E. C. L. 84.

81. Greene *v.* Goddard, 9 Metc. (Mass.) 212. See *infra*, XI, D, 10.

82. Greene *v.* Goddard, 9 Metc. (Mass.) 212, 232. In this case the court said: "In the use of the money, instead of realizing great profits, they might have encountered

in the action, then the full value of the property is the measure of damages and there can be no recovery for anticipated profits.[83]

H. Interruption of Business — 1. In General. The reputation and credit of a man in business is of great value, and is as much within the protection of the law as property or other valuable rights. Where the defendant has maliciously and by his wrongful act destroyed the business, credit, and reputation of the plaintiff the law will require him to make good the loss sustained.[84] As a general rule the loss of profits to a business which has been wrongfully interrupted by another is an element of damages for which a recovery may be had, where such profits can be made to appear with reasonable certainty;[85] but the evidence must afford the jury some data from which they can with reasonable certainty determine the loss. Outside of this rule no certain guide for estimating such damages can be established.[86] In an action to recover damages for a loss of profits, no evidence can be given as to the uncertain future profits of a commercial business,

difficulties and sustained injuries unforeseen at the time, and have suffered, like thousands of others. Theirs is not a loss, in the just sense of the term, but the deprivation of an opportunity for making money, which might have proved beneficial, or might have been ruinous; and it is of that uncertain character, which is not to be weighed in the even balances of the law, nor to be ascertained by well established rules of computation among merchants."

83. Erie City Iron Works *v.* Barber, 106 Pa. St. 125, 51 Am. Rep. 508; McKnight *v.* Ratcliff, 44 Pa. St. 156; The Lively, 15 Fed. Cas. No. 8,403, 1 Gall. 315. See also *infra*, XI, C, 1, a.

84. Lawrence *v.* Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Chapman *v.* Kirby, 49 Ill. 211.

In an action for the wrongful seizure by a sheriff of the stock in trade of plaintiff, and the closing of his place of business, which involves damages for trespass as well as the conversion, the loss of profits during the time plaintiff was kept out of possession is a proper element of damages. Ebenreiter *v.* Dahlman, 19 Misc. (N. Y.) 9, 42 N. Y. Suppl. 867.

Where defendant is liable for destroying plaintiff's business by fire, gains prevented during the reconstruction of plaintiff's place of business are proper elements of damage. Choctaw, etc., R. Co. *v.* Alexander, 7 Okla. 579, 52 Pac. 944.

Where license is given to persons about to excavate for a building to enter on adjoining premises to a limited extent only, for the purpose of shoring up the wall, and the license is exceeded, the licensers may recover damages for loss of profits on work for which the licensers had orders, and which they were prevented from doing by acts of the licensees. Capel *v.* Lyons, 3 Misc. (N. Y.) 73, 22 N. Y. Suppl. 378.

85. *California.*— Lambert *v.* Haskell, 80 Cal. 611, 22 Pac. 327.

Illinois.— Chapman *v.* Kirby, 49 Ill. 211; Sherman *v.* Dutch, 16 Ill. 283.

Kansas.— States *v.* Durkin, 65 Kan. 101, 68 Pac. 1091 [*following* Brown *v.* Hadley, 43 Kan. 267, 23 Pac. 492].

Maryland.— Lawson *v.* Price, 45 Md. 123; Shafer *v.* Wilson, 44 Md. 268.

Massachusetts.— White *v.* Moseley, 8 Pick. 356.

New York.— Menard *v.* Stevens, 44 N. Y. Super. Ct. 515; Walter *v.* Post, 6 Duer 363, 4 Abb. Pr. 382.

Texas.— San Antonio *v.* Royal, (1891) 16 S. W. 1101.

See 15 Cent. Dig. tit. "Damages," § 81.

Growing business.— Where the business which had been destroyed by the tort of defendants was a growing one, had been running about two years, the selling price of the machines which plaintiff sold was fixed, and the cost to plaintiff fixed at a given percentage of such price, and a large number of orders were on hand at the time defendants committed such wrongful acts, and a number of orders were received by plaintiff after that time, it was held proper, in estimating plaintiff's damages, to consider his future profits of the business for such time as would elapse before the contract could be legally terminated. Oliver *v.* Perkins, 92 Mich. 304, 52 N. W. 609.

Malicious tort.—In trespass for damages on the execution of a distress warrant, plaintiff may recover as special damages the loss suffered by the interruption of business and injuries received, where books of peculiar value and files of papers indispensable to the business are maliciously taken. Sherman *v.* Dutch, 16 Ill. 283. So in an action to recover damages for loss of trade, where the evidence showed that the plaintiff was a horseshoer; that one R was a customer of his; that defendant, with the intent of making R believe that the work of plaintiff was badly done, secretly loosened a shoe on R's horse shortly after it had been placed there by plaintiff; and that R was thereby induced to believe that plaintiff was not a skilful workman, it was held that plaintiff was entitled to damages resulting from the loss of R's custom. Hughes *v.* McDonough, 43 N. J. L. 459, 39 Am. Rep. 603.

86. In Lehman *v.* McQuown, 31 Fed. 138, personalty of a debtor was sold at sheriff's sale, and bought by the debtor's wife for less than its value. A creditor thereupon secured

nor can the amount of past profits derived therefrom be shown to enable the jury to conjecture what the future profits might be.[87] The plaintiff in such action has a right to prove the business in which he was engaged, its extent, and the particular part transacted by him, and if he can, the compensation usually paid to persons doing such business for others. These circumstances the jury have a right to consider in fixing the value of his time. But they ought not to be permitted to speculate as to the uncertain profits of commercial ventures in which the plaintiff, if uninjured, would have been engaged.[88] Past profits[89] cannot be taken as an exact measure of future profits; but all the various contingencies by which

the appointment of a receiver to take charge of the property so bought and restrained interference, alleging fraud. The *bona fides* of the transaction was afterward established, and the receiver settled his accounts, and was discharged, and turned over to the purchaser the residue of the property in his hands. Under such circumstances it was held in an action on the injunction bond that the profits which might have been made by the use of the property if the possession of the receiver had not been disturbed are so far speculative that in the absence of clear testimony they could not be measured by any exact standard.

Loss of rent.— One whose tenants have left because of the encroachment of a defective and dangerous retaining wall on his property may recover his loss of rents as part of the damages. Goldschmid *v.* New York, 14 N. Y. App. Div. 135, 43 N. Y. Suppl. 447. So in Burruss *v.* Hines, 94 Va. 413, 26 S. E. 875, it was held that damages might be recovered for the net rental value for delay in construction of a building on plaintiff's lot, caused by defendant's building overhanging the lot and defendant's delaying removal thereof, construction having been contracted for and commenced, and the building having been rented in advance, from a certain time, for a definite period, at a specified rent. But in an action for failure to construct an elevator in an office building according to contract, damages from failure to rent the rooms are too speculative to be recoverable. Clifford *v.* Leroux, 14 Tex. Civ. App. 340, 37 S. W. 172, 254.

87. These profits depend upon too many contingencies and are altogether too uncertain to furnish a safe guide in fixing the amount of damages.

Arkansas.— Brockway *v.* Thomas, 36 Ark. 518.

California.— Martin *v.* Deetz, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151.

Georgia.— Cooper *v.* Young, 22 Ga. 269, 68 Am. Dec. 502. In Smith *v.* Eubanks, 72 Ga. 280, it was held that where a party was ejected from leased premises, it was error to make the profits of his successor in business the measure of how much the plaintiff could have made if the eviction had not taken place.

Indiana.— Glass *v.* Garber, 55 Ind. 336.

Kansas.— Mitchell *v.* Woods, 17 Kan. 26.

Maine.— Ripley *v.* Mosely, 57 Me. 76.

Minnesota.— Casper *v.* Klippen, 61 Minn. 353, 63 N. W. 737, 52 Am. St. Rep. 604; O'Neil *v.* Johnson, 53 Minn. 439, 55 N. W. 601, 39 Am. St. Rep. 615; Todd *v.* Minneapolis, etc., R. Co., 39 Minn. 186, 39 N. W. 318.

New York.— Masterton *v.* Mt. Vernon, 58 N. Y. 391.

Ohio.— Cincinnati *v.* Evans, 5 Ohio St. 594.

Wisconsin.— Bierdach *v.* Goodyear Rubber Co., 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19.

United States.— New York, etc., Co. *v.* Fraser, 130 U. S. 611, 9 S. Ct. 665, 32 L. ed. 1031; Central Coal, etc., Co. *v.* Hartman, 111 Fed. 96, 49 C. C. A. 244.

See 15 Cent. Dig. tit. "Damages," § 72 *et seq.*

Seizure of property.— Loss sustained by a mercantile firm, from the seizure of their property, in the diminution of their business and its consequent profits, subsequent to the release of the property from the seizure, is not an element of damage susceptible of computation with any reasonable degree of accuracy, and evidence concerning it is properly excluded from the jury. Selden *v.* Cashman, 20 Cal. 56, 81 Am. Dec. 93.

The mere opinion of a witness as to the prospective profits which might have been realized from the use of property if the same had not been taken from his possession is inadmissible, such evidence being too uncertain and speculative to furnish a safe guide to the jury in estimating damages. Crabbs *v.* Koontz, 69 Md. 59, 13 Atl. 591.

88. Masterton *v.* Mt. Vernon, 58 N. Y. 391; Bierdach *v.* Goodyear Rubber Co., 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19. In Blair *v.* Milwaukee, etc., R. Co., 20 Wis. 262, it was held that the opinions of witnesses as to the amount of the loss suffered by the absence of a member of the firm on account of personal injuries received by him were inadmissible, although they might be merchants residing in the vicinity of the plaintiff and well acquainted with his business, and that such opinions were mere conjectures and did not furnish a safe guide to the verdict of the jury. See also Lincoln *v.* Saratoga, etc., R. Co., 23 Wend. (N. Y.) 425.

89. Past profits have been allowed for the purpose of measuring future profits both in actions *ex contractu* and *ex delicto*, although more frequently in the latter, where from the nature of the case no element of greater certainty appeared, and the actual damages must be more or less a matter of opinion. Allison *v.* Chandler, 11 Mich. 542. In es-

such profits would probably be affected should be taken into consideration by the jury.[90]

2. Established Business. Where an established business is wrongfully injured, destroyed, or interrupted, the owner of such business can recover damages sustained;[91] but in all such cases it must be made to appear that the business which is claimed to have been interrupted was an established one; that it had been successfully conducted for such a length of time and had such a trade established that the profits thereof are reasonably ascertainable.[92]

3. New Business. Where a new business or enterprise is floated and damages by way of profit are claimed for its interruption or prevention, they will be denied for the reason that such business is an adventure, as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation.[93]

4. Illegal Business. No damages, exemplary or otherwise, should be allowed for the interruption of an illegal business.[94]

5. Riparian Rights. Where interruption of business occurs through neglect of or interference with riparian rights, and the loss of profits can be definitely established, they may be included in the estimate of damages.[95]

I. Expenses — 1. In General. As a general rule a party is entitled to recover as damages all reasonable expenses to which he may have been put in consequence

timating the losses sustained by reason of the destruction of plaintiff's business, it is proper for the jury to take into consideration the extent of plaintiff's business, and his profits for a reasonable period next preceding the time when the injury was inflicted, leaving the defendant to show that by depression in trade or from other causes the profits would have been less. Chapman *v.* Kirby, 49 Ill. 211; Peltz *v.* Eichele, 62 Mo. 171.

90. Allison *v.* Chandler, 11 Mich. 542. And see *infra*, VII, H, 2.

91. *California.*— Lambert *v.* Haskell, 80 Cal. 611, 22 Pac. 327.

Michigan.— Allison *v.* Chandler, 11 Mich. 542.

Minnesota.— Goebel *v.* Hough, 26 Minn. 252, 2 N. W. 847.

Rhode Island.— Simmons *v.* Brown, 5 R. I. 299, 73 Am. Dec. 66.

United States.— Central, etc., Coal Co. *v.* Hartman, 111 Fed. 96, 49 C. C. A. 244.

See 15 Cent. Dig. tit. "Damages," § 79 *et seq.*

92. States *v.* Durkin, 65 Kan. 101, 68 Pac. 1091 [*following* Brown *v.* Hadley, 43 Kan. 267, 23 Pac. 492]. The loss of earning power is an element of damage which may be considered; but the loss of income, which means profits of a business fluctuating widely, and of possible profits in a special contract, cannot be regarded as a legitimate basis of recovery. People's Pass. R. Co. *v.* Lauderbach, 4 Pennyp. (Pa.) 406.

Suspension by injunction.— Where an established business is suspended by a preliminary injunction, the profits which would have been made can be recovered. And evidence of the profits which were actually being made is admissible upon the question of damages. Lambert *v.* Haskell, 80 Cal. 611, 22 Pac. 327.

93. *Georgia.*— Kenny *v.* Collier, 79 Ga. 743, 8 S. E. 58; Red *v.* Augusta, 25 Ga. 386.

Illinois.— Greene *v.* Williams, 45 Ill. 206.

Kansas.— States *v.* Durkin, 65 Kan. 101, 68 Pac. 1091.

Massachusetts.— Townsend *v.* Nickerson Wharf Co., 117 Mass. 501.

New York.— Giles *v.* O'Toole, 4 Barb. 261 [*following* Blanchard *v.* Ely, 21 Wend. 342, 34 Am. Dec. 250]; Morey *v.* Metropolitan Gas Light Co., 38 N. Y. Super. Ct. 185.

See 15 Cent. Dig. tit. "Damages," § 79 *et seq.*

Preventing plaintiff from engaging in new business.— When a party, being about to embark in a new business, is wrongfully prevented by another, he cannot recover expected profits, because there can be nothing to show that such profits would have been made. Consumers' Pure Ice Co. *v.* Jenkins, 58 Ill. App. 519.

94. Kane *v.* Johnston, 9 Bosw. (N. Y.) 154; Kauffman *v.* Babcock, 67 Tex. 241, 2 S. W. 878.

Where a party carries on an illegal business in connection with a legal one the court should instruct that no estimate should be made as to that which was illegal. Kauffman *v.* Babcock, 67 Tex. 241, 2 S. W. 878.

95. Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. 686; Gibson *v.* Fischer, 68 Iowa 29, 25 N. W. 914; Lawson *v.* Price, 45 Md. 123; Simmons *v.* Brown, 5 R. I. 299, 73 Am. Dec. 66.

In an action by the owner of a factory against the owners of a mill on the same stream above for unlawfully detaining the water from his factory, the measure of damages is the value of the use of the water to the plaintiffs, situated as they were, during the time they were wrongfully deprived of it. Speculative profits are not recoverable. Pollitt *v.* Long, 58 Barb. (N. Y.) 20.

of the wrong or injury inflicted;[96] but this rule is not one of universal application. There are certain expenses which are recognized by the law as reasonable, legitimate, and necessary, while others are regarded with suspicion and are only recoverable upon positive proof.[97]

2. INJURY TO PROPERTY. Any expense incurred by the loss or injury to property is usually compensated in damages.[98] It is not necessary that money should

96. *Connecticut.*— Ashcraft *v.* Chapman, 38 Conn. 230; Hawley *v.* Belden, 1 Conn. 93.

Georgia.— Brown *v.* South Western R. Co., 36 Ga. 377.

Illinois.— Chicago, etc., R. Co. *v.* Cleminger, 178 Ill. 536, 53 N. E. 320 [*affirming* 77 Ill. App. 186]; Chicago, etc., R. Co. *v.* Holland, 122 Ill. 461, 13 N. E. 145; St. Louis, etc., R. Co. *v.* Capps, 72 Ill. 188; Chicago, etc., R. Co. *v.* Harrington, 77 Ill. App. 499.

Indiana.— Sullivan County *v.* Arnett, 116 Ind. 438, 19 N. E. 299.

Iowa.— Kendall *v.* Albia, 73 Iowa 241, 34 N. W. 833; Smith *v.* Chicago, etc., R. Co., 38 Iowa 518.

Kansas.— Hutchinson *v.* Van Cleve, 7 Kan. App. 676, 53 Pac. 888; Abilene *v.* Wright, 4 Kan. App. 708, 46 Pac. 715.

Louisiana.— Goodloe *v.* Rogers, 9 La. Ann. 273, 61 Am. Dec. 205; Findley *v.* Breedlove, 4 Mart. N. S. 105.

Maine.— Sanford *v.* Augusta, 32 Me. 536; Watson *v.* Lisbon Bridge, 14 Me. 201, 31 Am. Dec. 49.

Massachusetts.—Dickinson *v.* Talmage, 138 Mass. 249; Benson *v.* Malden, etc., Gaslight Co., 6 Allen 149; Holt *v.* Sargent, 15 Gray 97.

Michigan.— Sherwood *v.* Chicago, etc., R. Co., 82 Mich. 374, 46 N. W. 773; Tracy *v.* Butters, 40 Mich. 406.

Missouri.— Shelby *v.* Missouri Pac. R. Co., 77 Mo. App. 205.

Nebraska.— Omaha St. R. Co. *v.* Emminger, 57 Nebr. 240, 77 N. W. 675; Minneapolis Threshing Mach. Co. *v.* Regier, 51 Nebr. 402, 70 N. W. 934; Barr *v.* Kimball, 43 Nebr. 766, 62 N. W. 196; Bryant *v.* Barton, 32 Nebr. 613, 49 N. W. 331; Long *v.* Clapp, 15 Nebr. 417, 19 N. W. 467.

New Hampshire.— Holyoke *v.* Grand Trunk R. Co., 48 N. H. 541; Woodbury *v.* Jones, 44 N. H. 206.

New York.— Wilson *v.* New York Cent. R. Co., 4 Abb. Dec. 618, 3 Keyes 381, 2 Transcr. App. 298; McPhillips *v.* Fitzgerald, 76 N. Y. App. Div. 15, 78 N. Y. Suppl. 631; Nelson *v.* Hatch, 70 N. Y. App. Div. 206, 75 N. Y. Suppl. 389; Seamans *v.* Smith, 46 Barb. 320; Eagle Tube Co. *v.* Edward Barr Co., 16 Daly 212, 10 N. Y. Suppl. 113; Jackson Architectural Iron Works *v.* Hurlburt, 15 Misc. 93, 36 N. Y. Suppl. 808; Hutton *v.* Murphy, 9 Misc. 151, 29 N. Y. Suppl. 70; Healy *v.* Bulkley, 10 N. Y. Suppl. 702.

Ohio.— Hill *v.* Anderson, 9 Ohio S. & C. Pl. Dec. 480.

Pennsylvania.— Hawes *v.* O'Reilly, 126 Pa. St. 440, 17 Atl. 642.

South Carolina.— Hart *v.* Charlotte, etc., R. Co., 33 S. C. 427, 12 S. E. 9, 10 L. R. A. 794.

Texas.— Gulf, etc., R. Co. *v.* Keith, 74 Tex. 287, 11 S. W. 1117; Trinity, etc., R. Co. *v.* Schofield, 72 Tex. 496, 10 S. W. 575; San Antonio, etc., R. Co. *v.* Moore, (Civ. App. 1903) 72 S. W. 226; Watkins *v.* Junker, (Civ. App. 1897) 38 S. W. 1129; Westfall *v.* Perry, (Civ. App. 1893) 23 S. W. 740; Tompkins Co. *v.* Galveston St. R. Co., 4 Tex. Civ. App. 1, 23 S. W. 25.

Vermont.—Hathaway *v.* Sabin, 63 Vt. 527, 22 Atl. 633.

Wisconsin.— Hulehan *v.* Green Bay, etc., R. Co., 68 Wis. 520, 32 N. W. 529; Zitske *v.* Goldberg, 38 Wis. 216; Johannesson *v.* Borschenius, 35 Wis. 131.

United States.— Switzerland Mar. Ins. Co. *v.* The Umbria, 46 Fed. 927.

England.— Smeed *v.* Foord, 1 E. & E. 602, 5 Jur. N. S. 291, 28 L. J. Q. B. 178, 7 Wkly. Rep. 266, 102 E. C. L. 602; Prior *v.* Wilson, 1 L. T. Rep. N. S. 549, 8 Wkly. Rep. 260.

Canada.—Whittaker *v.* Welch, 15 N. Brunsw. 436; Morrison *v.* European, etc., R. Co., 15 N. Brunsw. 295; McGowan *v.* Betts, 15 N. Brunsw. 90.

See 15 Cent. Dig. tit. "Damages," § 89 *et seq.*; and *infra*, XI, B, 4, a.

97. *Illinois.*— Indianapolis, etc., R. Co. *v.* Birney, 71 Ill. 391.

Maryland.— Borden Min. Co. *v.* Barry, 17 Md. 419; Benson *v.* Atwood, 13 Md. 20, 71 Am. Dec. 611.

Massachusetts.— Warner *v.* Bacon, 8 Gray 397, 69 Am. Dec. 253.

New York.— Mailler *v.* Express Propeller Line, 61 N. Y. 312; Myers *v.* Burns, 35 N. Y. 269.

England.— Hamlin *v.* Great Northern R. Co., 1 H. & N. 408, 2 Jur. N. S. 1122, 26 L. J. Exch. 20, 5 Wkly. Rep. 76. In Le Blanche *v.* London, etc., R. Co., 1 C. P. D. 286, 45 L. J. C. P. 521, 34 L. T. Rep. N. S. 667, 24 Wkly. Rep. 808, it was held that the plaintiff could not recover the expense of hiring a special train where he had been delayed on his journey.

See 15 Cent. Dig. tit. "Damages," § 89 *et seq.*; and *infra*, VII, I, 2 *et seq.*

98. *Illinois.*— St. Louis, etc., R. Co. *v.* Capps, 72 Ill. 188; Ottawa Gas Light, etc., Co. *v.* Graham, 28 Ill. 73, 81 Am. Dec. 263.

Louisiana.— Findley *v.* Breedlove, 4 Mart. N. S. 105.

Massachusetts.— Holt *v.* Sargent, 15 Gray 97; Brown *v.* Smith, 12 Cush. 366.

Michigan.— Tracy *v.* Butters, 40 Mich. 406.

Nebraska.— Long *v.* Clapp, 15 Nebr. 417, 19 N. W. 467.

have been actually paid out for expenses in order to be recovered. It is enough that it is liable to be paid.[99]

3. Attempt to Prevent Loss or Injury to Property. In attempting to prevent loss or injury to property a reasonable compensation for time and labor necessarily expended will be allowed as damages;[1] and especially is this so in case of injury to animals.[2]

4. Breach of Contract — a. In General. As a general rule a party is entitled to all legitimate expenses that may be shown to flow from or follow the breach of a legitimate contract,[3] provided it appears that such expenses were the natural

New York.— McPhillips *v.* Fitzgerald, 76 N. Y. App. Div. 15, 78 N. Y. Suppl. 631; Jackson Architectural Iron Works *v.* Hurlbut, 15 Misc. 93, 26 N. Y. Suppl. 808; Hutton *v.* Murphy, 9 Misc. 151, 29 N. Y. Suppl. 70.

Texas.— Trinity, etc., R. Co. *v.* Schofield, 72 Tex. 496, 10 S. W. 575; International, etc., R. Co. *v.* Cocke, 64 Tex. 151.

Wisconsin.— Zitske *v.* Goldberg, 38 Wis. 216.

United States.— The Amiable Nancy, 1 Fed. Cas. No. 331, 1 Paine 111. And see Switzerland Mar. Ins. Co. *v.* The Umbria, 46 Fed. 927.

Canada.—Whittaker *v.* Welch, 15 N. Brunsw. 436.

See 15 Cent. Dig. tit. "Damages," § 91.

Expenses paid to the sheriff in connection with the safe-keeping of property replevied are recoverable as damages. McGowan *v.* Betts, 15 N. Brunsw. 90.

99. Minneapolis Threshing Mach. Co. *v.* Regier, 51 Nebr. 402, 70 N. W. 934; Eagle Tube Co. *v.* Edward Barr Co., 16 Daly (N. Y.) 212, 10 N. Y. Suppl. 113 [*citing* Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487].

Services rendered by plaintiffs which are a necessary expense may be recovered for as part of the damages for breach of a contract, as though they had been rendered by others and paid for. Forsyth *v.* Mann, 68 Vt. 116, 34 Atl. 481, 32 L. R. A. 788.

1. *Georgia.*— Savannah, etc., R. Co. *v.* Pritchard, 77 Ga. 412, 1 S. E. 261, 4 Am. St. Rep. 92.

Indiana.— Sullivan County *v.* Arnett, 116 Ind. 438, 19 N. E. 299.

Iowa.— Smith *v.* Chicago, etc., R. Co., 38 Iowa 518 [*following* Chicago, etc., R. Co. *v.* Ward, 16 Ill. 522].

Kansas.— St. Louis, etc., R. Co. *v.* Ritz, 33 Kan. 404, 6 Pac. 533.

Maine.— Merrill *v.* How, 24 Me. 126; Watson *v.* Lisbon Bridge, 14 Me. 201, 31 Am. Dec. 49; Bucknam *v.* Nash, 12 Me. 474.

New York.—Sprague *v.* McKinzie, 63 Barb. 60; Seamans *v.* Smith, 46 Barb. 320; Armstrong *v.* Smith, 44 Barb. 120; Parmalee *v.* Wilks, 22 Barb. 539; Hough *v.* Bowe, 51 N. Y. Super. Ct. 207; Miller *v.* Garling, 12 How. Pr. 203.

Tennessee.— Nashville *v.* Sutherland, 94 Tenn. 356, 29 S. W. 228.

Texas.— Gulf, etc., R. Co. *v.* Keith, 74 Tex. 287, 11 S. W. 1117.

Vermont.— Trow *v.* Thomas, 70 Vt. 580, 41 Atl. 652.

United States.— The Henry Buck, 39 Fed. 211.

England.— Hales *v.* London, etc., R. Co., 4 B. & S. 66, 32 L. J. Q. B. 292, 8 L. T. Rep. N. S. 421, 11 Wkly. Rep. 856, 116 E. C. L. 66.

See 15 Cent. Dig. tit. "Damages," § 90.

Injuries to vessels.—The charterer of a vessel, who has been subjected to expense in getting her off from and over a gas-pipe, which was an unlawful obstruction to the navigation of a river, and upon which she caught in passing along a river, while navigated with due care, may maintain an action against those who laid the gas-pipe, to recover for such expense, but not for any delay in his business or other consequential damages. Benson *v.* Malden, etc., Gaslight Co., 6 Allen (Mass.) 149. So in an action against the master of a vessel for breaking up the voyage and disposing of the vessel, the expense of bringing home the vessel from a port to which the master has wrongfully navigated her is a legal element of damages. Brown *v.* Smith, 12 Cush. (Mass.) 366.

2. *Georgia.*—Atlanta Cotton-Seed Oil Mills *v.* Coffey, 80 Ga. 145, 4 S. E. 759, 12 Am. St. Rep. 244.

Indiana.— Sullivan County *v.* Arnett, 116 Ind. 438, 19 N. E. 299.

Maine.— Watson *v.* Lisbon Bridge, 14 Me. 201, 31 Am. Dec. 49.

New York.— Hutton *v.* Murphy, 9 Misc. 151, 29 N. Y. Suppl. 70.

Texas.— Gulf, etc., R. Co. *v.* Keith, 74 Tex. 287, 11 S. W. 1117; International, etc., R. Co. *v.* Cocke, 64 Tex. 151.

Wisconsin.— Zitske *v.* Goldberg, 38 Wis. 216.

See 15 Cent. Dig. tit. "Damages," § 90; and *infra*, XI, C, 1, b.

Expenses unavailing.— Where plaintiff's horse was injured so as to be entirely worthless through defendant's negligence, and plaintiff acting in good faith, and in the belief that the horse might be helped and made of some value, expended money in care and medical treatment without avail, he is entitled to recover for the money so expended in addition to the value of the horse. Ellis *v.* Hilton, 78 Mich. 150, 43 N. W. 1048, 18 Am. St. Rep. 438, 6 L. R. A. 454.

3. *Connecticut.*—Hawley *v.* Belden, 1 Conn. 93.

consequence of the breach,[4] and are reasonable, having regard to all the circumstances of the particular case.[5] In case the expenses are disconnected with the original contract or form no integral part within the contemplation of the parties at the time that the contract was made there can be no recovery;[6] but where such damages are denied it will always be found that the expenses claimed hinge upon some item of the contract not within the contemplation of the parties or something remote from the contract itself.[7]

Georgia.— Brown *v.* South Western R. Co., 36 Ga. 377.

Louisiana.— Findley *v.* Breedlove, 4 Mart. N. S. 105.

Maine.— McPheters *v.* Moose River Log Driving Co., 78 Me. 329, 5 Atl. 270.

Massachusetts.—Dickinson *v.* Talmage, 138 Mass. 249; Benson *v.* Malden, etc., Gaslight Co., 6 Allen 149; Brown *v.* Smith, 12 Cush. 366.

Nebraska.— Long *v.* Clapp, 15 Nebr. 417, 19 N. W. 467.

New York.— Wilson *v.* New York Cent. R. Co., 4 Abb. Dec. 618, 3 Keyes 381, 2 Transcr. App. 298; Freeman *v.* Clute, 3 Barb. 424; Eagle Tube Co. *v.* Edward Barr Co., 16 Daly 212, 10 N. Y. Suppl. 113; Healy *v.* Bulkley, 10 N. Y. Suppl. 702.

Texas.— Westfall *v.* Perry, (Civ. App. 1893) 23 S. W. 740; Tompkins Co. *v.* Galveston St., etc., R. Co., 4 Tex. Civ. App. 1, 23 S. W. 25.

Vermont.— Hathaway *v.* Sabin, 63 Vt. 527, 22 Atl. 633.

Wisconsin.— Johannesson *v.* Borschenius, 35 Wis. 131.

United States.— Switzerland Mar. Ins. Co. *v.* The Umbria, 46 Fed. 927.

See 15 Cent. Dig. tit. "Damages," § 96; and *infra*, XI, D, 1.

In an action by the surety on a promissory note against the payee for breach of contract to forbear payment thereof, the surety is entitled to recover as damages the amount paid by him to the payee as the consideration for the contract, and the costs he paid in the suit on the note, but not for any consequential damages, or for any trouble and expense he had been put to in raising the money to pay the note. Deyo *v.* Waggoner, 19 Johns. (N. Y.) 241.

4. Eagle Tube Co. *v.* Edward Barr Co., 16 Daly (N. Y.) 212, 10 N. Y. Suppl. 113 [*citing* Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487]; Slaughter *v.* Denmead, 88 Va. 1019, 14 S. E. 833. Where it may be inferred that at the time of entering into a contract for the erection of a sugar-mill and engine on plaintiff's plantation, it was contemplated by the parties that the mill should be erected in time to take care of the crop next succeeding the time of entering into the contract, and the defendant failed to erect the mill in time to care for such crop, the plaintiff may recover damages for loss of his crop and extra wages paid to his help in consequence of the delay. Goodloe *v.* Rogers, 9 La. Ann. 273, 61 Am. Dec. 205.

5. Kiralfy *v.* Macauley, 9 Ohio Dec. (Reprint) 833, 17 Cinc. L. Bul. 331; Le Blanche *v.* London, etc., R. Co., 1 C. P. D. 286, 45 L. J. C. P. 521, 34 L. T. Rep. N. S. 667, 24 Wkly. Rep. 808.

One mode of determining what would be reasonable is to consider whether under the circumstances a prudent person would have adopted such a course. Le Blanche *v.* London, etc., R. Co., 1 C. P. D. 286, 45 L. J. C. P. 521, 34 L. T. Rep. N. S. 667, 24 Wkly. Rep. 808.

Extra cost of hands and skilled labor.— In an action brought by plaintiff against defendant for breach of agreement not to go into business for a certain time, by reason of which breach plaintiff claimed he had been compelled to pay a higher rate of wages, and also that a number of his workmen had gone to the defendant, it was held that the plaintiff was entitled to recover reasonable damages for extra cost of hands and loss by skilled labor leaving plaintiff and going to defendant, and that four hundred and sixty-nine dollars were not excessive damages. Whittaker *v.* Welch, 15 N. Brunsw. 436.

6. *Alabama.*— Mason *v.* Alabama Iron Co., 73 Ala. 270.

Arkansas.— Goodell *v.* Bluff City Lumber Co., 57 Ark. 203, 21 S. W. 104.

Iowa.— Novelty Iron Works *v.* Capital City Oatmeal Co., 88 Iowa 524, 55 N. W. 518.

Massachusetts.— Noble *v.* Ames Mfg. Co., 112 Mass. 492.

North Carolina.— Crawford *v.* Geiser Mfg. Co., 88 N. C. 554.

Oregon.— Mackey *v.* Olssen, 12 Oreg. 429, 8 Pac. 357.

Pennsylvania.— Beaupland *v.* McKeen, 28 Pa. St. 124, 70 Am. Dec. 115.

Utah.— Hawley *v.* Corey, 9 Utah 175, 33 Pac. 695.

See 15 Cent. Dig. tit. "Damages," § 96.

Gratuitous act.—Where plaintiff, on the promise of defendant to make papers giving her property to plaintiff's wife after defendant's death, if plaintiff would move "from his residence" to defendant's home and take care of her, moved his buildings on to defendant's property, he cannot recover therefor, on defendant's repudiation of the agreement and refusal to allow plaintiff to remove them; moving the buildings having been either a gratuitous act, or at most a means by which plaintiff enabled himself to do his stipulated part. Kenerson *v.* Colgan, 164 Mass. 166, 41 N. E. 122.

7. *Alabama.*— Burton *v.* Henry, 90 Ala. 281, 7 So. 925.

Arkansas.— Goodell *v.* Bluff City Lumber Co., 57 Ark. 203, 21 S. W. 104.

b. Expenses Incurred in Reliance Upon Contract. It is a well-known rule of law that all necessary expenses incurred by a party in complying with the terms of the contract, and which may be shown in evidence, may be recovered as damages in an action for the breach thereof.[8]

c. Changing Location. Where in accordance with the contract a person has been induced to change his then present place of abode, the expenses connected with his removal can be recovered in case of breach of the contract.[9]

5. Personal Injuries. In an action for personal injuries a party is entitled to recover as damages all reasonable expenses paid or incurred by him for the treat-

Iowa.— Raridan *v.* Central Iowa R. Co., 69 Iowa 527, 29 N. W. 599.

Kentucky. — Singleton *v.* Kennedy, 9 B. Mon. 222.

Massachusetts.—Warner *v.* Bacon, 8 Gray 397, 69 Am. Dec. 253.

New Hampshire.— Richards *v.* Whittle, 16 N. H. 259; Stevens *v.* Lyford, 7 N. H. 360.

North Carolina.— Crawford *v.* Geiser Mfg. Co., 88 N. C. 554.

Pennsylvania.— Beaupland *v.* McKeen, 28 Pa. St. 124, 70 Am. Dec. 115.

Washington. — Adamant Plastering Mfg. Co. *v.* National Bank of Commerce, 5 Wash. 232, 31 Pac. 634.

See 15 Cent. Dig. tit. "Damages," § 96.

Attempted fraud.— A person against whom a false and fraudulent claim is made cannot recover of the claimant the expense which he incurs in investigating and detecting the attempted fraud. Enfield *v.* Colburn, 63 N. H. 218.

In an action for the breach of a covenant contained in an agreement, the plaintiff cannot recover back money which he has paid the defendant to induce him to enter into the agreement, the agreement being still subsisting and unrescinded. Shepard *v.* Ryers, 15 Johns. (N. Y.) 497.

Where one advertises and sells a proprietary article in a specified territory in violation of a contract, the other party cannot recover as damages any money spent by him in advertising for the purpose of counteracting the effect thereof, since he might in the first instance have resorted to the courts for the protection of his rights. Fowle *v.* Park, 48 Fed. 789.

8. *Connecticut.*— Hawley *v.* Belden, 1 Conn. 93.

Georgia.— Bryan *v.* Southwestern R. Co., 41 Ga. 71; Coweta Falls Mfg. Co. *v.* Rogers, 19 Ga. 416, 65 Am. Dec. 602.

Iowa.— Novelty Iron Works *v.* Capital City Oatmeal Co., 88 Iowa 524, 55 N. W. 518.

Kansas.— Paola Gas Co. *v.* Paola Glass Co. 56 Kan. 614, 44 Pac. 621, 54 Am. St. Rep. 598.

Kentucky.— Kentucky Tobacco Assoc. *v.* Ashby, 9 Ky. L. Rep. 109.

Maine.— McPheters *v.* Moose River Log Driving Co., 78 Me. 329, 5 Atl. 270.

Missouri.—Athletic Baseball Assoc. *v.* St. Louis Sportsman's Park, etc., Assoc., 67 Mo. App. 653.

New Mexico.— Orman *v.* Hager, 3 N. M. 331, 9 Pac. 363.

New York.— Nelson *v.* Hatch, 70 N. Y. App. Div. 206, 75 N. Y. Suppl. 389; Day *v.* New York Cent. R. Co., 22 Hun 412; Parmalee *v.* Wilks, 22 Barb. 539; Healy *v.* Bulkley, 10 N. Y. Suppl. 702.

Ohio.— Seely *v.* State, 11 Ohio 501; Kiralfy *v.* Macauley, 9 Ohio Dec. (Reprint) 833, 17 Cinc. L. Bul. 331; Hill *v.* Anderson, 9 Ohio S. & C. Pl. Dec. 480.

South Dakota. — Gleckler *v.* Slavens, 5 S. D. 364, 59 N. W. 323.

Texas. — Watkins *v.* Junker, (Civ. App. 1897) 38 S. W. 1129.

Vermont.— See Hathaway *v.* Sabin, 63 Vt. 527, 22 Atl. 633.

Washington.— Skagit R., etc., Co. *v.* Cole, 2 Wash. 57, 25 Pac. 1077.

Wisconsin. — Johannesson *v.* Borschenius, 35 Wis. 131.

See 15 Cent. Dig. tit. "Damages," § 93.

Expenditures in anticipation.— Expenses caused in great part by apprehension of injury based upon mere rumors are not recoverable as damages for breach of contract. Holt *v.* Silver, 169 Mass. 435, 48 N. E. 837.

9. Bryant *v.* Barton, 32 Nebr. 613, 49 N. W. 331; Woodbury *v.* Jones, 44 N. H. 206. Where a party agrees to demise certain premises to another, who proceeds with his family and furniture to the place where the premises are situated, and the landlord refuses to give possession, the tenant may recover the damages sustained by him by such removal of his family and furniture, although special damage is not alleged in the declaration. Driggs *v.* Dwight, 17 Wend. (N. Y.) 71, 31 Am. Dec. 283. Where a property-owner, by reason of the conditions of a grant by the city of the right of way to a railroad, is entitled to recover from such company for damages to his business caused by the construction of the road, and for the expense of removing such business to a place where it would not be interrupted by the operation of the road, he is, in case he should choose to remain and submit to the interruption of his business, entitled to recover as damages the necessary cost of removing to a place free from such interruption. St. Louis, etc., R. Co. *v.* Capps, 72 Ill. 188.

Where a tenant was induced to take the lease by false representations as to the condition of the premises, and because of their condition he was compelled to move his business therefrom, he may recover as damages the actual expense of such removal. Barr *v.* Kimball, 43 Nebr. 766, 62 N. W. 196.

ment of such injury,[10] and indeed some cases have gone so far as to announce the doctrine that not only is actual payment by plaintiff unnecessary, but that plaintiff may recover as damages in an action for personal injuries such reasonable expenses even when the services were gratuitous,[11] or accepted from members of plaintiff's own family.[12] Such expenses may be recovered as damages in such

10. *Alabama.*— Montgomery St. R. Co. *v.* Mason, 133 Ala. 508, 32 So. 261; Alabama Great Southern R. Co. *v.* Siniard, 123 Ala. 557, 26 So. 689; South, etc., R. Co. *v.* McLendon, 63 Ala. 266; Forbes *v.* Loftin, 50 Ala. 396.

District of Columbia.— Larmon *v.* District of Columbia, 5 Mackey 330.

Illinois.— Illinois Cent. R. Co. *v.* Jernigan, 198 Ill. 297, 65 N. E. 88 [*affirming* 101 Ill. App. 1]; Chicago, etc., R. Co. *v.* Cleminger, 178 Ill. 536, 53 N. E. 320 [*affirming* 77 Ill. App. 186]; Sheridan *v.* Hibbard, 119 Ill. 307, 9 N. E. 901; Chicago *v.* Langlass, 66 Ill. 361; Pierce *v.* Millay, 44 Ill. 189; Chicago, etc., R. Co. *v.* Harrington, 77 Ill. App. 499; St. Louis Consol. Coal Co. *v.* Scheiber, 65 Ill. App. 304.

Indiana.— Indianapolis *v.* Gaston, 58 Ind. 224.

Iowa.— Kendall *v.* Albia, 73 Iowa 241, 34 N. W. 833; Varnham *v.* Council Bluffs, 52 Iowa 698, 3 N. W. 792; McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748; Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462.

Kansas.— Missouri, etc., R. Co. *v.* Weaver, 16 Kan. 456; Tefft *v.* Wilcox, 6 Kan. 46; Hutchinson *v.* Van Cleve, 7 Kan. App. 676, 53 Pac. 888; Abilene *v.* Wright, 4 Kan. App. 708, 46 Pac. 715.

Kentucky.— Kentucky Cent. R. Co. *v.* Ackley, 87 Ky. 278, 8 S. W. 691, 10 Ky. L. Rep. 170, 12 Am. St. Rep. 463.

Maryland.— McMahon *v.* Northern Cent. R. Co., 39 Md. 438.

Massachusetts.—McGarrahan *v.* New York, etc., R. Co., 171 Mass. 211, 50 N. E. 610.

Michigan.— Styles *v.* Decatur, (1902) 91 N. W. 622; Williams *v.* West Bay City, 119 Mich. 395, 78 N. W. 328.

Mississippi.— Memphis, etc., R. Co. *v.* Whitfield, 44 Miss. 466, 7 Am. Rep. 669.

Missouri.— Stephens *v.* Hannibal, etc., R. Co., 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336; Fleming *v.* Kansas City Suburban Belt Line R. Co., 89 Mo. App. 129.

Nebraska.— Omaha, etc., R. Co. *v.* Emminger, 57 Nebr. 240, 77 N. W. 675; Golder *v.* Land, 50 Nebr. 867, 70 N. W. 379.

Nevada.— Cohen *v.* Eureka, etc., R. Co., 14 Nev. 376.

New York.— Sheehan *v.* Edgar, 58 N. Y. 631.

North Carolina.—Wallace *v.* Western North Carolina R. Co., 104 N. C. 442, 10 S. E. 552.

Ohio.— Klein *v.* Thompson, 19 Ohio St. 569; Ohliger *v.* Toledo, 20 Ohio Cir. Ct. 142, 10 Ohio Cir. Dec. 762; Toledo Electric St. R. Co. *v.* Tucker, 13 Ohio Cir. Ct. 411, 7 Ohio Cir. Dec. 169.

Oregon.— Oliver *v.* Northern Pac. Transp. R. Co., 3 Oreg. 84.

Pennsylvania.— Lake Shore, etc., R. Co. *v.* Frantz, 127 Pa. St. 297, 18 Atl. 22, 4 L. R. A. 389; Scott Tp. *v.* Montgomery, 95 Pa. St. 444; Pennsylvania, etc., Canal Co. *v.* Graham, 63 Pa. St. 290, 3 Am. Rep. 549.

South Carolina.— Parker *v.* South Carolina, etc., R. Co., 48 S. C. 364, 26 S. E. 669.

Texas.—San Antonio, etc., R. Co. *v.* Moore, (Civ. App. 1903) 72 S. W. 226; Galveston, etc., R. Co. *v.* Eckles, 25 Tex. Civ. App. 179, 60 S. W. 830.

Utah.— Wilson *v.* Southern Pac. Co., 13 Utah 352, 44 Pac. 1040, 57 Am. St. Rep. 766.

Vermont.— Trow *v.* Thomas, 70 Vt. 580, 41 Atl. 652.

Wisconsin.—Crouse *v.* Chicago, etc., R. Co., 102 Wis. 196, 78 N. W. 446, 778; Goodno *v.* Oshkosh, 28 Wis. 300.

United States.— Denver, etc., R. Co. *v.* Lorentzen, 79 Fed. 291, 24 C. C. A. 592.

See 15 Cent. Dig. tit. "Damages," § 242 *et seq.*

See also *infra*, XI, B, 4.

Additional expense.— Where a person already ill is injured through another's negligence, additional expenses of the illness, which are caused by the injury, are an element of damages. Emery *v.* Boston, etc., R. Co., 67 N. H. 434, 36 Atl. 367.

11. Brosnan *v.* Sweetser, 127 Ind. 1, 22 N. E. 555; Pennsylvania Co. *v.* Marion, 104 Ind. 239, 3 N. E. 874 [*following* Cunningham *v.* Evansville, etc., R. Co., 102 Ind. 478, 1 N. E. 800, 52 Am. Rep. 683]; Varnham *v.* Council Bluffs, 52 Iowa 698, 3 N. W. 792; Klein *v.* Thompson, 19 Ohio St. 569. *Compare* Peppercorn *v.* Blackriver Falls, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818.

Professional custom.— In an action for injuries, plaintiff may recover the reasonable value of the services of a physician, although it appears such physician intends to make no charge for the same on account of plaintiff being a brother physician. Ohliger *v.* Toledo, 20 Ohio Cir. Ct. 142, 10 Ohio Cir. Dec. 762.

12. Brosnan *v.* Sweetser, 127 Ind. 1, 26 N. E. 555; Varnham *v.* Council Bluffs, 52 Iowa 698, 3 N. W. 792; Missouri, etc., R. Co. *v.* Holman, 15 Tex. Civ. App. 16, 39 S. W. 130; Crouse *v.* Chicago, etc., R. Co., 102 Wis. 196, 78 N. W. 446, 778. See also Ft. Worth, etc., R. Co. *v.* Kennedy, 12 Tex. Civ. App. 654, 35 S. W. 335. *Compare* Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. Rep. 705.

The value of services rendered by a wife in nursing her husband for personal injuries sustained by him are recoverable by the husband in an action for such injury. Crouse

an action even though actual payment thereof was not made prior to the commencement of the suit,[13] although some courts have held that it must be shown, either that there had been an actual payment made or that a legal liability to pay had been incurred before a recovery can be had.[14] In those cases in which expenses for medical attention have not been allowed as damages, it will usually be found that there was no evidence in the case that anything had ever been paid or agreed to be paid, or any evidence of liability introduced into the case.[15] In

v. Chicago, etc., R. Co., 102 Wis. 196, 78 N. W. 446, 778.

By statute in Illinois a wife is not entitled to payment for services rendered her husband, while ill through injuries suffered during the course of his employment, and in an action brought to recover from the employer therefor the jury should not be instructed that the ministrations of the wife should be considered in the estimation of damages. Peoria, etc., R. Co. *v.* Johns, 43 Ill. App. 83.

13. *Illinois.*— Chicago, etc., R. Co. *v.* Cleminger, 178 Ill. 536, 53 N. E. 320 [*affirming* 77 Ill. App. 186]; Chicago, etc., R. Co. *v.* Harrington, 77 Ill. App. 499; St. Louis Consol. Coal Co. *v.* Scheiber, 65 Ill. App. 304.

Kansas.— Hutchinson *v.* Van Cleve, 7 Kan. App. 676, 53 Pac. 888; Abilene *v.* Wright, 4 Kan. App. 708, 46 Pac. 715.

Michigan.— See Styles *v.* Decatur, (1902) 91 N. W. 622.

Nebraska.— Omaha, etc., R. Co. *v.* Emminger, 57 Nebr. 240, 77 N. W. 675; Minneapolis Threshing Mach. Co. *v.* Regier, 51 Nebr. 402, 70 N. W. 934.

Ohio.— Ohliger *v.* Toledo, 20 Ohio Cir. Ct. 142, 10 Ohio Cir. Dec. 762.

Texas.— San Antonio, etc., R. Co. *v.* Moore, (Civ. App. 1903) 72 S. W. 226.

14. Robertson *v.* Wabash R. Co., 152 Mo. 382, 53 S. W. 1082; Morris *v.* Grand Ave. R. Co., 144 Mo. 500, 46 S. W. 170; Drinkwater *v.* Dinsmore, 80 N. Y. 390, 36 Am. Rep. 624; Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. Rep. 705.

The theory of the cases which hold that medical services cannot be included as damages, where there is no evidence of payment or liability therefor, is based upon the ground of compensation in damages, the theory being that a party ought not to be permitted to recover for a loss which he has never sustained and for which there is no apparent liability. Morris *v.* Grand Ave., etc., R. Co., 144 Mo. 500, 46 S. W. 170; Smith *v.* Chicago, etc., R. Co., 108 Mo. 243, 18 S. W. 971. See also Lee *v.* Western Union Tel. Co., 51 Mo. App. 375; Fry *v.* Hillan, (Tex. Civ. App. 1896) 37 S. W. 359. In San Antonio, etc., R. Co. *v.* Muth, 7 Tex. Civ. App. 443, 27 S. W. 752 [*quoted* in Morris *v.* Grand Ave. R. Co., 144 Mo. 500, 46 S. W. 170], it was held that there could be no recovery for medical expenses incurred to a physician who had no license, because under such circumstances there was no legal liability to pay on the part of the plaintiff. In Belyea *v.* Minneapolis, etc., R. Co., 61 Minn. 224, 63 N. W. 627 [*quoted* in Morris *v.* Grand Ave. R. Co., 144 Mo. 500, 46 S. W. 170], it was held that a married woman could not recover her medical expenses because the liability therefor was that of her husband and not her own. In Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. Rep. 705 [*quoted* in Morris *v.* Grand Ave. R. Co., 144 Mo. 500, 46 S. W. 170], the court announced the double proposition that the plaintiff could neither recover for the value of the services of his family in nursing him, in the absence of express agreement on his part to remunerate them therefor, nor would he be allowed his claim for time lost if it could be shown that during the period he was prevented from attending to business on account of his injuries, he received his regular salary.

Charity hospital.— In Drinkwater *v.* Dinsmore, 80 N. Y. 390, 36 Am. Rep. 624, it was held that the defendant might show that the plaintiff was doctored at a charity hospital, or at the expense of the town or county gratuitously, and in such case the doctor's bill would not be an element of damage.

In an action by a minor, by his next friend, for personal injuries, it was error to allow the jury in estimating the damages to consider medical bills, it not being shown that the minor's estate was liable therefor. Bering Mfg. Co. *v.* Peterson, 28 Tex. Civ. App. 194, 67 S. W. 133. See also Newbury *v.* Getchel, etc., Lumber, etc., Co., 100 Iowa 441, 69 N. W. 743, 62 Am. St. Rep. 582. Where a child does not live with its parents, and they have not undertaken to pay any of the expenses resulting from an injury, and all reasonable inferences would show that the infant's estate is liable for the same, an instruction, in an action by such child by its next friend, is proper which authorizes a recovery "for expenses incurred in and about being healed, if any are shown by the evidence." Illinois Cent. R. Co. *v.* Jernigan, 101 Ill. App. 1 [*affirmed* in 198 Ill. 297, 65 N. E. 88].

In case of a married woman where the expenses are not paid out of her private estate, and in the case of an infant under the control of its parents, the expenses for medical attention and assistance must be paid before the suit is brought, for the reason that such husband or parent is presumed to pay on his own behalf all necessary expenses and that he might recover them in a separate suit. Tompkins *v.* West, 56 Conn. 478, 16 Atl. 237; Newbury *v.* Getchel, etc., Lumber, etc., Co., 100 Iowa 441, 69 N. W. 743, 62 Am. St. Rep. 582. *Compare* Moody *v.* Osgood, 50 Barb. (N. Y.) 628.

15. *Illinois.*—Illinois Cent. R. Co. *v.* Frelka, 9 Ill. App. 605.

all cases where expenses for medical attention are claimed, it must be clearly shown that such expenses are reasonable and necessary.[16] It is not the reasonable charge for medical services which the plaintiff may recover, but the expense to him of such services, not to exceed their reasonable value,[17] and in determining the reasonable value of services rendered all the circumstances under which such services were rendered should be taken into consideration.[18] In addition to expenses incurred for medical help and assistance in connection with the alleged injury, the party is further entitled to expenses incurred in the employment of assistance in his ordinary duties or business.[19]

J. Matters in Aggravation or Mitigation of Damages — 1. In General. In considering the question of compensation, there is a difference between a person inflicting an injury through negligence so slight that it almost approaches to an accident, and damage which is accompanied by insult. The courts have always recognized the difference between awarding damages with a sparing or a liberal hand,[20] and in all cases they have taken into consideration the particular circumstances of the case presented for adjudication.[21] The question of aggrava-

Iowa.— Bowsher *v.* Chicago, etc., R. Co., 113 Iowa 462, 84 N. W. 958.

Michigan.—Rogers *v.* Orion, 116 Mich. 324, 74 N. W. 463.

Missouri.— Robertson *v.* Wabash R. Co., 152 Mo. 382, 53 S. W. 1082; Morris *v.* Grand Ave. R. Co., 144 Mo. 500, 46 S. W. 170; Smith *v.* Chicago, etc., R. Co., 108 Mo. 243, 18 S. W. 971; Duke *v.* Missouri Pac. R. Co., 99 Mo. 347, 12 S. W. 636.

New York.— Gumb *v.* Twenty-Third St. R. Co., 114 N. Y. 411, 21 N. E. 993.

Texas.— Houston, etc., R. Co. *v.* Pereira, (Civ. App. 1898) 45 S. W. 767 [*following* Wheeler *v.* Tyler Southeastern R. Co., (Sup. 1898) 43 S. W. 876].

See 15 Cent. Dig. tit. "Damages," § 242 *et seq.*

Distinction as to services.— In Robertson *v.* Wabash R. Co., 152 Mo. 382, 53 S. W. 1082 [*citing* Murray *v.* Missouri Pac. R. Co., 101 Mo. 236, 13 S. W. 817, 20 Am. St. Rep. 601], the distinction was drawn between the services of a nurse and the services of a physician, the court holding that in the former case it might be presumed that jurors were familiar with the value of such services, while in the latter there could be no such presumption. In Pennsylvania Co. *v.* Marion, 104 Ind. 239, 3 N. E. 874, the plaintiff, having testified that the nurses who attended him while prostrate from the injury did so voluntarily and without charge, was nevertheless permitted, over objection, to prove by his attending physician what their services were worth. It was held that this evidence was admissible under the rulings in Ohio, etc., R. Co. *v.* Dickerson, 59 Ind. 317; Indianapolis *v.* Gaston, 58 Ind. 224. So it was held in Copithorne *v.* Hardy, 173 Mass. 400, 53 N. E. 915, that the mother of the plaintiff in an action for personal injuries might testify as to what was a fair charge for services rendered by her.

16. Fleming *v.* St. Louis, etc., R. Co., 89 Mo. App. 129; Golder *v.* Lund, 50 Nebr. 867, 70 N. W. 379; Gumb *v.* Twenty-Third St. R. Co., 114 N. Y. 411, 21 N. E. 993; Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. Rep. 705.

In considering the question of reasonable expense, it has been held that money paid for going to a distant city for special medical treatment may be recovered. Sherwood *v.* Chicago, etc., R. Co., 82 Mich. 374, 46 N. W. 773.

17. Golder *v.* Lund, 50 Nebr. 867, 70 N. W. 379.

Evidence of the price agreed upon to be paid for nursing an injured party is admissible, but the reasonable value of the services and not the contract price is the true measure of damages. Texas, etc., R. Co. *v.* Short, (Tex. Civ. App. 1900) 58 S. W. 56.

18. Texas, etc., R. Co. *v.* Short, (Tex. Civ. App. 1900) 58 S. W. 56. Plaintiff and his wife occupied berths in a sleeping-car. At five o'clock A. M. the train stopped at a water-tank a half mile from their destination. The porter and conductor of the sleeping-car awoke them suddenly, and told them they were at the depot. They were hurried off, partially dressed, and the train left them before they discovered where they were. The exposure resulted in injury to the wife's health. It was held that the husband was entitled to recover for time necessarily lost while attending his wife during her sickness, and might give evidence of the salary he was earning at the time. Pullman Palace Car Co. *v.* Smith, 79 Tex. 468, 14 S. W. 993, 23 Am. St. Rep. 356, 13 L. R. A. 215.

In an action by a father to recover expenses incurred in nursing his infant daughter, who was injured through defendant's negligence, it was error to allow him to testify that in order to nurse his daughter he was obliged to abandon an engagement as theatrical manager at a salary of fifty dollars a week. Barnes *v.* Keene, 132 N. Y. 13, 20 N. E. 1090.

19. North Chicago, etc., R. Co. *v.* Zeiger, 182 Ill. 9, 54 N. E. 1006, 74 Am. St. Rep. 157; Emery *v.* Boston, etc., R. Co., 67 N. H. 434, 36 Atl. 367; Willis *v.* Second Ave. Traction Co., 189 Pa. St. 430, 42 Atl. 1.

20. Emblen *v.* Myers, 6 H. & N. 54, 30 L. J. Exch. 71, 2 L. T. Rep. N. S. 774, 8 Wkly. Rep. 665. See *infra*, IX, Q.

21. Young *v.* Mertens, 27 Md. 114; Snively *v.* Fahnestock, 18 Md. 391; Smith *v.* Trafton,

tion or mitigation of damages is evidently one of evidence and not of law. No general rule can be laid down for the reason that what might mitigate damages in one case would aggravate them in another.[22] Whether facts can be set up in mitigation of damages depends entirely upon the evidence produced in support thereof. As a general rule there must be some circumstances connected with the evidence that will impress the judge or jury that the defendant has not been entirely in fault,[23] and that some circumstance has entered into the case which renders the injury less serious than would ordinarily result from its infliction.[24]

3 Rob. (N. Y.) 709; Culbertson *v.* Ellis, 6 Fed. Cas. No. 3,461, 6 McLean 248; Oldershaw *v.* Holt, 12 A. & E. 590, 4 P. & D. 307, 40 E. C. L. 295; Emblen *v.* Myers, 6 H. & N. 54, 30 L. J. Exch. 71, 2 L. T. Rep. N. S. 774, 8 Wkly. Rep. 665. In an action against municipal officers for illegally seizing the plaintiff as a soldier and sending him to camp he may prove in aggravation of damages his mental suffering caused by the injury, and also the fact of his confinement in the guard tent when he was taken into camp. Tyler *v.* Pomeroy, 8 Allen (Mass.) 480.

Illegal seizure of property.— Knowledge upon the part of the officer that property levied upon by him is exempt from execution may properly go in aggravation of damages. Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79.

Joint ownership.— In an action on the case for causing water to flow back on plaintiff's land, injuring building materials thereon, he cannot prove, in aggravation of damages, injury to the building materials, if they belonged to him and another in partnership. Trimble *v.* Gilbert, 3 Blackf. (Ind.) 218.

Malicious intention.— In an action for throwing poisoned barley upon the plaintiff's premises in order to poison his poultry, the jury is not confined in their verdict to the actual damages sustained, but may consider the malicious intention of the defendant. Sears *v.* Lyons, 2 Stark. 317, 20 Rev. Rep. 688, 3 E. C. L. 426.

Obstinacy of plaintiff.—Although the plaintiff, in an action for an injury done, really has a right of action against the defendant, the jury is entitled to look at all the circumstances of the case and at the conduct of both parties, and if they think that in going on with the action the plaintiff has acted in an obstinate and perverse manner they may take that into consideration when estimating the damages. Davis *v.* North-Western R. Co., 4 Jur. N. S. 1303, 7 Wkly. Rep. 105.

Plea of justification.— In Warwick *v.* Foulkes, 1 D. & L. 638, 8 Jur. 85, 13 L. J. Exch. 109, 12 M. & W. 507, which was an action for false imprisonment, the defendant, in addition to the general issue, pleaded a justification, on the ground that the plaintiff had committed a felony, for which the defendant had him taken in custody; but at the trial his counsel abandoned this latter plea, and exonerated the plaintiff from the imputation contained in it. It was held that the putting this plea on the record was a persisting in the original charge, and proper to be taken into consideration by the jury in estimating the amount of damages.

22. 1 Sedgwick Dam. § 52. And see *infra*, XIII, B, 3, a. The fact that plaintiff's life has been shortened by the injuries cannot be considered in assessing damages. Richmond Gas Co. *v.* Baker, 146 Ind. 600, 45 N. E. 1049, 36 L. R. A. 683. In an action for injuries caused by a defective sidewalk, evidence that the plaintiff was married and had a family of small children depending on him for support is incompetent. Galion *v.* Lauer, 55 Ohio St. 392, 45 N. E. 1044. Allegation of matter in mitigation of damages is not material. It requires no reply, and is not the subject of demurrer. It is not set up as a defense, but merely as a notice. Smith *v.* Trafton, 3 Rob. (N. Y.) 709 [*citing* Maretzek *v.* Cauldwell, 2 Rob. (N. Y.) 715; Newman *v.* Otto, 4 Sandf. (N. Y.) 668].

23. *California.*— Nightingale *v.* Scannell, 18 Cal. 315.

Colorado.— Bowman *v.* Davis, 13 Colo. 297, 22 Pac. 507.

Connecticut.— Andrews *v.* Pardee, 5 Day 29.

Illinois.— Sherman *v.* Dutch, 16 Ill. 283.

Indiana.— Jenkins *v.* Parkhill, 25 Ind. 473.

Maryland.— Addison *v.* Hack, 2 Gill 221, 41 Am. Dec. 421.

Massachusetts.— King *v.* Bangs, 120 Mass. 514; Noxon *v.* Hill, 2 Allen 215.

New Hampshire.— Wallace *v.* Goodall, 18 N. H. 439.

Wisconsin.— Cotton *v.* Reed, 2 Wis. 458.

See 15 Cent. Dig. tit. "Damages," § 108.

Admission against malice.— An admission by plaintiff's counsel, on the trial of an action of trespass, that the defendant acted without malice, precludes the plaintiff from recovering vindictive damages, and therefore evidence on the part of the defendant in the nature of a justification of the act is admissible by way of mitigation of damages. Hoyt *v.* Gelston, 13 Johns. (N. Y.) 141.

False representations.—Where plaintiff was induced to purchase bonds secured by a real-estate mortgage on the false representations of defendant that the title to the land was perfect, while in fact there was a prior mortgage thereon, it was not error to refuse to allow defendant to show, in mitigation of damages, that he had procured an assignment of the prior mortgage, and had tendered a discharge of it to plaintiff at the trial. Nash *v.* Minnesota Title Ins., etc., Co., 163 Mass. 574, 40 N. E. 1039, 47 Am. St. Rep. 489, 28 L. R. A. 753.

24. Andrews *v.* Pardee, 5 Day (Conn.) 29.

On the other hand it is not every circumstance of mitigation that can be introduced to reduce the damages claimed. The question is usually one of evidence, and each case must be determined upon its own peculiar merits.[25]

2. Joint Liability. Where there is a joint liability and part of the damages have been paid or accounted for, evidence of such payment or accounting can be introduced in mitigation of the whole demand.[26] Satisfaction by one joint tort-feasor is a bar to an action against another, and a partial satisfaction by one may be shown in mitigation of damages.[27]

Act done under license.— In an action for damages for diverting the course of a stream which ran through the plaintiff's land, the defendant may show in mitigation that the diversion was made on his own land, that it was a benefit rather than an injury to the plaintiff, and that it was done under a license from the plaintiff. Addison *v.* Hack, 2 Gill (Md.) 221, 41 Am. Dec. 421.

Injury to mortgaged property.— In a mortgagee's action against one who has injured the mortgaged property by a removal of fixtures, evidence that the mortgagee, after the alleged injury, and before the action was brought, under the power in his mortgage, sold the mortgaged premises for more than enough to pay his debt and all prior encumbrances is admissible in mitigation of damages. King *v.* Bangs, 120 Mass. 514.

Issuance of void execution.— In an action against a magistrate to recover damages for his wrongful act in issuing an execution which was invalid on its face, he may show in mitigation that the condition and circumstances of the judgment debtor were such that nothing could have been collected upon a valid execution. Noxon *v.* Hill, 2 Allen (Mass.) 215.

Transfer without consideration.— In an action against an agent to whom a note was given for collection, and who without authority and without consideration delivers it up to the maker, who is insolvent, such insolvency may be given in evidence in mitigation of damages. Andrews *v.* Pardee, 5 Day (Conn.) 29.

Trespass to real estate.— If the plaintiff has sold the standing trees upon the soil, this may be shown, in mitigation of damages, in an action of trespass for breaking the close against the purchasers of the trees; and his admission that he has sold them is evidence of the fact. Wallace *v.* Goodall, 18 N. H. 439.

25. Foster *v.* Chamberlain, 41 Ala. 158; Locke *v.* Garrett, 16 Ala. 698; Anonymous, 3 N. C. 34; Bowman *v.* Barnard, 24 Vt. 355. See also Louisville, etc., R. Co. *v.* East Tennessee, etc., R. Co., 60 Fed. 993, 9 C. C. A. 314. In an action by a husband and wife on account of injuries received by the latter in being forcibly prevented from entering her house, evidence that the husband some time before had obtained possession of the house fraudulently from one of defendants is inadmissible in mitigation of damages. Jacobs *v.* Hoover, 9 Minn. 204. In an action by a tenant against his landlord for an injury to the crop caused by trespassing animals, evidence that the tenant in dividing the residue had retained a portion to which the landlord was entitled is inadmissible in mitigation of damages. Frout *v.* Hardin, 56 Ind. 165, 26 Am. Rep. 18.

House of ill-fame.— In an action of trespass for demolishing certain dwelling-houses, it was held incompetent for the defendant to prove in mitigation of damages that they were occupied as houses of ill-fame. Johnson *v.* Farwell, 7 Me. 370, 22 Am. Dec. 203. So where defendant broke into the house of his tenant on Sunday, and carried away furniture to distrain for rent, the fact that the tenant had been found guilty of keeping the place as a disorderly house, and was at that time in jail, and was therefore not disturbed by defendant's entry would not reduce or mitigate the tenant's damage's for the trespass. Mayfield *v.* White, 1 Browne (Pa.) 241.

Improper attachment.— In a suit against a town for a failure of its constable to have property attached ready to meet execution, it is not competent for the town to show in mitigation of damages that the creditor may still by a new process or new judgment obtain satisfaction of his debt, for the creditor has the right to proceed against the specific property attached until his judgment and execution are satisfied. Bowman *v.* Barnard, 24 Vt. 355.

No proof of actual benefit.— In an action for damages against a railroad for killing an animal, the value of the dead animal cannot be shown in diminution of damages unless it appears that the owner derived an actual benefit therefrom. Indianapolis, etc., R. Co. *v.* Mustard, 34 Ind. 50.

26. Lanahan *v.* Heaver, 79 Md. 413, 29 Atl. 1036; Knapp *v.* Roche, 94 N. Y. 329; Chamberlin *v.* Murphy, 41 Vt. 110; Bloss *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752.

27. Knapp *v.* Roche, 94 N. Y. 329. If a defendant neglects to avail himself of the non-joinder of one or more joint tenants in an action of tort, he cannot give it in evidence in reduction of damages. Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551.

In trover against two for a joint conversion, the plaintiffs obtained judgment by default against one, and then withdrew their action against the other, upon receiving from him partial satisfaction for the wrong, and agreeing no further to prosecute him personally therefor. It was held that damages might be assessed against the defaulted defendant for the value of the goods converted, with interest from the time of conversion, deducting therefrom the amount received

3. For Breach of Contract. As a general rule one who has been injured by breach of contract may set up in mitigation of damages any loss that has resulted to him from such breach.[28] Especially is this so where the action is brought in a court of equity. A benefit derived by one party from a part performance of the contract will always be taken into consideration in estimating the damages for the breach.[29]

4. Return of Property After Conversion. Where property has been wrongfully taken and is returned before suit brought, the plaintiff will be considered to have received it in mitigation of damages, upon the principle that he has thereby received a partial recompense for the injury suffered.[30] The fact, however, that a party has received the whole or a portion of the converted property or the proceeds arising from its sale is not a bar to an action for the wrongful

from his co-defendant by way of compromise, for his liability. Heyer *v.* Carr, 6 R. I. 45.

So in an action of trespass evidence of a sum received by the plaintiff in consideration of the release of a co-trespasser, which did not discharge the defendant, is admissible in mitigation of damages. Bloss *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752.

28. *Alabama.*— Ready *v.* Tuskaloosa, 6 Ala. 327; Hill *v.* Bishop, 2 Ala. 320.

Georgia.— Williams *v.* Waters, 36 Ga. 454.

Illinois.— Bates *v.* Courtwright, 36 Ill. 518; Stow *v.* Yarwood, 14 Ill. 424.

Indiana.— Cox *v.* Way, 3 Blackf. 143.

Iowa.— Richmond *v.* Dubuque, etc., R. Co., 40 Iowa 264.

Kentucky.— Kennedy *v.* Vanwinkle, 6 T. B. Mon. 398.

Massachusetts.— Collins *v.* Delaporte, 115 Mass. 159; Curtis *v.* Aspinwall, 114 Mass. 187, 19 Am. Rep. 332; Pierce *v.* Benjamin, 14 Pick. 356, 25 Am. Dec. 396.

Michigan.— Rall *v.* Cook, 77 Mich. 681, 43 N. W. 1069.

New York.— Bridge *v.* Mason, 45 Barb. 37; Durkee *v.* Mott, 8 Barb. 423; Fletcher *v.* Button, 6 Barb. 646; Batterman *v.* Pierce, 3 Hill 171.

North Carolina.— Austin *v.* Miller, 74 N. C. 274.

Pennsylvania.— Wolf *v.* Studebaker, 65 Pa. St. 459.

England.— Wilson *v.* Hicks, 26 L. J. Exch. 242.

Canada.— McGregor *v.* McArthur, 5 U. C. C. P. 493.

See 15 Cent. Dig. tit. "Damages," § 118.

29. Taylor *v.* Read, 4 Paige (N. Y.) 561.

30. *Alabama.*— Stephenson *v.* Wright, 111 Ala. 579, 20 So. 622; Renfro *v.* Hughes, 69 Ala. 581; St. John *v.* O'Connel, 7 Port. 466.

California.— Conroy *v.* Flint, 5 Cal. 327.

Maine.— Merrill *v.* How, 24 Me. 126.

Maryland.— Hepburn *v.* Sewell, 5 Harr. & J. 211, 9 Am. Dec. 512.

Missouri.— Gilbert *v.* Peck, 43 Mo. App. 577; Ward *v.* Moffett, 38 Mo. App. 395. See also Green *v.* Stephens, 37 Mo. App. 641.

Nebraska.— Watson *v.* Coburn, 35 Nebr. 492, 53 N. W. 477.

New Hampshire.— Towle *v.* Lawrence, 59 N. H. 501.

New Jersey.— Wooley *v.* Carter, 7 N. J. L. 85, 11 Am. Dec. 520.

New York.— Dailey *v.* Crowley, 5 Lans. 301; Hibbard *v.* Stewart, 1 Hilt. 207; Hallett *v.* Novion, 14 Johns. 273.

Pennsylvania.— Ingram *v.* Hartz, 48 Pa. St. 380.

Texas.— Hogan *v.* Kellum, 13 Tex. 396; Bitterman *v.* Hearn, (Civ. App. 1895) 32 S. W. 341.

Vermont.— Yale *v.* Saunders, 16 Vt. 243. See also Luce *v.* Hoisington, 56 Vt. 436.

Canada.—Andrus *v.* Burwell, Taylor (U. C.) 382.

Acceptance necessary.— In trover the right of action is complete when a conversion is shown; and no tender of the property after conversion, or mere agreement of the owner, without consideration, to receive it, will defeat the action or mitigate the damages. But if the owner accepts the property when tendered it may be shown in mitigation. Norman *v.* Rogers, 29 Ark. 365.

Notice of relinquishment of claim.— If in an action for the conversion of machinery in a workshop it does not appear that the defendant has ever appropriated the same to his own use, removed the same, or had the actual possession thereof, otherwise than by being in the rightful possession of the workshop, and the alleged conversion consists in the refusal to allow the plaintiff to remove the same upon demand, a subsequent notice to the plaintiff by the defendant that he has relinquished all claim to the machinery should be considered in mitigation of damages. Delano *v.* Curtis, 7 Allen (Mass.) 470.

Plaintiff not compelled to accept.— In an action for breach of contract the court cannot, unless so authorized by statute, compel the plaintiff to accept, in mitigation of damages, when tendered to him by the defendant in open court, property for the non-delivery of which the action was brought. Colby *v.* Reed, 99 U. S. 560, 25 L. ed. 484.

Time of return of property.— In an action of trover, after the testimony and argument of counsel have been heard by the jury, and before the judge has delivered his charge, it is too late for the defendant to tender the article which is the subject of the action in mitigation of damages. Tracey *v.* Good, 1 Pa. L. J. Rep. 472, 3 Pa. L. J. 135. See also Park *v.* McDaniels, 37 Vt. 594.

taking; but only evidence in mitigation of the entire damage sustained.[31] Where the conversion of property has been wilful or wrongful, or wilful refusal to surrender it on demand has been made,[32] or where property has suffered injury or deterioration in value,[33] the wrong-doer cannot compel the adverse party to accept the property, even in mitigation of damages.

5. Proceeds of Property Applied to Benefit of Owner. Where property has been converted or levied upon, and the proceeds applied to the payment of a party's debt, or otherwise to his use, such fact may be set up in mitigation of damages.[34]

6. Contributory Negligence. Contributory negligence may be considered in mitigation of damages.[35]

7. Payment of Salary and Expenses. The courts are not quite agreed as to whether a payment of salary or expenses in case of personal injury can be introduced in mitigation of damages. Some courts have held that such payment cannot be set up in mitigation of damages;[36] while others have laid down the doctrine that there could be no compensation in damages for injuries which have never been suffered.[37]

8. Insurance. The rule seems to be well established by the authorities that the fact of insurance cannot be set up in mitigation of damages,[38] whether

31. Watson *v.* Coburn, 35 Nebr. 492, 53 N. W. 477; Hibbard *v.* Stewart, 1 Hilt. (N. Y.) 207; Yale *v.* Saunders, 16 Vt. 243.

32. Gilbert *v.* Peek, 43 Mo. App. 577; Rutland, etc., R. Co. *v.* Middlebury Bank, 32 Vt. 639; Hart *v.* Skinner, 16 Vt. 138, 42 Am. Dec. 500; Green *v.* Sperry, 16 Vt. 390, 42 Am. Dec. 519. The tender by an officer of a part of the value of property sold under void process does not entitle him to a mitigation of damages. Clarke *v.* Hallock, 16 Wend. (N. Y.) 607. In an action for the conversion of chattels to the defendant's use the measure of damages is not affected by the defendant's having after the conversion attached them on mesne process against the plaintiff and then discontinued that action and offered to restore them to the plaintiff who refused to receive them. Stickney *v.* Allen, 10 Gray (Mass.) 352.

33. Gilbert *v.* Peek, 43 Mo. App. 577; Rutland, etc., R. Co. *v.* Middlebury Bank, 32 Vt. 639; Hart *v.* Skinner, 16 Vt. 138, 42 Am. Dec. 500.

34. *Illinois.*—Tripp *v.* Grouner, 60 Ill. 474; Bates *v.* Courtwright, 36 Ill. 518; Sherman *v.* Dutch, 16 Ill. 283; Stow *v.* Yarwood, 14 Ill. 424.

Massachusetts.—Pierce *v.* Benjamin, 14 Pick. 356, 25 Am. Dec. 396; Prescott *v.* Wright, 6 Mass. 20; Caldwell *v.* Eaton, 5 Mass. 399.

New Hampshire.—Cooper *v.* Newman, 45 N. H. 339.

Ohio.—Doolittle *v.* McCullough, 7 Ohio St. 299.

Pennsylvania.—Mickle *v.* Miles, 1 Grant 320.

See 15 Cent. Dig. tit. "Damages," § 116.

Qualification of rule.—Although the general rule is as stated above a party who has tortiously obtained possession of property cannot, in an action for conversion, show in mitigation of damages that he has applied the proceeds to a debt of the plaintiff. East *v.* Pace, 57 Ala. 521. See also note to Prescott *v.* Wright, 6 Mass. 23.

35. Atlanta, etc., R. Co. *v.* Wyly, 65 Ga. 120; Flanders *v.* Meath, 27 Ga. 358; Lord *v.* Carbon Iron Mfg. Co., 42 N. J. Eq. 157, 6 Atl. 812; East Tennessee, etc., R. Co. *v.* Humphreys, 12 Lea (Tenn.) 200; East Tennessee, etc., R. Co. *v.* Fain, 12 Lea (Tenn.) 35. But *compare* Rice *v.* Crescent City R. Co., 51 La. Ann. 108, 24 So. 791.

Apportionment of negligence.—In Georgia Cent. R. Co. *v.* McKenney, 116 Ga. 13, 42 S. E. 229, it was held that if a passenger was not guilty of such negligence as would bar his recovery, and the carrier was negligent, the jury could apportion the damages, as they would apportion the amount of negligence each had been guilty of to reduce the amount of damages plaintiff would otherwise be entitled to recover.

Where the damages resulting from a trespass are aggravated or increased by the folly, wilful obstinacy, or gross carelessness of the injured person, such part of his loss as is directly attributable to his own fault cannot be recovered. Lord *v.* Carbon Iron Mfg. Co., 42 N. J. Eq. 157, 6 Atl. 812.

36. Ohio, etc., R. Co. *v.* Dickerson, 59 Ind. 317; Missouri Pac. R. Co. *v.* Jarrard, 65 Tex. 560. See also Indianapolis *v.* Gaston, 58 Ind. 224.

Payment by beneficial association.—In an action for damages for personal injuries it is incompetent for the defendant to offer evidence in mitigation of damages that the plaintiff's doctor bill and expenses were paid by a beneficial association. Alston *v.* Stewart, 2 Mona. (Pa.) 51.

37. Ephland *v.* Missouri Pac. R. Co., 57 Mo. App. 147 [*following* Lee *v.* Western Union Tel. Co., 51 Mo. App. 375]; Drinkwater *v.* Dinsmore, 80 N. Y. 390, 36 Am. Rep. 624; Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. Rep. 705.

38. *California.*—White *v.* The Mary Ann, 6 Cal. 462, 65 Am. Dec. 523.

Georgia.—Western, etc., R. Co. *v.* Meigs, 74 Ga. 857.

such reduction is set up in mitigation in case of fire,[39] life,[40] marine,[41] or accident insurance.[42]

K. Duty to Prevent or Reduce Damages — 1. In General. Where an injured party finds that a wrong has been perpetrated on him, he should use all reasonable means to arrest the loss. He cannot stand idly by and permit the loss to increase, and then hold the wrong-doer liable for the loss which he might have prevented.[43] It is only incumbent upon him, however, to use reasonable exertion

Illinois.— Pittsburg, etc., R. Co. *v.* Thompson, 56 Ill. 138.

Indiana.— Cunningham *v.* Evansville, etc., R. Co., 102 Ind. 478, 1 N. E. 800, 52 Am. Rep. 683; Sherlock *v.* Alling, 44 Ind. 184; Lake Erie, etc., R. Co. *v.* Griffin, 8 Ind. App. 47, 35 N. E. 396, 52 Am. St. Rep. 465.

Michigan.— Perrott *v.* Shearer, 17 Mich. 48.

Missouri.— Dillon *v.* Hunt, 105 Mo. 154, 16 S. W. 516, 24 Am. St. Rep. 374.

New Jersey.—Weber *v.* Morris, etc., R. Co., 36 N. J. L. 213.

New York.— Drinkwater *v.* Dinsmore, 80 N. Y. 390, 36 Am. Rep. 624; Althorp *v.* Wolfe, 22 N. Y. 355; Collins *v.* New York Cent., etc., R. Co., 5 Hun 503.

North Carolina.— Hammond *v.* Schiff, 100 N. C. 161, 6 S. E. 753.

Pennsylvania. — Lindsay *v.* Bridgewater Gas Co., 14 Pa. Co. Ct. 181.

Vermont.— Harding *v.* Townshend, 43 Vt. 536, 5 Am. Rep. 304.

United States.— The Yeager, 20 Fed. 653, 4 Woods 18.

See 15 Cent. Dig. tit. "Damages," § 113.

39. *Indiana.*— Cunningham *v.* Evansville, etc., R. Co., 102 Ind. 478, 1 N. E. 800, 52 Am. Rep. 683; Lake Erie, etc., R. Co. *v.* Griffin, 8 Ind. App. 47, 35 N. E. 396, 52 Am. St. Rep. 465.

Iowa.—Allen *v.* Barrett, 100 Iowa 16, 69 N. W. 272.

Michigan.—Perrott *v.* Shearer, 17 Mich. 48.

New York.— Drinkwater *v.* Dinsmore, 80 N. Y. 390, 36 Am. Rep. 624; Collins *v.* New York Cent., etc., R. Co., 5 Hun 503.

North Carolina.— Hammond *v.* Schiff, 100 N. C. 161, 6 S. E. 753.

Pennsylvania. — Lindsay *v.* Bridgewater Gas Co., 14 Pa. Co. Ct. 181.

See 15 Cent. Dig. tit. "Damages," § 113.

40. Western, etc., R. Co. *v.* Meigs, 74 Ga. 857; Sherlock *v.* Alling, 44 Ind. 184; Harding *v.* Townshend, 43 Vt. 536, 5 Am. Rep. 304; Hicks *v.* Newport, etc., R. Co., 4 B. & S. 403 note, 116 E. C. L. 403 [*distinguished* in Farmer *v.* Grand Trunk R. Co., 21 Ont. 299].

41. Yates *v.* Whyte, 4 Bing. N. Cas. 272, 7 L. J. C. P. 116, 5 Scott 640, 33 E. C. L. 706.

Damages caused by a collision may be recovered by the owners of the injured vessel in a proceeding against the vessel in fault, notwithstanding the fact that they have received satisfaction from the insurers for the damages sustained. The Yeager, 20 Fed. 653, 4 Woods 18.

Partial insurance.— The fact that a vessel, lost while being towed out to sea, is insured does not divest the owner of his right of action for damages, especially in the case of a mere partial insurance, for in such a case the abandonment by the owner only transfers his interest so far as that interest is covered by the policy. White *v.* The Mary Ann, 6 Cal. 462, 65 Am. Dec. 523.

42. *Illinois.*— Pittsburg, etc., R. Co. *v.* Thompson, 56 Ill. 138.

Kentucky. — Louisville, etc., R. Co. *v.* Carothers, 65 S. W. 833, 66 S. W. 385, 23 Ky. L. Rep. 1673.

Maryland.— Baltimore City Pass. R. Co. *v.* Baer, 90 Md. 97, 44 Atl. 992.

Texas.— Missouri, etc., R. Co. *v.* Rains, (Civ. App. 1897) 40 S. W. 635.

Vermont.— Harding *v.* Townshend, 43 Vt. 536, 5 Am. Rep. 304.

England.— Bradburn *v.* Greatwestern R. Co., L. R. 10 Exch. 1, 44 L. J. Exch. 9, 31 L. T. Rep. N. S. 464, 23 Wkly. Rep. 468; Grand Trunk R. Co. *v.* Jennings, 13 App. Cas. 800, 58 L. J. P. C. 1, 59 L. T. Rep. N. S. 679, 37 Wkly. Rep. 403.

See 15 Cent. Dig. tit. "Damages," § 113.

43. *Arkansas.*— St. Louis, etc., R. Co. *v.* Stroud, 67 Ark. 112, 56 S. W. 870; Walworth *v.* Pool, 9 Ark. 394.

Georgia.—Louisville, etc., R. Co. *v.* Spinks, 104 Ga. 692, 30 S. E. 968; Akridge *v.* Atlanta, etc., R. Co., 90 Ga. 232, 16 S. E. 81.

Illinois.— Indianapolis, etc., R. Co. *v.* Birney, 71 Ill. 391; Kankakee, etc., R. Co. *v.* Fitzgerald, 17 Ill. App. 525.

Indiana.— Cincinnati, etc., Air Line R. Co. *v.* Rodgers, 24 Ind. 103; Citizens' Nat. Bank *v.* Greensburg Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171; Hamilton *v.* Feary, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. Rep. 485.

Iowa.— Decorah Woolen Mill Co. *v.* Greer, 49 Iowa 490; Beymer *v.* McBride, 37 Iowa 114; Davis *v.* Fish, 1 Greene 406, 48 Am. Dec. 387.

Louisiana.— Armistead *v.* Shreveport, etc., R. Co., 108 La. 171, 32 So. 456.

Maine.— Sutherland *v.* Wyer, 67 Me. 64; Miller *v.* Mariner's Church, 7 Me. 51, 20 Am. Dec. 341.

Maryland.— Lawson *v.* Price, 45 Md. 123.

Massachusetts. — French *v.* Vining, 102 Mass. 132, 3 Am. Rep. 440; Loker *v.* Damon, 17 Pick. 284.

Michigan.— Chandler *v.* Allison, 10 Mich. 460.

Minnesota. — Gniadack *v.* Northwestern Imp., etc., Co., 73 Minn. 87, 75 N. W. 894.

Missouri.— Fullerton *v.* Fordyce, 144 Mo. 519, 44 S. W. 1053; State *v.* Powell, 44 Mo. 436; Douglass *v.* Stephens, 18 Mo. 362;

and reasonable expense,[44] and the question in such cases is always whether the act was a reasonable one, having regard to all the circumstances of the particular case.[45] The application of this rule sometimes has the effect of enhancing the damages rather than reducing them, but where a reasonable and *bona fide* attempt has been made on the part of the plaintiff to reduce the damages or provide for his own safety in case of personal injury, it does not relieve the defendant from a full recovery of the damages sustained.[46]

2. Breach of Contract — a. In General. A party injured by a breach of

Webb *v.* Metropolitan St. R. Co., 89 Mo. App. 604.

New York.— New York State Monitor Milk-Pan, etc., Co. *v.* Remington, 109 N. Y. 143, 16 N. E. 48; Shannon *v.* Comstock, 21 Wend. 457, 34 Am. Dec. 262.

Pennsylvania.— King *v.* Steiren, 44 Pa. St. 99, 84 Am. Dec. 419; Finch *v.* Heermans, 5 Luz. Leg. Reg. 125.

Texas.— Waco Artesian Water Co. *v.* Cauble, 19 Tex. Civ. App. 417, 47 S. W. 538; Trinity, etc., R. Co. *v.* O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389; Brown *v.* Leath, 17 Tex. Civ. App. 262, 42 S. W. 655, 44 S. W. 42.

Wisconsin.—Selleck *v.* Janesville, 100 Wis. 157, 75 N. W. 563, 69 Am. St. Rep. 906, 41 L. R. A. 563; Gordon *v.* Brewster, 7 Wis. 355.

United States.— Warren *v.* Stoddart, 105 U. S. 224, 26 L. ed. 1117; U. S. *v.* Smith, 94 U. S. 214, 24 L. ed. 115; Burdon Cent. Sugar-Refining Co. *v.* Ferris Sugar Mfg. Co., 78 Fed. 417; Pennsylvania R. Co. *v.* Washburn, 50 Fed. 335.

Canada.—McCollum *v.* Davis, 8 U. C. Q. B. 150 [*cited* in Stewart *v.* Sculthorp, 25 Ont. 544].

See 15 Cent. Dig. tit. "Damages," § 119 *et seq.*

Exposure to weather.—In an action against a railroad company for injuries to plaintiff caused by exposure while waiting for the opening of defendant's depot, it is error to refuse to charge, on the facts of the case, that if plaintiff was informed that the depot would not be opened that night for the train on which she desired to take passage it was her duty to protect herself from the consequences of exposure to the inclement weather. Texas, etc., R. Co. *v.* Pierce, 10 Tex. Civ. App. 429, 30 S. W. 1122.

Under Ohio Rev. St. §§ 3324, 3325, providing that railway companies shall construct a stock fence along their lines, and on failure to do so the adjoining landowner may construct the fence and recover therefor, where plaintiff observed that he was losing pasture by failure of a railway company to construct such fence it was his duty to check such loss by constructing the fence, and on failure to do so he can recover as damages only the amount such construction would have cost, and not the actual damage sustained by loss of pasture. Millhouse *v.* Chicago, etc., R. Co., 7 Ohio Cir. Ct. 466.

44. *Alabama.*— See Watson *v.* Kirby, 112 Ala. 436, 20 So. 624.

Illinois.— Indianapolis, etc., R. Co. *v.* Birney, 71 Ill. 391; Green *v.* Mann, 11 Ill. 613.

Indiana.—Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

Maryland.— See Borden Min. Co. *v.* Barry, 17 Md. 419.

Michigan.— Chandler *v.* Allison, 10 Mich. 460.

Missouri.— Douglass *v.* Stephens, 18 Mo. 362; Webb *v.* Metropolitan St. R. Co., 89 Mo. App. 604.

New York.— Mailler *v.* Express Propeller Line, 61 N. Y. 312; Leonard *v.* New York, etc., Electro Magnetic Tel. Co., 41 N. Y. 544, 1 Am. St. Rep. 446.

Tennessee.—Louisville, etc., R. Co. *v.* Fleming, 14 Lea 128.

Texas.— See Gulf, etc., R. Co. *v.* Reed, (Civ. App. 1893) 22 S. W. 283.

Wisconsin.— Popaskey *v.* Munkwitz, 68 Wis. 322, 32 N. W. 35, 60 Am. Rep. 858; Hinckley *v.* Beckwith, 13 Wis. 31.

United States.— Newberry *v.* Bennett, 38 Fed. 308, 13 Sawy. 632.

England.— Smeed *v.* Foord, 1 E. & E. 602, 5 Jur. N. S. 291, 28 L. J. Q. B. 178, 7 Wkly. Rep. 266, 102 E. C. L. 602.

See 15 Cent. Dig. tit. "Damages," § 119 *et seq.*

Duty to sell live stock.— One whose beef cattle are driven from their feed yard by an overflow caused by the fault of another, while he must take such care of them that the loss will be as slight as possible, is not bound to put them on what he regards a poor market, although they be in a marketable condition. McCleneghan *v.* Omaha, etc., R. Co., 25 Nebr. 523, 41 N. W. 350, 13 Am. St. Rep. 508.

45. *Illinois.*— Indianapolis, etc., R. Co. *v.* Birney, 71 Ill. 391; Green *v.* Mann, 11 Ill. 613.

Maryland.— Middlekauff *v.* Smith, 1 Md. 329.

Massachusetts.—Dickenson *v.* Talmage, 138 Mass. 249; Warner *v.* Bacon, 8 Gray 397, 69 Am. Dec. 253.

New York.— Wilcox *v.* Campbell, 35 Hun 254.

England.— Le Blanche *v.* London, etc., R. Co., 1 C. P. D. 286, 45 L. J. C. P. 521, 34 L. T. Rep. N. S. 667, 24 Wkly. Rep. 808; Hamlin *v.* Great Northern R. Co., 1 H. & N. 408, 2 Jur. N. S. 1122, 26 L. J. Exch. 20, 5 Wkly. Rep. 76.

See 15 Cent. Dig. tit. "Damages," § 119.

46. Ingalls *v.* Bills, 9 Metc. (Mass.) 1, 43 Am. Dec. 346; Jones *v.* Boyce, 1 Stark. 493, 18 Rev. Rep. 812, 2 E. C. L. 189.

contract must make reasonable exertions to render the injury as light as possible; and he cannot recover for any loss which he might have avoided with ordinary care and reasonable expense.[47] This rule is especially applicable where one of the contracting parties has acquired notice of the breach of contract and makes no reasonable effort to mitigate the damages claimed.[48] If, however, a contract has been practically broken, the fact that the other party has from time to time made promises leading to a belief that it would be fulfilled will not prevent a full recovery, although the plaintiff may have taken no action to prevent the injury.[49]

47. *Alabama.*— Watson *v.* Kirby, 112 Ala. 436, 20 So. 624; Dryer *v.* Lewis, 57 Ala. 551.
Florida.— Hodges *v.* Fries, 34 Fla. 63, 15 So. 682.
Illinois.— Hewitt *v.* Walker, 2 Ill. App. 490.
Indiana.— Cincinnati, etc., Air Line R. Co. *v.* Rodgers, 24 Ind. 103.
Iowa.— Beymer *v.* McBride, 37 Iowa 114.
Kansas.— Frick Co. *v.* Falk, 50 Kan. 644, 32 Pac. 360; Sherman Center Town Co. *v.* Leonard, 46 Kan. 354, 26 Pac. 717, 26 Am. St. Rep. 101.
Louisiana.— Campbell *v.* Miltenberger, 26 La. Ann. 72.
Maine.— Miller *v.* Mariner's Church, 7 Me. 51, 20 Am. Dec. 341.
Maryland.— Furstenburg *v.* Fawsett, 61 Md. 184.
Mississippi.— Vicksburg, etc., R. Co. *v.* Ragsdale, 46 Miss. 458.
Missouri.— Haysler *v.* Owen, 61 Mo. 270; Fisher *v.* Goebel, 40 Mo. 475; Shelby *v.* Missouri Pac. R. Co., 77 Mo. App. 205.
New York.— Dillon *v.* Anderson, 43 N. Y. 231; Hamilton *v.* McPherson, 28 N. Y. 72, 82 Am. Dec. 330; Manhattan Stamping Works *v.* Koehler, 45 Hun 150; Worth *v.* Edmonds, 52 Barb. 40; Terry *v.* New York, 8 Bosw. 504; Taylor *v.* Read, 4 Paige 561.
Texas.— Jones *v.* George, 61 Tex. 345, 48 Am. Rep. 280; Brandon *v.* Gulf City Cotton Press, etc., Co., 51 Tex. 121; A. B. Frank Co. *v.* A. H. Motley Co., (Civ. App. 1896) 37 S. W. 868.
Vermont.— Humphreysville Copper Co. *v.* Vermont Copper Min. Co., 33 Vt. 92.
Wisconsin.— Bradley *v.* Denton, 3 Wis. 557.
United States.— Cunningham Iron Works *v.* Warren Mfg. Co., 80 Fed. 378; U. S. *v.* Burnham, 24 Fed. Cas. No. 14,690, 1 Mason 57.
See 15 Cent. Dig. tit. "Damages," § 128.

A mechanic undertaking to make and deliver a crank to a steamer as soon as possible is only liable for the damages caused by her detention during the time actually necessary to obtain a suitable crank, after a reasonable period has elapsed for the performance of his agreement. Cable *v.* Leeds, 6 La. Ann. 293.

Easy sale assured.— In Halstead Lumber Co. *v.* Sutton, 46 Kan. 192, 26 Pac. 444, defendant contracted to deliver a certain kind of lumber to plaintiff. He failed to deliver it at the time agreed upon, but did deliver it later. Plaintiff refused to accept it, and returned it. Lumber of that sort was still very much in demand at plaintiff's place of business. It was held that it was plaintiff's duty to have reduced the damages by keeping the lumber and using it, and that he could only recover for the loss suffered by the delay.

Leaky barrels.— In an action on a note for the price of barrels furnished plaintiff's distillery, an instruction that if the barrels were leaking and defendant could not have transferred the contents without considerable loss to herself, then she was not bound to do so, but might still recover for the leakage, is properly refused, as a party cannot stand by and see his property go to waste, when, by reasonable exertion and expense, he might save it. Graham *v.* Eiszner, 28 Ill. App. 269. See also Hitchcock *v.* Hunt, 28 Conn. 343.

Nominal damages.— A vendee of real estate is entitled to recover nominal damages only of the vendor for a breach of a contract to loan the vendee money with which to build a house on the land, where it does not appear that the vendee made any effort to borrow the money of others, or that for any reason she could not have borrowed it if she had made such effort. Gooden *v.* Moses, 99 Ala. 230, 13 So. 765. See also Colt *v.* Owens, 90 N. Y. 368.

48. *Iowa.*— Nye *v.* Iowa City Alcohol Works, 51 Iowa 129, 50 N. W. 988, 33 Am. Rep. 121.
Kentucky.— Kentucky, etc., R. Co. *v.* Jarvis, 7 Ky. L. Rep. 676.
Mississippi.— New Orleans, etc., R. Co. *v.* Echols, 54 Miss. 264.
Nebraska.— Uhlig *v.* Barnum, 43 Nebr. 584, 61 N. W. 749; Loomer *v.* Thomas, 38 Nebr. 277, 56 N. W. 973; Oliver *v.* Hawley, 5 Nebr. 439.
Vermont.— Danforth *v.* Walker, 40 Vt. 257.
United States.— Lawrence *v.* Porter, 63 Fed. 62, 11 C. C. A. 27, 26 L. R. A. 167.
See 15 Cent. Dig. tit. "Damages," § 128.

Where the owner of a building who has made an agreement for its insurance is informed that such agreement has not been carried out, it is his duty to effect such insurance himself; and he cannot recover, in an action for such breach of contract, for loss that would have been avoided had he insured the building himself when so notified. Brant *v.* Gallup, 111 Ill. 487, 53 Am. Rep. 638.

49. Graves *v.* Glass, 86 Iowa 261, 53 N. W. 231. In Ford *v.* Illinois Refrigerating Constr. Co., 40 Ill. App. 222, plaintiff contracted to construct a refrigerator for storing meats, guaranteeing that it could be run at a cer-

b. Contract For Services. Where a contract for services has been broken, it is the duty of the plaintiff to use all reasonable effort to secure another contract if he can do so by ordinary means and the use of proper opportunity;[50] and the defendant may show in mitigation of damages that the plaintiff has obtained other employment.[51] It has been held that this rule does not require a party to accept employment of a different kind altogether from that in which he was originally engaged, but only to use reasonable diligence in securing other services of like nature.[52]

c. Covenant to Repair. The question as to the duty of a tenant to avoid the consequences of a breach of contract of covenant to repair depends upon the contract of covenant and the circumstances of the particular case; where the agreement on the part of the landlord is express, and the premises rented in considera-

tain temperature. On the representation that it was ready for use defendant placed his meats therein, and so continued to keep them, on the continued promise of plaintiff that he would get the temperature down as agreed, until at the end of six weeks, when the system was abandoned and another put in. It was held in an action for the price that defendant might set off his damages from spoiled meat, caused by the high temperature, he having been induced to keep his meat in the refrigerator by the continued promises of plaintiff to bring the temperature down.

50. *Alabama.*— Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8; Murrell *v.* Whiting, 32 Ala. 54.

Arkansas.— McDaniel *v.* Parks, 19 Ark. 671; Walworth *v.* Pool, 9 Ark. 394.

Illinois.—Williams *v.* Chicago Coal Co., 60 Ill. 149.

Maine.— Sutherland *v.* Wyer, 67 Me. 64.

New York.—Hoyt *v.* Wildfire, 3 Johns. 518.

North Carolina.— Hendrickson *v.* Anderson, 50 N. C. 246.

Pennsylvania.— King *v.* Steiren, 44 Pa. St. 99, 84 Am. Dec. 419.

Wisconsin.— Gordon *v.* Brewster, 7 Wis. 355; Medbery *v.* Sweet, 3 Pinn. 210, 3 Chandl. 231.

See 15 Cent. Dig. tit. "Damages," § 129.

Loss of profits.— Where a person contracts to do a certain amount of work at a stipulated price, on materials to be furnished by his employer within a specified time, and is ready and willing to perform, but is prevented by the failure of the employer to furnish materials as promised, he cannot claim the amount of profits he would have had if the contract had been fully performed by both parties, he having been offered other employment of the same kind during such time. Heavilon *v.* Kramer, 31 Ind. 241. The rule that one who has been damaged by a breach of a contract should do all that reasonably lies within his power to protect himself from loss by seeking another contract of like character, the profits of which should be applied in mitigation of such damages, does not apply to a contract which is simply for the delivery of certain logs at a certain place, which might have been performed by the parties undertaking such delivery with their own teams and personal labor, or by any other means or agency to which they might have seen fit to intrust the performance of the same, when there is nothing in the contract to show that the execution of the same required all or any great portion of the time or personal attention of such parties or any of them. Sullivan *v.* McMillan, 37 Fla. 134, 19 So. 340, 56 Am. St. Rep. 239.

No personal performance.— The rule requiring a party, on a breach of contract of employment, to accept other employment, which shall be considered in mitigation of damages, does not apply to a building contractor, where the work under the contract was not to be performed by him personally, but by his employees under his superintendence. Graves *v.* Hunt, 8 N. Y. St. 308.

51. Benziger *v.* Miller, 50 Ala. 206; Williams *v.* Chicago Coal Co., 60 Ill. 149; Ryan *v.* Miller, 52 Ill. App. 191; Sutherland *v.* Wyer, 67 Me. 64.

Profits — No reduction.— Where one who has contracted to do a specific piece of work at an agreed price is prevented from doing so by the wrongful act of the other party, the profit made by the contractor out of other jobs during the time he would have spent on the one in suit, had it been carried out, cannot be shown in mitigation of damages. Watson *v.* Gray's Harbor Brick Co., 3 Wash. 283, 28 Pac. 527.

52. Williams *v.* Chicago, etc., Co., 60 Ill. 149; Fuchs *v.* Koerner, 107 N. Y. 529, 14 N. E. 445; Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; Costigan *v.* Mohawk, etc., R. Co., 2 Den. (N. Y.) 609, 4 Am. Dec. 758; Leatherberry *v.* Odell, 7 Fed. 641. In Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8, it was held that the principle involved in the text that a party wrongfully discharged must accept other employment of a similar nature in reduction of damages did not apply where a minor had been wrongfully discharged, and that the father should be allowed to take into consideration the habits and morals of the person to whom he subsequently apprenticed his son.

Special engagement.— Where a defendant employed the plaintiff to furnish a concert in a hall which defendant was to furnish, and on account of a snow-storm defendant concluded that plaintiff and his musicians would be unable to come, and failed to furnish the hall, it was held that plaintiff was not obliged, on finding that the hall was not fur-

tion of such agreement, the tenant cannot be held liable, although the costs of preventing injury would have been comparatively small.[53]

3. INJURIES TO PROPERTY — a. In General. One whose property is endangered or injured by the negligence of another must exercise reasonable care to protect it from further injury;[54] and especially is this rule true where notice of the wrong or injury has been brought home to the party seeking to recover damages, and he has taken no steps to protect himself from further loss.[55] The rule only requires a party to protect himself from the injurious consequences of the wrong-

nished, to seek for other employment for his musicians. Hathaway *v.* Sabin, 63 Vt. 527, 22 Atl. 633.

53. Culver *v.* Hill, 68 Ala. 66, 44 Am. Rep. 134.

On the other hand, where the tenant is aware of the risk to which his property will be exposed, he cannot recover full damages where he has made no effort to prevent its loss. Cook *v.* Soule, 56 N. Y. 420 [*affirming* 1 Thomps. & C. 116]; Rose *v.* Butler, 69 Hun (N. Y.) 140, 23 N. Y. Suppl. 375.

54. *Georgia.*— Hobbs *v.* Davis, 30 Ga. 423.

Iowa.— German Theological School *v.* Dubuque, 64 Iowa 736, 17 N. W. 153; Decorah Woolen Mill Co. *v.* Greer, 49 Iowa 490; Little *v.* McGuire, 38 Iowa 560; Simpson *v.* Keokuk, 34 Iowa 568.

Kansas.— Kansas Pac. R. Co. *v.* Mihlman, 17 Kan. 224.

Maine.— Fitzpatrick *v.* Boston, etc., R. Co., 84 Me. 33, 24 Atl. 432.

Maryland.— Lawson *v.* Price, 45 Md. 123.

Massachusetts.— Loker *v.* Damon, 17 Pick. 284.

Michigan.— Talley *v.* Courter, 93 Mich. 473, 53 N. W. 621; Chandler *v.* Allison, 10 Mich. 460.

Minnesota.—Gniadek *v.* Northwestern Imp., etc., Co., 73 Minn. 87, 75 N. W. 894.

Missouri.— Waters *v.* Brown, 44 Mo. 302.

Nebraska.— Long *v.* Clapp, 15 Nebr. 417, 19 N. W. 467.

New Jersey.— Luse *v.* Jones, 39 N. J. L. 707; Lurch *v.* Holder, (Ch. 1893) 27 Atl. 81.

New York.— Rexter *v.* Starin, 73 N. Y. 601; Hogle *v.* New York Cent., etc., R. Co., 28 Hun 363; Bevier *v.* Delaware, etc., Canal Co., 13 Hun 254; Ludlow *v.* Yonkers, 43 Barb. 493; Chase *v.* New York Cent. R. Co., 24 Barb. 273; Mark *v.* Hudson River Bridge Co., 56 How. Pr. 108.

Texas.—Dallas *v.* Cooper, (Civ. App. 1896) 34 S. W. 321; Texas, etc., R. Co. *v.* Newton, (Civ. App. 1895) 30 S. W. 475.

Vermont.— Watkins *v.* Rist, 67 Vt. 284, 31 Atl. 413.

See 15 Cent. Dig. tit. "Damages," § 124.

Malicious tort.— In an action of case for unfastening a vessel from a dock, by means of which it floated off and was injured, proof that the owner of the vessel after it had been so set adrift had neglected to take such measures as were in his power to recover and secure it will not mitigate the damages. Heaney *v.* Heeney, 2 Den. (N. Y.) 625.

Unlawful excavation.— A party is entitled to recover for special injury to the use and occupation of premises caused by the unlawful excavation and removal of soil only the damages accruing for such length of time as will afford him a reasonable opportunity to stop the excavation. Karst *v.* St. Paul, etc., R. Co., 22 Minn. 118.

Where defendant obstructed plaintiff's drain, and plaintiff could have indemnified himself for twenty-five dollars, but by delaying to repair, the damages amounted to one hundred dollars, plaintiff could recover only twenty-five dollars, as he should have protected himself. Lloyd *v.* Lloyd, 60 Vt. 288, 13 Atl. 638.

Where plaintiff's horses were unlawfully seized at a time when plaintiff could not procure other means of cultivating his crop, and thereby it was damaged in excess of the value of the use of the horses, the damage to the crop was the proper measure; but if plaintiff could have procured other horses the measure of recovery would be the value of the use or hire of the horses during the time he was deprived of them. Steel *v.* Metcalf, 4 Tex. Civ. App. 313, 23 S. W. 474.

55. A lessee, in an action against one who has laid gas-pipes in neighboring streets so imperfectly that gas escapes therefrom through the ground and into the water of a well upon premises hired and used by him for a livery stable, and therefore renders it unfit for use, and makes the enjoyment of his estate less beneficial, may recover for the inconvenience to which he has thereby been subjected, and expenses incurred in reasonable and proper attempts to exclude the gas from the well, but not for injury caused by allowing his horses to drink the water after he knew that it was corrupted by the gas. Sherman *v.* Fall River Iron Works Co., 2 Allen (Mass.) 524, 79 Am. Dec. 799.

Notice of fraud.— Where an action was brought to recover the value of certain horses alleged to have died from eating corn mixed with arsenic, which the plaintiff bought from the defendant, it was held that notwithstanding the defendant had fraudulently concealed from the plaintiff the fact that arsenic was so mixed with the corn, yet, if the plaintiff was informed of the fact before he gave it to his horses he could only recover damages to the value of the corn. Stafford *v.* Newsom, 31 N. C. 507.

Where plaintiffs knew of the infringement of a trade-mark, but took no steps to arrest it, damages will only be given for such sales as took place after the commencement of the action. Enoch Morgan's Sons' Co. *v.* Troxell, 57 How. Pr. (N. Y.) 121.

ful act by the exercise of ordinary effort and care and moderate expense;[56] such rule has no application where the injury could only be prevented by extraordinary effort or cost.[57]

b. Defective Construction. Where a party seeks to recover damages caused by defective construction of property, it is his duty to use reasonable efforts to protect himself therefrom, and he can only recover for such expenses as he could not have avoided by the exercise of reasonable diligence.[58]

4. Personal Injuries — a. In General. One who has been injured by the negligence of another must use ordinary diligence to effect a cure, and there can be no recovery for damages that might have been avoided by the exercise of such care.[59]

56. Reynolds *v.* Chandler River Co., 43 Me. 513; Mark *v.* Hudson River Bridge Co., 103 N. Y. 28, 8 N. E. 243; Rexter *v.* Starin, 73 N. Y. 601; Ludlow *v.* Yonkers, 43 Barb. (N. Y.) 493; Chase *v.* New York Cent. R. Co., 24 Barb. (N. Y.) 273; Johnston *v.* Rudesill, 46 N. C. 510; Dallas *v.* Cooper, (Tex. Civ. App. 1896) 34 S. W. 321; Galveston, etc., R. Co. *v.* Ryan, (Tex. Civ. App. 1893) 21 S. W. 1013; Galveston, etc., R. Co. *v.* Borsky, 2 Tex. Civ. App. 545, 21 S. W. 1011. One whose animals have been killed by a railroad train through the fault of the company, and who does not discover their bodies until swollen, is not bound to use dilligence to dispose of the same in order to entitle him to recover their full value. Rockford, etc., R. Co. *v.* Lynch, 67 Ill. 149.

In an action for inducing the plaintiff, by means of false and fraudulent representations, to purchase for value corporate shares which the defendant knew to be worthless, the proper measure of damages is the difference in value of the stock as the condition of the company issuing it really was and as the purchaser was fraudulently induced to believe it was. The market price of the stock about the time of or soon after the purchase is strong evidence of its value, and in the absence of other proof will control. But where the real pecuniary condition of the company is shown, from which it appears that the stock was worthless, such market price is entitled to no weight upon the question of value. The purchaser, after discovery of its worthlessness, is not bound to mitigate the loss of him by whose fraud he was induced to purchase, by himself cheating some ignorant purchaser. Hubbell *v.* Meigs, 50 N. Y. 480.

Speculation.— On a reference to ascertain the damages caused by an injunction against the sale of an option on real estate, evidence that defendant by a further speculation with regard to the realty might have reduced his loss is properly excluded. O'Connor *v.* New York, etc., Land Imp. Co., 8 Misc. (N. Y.) 243, 28 N. Y. Suppl. 544.

57. Pierpont Mfg. Co. *v.* Goodman Produce Co., (Tex. Civ. App. 1900) 60 S. W. 347; Galveston, etc., R. Co. *v.* Ryan, (Tex. Civ. App. 1893) 21 S. W. 1013; Galveston, etc., R. Co. *v.* Borsky, 2 Tex. Civ. App. 545, 21 S. W. 1011. See also Easterbrook *v.* Erie R. Co., 51 Barb. (N. Y.) 94.

Extraordinary care.— An owner of growing crops destroyed or injured by a railway company's failure to maintain proper cattle-guards as required by Iowa Laws (1862), c. 169, § 3, is not bound to the exercise of extraordinary care to save his crops, even though that might have been successful. And where he has had reason to expect that his request to have proper cattle-guards constructed would be complied with he is justified in having planted his crops in a field not thereby protected. Smith *v.* Chicago, etc., R. Co., 38 Iowa 518.

58. Mather *v.* Butler County, 28 Iowa 253; Gibson *v.* Carlin, 13 Lea (Tenn.) 440. Where the defendant, in an action for the contract price of a roof, set up by way of counter-claim the damage to his machinery caused by a leakage in the roof before it was blown off, owing to the alleged negligent work of plaintiff, it was held that the counter-claim should not be allowed; it appearing that the roof leaked from the time it was put on, and it being therefore negligence on the part of defendant to put in the machinery. Muth *v.* Frost, 68 Wis. 425, 32 N. W. 231. See also Campbell *v.* Miltenberger, 26 La. Ann. 72.

59. *Illinois.*— Sandwich *v.* Dolan, 34 Ill. App. 199.

Indiana.— Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Citizens' St. R. Co. *v.* Hobbs, 15 Ind. App. 610, 43 N. E. 479, 44 N. E. 377.

Iowa.— Allender *v.* Chicago, etc., R. Co., 37 Iowa 264.

Massachusetts.— McGarrahan *v.* New York, etc., Co., 171 Mass. 211, 50 N. E. 610.

United States.— Texas, etc., R. Co. *v.* White, 101 Fed. 928, 42 C. C. A. 86, 62 L. R. A. 90; Owens *v.* Baltimore, etc., R. Co., 35 Fed. 715, 1 L. R. A. 75.

See 15 Cent. Dig. tit. "Damages," § 120.

Neglect not pleaded.— Evidence of the negligence of one injured to attend to his injuries, whereby they were aggravated, may be introduced by defendant in mitigation of damages, although such neglect was not pleaded. Waxahachie *v.* Connor, (Tex. Civ. App. 1896) 35 S. W. 692.

Personal injuries increased by failure to follow advice of physician.— In an action for personal injuries, where it appears that plaintiff employed a reputable physician to care for the injuries, defendant is not liable for any aggravation of the injuries caused by negligence of plaintiff in failing to follow

Only ordinary care is required;[60] and where there has been no neglect on the part of the injured party, and his injuries were more serious, or resulted more seriously than it was at first supposed they would, there can be a full recovery for the entire result.[61]

b. Duty to Summon Medical Aid. While it is the duty of an injured party to summon medical aid and attention, yet the fact that such course was not adopted will not defeat a recovery where there are no circumstances to indicate their absolute necessity.[62]

c. Unskilful Treatment by Physician. Where a party has used reasonable care in selecting a physician or surgeon, but owing to unskilful treatment the injury has been increased, the party causing the original injury will be held liable in damages for the latter.[63]

the directions of such physician. Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616.

60. *Illinois.*— Mt. Sterling *v.* Crummy, 73 Ill. App. 572; Sandwich *v.* Dolan, 34 Ill. App. 199.

Indiana.— Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

Missouri.— Fullerton *v.* Fordyce, 144 Mo. 519, 44 S. W. 1053.

New York.— Lyons *v.* Erie R. Co., 57 N. Y. 489.

Ohio.— Heintz *v.* Caldwell, 16 Ohio Cir. Ct. 630.

Texas.— Trinity, etc., R. Co. *v.* O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389.

See 15 Cent. Dig. tit. "Damages," § 120.

61. Toledo *v.* Radbone, 23 Ohio Cir. Ct. 268; Trinity, etc., R. Co. *v.* O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389; Salladay *v.* Dodgeville, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541. A party injured cannot be held guilty of contributory negligence for having returned to work and used the injured limb before complete recovery, in the absence of bad faith, and from mere ignorance. Toledo Electric St. R. Co. *v.* Tucker, 13 Ohio Cir. Ct. 411, 7 Ohio Cir. Dec. 169. So where one whose hand was injured by the negligence of defendant employed at the time a physician or surgeon competent to treat an injury of that kind, and obeyed his instructions, and was not negligent on his part in treating the wound, which progressed from causes beyond the control of the surgeon until the arm had to be amputated he is entitled to recover for the loss of his arm. Radman *v.* Haberstro, 49 Hun (N. Y.) 605, 1 N. Y. Suppl. 561. In Postal Tel. Cable Co. *v.* Hulsey, 132 Ala. 444, 31 So. 527, where plaintiff in an action for damages resulting from a broken leg became afflicted with nausea before he was able to sit up, and upon turning partially over in bed to avoid vomiting on the bed, rebroke the leg, it was held that the accident causing the original fracture was the proximate cause of the rebreakage.

62. The fact that plaintiff delayed for some time in calling a physician and treated her injury herself is not conclusive of negligence on her part, although the injury was one which required prompt surgical treatment, where there was nothing to indicate that fact to a person of average experience. Galesburg *v.* Rahn, 45 Ill. App. 351.

Illustrations.—An injured person, who from the circumstances might reasonably believe that his injury is of such a character that rest alone will afford a speedy recovery, is not required to incur the expense of nursing and medical attendance, as a condition to his right to recover adequate damages, if any, against the wrong-doer. Kennedy *v.* Busse, 60 Ill. App. 440. So where a pregnant woman fell by reason of a hole in the floor in defendant's station, it was not negligence on her part to fail to send for a physician at the time, the injury not creating an apprehension of immediate danger to her life or health. Texas, etc., R. Co. *v.* Neal, (Tex. Civ. App. 1895) 33 S. W. 693.

Liberty of choice.— One who has been hurt by the negligence of another is not bound in law to undergo a serious and critical surgical operation which would necessarily be attended with some risk of failure and of death, but must be permitted to exercise the liberty of choice in the matter, and his refusal to submit to the operation, although under the evidence it would probably lessen the effects of the injury, cannot be considered in mitigation of damages recoverable therefor. Mattis *v.* Philadelphia Traction Co., 6 Pa. Dist. 94, 19 Pa. Co. Ct. 106.

63. *Alabama.*— Alabama, etc., R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65.

Illinois.— Pullman Palace Car Co. *v.* Bluhm, 109 Ill. 20, 50 Am. Rep. 601; Sandwich *v.* Dolan, 34 Ill. App. 199. *Compare* Moss *v.* Pardridge, 9 Ill. App. 490, which was a most extreme case and where the treatment did not appeal to ordinary reason.

Iowa.— Rice *v.* Des Moines, 40 Iowa 638.

Massachusetts.—McGarrahan *v.* New York, etc., Co., 171 Mass. 211, 50 N. E. 610.

Michigan.— Reed *v.* Detroit, 108 Mich. 224, 65 N. W. 967.

New Hampshire.— Tuttle *v.* Farmington, 58 N. H. 13.

New York.— Lyons *v.* Erie R. Co., 57 N. Y. 489; Sauter *v.* New York Cent., etc., R. Co., 6 Hun 446.

Ohio.— Loeser *v.* Humphrey, 41 Ohio St. 378, 52 Am. Rep. 86.

Tennessee.— Arkansas River Packet Co. *v.* Hobbs, 105 Tenn. 29, 58 S. W. 278.

Texas.— Houston, etc., R. Co. *v.* Hollis, 2 Tex. App. Civ. Cas. § 218.

5. Expenses Incurred in Reducing Damages. As a general rule a party is entitled to all legitimate expenses that he may show to have been incurred by him in an honest endeavor to reduce the damages flowing from or following the wrongful act.[64] This rule applies equally to actions *ex delicto* and actions *ex contractu*.[65] Thus a party may recover expenses legitimately incurred in attempting to prevent loss and injury to property,[66] or expenses incurred in following up property which has been wrongfully taken.[67] So in actions for personal injuries or injuries to live stock a party is entitled to recover time or expenses incurred in effecting a cure.[68]

Wisconsin.— Selleck *v.* Janesville, 100 Wis. 157, 75 N. W. 975, 69 Am. St. Rep. 906, 41 L. R. A. 563.

See 15 Cent. Dig. tit. "Damages," § 123.

Compare Thorne *v.* California Stage Co., 6 Cal. 232, where it was held that evidence was competent that plaintiff's injuries were partially the result of improper treatment on the part of his attending physician, but that there could be no evidence as to the professional reputation of the physician.

Defendant's surgeon.—Where a brakeman's foot was crushed by defendant's negligence, and the brakeman allowed its amputation on the advice of defendant's surgeon, the amputation was the result of defendant's negligence, and whether or not the physician made a mistake is immaterial. St. Louis, etc., R. Co. *v.* Doyle, (Tex. Civ. App. 1894) 25 S. W. 461.

64. *Georgia.*— Savannah, etc., R. Co. *v.* Pritchard, 77 Ga. 412, 1 S. E. 261, 4 Am. St. Rep. 92.

Illinois.— St. Louis, etc., R. Co. *v.* Capps, 72 Ill. 188; St. Louis, etc., R. Co. *v.* Lurton, 72 Ill. 118; Indianapolis, etc., R. Co. *v.* Birney, 71 Ill. 391; Ottawa Gas Light, etc., Co. *v.* Graham, 28 Ill. 73, 81 Am. Dec. 263; Ohio, etc., R. Co. *v.* Dunbar, 20 Ill. 623, 71 Am. Dec. 291.

Indiana.— Sullivan County *v.* Arnett, 116 Ind. 438, 19 N. E. 299.

Iowa.— Smith *v.* Chicago, etc., R. Co., 38 Iowa 518.

Kansas.— St. Louis, etc., R. Co. *v.* Ritz, 33 Kan. 404, 6 Pac. 533; Kansas Pac. R. Co. *v.* Mihlman, 17 Kan. 224.

Maine.— Merrill *v.* How, 24 Me. 126; Watson *v.* Lisbon Bridge, 14 Me. 201, 31 Am. Dec. 49.

Massachusetts.— Emery *v.* Lowell, 109 Mass. 107; Shaw *v.* Cummiskey, 7 Pick. 76.

Michigan.— Ellis *v.* Hilton, 78 Mich. 150, 43 N. W. 1048, 18 Am. St. Rep. 438, 6 L. R. A. 454.

New York.— Jones *v.* Morgan, 90 N. Y. 4, 43 Am. Rep. 131; Jutte *v.* Hughes, 67 N. Y. 267; Comstock *v.* New York Cent., etc., Co., 48 Hun 225; Worth *v.* Edmonds, 52 Barb. 40; Hutton *v.* Murphy, 9 Misc. 151, 29 N. Y. Suppl. 70.

Tennessee.— Nashville *v.* Sutherland, 94 Tenn. 356, 29 S. W. 228.

Texas.— Gulf, etc., R. Co. *v.* Keith, 74 Tex. 287, 11 S. W. 1117; Trinity, etc., R. Co. *v.* Schofield, 72 Tex. 496, 10 S. W. 575; International, etc., R. Co. *v.* Cocke, 64 Tex. 151; Buffalo Bayou Ship Canal Co. *v.* Milby, 63 Tex. 492, 51 Am. Rep. 668.

Vermont.— Lloyd *v.* Lloyd, 60 Vt. 288, 13 Atl. 638; Chase *v.* Snow, 52 Vt. 525.

Wisconsin.— Zitske *v.* Goldberg, 38 Wis. 216.

United States.— The Henry Buck, 39 Fed. 211.

England.— Hales *v.* London, etc., R. Co., 4 B. & S. 66, 32 L. J. Q. B. 292, 8 L. T. Rep. N. S. 421, 11 Wkly. Rep. 856, 116 E. C. L. 66; Borries *v.* Hutchinson, 18 C. B. N. S. 445, 11 Jur. N. S. 267, 34 L. J. C. P. 169, 11 L. T. Rep. N. S. 771, 13 Wkly. Rep. 386, 114 E. C. L. 445.

See 15 Cent. Dig. tit. "Damages," § 91; and *supra*, VII, I, 1.

65. See *supra*, VII, I, 1.

66. *Indiana.*— Pittsburg, etc., R. Co. *v.* Hixon, 110 Ind. 225, 11 N. E. 285.

Iowa.— Smith *v.* Chicago, etc., R. Co., 38 Iowa 518.

Massachusetts.— Shaw *v.* Cummiskey, 7 Pick. 76.

New York.— Jones *v.* Morgan, 90 N. Y. 4, 43 Am. Rep. 131; Comstock *v.* New York, etc., R. Co., 48 Hun 225.

Tennessee.— Nashville *v.* Sutherland, 94 Tenn. 356, 29 S. W. 228.

Texas.— Buffalo Bayou Ship Canal Co. *v.* Milby, 63 Tex. 492, 51 Am. Rep. 668.

United States.— The Henry Buck, 39 Fed. 211.

See also *supra*, VII, I, 3.

67. Savannah, etc., R. Co. *v.* Pritchard, 77 Ga. 412, 1 S. E. 261, 4 Am. St. Rep. 92; Brown *v.* South Western R. Co., 36 Ga. 377; Ohio, etc., R. Co. *v.* Dunbar, 20 Ill. 623, 71 Am. Dec. 291; Merrill *v.* How, 24 Me. 126; Bennett *v.* Lockwood, 20 Wend. (N. Y.) 223, 32 Am. Dec. 532. *Compare* Kelly *v.* McKibben, 54 Cal. 192.

68. *Georgia.*— Atlanta Cotton-Seed Oil Mills *v.* Coffey, 80 Ga. 145, 4 S. E. 759, 12 Am. St. Rep. 244.

Illinois.— Sheridan *v.* Hibbard, 119 Ill. 307, 9 N. E. 894; Chicago *v.* Langlass, 66 Ill. 361.

Indiana.— Sullivan County *v.* Arnett, 116 Ind. 438, 19 N. E. 299; Indianapolis *v.* Gaston, 58 Ind. 224.

Iowa.— Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462.

Kansas.— Missouri, etc., R. Co. *v.* Weaver, 16 Kan. 456.

Maine.— Watson *v.* Lisbon Bridge, 14 Me. 201, 31 Am. Dec. 49.

Maryland.— McMahon *v.* Northern Cent. R. Co., 39 Md. 438.

Michigan.— Ellis *v.* Hilton, 78 Mich. 150,

L. Costs and Expenses of Litigation — **1. In General.** As a general rule the expenses of litigation incurred in the prosecution of the suit are not ordinarily recoverable as damages.[69] In cases of civil injury or breach of contract, in which there is no fraud, wilful negligence, or malice, the courts have considered that an award of the costs in the action is sufficient to cover the expenses of litigation and make no allowance for time, indirect loss, and annoyance.[70]

2. Fraud or Wilful Wrong. In case of fraud, wilful wrong, or gross negligence, the courts have sometimes allowed the expenses of the suit to be taken into consideration in estimating the damages.[71]

43 N. W. 1048, 18 Am. St. Rep. 438, 6 L. R. A. 454.

Missouri.— Stephens *v.* Hannibal, etc., R. Co., 96 Mo. 207, 9 S. W. 589.

New York.— Brignoli *v.* Chicago, etc., R. Co., 4 Daly 182.

Pennsylvania.— Lake Shore, etc., R. Co. *v.* Frantz, 127 Pa. St. 297, 18 Atl. 22, 4 L. R. A. 389; Pennsylvania, etc., Canal Co. *v.* Graham, 63 Pa. St. 290, 3 Am. Rep. 549.

Texas.— Gulf, etc., R. Co. *v.* Keith, 74 Tex. 287, 11 S. W. 1117.

Wisconsin.— Goodno *v.* Oshkosh, 28 Wis. 300.

United States.— Beardsley *v.* Swann, 4 Fed. Cas. No. 1,187, 4 McLean 333.

And see *supra*, VII, I, 5.

69. *Alabama.*— Birmingham First Nat. Bank *v.* Newport First Nat. Bank, 116 Ala. 520, 22 So. 976.

Arkansas.— Jacobson *v.* Poindexter, 42 Ark. 97; Goodbar *v.* Lindsley, 51 Ark. 380, 11 S. W. 577, 14 Am. St. Rep. 54.

Connecticut.—Maisenbacher *v.* Society Concordia, 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213; Dibble *v.* Morris, 26 Conn. 416.

Iowa.—Boardman *v.* Marshalltown Grocery Co., 105 Iowa 445, 75 N. W. 343; Bull *v.* Keenan, 100 Iowa 144, 69 N. W. 433; Voise *v.* Phillips, 37 Iowa 428.

Massachusetts.— Barnard *v.* Poor, 21 Pick. 378.

Michigan.— Warren *v.* Cole, 15 Mich. 265 [*following* Hatch *v.* Hart, 2 Mich. 289].

New York.— Halstead *v.* Nelson, 24 Hun 395 [*following* Hicks *v.* Foster, 13 Barb. 663]; Lincoln *v.* Saratoga, etc., R. Co., 23 Wend. 425.

Ohio.— Roberts *v.* Mason, 10 Ohio St. 277; Stephens *v.* Handly, Wright 121.

Pennsylvania.— Stopp *v.* Smith, 71 Pa. St. 285; Good *v.* Mylin, 8 Pa. St. 51, 49 Am. Dec. 493.

Vermont.— Park *v.* McDaniels, 37 Vt. 594.

United States.— Day *v.* Woodworth, 13 How. 363, 14 L. ed. 181; Holbrook *v.* Small, 12 Fed. Cas. No. 6,596, 3 Ban. & A. 625; Simpson *v.* Leiper, 22 Fed. Cas. No. 12,884.

England— Holloway *v.* Turner, 6 Q. B. 928, 9 Jur. 160, 14 L. J. Q. B. 143, 51 E. C. L. 928; Abthorp *v.* Bedford, etc., R. Co., 8 L. T. Rep. N. S. 200.

Canada.— Deveber *v.* Roop, 16 N. Brunsw. 295; Davis *v.* Cushing, 10 N. Brunsw. 383.

See 15 Cent. Dig. tit. "Damages," § 146 *et seq.*

Appeal.— The grantor in a deed of trust executed to secure a debt is not responsible for the damages or costs which the grantee was compelled to pay on account of the prosecution of an appeal from a judgment in favor of creditors of the grantor's husband subjecting the property conveyed, where she did not request that the appeal be prosecuted. Merchants', etc., Bank *v.* Cleland, (Ky. 1902) 67 S. W. 386.

Expenses unnecessary.— Where the expenses should not have been incurred, such expenses have been denied by the courts. Holmes *v.* Balcom, 84 Me. 226, 24 Atl. 821.

Loss of time.— The damages recoverable in an action cannot include an allowance to plaintiff for loss of time in bringing it. Blackwell *v.* Acton, 38 Ind. 425. So in an action against a corporation for refusal to allow plaintiff to inspect its stock-book, the value of plaintiff's time in attempting to secure the right to inspect the stock-book of defendant corporation, and sums paid to his attorney therefor, are not recoverable as actual damages. Boardman *v.* Marshalltown Grocery Co., 105 Iowa 445, 75 N. W. 343.

Malicious prosecution.— In an action for malicious prosecution the jury are not at liberty in assessing damages to estimate the traveling expenses and loss of time of defendant in preparing his defense and in attending court. In the eye of the law the expenses of a suit which a party incurs are as a general rule considered as covered by the taxed costs. Osborn *v.* Moore, 12 La. Ann. 714.

70. *Arkansas.*— Jacobson *v.* Poindexter, 42 Ark. 97.

Louisiana.— Young *v.* Courtney, 13 La. Ann. 193; Osborn *v.* Moore, 12 La. Ann. 714.

Massachusetts.—Henry *v.* Davis, 123 Mass. 345; Adams *v.* Cordis, 8 Pick. 260.

New York.— Marvin *v.* Prentice, 94 N. Y. 295.

Texas.— Smith *v.* Sherwood, 2 Tex. 460.

Vermont.— Park *v.* McDaniels, 37 Vt. 594.

United States.— Day *v.* Woodworth, 13 How. 363, 14 L. ed. 181. See also Whittemore *v.* Cutter, 29 Fed. Cas. No. 17,600, 1 Gall. 429.

See 15 Cent. Dig. tit. "Damages," § 146 *et seq.*

71. St. Peter's Church *v.* Beach, 26 Conn. 355, where it is held that a jury is allowed to take expenses of litigation into consideration in cases of wanton and malicious in-

3. Attorney's Fees — a. In General. Upon the same principle as heretofore stated the courts will not as a general rule allow attorney's fees to be recovered as part of the damages in an action,[72] unless the wrong or injury complained of

jury, only because the law furnishes no definite rule of damages in such a case, in consequence of which the jury is at liberty, in the exercise of its discretion, to consider such a known and actual incident of the injury, although not its natural consequence.

Actions for fraud.— Where a party is obliged to bring suit to relieve himself from the consequences of another's fraud, he may recover his attorney's fees as special damages (Flack *v.* Neill, 22 Tex. 253; Bracken *v.* Neill, 15 Tex. 1097); but where a defendant in an action on contract pleads fraud as a defense thereto he is not entitled to recover attorney's fees as special damages (Flack *v.* Neill, 22 Tex. 253).

Damages for an injury from a defect in a highway should be compensatory merely unless the jury should find gross negligence on the part of the town, in which case they may increase the amount by considering the expenses of the plaintiff's suit, not including the taxable costs. Wilson *v.* Granby, 47 Conn. 59, 36 Am. Rep. 51; Beecher *v.* Derby Bridge, etc., Co., 24 Conn. 491.

Fraudulent dispossession.—The trouble and expense to which plaintiff is subjected in establishing his title to property, of which defendant has attempted fraudulently to dispossess him, form a good ground for estimating the damages. Copley *v.* Berry, 12 Rob. (La.) 79.

In an action for the value of property irregularly sold on execution, plaintiff is entitled to recover not only the amount for which the property sold, but also the costs of summoning witnesses to prove its value. Zent *v.* Smith, 83 Ind. 442. See also White *v.* Givens, 29 La. Ann. 571.

In an action on the case for obstructing a highway, whereby plaintiff was injured, the jury in estimating damages can take into consideration the necessary trouble and expenses of plaintiff in the prosecution of the action. Linsley *v.* Bushnell, 15 Conn. 225, 38 Am. Dec. 79.

In a suit for damages on account of a trespass, the trouble and expense the plaintiff has been illegally put to are to be considered in estimating the damages. Attorney's fees are a part of such expense. Cooper *v.* Cappel, 29 La. Ann. 213.

Referee's fees.— Where a reference is ordered, under N. Y. Code, § 222, to ascertain damages upon an undertaking given on the granting of an injunction, the referee's fees are a part of the damages, and are recoverable as such. Lawton *v.* Green, 64 N. Y. 326. So under a contract to submit a question to the decision of a referee *pendente lite*, and then, if the decision is adverse to plaintiff, the suit is to be dismissed, the damages for plaintiff's breach of the contract will properly include expenses incurred in resisting further prosecution of the case, a reasonable counsel fee, and the necessary attendant expenses. Scott *v.* Reedy, 5 Ohio Dec. (Reprint) 388, 5 Am. L. Rec. 367, 1 Cinc. L. Bul. 331.

Recovery by statute.— Plaintiff purchased a horse from defendant, who warranted it to be sound. Afterward the horse was returned, plaintiff taking another in exchange, and this was also returned as worthless. Defendant kept both horses and refused to return the purchase-money. It was held that plaintiff was entitled to recover his counsel fees under Ga. Code, § 2942, providing that they may be recovered where defendant has acted in bad faith. Chambers *v.* Harper, 83 Ga. 382, 9 S. E. 717.

72. *California.*—Falk *v.* Waterman, 49 Cal. 224; Howell *v.* Scoggins, 48 Cal. 355.

Colorado.— Spencer *v.* Murphy, 6 Colo. App. 453, 41 Pac. 841.

District of Columbia.— Donovan *v.* Johnson, 13 App. Cas. 356.

Georgia.— Clark *v.* Wolfe, 115 Ga. 320, 41 S. E. 581.

Illinois.— Knefel *v.* Ahern, 57 Ill. App. 568.

Iowa.— Dorris *v.* Miller, 105 Iowa 564, 75 N. W. 482; Bull *v.* Keenan, 100 Iowa 144, 69 N. W. 433.

Kansas.— Winsted *v.* Hulme, 32 Kan. 568, 4 Pac. 994.

Louisiana.— Eatman *v.* New Orleans Pac. R. Co., 35 La. Ann. 1018; Day *v.* New Orleans Pac. R. Co., 35 La. Ann. 694; Campbell *v.* Short, 35 La. Ann. 465; Massie *v.* Baily, 33 La. Ann. 485; Hale *v.* New Orleans, 18 La. Ann. 321; Burham *v.* Hart, 15 La. Ann. 517; Flynn *v.* Rhodes, 12 La. Ann. 239; Knott *v.* Gough, 10 La. Ann. 562.

Massachusetts.—Henry *v.* Davis, 123 Mass. 345; Barnard *v.* Poor, 21 Pick. 378.

Minnesota.— Kelly *v.* Rogers, 21 Minn. 146.

New York.— Lincoln *v.* Saratoga, etc., R. Co., 23 Wend. 425.

Ohio.— Gates *v.* Toledo, 57 Ohio St. 105, 48 N. E. 500.

Pennsylvania.—Haverstick *v.* Erie Gas Co., 29 Pa. St. 254; Murphy *v.* Jarvis, 1 Phila. 84.

South Carolina.— Welch *v.* Northeastern R. Co., 12 Rich. 290.

Texas.— Webb *v.* Harris, 1 Tex. App. Civ. Cas. § 1035; Brooks *v.* Price, 2 Tex. Unrep. Cas. 118.

Vermont.— Hoadley *v.* Watson, 45 Vt. 289, 12 Am. Rep. 197; Earl *v.* Tupper, 45 Vt. 275.

Virginia.— Burruss *v.* Hines, 94 Va. 413, 26 S. E. 875.

Wisconsin.— Fairbanks *v.* Witter, 18 Wis. 287, 76 Am. Dec. 765.

United States.— Oelrichs *v.* Williams, 15 Wall. 211, 21 L. ed. 43; Day *v.* Woodworth, 13 How. 363, 14 L. ed. 181; Arcambel *v.*

is connected with some circumstance of aggravation or malice,[73] but even in such cases the courts are very loathe to depart from the well established rule, and when only compensatory damages are sought counsel fees will usually be denied as an element of damages.[74]

b. Actions of Contract. It seems that expenses of litigation and attorney's fees will never be allowed in case of the breach of a simple contract.[75]

c. Actions of Tort. The courts have been far from uniform in their decisions in allowing expenses and attorney's fees in cases of tort.[76] Thus in actions of trover,[77] trespass,[78] and deceit[79] the right of recovery has been denied; while in the same or other cases involving no more injury or loss the right of recovery has been affirmed.[80] The ruling principle which usually guides the courts in this regard is the distinction drawn as to the malice or negligence of the act com-

Wiseman, 3 Dall. 306, 1 L. ed. 613; Simpson *v.* Leiper, 22 Fed. Cas. No. 12,884.

Canada.— Cox *v.* Turner, 2 Montreal Q. B. 278; Davis *v.* Cushing, 10 N. Brunsw. 383.

In an action by an administrator to recover personal property of his decedent he cannot recover as damages fees paid by him to counsel for services rendered in the litigation against defendant. Bishop *v.* Hendrick, 82 Hun (N. Y.) 323, 31 N. Y. Suppl. 502.

73. If a lessor breaks a covenant for quiet enjoyment by suing lessee to recover possession, lessee's costs and counsel fees are properly allowed as damages in an action for a breach. Levitzky *v.* Canning, 33 Cal. 299. Where a landlord's refusal to deliver either the check or the baggage is capricious, or puts the guest to unnecessary expense, the latter may recover attorney's fees as part of his damages. Carhart *v.* Wainman, 114 Ga. 632, 40 S. E. 781, 88 Am. St. Rep. 45. In Flanders *v.* Tweed, 15 Wall. (U. S.) 450, 21 L. ed. 203, plaintiff's fees to counsel on a suit for damages against a treasury agent for illegally seizing and retaining his property were disallowed, although the seizure was adjudged to have been illegal and damages were given accordingly.

Fraudulent compromise.— One who has compromised a judgment obtained against him through the fraud of another is entitled to recover from such person as damages the counsel fees paid in effecting the compromise. Hynes *v.* Patterson, 95 N. Y. 1.

Spoliation of will.— In an action by the devisees and legatees under a will against one for the spoliation of such will, after the death of the testator, the plaintiffs are entitled to recover the attorney's fees reasonably expended in having said will admitted to probate. Taylor *v.* Bennett, 1 Ohio Cir. Ct. 95.

Under Cal. Civ. Code, § 3336, providing that the damages recoverable for wrongful conversion shall include "a fair compensation for the time and money properly expended in pursuit of the property," reasonable attorney's fees properly expended by one in recovering a large part of a sum of money, obtained from him through the fraud of another's agent, for which the principal is liable, are recoverable as an element of compensatory damages in an action against the principal. Palo Alto Bank *v.* Pacific Postal Tel. Cable Co., 103 Fed. 841.

74. Salado College *v.* Davis, 47 Tex. 131. See also Barnard *v.* Poor, 21 Pick. (Mass.) 378.

75. Massie *v.* Baily, 33 La. Ann. 485; Haverstick *v.* Erie Gas Co., 29 Pa. St. 254.

76. See cases cited *infra*, note 77 *et seq.*

77. **Trover.**— In trover the jury are not at liberty to give additional damages in consideration of plaintiff's trouble and expenses incurred in the prosecution of his suit. Hurd *v.* Hubbell, 26 Conn. 389. So where defendant paid a note which plaintiff had given for his accommodation, and then attempted to hold it against plaintiff as a valid obligation, it was held that the plaintiff could recover the note in trover, together with the actual damages sustained by him; but he was not entitled to recover the expenses of the suit beyond taxable costs. Park *v.* McDaniels, 37 Vt. 594.

78. **Trespass.**— In an action of trespass, where it does not appear that the injury was wanton or malicious, the expenses of the plaintiff in the prosecution of his suit cannot be included in the damages. Dibble *v.* Morris, 26 Conn. 416; St. Peter's Church *v.* Beach, 26 Conn. 355. See also Fairbanks *v.* Witter, 18 Wis. 287, 76 Am. Dec. 765. *Compare* Cooper *v.* Cappel, 29 La. Ann. 213. In estimating damages in an action for trespass committed by breaking into plaintiff's rooms and destroying property, plaintiff's attorney's fees and other expenses of litigation cannot be included. Falk *v.* Waterman, 49 Cal. 224.

79. **Deceit.**— In an action for deceit, where there was no evidence that defendant had been stubbornly litigious, or had caused plaintiff unnecessary trouble or expense, it was error to charge that plaintiff might be allowed damages for unnecessary trouble and expense put on him by defendant's stubborn litigation. Smith *v.* Dudley, 69 Ga. 78. See also Warren *v.* Cole, 15 Mich. 265.

80. Attorney's fees and expenses incurred in good faith by a bank in saving itself from loss occasioned by the fraud of a party who obtained from it a draft, and then caused the same to be cashed, are compensatory and not exemplary, and may be re-

plained of, and upon that ground alone can be predicated the lack of harmony that seems to exist between the various decisions.[81]

4. Expenses of Prior Litigation — a. In General. As far as the recovery of the expenses of prior actions are concerned, as a general rule there can be no recovery, unless there is shown some mitigating circumstances which warrant the institution of the suit, or the defense thereof.[82] The allowance of expenses in such cases depends entirely upon the circumstances of the case as presented to the court. Where the prevailing party has acted *bona fide* in his action or defense his expenses formerly incurred will be allowed.[83] In order to be entitled to

covered in an action against the wrong-doer. Hutchinson First Nat. Bank *v.* Williams, 62 Kan. 431, 63 Pac. 744.

It seems that in cases of trespass, where compensatory damages are allowable, the attorney's fees and other necessary expenses of the plaintiff may be included in the estimate of damages. Cleveland, etc., R. Co. *v.* Bartram, 11 Ohio St. 457.

Where property is wrongfully seized on execution, the owner is entitled to a reasonable amount for attorney's fees expended in an action to protect his rights. Gilkerson-Sloss Commission Co. *v.* Yale, 47 La. Ann. 690, 17 So. 244; White *v.* Givens, 29 La. Ann. 571.

81. *Connecticut.*— See Wilson *v.* Granby, 47 Conn. 59, 36 Am. Rep. 51; Dibble *v.* Morris, 26 Conn. 416; St. Peter's Church *v.* Beach, 26 Conn. 355.

Georgia.— Clarke *v.* Wolfe, 115 Ga. 320, 41 S. E. 581; Carhart *v.* Wainman, 114 Ga. 632, 40 S. E. 781, 88 Am. St. Rep. 45; Chambers *v.* Harper, 83 Ga. 382, 9 S. E. 717; Smith *v.* Dudley, 69 Ga. 78.

Iowa.— Dorris *v.* Miller, 105 Iowa 564, 75 N. W. 482.

Kansas.— Hutchinson First Nat. Bank *v.* Williams, 62 Kan. 431, 63 Pac. 744; Winstead *v.* Hulme, 32 Kan. 568, 4 Pac. 994.

Louisiana.— Eatman *v.* New Orleans Pac. R. Co., 35 La. Ann. 1018.

Texas.— Brooks *v.* Price, 2 Tex. Unrep. Cas. 118.

False imprisonment.— In Carman *v.* Dunn, 23 N. Brunsw. 335, which was an action for false imprisonment, it was held that the party was entitled to recover the expenses to which he had been put in securing a reversal of a former judgment.

In an action for flooding plaintiff's land plaintiff cannot recover for his trouble and expense in conducting his suit and establishing his right at law. Good *v.* Mylin, 8 Pa. St. 51, 49 Am. Dec. 493.

Where a city erroneously assumes that a certain way is a public street, and passes an ordinance to change its grade, an abutting owner is entitled to recover of the city the expense incurred by him in showing that it has no rights in such way. Huckestein *v.* Allegheny City, 165 Pa. St. 367, 30 Atl. 982.

82. Marvin *v.* Prentice, 94 N. Y. 295; Wilson *v.* Mathews, 24 Barb. (N. Y.) 295; Jeter *v.* Glenn, 9 Rich. (S. C.) 374; Wood Mowing, etc., Mach. Co. *v.* Hancock, 4 Tex. Civ. App. 302, 23 S. W. 384. A municipal officer who had been removed from office by the city government on charges of misconduct sued to recover his salary for the entire term during which he was removed, alleging that such removal was illegal, and also claimed to recover for money expended by him in defending himself against said charges. It was held that such expenses were not damages which he could recover. Shaw *v.* Macon, 19 Ga. 468. In an action by an officer, who has been defeated in an action for suffering an escape, against the prisoner, he may recover the costs paid by him as well as the damages. Griffin *v.* Brown, 2 Pick. (Mass.) 304. Where an assessment is made for a contractor, and is held invalid in his suit to collect it, the contractor, in an action against the city to recover for the contract price of his work, cannot recover for his expenses incurred in employing counsel in the prior suit. Toledo *v.* Goulden, 6 Ohio Cir. Dec. 445.

Expenses in obtaining an injunction cannot be embraced in the damages recoverable for the infringement of a trade-mark. Burnett *v.* Phalon, 12 Abb. Pr. (N. Y.) 186, 21 How. Pr. (N. Y.) 100. *Compare* Abthorp *v.* Bedford, etc., R. Co., 8 L. T. Rep. N. S. 200.

Under Ohio Rev. St. § 6778, providing that one who in an action of quo warranto against the usurper of an office recovers a judgment of ouster may at any time within one year after the date of the judgment bring an action against the party ousted for the damages he sustained by reason of such usurpation, it was held that the plaintiff could not recover his attorney's fees and expenses incurred in such an action. Palmer *v.* Darby, 4 Ohio S. & C. Pl. Dec. 48.

83. *Massachusetts.*— Coolidge *v.* Brigham, 5 Metc. 68.

New York.— Dubois *v.* Hermance, 56 N. Y. 673; Hastie *v.* De Peyster, 3 Cai. 190.

Ohio.— Karchner *v.* Cincinnati, 9 Ohio Dec. (Reprint) 463, 14 Cinc. L. Bul. 48.

United States.— New York State Mar. Ins. Co. *v.* Protection Ins. Co., 18 Fed. Cas. No. 10,216, 1 Story 458.

England.— Baxendale *v.* London, etc., R. Co., L. R. 10 Exch. 35; Hughes *v.* Graeme, 33 L. J. Q. B. 335, 12 Wkly. Rep. 857.

See 15 Cent. Dig. tit. "Damages," § 151.

Death of juror.— Where it appeared in an action of assault and battery that there had been a former trial of the cause, and by reason of the death of one of the jurors no verdict was rendered, it was held that the jury might properly take into consideration the

expenses of a prior suit by way of damages, they must be the natural and reasonable consequence of the wrong or injury complained of.[84]

b. Prior Litigation Unnecessary. Where the prior litigation was unnecessary, there can be no recovery for expenses therein.[85]

c. In Case of Exemplary Damages. There is a decided conflict of authority as to whether expenses and attorney's fees can be awarded in those cases in which exemplary damages are given by the jury. In Alabama, Connecticut, Kansas, Mississippi, and Ohio such practice is allowed.[86] The better rule on this subject, however, seems to be that such expenses and fees are no more allowable where exemplary damages are given than in ordinary cases.[87]

M. Interest by Way of Damages — 1. In General. As a general rule interest as damages cannot be recovered on an unliquidated demand,[88] or where

expenses of such former trial in estimating the damages. Noyes *v.* Ward, 19 Conn. 250.

Defamation of title.— The fact that plaintiff recovered taxable costs against defendant in an action to quiet title to land is not a bar to an action for defamation of title. If defendants acted maliciously, and under a claim which they knew to be false, plaintiff may recover for any reasonable outlay by him in removing the cloud from his title. Chesebro *v.* Powers, 78 Mich. 472, 44 N. W. 290.

84. Hancock *v.* Hubbell, 71 Cal. 537, 12 Pac. 618; Chase *v.* Bennett, 59 N. H. 394; Slingerland *v.* Bennett, 66 N. Y. 611.

85. Lunt *v.* Wrenn, 113 Ill. 168; Holmes *v.* Balcom, 84 Me. 226, 24 Atl. 821; New York State Mar. Ins. Co. *v.* Protection Ins. Co., 18 Fed. Cas. No. 10,216, 1 Story 458. In an action for causing an officer who arrested plaintiff in a suit brought against him by defendant to refuse to accept sufficient bail, the expense of defending the suit in which the arrest was made, not caused by the refusal of bail, cannot be included in the damages. Gibbs *v.* Randlett, 58 N. H. 407.

86. *Alabama.*— Marshall *v.* Betner, 17 Ala. 832 [*citing* Haddan *v.* Mills, 4 C. & P. 486, 19 E. C. L. 614].

Connecticut.—Maisenbacker *v.* Society Concordia, 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213; Wynne *v.* Parsons, 57 Conn. 73, 17 Atl. 362; Welch *v.* Durand, 36 Conn. 182, 4 Am. Rep. 55; Dibble *v.* Morris, 26 Conn. 416; St. Peter's Church *v.* Beach, 26 Conn. 355; Beecher *v.* Derby Bridge, etc., Co., 24 Conn. 491; Linsley *v.* Bushnell, 15 Conn. 225, 38 Am. Dec. 79. See also Mason *v.* Hawes, 52 Conn. 12, 52 Am. Rep. 552.

Kansas.— Dow *v.* Julien, 32 Kan. 576, 4 Pac. 1000; Winstead *v.* Hulme, 32 Kan. 568, 4 Pac. 994; Titus *v.* Corkins, 21 Kan. 722.

Mississippi.— New Orleans, etc., R. Co. *v.* Allbritton, 38 Miss. 242, 75 Am. Dec. 98.

Ohio.— Roberts *v.* Mason, 10 Ohio St. 277; Stevens *v.* Handly, Wright 121; Shafer *v.* Patterson, 4 Ohio Dec. (Reprint) 167, 1 Clev. L. Rep. 84. See also Peckham Iron Co. *v.* Harper, 41 Ohio St. 100; Sexton *v.* Todd, Wright 316.

See 15 Cent. Dig. tit. "Damages." § 219.

By statute.— As vindictive damages cannot be recovered in Nebraska, attorney's fees are not recoverable in actions of tort, except where specifically provided for by statute. Winkler *v.* Roeder, 23 Nebr. 706, 37 N. W. 607, 8 Am. St. Rep. 155. Under Ga. Code, § 2942, the jury may allow expenses of litigation as a part of the damages, where defendant has acted in bad faith, has been stubbornly litigious, or has caused plaintiff unnecessary trouble and expense. Guernsey *v.* Shellman, 59 Ga. 797.

87. Falk *v.* Waterman, 49 Cal. 224; Howell *v.* Scoggins, 48 Cal. 355; Kelly *v.* Rogers, 21 Minn. 146; Hoadley *v.* Watson, 45 Vt. 289, 12 Am. Rep. 197; Earl *v.* Tupper, 45 Vt. 275; Oelrichs *v.* Spain, 15 Wall. (U. S.) 211, 21 L. ed. 43; Day *v.* Woodworth, 13 How. (U. S.) 363, 14 L. ed. 181.

88. *California.*— Swinnerton *v.* Argonaut Land, etc., Co., 112 Cal. 375, 44 Pac. 719; Hooper *v.* Patterson, (1893) 32 Pac. 514.

Illinois.— Brownell Imp. Co. *v.* Critchfield, 197 Ill. 61, 64 N. E. 332; Dady *v.* Condit, 104 Ill. App. 507.

Michigan.— Coburn *v.* Muskegon Booming Co., 72 Mich. 134, 40 N. W. 198.

Montana.— Randall *v.* Greenhood, 3 Mont. 506.

New Jersey.— Speer *v.* Vanorden, 3 N. J. L. 652.

New York.— Mansfield *v.* New York Cent., etc., R. Co., 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566; McMaster *v.* State, 108 N. Y. 542, 15 N. E. 417; Duryee *v.* New York, 96 N. Y. 477; White *v.* Miller, 71 N. Y. 118, 27 Am. Rep. 13, 78 N. Y. 393, 34 Am. Rep. 544; Gray *v.* Cent. R. Co., 89 Hun 477, 35 N. Y. Suppl. 378; Button *v.* Kinnetz, 88 Hun 35, 34 N. Y. Suppl. 522; Doctor *v.* Darling, 68 Hun 70, 22 N. Y. Suppl. 594; Chamberlain *v.* Dunlop, 54 Hun 639, 8 N. Y. Suppl. 125.

South Carolina.— Sullivan *v.* Susong, 30 S. C. 305, 9 S. E. 156; Budd *v.* Union Ins. Co., 4 McCord 1.

Wisconsin.—Tucker *v.* Grover, 60 Wis. 240, 19 N. W. 62.

United States.— Gilpins *v.* Consequa, 10 Fed. Cas. No. 5,452, Pet. C. C. 85, 3 Wash. 184; Willings *v.* Consequa, 30 Fed. Cas. No. 17,766, Pet. C. C. 172.

Canada.— Beam *v.* Beatty, 3 Ont. L. Rep. 345.

See 15 Cent. Dig. tit. "Damages," § 135 *et seq.*

the amount due is not susceptible of ascertainment by computation or by reference to market values.[89] The old common-law rule which required that a demand should be liquidated or its amount in some way ascertained before interest could be allowed has been modified to some extent, however, by general consent,[90] and under the latter-day decisions, even though the amount of damages be unliquidated, yet if it can be ascertained by computation and reference to established market values, interest may be recoverable thereon.[91]

2. By Statute. In some states interest by way of damages is provided for by statute.[92]

3. Detention of, or Delay in Paying Over, Money. Where a party has detained money after the same is due, the opposite party may recover by way of compensation not only the original amount but interest by way of damages for its detention.[93] However, a mere delay or a dispute of the claim made in good

When judgment by default is entered interest will be allowed from the time of the commencement of the action, although the complaint is for unliquidated damages and interest is not specifically prayed for. Whereatt *v.* Ellis, 68 Wis. 61, 30 N. W. 520, 31 N. W. 762.

89. Swinnerton *v.* Argonaut Land, etc., Co., 112 Cal. 375, 44 Pac. 719; Coburn *v.* Goodall, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75; Coburn *v.* Muskegon Booming Co., 72 Mich. 134, 40 N. W. 198; Mansfield *v.* New York Cent., etc., R. Co., 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566; McMaster *v.* State, 108 N. Y. 542, 15 N. E. 417; White *v.* Miller, 71 N. Y. 118, 27 Am. Rep. 13; Gray *v.* Central R. Co., 89 Hun (N. Y.) 477, 35 N. Y. Suppl. 378.

In an action for breach of a contract to sell a rubber-manufacturing plant, the plaintiff was not entitled to interest on his damages, where from the character of the property and the conflicting opinions of witnesses as to its value the plant could not be regarded as having a market value. Sloan *v.* Baird, 162 N. Y. 327, 56 N. E. 752, 30 N. Y. Civ. Proc. 361 [*affirming* 12 N. Y. App. Div. 481, 42 N. Y. Suppl. 38].

Where a contractual claim is uncertain in amount and is contested on reasonable grounds, interest will not be allowed for the time preceding the determination of the right of recovery and the amount due. Shipman *v.* State, 44 Wis. 458.

90. McMahon *v.* New York, etc., R. Co., 20 N. Y. 463.

The English courts do not allow interest in cases where the damages are unliquidated. So stated in Van Rensselaer *v.* Jewett, 2 N. Y. 135, 51 Am. Dec. 275.

91. Mansfield *v.* New York Cent., etc., R. Co., 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566; McCollum *v.* Seward, 62 N. Y. 316; McMahon *v.* New York, etc., R. Co., 20 N. Y. 463; Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Van Rensselaer *v.* Jewett, 2 N. Y. 135, 51 Am. Dec. 275; Sipperly *v.* Stewart, 50 Barb. (N. Y.) 62; Fitch *v.* Livingston, 4 Sandf. (N. Y.) 492; Barrow *v.* Reab, 9 How. (U. S.) 366, 13 L. ed. 177.

One who recovers damages on an unliquidated claim is entitled to interest only from the time his action was brought, and not from the time his cause of action accrued; and this rule is not changed by the fact that such damages were recovered by way of counter-claim to an action on a liquidated claim, in which plaintiff was allowed interest on his damages from the time of their accrual. Hewitt *v.* John Week Lumber Co., 77 Wis. 548, 46 N. W. 822.

92. *California.*— Coburn *v.* Goodall, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75. And see Hewes *v.* Germain Fruit Co., 106 Cal. 441, 39 Pac. 853.

Colorado.— Corson *v.* Neatheny, 9 Colo. 212, 11 Pac. 82; Denver, etc., R. Co. *v.* Moynahan, 8 Colo. 56, 5 Pac. 811; Denver, etc., R. Co. *v.* Conway, 8 Colo. 1, 5 Pac. 142, 54 Am. Rep. 537.

Georgia.— Snowden *v.* Waterman, 110 Ga. 99, 35 S. E. 309. And see Fell *v.* Abbot, R. M. Charlt. 452.

Illinois.— McCormick *v.* Elston, 16 Ill. 204.

Indiana.— Rogers *v.* West, 9 Ind. 400; New York, etc., R. Co. *v.* Zumbaugh, 12 Ind. App. 272, 39 N. E. 1058.

Missouri.— State *v.* Hope, 121 Mo. 34, 25 S. W. 893; Atkinson *v.* Atlantic, etc., R. Co., 63 Mo. 367; Kenney *v.* Hannibal, etc., R. Co., 63 Mo. 99.

North Dakota.— Ell *v.* Northern Pac. R. Co., 1 N. D. 336, 48 N. W. 222, 26 Am. St. Rep. 621, 12 L. R. A. 97.

South Dakota.— Hollister *v.* Donahoe, (1902) 92 N. W. 12; Uhe *v.* Chicago, etc., R. Co., 3 S. D. 563, 54 N. W. 601.

Texas.— Houston, etc., R. Co. *v.* Muldrow, 54 Tex. 233.

See 15 Cent. Dig. tit. "Damages," § 135 *et seq.*

Under a statute of a penal character, allowing treble damages, attorney's fees, and costs, as compensation for damages sustained, a party is not entitled to interest from the time the cause of action accrued. Blair *v.* Sioux City, etc., R. Co., (Iowa 1898) 73 N. W. 1053.

93. *Alabama.*— Cooke *v.* Farinholt, 3 Ala. 384.

Michigan.— McCreery *v.* Green, 38 Mich. 172.

Minnesota.—Owsley *v.* Greenwood, 18 Minn. 429.

New Hampshire.— National Lancers *v.* Lovering, 30 N. H. 511.

faith[94] will not warrant a recovery of interest by way of damages;[95] but where the delay has been unreasonable and vexatious such interest may be recovered.[96]

4. In Actions For Breach of Contract. The decisions are very conflicting as to the allowance of interest by way of damages in case of breach of contract, unless the rate or amount is fixed in the contract itself.[97] The allowance of interest in such cases was formerly a question somewhat within the discretion of the jury;[98] but it is now considered more a question of law for the court.[99] The better rule on this subject seems to be that such interest as damages will be allowed, especially where the damages are capable of being definitely ascertained.[1]

Texas.— Smith *v.* Sherwood, 2 Tex. 460.

A note for a certain sum, with "interest annually" is not a contract for anything more than six per cent annual interest on the principal; but interest may be cast on the annual interest, in the nature of damages for its detention and use, from the time it becomes payable until judgment. Peirce *v.* Rowe, 1 N. H. 179.

Detention by insurance company.— In case of loss an insurance company is liable to the assured for interest, by way of damages, for the wrongful detention of the sum due him beyond the time prescribed by the policy, as affected by the charter and by-laws thereof for its payment. Swamscot Mach. Co. *v.* Partridge, 25 N. H. 369.

94. Bad faith.— In order to warrant a recovery for interest for unreasonably and vexatiously retaining money, there must be some evidence of bad faith. Corson *v.* Neatheny, 9 Colo. 212, 11 Pac. 82.

95. Aldrich *v.* Dunham, 16 Ill. 403; Hatterman *v.* Thompson, 83 Ill. App. 217; Moshier *v.* Shear, 15 Ill. App. 342.

Where defendant in good faith defends an action by an employee for his salary, he cannot be compelled to pay ten per cent interest on the claim for vexatious delay in paying therefor. Nixon *v.* Cutting Fruit Packing Co., 17 Mont. 90, 42 Pac. 108.

96. Devine *v.* Edwards, 101 Ill. 138; Rogers *v.* West, 9 Ind. 400. Interest is recoverable for unreasonable "and" vexatious delay in payment, not for unreasonable "or" vexatious delay. Devine *v.* Edwards, 101 Ill. 138. A delay of payment from October to December, where defendant shows a just claim for damages in set-off, is not such an "unreasonable and vexatious delay" as to allow an award of interest under the statute. McCormick *v.* Elston, 16 Ill. 204.

Unsuccessful litigation.—In Lakeside Paper Co. *v.* State, 45 N. Y. App. Div. 112, 60 N. Y. Suppl. 1081, it was held that in an action against the state for loss of profits caused by a wrongful shutting off of the water-supply to a paper mill, interest from the date of filing the claim should be added to the award, where the collection of the claim has been delayed several years by unsuccessful litigation of the state.

Question for jury.— The question whether there has been an unreasonable and vexatious delay of payment so as to warrant the allowance of interest as an element of damages is usually one for the determination of the jury. Davis *v.* Kenaga, 51 Ill. 170; Rogers *v.* West, 9 Ind. 400.

97. National Lancers *v.* Lovering, 30 N. H. 511; Adams *v.* Ft. Plain Bank, 36 N. Y. 255; Shipman *v.* State, 44 Wis. 458.

Exorbitant rate.— In Young *v.* Fluke, 15 U. C. C. P. 360, it was held, following Howland *v.* Jennings, 11 U. C. C. P. 272, and Montgomery *v.* Boucher, 14 U. C. C. P. 45, that the agreement between the parties fixes the rate of interest recoverable as damages, however exorbitant that rate might be.

Where a contract is made for a special rate of interest, the contract for interest ceases at maturity, and thereafter interest is allowed as damages. Lash *v.* Lambert, 15 Minn. 416, 2 Am. Rep. 142.

98. Dotterer *v.* Bennett, 5 Rich. (S. C.) 295; Gilpins *v.* Consequa, 10 Fed. Cas. No. 5,452, Pet. C. C. 85, 3 Wash. 184; Letcher *v.* Woodson, 15 Fed. Cas. No. 8,280, 1 Brock. 212. See also Dox *v.* Dey, 3 Wend. (N. Y.) 356. See *infra*, VII, M, 7. In Letcher *v.* Woodson, 15 Fed. Cas. No. 8,280, 1 Brock. 212, it was held that the question whether a jury should allow interest must depend upon the circumstances of the case, of which they are the proper judges, and it is competent for the defendant to give in evidence to the jury any circumstances tending to show that interest should not be allowed. A purchaser who has paid in advance, and recovers damages for non-delivery, cannot recover interest on his advances, he affirming the contract. Dobenspeck *v.* Armel, 11 Ind. 31. In an action for breach of contract to convey land, interest on money borrowed to complete the purchase is not an element of damages. Kempner *v.* Cohn, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775.

Breach of warranty in sale.— Interest should not be allowed as damages for a breach of warranty in the sale of goods. Riss *v.* Messmore, 58 N. Y. Super. Ct. 23, 9 N. Y. Suppl. 320. See also Moulton *v.* Scruton, 39 Me. 287.

99. Broughton *v.* Mitchell, 64 Ala. 210; Mansfield *v.* New York Cent., etc., R. Co., 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566; De Lavallette *v.* Wendt, 75 N. Y. 579, 31 Am. Rep. 494; Andrews *v.* Durant, 18 N. Y. 496; Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Lewis *v.* Rountree, 79 N. C. 122, 28 Am. Rep. 309.

1. *Colorado.*— Beckwith *v.* Talbot, 2 Colo. 639.

Indiana.— Louisville, etc., R. Co. *v.* Hollerbach, 105 Ind. 137, 5 N. E. 28.

Indian Territory.— Missouri, etc., R. Co. *v.* Truskett, 2 Indian Terr. 633, 53 S. W. 444.

Thus interest by way of damages may be allowed where there has been a failure to deliver money or property contracted for;[2] but it seems that in such cases demand should be made.[3]

5. In Actions of Tort — a. In General. In actions of tort as a general rule interest will not be allowed,[4] and this has been held especially in cases of mere

Kentucky.— Com. *v.* Collins, 12 Bush 386.

Minnesota.— Minneapolis Harvester Works *v.* Bonnallie, 29 Minn. 373, 13 N. W. 149.

Missouri.— Huston *v.* De Zeng, 78 Mo. App. 522.

New York.— Roussel *v.* Mathews, 171 N. Y. 634, 63 N. E. 1122 [*affirming* 62 N. Y. App. Div. 1, 70 N. Y. Suppl. 886]; Van Rensselaer *v.* Jewett, 5 Den. 135; Dox *v.* Dey, 3 Wend. 356.

South Carolina.— Woods *v.* Cramer, 34 S. C. 508, 13 S. E. 660.

Texas.— Gulf, etc., R. Co. *v.* McCarty, 82 Tex. 608, 18 S. W. 716; Connor *v.* S. Blaisdell Jr. Co., (Civ. App. 1901) 60 S. W. 890; Missouri Pac. R. Co. *v.* Hewett, 2 Tex. App. Civ. Cas. § 273.

Wisconsin.— Allen *v.* Murray, 87 Wis. 41, 57 N. W. 979; Gallun *v.* Seymour, 76 Wis. 251, 45 N. W. 115.

United States.— District of Columbia *v.* Camden Iron Works, 181 U. S. 453, 21 S. Ct. 680, 45 L. ed. 948 [*affirming* 15 App. Cas. (D. C.) 198].

Canada.— Montreal Gas Co. *v.* Vasey, 8 Quebec Q. B. 412.

See 15 Cent. Dig. tit. "Damages," § 141.

Actions against common carriers.— Interest is an element of damages recoverable from a common carrier for breach of a contract to receive and transport freight. Cobb *v.* Illinois Cent. R. Co., 38 Iowa 601.

Profits.— Where plaintiff contracted with defendant to carry coal for it from a certain point to other points, and defendant agreed to load plaintiff's boat in regular turn with its own, but failed to do so, whereby plaintiff was damaged to an amount equal to the profits of one trip, which it was shown he could have made during the period of detention, plaintiff is entitled to interest on the amount of his damages. Kelly *v.* Fall Brook Coal Co., 67 Barb. (N. Y.) 183. See also McCall *v.* Icks, 107 Wis. 232, 83 N. W. 300.

Unascertained amount.— Where a contract for constructing a railroad provided that all measurements should be made and the amount of labor determined by the company's engineer, whose decision was final, it was held that where the company refused to have a measurement made, or those already made reviewed, by the engineer, the contractor was entitled to interest on the amount due him, although it had not been ascertained. McMahon *v.* New York, etc., R. Co., 20 N. Y. 463.

2. *Kentucky.*—Younger *v.* Givens, 6 Dana 1.

Michigan.— Edwards *v.* Sanborn, 6 Mich. 348.

Minnesota.— Cooper *v.* Reaney, 4 Minn. 528.

New York.— Dana *v.* Fielder, 12 N. Y. 40, 62 Am. Dec. 130; Fishell *v.* Winans, 38 Barb. 288; Griffin *v.* Colver, 22 Barb. 587.

South Carolina.— Ryan *v.* Baldrick, 3 McCord 498.

Tennessee.— Noe *v.* Hodges, 5 Humphr. 103.

See 15 Cent. Dig. tit. "Damages," § 141.

Election to affirm contract.— Where a contract for the sale of a chattel is broken by the seller failing to deliver it to the buyer, who has paid the price in advance, he may elect to rescind the agreement and recover the money, with interest; but if he elect to affirm the contract and sue for damages he cannot recover interest. Harvey *v.* Myer, 9 Ind. 391.

When a vendor put it out of his power to deliver the goods, the value of which was agreed, the vendee was entitled to interest on his demand from that date. Arlington First Nat. Bank *v.* Lynch, 6 Tex. Civ. App. 590, 25 S. W. 1042.

3. Burham *v.* Hart, 15 La. Ann. 517.

Demand made.— Interest cannot be allowed by way of damages for the breach of an agreement to convey land with a deed of warranty, until demand made, succeeded by the defendant's non-performance. Wells *v.* Abernethy, 5 Conn. 222. But the law will imply a contract to pay interest upon a debt, payable on demand, after demand made, by way of damages for the delay. Gleason *v.* Briggs, 28 Vt. 135.

Where a sum is due upon an account, and payment has been demanded, interest should be cast upon the sum due from the time of the demand as damages for its non-payment. Livermore *v.* Rand, 26 N. H. 85.

4. *Georgia.*—Western, etc., R. Co. *v.* Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; Ratteree *v.* Chapman, 79 Ga. 574, 4 S. E. 684.

Louisiana.— Green *v.* Garcia, 3 La. Ann. 702.

New Hampshire.— In actions of tort, the plaintiff is generally not entitled to interest on his damages when he refused before suit to accept as damages a sum larger than he was entitled to. Thompson *v.* Boston, etc., R. Co., 58 N. H. 524.

New York.— Duryee *v.* New York, 96 N. Y. 477; Walrath *v.* Redfield, 18 N. Y. 457.

North Carolina.—Satterwhite *v.* Carson, 25 N. C. 549.

Pennsylvania.— Emerson *v.* Schoonmaker, 135 Pa. St. 437, 19 Atl. 1025; Plymouth Tp. *v.* Graver, 125 Pa. St. 24, 17 Atl. 249, 11 Am. St. Rep. 867.

Virginia.— Brugh *v.* Shanks, 5 Leigh 598.

United States.— The Scotland, 118 U. S. 507, 6 S. Ct. 1174, 30 L. ed. 153. See also Lincoln *v.* Claflin, 7 Wall. 132, 19 L. ed. 106.

See 15 Cent. Dig. tit. "Damages," § 137.

negligence.[5] On the other hand some of the courts have allowed interest, so far as actions *ex delicto* in general are concerned, where the amount of the damages inflicted are capable of being ascertained with any degree of certainty.[6] The better rule on this subject seems to be that while the jury should not be allowed to award interest as damages *eo nomine* in actions sounding in tort,[7] yet they may take into consideration the length of time that has elapsed since the injury complained of,[8] and in some cases may exercise their own discretion in rendering the verdict.[9]

b. For Personal Injuries. As a general rule in an action for personal injuries interest cannot be allowed on the amount of damages recovered, prior to the judgment.[10] Only special damages which may be computed from evidence of actual values can be thus increased.[11]

5. Atkinson *v.* Atlantic, etc., R. Co., 63 Mo. 367; Marshall *v.* Schricker, 63 Mo. 308; Kenney *v.* Hannibal, etc., R. Co., 63 Mo. 99; Sonnenfeld Millinery Co. *v.* People's R. Co., 59 Mo. App. 668; Damhorst *v.* Missouri Pac. R. Co., 32 Mo. App. 350.

6. *California.*— Hamer *v.* Hathaway, 33 Cal. 117.

Connecticut.— New York, etc., R. Co. *v.* Ansonia Land, etc., Co., 72 Conn. 703, 46 Atl. 157.

Massachusetts.— Frazer *v.* Bigelow Carpet Co., 141 Mass. 126, 4 N. E. 620.

Missouri.— Arthur *v.* Wheeler, etc., Mfg. Co., 12 Mo. App. 335.

New York.— Clark *v.* Miller, 54 N. Y. 528; Whitehall Transp. Co. *v.* New Jersey Steamboat Co., 51 N. Y. 369; Andrews *v.* Durant, 18 N. Y. 496; Walrath *v.* Redfield, 18 N. Y. 457; Wilson *v.* Troy, 60 Hun 183, 14 N. Y. Suppl. 721.

Ohio.— Lawrence R. Co. *v.* Cobb, 35 Ohio St. 94; Hogg *v.* Zanesville Canal, etc., Co., 5 Ohio 410; Norton *v.* Parker, 8 Ohio Cir. Dec. 572.

Pennsylvania.— McInroy *v.* Dyer, 47 Pa. St. 118.

See 15 Cent. Dig. tit. "Damages," § 137 *et seq.*

Deceit.— Where in an action for damages for deceit, the jury find the amount of damages and the date when the damage accrued, as special findings, judgment should be entered for the amount of such damages with interest from such date. Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188.

Fraudulent representations.— Interest is recoverable in an action for damages for fraudulent representations as to the value of land exchanged with plaintiff, where the difference in the values of the property will not make good his damages. Snow *v.* Nowlin, 43 Mich. 383, 5 N. W. 443.

Interest may be allowed as part of the damages in an action for a tort committed in another state, in which a jury could have included it in their assessment. Holmes *v.* Barclay, 4 La. Ann. 64.

7. Frazer *v.* Bigelow Carpet Co., 141 Mass. 126, 4 N. E. 620; Clement *v.* Spear, 56 Vt. 401. See also Lincoln *v.* Claflin, 7 Wall. (U. S.) 132, 19 L. ed. 106.

8. Zipperlein *v.* Pittsburg, etc., R. Co., 8 Ohio S. & C. Pl. Dec. 587; Richards *v.* Citizens' Natural Gas Co., 130 Pa. St. 37, 18 Atl. 600; Clement *v.* Spear, 56 Vt. 401. See also Thrall *v.* Lathrop, 30 Vt. 307, 73 Am. Dec. 306; Grant *v.* King, 14 Vt. 367. In Emerson *v.* Schoonmaker, 135 Pa. St. 437, 440, 19 Atl. 1025, the court said: "While lapse of time between the happening of an injury and the time of trial is ordinarily a proper subject for the consideration of a jury in making up the amount of damages for which their verdict should be rendered, it is well settled that interest, *eo nomine*, is not recoverable in actions *ex delicto*, as it is in cases where a definite sum of money is demandable as a debt; in the latter, interest, at the legal rate, is a matter of right, and the jury may be directed to include it in their verdict: . Reading, etc., R. Co. *v.* Balthaser, 126 Pa. St. 1, 12, 17 Atl. 518; Richards *v.* Citizens' Natural Gas Co., 130 Pa. St. 37, 18 Atl. 600."

9. *Georgia.*— Central R. Co. *v.* Sears, 66 Ga. 499.

New York.— Mansfield *v.* New York Cent., etc., R. Co., 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566; Duryee *v.* New York, 96 N. Y. 477; Parrott *v.* Knickerbocker Ice Co., 46 N. Y. 361; Walrath *v.* Redfield, 18 N. Y. 457.

Ohio.— Lawrence R. Co. *v.* Cobb, 35 Ohio St. 94.

Pennsylvania.— Bare *v.* Hoffmann, 79 Pa. St. 71, 21 Am. Rep. 42.

United States.— The Scotland, 118 U. S. 507, 6 S. Ct. 1174, 30 L. ed. 153.

See 15 Cent. Dig. tit. "Damages," § 137 *et seq.*; and, generally, *infra*, VII, M, 7.

10. Western, etc., R. Co. *v.* Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; Pittsburg Southern R. Co. *v.* Taylor, 104 Pa. St. 306, 49 Am. Rep. 580; Louisville, etc., R. Co. *v.* Wallace, 91 Tenn. 35, 17 S. W. 882, 14 L. R. A. 548.

Length of time since accident.— Interest is not allowable as part of the damages in an action for personal injuries, although the jury in estimating the damages may consider the length of time which has elapsed since the accident occurred. Zipperlein *v.* Pittsburg, etc., R. Co., 8 Ohio S. & C. Pl. Dec. 587.

11. Western, etc., R. Co. *v.* Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320.

Legal rate of interest.— In an action to re-

6. Loss or Destruction of Property — a. In General. As a general rule where property has been lost or destroyed, the amount of damages is capable of exact computation and the party is entitled to interest.[12]

b. Through Negligence of Railroad. In an action against carriers for the loss of goods, the plaintiff is entitled to interest on their value at the legal rate from the time when they ought to have been delivered or from the time of their loss.[13] Interest on a claim for damages for killing animals by a railroad company cannot be recovered previous to the rendition of judgment;[14] nor can such interest

eover for injuries alleged to be permanent, the court, in charging with respect to the six per cent and seven per cent columns in an annuity table, should direct the jury to use the latter, as that is the legal rate of interest where none is fixed by writing. Georgia Cent. R. Co. *v.* Mosely, 112 Ga. 914, 38 S. E. 350.

12. *Connecticut.*— Regan *v.* New York, etc., R. Co., 60 Conn. 124, 22 Atl. 503, 25 Am. St. Rep. 306.

Florida.— Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Illinois.— Chicago, etc., R. Co. *v.* Shultz, 55 Ill. 421.

Iowa.— Arthur *v.* Chicago, etc., R. Co., 61 Iowa 648, 17 N. W. 24.

Michigan.— Kendriek *v.* Towle, 60 Mich. 363, 27 N. W. 567, 1 Am. St. Rep. 526.

Minnesota.— Varco *v.* Chicago, etc., R. Co., 30 Minn. 18, 13 N. W. 921.

Missouri.— Gray *v.* Missouri River Packet Co., 64 Mo. 47.

Nebraska.— Fremont, etc., R. Co. *v.* Marley, 25 Nebr. 138, 40 N. W. 948, 13 Am. St. Rep. 482.

New York.— Parrott *v.* Kniekerboeker Ice Co., 46 N. Y. 361; Laekin *v.* Delaware, etc., Canal Co., 22 Hun 309; Orr *v.* New York, 64 Barb. 106; Sehwerin *v.* McKie, 5 Rob. 404; Greer *v.* New York, 3 Rob. 406.

Ohio.— Toledo *v.* Grasser, 12 Ohio Cir. Ct. 520.

Pennsylvania.— Allegheny *v.* Campbell, 107 Pa. St. 530, 52 Am. Rep. 478; Bare *v.* Hoffman, 79 Pa. St. 71, 21 Am. Rep. 42; St. Michael's Church *v.* Philadelphia County, Brightly 121.

Texas.— Gulf, etc., R. Co. *v.* Holliday, 65 Tex. 512; Texas, etc., R. Co. *v.* Tankersley, 63 Tex. 57; Gulf, etc., R. Co. *v.* Jagoe, (Civ. App. 1895) 32 S. W. 717; Clarendon Land, etc., Co. *v.* McClelland, (Civ. App. 1895) 31 S. W. 1088; Gulf, etc., R. Co. *v.* Dunlap, (Civ. App. 1894) 26 S. W. 655; Gulf, etc., R. Co. *v.* Dunman, 6 Tex. Civ. App. 101, 24 S. W. 995; Gulf, etc., R. Co. *v.* Calhoun, (Civ. App. 1893) 24 S. W. 362.

Utah.— Woodland *v.* Union Pac. R. Co., (1891) 26 Pac. 298; Rhemke *v.* Clinton, 2 Utah 230.

Wisconsin.— McArthur *v.* Green Bay, etc., Canal Co., 34 Wis. 139; Chapman *v.* Chicago, etc., R. Co., 26 Wis. 295, 7 Am. Rep. 81.

In computing damages in such cases, the plaintiff is entitled to a sum equal to what would be the legal rate of interest on the amount of compensation to which he is found to be entitled, computed from the date when the loss was suffered, where defendant knew, or could have known by inquiry immediately after the injury, what the amount of plaintiff's damage was. New York, etc., R. Co. *v.* Ansonia Land, etc., Co., 72 Conn. 703, 46 Atl. 157.

Property lost by bailee.— Interest is recoverable on the value of property lost by a bailee, from the date of the loss. Mote *v.* Chicago, etc., R. Co., 27 Iowa 22, 1 Am. Rep. 212.

Trespass to realty.— In the trial of a suit for damages for a trespass to realty, the jury may add to the amount of damages interest thereon from the date of their accrual. Gress Lumber Co. *v.* Coody, 104 Ga. 611, 30 S. E. 810.

Where plaintiff's engine was thrown into a ditch by a defective bridge giving way, and the jury did not allow him anything for the loss of the use of it, he was entitled to recover interest on its value from the date of the accident. Coan *v.* Brownstown Tp., 126 Mich. 626, 86 N. W. 130.

13. Chicago, etc., R. Co. *v.* Ames, 40 Ill. 249; Robinson *v.* Merchants' Despatch Transp. Co., 45 Iowa 470.

14. Toledo, etc., R. Co. *v.* Johnston, 74 Ill. 83; New York, etc., R. Co. *v.* Zumbaugh, 12 Ind. App. 272, 39 N. E. 1058; Meyer *v.* Atlantic, etc., R. Co., 64 Mo. 542; International, etc., R. Co. *v.* Barton, 93 Tex. 63, 53 S. W. 1117; St. Louis, etc., R. Co. *v.* Chambliss, 93 Tex. 62, 53 S. W. 343; Houston, etc., R. Co. *v.* Muldrow, 54 Tex. 233; Galveston, etc., R. Co. *v.* Vaughan, (Tex. Civ. App. 1899) 54 S. W. 1055; Texas, etc., R. Co. *v.* Payne, (Tex. Civ. App. 1896) 35 S. W. 297; Galveston, etc., R. Co. *v.* Downey, (Tex. Civ. App. 1894) 28 S. W. 109; Galveston, etc., R. Co. *v.* Dromgoole, (Tex. Civ. App. 1893) 24 S. W. 372; Texas, etc., R. Co. *v.* Cunningham, 4 Tex. Civ. App. 262, 23 S. W. 332. *Compare* Gulf, etc., R. Co. *v.* Dunman, 6 Tex. Civ. App. 101, 24 S. W. 995, which was an action under a statute making a railroad liable for the value of stock killed by its negligence, or at a point where its track might have been fenced, and where it was held that the damages were not penal, but compensatory, and interest thereon was properly allowed.

Presumption as to interest.— In an action for damages against a railroad for injuries to plaintiff's cattle and land, the jury found the land was injured in the sum of one hundred and sixty-five dollars and the cattle to the amount of one hundred dollars, and fixed

be recovered for fires negligently caused by a railroad company along its right of way.[15]

7. Discretion of Jury. Interest as damages in a great number of cases is left to the discretion of the jury under all the circumstances of the particular case.[16] In some cases, however, interest by way of damages is a matter of law and in such cases the court may instruct the jury on this point.[17]

VIII. Liquidated Damages and Penalties.

A. In General. Before the passage of 8 & 9 Wm. III, in an action of debt on an agreement, performance of which was secured by a penalty, the recovery was for the entire penalty. Relief was solely in equity, and originally was only

the total sum at two hundred and seventy-seven and forty-one one-hundredths dollars. It was held that it would be presumed that the excess of the total sum over the damages found was added by the jury as interest, which addition the jury may make in an action of tort, no exemplary damages having been found, and the amount added not increasing the damages so much as to be clearly unjust. Chicago, etc., R. Co. *v.* Barnes, 2 Ind. App. 213, 28 N. E. 328.

15. Atchison, etc., R. Co. *v.* Ayers, 56 Kan. 176, 42 Pac. 722; De Steiger *v.* Hannibal, etc., R. Co., 73 Mo. 33; Atkinson *v.* Atlantic, etc., R. Co., 63 Mo. 367; Kenney *v.* Hannibal, etc., R. Co., 63 Mo. 99; Flannery *v.* St. Louis, etc., R. Co., 44 Mo. App. 396. *Compare* Union Pac. R. Co. *v.* Ray, 46 Nebr. 750, 65 N. W. 773; Freemont, etc., R. Co. *v.* Marley, 25 Nebr. 138, 40 N. W. 948, 13 Am. St. Rep. 482.

Flooded lands.— In an action to recover damages against a railroad corporation for obstructing natural watercourses, whereby plaintiff's lands are flooded and his crops destroyed, interest from the date of the commencement of the suit on the amount of the damage recovered is not allowable. Brink *v.* Kansas City, etc., R. Co., 17 Mo. App. 177.

16. *Arkansas.*— Crow *v.* State, 23 Ark. 684.

Georgia.— Snowden *v.* Waterman, 110 Ga. 99, 35 S. E. 309; Central R. Co. *v.* Sears, 66 Ga. 499.

Illinois.— Williams *v.* Chicago Coal Co., 60 Ill. 149; Davis *v.* Kenaga, 51 Ill. 170.

Kentucky.— Newcomb-Buchanan Co. *v.* Baskett, 14 Bush 658; Stark *v.* Price, 5 Dana 140; Handley *v.* Chambers, 1 Litt. 357; Guthrie *v.* Wickliffs, 4 Bibb 541, 7 Am. Dec. 746.

Missouri.— State *v.* Hope, 121 Mo. 34, 25 S. W. 893; Sparr *v.* Wellman, 11 Mo. 230.

New York.— Wilson *v.* Troy, 135 N. Y. 96, 32 N. E. 44, 31 Am. St. Rep. 817, 18 L. R. A. 449; Aikin *v.* Davis, 45 Barb. 44; Reiss *v.* New York Steam Co., 59 N. Y. Super. Ct. 57, 12 N. Y. Suppl. 557; Anonymous, 1 Johns. 315.

North Carolina.— Patapsco Guano Co. *v.* Magee, 86 N. C. 350.

North Dakota.— Hegar *v.* De Groat, 3 N. D. 354, 56 N. W. 150; Ell *v.* Northern Pac. R. Co., 1 N. D. 336, 48 N. W. 222, 26 Am. St. Rep. 621, 12 L. R. A. 97.

Ohio.— Floyd *v.* Paul, 6 Ohio Dec. (Reprint) 1185, 12 Am. L. Rec. 231.

South Dakota.— Uhe *v.* Chicago, etc., R. Co., 3 S. D. 563, 54 N. W. 601.

Tennessee.— Williams *v.* Inman, 5 Coldw. 267.

United States.— District of Columbia *v.* Robinson, 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440; Lincoln *v.* Claflin, 7 Wall. 132, 19 L. ed. 106; Brent *v.* Thornton, 106 Fed. 35, 45 C. C. A. 214; Matthews *v.* Menedger, 16 Fed. Cas. No. 9,289, 2 McLean 145.

See also *supra*, VII, M, 1.

Abuse of discretion.— Whether money has been vexatiously withheld, so as to allow interest, in addition to the damages for breach of contract, is for the jury; and it would require a clear abuse of discretion on their part to justify an interference of the court. Rogers *v.* West, 9 Ind. 400.

By statute.— In an action for damages to property caused by negligence, the giving or withholding of interest is by S. D. Comp. Laws, § 4578, committed to the discretion of the jury, and an instruction that they compute interest on such damages, if any, as they may find for plaintiff, is erroneous. Uhe *v.* Chicago, etc., R. Co., 4 S. D. 505, 57 N. W. 484.

17. Garrard *v.* Dawson, 49 Ga. 434; Field *v.* Burnam, 3 Bush (Ky.) 518; Mansfield *v.* New York Cent., etc., R. Co., 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566; White *v.* Miller, 71 N. Y. 118, 27 Am. Rep. 13, 78 N. Y. 393, 34 Am. Rep. 544; Rhemke *v.* Clinton, 2 Utah 230. A judgment will not be reversed merely because the judge allowed interest on the amount of damages found by the jury, instead of directing the jury to include it in their verdict, where as a matter of law plaintiff was entitled to the interest. Longworth *v.* Cincinnati, 48 Ohio St. 637, 29 N. E. 274. Where plaintiff is not entitled to damages by way of interest as matter of law, yet if the jury in the case could in their discretion allow interest, and the court is satisfied on inspection that they should have allowed it, the judgment will be affirmed, notwithstanding the judge at the trial instructed the jury to allow interest as a matter of law. Close *v.* Fields, 13 Tex. 623.

granted in cases of fraud, extremity, or accident.[18] The effect of this statute was to put actions for the recovery of penalties for default in the performance of agreements upon the same basis as actions directly upon the agreement to recover damages, with respect to the *quantum* of recovery; in other words, to provide substantially the same measure of relief in an action at law as the defendant might have obtained in a court of equity.[19] There are two excellent rules given for inferring that the parties intended the sum as liquidated damages: (1) Where the damages are uncertain, and not capable of being ascertained by any satisfactory and known rule, whether the uncertainty lies in the nature of the subject itself, or in the particular circumstances of the case; or (2) where from the nature of the case and the tenor of the agreement, it is apparent that the damages have already been the subject of actual and fair calculation and adjustment between the parties.[20]

B. Intention of the Parties. As to whether a sum agreed to be paid as damages for the violation of an agreement shall be considered as liquidated damages or only as a penalty is held to depend upon the meaning and intent of the parties as gathered from a full view of the provisions of the contract, the terms used to express the intent, and the peculiar circumstances of the subject-matter of the agreement.[21] The contract is to govern; and the true question is, What

In an action for false imprisonment the recovery of interest on money paid to procure a release is a question of fact for the jury, and where allowed is part of the damages and not strictly interest; so that a direction by the court that interest be added is error. Taylor *v.* Coolidge, 64 Vt. 506, 24 Atl. 656.

18. Whitfield *v.* Levy, 35 N. J. L. 149 [*citing* Cary Rep. 1; Harrison L. Tracts 431].

19. Whitfield *v.* Levy, 35 N. J. L. 149. In Lowe *v.* Peers, 4 Burr. 2225, 2229, Lord Mansfield says: "Where the precise sum is not the essence of the agreement, the *quantum* of damages may be assessed by the jury; but, where the precise sum is fixed and agreed upon between the parties, that very sum is the ascertained damage, and the jury are confined to it."

20. Greenleaf Ev. § 459 [*quoted* in Shreve *v.* Brereton, 51 Pa. St. 175, 185; Schofield *v.* Preston, 16 Phila. (Pa.) 100, 101].

It has been well said in a leading case that "where unliquidated damages are claimed, whether by the plaintiff, as his cause of action, or by the defendant, in reduction of the verdict, it is very difficult to apply a rule that will do full justice to the parties; the most that courts can accomplish is to approximate that result, with the limited and imperfect aids that the parties may furnish. As a general proposition, one who has so suffered, is entitled to be placed as nearly as money can do it, in the same plight as if the contract had been faithfully executed. But there are many transactions in which this is wholly impracticable, because of the impossibility of determining, after the occurrence, what might have happened under a different state of things." Abbott *v.* Gatch, 13 Md. 314, 332, 71 Am. Dec. 635.

Liquidated damages in the proper sense of the term are a positive debt excluding evidence of actual damages wherever a breach is proved to which they apply. Beale *v.* Hayes, 5 Sandf. (N. Y.) 640.

21. *Arkansas.*— Williams *v.* Green, 14 Ark. 315.

California.— Ricketson *v.* Richardson, 19 Cal. 330; California Steam Nav. Co. *v.* Wright, 6 Cal. 258, 65 Am. Dec. 511.

Georgia.— Sutton *v.* Howard, 33 Ga. 536.

Illinois.— Reeves *v.* Stipp, 91 Ill. 609; Low *v.* Nolte, 16 Ill. 475; Butler *v.* Wallbaum Stone, etc., Co., 47 Ill. App. 153.

Iowa.— Sanford *v.* Belle Plaine First Nat. Bank, 94 Iowa 380, 63 N. W. 459.

Maine.— Gowen *v.* Gerrish, 15 Me. 273.

Massachusetts.— Lynde *v.* Thompson, 2 Allen 456; Chase *v.* Allen, 13 Gray 42; Hodges *v.* King, 7 Metc. 583; Perkins *v.* Lyman, 11 Mass. 76, 6 Am. Dec. 158. And see Tufts *v.* Atlantic Tel. Co., 151 Mass. 269, 23 N. E. 844.

Missouri.— Hamaker *v.* Schroers, 49 Mo. 406; Morse *v.* Rathburn, 42 Mo. 594, 97 Am. Dec. 359; Board of Com'rs *v.* Shield, 4 Mo. App. 580.

New Hampshire.— Hurd *v.* Dunsmore, 63 N. H. 171; Houghton *v.* Pattee, 58 N. H. 326; Mead *v.* Wheeler, 13 N. H. 351; Brewster *v.* Edgerly, 13 N. H. 275; Chamberlain *v.* Bagley, 11 N. H. 234.

New York.—Hosmer *v.* True, 19 Barb. 106; Shute *v.* Hamilton, 3 Daly 462; Frank *v.* Block, 9 N. Y. St. 101; Pearson *v.* Williams, 26 Wend. 630; Dakin *v.* Williams, 17 Wend. 447 [*affirmed* in 22 Wend. 201]; Knapp *v.* Maltby, 13 Wend. 587; Ayers *v.* Pease, 12 Wend. 393; Gray *v.* Crosby, 18 Johns. 219; Hasbrouck *v.* Tappen, 15 Johns. 200; Slosson *v.* Beadle, 7 Johns. 72; Dennis *v.* Cummins, 3 Johns. Cas. 297, 2 Am. Dec. 160.

Ohio.— Easton *v.* Pennsylvania, etc., Canal Co., 13 Ohio 79.

Pennsylvania.— March *v.* Allabough, 103 Pa. St. 335; Streeper *v.* Williams, 48 Pa. St. 450.

South Carolina.—Law *v.* House, 3 Hill 268.

was the contract? Whether it was folly or wisdom for the contracting parties thus to bind themselves is of no consequence if the intention is clear. If there be no fraud, circumvention, or illegality in the case the court is bound to enforce the agreement.[22] In order to determine whether the sum named in a contract as a forfeiture for non-compliance is intended as a penalty or as liquidated damages, it is necessary to look at the whole contract, its subject-matter, the ease or difficulty in measuring the breach in damages and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequence of the breach.[23]

C. Nature of Damages Expressed. No technical words are necessary if

Texas.— Durst *v.* Swift, 11 Tex. 273; Wright *v.* Dobie, 3 Tex. Civ. App. 194, 22 S. W. 66.

Wisconsin.— Yenner *v.* Hammond, 36 Wis. 277.

United States.— Lester *v.* U. S., 1 Ct. Cl. 52.

Compare Jaquith *v.* Hudson, 5 Mich. 123.

See 15 Cent. Dig. tit. "Damages," § 156.

Construed according to justice.—Where the word "penal" or "penalty" is used in a contract it must be construed as being so intended by the parties, but where a sum named is called "liquidated damages" it will be held as a penalty, if it seems from the contract that it was so intended by the parties, and the justice of the case requires such a construction. White *v.* Arleth, 28 Fed. Cas. No. 17,536, 1 Bond 319.

In an action to recover advanced payments for tuition of plaintiff's son, who had been expelled from defendant's school, the evidence showed that it was the understanding of the parties that in case of expulsion of the pupil for misconduct advanced payments should be liquidated damages and not recoverable. The rules of the school provided that there would be no reduction in case of withdrawals, and for the forfeiture of all payments in case of expulsion. It was held that plaintiff could not recover. Fessman *v.* Seeley, (Tex. Civ. App. 1895) 30 S. W. 268.

22. Cushing *v.* Drew, 97 Mass. 445; Bagley *v.* Peddie, 16 N. Y. 469, 69 Am. Dec. 713; Hosmer *v.* True, 19 Barb. (N. Y.) 106; Noble *v.* Bates, 7 Cow. (N. Y.) 307; Spencer *v.* Tilden, 5 Cow. (N. Y.) 144 and note; Slosson *v.* Beadle, 7 Johns. (N. Y.) 72; Davies *v.* Penton, 6 B. & C. 216, 9 D. & R. 369, 5 L. J. K. B. O. S. 112, 30 Rev. Rep. 298, 13 E. C. L. 108; Kemble *v.* Farren, 6 Bing. 141, 19 E. C. L. 71, 3 C. & P. 623, 14 E. C. L. 749, 7 L. J. C. P. O. S. 258, 3 M. & P. 425, 31 Rev. Rep. 366; Reilly *v.* Jones, 1 Bing. 302, 1 L. J. C. P. O. S. 105, 8 Moore C. P. 244, 25 Rev. Rep. 640, 8 E. C. L. 519; Astley *v.* Weldon, 2 B. & P. 346, 5 Rev. Rep. 618; Crisdee *v.* Bolton, 3 C. & P. 240, 14 E. C. L. 547; Randall *v.* Everest, 2 C. & P. 577, M. & M. 41, 12 E. C. L. 742; Barton *v.* Glover, Holt N. P. 43 and note, 3 E. C. L. 27. Where the parties to a contract in which the damages growing out of it are uncertain in amount mutually agree that a certain sum shall be the damages in case of a failure to perform, in language plainly expressive of such agreement, and when the intention is plain and palpable, there is no law to justify the courts in giving the contract a different construction. Morse *v.* Rathburn, 42 Mo. 594, 97 Am. Dec. 359.

Where an agreement grants the privilege of taking clay from land for a certain number of years, for which the grantees are to pay a certain amount per ton and a definite sum at the end of every six months, whether or not they have taken away enough clay to amount to that sum, the latter payments are liquidated damages, since it is the sum stipulated to be paid for the privilege and does not depend on the exercise of such privilege. Johnston *v.* Cowan, 59 Pa. St. 275.

23. *Iowa.*— Sanford *v.* Belle Plaine First Nat. Bank, 94 Iowa 380, 63 N. W. 459; Foley *v.* McKeegan, 4 Iowa 1, 66 Am. Dec. 107.

New Hampshire.— Hurd *v.* Dunsmore, 63 N. H. 171.

New Jersey.— Whitfield *v.* Levy, 35 N. J. L. 149.

New York.— Hosmer *v.* True, 19 Barb. 106.

Pennsylvania.— March *v.* Allabough, 103 Pa. St. 335; Mathews *v.* Sharp, 99 Pa. St. 560; Streeper *v.* Williams, 48 Pa. St. 450.

United States.— Davis *v.* U. S. 17 Ct. Cl. 201.

Proof of extrinsic facts.— In determining whether a penalty or liquidated damages is intended by a provision for the forfeiture of a certain sum, upon failure to perform a contract, the actual intention of the parties in view of the whole subject-matter is chiefly to be looked to; and if this is doubtful upon the face of the instrument the writing may be aided and the real intention ascertained by proof of extrinsic facts. Shute *v.* Hamilton, 3 Daly (N. Y.) 462. In Sainter *v.* Ferguson, 7 C. B. 716, 728, 13 Jur. 828, 18 L. J. C. P. 217, 62 E. C. L. 716 [*quoted* in Whitfield *v.* Levy, 35 N. J. L. 149], Coltman, J., says: "Although the word 'penalty,' which would *prima facie*, exclude the notion of stipulated damages, is used here, yet we must look at the nature of the agreement, and the surrounding circumstances, to see whether the parties intended the sum mentioned to be a penalty or stipulated damages. Considering the nature of this agreement, and the difficulty the plaintiff would be under in showing what specific damage he has sustained from the defendant's breach of it, I think we can

the intention of the parties is fairly to be gathered from the instrument.[24] The name given by parties will not have a controlling effect, if their intention appears otherwise, from the consideration of the whole agreement.[25] The use of the word "penalty" in connection with the sum named is not decisive on the point;[26]

reasonably construe it to be a contract for stipulated and ascertained damages."

24. Smith *v.* Bergengren, 153 Mass. 236, 26 N. E. 690, 15 L. R. A. 768; St. Albans *v.* Ellis, 16 East 352. In Jaquith *v.* Hudson, 5 Mich. 123, 138, the court said: "In this class of cases, where the law permits the parties to ascertain and fix the amount of damages in the contract, the first inquiry obviously is, whether they have done so in fact? And here, the intention of the parties is the governing consideration; and in ascertaining this intention, no merely technical effect will be given to the particular words relating to the sum, but the entire contract, the subject matter, and often the situation of the parties with respect to each other and to the subject matter, will be considered." In an action on a contract binding the parties "in a penal sum as fixed damages" for failure to perform, it was held that actual damages as shown by the evidence could alone be recovered. Hallock *v.* Slater, 9 Iowa 599; Lord *v.* Gaddis, 9 Iowa 265.

25. *New Jersey.*— Whitfield *v.* Levy, 35 N. J. L. 149.

New York.— Beale *v.* Hayes, 5 Sandf. 640.

North Carolina.— Lindsay *v.* Anesley, 28 N. C. 186.

Pennsylvania.— Pennypacker *v.* Jones, 106 Pa. St. 237.

Texas.— Eakin *v.* Scott, 70 Tex. 442, 7 S. W. 777.

England.— Sainter *v.* Ferguson, 7 C. B. 716, 13 Jur. 828, 18 L. J. C. P. 217, 62 E. C. L. 716. Lord Tenterden said that "whether the term penalty or liquidated damages be used in the agreement, a party who claims compensation for default shall only be allowed to recover what damage he has really sustained." Kemble *v.* Farren, 6 Bing. 141, 145, 19 E. C. L. 71, 3 C. & P. 623, 14 E. C. L. 749, 7 L. J. C. P. O. S. 258, 3 M. & P. 425, 31 Rev. Rep. 366.

See 15 Cent. Dig. tit. "Damages," § 157.

"Fixed and settled damages."— A contract for the sale of land at about five thousand dollars stipulated that the party failing to perform should pay two hundred dollars as "fixed and settled damages." It was held that this sum was liquidated damages and not a penalty. Brinkerhoff *v.* Olp, 35 Barb. (N. Y.) 27.

"To forfeit and pay."— When a party to an agreement contracts upon a given event "to forfeit and pay" a certain sum of money, it will be construed as stipulated damages, and not as a penalty, unless a contrary intention is to be inferred from other parts of the agreement. Cheddick *v.* Marsh, 21 N. J. L. 463.

26. *Iowa.*— Nowlin *v.* Pyne, 40 Iowa 166.

Louisiana.— Welch *v.* Thorn, 16 La. 188.

Maryland.— Willson *v.* Baltimore, 83 Md 203, 34 Atl. 774, 55 Am. St. Rep. 339.

Massachusetts.— Kellogg *v.* Curtis, 9 Pick. 534.

Michigan.— Jaquith *v.* Hudson, 5 Mich. 123.

Missouri.— Tinkham *v.* Satori, 44 Mo. App. 659.

New York.— Noyes *v.* Phillips, 60 N. Y. 408, 16 Abb. Pr. N. S. 400. Where a contract prescribes a "penalty of five thousand dollars, which sum is hereby named as stipulated damages" for a violation of its covenants, the maker will be held liable for the sum named as liquidated damages. Tode *v.* Gross, 4 N. Y. Suppl. 402.

Pennsylvania.— Graham *v.* Bickham, 2 Yeates 32, 4 Dall. 149, 1 Am. Dec. 328, 1 L. ed. 778; Schofield *v.* Preston, 16 Phila. 100.

Texas.— Lindsey *v.* Rockwall County, 10 Tex. Civ. App. 225, 30 S. W. 380.

United States.— Grand Tower Min., etc., Co. *v.* Phillips, 23 Wall. 471, 23 L. ed. 71.

See 15 Cent. Dig. tit. "Damages," § 157.

"Fine" equivalent to "penalty."— The defendant at the time of purchasing from the plaintiff certain village lots entered into a written agreement not to sell upon said lots any kind of spirituous liquors in quantities less than a half barrel, and that in case he did so he should be "liable to pay the plaintiff, his heirs and assigns, in the first case a fine of ten dollars, in the second case a fine of twenty dollars, and for every further case the sum of fifty dollars;" and by a further clause he promised to "pay the said punishment" for non-performance of his covenant. It was held that the sums named must be regarded as a penalty, and not as liquidated damages, the word "fine" being equivalent to "penalty." Laubenheimer *v.* Mann, 19 Wis. 519.

Remedy double.— A penal obligation being secondary to a primary one, the performance of which it is intended to assure, the creditor cannot, except in two contingencies, avail himself of the double remedy in the event of the debtor's failure to fulfil the primary obligation to accept the subsequent performance of that and exact the penalty at one and the same time; and those two contingencies are: First, when the penalty is expressly stipulated for the mere delay; and, second, when by a special stipulation the penalty may be exacted if the principal obligation is not executed. Barrow *v.* Bloom, 18 La. Ann. 276.

Unless the intent of the parties be clearly expressed a penalty or forfeiture will not be considered as liquidated damages. Colwell *v.* Lawrence, 38 N. Y. 71, 36 How. Pr. (N. Y.) 306 [*affirming* 36 Barb. 643, 24 How. Pr. 324]; Hoag *v.* McGinnis, 22 Wend. (N. Y.)

nor is the use of the words "liquidated damages" conclusive.[27] In determining whether an amount named in a contract is to be taken as penalty or liquidated damages courts are influenced largely by the reasonableness of the transaction, and are not restrained by the form of the agreement nor by the terms used by the parties, nor even by their manifest intent.[28] If the instrument provide that a larger sum shall be paid, on the failure of the party to pay a less sum, the larger sum is a penalty.[29] So where the agreement imposes several distinct duties or obligations of different degrees of importance, and the same sum is named as damages for a breach of either indifferently, the sum is to be regarded as a penalty.[30] Where the agreement is made for the attainment of another object or purpose, to which the stipulated sum is wholly collateral, such sum will be treated as a penalty.[31] Where the damages are capable of being known and estimated, the sum fixed upon as damages will be treated as a penalty, although declared to be intended as liquidated damages.[32] Where the parties have agreed on the amount of damages, ascertained by fair calculation and adjustment, and have

163; Dennis *v.* Cummins, 3 Johns. Cas. (N. Y.) 297, 2 Am. Dec. 160.

27. If the court can see from the whole instrument taken together that there was no intention that the entire sum should be paid absolutely on the non-performance of any of the stipulations in the agreement, they will reject the words and consider it as being in the nature of a penalty only.

Alabama.— Watt *v.* Sheppard, 2 Ala. 425.

Indiana.— Miller *v.* Elliott, 1 Ind. 484, 50 Am. Dec. 475.

Michigan.— Davis *v.* Freeman, 10 Mich. 188.

New Hampshire.— Chamberlain *v.* Bagley, 11 N. H. 234.

New Jersey.—Whitfield *v.* Levy, 35 N. J. L. 149.

New York.— Shiell *v.* McNitt, 9 Paige 101.

United States.— Davis *v.* U. S., 17 Ct. Cl. 201.

England.— Davies *v.* Penton, 6 B. & C. 216, 9 D. & R. 369, 5 L. J. K. B. O. S. 112, 30 Rev. Rep. 298, 13 E. C. L. 108; Kemble *v.* Farren, 6 Bing. 141, 19 E. C. L. 71, 3 C. & P. 623, 14 E. C. L. 749, 7 L. J. C. P. O. S. 258, 3 M. & P. 425, 31 Rev. Rep. 366; Wallis *v.* Smith, 21 Ch. D. 243, 52 L. J. Ch. 145, 47 L. T. Rep. N. S. 389, 31 Wkly. Rep. 214 [*distinguishing* Reilly *v.* Jones, 1 Bing. 302, 8 E. C. L. 519, 1 L. J. C. P. O. S. 105, 8 Moore C. P. 244, 25 Rev. Rep. 640]; Green *v.* Price, 9 Jur. 857, 14 L. J. Exch. 105, 13 M. & W. 695; Horner *v.* Flintiff, 11 L. J. Exch. 270, 9 M. & W. 678; Dimech *v.* Corlett, 12 Moore P. C. 199, 14 Eng. Reprint 887.

See 15 Cent. Dig. tit. "Damages," § 157.

28. Where the contract has expressly designated the amount named as liquidated damages, courts have held that it was a penalty; and conversely where the contract has called it a penalty it has been held to be liquidated damages; and again, where the parties have manifestly supposed and intended that an exorbitant and unconscionable amount should be forfeited, the courts have carried out the intent only so far as it was right and reasonable. Davis *v.* U. S., 17 Ct. Cl. 201.

29. Haldemann *v.* Jennings, 14 Ark. 329; Beale *v.* Hayes, 5 Sandf. (N. Y.) 640; Bagley *v.* Peddie, 5 Sandf. (N. Y.) 192.

30. *Indiana.*— Carpenter *v.* Lockhart, 1 Ind. 434.

New Jersey.—Hoagland *v.* Segur, 38 N. J. L. 230.

New York.— Lampman *v.* Cochran, 16 N. Y. 275; Beale *v.* Hayes, 5 Sandf. 640.

North Carolina.—Thoroughgood *v.* Walker, 47 N. C. 15.

Ohio.— Berry *v.* Wisdom, 3 Ohio St. 241.

Pennsylvania.— Shreve *v.* Brereton, 51 Pa. St. 175.

England.— Boys *v.* Ancell, 2 Arn. 9, 5 Bing. N. Cas. 390, 35 E. C. L. 213; Kemble *v.* Farren, 6 Bing. 141, 19 E. C. L. 71, 3 C. & P. 623, 14 E. C. L. 749, 7 L. J. C. P. O. S. 258, 3 M. & P. 425, 31 Rev. Rep. 366; Astley *v.* Weldon, 2 B. & P. 346, 5 Rev. Rep. 618.

See 15 Cent. Dig. tit. "Damages," § 157.

31. *California.*— Ricketson *v.* Richardson, 19 Cal. 330.

Massachusetts.—Fisk *v.* Gray, 11 Allen 132; Merrill *v.* Merrill, 15 Mass. 488; Perkins *v.* Lyman, 11 Mass. 76, 6 Am. Dec. 158.

Michigan.— Jaquith *v.* Hudson, 5 Mich. 123.

Missouri.— Long *v.* Towl, 42 Mo. 545, 67 Am. Dec. 355; Moore *v.* Platte County, 8 Mo. 467.

South Carolina.— Bearden *v.* Smith, 11 Rich. 554.

Wisconsin.— Laubenheimer *v.* Mann, 19 Wis. 519.

England.— Sloman *v.* Walter, 1 Bro. Ch. 418, 28 Eng. Reprint 1213.

32. Colwell *v.* Lawrence, 38 Barb. (N. Y.) 643 [*affirmed* in 38 N. Y. 71]; Spencer *v.* Tilden, 5 Cow. (N. Y.) 144 and note; Graham *v.* Bickham, 4 Dall. (Pa.) 149, 1 Am. Dec. 323, 1 L. ed. 778; Goldsborough *v.* Baker, 10 Fed. Cas. No. 5,516, 3 Cranch C. C. 48; Pinkerton *v.* Caslon, 2 B. & Ald. 704; Davies *v.* Penton, 6 B. & C. 216, 9 D. & R. 369, 5 L. J. K. B. O. S. 112, 30 Rev. Rep. 298, 13 E. C. L. 108. Where a party to a contract has an option, in effect, whether he will do or not do a particular thing, or where the sub

expressed this agreement in clear and explicit terms, the amount so fixed will be treated as the true damages and not as a penalty;[33] but if the agreement be unconscionable the court will not be bound by its terms as to the rule of damages.[34] Where the parties by the terms of their agreement have expressly provided in terms whether the damages shall be liquidated or unliquidated, they will be so construed by the court.[35]

ject-matter of the agreement is of such a nature that damages could not well be proved or estimated, and the amount named seems a reasonable approximation to the damages which the other party might actually suffer from the non-performance, it will be held that the amount named shall be taken as liquidated damages. But where there is an absolute agreement to do a particular act, followed by a stipulation as to damages in case of a breach, and the nature of the transaction is such that there can be no inherent difficulty in ascertaining the actual damages, and the amount named in the contract is so excessive that it will not only make the other party whole, but form an exorbitant and unconscionable recovery. it will be held that the amount named should be regarded as a penalty. Pearson *v.* Williams, 24 Wend. (N. Y.) 244, 26 Wend. (N. Y.) 630; Davis *v.* U. S., 17 Ct. Cl. 201. And see *infra*, VIII, E, 1.

33. *Alabama.*— Brahan *v.* Pope, 1 Stew. 135.

California.— Fisk *v.* Fowler, 10 Cal. 512.

Connecticut.— Tingley *v.* Cutler, 7 Conn. 291; Brooks *v.* Hubbard, 3 Conn. 58, 8 Am. Dec. 154.

Georgia.— Hardee *v.* Howard, 33 Ga. 533, 83 Am. Dec. 176.

Illinois. — Springdale Cemetery Assoc. *v.* Smith. 24 Ill. 480.

Maine.— Gammon *v.* Howe, 14 Me. 250.

Massachusetts.— Leland *v.* Stone, 10 Mass. 459.

New York.— Leggett *v.* Mutual L. Ins. Co., 53 N. Y. 394; Mott *v.* Mott, 11 Barb. 127; O'Donnell *v.* Rosenberg, 14 Abb. Pr. N. S. 59; Pettis *v.* Bloomer, 21 How. Pr. 317; Slosson *v.* Beadle, 7 Johns. 72.

Pennsylvania. — Westerman *v.* Means, 12 Pa. St. 97.

England.— Farrant *v.* Olmins, 3 B. & Ald. 692, 5 E. C. L. 398.

See 15 Cent. Dig. tit. "Damages," § 157 *et seq.*

34. Baxter *v.* Wales, 12 Mass. 365; Cutler *v.* How, 8 Mass. 257; Leggett *v.* Mutual L. Ins. Co., 53 N. Y. 394. See also Rolfe *v.* Peterson, 2 Bro. P. C. 436, 1 Eng. Reprint 1048; Lowe *v.* Peers, 4 Burr. 2225; Wilbeam *v.* Ashton, 1 Campb. 78; Harrison *v.* Wright, 13 East 343, 12 Rev. Rep. 369; Barton *v.* Glover, Holt N. P. 43, 3 E. C. L. 27.

35. *Alabama.*— Watts *v.* Sheppard, 2 Ala. 425.

Arkansas.— Nilson *v.* Jonesboro, 57 Ark. 168, 20 S. W. 1093.

California.— Potter *v.* Ahrens, 110 Cal. 674, 43 Pac. 388; Lightner *v.* Menzel, 35 Cal. 452.

Colorado. — Denver Land, etc., Co. *v.* Rosenfeld Constr. Co., 19 Colo. 539, 36 Pac. 146.

Delaware.— Jester *v.* Murphy, 2 Del. Ch. 171.

Georgia.— Sanders *v.* Carter, 91 Ga. 450, 17 S. E. 345; Swift *v.* Powell, 44 Ga. 123.

Iowa.— Sanford *v.* Belle Plaine First Nat. Bank, 94 Iowa 680, 63 N. W. 459; Foley *v.* McKeegan, 4 Iowa 1, 66 Am. Dec. 107.

Kentucky.— Woodbury *v.* Turner, etc., Mfg. Co., 96 Ky. 459, 29 S. W. 295, 16 Ky. L. Rep. 566; Hahn *v.* Horstman, 12 Bush 249.

Louisiana.— McGloin *v.* Henderson, 6 La. 720.

Maryland.—Geiger *v.* Western Maryland R. Co., 41 Md. 4; Smithson *v.* U. S. Telegraph Co., 29 Md. 162.

Massachusetts. — Lynde *v.* Thompson, 2 Allen 456; Hodges *v.* King, 7 Metc. 583.

Michigan.— Davis *v.* Freeman, 10 Mich. 188.

Missouri.— Basye *v.* Ambrose, 28 Mo. 39; Irwin *v.* Tanner, 1 Mo. 210.

New Jersey.—Whitfield *v.* Levy, 35 N. J. L. 149.

New York.— Dunlop *v.* Gregory, 10 N. Y. 241, 61 Am. Dec. 746; Laurea *v.* Bernauer, 33 Hun 307; Wheatland *v.* Taylor, 29 Hun 70; Leggett *v.* Mutual L. Ins. Co., 64 Barb. 23 [*affirming* 50 Barb. 616]; Holmes *v.* Holmes, 12 Barb. 137; Main *v.* King, 10 Barb. 59, 3 Code Rep. 142; Perzell *v.* Shook, 53 N. Y. Super. Ct. 501; Winch *v.* Mutual Ben. Ice Co., 9 Daly 177; Townsend *v.* Fisher, 2 Hilt. 47; Salters *v.* Ralph, 15 Abb. Pr. 273; Colwell *v.* Foulks, 36 How. Pr. 306; Pettis *v.* Bloomer, 21 How. Pr. 317; Pearson *v.* Williams, 24 Wend. 244, 26 Wend. 630; Knapp *v.* Maltby, 13 Wend. 587; Shiell *v.* McNitt, 9 Paige 101. And see Mundy *v.* Culver, 18 Barb. 336.

Ohio.— See Abrams *v.* Kounts, 4 Ohio 214.

Oregon.— Zachary *v.* Swanger, 1 Oreg. 92.

Pennsylvania.— Mathews *v.* Sharp, 99 Pa. St. 560; Streeper *v.* Williams, 48 Pa. St. 450.

South Carolina.—Williams *v.* Vance, 9 S. C. 344. 30 Am. Rep. 26.

Texas.— Eakin *v.* Scott, 70 Tex. 442, 7 S. W. 777; Bessling *v.* Hoyle, 1 Tex. App. Civ. Cas. § 287.

Vermont.—Smith *v.* Wainwright, 24 Vt. 97.

Virginia.— Welch *v.* McDonald, 85 Va. 500, 8 S. E. 711.

Wyoming.— Ivinson *v.* Althrop, 1 Wyo. 71.

United States.— Van Buren *v.* Digges, 11 How. 461, 13 L. ed. 771; White *v.* Arleth, 28 Fed. Cas. No. 17,536, 1 Bond 319; Satterlee *v.* U. S., 30 Ct. Cl. 31; Kennedy *v.* U. S., 24 Ct. Cl. 122.

England.— Magee *v.* Lavell, L. R. 9 C. P. 107, 43 L. J. C. P. 131, 30 L. T. Rep. N. S. 169, 22 Wkly. Rep. 334; Lea *v.* Whitaker, L. R. 8 C. P. 70, 27 L. T. Rep. N. S. 676, 21

D. Rule of Construction in Doubtful Cases. It is the tendency and preference of the law to regard a sum stated to be payable if a contract is not fulfilled as a penalty and not as liquidated damages; for by treating such sum as a penalty, the recovery can be apportioned to the actual damages or loss actually sustained.[36] If it is called a penalty it will be held to be such, unless that construction is overcome by very clear evidence of an intention to the contrary, derived from other parts of the agreement.[37]

E. Damages Capable of Being Ascertained — 1. In General. Whatever the nature of the contract or the terms in which it has been expressed, the courts will as a rule construe the damages as a penalty, where they are capable of being accurately ascertained.[38]

Wkly. Rep. 230; Hinton *v.* Sparkes, L. R. 3 C. P. 161, 37 L. J. C. P. 81, 17 L. T. Rep. N. S. 600, 16 Wkly. Rep. 360; Kemble *v.* Farren, 6 Bing. 141, 19 E. C. L. 71, 3 C. & P. 623, 14 E. C. L. 749, 7 L. J. C. P. O. S. 258, 3 M. & P. 425, 31 Rev. Rep. 366; Reilly *v.* Jones, 1 Bing. 302, 1 L. J. C. P. O. S. 105, 8 Moore C. P. 244, 25 Rev. Rep. 640, 3 E. C. L. 519; Wallis *v.* Smith, 21 Ch. D. 243, 52 L. J. Ch. 145, 47 L. T. Rep. N. S. 389, 31 Wkly. Rep. 214.

See 15 Cent. Dig. tit. "Damages," § 154 *et seq.*

Double designation.— Where one is employed as a superintendent of a factory by a written contract which is to run for ten years, and the parties bind themselves to performance in a certain sum as liquidated damages, and in an earlier arrangement of a similar kind the parties have called the sum both a penalty and liquidated damages, the amount so stipulated will be regarded as a penalty. *Ex p.* Pollard, 19 Fed. Cas. No. 11,252, 2 Lowell 411.

No recovery beyond stipulated sum.— In an action to recover money deposited with defendant, where the answer alleges that the deposit was made as a forfeit or liquidated damages to secure the performance of a contract by plaintiff, defendant is not entitled to introduce evidence showing damage from the breach of contract in addition to the liquidated damages agreed on. Morrison *v.* Ashburn, (Tex. Civ. App. 1893) 21 S. W. 993.

36. *Alabama.*— Watts *v.* Sheppard, 2 Ala. 425.

Indiana.— Hamilton *v.* Overton, 6 Blackf. 206, 38 Am. Dec. 136.

Iowa.— Foley *v.* McKeegan, 4 Iowa 1, 66 Am. Dec. 107.

Maine.— Gowen *v.* Gerrish, 15 Me. 273; Gammon *v.* Howe, 14 Me. 250.

Massachusetts.— Wallis *v.* Carpenter, 13 Allen 19; Hodges *v.* King, 7 Metc. 583; Brown *v.* Bellows, 4 Pick. 179.

Mississippi.— Bright *v.* Rowland, 3 How. 398.

Missouri.— Moore *v.* Platte County, 8 Mo. 467.

New Jersey.—Whitfield *v.* Levy, 35 N. J. L. 149; Cheddick *v.* Marsh, 21 N. J. L. 463.

New York.— Leggett *v.* Mutual L. Ins. Co., 53 N. Y. 394; Richards *v.* Edick, 17 Barb. 260; Hoag *v.* McGinness, 22 Wend. 163.

Pennsylvania.— Trenwith *v.* Meeser, 12 Phila. 366.

South Carolina.— Owens *v.* Hodges, 1 McMull. 106.

Tennessee.— Baird *v.* Tolliver, 6 Humphr. 186, 44 Am. Dec. 298.

See 15 Cent. Dig. tit. "Damages," § 155.

37. Whitfield *v.* Levy, 35 N. J. L. 149; Baird *v.* Tolliver, 6 Humphr. (Tenn.) 186, 44 Am. Dec. 298; Harris *v.* Miller, 11 Fed. 118, 6 Sawy. 319. There was a stipulation in the contract that "whosoever of the two contracting parties breaks this contract without sufficient cause, and which is contained in said contract, has to pay to the other party the sum of five hundred dollars in cash." It was held that the sum thus stipulated to be paid should be construed to be a penalty, and not as liquidated damages. Hammer *v.* Breidenbach, 31 Mo. 49.

The general disposition of courts in this country is to regard the sum expressed in a bond as a penalty or security for the performance of the condition and not as liquidated damages, in cases where the parties have not expressly declared it to be certainly the one or the other. Therefore, if the agreement assumes the form of a bond, with condition that it shall be void upon the performance or non-performance of an act, the *prima facie* presumption is that the sum of money mentioned therein is intended merely as a security, and not as liquidated damages; and this presumption will stand until controlled by very strong considerations. Davis *v.* Gillett, 52 N. H. 126.

38. *Arkansas.*— Nevada County *v.* Hicks, 38 Ark. 557.

Georgia.— Lee *v.* Overstreet, 44 Ga. 507.

Illinois.— Tiernan *v.* Hinman, 16 Ill. 400.

Kansas.— St. Louis, etc., R. Co. *v.* Shoemaker, 27 Kan. 677.

Kentucky.— Hahn *v.* Horstman, 12 Bush 249.

Nebraska.— Squires *v.* Elwood, 33 Nebr. 126, 49 N. W. 939.

Texas.— Gulf, etc., R. Co. *v.* Ward, (Civ. App. 1896) 34 S. W. 328.

Wisconsin.— Fitzpatrick *v.* Cottingham, 14 Wis. 219.

United States.— White *v.* Arleth, 29 Fed. Cas. No. 17,536, 1 Bond 319; Davis *v.* U. S., 17 Ct. Cl. 201.

2. Provisions of Agreement Partially Capable of Determination. Where damages for breach of some of the covenants of an agreement can be readily ascertained, yet there are others where the loss would be difficult to estimate, the damages will usually be construed as a penalty and not as liquidated.[39]

F. Actual Damages in Proportion to Sum Claimed — 1. In General. While parties are allowed to fix their own measure of damages in certain cases so far as they are deemed reasonable,[40] yet the amount of damages claimed must be proportionate to the breach alleged.[41]

See 15 Cent. Dig. tit. "Damages," § 154 *et seq.*; and cases cited *supra*, note 32.

Award of arbitrators.— Where parties bind themselves in a certain sum to abide by an award, the sum is a penalty, since the arbitrators can determine the actual amount due, and only the award with interest can be recovered. Stewart *v.* Grier, 7 Houst. (Del.) 378, 32 Atl. 328.

39. *Alabama.*—McPherson *v.* Robertson, 82 Ala. 459, 2 So. 333.

Illinois.— Trower *v.* Elder, 77 Ill. 452.

Indiana.— Carpenter *v.* Lockhart, 1 Ind. 434.

Kansas.— St. Louis, etc., R. Co. *v.* Shoemaker, 27 Kan. 677.

Massachusetts. — Higginson *v.* Weld, 14 Gray 165; Chase *v.* Allen, 13 Gray 42.

Missouri.— Morse *v.* Rathburn, 42 Mo. 594, 97 Am. Dec. 359; Long *v.* Towl, 42 Mo. 545, 97 Am. Dec. 355; Hammer *v.* Breidenbach, 31 Mo. 49; Basye *v.* Ambrose, 28 Mo. 39.

Nevada.— Morris *v.* McCoy, 7 Nev. 399.

New Jersey.—Whitfield *v.* Levy, 35 N. J. L. 149.

New York.— Niver *v.* Rossman, 18 Barb. 50; Bagley *v.* Peddie, 5 Sandf. 192.

United States.— Charleston Fruit Co. *v.* Bond, 26 Fed. 18.

See 15 Cent. Dig. tit. "Damages," § 165.

No division of provisions.—Where the damages resulting from not complying with part of the stipulations of a contract — as here, to convey land — are capable of being measured, the sum fixed upon will be treated as a penalty. The sum named cannot be regarded as a penalty as to part of the provisions and as liquidated damages as to the other part. State *v.* Dodd, 45 N. J. L. 525.

Where a man agreed to do three things of different degrees of importance, or pay two thousand five hundred dollars as stipulated damages, and the breach assigned was omitting to do one of the things, the value of which was readily ascertainable, and was less than the sum specified as damages, the stipulation was held to be a penalty. Thoroughgood *v.* Walker, 47 N. C. 15.

Where a note referred to in a contract is to be paid on breach of such contract by defendant, and the contract contains several covenants to be performed by defendant, some of more, and some of less, importance than others, and the actual amount of damages which plaintiff would sustain by a breach of some of the covenants would be easily ascertained, the sum mentioned in the note is not liquidated damages, but in the nature of a penalty. Berry *v.* Wisdom, 3 Ohio St. 241.

40. Morse *v.* Rathburn, 42 Mo. 594, 97 Am. Dec. 359; Cowdrey *v.* Carpenter, 1 Abb. Dec. (N. Y.) 445; Manice *v.* Brady, 15 Abb. Pr. (N. Y.) 173. The recital in a contract that in consequence of the difficulty of ascertaining the injury which would result from a nonperformance the parties agree upon a sum as stipulated damages is no evidence of the difficulty, etc.; yet since it shows that the parties intended to liquidate the damages by contract, if the sum agreed is a reasonable compensation, it is proper that the intention of the parties should be given effect. Watt *v.* Sheppard, 2 Ala. 425.

No more than compensation.— When parties to a contract stipulate that in case of a violation thereof the party making default shall pay to the other a stipulated sum, the sum so fixed will be taken as the innocent party's measure of damages only when it appears that to do so will no more than compensate his losses. Gillilan *v.* Rollins, 41 Nebr. 540, 59 N. W. 893.

41. *Alabama.*— Hooper *v.* Savannah, etc., R. Co., 69 Ala. 529; Watts *v.* Sheppard, 2 Ala. 425.

California.— Nash *v.* Hermosilla, 9 Cal. 584, 70 Am. Dec. 676.

Iowa.— Bolster *v.* Post, 57 Iowa 698, 11 N. W. 637.

Kansas.— Condon *v.* Kemper, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671.

Kentucky.— Hahn *v.* Horstman, 12 Bush 249; Louisville Water Co. *v.* Youngstown Bridge Co., 16 Ky. L. Rep. 350.

Massachusetts.— Hall *v.* Crowley, 5 Allen 304, 81 Am. Dec. 745.

Michigan.— Davis *v.* Freeman, 10 Mich. 188.

Missouri.— Potter *v.* McPherson, 61 Mo. 240; Morse *v.* Rathburn, 42 Mo. 594, 97 Am. Dec. 359; Gower *v.* Saltmarsh, 11 Mo. 271; Moore *v.* Platte County, 8 Mo. 467.

New York.— Greer *v.* Tweed, 13 Abb. Pr. N. S. 427.

North Carolina.— Henderson *v.* Cansler, 65 N. C. 542.

Pennsylvania.— Robeson *v.* Whitesides, 16 Serg. & R. 320; Graham *v.* Bickham, 4 Dall. 149, 1 L. ed. 778, 1 Am. Dec. 323.

United States.— Davis *v.* U. S., 17 Ct. Cl. 201; Taylor *v.* The Marcella, 23 Fed. Cas. No. 13,797, 1 Woods 302.

See 15 Cent. Dig. tit. "Damages," § 170.

Lord Eldon, in delivering the judgment of the court in Astley *v.* Weldon, 2 B. & P. 346,

2. Damages Disproportionate to Covenants. Where the damages provided for in the agreement are disproportionate to the several covenants therein provided, in some cases being grossly excessive and in others entirely inadequate, they will be construed as a penalty rather than as liquidated.[42]

G. Uncertainty as to Amount of Damages. Where the damages are uncertain in their nature, difficult to ascertain or impossible to be estimated with certainty, by reference to any pecuniary standard, and where the parties themselves are more intimately acquainted with all the peculiar circumstances, and are therefore better able to compute the actual or probable damages,[43] it has been the

5 Rev. Rep. 618 [*quoted* in Morse *v.* Rathburn, 42 Mo. 594, 97 Am. Dec. 359], said that he had felt much embarrassment in ascertaining the principle of the decisions, and that "this appeared to him the clearest principle: that where a doubt is stated, whether the sum inserted be intended as a penalty or not, if a certain damage less than that sum is made payable upon the face of the same instrument in case the act intended to be prohibited be done, that sum shall be construed to be a penalty, though the mere fact of the sum being apparently enormous and excessive would not prevent it from being considered as liquidated damages." He added further: "*Prima facie*, this certainly is contract, and not penalty, but we must look to the whole instrument;" and it was held a penalty.

In terrorem.— Where a contract provides for a forfeiture of a sum so great that it is apparent that the provision was inserted *in terrorem*, it will be treated as a penalty, and not as liquidated damages. Bradstreet *v.* Baker, 14 R. I. 546.

No decision necessary.— In Georgia Land, etc., Co. *v.* Flint, 35 Ga. 226, it was held that where the actual damage proved was equal to the sum awarded in an action for breach of contract, it became unnecessary to determine whether the condition of the contract was in fact stipulated damages or a penalty.

Sum above market value.— Where an aggregate sum was agreed to be paid in the event of the non-return of certain state bonds received on loan, and such aggregate sum was greatly above the market value of the bonds, it was regarded as a penalty. Baird *v.* Tolliver, 6 Humphr. (Tenn.) 186, 44 Am. Dec. 298.

Violation of rule of compensation.— In Doane *v.* Chicago City R. Co., 51 Ill. App. 353, it was held that where the amount stipulated in a bond is such that it violates the fundamental rule of compensation, it will be treated as a penalty, without reference to the name given it by the parties.

42. Watts *v.* Sheppard, 2 Ala. 425; Clement *v.* Cash, 21 N. Y. 253; Schofield *v.* Preston, 16 Phila. (Pa.) 100; Trenwith *v.* Meeser, 12 Phila. (Pa.) 366.

43. *Alabama.*— Watts *v.* Sheppard, 2 Ala. 425.

Arkansas.—Williams *v.* Green, 14 Ark. 315.

California.— Streeter *v.* Rush, 25 Cal. 67; People *v.* Brooks, 16 Cal. 11.

Georgia.— Newman *v.* Wolfson, 69 Ga. 764.

Illinois.— Gobble *v.* Linder, 76 Ill. 157; Boyce *v.* Watson, 52 Ill. App. 361.

Indiana.— Studabaker *v.* White, 31 Ind. 211, 99 Am. Dec. 628; Brown *v.* Maulsby, 17 Ind. 10; Hamilton *v.* Overton, 6 Blackf. 206, 38 Am. Dec. 136.

Kentucky.— Elizabethtown, etc., R. Co. *v.* Geoghegan, 9 Bush 56.

Maine.— Jones *v.* Binford, 74 Me. 439; Dwinel *v.* Brown, 54 Me. 468; Gammon *v.* Howe, 14 Me. 250.

Maryland.— Pennsylvania R. Co. *v.* Reichert, 58 Md. 261.

Massachusetts.—Cushing *v.* Drew, 97 Mass. 445; Chase *v.* Allen, 13 Gray 42; Hodges *v.* King, 7 Metc. 583; Pierce *v.* Fuller, 8 Mass. 223, 5 Am. Dec. 102.

Michigan.—Jaquith *v.* Hudson, 5 Mich. 123.

Minnesota.— Mason *v.* Callender, 2 Minn. 350, 72 Am. Dec. 102.

Mississippi.— Bright *v.* Rowland, 3 How. 398.

Missouri.— Morse *v.* Rathburn, 42 Mo. 594, 97 Am. Dec. 359.

New Jersey.—Whitfield *v.* Levy, 35 N. J. L. 149.

New York.—Bagley *v.* Peddie, 16 N. Y. 469, 69 Am. Dec. 713 [*reversing* 5 Sandf. 192]; Cotheal *v.* Talmage, 9 N. Y. 551, 61 Am. Dec. 716 [*affirming* 1 E. D. Smith 573]; Cowdrey *v.* Carpenter, 1 Abb. Dec. 445 [*reversing* 1 Rob. 429]; Wooster *v.* Kisch, 26 Hun 61; Parsons *v.* Taylor, 12 Hun 252; Hosmer *v.* True, 19 Barb. 106; Mundy *v.* Culver, 18 Barb. 336; Niver *v.* Rossman, 18 Barb. 50; Esmond *v.* Van Benschoten, 12 Barb. 366; Holmes *v.* Holmes, 12 Barb. 137; Mott *v.* Mott, 11 Barb. 127; Birdsall *v.* Twenty-Third St. R. Co., 8 Daly 419; Shute *v.* Hamilton, 3 Daly 462; Townsend *v.* Fisher, 2 Hilt. 47; Williams *v.* Dakin, 22 Wend. 201 [*affirming* 17 Wend. 447]; Smith *v.* Smith, 4 Wend. 468; Nobles *v.* Bates, 7 Cow. 307.

Ohio.—Waggoner *v.* Cox, 40 Ohio St. 539; Grasselli *v.* Lowden, 11 Ohio St. 349; Lange *v.* Werk, 2 Ohio St. 519.

Pennsylvania.— Powell *v.* Burroughs, 54 Pa. St. 329; Stover *v.* Spielman, 1 Pa. Super. Ct. 526; Wilkinson *v.* Colley, 6 Kulp 401; Fox *v.* Snyder, 9 Phila. 285; Schofield *v.* Preston, 16 Phila. 100.

South Carolina.— Lipscomb *v.* Seegers, 19 S. C. 425; Williams *v.* Vance, 9 S. C. 344, 30 Am. Rep. 26.

Tennessee.— Muse *v.* Swayne, 2 Lea 251, 31 Am. Rep. 607.

rule to allow the parties to ascertain for themselves, and provide in the agreement itself the amount of damages which shall be paid.

H. Delay in Performance — 1. In General. Where a party has defaulted in the performance of some contract involving a stipulation of forfeiture, the courts as a general rule construe the same as liquidated damages rather than as a penalty,[44] unless it can be seen from the evidence that the forfeiture is disproportionate to the breach.[45]

2. Delay in Building Contracts. The question as to liquidated damages or a penalty very frequently arises under contracts for building, which provide a for-

Texas.— Bessling *v.* Hoyle, 1 Tex. App. Civ. Cas. § 287.

Vermont.— Barry *v.* Harris, 49 Vt. 392.

Wisconsin.— Pierce *v.* Jung, 10 Wis. 30.

United States.— Nielson *v.* Read, 12 Fed. 441; Harris *v.* Miller, 11 Fed. 118, 6 Sawy. 319; U. S. *v.* Hatch, 26 Fed. Cas. No. 15,325, 1 Paine 336.

England.— Crisdee *v.* Bolton, 3 C. & P. 240, 14 E. C. L. 547; Atkyns *v.* Kinnier, 4 Exch. 776; Green *v.* Price, 9 Jur. 857, 14 L. J. Exch. 105, 13 M. & W. 695; Leighton *v.* Wales, 7 L. J. Exch. 145, 3 M. & W. 545.

See 15 Cent. Dig. tit. "Damages," § 164.

Relinquishment of right of support.— The actual consideration in a deed from husband to wife was her relinquishment of her right to support within the family, but the nominal consideration was one thousand dollars. It was held that this should be considered as stipulated damages, since the value of the support relinquished could not be estimated in money. Randall *v.* Randall, 37 Mich. 563.

Unless unreasonable.— When at the time of making a contract there is no established rule by which damages for its breach can be measured, it is legitimate for the parties to stipulate for compensation to either side, in case of a breach, and the amount fixed by them will be treated as liquidated damages, unless it is unreasonable. Louisville Water Co. *v.* Youngstown Bridge Co., 16 Ky. L. Rep. 350.

44. *Alabama.*— O'Brien *v.* Anniston Pipe-Works, 93 Ala. 582, 9 So. 415; Watt *v.* Sheppard, 2 Ala. 425.

Arkansas.— Nilson *v.* Jonesboro, 57 Ark. 168, 20 S. W. 1093; Lincoln *v.* Little Rock Granite Co., 56 Ark. 405, 19 S. W. 1056.

Illinois.—Hennessy *v.* Metzger, 152 Ill. 505, 38 N. E. 1058, 43 Am. St. Rep. 267.

Maryland.—Geiger *v.* Western Maryland R. Co., 41 Md. 4.

Massachusetts.— Hall *v.* Crowley, 5 Allen 304, 81 Am. Dec. 745.

New York.— Weeks *v.* Little, 47 N. Y. Super. Ct. 1.

Oregon.— Louis *v.* Brown, 7 Oreg. 326.

Pennsylvania.—Malone *v.* Philadelphia, 147 Pa. St. 416, 23 Atl. 628.

Virginia.—Welch *v.* McDonald, 85 Va. 500, 8 S. E. 711.

See 15 Cent. Dig. tit. "Damages," §§ 167, 173.

In a contract to complete a grand stand for a race-course by a designated day, the contractor agreed to pay the owner one hundred dollars a day for every day that he should be in default after the day stated, which sum was thereby agreed upon as the damages which the owner would suffer by reason of such default and not by way of penalty. It was held that the sum of one hundred dollars a day was liquidated damages. Monmouth Park Assoc. *v.* Wallis Iron Works, 55 N. J. L. 132, 26 Atl. 140, 39 Am. St. Rep. 626, 19 L. R. A. 456.

45. *Alabama.*— O'Brien *v.* Anniston Pipe-Works, 93 Ala. 582, 9 So. 415; Watt *v.* Sheppard, 2 Ala. 425.

Arkansas.— Lincoln *v.* Little Rock Granite Co., 56 Ark. 405, 19 S. W. 1056.

California.— See Muldoon *v.* Lynch, 66 Cal. 536, 6 Pac. 417.

Indiana.— Dill *v.* Lawrence, 109 Ind. 564, 10 N. E. 573.

Kentucky.— Elizabethtown, etc., R. Co. *v.* Geoghegan, 9 Bush 56.

Massachusetts.— Hall *v.* Crowley, 5 Allen 304, 81 Am. Dec. 745.

Missouri.— Potter *v.* McPherson, 61 Mo. 240; Moore *v.* Platte County, 8 Mo. 467.

New York.— Colwell *v.* Lawrence, 38 N. Y. 71, 38 Barb. 643, 36 How. Pr. 306.

Pennsylvania.— Clements *v.* Schuylkill River, etc., Co., 132 Pa. St. 445, 19 Atl. 276.

Texas.— Jennings *v.* Willer, (Civ. App. 1895) 32 S. W. 24.

See 15 Cent. Dig. tit. "Damages," § 173.

Damages disproportionate to breach.— Where a vendor contracted to do certain work on the lot sold, and in case he failed to perform, agreed to pay "as liquidated damages" twenty dollars a day for each day the work remained incomplete after the expiration of the stipulated time, such amount to be deducted from the purchase-price for which the vendee had given his note, and the vendor performed about sixty per cent of the agreed work, and then stopped, it was held that since the actual damages sustained by the vendee could readily be ascertained, the amount named in the contract as "liquidated damages" should be regarded as a penalty, especially as its enforcement would deprive the vendor not only of the purchase-money due him, but a large sum in excess thereof. Hahn *v.* Horstman, 12 Bush (Ky.) 249.

Where a railroad, instead of condemning land under the statute, contracted with the owner for the land on condition of doing certain work on specified streets within a certain time, agreeing that for every day after default it would pay the owner one dollar, the agreement was for a penalty, and not for

feiture of a certain amount for each day in which the work is delayed. The courts have usually construed such forfeiture clauses as liquidated damages rather than as a penalty;[46] and this principally on the ground of the uncertainty in calculating the damages claimed.[47] Where, however, from a consideration of the contract, and the intention and circumstances of the parties, it can be determined that the agreement was really intended or should be construed as a penalty, the courts have not hesitated so to construe it.[48]

I. Contract Not to Engage in Particular Business. Where a contract has been made not to engage in any particular profession or business within

liquidated damages, since there was no proportionment of the sum stipulated to the actual damage. Hooper *v.* Savannah, etc., R. Co., 69 Ala. 529.

46. *Arkansas.*— Nilson *v.* Jonesboro, 57 Ark. 168, 20 S. W. 1093.

Illinois.—Hennessy *v.* Metzger, 152 Ill. 505, 38 N. E. 1058, 43 Am. St. Rep. 267.

Maryland.—Geiger *v.* Western Maryland R. Co., 41 Md. 4.

Massachusetts.— Folsom *v.* McDonough, 6 Cush. 208.

New York.— Weeks *v.* Little, 47 N. Y. Super. Ct. 1; Lennon *v.* Smith, 14 Daly 520, 1 N. Y. Suppl. 97; Bridges *v.* Hyatt, 2 Abb. Pr. 449; Pettis *v.* Bloomer, 21 How. Pr. 317. In Beale *v.* Hayes, 5 Sandf. 640, 644, the court said: "Liquidated damages, when a breach is proved to which they apply, are a positive debt, and as such, they exclude, on both sides, the consideration and the proof of actual damages."

Oregon.— Louis *v.* Brown, 7 Oreg. 326.

Pennsylvania.— Malone *v.* Philadelphia, 147 Pa. St. 416, 23 Atl. 628; Faunce *v.* Burke, 16 Pa. St. 469, 55 Am. Dec. 519.

Texas.— Indianola *v.* Gulf, etc., R. Co., 56 Tex. 594.

Virginia.—Welch *v.* McDonald, 85 Va. 500, 8 S. E. 711.

United States.— Texas, etc., R. Co. *v.* Rust, 19 Fed. 239.

England.— Fletcher *v.* Dyche, 2 T. R. 32, 1 Rev. Rep. 414.

Canada.— Scott *v.* Dent, 38 U. C. Q. B. 30; McPhee *v.* Wilson, 25 U. C. Q. B. 169.

Compare Brennan *v.* Clark, 29 Nebr. 385, 45 N. W. 472.

Building of vessel.—In Curtis *v.* Brewer, 17 Pick. (Mass.) 513, it was held that in a contract for building a vessel, where it was stipulated that if it was not completed by a specified date defendant was to pay therefor to plaintiffs at a certain rate per month for any delay in its completion after that time, and the parties bound themselves to the faithful performance of the contract in a specified sum, the damages for such delay were liquidated by the agreement.

47. *Arkansas.*— Nilson *v.* Jonesboro, 57 Ark. 168, 20 S. W. 1093.

Illinois.—Hennessy *v.* Metzger, 152 Ill. 505, 38 N. E. 1058, 43 Am. St. Rep. 267.

Iowa.— Wolf *v.* Des Moines, etc., R. Co., 64 Iowa 380, 20 N. W. 481.

Maryland.—Geiger *v.* Western Maryland R. Co., 41 Md. 4.

Massachusetts.—Chase *v.* Allen, 13 Gray 42.

New York.— Lennon *v.* Smith, 14 Daly 520, 1 N. Y. Suppl. 97.

Pennsylvania.— Malone *v.* Philadelphia, 147 Pa. St. 416, 23 Atl. 628; Faunce *v.* Burke, 16 Pa. St. 469, 55 Am. Dec. 519.

Texas.— Indianola *v.* Gulf, etc., R. Co., 56 Tex. 594.

United States.— Texas, etc., R. Co. *v.* Rust, 19 Fed. 239.

Under Cal. Code Civ. Proc. § 1671, which provides that parties to a contract may agree on an amount as liquidated damages when from the nature of the case it would be impracticable to fix the actual damages, taken in connection with section 1670, which provides that every contract by which the damages to be paid for a breach are determined in anticipation is to that extent void, except as expressly provided in section 1671, a building contractor's bond, stipulating that if the building is not completed on a day certain he should pay one hundred dollars for each day of delay as liquidated damages does not of itself, in the absence of all other evidence, make it clear that it would be impracticable to fix the actual damages. Patent Brick Co. *v.* Moore, 75 Cal. 205, 16 Pac. 890.

48. K contracted with C for the building of a mill, agreeing to furnish to him all materials, as fast as needed, etc., and to pay him one thousand dollars "fixed and stipulated damages" for any failure in performance upon his part. It was held that the one thousand dollars was in the nature of a penalty, and plaintiff was entitled to recover only his actual damages. Fitzpatrick *v.* Cottingham, 14 Wis. 219.

Agreement resembling bond.— Where by written instrument A acknowledged his indebtedness in a specific sum, with condition, to be void if B should be put in possession of a certain house and lot on a certain day, it was held that the amount was a penalty and not liquidated damages, the form of the instrument, which was not unlike a bond, precluding the idea of assessed damages. Bearden *v.* Smith, 11 Rich. (S. C.) 554.

Rental value.— Where defendant failed to finish the building of a house for plaintiff in the time agreed on, and it does not appear that he knew plaintiff expected to move in the house at such time, the only damages recoverable by plaintiff is the rental value of the house for the time it remained uncompleted after the date fixed for its completion, although there was an agreement in the con-

stated limits, it has been the policy of the courts to construe such an agreement as liquidated damages rather than as a penalty,[49] in the absence of any evidence to show that the amount of damages claimed is unjust or oppressive,[50] or that the amount claimed is disproportionate to the damages that would result from the breach or breaches of the several covenants of the agreement.[51] While the decisions in this class of cases are usually based upon the fact that the damages are uncertain and cannot be estimated,[52] it has also been held that where there is a promise to pay a particular sum in case of breach, or where the payment of the sum named is the very substance of the agreement, a recovery may be had for the sum named.[53]

tract for the payment of a certain sum per day, as liquidated damages in case of failure to complete. Simon *v.* Lanius, 9 Ky. L. Rep. 59.

49. *Alabama.*— McCurry *v.* Gibson, 108 Ala. 451, 18 So. 806, 54 Am. St. Rep. 177.

California.— Streeter *v.* Rush, 25 Cal. 67.

Georgia.— Newman *v.* Wolfson, 69 Ga. 764.

Illinois.— Boyee *v.* Watson, 52 Ill. App. 361.

Indiana.— Duffy *v.* Shockey, 11 Ind. 70, 71 Am. Dec. 348; Miller *v.* Elliott, Smith 267.

Kentucky.— Applegate *v.* Jacoby, 9 Dana 206. *Compare* Collins *v.* Farquar, 4 Litt. 153.

Maine.— Holbrook *v.* Tolby, 66 Me. 410, 22 Am. Rep. 581.

Massachusetts.—Cushing *v.* Drew, 97 Mass. 445; Pieree *v.* Fuller, 8 Mass. 223, 5 Am. Dec. 102.

New Jersey. — Hoagland *v.* Segur, 38 N. J. L. 230.

New York.— Mott *v.* Mott, 11 Barb. 127; Breek *v.* Ringler, 13 N. Y. Suppl. 501; Williams *v.* Dakin, 22 Wend. 201 [*affirming* 17 Wend. 447]; Nobles *v.* Bates, 7 Cow. 307.

Ohio.— Lange *v.* Werk, 2 Ohio St. 519.

Pennsylvania.— Kelso *v.* Reid, 145 Pa. St. 606, 23 Atl. 323, 27 Am. St. Rep. 716; Stover *v.* Spielman, 1 Pa. Super. Ct. 526.

Tennessee.— Muse *v.* Swayne, 2 Lea 251, 31 Am. Rep. 607.

Texas.— Riggins *v.* Hinehman, 3 Tex. App. Civ. Cas. § 30.

Vermont.— Barry *v.* Harris, 49 Vt. 392.

See 15 Cent. Dig. tit. "Damages," § 160.

Person entitled to recover or liable on stipulation.— Where a livery-stable keeper sold out his stock to two persons, agreeing not to engage in the business in the same stable, title to which he had retained for five years, it was held that after one of the buyers had retired from the business and broken his agreement the other buyer could sue in his own name for the recovery of the whole sum named, as liquidated damages in the original agreement. Johnson *v.* Gwinn, 100 Ind. 466.

50. Mueller *v.* Kleine, 27 Ill. App. 473; Kelso *v.* Reid, 145 Pa. St. 606, 23 Atl. 323, 27 Am. St. Rep. 716; Muse *v.* Swayne, 2 Lea (Tenn.) 251, 31 Am. Rep. 607; Riggins *v.* Hinchman, 3 Tex. App. Civ. Cas. § 30. In Smith *v.* Brown, 164 Mass. 584, 42 N. E. 101, the contract by which defendant, on selling to plaintiff his business, covenanted "under a penalty" of a certain amount, not to engage in competition with him, and was drawn by plaintiff's attorney and signed by defendant without reading. It was held to provide a penalty, and not liquidated damages, in the absence of strong evidence to show a contrary intention.

51. Heatwole *v.* Gorrell, 35 Kan. 692, 12 Pac. 135; Perkins *v.* Lyman, 11 Mass. 76, 6 Am. Dec. 158; Wilkinson *v.* Colley, 164 Pa. St. 35, 30 Atl. 286, 26 L. R. A. 114; Moore *v.* Colt, 127 Pa. St. 289, 18 Atl. 8, 14 Am. St. Rep. 845.

52. *California.*— Streeter *v.* Rush, 25 Cal. 67.

Georgia.— Newman *v.* Wolfson, 69 Ga. 764.

Illinois.— Boyce *v.* Watson, 52 Ill. App. 361.

Massachusetts.—Cushing *v.* Drew, 97 Mass. 445.

Michigan.—Jaquith *v.* Hudson, 5 Mich. 123.

New York.— Mott *v.* Mott, 11 Barb. 127; Dakin *v.* Williams, 17 Wend. 447; Nobles *v.* Bates, 7 Cow. 307.

Ohio.— Lange *v.* Werk, 2 Ohio St. 519.

Pennsylvania.—Wilkinson *v.* Colley, 6 Kulp 401.

Tennessee.— Muse *v.* Swayne, 2 Lea 251, 31 Am. Rep. 607.

Vermont.— Barry *v.* Harris, 49 Vt. 392.

See 15 Cent. Dig. tit. "Damages," § 166.

53. Applegate *v.* Jacoby, 9 Dana (Ky.) 206; Smith *v.* Bergengren, 153 Mass. 236, 26 N. E. 690, 18 L. R. A. 768. Thus Lord Mansfield held in Lowe *v.* Peers, 4 Burr. 2225, 2229 [*quoted* in Smith *v.* Bergengren, 153 Mass. 236, 26 N. E. 690, 18 L. R. A. 768], that if there is a covenant not to plow, with a penalty in a lease, a court of equity will relieve against the penalty; "but if it is worded — 'to pay 5*l.* an acre for every acre plowed up,' there is no alternative, no room for any relief against it, no compensation; it is the substance of the agreement." In Stafford *v.* Shortreed, 62 Iowa 524, 17 N. W. 756, defendant sold plaintiff his business and good-will, and gave a bond in the penalty of one hundred dollars not to engage in the same business in the same place. It was held that the one hundred dollars was in the nature of stipulated damages, and that defendant was liable in the full sum for a single breach, and that plaintiff could not maintain an injunction under Iowa Code, § 3386, for a "continuation" of the breach, the whole liability having been incurred by a single breach.

J. Default in Payment of Money — 1. In General. As a general rule the doctrine of liquidated damages is not applicable to contracts for the payment of money alone; in such case the court construe the damages as a penalty.[54] In cases where the parties to a contract stipulate for the payment of a large sum of money as damages for the failure or non-payment of a smaller sum at a given time, no matter what may be the language of the parties, the large sum agreed upon will be deemed a penalty, and not liquidated damages.[55]

2. Usurious Damages. Where liquidated damages are claimed for the non-payment of a sum of money and such damages exceed the lawful rate of interest, they are necessarily in violation of the law of usury and will not be allowed.[56]

K. Non-Performance of Any One of Several Acts. Where the agreement contains several distinct and independent covenants upon which there may be several breaches, and one sum is stated to be paid upon breach of performance, that sum will be considered a penalty and not liquidated damages.[57]

54. *Illinois.*— Morris *v.* Tillson, 81 Ill. 607.

Iowa.— Kuhn *v.* Myers, 37 Iowa 351.

New York.— Ward *v.* Jewett, 4 Rob. 714; Spear *v.* Smith, 1 Den. 464.

Rhode Island.— Sessions *v.* Richmond, 1 R. I. 298.

Wisconsin.— Fitzpatrick *v.* Cottingham, 14 Wis. 219.

England.— Kemble *v.* Farren, 6 Bing. 141, 19 E. C. L. 71, 3 C. & P. 623, 14 E. C. L. 749, 7 L. J. C. P. O. S. 258, 3 M. & P. 425, 31 Rev. Rep. 366.

See 15 Cent. Dig. tit. "Damages," § 162.

55. *Alabama.*— Watts *v.* Sheppard, 2 Ala. 425.

Illinois.— Tiernan *v.* Hinman, 16 Ill. 400; Kimball *v.* Doggett, 62 Ill. App. 528; Bryton *v.* Marston, 33 Ill. App. 211. And see Scofield *v.* Tompkins, 95 Ill. 190, 35 Am. Rep. 160.

Iowa.— Gower *v.* Carter, 3 Iowa 244, 66 Am. Dec. 71.

Maryland.— Hough *v.* Kugler, 36 Md. 186.

Massachusetts.— Fisk *v.* Gray, 11 Allen 132.

Nevada.— Morris *v.* McCoy, 7 Nev. 399.

New York.— Clement *v.* Cash, 21 N. Y. 253 [*following* Lampman *v.* Cochran, 16 N. Y. 275]; Niver *v.* Rossman, 18 Barb. 50; Beale *v.* Hayes, 5 Sandf. 640; Spear *v.* Smith, 1 Den. 464.

Ohio.— Cairnes *v.* Knight, 17 Ohio St. 68.

Pennsylvania.— Schofield *v.* Preston, 16 Phila. 100.

England.— Astley *v.* Weldon, 2 B. & P. 346, 5 Rev. Rep. 618.

See 15 Cent. Dig. tit. "Damages," § 162.

Arbitration of claim.— A claimed a balance to be due him from B and they referred their dispute to referees with an agreement to abide by the result, and that if either party refused to fulfil the agreement he should pay the other five hundred dollars as "liquidated damages." The referees reported that A should pay B three hundred and ten dollars. It was held that on the refusal of A to pay the amount awarded against him B might maintain suit for its recovery, but not for the "liquidated damages" specified in the agreement. Gray *v.* Crosby, 18 Johns. (N. Y.) 219.

Debt actually due.— If a note be payable at a specified day, for a certain sum, which may be discharged by the payment of a less sum at an earlier day, the greater sum is not in the nature of a penalty, but is the debt actually due, and is recoverable if the less sum be not paid according to the terms of the note. Carter *v.* Corley, 23 Ala. 612.

56. *Georgia.*— Clark *v.* Kay, 26 Ga. 403.

Indiana.— Brown *v.* Maulsby, 17 Ind. 10.

Kansas.— Foote *v.* Sprague, 13 Kan. 155; Kurtz *v.* Sponable, 6 Kan. 395.

Louisiana.— Griffin *v.* His Creditors, 6 Rob. 216.

New York.— Gray *v.* Cosby, 18 Johns. 219.

Rhode Island.— Sessions *v.* Richmond, 1 R. I. 298.

England.— Orr *v.* Churchill, 1 H. Bl. 227, 2 Rev. Rep. 759.

See 15 Cent. Dig. tit. "Damages," § 162.

Not a matter of equity.— Where a note stipulates for payment of a certain per cent as liquidated damages for non-payment, if it is not paid promptly at maturity, the increased interest is merely liquidated damages from which relief can be had at any time by payment, and involves no special hardship calling for the interference of a court of equity. Bane *v.* Gridley, 67 Ill. 388.

The stipulation of the parties as to the rate of interest after maturity may be accepted as the measure of damages, provided they adhere to what may be reasonably sufficient to compensate the loss arising from the breach of contract. If, however, the rate of interest specified in the contract greatly exceeds the real value of the money, it is to be regarded as a penalty for the non-payment of the principal sum, rather than a just recompense for detaining it. Browne *v.* Steck, 2 Colo. 70.

57. *Alabama.*— Watt *v.* Sheppard, 2 Ala. 425.

California.— People *v.* Central Pac. R. Co., 76 Cal. 29, 18 Pac. 90; Nash *v.* Hermosilla, 9 Cal. 584, 70 Am. Dec. 676.

Florida.— Smith *v.* Newell, 37 Fla. 147, 20 So. 249.

L. Breach of Contract of Sale. In determining whether a sum claimed upon a breach of contract for sale is liquidated damages or a penalty, the court should look at the nature of the contract and the words and intentions of the parties;[58] but such sums have usually been held liquidated damages for the reason that the damages sustained are in almost all cases uncertain and very difficult to estimate.[59]

Georgia.— Swift *v.* Crow, 17 Ga. 609.

Indiana.— Carpenter *v.* Lockhart, Smith 326.

Kansas.— St. Louis, etc., R. Co. *v.* Shoemaker, 27 Kan. 677.

Massachusetts.— Chase *v.* Allen, 13 Gray 42; Heard *v.* Bowers, 23 Pick. 455.

Michigan.— Daily *v.* Litchfield, 10 Mich. 29.

Minnesota.— Carter *v.* Strom, 41 Minn. 522, 43 N. W. 394.

Missouri.—Morse *v.* Rathburn, 42 Mo. 594, 97 Am. Dec. 359.

New Jersey.— Monmouth Park Assoc. *v.* Warren, 55 N. J. L. 598, 27 Atl. 932; Hoagland *v.* Segur, 38 N. J. L. 230; Cheddick *v.* Marsh, 21 N. J. L. 463.

New York.— Staples *v.* Parker, 41 Barb. 648; Niver *v.* Rossman, 18 Barb. 50; Beale *v.* Hayes, 5 Sandf. 640.

Oregon.— Wilhelm *v.* Eaves, 21 Oreg. 194, 27 Pac. 1053, 14 L. R. A. 297.

Pennsylvania.— Keck *v.* Bieber, 148 Pa. St. 645. 24 Atl. 170, 33 Am. St. Rep. 846; Curry *v.* Larer, 7 Pa. St. 470, 49 Am. Dec. 486; Trenwith *v.* Meeser, 12 Phila. 366.

South Carolina.— Owens *v.* Hodges, 1 McMull. 106.

England.— Kemble *v.* Farren, 6 Bing. 141, 19 E. C. L. 71, 3 C. & P. 623, 14 E. C. L. 749, 7 L. J. C. P. O. S. 258, 3 M. & P. 425, 31 Rev. Rep. 366 [*cited* in Cheddick *v.* Marsh, 21 N. J. L. 463]; Astley *v.* Weldon, 2 B. & P. 346, 5 Rev. Rep. 618; Crisdee *v.* Bolton, 3 C. & P. 240, 14 E. C. L. 547.

See 15 Cent. Dig. tit. "Damages," § 163.

Partial performance.— Where a contract specifies a certain sum to be paid as damages on failure of either party to perform "all and every one of the covenants and agreements resting upon him" and does not provide for part performance, plaintiff's waiver of complete, and his acceptance of part, performance changes the agreement for liquidated damages into one for a penalty, and entitles him to recover only for damages actually sustained by a partial breach of the contract. Wibaux *v.* Grinnell Live-Stock Co., 9 Mont. 154, 22 Pac. 492. So where a contract prescribed payment of one and the same round sum, for a default of the promisor to obtain for the promisee title to any of certain lands, or to obtain a privilege of selection between certain lands, and made no difference between a total and a partial default, it was held that the sum must be considered a penalty, not liquidated damages. Lyman *v.* Babcock, 40 Wis. 503.

Where an agreement consisted of several particulars differing very much in importance, and contained a provision that either party who should violate the agreement in any part should pay the sum of five thousand dollars "as liquidated damages," but this provision was inserted at the suggestion of the draftsman, and it appeared to have received little or no previous attention by the parties, it was held that it was to be treated as a penalty. Jackson *v.* Baker, 2 Edw. (N. Y.) 471.

58. Gobble *v.* Linder, 76 Ill. 157; Yetter *v.* Hudson, 57 Tex. 604.

59. *California.*— Fisk *v.* Fowler, 10 Cal. 512.

Connecticut.— Tingley *v.* Cutler, 7 Conn. 291.

Illinois.— Burk *v.* Dunn, 55 Ill. App. 25.

Indiana.— Jaqua *v.* Headington, 114 Ind. 309, 16 N. E. 527; McCormick *v.* Mitchell, 57 Ind. 248.

Minnesota.— Fasler *v.* Beard, 39 Minn. 32, 38 N. W. 755.

Missouri.— Morse *v.* Rathburn, 42 Mo. 594, 97 Am. Dec. 359.

Pennsylvania.— Wolf Creek Diamond Coal Co. *v.* Schultz, 71 Pa. St. 180; Streeper *v.* Williams, 48 Pa. St. 450.

South Dakota.— Barnes *v.* Clement, 8 S. D. 421, 66 N. W. 810.

Texas.— Talkin *v.* Anderson, (Sup. 1892) 19 S. W. 852; Yetter *v.* Hudson, 57 Tex. 604.

Wisconsin.— Berrinkott *v.* Traphagen, 39 Wis. 219; Pierce *v.* Jung, 10 Wis. 30.

See 15 Cent. Dig. tit. "Damages," § 168.

Cal. Civ. Code, § 1670, provides that "every contract by which the amount of damages to be paid . . . for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in next section." Section 1671 provides that "the parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damages sustained by a breach thereof, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage." Under such statute it was held that a contract for the sale of grain bags, which provides that the vendor shall pay the vendee three cents for each bag which he refuses or neglects to deliver, as liquidated damages, is void, although it recites that from the nature of the case it will be extremely difficult to determine the damages. Pacific Factor Co. *v.* Adler, 90 Cal. 110, 120, 27 Pac. 36, 25 Am. St. Rep. 102. See also Drew *v.* Pedlar, 87 Cal. 443, 25 Pac. 749, 22 Am. St. Rep. 257; Eva *v.* McMahon, 77 Cal. 467, 19 Pac. 872. Where, however, under the same statute a manufacturer agreed to deliver a harvester to plaintiff, with contract of warranty, in exchange for a machine be-

M. Breach of Contract of Hiring. The courts have usually construed the damages as liquidated in breaches of contract for hiring on the ground that they can be rarely estimated,[60] but in such cases the stipulation must be reasonable and bear some proportion to the breach complained of.[61]

N. Breach of Contract of Lease. The same general rule obtains in cases of breach of contracts of lease, since damages in such cases can rarely be correctly estimated. Parties are allowed to fix their own terms;[62] but the stipulation must be a reasonable one, and some substantial damage must have resulted.[63]

longing to plaintiff, the latter agreeing to pay in addition thereto a named sum, and in case the harvester should not do good work plaintiff was not to pay any money in consideration of the exchange, it was held that such contract did not come within the exception of the above statute, and that evidence was admissible of the actual damage sustained by plaintiff from a breach of the warranty. Greenleaf *v.* Stockton Combined Harvester, etc., Works, 78 Cal. 606, 21 Pac. 369.

60. Wilson *v.* Duls, 1 N. Y. City Ct. 132; Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211. Where an agreement to employ an attorney in a very important suit, after providing for a liberal compensation in case of success, stipulated that in case the suit should be settled, discontinued, or taken from the attorney's control, he should be paid fifteen thousand dollars, it was held that this sum was not a penalty, but liquidated damages, in lieu of damages of an uncertain and doubtful nature. Ryan *v.* Martin, 16 Wis. 57.

Intoxication.— In Henderson *v.* Murphree, 109 Ala. 556, 20 So. 45, defendants took plaintiff, who had theretofore been their clerk, into partnership. Plaintiff, who had been addicted to the excessive use of intoxicating liquor, but who had reformed, again became intoxicated, whereupon the parties entered into an agreement which provided that if he should again use liquor to excess he should forfeit to plaintiff all interest in the partnership and in the profits, and should instead be paid a certain salary for his services, it was held that the forfeiture of plaintiff's interest in the partnership in case of his becoming intoxicated would be enforced as liquidated damages, since the actual damages were uncertain. See also Keeble *v.* Keeble, 85 Ala. 552, 5 So. 149.

61. A contract of employment between a waiter and the proprietors of a hotel which stipulates that if the waiter leave their service without giving three days' notice he shall forfeit all moneys owing him provides for a penalty, and not for liquidated damages, since the amount is greatly in excess of the actual damage. Wagner *v.* Kingsley, 7 Misc. (N. Y.) 744, 27 N. Y. Suppl. 1124; Schmieder *v.* Kingsley, 6 Misc. (N. Y.) 107, 26 N. Y. Suppl. 31.

62. In Mawson *v.* Leavitt, 16 Misc. (N. Y.) 289, 37 N. Y. Suppl. 1138, it was held that a provision in a contract (by which defendant agreed to furnish his theater for a week, and plaintiff agreed to furnish his theatrical company and play in the theater for said week, proceeds to be divided) that on any violation of the above-mentioned covenants by either party the sum of five hundred dollars on demand as liquidated damages is not a covenant for a penalty, but for liquidated damages, since it was competent for the parties to fix their liability in a reasonable amount.

Fine in addition to actual damages.—Where a contract by defendants for the use of electrotype plates provides that they shall be liable for any damages caused by a wrongful use thereof, and shall pay in addition a fine equal to ten times the price of the electrotypes wrongfully used, the fine is a penalty, and not liquidated damages, since it is in addition to the actual damage sustained. Meyer *v.* Estes, 164 Mass. 457, 41 N. E. 683, 32 L. R. A. 283.

Lessee remaining in possession.— Where the lessee covenants to pay double rent for such time as the lessor shall be kept out of possession, after the term is ended, by a forfeiture, such double rent will not be considered as a penalty, but as liquidated damages, since the lessee by remaining in possession evidently considers the property of greater value than the rent. Walker *v.* Engler, 30 Mo. 130.

63. Wilmington Transp. Co. *v.* O'Neil, 98 Cal. 1, 32 Pac. 705; Poppers *v.* Meagher, 148 Ill. 192, 35 N. E. 805 [*affirming* 47 Ill. App. 593]; Peine *v.* Weber, 47 Ill. 41; Leary *v.* Laflin, 101 Mass. 334; Powell *v.* Burroughs, 54 Pa. St. 329.

A bark was chartered to respondents, the charter providing that it should be "entered at New York, by the respondent's agents, or, on default thereof, the owner should pay £20 estimated damages." It was held that the stipulation was a reasonable one, and that the stipulated damages should be allowed without further proof of specific damage than the delay of one day. Gallo *v.* McAndrews, 29 Fed. 715.

A clause in a lease of water-power, that in default of a sufficient supply of water the lessor shall forfeit a *pro rata* proportion of the water-rents accruing during the existence of such deficiency, is not a provision for liquidated damages, such as will prevent recovery of other damages by the lessee, when it appears that the deficiency was the result of the lessor's failure to repair injuries to the race and dam caused by an unusual freshet, and that the rental value of the lessee's mill, which was useless without the power, was

O. Partial Breach of Agreement. Where the agreement has been partially performed, it is the policy of the courts to regard the damages as a penalty, and allow the plaintiff to recover only such damages as he has actually sustained.[64] Where the contract contains several distinct agreements or stipulations, the mere omission or failure to perform the contract in its entirety will not entitle the plaintiff to liquidated damages.[65] So a claim for a stipulated sum as liquidated damages for a non-performance of a partially performed contract cannot be enforced where its completion can be effected at small expense compared to the liquidated sum.[66]

P. Accrual of Right. As a general rule the right to claim damages as liquidated damages or a penalty accrues after an offer and refusal to perform the agreement, coupled with a present ability to do so.[67] In all cases, however, regard should be had to the terms of the contract itself,[68] and to the intention of the parties and the surrounding circumstances under which the agreement was made.[69]

twenty dollars per day, while the rent of the power was but three dollars. Pengra *v.* Wheeler, 24 Oreg. 532, 34 Pac. 354, 21 L. R. A. 726.

No substantial damages.— A provision in a lease for five thousand dollars' damages, to cover interruption of earnings and other losses in addition to unpaid rent, in case of breach by the lessee, when, on an actual breach, no substantial damage has been suffered, must be held to be a penalty. Gay Mfg. Co. *v.* Camp, 65 Fed. 794, 13 C. C. A. 137.

Terms unreasonable.— Where a contract for the hiring of a cow for a year provides that the borrower is to return the cow in a year with six dollars, and if not then delivered pay six dollars a year until delivered, the damages allowed for failure to return the cow will be the first six dollars and interest thereafter on that amount and the value of the cow, since the terms of the contract are unconscionable and void. Baxter *v.* Wales, 12 Mass. 365.

64. McGowan *v.* Ford, 107 Cal. 177, 40 Pac. 231; Shute *v.* Taylor, 5 Metc. (Mass.) 61. In Lampman *v.* Cochran, 19 Barb. (N. Y.) 388, A agreed to convey certain premises to B, upon certain payments being made. A stipulation in the agreement was "to pay one to the other, the sum of $500, as liquidated damages, in case, if one of the parties shall fail to perform said contract." B paid one hundred dollars of the purchase-money. It was held that the five hundred dollars was to be deemed liquidated damages, but payable only in case of a total failure to perform the contract, and that part payment having been made, B was only liable for damages.

65. Cook *v.* Finch, 19 Minn. 407. So where an agreement contains several stipulations of different degrees of importance, and a sum is named as liquidated damages, an intention to make the sum so determined payable on the breach of minor and unimportant parts of the agreement will not be imputed, in the absence of language declaring such intention with precision. Hoagland *v.* Segur, 38 N. J. L. 230. See also *supra*, VIII, K.

66. Colwell *v.* Lawrence, 38 Barb. (N. Y.) 643, 24 How. Pr. (N. Y.) 324.

67. Hammond *v.* Gilmore, 14 Conn. 479; Thorndike *v.* Locke, 98 Mass. 340.

68. Stillwell *v.* Temple, 28 Mo. 156.

Construction of contract.—Where the members of a firm agreed with plaintiff that he should have the exclusive sale within certain territory, for a certain period, of an article manufactured by them, with a provision that if they should sell or assign their business before the termination of the agreement, without securing an adoption thereof by the purchaser, plaintiff should be entitled to receive a certain sum as liquidated damages, it was held that one of the partners having died during the life of the contract, the sale of his interest to the survivors was not within the meaning of the contract. Murdock *v.* Martin, 147 Pa. St. 203, 23 Atl. 804.

Where a contract for the construction of a railroad reserved to the company the right to terminate the contract at any time by formal notice in writing, and upon payment to the contractor for all labor performed, and the further sum of three thousand dollars as liquidated damages, it was held, where the company suspended the work and then failed to resume it, that the contractor could not recover the three thousand dollars, since a payment of liquidated damages was not reserved for a breach of the contract, but as a means to dissolve it. Curnan *v.* Delaware, etc., R. Co., 138 N. Y. 480, 34 N. E. 201.

69. In Amedon *v.* Gannon, 6 Hun (N. Y.) 384, the defendant agreed not to practise medicine in a certain town for ten years, the contract providing for a bond on request conditioned that he should not practise as aforesaid. The bond was not given. In an action by plaintiff to recover damages, it was held that as the bond was only to be given if required by plaintiff, and as he never demanded the same, it could not be assumed that the rights of the parties were the same, so as to authorize plaintiff to recover the penalty of the bond as liquidated damages.

No recovery.— Where a land contract provided that a wharf to be erected on the land by the vendor should be finished, ready for business, within thirty days, under a penalty

Q. Necessity of Actual Damage. In an action to recover liquidated damages, there is no necessity to prove that actual damages have been suffered.[70] In such cases upon a failure to perform the contract the stipulated damages may be recovered with interest,[71] unless the parties have expressly agreed upon a certain sum under the terms of their contract.[72]

IX. EXEMPLARY DAMAGES.[73]

A. In General. "Punitive damages," "vindictive damages," and "exemplary damages" are in legal contemplation synonymous terms.[74] The kind of wrongs to which exemplary damages are applicable are those which besides the violation of a right, or the actual damages sustained, import insult, fraud, or oppression, and are not merely injuries, but injuries inflicted in the spirit of

of ten dollars for each day exceeding the thirty days, and there was no evidence that the vendee, a dealer in kindling wood, could not have gone on to the wharf, received his wood, stored it, erected his kiln, and transacted his business within the thirty days, it was held that, although the entire lot had not been graded to the vendee's satisfaction, and although there was a projection of about six feet along the lower part of the bulkhead, the vendee was not entitled to recover anything, either as liquidated damages or as a penalty. McCullough *v.* Manning, 132 Pa. St. 43, 18 Atl. 1080.

70. Stanley *v.* Montgomery, 102 Ind. 102, 26 N. E. 213; Spicer *v.* Hoop, 51 Ind. 365; Sanford *v.* Belle Plaine First Nat. Bank, 94 Iowa 680, 63 N. W. 459; De Graff *v.* Wickham, 89 Iowa 720, 52 N. W. 503, 57 N. W. 420; Beale *v.* Hayes, 5 Sandf. (N. Y.) 640; Gibson *v.* Oliver, 158 Pa. St. 277, 27 Atl. 961; Kelso *v.* Reid, 145 Pa. St. 606, 23 Atl. 323, 27 Am. St. Rep. 716. *Compare* Hathaway *v.* Lynn, 75 Wis. 186, 43 N. W. 956, 6 L. R. A. 551.

Amount not unreasonable.— In Louisville Water Co. *v.* Youngstown Bridge Co., 16 Ky. L. Rep. 350, a water company, having in course of erection two large buildings to hold the boilers, machinery, and engines for a new pumping station, contracted with defendant to furnish it two sets of steel and iron trusses for the two roofs. By the terms of the contract the work was to be finished on a certain day, and it was agreed that defendant was to receive a bonus of one hundred dollars for each day that the work was finished before contract time, and that for each day its completion was delayed beyond the day named one hundred dollars was to be deducted from the contract price as liquidated damages. It was held that the work not being completed until eight days after the agreed time the plaintiff was entitled to the liquidated damages agreed upon, although no damage was shown, the amount stipulated not being unreasonable.

Nominal damages.— In the absence of proof that the owner of a house is damaged by delay in its completion, he can only recover nominal damages, although the builder's contract stipulates for a payment of twenty dollars per day for every day's delay in completing it. Wilcus *v.* Kling, 87 Ill. 107.

71. Mead *v.* Wheeler, 13 N. H. 351; Winch *v.* Mutual Ben. Ice Co., 86 N. Y. 618; Slosson *v.* Beadle, 7 Johns. (N. Y.) 72.

72. Interest is not allowable upon a sum named in an agreement, not as a penalty, but as liquidated damages, and recoverable, not as the representative of an actual debt, or as the measure of actual compensation, but as the damages fixed by the parties to be recovered on a breach. The verdict must be for that precise sum. Hoagland *v.* Segur, 38 N. J. L. 230.

Set-off.— The amount of damages recoverable in an action brought for a sum fixed by agreement as liquidated damages may be reduced by proving that a certain portion of the consideration expressed in the agreement has not been paid. Baker *v.* Connell, 1 Daly (N. Y.) 469.

Waiver of right and defenses.— The mere fact that a contract was terminated by agreement rather than by notice, as provided for in the contract, does not constitute a waiver of the right to retain the amount named therein as liquidated damages. Wolf *v.* Des Moines, etc., R. Co., 64 Iowa 380, 20 N. W. 481.

Where parties submitted their matters in controversy to arbitration, with the agreement that one thousand dollars should be the amount of stipulated damages in case of a refusal to abide the award, it was held that no interest at all should be allowed, as the parties had fixed their own damages. Devereux *v.* Burgwin, 33 N. C. 490.

73. **Whether expenses of litigation and counsel fees** could be assessed where exemplary damages are recovered has already been discussed. See *supra*, VII, L. And see Winters *v.* Cowen, 90 Fed. 99.

74. *District of Columbia.*— Herfurth *v.* Washington, 6 D. C. 288.

Illinois.— Lowry *v.* Coster, 91 Ill. 182; Roth *v.* Eppy, 80 Ill. 283.

Indiana.— Koerner *v.* Oberly, 56 Ind. 284, 26 Am. Rep. 34.

Kentucky.— Chiles *v.* Drake, 2 Metc. 146, 74 Am. Dec. 406.

New Hampshire.— Bixby *v.* Dunlap, 56 N. H. 456, 22 Am. Rep. 475.

wanton disregard.[75] On the point of exemplary or vindictive damages there has been some discussion between law writers, some contending that punitive damages are intended as a personal punishment to the offender; others that the object should rather be a lesson to the public.[76] The better doctrine seems to be that they are usually given as a punishment to the offender, for the benefit of the community and a restraint to the transgressor.[77] Such damages are only given in cases where malice, fraud, or gross negligence enter into the cause of action;[78]

75. New Orleans, etc., R. Co. *v.* Statham, 42 Miss. 607, 97 Am. Dec. 478; Zimmerman *v.* Bonzar, (Pa. 1888) 16 Atl. 71. In Chicago, etc., R. Co. *v.* Scurr, 59 Miss. 456, 463, 42 Am. Rep. 373, the court said: "The point was met and decided by the Supreme Court of the United States in Milwaukee R. Co. *v.* Arms, 91 U. S. 489, 23 L. ed. 374, in which the lower court had charged the jury that 'if you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give to the plaintiffs punitive or exemplary damages.'" In Southern R. Co. *v.* Kendrick, 40 Miss. 374, 390, 90 Am. Dec. 332 [*quoted* in Chicago, etc., R. Co. *v.* Scurr, 59 Miss. 456, 463, 42 Am. Rep. 373], it is said that "a neglect of duty, clearly not attended with any circumstances of insult, of aggravation of feelings, of injury to the person or his property, or of bodily or mental suffering, would not justify vindictive damages; yet if there be any evidence tending to show such circumstances, its weight and force rest peculiarly in the discretion of the jury."

76. Wright *v.* Donnell, 34 Tex. 291 [*quoting* Fitzpatrick *v.* Blocker, 23 Tex. 552]. In Southern R. Co. *v.* Barr, 55 S. W. 900. 12 Ky. L. Rep. 1615, it was held that while plaintiff was entitled to an instruction authorizing punitive damages if the negligence was gross, it was error to tell the jury that they might give such damages "by way of punishing the defendant and to deter others from like practices." In an action for personal injuries, exemplary damages may be recovered, not as a penalty for a public wrong, but in vindication of a private right which has been wilfully invaded, and as a warning to others. Oliver *v.* Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307.

77. *Alabama.*— Burns *v.* Campbell, 71 Ala. 271.

Illinois.— St. Louis Consol. Coal Co. *v.* Haenni, 146 Ill. 614, 35 N. E. 162.

Iowa.— Sheik *v.* Hobson, 64 Iowa 146, 19 N. W. 875; Ward *v.* Ward, 41 Iowa 686.

Kansas.— Chicago, etc., R. Co. *v.* O'Connell, 46 Kan. 581, 26 Pac. 947; Kansas City, etc., R. Co. *v.* Kier, 41 Kan. 661, 671, 21 Pac. 770, 13 Am. St. Rep. 311.

Louisiana.— Edwards *v.* Ricks, 30 La. Ann. 926; Keene *v.* Lizardi, 8 La. 26.

Mississippi.— New Orleans, etc., R. Co. *v.* Bailey, 40 Miss. 395.

New York.— Millard *v.* Brown, 35 N. Y. 297.

North Carolina.— Rippey *v.* Miller, 33 N. C. 247.

Texas.— Cole *v.* Tucker, 6 Tex. 266.

Virginia.— Borland *v.* Barrett, 76 Va. 128, 44 Am. Rep. 152.

West Virginia.—Mayer *v.* Frobe, 40 W. Va. 246, 22 S. E. 58.

United States.— The Amiable Nancy, 3 Wheat. 546, 4 L. ed. 456; Press Pub. Co. *v.* Monroe, 73 Fed. 196, 19 C. C. A. 429, 51 L. R. A. 353; Tiblier *v.* Alford, 12 Fed. 262.

See 15 Cent. Dig. tit. "Damages," § 188 *et seq.*

78. *Alabama.*— Southern R. Co. *v.* Bunt, 131 Ala. 591, 32 So. 507; Garrett *v.* Sewell, 108 Ala. 521, 18 So. 737; Patterson *v.* South Alabama, etc., R. Co., 89 Ala. 318, 7 So. 437.

Arkansas.— Barlow *v.* Lowder, 35 Ark. 492.

California.— Bundy *v.* Maginess, 76 Cal. 532, 18 Pac. 668; St. Ores *v.* McGlashen, 74 Cal. 148, 15 Pac. 452; Wade *v.* Thayer, 40 Cal. 578; Dorsey *v.* Manlove, 14 Cal. 553.

Colorado.— Wall *v.* Cameron, 6 Colo. 275 [*cited* in Murphy *v.* Hobbs, 7 Colo. 541, 553, 5 Pac. 119, 49 Am. Rep. 366].

Connecticut.—Welch *v.* Durand, 36 Conn. 182, 4 Am. Rep. 55; Dibble *v.* Morris, 26 Conn. 416; Merrills *v.* Tariff Mfg. Co., 10 Conn. 384, 27 Am. Dec. 682; Churchill *v.* Watson, 5 Day 140, 5 Am. Dec. 130.

Delaware.— Watson *v.* Hastings, 1 Pennew. 47, 39 Atl. 587; Tatnall *v.* Courtney, 6 Houst. 434.

Georgia.—Jacobus *v.* Congregation, etc., 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141; Ratteree *v.* Chapman, 79 Ga. 574, 4 S. E. 684; Mosely *v.* Sanders, 76 Ga. 293; Coleman *v.* Ryan, 58 Ga. 132.

Hawaii.— Coffin *v.* Spencer, 2 Hawaii 23.

Illinois.— St. Louis Consol. Coal Co. *v.* Haenni, 146 Ill. 614, 35 N. E. 162; Harrison *v.* Ely, 120 Ill. 83, 11 N. E. 334; Drohn *v.* Brewer, 77 Ill. 280; Becker *v.* Dupree, 75 Ill. 167; Jones *v.* Jones, 71 Ill. 562; Scott *v.* Hamilton, 71 Ill. 85; Illinois, etc., R., etc., Co. *v.* Cobb, 68 Ill. 53.

Indiana.— Moore *v.* Crose, 43 Ind. 30; Millison *v.* Hoch, 17 Ind. 227; Anthony *v.* Gilbert, 4 Blackf. 348. See Wolf *v.* Trinkle, 103 Ind. 355, 3 N. E. 110, denying the right to exemplary damages in an action for indecent assault.

Iowa.— Casey *v.* Ballou Banking Co., 98 Iowa 107, 67 N. W. 98; Martin *v.* Murphy, 85 Iowa 669, 52 N. W. 662; Root *v.* Sturdivant, 70 Iowa 55, 29 N. W. 802; White *v.* Spangler, 68 Iowa 222, 26 N. W. 85; Mallett *v.* Beale, 66 Iowa 70, 23 N. W. 269; Curl *v.* Chicago, etc., R. Co., 63 Iowa 417, 16 N. W. 69, 19 N. W. 308.

and in order to warrant their recovery, there must enter into the injury some element of aggravation, or some coloring of insult or malice that will take the

Kansas.— Cady *v.* Case, 45 Kan. 733, 26 Pac. 448; Kansas City, etc., R. Co. *v.* Kier, 41 Kan. 661, 671, 21 Pac. 770, 13 Am. St. Rep. 311; Winstead *v.* Hulme, 32 Kan. 568, 4 Pac. 994; Hefley *v.* Baker, 19 Kan. 9.

Kentucky.—Slater *v.* Sherman, 5 Bush 206; Chiles *v.* Drake, 2 Metc. 146, 74 Am. Dec. 406; Jennings *v.* Maddox, 8 B. Mon. 430; Tyson *v.* Ewing, 3 J. J. Marsh. 185; Louisville, etc., R. Co. *v.* Simpson, 64 S. W. 733, 23 Ky. L. Rep. 1044; Illinois Cent. R. Co. *v.* Stewart, 63 S. W. 596, 23 Ky. L. Rep. 637.

Louisiana.— Webb *v.* Rothschild, 49 La. Ann. 244, 21 So. 258; Graham *v.* St. Charles, etc., R. Co., 47 La. Ann. 1656, 49 Am. St. Rep. 436, 18 So. 707; Scheen *v.* Poland, 34 La. Ann. 1107.

Maine.— Webb *v.* Gilman, 80 Me. 177, 13 Atl. 688; Johnson *v.* Smith, 64 Me. 553; Pike *v.* Dilling, 48 Me. 539.

Maryland.— Thillman *v.* Neal, 88 Md. 525, 42 Atl. 242; Atlantic, etc., Consol. Coal Co. *v.* Maryland Coal Co., 62 Md. 135; Sloan *v.* Edwards, 61 Md. 89; Friend *v.* Hamill, 34 Md. 298; Zimmerman *v.* Hesler, 32 Md. 274; Baltimore, etc., R. Co. *v.* Blocher, 27 Md. 277.

Massachusetts.— Hawes *v.* Knowles, 114 Mass. 518, 19 Am. Rep. 383.

Michigan.— McChesney *v.* Wilson, (1903) 93 N. W. 627; Briggs *v.* Milburn, 40 Mich. 512.

Minnesota.— Rauma *v.* Lamont, 82 Minn. 477, 85 N. W. 236; Crosby *v.* Humphreys, 59 Minn. 92, 60 N. W. 843; Boetcher *v.* Staples, 27 Minn. 308, 7 N. W. 263, 38 Am. Rep. 295; Gardner *v.* Kellogg, 23 Minn. 463; McCarthy *v.* Niskern, 22 Minn. 90; Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79.

Mississippi.—Lochte *v.* Mitchell, (1900) 28 So. 877; Reese *v.* Barbee, 61 Miss. 181; Storm *v.* Green, 51 Miss. 103; New Orleans, etc., R. Co. *v.* Statham, 42 Miss. 607, 97 Am. Dec. 478; Heirn *v.* McCaughan, 32 Miss. 17, 66 Am. Dec. 588; Bell *v.* Morrison, 27 Miss. 68.

Missouri.— Beck *v.* Dowell, 111 Mo. 506, 20 S. W. 209, 33 Am. St. Rep. 547; Green *v.* Craig, 47 Mo. 90; Goetz *v.* Ambs, 27 Mo. 28; Corwin *v.* Walton, 18 Mo. 71, 59 Am. Dec. 285; Milborn *v.* Beach, 14 Mo. 104, 55 Am. Dec. 91; Gildersleeve *v.* Overstolz, 90 Mo. App. 518; Lyddon *v.* Dose, 81 Mo. App. 64.

New Hampshire.— Cooper *v.* Hopkins, 70 N. H. 271, 48 Atl. 100; Kimball *v.* Holmes, 60 N. H. 163; Belknap *v.* Boston, etc., R. Co., 49 N. H. 358; Taylor *v.* Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229; Cram *v.* Hadley, 48 N. H. 191; Towle *v.* Blake, 48 N. H. 92; Hopkins *v.* Atlantic, etc., R. Co., 36 N. H. 9, 72 Am. Dec. 287; Whipple *v.* Walpole, 10 N. H. 130.

New Jersey.— Trainer *v.* Wolff, 58 N. J. L. 381, 33 Atl. 1051; Magee *v.* Holland, 27 N. J. L. 86, 72 Am. Dec. 341.

New York.— Conners *v.* Walsh, 131 N. Y. 590, 30 N. E. 59; Lawyer *v.* Fritcher, 130 N. Y. 239, 29 N. E. 267, 27 Am. Rep. 521, 14 L. R. A. 700 [*affirming* 54 Hun 586, 7 N. Y. Suppl. 909]; Kiff *v.* Youmans, 20 Hun 123; Walker *v.* Wilson, 8 Bosw. 586; Lewis *v.* Bulkley, 4 Daly 156; Tifft *v.* Culver, 3 Hill 180; Cable *v.* Dakin, 20 Wend. 172; Woert *v.* Jenkins, 14 Johns. 352.

North Carolina.— White *v.* Barnes, 112 N. C. 323, 16 S. E. 922; Holmes *v.* Carolina Cent. R. Co., 94 N. C. 318; Louder *v.* Hinson, 49 N. C. 369; Causee *v.* Anders, 20 N. C. 388; Duncan *v.* Stalcup, 18 N. C. 440.

Ohio.— Peckham Iron Co. *v.* Harper, 41 Ohio St. 100; Roberts *v.* Mason, 10 Ohio St. 277; Hendricks *v.* Fowler, 16 Ohio Cir. Ct. 597, 9 Ohio Cir. Dec. 209; Hilbert *v.* Doebricks, 8 Ohio Dec. (Reprint) 518, 8 Cinc. L. Bul. 268.

Oregon.— Hamerlynck *v.* Banfield, 36 Oreg. 436, 59 Pac. 712.

Pennsylvania.— McDevitt *v.* Vial, (1887) 11 Atl. 645; Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574; Nagle *v.* Mullison, 34 Pa. St. 48; Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341; Kennedy *v.* Wade, Brightly N. P. 186.

South Carolina.— Brasington *v.* South Bound R. Co., 62 S. C. 325, 40 S. E. 665, 89 Am. St. Rep. 905; Watts *v.* South Bound R. Co., 60 S. C. 67, 38 S. E. 240; Rowe *v.* Moses, 9 Rich. 423, 67 Am. Dec. 560.

Tennessee.— Byram *v.* McGuire, 3 Head 530; Wilkins *v.* Gilmore, 2 Humphr. 140.

Texas.— Sargent *v.* Carnes, 84 Tex. 156, 19 S. W. 378; Shook *v.* Peters, 59 Tex. 393; Craddock *v.* Goodwin, 54 Tex. 578; Rodgers *v.* Ferguson, 36 Tex. 544; Champion *v.* Vincent, 20 Tex. 811; Hedgepeth *v.* Robertson, 18 Tex. 858; Oliver *v.* Chapman, 15 Tex. 400; Cole *v.* Tucker, 6 Tex. 666; Graham *v.* Roder, 5 Tex. 141; Smith *v.* Sherwood, 2 Tex. 460.

Vermont.— Edwards *v.* Leavitt, 46 Vt. 126; Hoadley *v.* Watson, 45 Vt. 289, 12 Am. Rep. 197; Earl *v.* Tupper, 45 Vt. 275; Devine *v.* Rand, 38 Vt. 621; Nye *v.* Merriam, 35 Vt. 438.

Virginia.— Wood *v.* American Nat. Bank, 100 Va. 306, 40 S. E. 931; Borland *v.* Barrett, 76 Va. 128, 44 Am. Rep. 152.

Wisconsin.— Lamb *v.* Stone, 95 Wis. 254, 70 N. W. 72; Nichols *v.* Brabazon, 94 Wis. 549, 69 N. W. 342; Johannesson *v.* Borschenius, 35 Wis. 131; Mowry *v.* Wood, 12 Wis. 413; Birchard *v.* Booth, 4 Wis. 67; McWilliams *v.* Bragg, 3 Wis. 424.

Wyoming.— Cosfriff *v.* Miller, 10 Wyo. 190, 68 Pac. 206.

United States.— Scott *v.* Donald, 165 U. S. 58, 17 S. Ct. 265, 41 L. ed. 632; The Amiable Nancy, 3 Wheat. 546, 4 L. ed. 456; Cowen *v.* Winters, 96 Fed. 929, 37 C. C. A. 628 [*affirming* 90 Fed. 99]; Boyle *v.* Case, 18 Fed. 880, 9 Sawy. 386; Brown *v.* Evans, 17 Fed. 912, 8 Sawy. 488; Gray *v.* Cincinnati Southern, etc., R. Co., 11 Fed. 683; Miller *v.*

case out of the ordinary rule of compensation. The question of whether an act was wilful, wanton, or malicious relates only to damages, and not to the right of recovery; and, if the act complained of can be so classified, the jury is authorized by law to award smart money or punitive damages.[79] Unless there is some element of malice, or gross negligence, or circumstances of aggravation, the measure of damages is the measure of compensation for the loss sustained and nothing more;[80] and an instruction as to punitive damages when there is no sub-

Baltimore, etc., R. Co., 17 Fed. Cas. No. 9,560.

England.— Forde *v.* Skinner, 4 C. & P. 239, 19 E. C. L. 494; Emblen *v.* Myers, 6 H. & N. 54, 30 L. J. Exch. 71, 2 L. T. Rep. N. S. 774, 8 Wkly. Rep. 665.

Canada.— Falardeau *v.* Couture, 2 L. C. Jur. 96; Carsley *v.* Bradstreet Co., 29 L. C. Jur. 330, 2 Montreal Super. Ct. 33 [*affirmed* in 15 Rev. Lég. 358, 31 L. C. Jur. 292].

See 15 Cent. Dig. tit. "Damages," § 194 *et seq.*

79. Kirton *v.* North Chicago St. R. Co., 91 Ill. App. 554.

Malice necessary.— In Curl *v.* Chicago, etc., R. Co., 63 Iowa 417, 16 N. W. 69, 19 N. W. 308, it was held error to give an instruction to the jury which did not make the recovery of exemplary damages depend upon the malice of the wrong-doer.

No intention to injure.— Exemplary damages cannot be recovered of a constable for the seizure and sale of the wife's household goods under an attachment against the husband, where it appears that the goods were believed to belong to the husband, and that there was nothing wanton or malicious in the conduct of the constable or of the attachment plaintiff, nor any unnecessary humiliation inflicted upon the wife, nor any force used. Brown *v.* Allen, 67 Ark. 386, 55 S. W. 143. So in Wallace *v.* New York, 18 How. Pr. (N. Y.) 169, which was an action against the city for personal injuries caused by defects in the sidewalk, it was held that exemplary damages could not be recovered unless the circumstances showed a deliberate and positive intention to injure, or a reckless disregard of personal safety.

Burden of proof.— If damages beyond compensation are sought, in an action of tort, the burden is on plaintiff to show, or at least the evidence must establish, facts proving oppression, outrage, or vindictiveness by the wrong-doer before such damages can be awarded. Gedusky *v.* Rubinsky, 21 Pa. Co. Ct. 549.

80. *Arkansas.*— Kelly *v.* McDonald, 39 Ark. 387.

California.— Selden *v.* Cashman, 20 Cal. 56, 81 Am. Dec. 93; Moody *v.* McDonald, 4 Cal. 297.

Colorado.— Page *v.* Yool, 28 Colo. 464, 65 Pac. 636.

Delaware.— Brown *v.* Green, 1 Pennew. 535, 42 Atl. 991; McCoy *v.* Philadelphia, etc., R. Co., 5 Houst. 599.

Illinois.— Miller *v.* Kirby, 74 Ill. 242; Chicago, etc., R. Co. *v.* Jackson, 55 Ill. 492, 8 Am. Rep. 661; Williams *v.* Reil, 20 Ill. 147; Vangundy *v.* Berkenmeyer, 19 Ill. App. 229.

Indiana.— Louisville, etc., R. Co. *v.* Shanks, 94 Ind. 598.

Kansas.— Winstead *v.* Hulme, 32 Kan. 568, 4 Pac. 994; Gripton *v.* Thompson, 32 Kan. 367, 4 Pac. 698.

Kentucky.— Louisville, etc., R. Co. *v.* Long, 94 Ky. 410, 22 S. W. 747, 15 Ky. L. Rep. 199; Slater *v.* Sherman, 5 Bush 206; Chiles *v.* Drake, 2 Metc. 146, 74 Am. Dec. 406; American Nat. Bank *v.* Morey, 69 S. W. 759, 24 Ky. L. Rep. 658, 58 L. R. A. 956; Andrews *v.* Singer Mfg. Co., 48 S. W. 976, 20 Ky. L. Rep. 1089.

Louisiana.— Townsend *v.* Fontenot, 42 La. Ann. 890, 8 So. 616; Marin *v.* Satterfield, 41 La. Ann. 742, 6 So. 551; Leen Kee *v.* Smith, 35 La. Ann. 518; Massie *v.* Baily, 33 La. Ann. 485; Carter *v.* Tufts, 15 La. Ann. 16; Biggs *v.* D'Aquin, 13 La. Ann. 21; Stinson *v.* Buisson, 17 La. 567.

Maine.— Pierce *v.* Getchell, 76 Me. 216; Sanders *v.* Getchell, 76 Me. 158, 49 Am. Rep. 606.

Maryland.— Eliason *v.* Grove, 85 Md. 215, 36 Atl. 844; Wanamaker *v.* Bowes, 36 Md. 42.

Michigan.— Elliott *v.* Herz, 29 Mich. 202.

Minnesota.— Seeman *v.* Feeney, 19 Minn. 79.

Mississippi.— Biloxi City R. Co. *v.* Maloney, 74 Miss. 738, 21 So. 561; Yazoo, etc., R. Co. *v.* Brumfield, (1888) 4 So. 341; Chicago, etc., R. Co. *v.* Scurr, 59 Miss. 456, 42 Am. Rep. 373.

Missouri.— Brown *v.* Cape Girardeau Macadamized, etc., Co., 89 Mo. 152, 1 S. W. 129; Engle *v.* Jones, 51 Mo. 316; Laird *v.* Chicago, etc., R. Co., 78 Mo. App. 273.

Nevada.— Waters *v.* Stevenson, 13 Nev. 157, 29 Am. Rep. 293.

New Jersey.— Bullock *v.* Delaware, etc., R. Co., 61 N. J. L. 550, 40 Atl. 650.

New York.— Hamilton *v.* Third Ave. R. Co., 53 N. Y. 25; Rawlins *v.* Vidvard, 34 Hun 205; Edwards *v.* Beebe, 48 Barb. 106; MacGowan *v.* Duff, 14 Daly 315, 12 N. Y. St. 680.

North Carolina.— Remington *v.* Kirby, 120 N. C. 320, 26 S. E. 917.

Oklahoma.— Atchison, etc., R. Co. *v.* Chamberlain, 4 Okla. 542, 46 Pac. 499.

Pennsylvania.— Philadelphia Traction Co. *v.* Orbann, 119 Pa. St. 37, 12 Atl. 816; Cummings *v.* Gann, 52 Pa. St. 484; Nagle *v.* Mullison, 34 Pa. St. 48.

Texas.— Weaver *v.* Ashcroft, 50 Tex. 427; Cole *v.* Tucker, 6 Tex. 266; Trinity, etc., R. Co. *v.* O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389; Stephens *v.* Taylor, (Civ. App. 1896) 36 S. W. 1083; Tignor *v.* Toncy, 13 Tex. Civ. App

stantial evidence that the negligent act complained of was wanton or malicious has been held to be erroneous.[81] Although the courts have not been uniform in awarding exemplary damages where the injury is purely nominal, yet where the law implies sufficient damages to sustain an action, it has been held sufficient ground to warrant the imposition of vindictive damages;[82] but as a rule it must be shown by the evidence that actual damages are due.[83]

B. Acts Done in Good Faith. Where an act has been done in good faith, although it may result in serious injury to the defendant, there can be no recovery of exemplary damages.[84] The question whether an act was wilfully or wan-

518, 35 S. W. 881; Slocum *v.* Putnam, (Civ. App. 1894) 25 S. W. 52; International, etc., R. Co. *v.* Greenwood, 2 Tex. Civ. App. 76, 21 S. W. 559; Gray *v.* Webb, 3 Tex. App. Civ. Cas. § 331; Hoskins *v.* Huling, 2 Tex. App. Civ. Cas. § 155; Blum *v.* Martindale, 1 Tex. App. Civ. Cas. § 1127.

Virginia.— Burruss *v.* Hines, 94 Va. 413, 26 S. E. 875; Anderson *v.* Fox, 2 Hen. & M. 245.

West Virginia.— Talbott *v.* West Virginia, etc., R. Co., 42 W. Va. 560, 26 S. E. 311.

Wisconsin.— Barnes *v.* Martin, 15 Wis. 240, 82 Am. Dec. 670.

United States.— Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 489, 23 L. ed. 374; Chambers *v.* Upton, 34 Fed. 473; Bierbach *v.* Goodyear Rubber Co., 14 Fed. 286; Gould *v.* Christianson, 10 Fed. Cas. No. 5,636, 1 Blatchf. & H. 507; Jay *v.* Almy, 13 Fed. Cas. No. 7,236, 1 Woodb. & M. 262.

Canada.— Stephens *v.* Chausse, 3 Montreal Q. B. 270.

81. Curl *v.* Chicago, etc., R. Co., 63 Iowa 417, 16 N. W. 69, 19 N. W. 308; Chicago, etc., R. Co. *v.* O'Connell, 46 Kan. 581, 26 Pac. 947; Kansas City, etc., R. Co. *v.* Kier, 41 Kan. 661, 671, 21 Pac. 770, 13 Am. St. Rep. 311; Mud River Coal, etc., Co. *v.* Williams, 15 Ky. L. Rep. 847; Lewis *v.* Jannoupoulo, 70 Mo. App. 325.

Ordinary negligence.— A requested instruction on exemplary damages was modified by the court's adding that punitive damages are given, where the action has been prompted by recklessness, wantonness, wilfulness, malice, or happened through negligence. It was held the modification taken in its entirety did not authorize a recovery for exemplary damages for ordinary negligence. Mack *v.* South Bound R. Co., 52 S. C. 323, 29 S. E. 905, 68 Am. St. Rep. 900, 40 L. R. A. 679.

82. *Alabama.*—Alabama Great Southern R. Co. *v.* Sellers, 93 Ala. 9, 9 So. 375, 30 Am. St. Rep. 17.

Illinois.— Blanchard *v.* Burbank, 16 Ill. App. 375.

Kansas.— Hefley *v.* Baker, 19 Kan. 9.

Mississippi.— Bell *v.* Morrison, 27 Miss. 68.

United States.— Wilson *v.* Vaughn, 23 Fed. 229.

Compare Stacy *v.* Portland Pub. Co., 68 Me. 279; Spokane Truck, etc., Co. *v.* Hoefer, 2 Wash. 45, 25 Pac. 1072, 26 Am. St. Rep. 842, 11 L. R. A. 689.

See 15 Cent. Dig. tit. "Damages," § 191.

83. *California.*— Lamb *v.* Harbaugh, 105 Cal. 680, 39 Pac. 56.

Illinois.— Brantigam *v.* While, 73 Ill. 561; Fentz *v.* Meadows, 72 Ill. 540; Keedy *v.* Howe, 72 Ill. 133; Freese *v.* Tripp, 70 Ill. 496; Dickinson *v.* Atkins, 100 Ill. App. 401; Martin *v.* Leslie, 93 Ill. App. 44; Kelly *v.* Valentine, 17 Ill. App. 87.

Iowa.—Boardman *v.* Marshalltown Grocery Co., 105 Iowa 445, 75 N. W. 343.

Kansas.— Adams *v.* Salina, 58 Kan. 246, 48 Pac. 918; Schippel *v.* Norton, 38 Kan. 567, 16 Pac. 804; Stonestreet *v.* Crandell, (App. 1900) 62 Pac. 249.

Mississippi.— Robinson *v.* Goings, 63 Miss. 500.

Missouri.— Hoagland *v.* Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740.

Texas.— Girard *v.* Moore, 86 Tex. 675, 26 S. W. 945; Lacy *v.* Gentry, (Civ. App. 1900) 56 S. W. 949; King *v.* Sassaman, (Civ. App. 1899) 54 S. W. 304; Carson *v.* Texas Installment Co., (Civ. App. 1896) 34 S. W. 762.

United States.— Friedly *v.* Giddings, 119 Fed. 438.

See 15 Cent. Dig. tit. "Damages," § 191.

Where an action against a sheriff for abuse of process was tried by the court, it was not necessary for the court to segregate in its findings the amount of actual damages from the amount given as exemplary damages, in the absence of a request. Foley *v.* Martin, (Cal. 1903) 71 Pac. 165.

84. *Alabama.*— Burns *v.* Campbell, 71 Ala. 271.

Arkansas.— Walker *v.* Fuller, 29 Ark. 448.

California.— Lyles *v.* Perrin, 119 Cal. 264, 51 Pac. 332.

Georgia.— Yahoola River, etc., Hydraulic Hose Min. Co. *v.* Irby, 40 Ga. 479.

Illinois.— Gravett *v.* Mugge, 89 Ill. 218; Waldron *v.* Marcier, 82 Ill. 550; Scott *v.* Bryson, 74 Ill. 420; Dobbins *v.* Duquid, 65 Ill. 464; Tripp *v.* Gouner, 60 Ill. 474; Hawk *v.* Ridgway, 33 Ill. 473; Mackin *v.* Blythe, 35 Ill. App. 216.

Iowa.— Waller *v.* Waller, 76 Iowa 513, 41 N. W. 307; Wentworth *v.* Blackman, 71 Iowa 255, 32 N. W. 311; Inman *v.* Ball, 65 Iowa 543, 22 N. W. 666; Long *v.* Emsley, 57 Iowa 11, 10 N. W. 280; Plummer *v.* Harbut, 5 Iowa 308.

Kentucky.— Gerkins *v.* Kentucky Salt Co., 67 S. W. 821, 23 Ky. L. Rep. 2415; Patterson *v.* Waldman, 46 S. W. 17, 20 Ky. L. Rep. 514; Wormald *v.* Hill, 4 Ky. L. Rep. 723.

Louisiana.— Jackson *v.* Schmidt, 14 La. Ann. 806.

tonly committed is important in considering the damages. Where the wrong is wilful or wanton, the jury are authorized to give any amount of damages beyond the actual injury sustained as a punishment and to preserve the public tranquillity. But where the wrong-doer acts in good faith, with honest intentions, and with prudence and proper caution, although he may invade the rights of another, exemplary damages cannot be recovered.[85] Thus where an officer in discharge of his duty acts in good faith no exemplary damages can be awarded against him.[86]

C. Negligent Acts. It is only in cases of gross negligence that the theory of exemplary damages will be applied.[87] Where the negligence is accidental, or no wantonness or circumstances of malice enter into the wrong, there can be no recovery of exemplary damages.[88]

Maryland.— Sapp *v.* Northern Cent. R. Co., 51 Md. 115.

Michigan.— Allison *v.* Chandler, 11 Mich. 542.

Minnesota.— Jones *v.* Rahilly, 16 Minn. 320.

Missouri.— Bruce *v.* Ulery, 79 Mo. 322; Hull *v.* Sumner, 12 Mo. App. 583.

New York.— Dyke *v.* National Transit Co., 22 N. Y. App. Div. 360, 49 N. Y. Suppl. 180; Price *v.* Murray, 10 Bosw. 243.

North Carolina.— Hays *v.* Askew, 52 N. C. 272.

Ohio.— Mallannee *v.* Hills, 7 Ohio Dec. (Reprint) 281, 2 Cinc. L. Bul. 61.

Pennsylvania.—Blewett *v.* Coleman, 1 Pearson 516.

Texas.— Neese *v.* Radford, 83 Tex. 585, 19 S. W. 141; Erie Tel., etc., Co. *v.* Kennedy, 80 Tex. 71, 15 S. W. 704; Jackel *v.* Reiman, 78 Tex. 688, 14 S. W. 1001; Ulander *v.* Orman, (Civ. App. 1894) 26 S. W. 1103; Le Gierse *v.* Pierce, 2 Tex. App. Civ. Cas. § 89; Anderson *v.* Larremore, 1 Tex. App. Civ. Cas. § 947.

Vermont.— Blodgett *v.* Brattleboro, 30 Vt. 579.

Virginia.— Wood *v.* American Nat. Bank, 100 Va. 306, 40 S. E. 931.

Belief in legal right.— Where a person believing that he has the legal right wilfully and cruelly dispossessed another during severe weather, exemplary damages may be recovered against him where no such right existed. Raynor *v.* Nims, 37 Mich. 34, 26 Am. Rep. 493.

85. Hawk *v.* Ridgway, 33 Ill. 473.

86. Inman *v.* Ball, 65 Iowa 543, 22 N. W. 666; Long *v.* Emsley, 57 Iowa 11, 10 N. W. 280; Plummer *v.* Harbut, 5 Iowa 308; Bruce *v.* Ulery, 79 Mo. 322; Mallannee *v.* Hills, 7 Ohio Dec. (Reprint) 281, 2 Cinc. L. Bul. 61; Neese *v.* Radford, 83 Tex. 585, 19 S. W. 141; Anderson *v.* Larremore, 1 Tex. App. Civ. Cas. § 947. In Tracy *v.* Swartwout, 10 Pet. (U. S.) 80, 9 L. ed. 354, it was held, however, that where a ministerial officer had acted clearly against the law, he might be held liable in exemplary damages, although he had acted in good faith.

87. *Alabama.*— Patterson *v.* South Alabama, etc., R. Co., 89 Ala. 318, 7 So. 437; Alabama Great Southern R. Co. *v.* Arnold, 80 Ala. 600, 2 So. 337; South Alabama, etc., R. Co. *v.* McLendon, 63 Ala. 266; Rhodes *v.* Roberts, 1 Stew. 145.

Colorado.— Wall *v.* Cameron, 6 Colo. 275 [*cited* in Murphy *v.* Hobbs, 7 Colo. 541, 553, 5 Pac. 119, 49 Am. Rep. 366]; Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442.

Georgia.— Chattanooga, etc., R. Co. *v.* Liddell, 85 Ga. 482, 11 S. E. 853, 21 Am. St. Rep. 169.

Illinois.— Louisville, etc., R. Co. *v.* Wurl, 62 Ill. App. 381.

Iowa.— Cochran *v.* Miller, 13 Iowa 128.

Kansas.— Kansas City, etc., R. Co. *v.* Kier, 41 Kan. 661, 671, 21 Pac. 770, 13 Am. St. Rep. 311; Kansas Pac. R. Co. *v.* Kessler, 18 Kan. 523; Leavenworth, etc., R. Co. *v.* Rice, 10 Kan. 426.

Kentucky.— Maysville, etc., R. Co. *v.* Herrick, 13 Bush 122; Kountz *v.* Brown, 16 B. Mon. 577; Central Pass. R. Co. *v.* Chatterson, 29 S. W. 18, 17 Ky. L. Rep. 5; Louisville, etc., R. Co. *v.* Constantine, 14 Ky. L. Rep. 432. And see Mud River Coal, etc., Co. *v.* Williams, 15 Ky. L. Rep. 847.

Maryland.— Baltimore, etc., R. Co. *v.* Breneg, 25 Md. 378, 90 Am. Dec. 49.

Mississippi.— New Orleans, etc., R. Co. *v.* Stathan, 42 Miss. 607, 97 Am. Dec. 478; Southern R. Co. *v.* Kendrick, 40 Miss. 374, 90 Am. Dec. 332.

Missouri.— McKeon *v.* Citizens' R. Co., 42 Mo. 79; Kennedy *v.* North Missouri R. Co., 36 Mo. 351; Edelmann *v.* St. Louis Transfer Co., 3 Mo. App. 503.

New Hampshire.— Taylor *v.* Grand Trunk, etc., R. Co., 48 N. H. 304, 2 Am. Rep. 229; Hopkins *v.* Atlantic, etc., R. Co., 36 N. H. 9, 27 Am. Dec. 287; Whipple *v.* Walpole, 10 N. H. 130.

Ohio.— Kuchenmeister *v.* O'Connor, 9 Ohio Dec. (Reprint) 159, 11 Cinc. L. Bul. 120.

United States.— Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 489, 23 L. ed. 374; Beale *v.* Railway Co., 2 Fed. Cas. No. 1,159, 1 Dill. 568.

See 15 Cent. Dig. tit. "Damages," § 200.

In all cases of negligence the law governing the assessment of exemplary, punitive, or vindictive damages is the same, whether death results in consequence thereof or not. Turner *v.* Norfolk, etc., R. Co., 40 W. Va. 675, 22 S. E. 83.

88. *Arkansas.*— Walker *v.* Fuller, 29 Ark. 448.

D. In Actions For Injury to Property — 1. In General. The question whether exemplary damages will be allowed in actions for injuries to property depends upon the nature of the injury complained of. As a general rule they will only be allowed where such injury is attended by circumstances of wilful fraud, malice, or gross negligence.[89]

2. Injuries to Personal Property. Exemplary damages are not confined to injuries to the person, but may be awarded in case of injury, seizure, or conversion of personal property, where such injury, seizure, or conversion is attended with circumstances of aggravation.[90]

3. Injuries to Real Property. Vindictive or exemplary damages will not be usually given where the injury complained of is connected with real property.[91]

California.— Moody *v.* McDonald, 4 Cal. 297.

Colorado.— Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442.

Delaware.— McCoy *v.* Philadelphia, etc., R. Co., 5 Houst. 599.

Illinois.— Toledo, etc., R. Co. *v.* Johnston, 74 Ill. 83; Jacksonville *v.* Lambert, 62 Ill. 519; Tripp *v.* Grouner, 60 Ill. 474; Pierce *v.* Millay, 44 Ill. 189; Toledo, etc., R. Co. *v.* Arnold, 43 Ill. 418.

Indiana.—Louisville, etc., R. Co. *v.* Shanks, 94 Ind. 598.

Iowa.— Waller *v.* Waller, 76 Iowa 513, 41 N. W. 307.

Kansas.— Parsons *v.* Lindsay, 26 Kan. 426.

Kentucky.— McHenry Coal Co. *v.* Sneddon, 98 Ky. 684, 34 S. W. 288, 17 Ky. L. Rep. 1261; Louisville, etc., R. Co. *v.* Law, 21 S. W. 648, 14 Ky. L. Rep. 850; Mud River Coal, etc., Co. *v.* Williams, 15 Ky. L. Rep. 847.

Louisiana. — Jackson *v.* Schmidt, 14 La. Ann. 806.

Maryland.— Oursler *v.* Baltimore, etc., R. Co., 60 Md. 358.

Michigan.— Batterson *v.* Chicago, etc., R. Co., 49 Mich. 184, 13 N. W. 508.

Mississippi.— Southern R. Co. *v.* Kendrick, 40 Miss. 374, 90 Am. Dec. 332.

Missouri.— Leahy *v.* Davis, 121 Mo. 227, 25 S. W. 941; McKeon *v.* Citizens' R. Co., 42 Mo. 79; Goetz *v.* Ambs, 27 Mo. 28.

Ohio.— Kuchenmeister *v.* O'Connor, 9 Ohio Dec. (Reprint) 159, 11 Cinc. L. Bul. 120.

Vermont.— Blodgett *v.* Brattleboro, 30 Vt. 579.

United States.— Bierbach *v.* Goodyear Rubber Co., 14 Fed. 826.

See 15 Cent. Dig. tit. "Damages," § 200.

89. *Illinois.*— West Chicago, etc., R. Co. *v.* Morrison, 160 Ill. 288, 43 N. E. 393.

Iowa.— Inman *v.* Ball, 65 Iowa 543, 22 N. W. 666.

Kentucky. — Loeser *v.* Axtin, 12 Ky. L. Rep. 636.

Maine.— Wellman *v.* Dickey, 78 Me. 29, 2 Atl. 133.

New Hampshire.— Kimball *v.* Holmes, 60 N. H. 163.

New York.—Woert *v.* Jenkins, 14 Johns. 352.

Pennsylvania.— Stroud *v.* Smith, 194 Pa. St. 502, 45 Atl. 329; Walker *v.* Butz, 1 Yeates 574.

Tennessee.— Cumberland Tel., etc., Co. *v.* Poston, 94 Tenn. 696, 30 S. W. 1040.

Canada.—Bernard *v.* Bertoni, 16 Quebec 73.

See 15 Cent. Dig. tit. "Damages," § 196 *et seq.*; and, generally, *infra*, IX, D, 2, 3.

90. *Alabama.*— Dearing *v.* Moore, 26 Ala. 586.

Connecticut.— Merrills *v.* Tariff Mfg. Co., 10 Conn. 384, 27 Am. Dec. 682; Churchill *v.* Watson, 5 Day 140, 5 Am. Dec. 130.

Illinois.— Bull *v.* Griswold, 19 Ill. 631; Dean *v.* Blackwell, 18 Ill. 336; Sherman *v.* Dutch, 16 Ill. 283; O'Conner *v.* Parrott, 22 Ill. App. 429.

Indiana.— Anthony *v.* Gilbert, 4 Blackf. 348.

Iowa.— Casey *v.* Ballou Banking Co., 98 Iowa 107, 67 N. W. 98.

Kentucky.— Loeser *v.* Axtin, 12 Ky. L. Rep. 636.

Michigan.— Briggs *v.* Milburn, 40 Mich. 512.

New York.— Lewis *v.* Bulkley, 4 Daly 156; Woert *v.* Jenkins, 14 Johns. 352.

North Carolina.— Duncan *v.* Stalcup, 18 N. C. 440.

Texas.—Craddock *v.* Goodwin, 54 Tex. 578; Rogers *v.* Ferguson, 36 Tex. 544; Champion *v.* Vincent, 20 Tex. 811; Hedgepeth *v.* Robertson, 18 Tex. 858; Frank *v.* Tatum, (Civ. App. 1894) 26 S. W. 900; Alderson *v.* Gulf, etc., Co., (Civ. App. 1893) 23 S. W. 617; San Antonio *v.* Kniffen, 4 Tex. Civ. App. 484, 23 S. W. 457.

Wisconsin. — Johannesson *v.* Borschenius, 35 Wis. 131; Mowry *v.* Wood, 12 Wis. 413.

United States. — The Amiable Nancy, 3 Wheat. 546, 4 L. ed. 456.

See 15 Cent. Dig. tit. "Damages," § 196.

In an action for conversion in order that exemplary damages may be recovered, it must appear from the evidence that the act complained of was a wilful and malicious wrong, and that there was an intent to injure. Inman *v.* Ball, 65 Iowa 543, 22 N. W. 666.

Where an act of trespass is aggravated by wanton cruelty, exemplary damages will always be awarded. Kimball *v.* Holmes, 60 N. H. 163; Woert *v.* Jenkins, 14 Johns. (N. Y.) 352.

91. *Illinois.*— Stillwell *v.* Barnett, 60 Ill. 210; White *v.* Naerup, 57 Ill. App. 114; Van Tuyl *v.* Riner, 3 Ill. App. 556.

Indiana.— Moore *v.* Crose, 43 Ind. 30.

Iowa.— Brown *v.* Allen, 35 Iowa 306.

Where, however, the wrongful act complained of is accompanied with certain circumstances of aggravation and is wantonly or recklessly committed, exemplary damages may be recovered.[92] The question in this class of cases depends entirely upon the maliciousness of the trespass.[93] Especially are exemplary damages awarded in cases where a private home or residence has been invaded.[94]

E. In Actions For Personal Injury — 1. In General. Exemplary damages can only be awarded in case of personal injuries where the negligence or injury complained of is malicious or wanton or the negligence gross. The act must partake of a criminal or wilful nature, and in the absence of any evidence to that effect the damages must be confined to compensation only.[95] If the jury find as a fact from the evidence that defendant has been guilty of negligence so gross as would show a reckless indifference to human life or human society, or to indi-

Maryland.—Baltimore, etc., R. Co. *v.* Boyd, 63 Md. 325.

Minnesota.—Carli *v.* Union Depot, etc., Co., 32 Minn. 101, 20 N. W. 89.

Missouri.— Prueitt *v.* Cheltenham Quarry Co., 33 Mo. App. 8; McMenamy *v.* Cohich, 1 Mo. App. 529.

See 15 Cent. Dig. tit. "Damages," § 197.

92. *Alabama.*—Devaughn *v.* Heath, 37 Ala. 595; Mitchell *v.* Billingsley, 17 Ala. 391.

Delaware. — Hysore *v.* Quigley, 9 Houst. 348, 32 Atl. 960; Bonsall *v.* McKay, 1 Houst. 520.

Illinois.— Smalley *v.* Smalley, 81 Ill. 70.

Kansas.— Hefley *v.* Baker, 19 Kan. 9.

Kentucky.— Bronson *v.* Green, 2 Duv. 234; Kentucky Midland R. Co. *v.* Stump, 12 Ky. L. Rep. 316.

Maine.— Wellman *v.* Dickey, 78 Me. 29, 2 Atl. 133.

Maryland.— Smith *v.* Thompson, 55 Md. 5, 39 Am. Rep. 409; Barton Coal Co. *v.* Cox, 39 Md. 1, 17 Am. Rep. 525.

Minnesota.— Craig *v.* Cook, 28 Minn. 232, 9 N. W. 712.

Missouri.— Berlin *v.* Thompson, 61 Mo. App. 234; Newman *v.* St. Louis, etc., R. Co., 2 Mo. App. 402.

New Jersey. — Winter *v.* Peterson, 24 N. J. L. 524, 61 Am. Dec. 678.

North Carolina.— Wylie *v.* Smitherman, 30 N. C. 236.

Pennsylvania. — Kennedy *v.* Erdman, 150 Pa. St. 427, 24 Atl. 643; Walker *v.* Butz, 1 Yeates 574; Blair Iron, etc., Co. *v.* Lloyd, 1 Walk. 158.

South Carolina. — Greenville, etc., Co. *v.* Partlow, 14 Rich. 237.

Tennessee.— Cumberland Tel., etc., Co. *v.* Poston, 94 Tenn. 696, 30 S. W. 1040.

Texas.— Loftus *v.* Maxey, 73 Tex. 242, 11 S. W. 272; Weyer *v.* Wegner, 58 Tex. 539; Simpson *v.* Lee, (Civ. App. 1893) 34 S. W. 1053.

See 15 Cent. Dig. tit. "Damages," § 197.

93. Smith *v.* Thompson, 55 Md. 5, 39 Am. Rep. 409; Barton Coal Co. *v.* Cox, 39 Md. 1, 17 Am. Rep. 525.

Thus where ornamental trees were destroyed with an intent to injure the landowner exemplary damages were awarded. Wellman *v.* Dickey, 78 Me. 29, 2 Atl. 133; Cumberland Tel., etc., Co. *v.* Poston, 94 Tenn. 696, 30 S. W. 1040.

94. Hysore *v.* Quigley, 9 Houst. (Del.) 348, 32 Atl. 960; Bonsall *v.* McKay, 1 Houst. (Del.) 520; Loftus *v.* Maxey, 73 Tex. 242, 11 S. W. 272; Weyer *v.* Wegner, 58 Tex. 539. So it was held in West Chicago St. R. Co. *v.* Morrison, etc., Co., 160 Ill. 288, 43 N. E. 393, that where a lessor committed a wilful trespass upon the leased premises for the purpose of rendering the same uninhabitable in causing the lessee to surrender possession exemplary damages could be recovered.

95. *Alabama.*— Patterson *v.* South, etc., R. Co., 89 Ala. 318, 7 So. 437; Rhodes *v.* Roberts, 1 Stew. 145.

Arkansas.— Barlow *v.* Lowder, 35 Ark. 492.

Colorado.—Wall *v.* Cameron, 6 Colo. 275 [*cited* in Murphy *v.* Hobbs, 7 Colo. 541, 553, 5 Pac. 119, 49 Am. Rep. 366].

Connecticut.—Welch *v.* Durand, 36 Conn. 182, 4 Am. Rep. 55.

Illinois.— Chicago, etc., R. Co. *v.* Jackson, 55 Ill. 492, 8 Am. Rep. 661; Pierce *v.* Millay, 44 Ill. 189; Louisville, etc., R. Co. *v.* Wurl, 62 Ill. App. 381.

Kansas.—Chicago, etc., R. Co. *v.* O'Connell, 46 Kan. 581, 26 Pac. 947; Kansas City, etc., R. Co. *v.* Kier, 41 Kan. 661, 671, 21 Pac. 770, 13 Am. St. Rep. 311.

Kentucky.— McHenry Coal Co. *v.* Sneddon, 98 Ky. 684, 34 S. W. 228, 17 Ky. L. Rep. 1261; Maysville, etc., R. Co. *v.* Herrick, 13 Bush 122; Louisville, etc., R. Co. *v.* Law, 21 S. W. 648, 14 Ky. L. Rep. 850; Louisville, etc., R. Co. *v.* Roberts, 8 S. W. 459, 10 Ky. L. Rep. 528; Louisville, etc., R. Co. *v.* Constantine, 14 Ky. L. Rep. 432.

Michigan.— Batterson *v.* Chicago, etc., R. Co., 49 Mich. 184, 13 N. W. 508.

Mississippi.— New Orleans, etc., R. Co. *v.* Statham, 42 Miss. 607, 97 Am. Dec. 478.

Missouri.— Leahy *v.* Davis, 121 Mo. 227, 25 S. W. 941; Edelmann *v.* St. Louis Transfer Co., 3 Mo. App. 503.

Ohio — Kuchenmeister *v.* O'Conner, 9 Ohio Dec. (Reprint) 159, 11 Cinc. L. Bul. 120.

Pennsylvania.— Philadelphia Traction Co. *v.* Orbann, 119 Pa. St. 37, 12 Atl. 816.

United States.— Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 489, 23 L. ed. 374; Beale *v.*

cate recklessness, wantonness, or ill-will, they are at liberty to add exemplary damages.[96]

2. Railroad Accidents. Exemplary damages have often been claimed in case of a railroad accident, but in order to recover the same there must be shown such an entire want of care as amounts to "gross negligence."[97]

F. In Actions Ex Contractu — 1. In General. Exemplary damages have been almost universally denied in actions *ex contractu*.[98] No more can be recovered as damages than will fully compensate the party injured.[99] There exists, however, an exception to this general rule in case of a breach of contract to marry, in which exemplary damages may be allowed.[1]

2. Actions Against Common Carriers. As a general rule where there is a breach of contract on the part of a carrier for negligence on his part, and there are no circumstances to aggravate the case, exemplary damages will not be allowed.[2] Where, however, there is a breach of contract on the part of a common carrier to deliver a passenger at his destination within a certain time, and such breach of contract is attended with gross negligence, insult, or indignity, the passenger may recover exemplary damages for the injury sustained.[3]

Railway Co., 2 Fed. Cas. No. 1,159, 1 Dill. 568.

See 15 Cent. Dig. tit. "Damages," § 195.

96. Kuchenmeister *v.* O'Conner, 9 Ohio Dec. (Reprint) 159, 11 Cinc. L. Bul. 120.

97. Chattanooga, etc., R. Co. *v.* Liddell, 85 Ga. 482, 11 S. E. 853, 21 Am. St. Rep. 169; Kansas Pac. R. Co. *v.* Kessler, 18 Kan. 523; Batterson *v.* Chicago, etc., R. Co., 49 Mich. 184, 13 N. W. 508; Kennedy *v.* North Missouri R. Co., 36 Mo. 351. See also Kansas City, etc., R. Co. *v.* Kier, 41 Kan. 661, 671, 21 Pac. 770, 13 Am. St. Rep. 311.

98. *Arkansas.*—Snow *v.* Grace, 25 Ark. 570.

Georgia.— Goins *v.* Alabama Western R. Co., 68 Ga. 190.

Louisiana.— Ryder *v.* Thayer, 3 La. Ann. 149.

Maryland.— Oursler *v.* Baltimore, etc., R. Co., 60 Md. 358.

New York.— Duche *v.* Wilson, 37 Hun 519; Lane *v.* Wilcox, 55 Barb. 615.

Pennsylvania.— Hoy *v.* Grenoble, 34 Pa. St. 9, 75 Am. Dec. 628.

Texas.— Houston, etc., R. Co. *v.* Shirley, 54 Tex. 125; Thomas *v.* Peterson, (Civ. App. 1894) 24 S. W. 1125; St. Antonio, etc., Co. *v.* Kniffen, 4 Tex. Civ. App. 484, 23 S. W. 457.

Wisconsin.— Gordon *v.* Brewster, 7 Wis. 355.

See 15 Cent. Dig. tit. "Damages," § 203.

Thus in actions upon bonds exemplary or vindictive damages are seldom allowed. Dalby *v.* Campbell, 26 Ill. App. 502; Crump *v.* Ficklin, 1 Patt. & H. (Va.) 201. It was held, however, in Hayes *v.* Anderson, 57 Ala. 374, in an action on the bond of a plaintiff in garnishment proceedings that exemplary damages might be recovered where it appeared that the garnishment process was vexatious.

99. Ryder *v.* Thayer, 3 La. Ann. 149.

1. See Houston, etc., R. Co. *v.* Shirley, 54 Tex. 125; Mathieu *v.* Laflamme, 4 Rev. Lég. 371. See also Breach of Promise to Marry, 5 Cyc. 1021.

2. *Indiana.*— Cleveland, etc., R. Co. *v.* Quillen, 22 Ind. App. 496, 53 N. E. 1024.

Kentucky.— Louisville, etc., R. Co. *v.* Jackson, 36 S. W. 173, 18 Ky. L. Rep. 296; Carter *v.* Illinois Cent. R. Co., 34 S. W. 907, 17 Ky. L. Rep. 1352.

Mississippi.— Kansas City, etc., R. Co. *v.* Fite, 67 Miss. 373, 7 So. 223; Mississippi, etc., R. Co. *v.* Gill, 66 Miss. 39, 5 So. 393; Dorrah *v.* Illinois Cent. R. Co., 65 Miss. 14, 3 So. 36, 7 Am. St. Rep. 629; Chicago, etc., R. Co. *v.* Scurr, 59 Miss. 456, 42 Am. Rep. 373; Southern R. Co. *v.* Kendrick, 40 Miss. 374, 90 Am. Dec. 332.

North Carolina.— Thomas *v.* Southern R. Co., 122 N. C. 1005, 30 S. E. 343; Hansley *v.* Jamesville, etc., R. Co., 117 N. C. 565, 23 S. E. 443, 53 Am. St. Rep. 600, 32 L. R. A. 543, 115 N. C. 602, 20 S. E. 528, 44 Am. St. Rep. 474, 32 L. R. A. 543; Holmes *v.* Carolina Cent. R. Co., 94 N. C. 318.

Texas.— Gulf, etc., R. Co. *v.* McFadden, (Civ. App. 1894) 25 S. W. 451.

Virginia.— Norfolk, etc., R. Co. *v.* Lipscomb, 90 Va. 137, 17 S. E. 809, 20 L. R. A. 817.

See 15 Cent. Dig. tit. "Damages," § 1083; and, generally, Carriers.

3. *Alabama.*— Alabama Great Southern R. Co. *v.* Sellers, 93 Ala. 9, 9 So. 375, 30 Am. St. Rep. 17.

Georgia.— Savannah City, etc., R. Co. *v.* Brauss, 70 Ga. 368.

Kentucky.— Memphis, etc., Packet Co. *v.* Nagel, 97 Ky. 9, 29 S. W. 743, 16 Ky. L. Rep. 748; Louisville, etc., R. Co. *v.* Grundy, 12 Ky. L. Rep. 293; Dawson *v.* Louisville, etc., R. Co., 4 Ky. L. Rep. 801.

Mississippi.— Jackson Electric R., etc., Co. *v.* Lowry, 79 Miss. 431, 30 So. 634; Wilson *v.* New Orleans, etc., R. Co., 63 Miss. 352; New Orleans, etc., R. Co. *v.* Hurst, 36 Miss. 660, 74 Am. Dec. 785.

Missouri.— Hicks *v.* Hannibal, etc., R. Co., 68 Mo. 329.

New York.— Cagney *v.* Manhattan R. Co., 2 N. Y. Suppl. 410.

South Carolina.— Pickens *v.* South Caro-

G. Liability of Principal For Act of Agent — 1. In General. How far a principal is liable in exemplary damages for the acts of his agent is a question about which there is the utmost contrariety, and not a little confusion of authority. This results to some extent from a failure to classify the cases, many of which have been decided upon principles of public policy.[4] Some of the courts have laid down the broad doctrine that a principal is liable in exemplary damages for the acts of his agent, however tortious or unauthorized, where they are performed in the course of his regular business, on the ground that the principal is liable for all acts so done by his agent;[5] and this too whether such acts are previously authorized or subsequently ratified by the principal.[6] The better rule on this subject seems to be that a principal will not be held liable in exemplary damages for the act of an agent,[7] unless it be shown that he authorized or

lina, etc., R. Co., 54 S. C. 498, 32 S. E. 567; Samuels *v.* Richmond, etc., R. Co., 35 S. C. 493, 14 S. E. 943, 28 Am. St. Rep. 883.

United States.— Morse *v.* Duncan, 14 Fed. 396; Morrison *v.* The John L. Stephens, 17 Fed. Cas. No. 9,847, Hoffm. Op. 473.

4. Lienkauf *v.* Morris, 66 Ala. 406.

The rule has gradually grown more stringent as against common carriers, and especially railroad companies, on the ground that public policy and the safety of the traveling public require that they should not only exercise the highest degree of care in the conduct of their affairs, but should even "guarantee that none of their servants should commit crimes or wilful torts." Lienkauf *v.* Morris, 66 Ala. 406; Louisville, etc., Co. *v.* Garrett, 8 Lea 438, 41 Am. Rep. 640 [*citing* Goddard *v.* Canada Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39]; Haley *v.* Mobile, etc., R. Co., 7 Baxt. 239.

5. *Illinois.*— Chicago, etc., R. Co. *v.* Herring, 57 Ill. 59.

Kentucky.— City Transfer Co. *v.* Robinson, 12 Ky. L. Rep. 555.

Mississippi.— Southern Express Co. *v.* Brown, 67 Miss. 260, 7 So. 318, 8 So. 425, 19 Am. St. Rep. 306; New Orleans, etc., R. Co. *v.* Bailey, 40 Miss. 395.

Missouri.— Canfield *v.* Chicago, etc., R. Co., 59 Mo. App. 354.

Pennsylvania.— Hazard *v.* Israel, 1 Binn. 240, 2 Am. Dec. 438.

South Carolina.—Rucker *v.* Smoke, 37 S. C. 377, 16 S. E. 40, 34 Am. St. Rep. 758.

Tennessee.— Louisville, etc., R. Co. *v.* Garrett, 8 Lea 438, 41 Am. Rep. 640.

United States.— Fell *v.* Northern Pac. R. Co., 44 Fed. 248; Malloy *v.* Bennett, 15 Fed. 371.

See 15 Cent. Dig. tit. "Damages," § 208.

Scope of authority.— In Illinois Cent. R. Co. *v.* Ross, 31 Ill. App. 170, it was held that the master is liable in vindictive as well as actual damages for the tortious acts of his servant, done within the scope of his employment, in good faith, with a view to the furtherance of his master's business; but is not liable for a tort which grows out of the scope of his employment, when such tort is separated from all that preceded it, and is clearly distinguishable as to time, motive, and object and is on purely personal account.

Wanton trespass.—In Rockford, etc., R. Co. *v.* Wells, 66 Ill. 321, it was held that a railway company was liable in exemplary damages for wanton trespasses committed by its contractors on the land of another.

6. Canfield *v.* Chicago, etc., R. Co., 59 Mo. App. 354; Rucker *v.* Smoke, 37 S. C. 377, 16 S. E. 40, 34 Am. St. Rep. 758.

7. *Alabama.*— Burns *v.* Campbell, 71 Ala. 271; Pollock *v.* Gantt, 69 Ala. 373, 44 Am. Rep. 519.

California.—Mendlesohn *v.* Anaheim Lighter Co., 40 Cal. 657; Wardrobe *v.* California Stage Co., 7 Cal. 118, 68 Am. Dec. 231.

Connecticut.—Colvin *v.* Peck, 62 Conn. 155, 25 Atl. 355.

District of Columbia.— Redwood *v.* Metropolitan R. Co., 6 D. C. 302.

Georgia.— Augusta Factory *v.* Barnes, 72 Ga. 217, 53 Am. Rep. 838.

Illinois.— Brantigam *v.* While, 73 Ill. 561; Fentz *v.* Meadows, 72 Ill. 540; Keedy *v.* Howe, 72 Ill. 133; Grund *v.* Van Vleck, 69 Ill. 478.

Louisiana.— Boulard *v.* Calhoun, 13 La. Ann. 445; Keene *v.* Lizardi, 8 La. 26.

Missouri.— Rouse *v.* Metropolitan St. R. Co., 41 Mo. App. 298.

New York.— Cleghorn *v.* New York Cent., etc., R. Co., 56 N. Y. 44, 15 Am. Rep. 375; Fisher *v.* Metropolitan El. R. Co., 34 Hun 433.

Oregon.— Oliver *v.* North Pac. Transp. Co., 3 Oreg. 84.

Rhode Island.— Hagan *v.* Providence, etc., R. Co., 3 R. I. 88, 62 Am. Dec. 377.

Tennessee.— Nashville, etc., R. Co. *v.* Starnes, 9 Heisk. 52, 24 Am. Rep. 296.

Texas.— Texas Trunk R. Co. *v.* Johnson, 75 Tex. 158, 12 S. W. 482; Western Union Tel. Co. *v.* Brown, 58 Tex. 170, 44 Am. Rep. 610; Willis *v.* McNeill, 57 Tex. 465; Houston, etc., R. Co. *v.* Cowser, 57 Tex. 293; Dillon *v.* Rogers, 36 Tex. 152; Texas, etc., R. Co. *v.* Woodall, 2 Tex. App. Civ. Cas. § 471; Galveston, etc., R. Co. *v.* Davis, 1 Tex. App. Civ. Cas. § 147.

West Virginia.— Ricketts *v.* Chesapeake, etc., R. Co., 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901, 7 L. R. A. 354.

Wisconsin.— Bass *v.* Chicago, etc., R. Co., 42 Wis. 654, 24 Am. Rep. 437; Craker *v.* Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504; Milwaukee, etc., R. Co. *v.* Finney, 10 Wis. 388.

approved the act for which the exemplary damages are claimed,[8] that he approved of or participated in the wrong of which his agent had been guilty,[9] or that he had not exercised proper care in selecting his servants.[10]

United States.— The Normannia, 62 Fed. 469.

A master is not liable in exemplary damages for the act of his servant, where the plaintiff would not have been entitled to recover such damages had the suit been against the servant. Townsend *v.* New York Cent., etc., R. Co., 56 N. Y. 295, 15 Am. Rep. 419.

Good faith of principal.— A landlord will not be liable for more than actual damages for a seizure by his agents with knowledge that the furniture was in the possession of a third person as mortgagee, unless he ratified their acts with full knowledge; and not even then if he retained the goods in good faith, proposing to test the validity of the mortgage. Mackin *v.* Blythe, 35 Ill. App. 216.

In an action for nuisance plaintiff cannot have exemplary damages if defendant exercised due care and prudence himself, and the damage occurred by reason of the neglect of his workmen to follow his directions. Morford *v.* Woodworth, 7 Ind. 83.

8. Cleghorn *v.* New York Cent., etc., R. Co., 56 N. Y. 44, 15 Am. Rep. 375; Hagan *v.* Providence, etc., R. Co., 3 R. I. 88, 62 Am. Dec. 377; Willis *v.* McNeill, 57 Tex. 465; Texas, etc., R. Co. *v.* Woodall, 2 Tex. App. Civ. Cas. § 471; Denver, etc., R. Co. *v.* Harris, 122 U. S. 597, 7 S. Ct. 1286, 30 L. ed. 1146. In Burns *v.* Campbell, 71 Ala. 271, 292, the court said: "Principals are not generally held liable for such damages by reason of the evil motive of an agent, unless the act of the agent was fully ratified with a knowledge of its malicious, aggravating, or grossly negligent character; or these matters of aggravation were probably consequent on the doing of the wrongful act ordered by the principal; or unless the agent was employed with a knowledge of his incompetency." In Fisher *v.* Metropolitan El. R. Co., 34 Hun (N. Y.) 433, it was held that a master will not be liable in punitive damages for the misconduct of his servant, unless he is shown to have himself been guilty of gross neglect or misconduct.

No knowledge on part of principal.— In an action for damages for fraud in the sale of a horse, it appeared that defendant's agent sold the horse to plaintiffs, representing that it belonged to defendant, whereas the latter had given a note for it, and agreed that the title should remain in the vendor until the note was paid. Plaintiffs took an assignment of the note from the vendor, and recovered judgment thereon against defendant. There was no evidence that defendant authorized the agent to misrepresent the title, or that he knew that the agent had done so at the time he ratified the sale. It was held that plaintiffs were not entitled to exemplary damages. Colvin *v.* Peck, 62 Conn. 155, 25 Atl. 355.

9. Lienkauf *v.* Morris, 66 Ala. 406; Becker *v.* Dupree, 75 Ill. 167; Eviston *v.* Cramer, 57 Wis. 570, 15 N. W. 760; Kilpatrick *v.* Haley, 66 Fed. 133, 13 C. C. A. 480. In Craker *v.* Chicago, etc., R. Co., 36 Wis. 658, 675, 17 Am. Rep. 504 [*quoted* in Eviston *v.* Cramer, 57 Wis. 570, 15 N. W. 760], the learned chief justice, in considering this question, says: "It is said in Milwaukee, etc., R. Co. *v.* Finney, 10 Wis. 388, that the plaintiff in such a case is not entitled to exemplary damages against the principal, for the malicious act of the agent, without proof that the principal expressly authorized or confirmed it. Without now discussing what would or would not be competent or sufficient evidence of such authority or confirmation, we may say that we have, on very mature consideration, concluded that the rule in Milwaukee, etc., R. Co. *v.* Finney, [*supra*], is the better and safer rule. We are aware that there is authority, and perhaps the greater weight of authority, for exemplary damages in such cases, without privity of the principal to the malice of the agent; and that reasons of public policy are strongly urged in support of such a rule. Jeffersonville R. Co. *v.* Rogers, 38 Ind. 116, 10 Am. Rep. 103; Goddard *v.* Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39; Sanford *v.* Eighth Ave. R. Co., 23 N. Y. 343, 80 Am. Dec. 286; and other cases. But we adhere to what is said on that point in Milwaukee, etc., R. Co. *v.* Finney, [*supra*]. We think that in justice there ought to be a difference in the rule of damages against principals for torts actually committed by agents, in cases where the principal is, and in cases where the principal is not, a party to the malice of the agent. In the former class of cases, the damages go upon the malice of the principal: malice common to principal and agent. In the latter class of cases, the recovery is for the act of the principal through the agent, in malice of the agent not shared by the principal; the principal being responsible for the act, but not for the motive of the agent." In Staples *v.* Schmid, 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824, defendants' salesman, erroneously suspecting plaintiff of having stolen certain goods from the store which was in his charge, detained her and had her sent to the police station and there searched. It was held that a verdict awarding plaintiff seven hundred and fifty dollars damages was grossly excessive; punitive damages not being allowable except where the master participates in or approves the wrongs of his servant.

10. *Alabama.*— Burns *v.* Campbell, 71 Ala. 271. And see Lienkauf *v.* Morris, 66 Ala. 406 [*quoting* Field Dam. § 87].

Kansas.— Sawyer *v.* Sauer, 10 Kan. 466.

Kentucky.— Hawkins *v.* Riley, 17 B. Mon. 101.

New York.— Cleghorn *v.* New York Cent., etc., R. Co., 56 N. Y. 44, 15 Am. Rep. 375.

Texas.— Texas, etc., R. Co. *v.* Woodall, 2 Tex. App. Civ. Cas. § 471.

2. As Between Attorney and Client. The liability for exemplary damages as between attorney and client is much the same as in other cases of agency. The question depends upon the good faith of the attorney in his actions,[11] and whether such actions are or are not subsequently ratified or sanctioned by the client.[12]

H. Liability Between Joint Defendants. Where the liability is joint as to the actual damages sustained, exemplary damages can as a general rule only be awarded against those who have participated in or contributed to the malicious act or the gross negligence involved;[13] but where all have acted in concert and are equally guilty they are all liable to the same extent.[14]

I. Liability of Public Officials. Where a public official has acted in good faith and there is no evidence in his acts of fraud or maliciousness, exemplary damages should not be awarded.[15] If, however, an officer in the exercise of his official duties oversteps and abuses his powers and is guilty of oppression under color of his office exemplary damages will be allowed.[16]

J. Liability of Sureties on Bonds. Exemplary damages are not generally recoverable against sureties upon bonds,[17] even though the breach on the part of the principal was malicious or tortious.[18]

United States.— Henning *v.* Western Union Tel. Co., 41 Fed. 864.

11. In Jones *v.* Lamon, 92 Ga. 529, 18 S. E. 423, it was held that where property seized on attachment belonged, not to defendant in attachment, but to his daughter, and the attorney authorizing the levy knew or had reasonable grounds for believing that it belonged to her, his client would be liable for the actual damages sustained by the daughter, and might be subject to exemplary damages, if the tort was attended with circumstances of aggravation. On the other hand, if attaching plaintiff's attorney, ordering a levy on the property of defendant's daughter, was ignorant of the daughter's title, and believed in good faith that the title was in defendant in attachment, and caused the levy to be dismissed without any unreasonable delay on being informed of her title, his client would be liable for actual damages only. In Marks *v.* Culmer, 6 Utah 419, 24 Pac. 528, it was held that the claimant of premises, who institutes the proceeding, and the attorney, who directs the constable to execute a writ of restitution, which is void, are liable for actual damages necessarily incurred in the proper execution of the writ, and not for exemplary damages arising from the acts of the constable unauthorized by the mandate of the writ.

12. Strauss *v.* Dundon, (Tex. Civ. App. 1894) 27 S. W. 503; Anderson *v.* Larremore, 1 Tex. App. Civ. Cas. § 947.

13. Burns *v.* Campbell, 71 Ala. 271; Hair *v.* Little, 28 Ala. 236; Nightingale *v.* Seannell, 18 Cal. 315; Becker *v.* Dupree, 75 Ill. 167; Weiler *v.* Railroad Co., 29 Pittsb. Leg. J. (Pa.) 347. Exemplary damages are not recoverable against several defendants unless all are shown to have been moved by a wanton desire to injure. Boutwell *v.* Marr, 71 Vt. 1, 42 Atl. 607, 76 Am. St. Rep. 746, 43 L. R. A. 803.

Dismissal as to some defendants.— Where in trespass a proper case is made for exemplary damages as to some of the defendants, but not as to others, only actual damages for the real injury sustained may be assessed against all of the defendants, in the absence of a dismissal as to defendants against whom no case is made for exemplary damages. Pardridge *v.* Brady, 7 Ill. App. 639.

14. Hair *v.* Little, 28 Ala. 236.

Liability between partners.— One who in behalf of the firm of which he is a member unlawfully seizes and detains another's goods is properly answerable in punitive damages, and so is the firm. Robinson *v.* Goings, 63 Miss. 500.

Liability of husband for acts of wife.— Exemplary damages are recoverable in an action against a husband and wife for the malicious trespass of the wife, even though the husband be free from blame. Lombard *v.* Batchelder, 58 Vt. 558, 5 Atl. 511.

15. *California.*— Nightingale *v.* Seannell, 18 Cal. 315.

Iowa.— Plummer *v.* Harbut, 5 Iowa 308.

Maine.— Pierce *v.* Getchell, 76 Me. 216.

Missouri.— Bruce *v.* Ulery, 79 Mo. 322.

Texas.— Neese *v.* Radford, 83 Tex. 585, 19 S. W. 141.

United States.— Tracy *v.* Swartwout, 10 Pet. 80, 9 L. ed. 354.

See 15 Cent. Dig. tit. "Damages," § 214.

16. Nightingale *v.* Seannell, 18 Cal. 315; Prettyman *v.* Dean, 2 Harr. (Del.) 494; Rodgers *v.* Ferguson, 36 Tex. 544; Strickler *v.* Yager, 29 Fed. 244; Willis *v.* Miller, 29 Fed. 238.

17. *Alabama.*— Lienkauf *v.* Morris, 66 Ala. 406.

Indiana.— Peelle *v.* State, 118 Ind. 512, 21 N. E. 288.

Kentucky.— Johnson *v.* Williams, 63 S. W. 759, 23 Ky. L. Rep. 658, 54 L. R. A. 220.

Minnesota.— North *v.* Johnson, 58 Minn. 242, 59 N. W. 1012.

Texas.— McArthur *v.* Barnes, 10 Tex. Civ. App. 318, 31 S. W. 212; Hamilton *v.* Kilpatrick, (Civ. App. 1895) 29 S. W. 819.

18. North *v.* Johnson, 58 Minn. 242, 59 N. W. 1012; McArthur *v.* Barnes, 10 Tex. Civ. App. 318, 31 S. W. 212.

K. Liability of Corporations. While there has been some question as to whether corporations can be held liable in exemplary damages for the acts of their servants, the better rule seems to be that where a wrong is committed in the ordinary course of the servant's duty, and is committed wilfully and wrongfully, the corporation can be held liable as in ordinary cases of tort.[19] Since a corporation can only act through its agents or servants a stricter rule has sometimes been applied than in cases of individual liability,[20] and they have been held liable in exemplary damages, although there was no previous authorization of the wrong or subsequent ratification of it.[21] The better rule on the subject seems to be that they are liable only as in case of an individual, and it must be shown that the corporation has either authorized or ratified the act or been negligent in the employment of its agents or servants.[22]

L. By Statute. Exemplary damages are sometimes awarded by statute,[23]

19. *Arkansas.*— Citizens' St. R. Co. *v.* Steen, 42 Ark. 321.

Illinois.— Singer Mfg. Co. *v.* Holdfodt, 86 Ill. 455, 29 Am. Rep. 43 [*following* St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353].

Indiana.— Jeffersonville R. Co. *v.* Rogers, 38 Ind. 116, 10 Am. Rep. 103.

Kansas.— Wheeler, etc., Mfg. Co. *v.* Boyce, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571; Western News Co. *v.* Wilmarth, 33 Kan. 510, 6 Pac. 786; Kansas Pac. R. Co. *v.* Little, 19 Kan. 267.

Kentucky.— Louisville, etc., R. Co. *v.* Ballard, 85 Ky. 307, 3 S. W. 530, 9 Ky. L. Rep. 7, 7 Am. St. Rep. 600 [*citing* Dawson *v.* Louisville, etc., R. Co., 6 Ky. L. Rep. 668]; Chesapeake, etc., R. Co. *v.* Dodge, 66 S. W. 606, 23 Ky. L. Rep. 1959.

Maine.— Hanson *v.* European, etc., R. Co., 62 Me. 84, 16 Am. Rep. 404; Goddard *v.* Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39.

Maryland.— Baltimore, etc., Turnpike Road *v.* Boone, 45 Md. 344.

Mississippi.— New Orleans, etc., R. Co. *v.* Statham, 42 Miss. 607, 97 Am. Dec. 478; New Orleans, etc., R. Co. *v.* Hurst, 36 Miss. 660, 74 Am. Dec. 785.

Missouri.— Travers *v.* Kansas Pac. R. Co., 63 Mo. 421.

New Hampshire.— Bixby *v.* Dunlap, 56 N. H. 456, 22 Am. Rep. 475 [*approving* Goddard *v.* Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39].

Ohio.— Atlantic, etc., R. Co. *v.* Dunn, 19 Ohio St. 162, 2 Am. Rep. 382.

Tennessee.— Louisville, etc., R. Co. *v.* Garrett, 8 Lea 438, 41 Am. Rep. 640.

Where a general passenger agent of a railroad company deliberately repudiated a large number of mileage tickets which had been issued and sold to the public by his authority, and in consequence of his orders plaintiff who had purchased one of such tickets in good faith was ejected from defendant's train, such action by one of its controlling officers was held to be such a wanton and reckless disregard of the corporation's duties, and of the rights of its ticket-holders, as to be equivalent to an intentional violation of such rights, and to warrant the imposition of exemplary damages. Cowen *v.* Winters, 96 Fed. 929, 37 C. C. A. 628 [*affirming* 90 Fed. 99].

20. In Hart *v.* Charlotte, etc., R. Co., 33 S. C. 427, 12 S. E. 9, 10 L. R. A. 794, it was held that a railroad company was liable in exemplary damages for an injury caused by the recklessness of its lessee.

21. Singer Mfg. Co. *v.* Holdfodt, 86 Ill. 455 [*following* St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353]; Jeffersonville R. Co. *v.* Rogers, 38 Ind. 116, 10 Am. Rep. 103; Wheeler, etc., Mfg. Co. *v.* Boyce, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571.

22. *California.*— Mendelsohn *v.* Anaheim Lighter Co., 40 Cal. 657; Turner *v.* North Beach, etc., R. Co., 34 Cal. 594.

New Jersey.— Ackerson *v.* Erie R. Co., 32 N. J. L. 254.

New York.— Murphy *v.* Central Park, etc., R. Co., 48 N. Y. Super. Ct. 96.

Oregon.— Sullivan *v.* Oregon R., etc., Co., 12 Oreg. 392, 7 Pac. 508, 53 Am. Rep. 364.

Texas.— International, etc., R. Co. *v.* Garcia, 70 Tex. 207, 7 S. W. 802; Galveston, etc., R. Co. *v.* Donahoe, 56 Tex. 162; Hays *v.* Houston, etc., R. Co., 46 Tex. 272.

Wisconsin.— Eviston *v.* Cramer, 57 Wis. 570, 15 N. W. 760; Craker *v.* Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504; Bass *v.* Chicago, etc., R. Co., 36 Wis. 450, 39 Wis. 636.

A corporation is not liable for exemplary damages for the torts of its employee, committed while performing his duty, where it was diligent in selecting a suitable employee, and neither authorized nor ratified his act. Rouse *v.* Metropolitan St. R. Co., 41 Mo. App. 298.

23. *Alabama.*— Southern R. Co. *v.* Bunt, 131 Ala. 591, 32 So. 507.

Colorado.— Howlett *v.* Tuttle, 15 Colo. 454, 24 Pac. 921.

Dakota.— Holt *v.* Van Eps, 1 Dak. 206, 46 N. W. 689.

Kentucky.— Maysville, etc., R. Co. *v.* Herrick, 13 Bush 122; Stovall *v.* Smith, 4 B. Mon. 378.

Tennessee.— Fowlkes *v.* Nashville, etc., R. Co., 9 Heisk. 829.

United States.— Fell *v.* Northern Pac. R. Co., 44 Fed. 248.

See 15 Cent. Dig. tit. "Damages," § 190.

but in order to warrant a recovery under such statutes it is necessary to show that the conduct of the wrong-doer was reckless or that he omitted intentionally some duty which he owed to the public or to the person injured.[24]

M. Acts Punishable as Crimes. The courts have been very divided in their opinions as to whether exemplary damages may be recovered for an act that may be punishable as a crime. The better opinion seems to be that they may be recovered,[25] although there seems to be judicial opinion to the contrary.[26] In some cases the question has arisen, where exemplary damages were allowed and the act complained of was a criminal offense, whether such recovery was constitutional, as subjecting the defendant to a double punishment. In most cases it has been so held on the ground that damages recovered in a private suit are wholly uninfluenced by anything that may have transpired in the proceeding carried on by the state.[27]

N. Question For Jury. In all cases in determining whether exemplary damages shall be awarded the question as to gross negligence or the wilfulness or wantonness of the act should be left to the jury.[28] Whether the evidence in a

24. Claxton *v.* Lexington, etc., R. Co., 13 Bush (Ky.) 636.

25. *California.*— Wilson *v.* Middleton, 2 Cal. 54.

Colorado.— Howlett *v.* Tuttle, 15 Colo. 454, 24 Pac. 921.

Florida.— Smith *v.* Bagwell, 19 Fla. 117, 45 Am. Rep. 12.

Illinois.— Brannon *v.* Silvernail, 81 Ill. 434.

Iowa.— Hauser *v.* Griffith, 102 Iowa 215, 71 N. W. 223; Ward *v.* Ward, 41 Iowa 686; Garland *v.* Wholeham, 26 Iowa 185; Hendrickson *v.* Kingsbury, 21 Iowa 379.

Kansas.— Jockers *v.* Borgman, 29 Kan. 109, 44 Am. Rep. 625.

Kentucky.— Chiles *v.* Drake, 2 Metc. 146, 74 Am. Dec. 406.

Minnesota.— Boetcher *v.* Staples, 27 Minn. 308, 7 N. W. 263, 38 Am. Rep. 295.

Missouri.— Baldwin *v.* Fries, 46 Mo. App. 288.

Pennsylvania.— Barr *v.* Moore, 87 Pa. St. 385, 30 Am. Rep. 367.

Texas.— Cole *v.* Tucker, 6 Tex. 266.

Vermont.— Edwards *v.* Leavitt, 46 Vt. 126.

Wisconsin.— Brown *v.* Swineford, 44 Wis. 282, 28 Am. Rep. 582.

United States.— Brown *v.* Evans, 17 Fed. 912, 8 Sawy. 488.

See 15 Cent. Dig. tit. "Damages," § 202.

Fine.—The imposition of a fine for a wrongful act will not bar or mitigate liability to exemplary damages in a civil action for the same act. Hoadley *v.* Watson, 45 Vt. 289, 12 Am. Rep. 197.

26. *Colorado.*— Murphy *v.* Hobbs, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366.

District of Columbia.— Huber *v.* Teuber, 3 MacArthur 484, 36 Am. Rep. 110.

Illinois.— Albrecht *v.* Walker, 73 Ill. 69.

Indiana.— Wabash Printing, etc., Co. *v.* Crumrine, 123 Ind. 189, 21 N. E. 904; Farman *v.* Lauman, 73 Ind. 568; Stewart *v.* Maddox, 63 Ind. 51; Humphries *v.* Johnson, 20 Ind. 190; Nossaman *v.* Rickert, 18 Ind. 350; Butler *v.* Mercer, 14 Ind. 479; Struble *v.* Nodwift, 11 Ind. 64; Taber *v.* Hutson, 5 Ind. 322, 61 Am. Dec. 96; Tracy *v.* Hacket, 19 Ind. App. 133, 49 N. E. 185, 65 Am. St. Rep. 398.

Massachusetts.— Austin *v.* Wilson, 4 Cush. 273, 50 Am. Dec. 766.

Nebraska.— Boyer *v.* Barr, 8 Nebr. 68, 30 Am. Rep. 814.

New Hampshire.— Fay *v.* Parker, 53 N. H. 342, 16 Am. Rep. 270.

See 15 Cent. Dig. tit. "Damages," § 202.

27. Wilson *v.* Middleton, 2 Cal. 54; Chiles *v.* Drake, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; Baldwin *v.* Fries, 46 Mo. App. 288; Cole *v.* Tucker, 6 Tex. 266. *Contra*, Koerner *v.* Oberly, 56 Ind. 284, 26 Am. Rep. 34. In Hendrickson *v.* Kingsbury, 21 Iowa 379, it was held that the damages allowed in a civil case by way of punishment have no necessary relation to the penalty incurred for the wrong done to the public, but are called punitive damages by way of distinction from pecuniary damages, and to characterize them as a punishment for the wrong done to the individual. Therefore such damages can in no just sense be said to be in conflict with the constitutional or common-law inhibition against inflicting two punishments for the same offense, although the defendant is liable to a criminal prosecution for the act on account of which the damags are given.

28. *Alabama.*— Devaughn *v.* Heath, 37 Ala. 595.

Connecticut.— Pratt *v.* Pond, 42 Conn. 318.

Georgia.— Dye *v.* Denham, 54 Ga. 224.

Illinois.— Wolfe *v.* Johnson, 45 Ill. App. 122.

Iowa.— Reizenstein *v.* Clark, 104 Iowa 287, 73 N. W. 588.

Kentucky.— Claxton *v.* Lexington, etc., R. Co., 13 Bush 636.

Maine.— Johnson *v.* Smith, 64 Me. 553.

Maryland.— Smith *v.* Thompson, 55 Md. 5, 39 Am. Rep. 409.

Mississippi.— Chicago, etc., R. Co. *v.* Scurr, 59 Miss. 456, 42 Am. Rep. 373.

Missouri.— Graham *v.* Pacific R. Co., 66 Mo. 536; Canfield *v.* Chicago, etc., R. Co., 59 Mo. App. 354.

case tends to warrant exemplary damages is a question for the court to determine in its instructions, but the sufficiency of the evidence to establish such facts is a question for the jury.[29]

O. Amount of Damages. In assessing the amount of exemplary damages to be awarded, the jury should take into consideration the malice or wantonness of the act complained of, and all the particular circumstances which go to aggravate the case;[30] but the damages awarded should bear some reasonable proportion to the real damage sustained.[31] The amount is usually left to the discretion of the jury[32] under instructions by the court.[33] In case the damages as

North Carolina.— Wylie *v.* Smitherman, 30 N. C. 236.

Pennsylvania.— Nagle *v.* Mullison, 34 Pa. St. 48.

South Carolina.— Samuels *v.* Richmond, etc., R. Co., 35 S. C. 493, 14 S. E. 943, 28 Am. St. Rep. 883.

Wisconsin.— Robinson *v.* Superior Rapid Transit R. Co., 94 Wis. 345, 68 N. W. 961, 59 Am. St. Rep. 897, 34 L. R. A. 205.

See 15 Cent. Dig. tit. "Damages," § 205.

Erroneous charge.— A charge informing the jury that it is their duty to award exemplary damages is erroneous, since the imposition of such damages is always discretionary with the jury. New Orleans, etc., R. Co. *v.* Burke, 53 Miss. 200, 24 Am. Rep. 689.

In an action against a corporation for a personal injury whether or not plaintiff is entitled to exemplary damages is for the jury, depending on the circumstances of the particular case; and their verdict will not be disturbed unless unwarranted by the evidence. Southern R. Co. *v.* Kendrick, 40 Miss. 374, 90 Am. Dec. 332.

Social standing of parties.— The value and influence of an example set by awarding exemplary damages for a wilful injury depend upon the social standing of the parties, and the jury may consider that circumstance in determining the amount. Goldsmith *v.* Joy, 61 Vt. 488, 17 Atl. 1010, 15 Am. St. Rep. 923, 4 L. R. A. 500. See also Ward *v.* Ward, 41 Iowa 686.

29. Chicago, etc., R. Co. *v.* Scurr, 59 Miss. 456, 42 Am. Rep. 733. An instruction which allows the jury to find punitive damages which are not authorized by the facts in a case is erroneous. Louisville, etc., R. Co. *v.* Sanders, 44 S. W. 644, 19 Ky. L. Rep. 1941.

30. Boardman *v.* Goldsmith, 48 Vt. 403. In estimating exemplary damages the jury may consider the injury intended to be done as well as that actually done. Hildreth *v.* Hancock, 55 Ill. App. 572.

In an action of trespass, where the evidence disclosed that the defendants, in the nighttime, had thrown stones and eggs through the plaintiff's windows, and that her family consisted of herself, her four daughters, and young son, it was proper to instruct the jury to award such exemplary damages as they deemed proportionated to the alleged insult, etc., on a consideration of all the circumstances. Ellsworth *v.* Potter, 41 Vt. 685. In an action of trespass to real estate, if the circumstances of aggravation render it impossible to apply any fixed rule of law, the jury may give exemplary damages, to be graduated with reference to the motives which actuated defendant, and the manner in which the act complained of was committed. Smith *v.* Wunderlich, 70 Ill. 426.

Malicious prosecution.—In fixing exemplary damages for malicious prosecution, the jury should exercise a fair and reasonable discretion, keeping in view the nature of the wrong committed, and the enormity, or otherwise, of such aggravating circumstances as may be shown, rather than the measure of compensation to the plaintiff. Frankfurter *v.* Bryan, 12 Ill. App. 549.

The public good in the restraint of others from wrong-doing, as well as the punishment of the offender, is to be considered in estimating exemplary damages. Ward *v.* Ward, 41 Iowa 686.

31. Burkett *v.* Lanata, 15 La. Ann. 337; Grant *v.* McDonogh, 7 La. Ann. 447.

Sum sued for.— In Alabama, etc., R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28, it was held that in the assessment of punitive damages, juries might give such punishment as in their judgment the evidence authorizes, not exceeding the sum sued for.

32. *Alabama.*— Alabama, etc., R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28.

Connecticut.— Pratt *v.* Pond, 42 Conn. 318.

Illinois.— Doremus *v.* Hennessy, 62 Ill. App. 391; Frankfurter *v.* Bryan, 12 Ill. App. 549.

Indiana.— Colburn *v.* State, 47 Ind. 310.

Louisiana.— Grant *v.* McDonogh, 7 La. Ann. 447.

Mississippi.—Chicago, etc., R. Co. *v.* Scurr, 59 Miss. 456, 42 Am. Rep. 373.

Missouri.— Canfield *v.* Chicago, etc., R. Co., 59 Mo. App. 354.

United States.—Russell *v.* Bradley, 50 Fed. 515.

See 15 Cent. Dig. tit. "Damages," § 218 *et seq.*; and, generally, *infra*, XIV, B, 3, b, (II), (A).

33. Thill *v.* Pohlman, 76 Iowa 638, 41 N. W. 385; Fox *v.* Wunderlieh, 64 Iowa 187, 20 N. W. 7; Hooker *v.* Newton, 24 Wis. 292. In Jones *v.* Turpin, 6 Heisk. (Tenn.) 181, an instruction that the jury might give such damages as would satisfy the "highly excited feelings" of the plaintiff was erroneous.

Where, in an action for trespass to personal property, there is some evidence that defendants' conduct was reckless, oppressive, or

awarded are grossly excessive or indicate prejudice they may be set aside by the court.[34]

P. No Survival. As exemplary damages are given as a punishment to the wrong-doer and not as compensation, there can be no survival after the death of the guilty party.[35]

Q. Matters in Mitigation. Punitive or exemplary damages being only allowed because of the malicious motive which is supposed, from the circumstances attending the wrong, to have animated the wrong-doer and prompted his act,[36] they are the last to be assessed in the elements of injury to be considered by a jury, and should be the first to be rejected by facts in mitigation.[37] If the plaintiff may enhance the damages by showing circumstances of aggravation, a defendant may also give such evidence as he has tending to explain the circumstances which are relied upon to aggravate the damages.[38] So he may show that he acted in good faith and with no malicious intent,[39] that he acted under the advice of counsel,[40] or that he did acts of reparation or restoration which lay in

wanton, and the jury are instructed to assess plaintiff's damages at no more than compensation for the injury, unless they believe that the defendants committed the trespass wilfully or recklessly, or in wanton disregard of the plaintiff's rights, a verdict for one thousand three hundred and fifty dollars damages, where the actual damage proved is only nine hundred and fifty dollars, should not be set aside as excessive, since it must be presumed that the jury found that the defendants' conduct was reckless, oppressive, or wanton. Pearson *v.* Zehr, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113.

34. *District of Columbia.*— Flannery *v.* Baltimore, etc., R. Co., 4 Mackey 111.

Georgia.— Bryan *v.* Acee, 27 Ga. 87.

Illinois.— Cutler *v.* Smith, 57 Ill. 252.

Iowa.— Saunders *v.* Mullen, 66 Iowa 728, 24 N. W. 529; Collins *v.* Council Bluffs, 35 Iowa 432.

Kentucky.— Louisville Southern R. Co. *v.* Minogue, 90 Ky. 369, 14 S. W. 357, 12 Ky. L. Rep. 378, 29 Am. St. Rep. 378.

Louisiana.—Burkett *v.* Lanata, 15 La. Ann. 337.

Michigan.— Brushaber *v.* Stegemann, 22 Mich. 266.

Minnesota.—McCarthy *v.* Niskern, 22 Minn. 90.

Texas.—International, etc., R. Co. *v.* Telephone, etc., Co., 69 Tex. 277, 5 S. W. 517, 5 Am. St. Rep. 45; Willis *v.* McNeill, 57 Tex. 465.

Virginia.— Borland *v.* Barrett, 76 Va. 128, 44 Am. Rep. 152.

Wisconsin.— Rogers *v.* Henry, 32 Wis. 327.

See 15 Cent. Dig. tit. "Damages," § 221.

35. *Iowa.*— Sheik *v.* Hobson, 64 Iowa 146, 19 N. W. 875.

Louisiana.—Edwards *v.* Ricks, 30 La. Ann. 926.

Mississippi.— Hewlett *v.* George, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682.

North Carolina.— Rippey *v.* Miller, 33 N. C. 247.

Texas.— Wright *v.* Donnell, 34 Tex. 291.

See 15 Cent. Dig. tit. "Damages," § 217; and 1 Cyc. 50 *et seq.*

Although under Iowa Code, § 2525, a cause of action for a tort survives the death of the wrong-doer, yet, since the civil law never inflicts vicarious punishment, nothing more than compensatory damages can be awarded against the personal representative of the wrong-doer. Sheik *v.* Hobson, 64 Iowa 146, 19 N. W. 875.

The liability of a widow and the heirs of deceased on account of a trespass committed by him does not extend to any vindictive damages unless the suit was instituted before the death of the deceased. Edwards *v.* Ricks, 30 La. Ann. 926.

36. Oursler *v.* Baltimore, etc., R. Co., 60 Md. 358.

37. Stacy *v.* Portland Pub. Co., 68 Me. 279. And see *supra*, VII, J.

38. Millard *v.* Brown, 35 N. Y. 297.

39. In Livingston *v.* Burroughs, 33 Mich. 511, 514, the court said: "For the purpose of determining whether, under all the circumstances, the party acted in good faith or not, the jury will have the right, and it will be their duty, to consider the sources from which the party sought and derived his information. He would not be justified in knowingly seeking and acting upon information, either of law or fact, given him by unreliable or disreputable parties." See also *supra*, IX, B.

40. *Alabama.*— City Nat. Bank *v.* Jeffries, 73 Ala. 183.

Illinois.— Murphy *v.* Larson, 77 Ill. 172; Cochrane *v.* Tuttle, 75 Ill. 361.

Montana.— Bohm *v.* Dunphy, 1 Mont. 333.

Wisconsin.—Bonesteel *v.* Bonesteel, 30 Wis. 511.

United States.— Devenny *v.* The Mascotte, 72 Fed. 684.

See 15 Cent. Dig. tit. "Damages," § 216.

Contrary to advice of counsel.— Evidence that the defendant acted under the advice of counsel is not admissible in mitigation of exemplary damages, when instead of following the advice as given he acted contrary to it. Carpenter *v.* Barber, 44 Vt. 441.

It must appear that the advice was given upon a full and fair statement of the facts,

his power.[41] Where the cause of offense or the objectionable cause of action is discontinued or withdrawn with such reasonable promptness as the circumstances of the case allow, such fact should go either in mitigation of exemplary damages, or as an absolute bar to their recovery.[42]

X. EXCESSIVE DAMAGES.

A. In General. Since damages as a general rule are regarded as a compensation for the injury or wrong inflicted, when not connected with matters of aggravation or malice, they are considered a matter within the discretion of the jury, under instructions by the court,[43] and an appellate court will seldom interfere with the verdict as rendered. The general rule on this point as expressed

or of such of them as were material to the question on which counsel was consulted. Shores *v.* Brooks, 81 Ga. 468, 8 S. E. 429, 12 Am. St. Rep. 332.

41. In an action against an officer for irregularities in making a distress warrant, where tender of the rent was made at the trial, and the person entitled to receive it signified a willingness to do so, punitive damages cannot be recovered. Tripp *v.* Grouner, 60 Ill. 474. Where it appears in an action by tenants against their landlord for wrongful eviction that the amount of the verdict could only have been reached by an allowance of punitive damages, and that defendant voluntarily assumed to make repairs rendered necessary by the acts of an adjoining owner in breaking the partition wall, and immediately put in a temporary wooden wall, with as little inconvenience to plaintiffs as possible, such verdict cannot be permitted to stand, although defendant be liable for actual damages for loss of and injury to stock, and expense of moving; since, under Colo. Acts (1889), p. 64, § 1, exemplary damages are allowed only when "the injury complained of shall have been attended by circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings." Eisenhart *v.* Ordean, 3 Colo. App. 162, 32 Pac. 495.

42. Oursler *v.* Baltimore, etc., R. Co., 60 Md 358.

43. *Alabama.*— Birmingham R., etc., Co. *v.* Baird, 130 Ala. 334, 30 So. 456, 89 Am. St. Rep. 43, 54 L. R. A. 752.

California.— Tedford *v.* Los Angeles Electric Co., 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85; Trabing *v.* California Nav., etc., Co., (1901) 65 Pac. 478.

Colorado.— Sanderson *v.* Frazier, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544; Colorado City *v.* Smith, (App. 1902) 67 Pac. 909.

Georgia.— Augusta *v.* Tharpe, 113 Ga. 152, 38 S. E. 389; Americus *v.* Chapman, 94 Ga. 711, 20 S. E. 3; Coast Line R. Co. *v.* Boston, 83 Ga. 387, 9 S. E. 1108; Atlanta, etc., R. Co. *v.* Smith, 81 Ga. 620, 8 S. E. 446; Western, etc., R. Co. *v.* Drysdale, 51 Ga. 644.

Illinois.— Chicago *v.* Hoy, 75 Ill. 530; Sorgenfrei *v.* Schroeder, 75 Ill. 397; Illinois Cent. R. Co. *v.* Ebert, 74 Ill. 399; Chicago *v.* Jones, 66 Ill. 349; Quincy Gas, etc., Co. *v.* Bauman, 104 Ill. App. 600; Chicago City R. Co. *v.* Biederman, 102 Ill. App. 617.

Indiana.— Clanin *v.* Fagan, 124 Ind. 304, 24 N. E. 1044; Indianapolis, etc., R. Co. *v.* McLin, 82 Ind. 435; Westerville *v.* Freeman, 66 Ind. 255; Cincinnati, etc., R. Co. *v.* Claire, 6 Ind. App. 390, 33 N. E. 918.

Iowa.— Beringer *v.* Dubuque St. R. Co., 118 Iowa 135, 91 N. W. 931; Cameron *v.* Bryan, 89 Iowa 214, 56 N. W. 434; Smith *v.* Des Moines, 84 Iowa 685, 51 N. W. 77; Riley *v.* Iowa Falls, 83 Iowa 761, 50 N. W. 33; Redfield *v.* Redfield, 75 Iowa 435, 39 N. W. 688.

Kansas.— James *v.* Hayes, 63 Kan. 133, 65 Pac. 241; Atchison, etc., R. Co. *v.* Stewart, 55 Kan. 667, 41 Pac. 961.

Kentucky.— Kentucky Hotel Co. *v.* Camp, 97 Ky. 424, 30 S. W. 1010; Monticello, etc., Turnpike Road Co. *v.* Jones, 69 S. W. 1073, 24 Ky. L. Rep. 821; Glasgow *v.* Gillenwaters, 67 S. W. 381, 23 Ky. L. Rep. 2375; Chesapeake, etc., R. Co. *v.* Davis, 58 S. W. 698, 22 Ky. L. Rep. 748, 60 S. W. 14, 22 Ky. L. Rep. 1156.

Louisiana.— Joseph *v.* Edison Electric Co., 104 La. 634, 29 So. 223; Carmanty *v.* Mexican Gulf R. Co., 5 La. Ann. 703.

Maine.— Fitzgerald *v.* Dobson, 78 Me. 559, 7 Atl. 704; Campbell *v.* Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503.

Massachusetts.— Worster *v.* Canal Bridge, etc., Co., 16 Pick. 541.

Minnesota.— St. Paul *v.* Kuby, 8 Minn. 154.

Missouri.— Bertram *v.* People's R. Co., 154 Mo. 639, 55 S. W. 1040, 52 S. W. 1119; Burdoin *v.* Trenton, 116 Mo. 358, 22 S. W. 728; Furnish *v.* Missouri Pac. R. Co., 102 Mo. 669, 15 S. W. 315, 22 Am. St. Rep. 800; Brown *v.* Hannibal, etc., R. Co., 99 Mo. 310, 12 S. W. 655.

New Jersey.— Terhune *v.* Koellisch, (Sup. 1899) 43 Atl. 655.

New York.— Wynne *v.* Atlantic Ave. R. Co., 156 N. Y. 702, 51 N. E. 1094 [*affirming* 14 Misc. 394, 35 N. Y. Suppl. 1034]; Wolf *v.* Third Ave. R. Co., 67 N. Y. App. Div. 605, 74 N. Y. Suppl. 336; Iver *v.* Brooklyn R. Co., 63 N. Y. App. Div. 311, 71 N. Y. Suppl. 633; Radjaviller *v.* Third Ave. R. Co., 58 N. Y. App. Div. 11, 68 N. Y. Suppl. 617.

Ohio.— Brooklyn St. R. Co. *v.* Kelly, 6 Ohio Cir. Ct. 155.

Oklahoma.— Long *v.* McWilliams, 11 Okla. 562, 69 Pac. 882.

Tennessee.—Chattanooga Rapid-Transit Co. *v.* Walton, 105 Tenn. 415, 58 S. W. 737;

by Judge Story is "that a verdict will not be set aside in a case of tort for excessive damages, unless the court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law, by which the damages are to be regulated." [44] In such cases the court should merely consider whether the

Nashville St. R. Co. *v.* O'Bryan, 104 Tenn. 28, 55 S. W. 300.

Texas.— Gulf, etc., R. Co. *v.* Smith, 74 Tex. 276, 11 S. W. 1104; Brown *v.* Sullivan, 71 Tex. 470, 10 S. W. 288; Evans *v.* Delk, (Sup. 1888) 9 S. W. 550; Houston, etc., R. Co. *v.* Lee, 69 Tex. 556, 7 S. W. 324; Galveston *v.* Posnainsky, 62 Tex. 118, 50 Am. Rep. 517; Houston, etc., R. Co. *v.* Harris, 30 Tex. Civ. App. 179, 70 S. W. 335.

Virginia.— Richmond R., etc., Co. *v.* Garthright, 92 Va. 627, 24 S. E. 267, 53 Am. St. Rep. 839, 32 L. R. A. 220.

Washington.— Rush *v.* Spokane Falls, etc., R. Co., 23 Wash. 501, 63 Pac. 500; Robinson *v.* Marino, 3 Wash. 434, 28 Pac. 752, 28 Am. St. Rep. 50.

West Virginia.— Evans *v.* Huntington, 37 W. Va. 601, 16 S. E. 801; Sheff *v.* Huntington, 16 W. Va. 307.

Wisconsin.— Allen *v.* Voje, 114 Wis. 1, 89 N. W. 924; King *v.* Oshkosh, 75 Wis. 517, 44 N. W. 745; Meracle *v.* Down, 64 Wis. 323, 25 N. W. 412; Knowlton *v.* Milwaukee City R. Co., 59 Wis. 278, 18 N. W. 17; Delie *v.* Chicago, etc., R. Co., 51 Wis. 400, 8 N. W. 265; Benedict *v.* Fond du Lac, 44 Wis. 495; Houfe *v.* Fulton, 34 Wis. 608, 17 Am. Rep. 463.

United States.— New Orleans, etc., R. Co. *v.* Schneider, 60 Fed. 210, 8 C. C. A. 571; Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 33 Fed. 803; Philbrick *v.* Niles, 25 Fed. 265.

Canada.— Montreal Gas Co. *v.* St. Laurent, 26 Can. Supreme Ct. 176; Thibeaudeau *v.* Campagnie, etc., 4 Montreal Super. Ct. 400; Brewing *v.* Berryman, 15 N. Brunsw. 515; Rose *v.* Belyea, 12 N. Brunsw. 109; Desmond *v.* Fairbanks, 10 Nova Scotia 279; Sornberger *v.* Canadian Pac. R. Co., 24 Ont. App. 263; Perry *v.* Upper Canada Bank, 16 U. C. C. P. 404; Flint *v.* Bird, 11 U. C. Q. B. 444.

See 15 Cent. Dig. tit. "Damages," § 357.

44. Whipple *v.* Cumberland Mfg. Co., 29 Fed. Cas. No. 17,516, 2 Story 661. And to the same effect see the following cases:

Arkansas.— Kelly *v.* McDonald, 39 Ark. 387.

California.— Stuart *v.* Hoffman, 68 Cal. 381, 9 Pac. 451.

Connecticut.— Haight *v.* Hoyt, 50 Conn. 583; Waters *v.* Bristol, 26 Conn. 398.

Florida.— McMurray *v.* Basnett, 18 Fla. 609.

Illinois.— Loewenthal *v.* Streng, 90 Ill. 74; Hennies *v.* Vogel, 87 Ill. 242; Crose *v.* Rutledge, 81 Ill. 266; Chicago, etc., R. Co. *v.* Wilson, 63 Ill. 167; Walker *v.* Martin, 52 Ill. 347.

Indiana.— Pittsburg, etc., R. Co. *v.* Sponier, 85 Ind. 165; Parke County *v.* Sappenfield, 10 Ind. App. 609, 38 N. E. 358.

Iowa.— Berry *v.* Central R. Co., 40 Iowa 564.

Kansas.— Atchison, etc., R. Co. *v.* Moore, 31 Kan. 197, 1 Pac. 644 (statutory); Missouri, etc., R. Co. *v.* Weaver, 16 Kan. 456.

Kentucky.—Louisville, etc., R. Co. *v.* Mitchell, 87 Ky. 327, 8 S. W. 706, 10 Ky. L. Rep. 211; Holburn *v.* Neal, 4 Dana 120; North *v.* Cates, 2 Bibb 591.

Maine.— Cyr *v.* Dufour, 62 Me. 20; Field *v.* Plaisted, 75 Me. 476.

Minnesota.— Shartle *v.* Minneapolis, 17 Minn. 308; Chapman *v.* Dodd, 10 Minn. 350; St. Paul *v.* Kuby, 8 Minn. 154.

Missouri.— Graham *v.* Pacific R. Co., 66 Mo. 536; Wells *v.* Sanger, 21 Mo. 354; Dimmitt *v.* Hannibal, etc., R. Co., 40 Mo. App. 654.

Nevada.— Quigley *v.* Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

New Hampshire.—Hovey *v.* Brown, 59 N. H. 114.

New Jersey.—Merritt *v.* Harper, 44 N. J. L. 73; Vreeland *v.* Berry, 21 N. J. L. 183.

New York.— Bierbauer *v.* New York Cent., etc., R. Co., 15 Hun 559; Tinney *v.* New Jersey Steamboat Co., 5 Lans. 507; Walker *v.* Erie R. Co., 63 Barb. 260; Travis *v.* Barger, 24 Barb. 614; Jennings *v.* Van Schaick, 13 Daly 7; Blum *v.* Higgins, 3 Abb. Pr. 104.

Ohio.— Simpson *v.* Pitman, 13 Ohio 365.

South Carolina.— Wolff *v.* Cohen, 8 Rich. 144.

Tennessee.— Tennessee Coal, etc., Co. *v.* Roddy, 85 Tenn. 400, 5 S. W. 286; Tinkle *v.* Dunivant, 16 Lea 503; Nashville, etc., R. Co. *v.* Smith, 6 Heisk. 174; Moore *v.* Burchfield, 1 Heisk. 203.

Texas.— International, etc., R. Co. *v.* Telephone, etc., Co., 69 Tex. 277, 5 S. W. 517, 5 Am. St. Rep. 45; Galveston *v.* Posnainsky, 62 Tex. 118; Willis *v.* McNeill, 57 Tex. 465; McGehee *v.* Shafer, 9 Tex. 20.

Virginia.— Farish *v.* Reigle, 11 Gratt. 697, 62 Am. Dec. 666.

Wisconsin.— Goodno *v.* Oshkosh, 28 Wis. 300.

Wyoming.— Union Pac. R. Co. *v.* House, 1 Wyo. 27.

United States.— Barry *v.* Edmunds, 116 U. S. 550, 6 S. Ct. 501, 29 L. ed. 729; Harris *v.* Louisville, etc., R. Co., 35 Fed. 116; Brown *v.* Evans, 17 Fed. 912, 8 Sawy. 488; Wiggin *v.* Coffin, 29 Fed. Cas. No. 17,624, 3 Story 1.

England.— Lambkin *v.* South Eastern R. Co., 5 App. Cas. 352, 28 Wkly. Rep. 837; Gilbert *v.* Burtenshaw, Cowp. 230, Lofft. 771.

Canada.— Montreal *v.* Hall, 12 Can. Supreme Ct. 74; Levi *v.* Reed, 6 Can. Supreme Ct. 482; Mail Printing Co. *v.* Lallamme, 4 Montreal Q. B. 84; St. Lawrence Steam Nav. Co. *v.* Lemay, 3 Montreal Q. B. 214.

See 15 Cent. Dig. tit. "Damages," § 354 *et seq.*

Second trial.— Where on a former trial the

verdict is fair and reasonable, and in the exercise of sound discretion, under all the circumstances of the case; and it will be so presumed, unless the verdict is so excessive or outrageous with reference to those circumstances as to demonstrate that the jury have acted against the rules of law or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them.[45] In some states the courts have taken an extreme position on the subject of setting aside excessive verdicts.[46] While the general rule is as stated above, the courts must be governed in a measure by the circumstances of the particular case presented for their consideration;[47] yet where the circumstances of the case or

jury awarded the respondent three thousand dollars damages, but the verdict was set aside by the supreme court on the ground of misdirection, and on the second trial the jury awarded six thousand five hundred dollars damages, the amount was not so excessive that the court should set aside the verdict and order a new trial. Canada Pac. R. Co. *v.* Robinson, 6 Montreal L. Rep. 118.

45. *Illinois.*—Ottawa *v.* Sweely, 65 Ill. 434; Chicago, etc., R. Co. *v.* Wilson, 63 Ill. 167.

Kentucky.—Henderson *v.* Clayton, 57 S. W. 1, 22 Ky. L. Rep. 283, 53 L. R. A. 145.

New Jersey.—Vreeland *v.* Berry, 21 N. J. L. 183.

New York.—Walker *v.* Erie R. Co., 63 Barb. 260.

Texas.—McGehee *v.* Shafer, 9 Tex. 20.

Wisconsin.—Goodno *v.* Oshkosh, 28 Wis. 300.

United States.—Harris *v.* Louisville, etc., R. Co., 35 Fed. 116; Thurston *v.* Martin, 24 Fed. Cas. No. 14,018, 5 Mason 497; Whipple *v.* Cumberland Mfg. Co., 29 Fed. Cas. No. 17,516, 2 Story 661; Wiggin *v.* Coffin, 29 Fed. Cas. No. 17,624, 3 Story 1.

England.—Gilbert *v.* Burtenshaw, Cowp. 230, Lofft. 771.

Canada.—Cossette *v.* Dun, 18 Can. Supreme Ct. 222; Levi *v.* Reed, 6 Can. Supreme Ct. 482.

See 15 Cent. Dig. tit. "Damages," § 354 *et seq.*

Inflammatory address to jury.—Where complaint is made that counsel at the trial has improperly inflamed the minds of the jurors by remarks addressed to them, objection must be lodged at the time the remarks are made, and the intervention of the trial judge claimed; and where this has not been done, the court will not interfere upon appeal. The injuries having been severe and caused much suffering, a verdict of six thousand five hundred dollars was not one that should be disturbed as excessive. Sornberger *v.* Canadian Pac. R. Co., 24 Ont. App. 263.

46. **In California** it has been held that, the right of trial by jury in civil cases being secured by the bill of rights, it was doubtful whether a judgment could be set aside as excessive. Payne *v.* Pacific Mail Steamship Co., 1 Cal. 33.

In Missouri a judgment will not be set aside where the only reason is that the verdict appears to be larger than the evidence would apparently justify. Fullerton *v.* Fordyce, 144 Mo. 519, 44 S. W. 1053.

In New Mexico it has been held that the appellate court does not sit to pass upon the amount of the verdict, but only to correct errors on the trial. Schofield *v.* Territory, 9 N. M. 526, 56 Pac. 306.

In New York it has been held that the trial court having power to review the facts presented by the evidence, the appellate court would not pronounce a verdict excessive if it could be upheld in any view of the evidence presented. Maher *v.* Central Park, etc., R. Co., 67 N. Y. 52. See also Slavin *v.* State, 152 N. Y. 45, 46 N. E. 321. In Starbird *v.* Barrows, 62 N. Y. 615, it was held that if the jury gave excessive damages it could only be corrected in the lower court and the appellate court would not interfere.

In South Carolina the appellate court will not review the action of the lower court in refusing a motion for a new trial on the ground of excessive damages. Gillman *v.* Florida Cent., etc., R. Co., 53 S. C. 210, 31 S. E. 224; Dobson *v.* Cothran, 34 S. C. 518, 13 S. E. 899; Petrie *v.* Columbia, etc., R. Co., 29 S. C. 303, 7 S. E. 515; Steele *v.* Charlotte, etc., R. Co., 11 S. C. 589.

Under the United States practice it has been held that the appellate court possessed no revisory powers as to excessive verdicts, but was limited to the inquiry whether the jury was properly directed as to the mode of assessing damages. Homestake Min. Co. *v.* Fullerton, 69 Fed. 923, 16 C. C. A. 545.

47. *Georgia.*—Southwestern R. Co. *v.* Singleton, 66 Ga. 252.

Illinois.—Chicago, etc., R. Co. *v.* Payzant, 87 Ill. 125; Chicago West Div. R. Co. *v.* Hughes, 87 Ill. 94; Kolb *v.* O'Brien, 86 Ill. 210; Kepperly *v.* Ramsden, 83 Ill. 354; Decatur *v.* Fisher, 53 Ill. 407; Chicago, etc., R. Co. *v.* Dunn, 52 Ill. 451; Chicago, etc., R. Co. *v.* McAra, 52 Ill. 296; Timmons *v.* Broyles, 47 Ill. 92; Chicago, etc., R. Co. *v.* Mochell, 96 Ill. App. 178 [*affirmed* in 193 Ill. 208, 61 N. E. 1028, 86 Am. St. Rep. 318].

Iowa.—Lombard *v.* Chicago, etc., R. Co., 47 Iowa 494.

Kentucky.—Louisville, etc., R. Co. *v.* Survant, 96 Ky. 197, 27 S. W. 999, 16 Ky. L. Rep. 545; Louisville, etc., R. Co. *v.* Long, 94 Ky. 410, 22 S. W. 747, 15 Ky. L. Rep. 199; Louisville Southern R. Co. *v.* Minogue, 99 Ky. 369, 14 S. W. 357, 12 Ky. L. Rep. 378, 29 Am. St. Rep. 378; South Covington, etc., St. R. Co. *v.* Ware, 84 Ky. 267, 1 S. W. 493, 8 Ky. L. Rep. 241.

Louisiana.—Peyton *v.* Texas, etc., R. Co., 41 La. Ann. 861, 6 So. 690, 17 Am. St. Rep. 430; Maher *v.* Louisville, etc., R. Co., 40 La. Ann. 64, 3 So. 462.

Maine.—Gleason *v.* Bremen, 50 Me. 222.

the evidence produced indicate that the verdict has been the result of bias, prejudice, or gross overestimate, they have not hesitated to set it aside.[48]

Minnesota.— Guthier *v.* Minneapolis, etc., R. Co., 87 Minn. 355, 91 N. W. 1096; Matteson *v.* Munro, 80 Minn. 340, 83 N. W. 153; Kennedy *v.* St. Paul City R. Co., 59 Minn. 45, 60 N. W. 810; Slette *v.* Great Northern R. Co., 53 Minn. 341, 55 N. W. 137.

Missouri.—Haynes *v.* Trenton, 108 Mo. 123, 18 S. W. 1003; Hurt *v.* St. Louis, etc., R. Co., 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374; Sawyer *v.* Hannibal, etc., R. Co., 37 Mo. 240, 90 Am. Dec. 382; Goetz *v.* Ambs, 22 Mo. 170; Cook *v.* Missouri Pac. R. Co., 94 Mo. App. 417, 68 S. W. 230; Dimmitt *v.* Hannibal, etc., R. Co., 40 Mo. App. 654.

Montana.— Hamilton *v.* Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

Nebraska.— Hoover *v.* Haynes, (1902) 91 N. W. 392; Fremont, etc., R. Co. *v.* French, 48 Nebr. 638, 67 N. W. 472; Fremont, etc., R. Co. *v.* Leslie, 41 Nebr. 159, 59 N. W. 559; Orleans Village *v.* Perry, 24 Nebr. 831, 40 N. W. 417.

New York.— Mullady *v.* Brooklyn Heights R. Co., 65 N. Y. App. Div. 549, 72 N. Y. Suppl. 911; Fawdrey *v.* Brooklyn Heights R. Co., 64 N. Y. App. Div. 418, 72 N. Y. Suppl. 283; Meade *v.* Brooklyn Heights R. Co., 3 N. Y. App. Div. 432, 39 N. Y. Suppl. 320; Bosworth *v.* Standard Oil Co., 92 Hun 485, 37 N. Y. Suppl. 43.

Ohio.— Columbus, etc., R. Co. *v.* Shannon, 4 Ohio Cir. Ct. 449.

Texas.—Texas, etc., R. Co. *v.* Doherty, (App. 1890) 15 S. W. 44; San Antonio, etc., R. Co. *v.* Connell, 27 Tex. Civ. App. 533, 66 S. W. 246; A. J. Anderson Electric Co. *v.* Cleburne Water, etc., Co., 23 Tex. Civ. App. 328, 57 S. W. 575; Gulf, etc., R. Co. *v.* Woolems, (Civ. App. 1900) 55 S. W. 753.

Washington.— Mitchell *v.* Tacoma R., etc., Co., 13 Wash. 560, 43 Pac. 528.

Wisconsin.— Collins *v.* Janesville, 111 Wis. 348, 87 N. W. 241, 1087; Abbot *v.* Tolliver, 71 Wis. 64, 36 N. W. 622; Patten *v.* Chicago, etc., R. Co., 32 Wis. 524; Spicer *v.* Chicago, etc., R. Co., 29 Wis. 580; Goodno *v.* Oshkosh, 28 Wis. 300.

Wyoming.— Union Pac. R. Co. *v.* Hause, 1 Wyo. 27.

United States.— Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 41 Fed. 311.

See 15 Cent. Dig. tit. "Damages," § 354 *et seq.*

Mere opinion as to value.— A verdict for damages for injury to an untrained horse, which at the time of his injury was being shipped for training purposes, must be set aside as excessive, the only evidence of value approaching the amount of the verdict consisting chiefly of opinions based upon the idea that the horse had a good pedigree, and would when trained make good time. Illinois Cent. R. Co. *v.* Radford, 64 S. W. 511, 23 Ky. L. Rep. 886.

No special humiliation.— Where a person technically under arrest suffers no pain of body or mind or special humiliation, a verdict for two thousand five hundred dollars is excessive. O'Boyle *v.* Shively, 65 Ill. App. 278.

Ordinary sprain.— A verdict of two thousand dollars for an ordinary sprained ankle is excessive, where the injury is not permanent, and plaintiff himself testified that he laid aside his crutches about a month after the accident, and used a cane for some two or three months thereafter, and that he had worked up to the time of the trial, four months after the accident, for eight days, at carpenter work. Bennett *v.* E. W. Backus Lumber Co., 77 Minn. 198, 79 N. W. 682.

48. *Illinois.*— Swafford *v.* Rosenbloom, 102 Ill. App. 578; North Chicago St. R. Co. *v.* Hoffart, 82 Ill. App. 539; Nicholson *v.* O'Donald, 79 Ill. App. 195; Chicago West Div. R. Co. *v.* Haviland, 12 Ill. App. 561.

Kansas.— Kansas Pac. R. Co. *v.* Peavey, 34 Kan. 472, 8 Pac. 780.

Kentucky.—Louisville, etc., R. Co. *v.* Foley, 94 Ky. 220, 21 S. W. 866, 15 Ky. L. Rep. 17; Standard Oil Co. *v.* Tierney, 92 Ky. 367, 17 S. W. 1025, 13 Ky. L. Rep. 626, 36 Am. St. Rep. 595, 14 L. R. A. 677; Covington, etc., Bridge Co. *v.* Goodnight, 60 S. W. 415, 22 Ky. L. Rep. 1242; Donhard *v.* Shirley, 56 S. W. 17, 21 Ky. L. Rep. 1653; Louisville, etc., R. Co. *v.* Whitley County Ct., 49 S. W. 332, 20 Ky. L. Rep. 1367; Louisville, etc., R. Co. *v.* Law, 21 S. W. 648, 14 Ky. L. Rep. 850.

Minnesota.— Johnson *v.* St. Paul City R. Co., 67 Minn. 260, 69 N. W. 900, 36 L. R. A. 586.

Missouri.— Chitty *v.* St. Louis, etc., R. Co., 148 Mo. 64, 49 S. W. 868.

New York.— De Wardener *v.* Metropolitan St. R. Co., 1 N. Y. App. Div. 240, 37 N. Y. Suppl. 133; Silberstein *v.* Houston St., etc., R. Co., 52 Hun 611, 4 N. Y. Suppl 843; Ryder *v.* New York, 50 N. Y. Super. Ct. 220; Jennings *v.* Van Schaick, 13 Daly 7. And see Joly *v.* New York, etc., Ferry Co., 48 N. Y. App. Div. 624, 62 N. Y. Suppl. 576; Shortsleeves *v.* New York Cent., etc., R. Co., 9 N. Y. App. Div. 622, 40 N. Y. Suppl. 1105.

Pennsylvania.— Musser *v.* Lancaster City St. R. Co., 15 Pa. Co. Ct. 430.

Tennessee.— Cherokee Packet Co. *v.* Hilson, 95 Tenn. 1, 31 S. W. 737.

Texas.— International, etc., Co. *v.* Underwood, 64 Tex. 463.

Utah.— Mahood *v.* Pleasant Valley Coal Co., 8 Utah 85, 30 Pac. 149.

England.— Knight *v.* Egerton, 7 Exch. 407.

See 15 Cent. Dig. tit. "Damages," § 354 *et seq.*

"Every case must necessarily depend, to a great extent, upon its own peculiar facts. An examination of the decided cases in actions to recover damages for personal injuries clearly shows that the courts have differed in opinion as much as juries, as to the amount of damages that should be allowed in such cases. Extreme cases are found in the books upon both sides of this vexed question. The

B. Injuries to Property or Damages For Breach of Contract. Where an injury to property is involved, or damages are sought for a breach of a specific contract, the courts are little inclined to interfere with the verdict as rendered,[49] especially where the evidence is conflicting;[50] where, however, the verdict as rendered is in excess of the evidence of loss the court may set it aside.[51] No

tendency of some of the state courts is to allow only small damages. Other states are more liberal. What is considered as proper in one state is deemed excessive in another. The argument that juries . . . are disposed to give heavy damages in actions for personal injuries against corporations is undoubtedly true. But the records of this court will show that it has never hesitated, where the amount was deemed excessive, to set such verdicts aside." Engler *v.* Western Union Tel. Co., 69 Fed. 185, 187.

49. *Arizona.*— Davis *v.* Simmons, 1 Ariz. 25, 25 Pac. 535.

Arkansas.— Clark *v.* Bales, 15 Ark. 452.

California.—Cederberg *v.* Robison, 100 Cal. 93, 34 Pac. 625; Brumley *v.* Flint, 87 Cal. 471, 25 Pac. 683; Razzo *v.* Varni, 81 Cal. 289, 22 Pac. 848; Heilbron *v.* King's River, etc., Canal Co., 76 Cal. 11, 17 Pac. 933.

Colorado.— Manger *v.* Grodnick, 3 Colo. App. 534, 34 Pac. 688.

Dakota.— Fraley *v.* Bentley, 1 Dak. 25, 46 N. W. 506.

Florida.— Pensacola Gas Co. *v.* Pebley, 25 Fla. 381, 5 So. 593.

Illinois.—Schaffner *v.* Ehrman, 139 Ill. 109, 28 N. E. 917, 32 Am. St. Rep. 192, 15 L. R. A. 134; Shoup *v.* Shields, 116 Ill. 488, 6 N. E. 502; Singer Mfg. Co. *v.* Holdfodt, 86 Ill. 455, 29 Am. Rep. 43; Huftalin *v.* Misner, 70 Ill. 55; Jasper *v.* Purnell, 67 Ill. 358; Bauer *v.* Gottmanhausen, 65 Ill. 499; Illinois Cent. R. Co. *v.* Grabill, 50 Ill. 241; Richardson *v.* O'Brien, 44 Ill. App. 243.

Indiana.— Balue *v.* Taylor, 136 Ind. 368, 36 N. E. 269; Baughan *v.* Brown, 122 Ind. 115, 23 N. E. 695; Shover *v.* Myrick, 4 Ind. App. 7, 30 N. E. 207.

Iowa.— Casey *v.* Ballou Banking Co., 98 Iowa 107, 67 N. W. 98; Minthon *v.* Lewis, 78 Iowa 620, 43 N. W. 465.

Kansas.—Lamont *v.* Williams, 43 Kan. 558, 23 Pac. 592.

Kentucky.— Kentucky Midland R. Co. *v.* Stump, 12 Ky. L. Rep. 316.

Maine.— Field *v.* Plaisted, 75 Me. 476.

Massachusetts.—Reed *v.* Davis, 4 Pick. 216.

Minnesota.— Kopp *v.* Northern Pac. R. Co., 41 Minn. 310, 43 N. W. 73.

Missouri.— Sheehy *v.* Kansas City Cable R. Co., 94 Mo. 574, 7 S. W. 579, 4 Am. St. Rep. 396; Athletic Baseball Assoc. *v.* St. Louis Sportsman's, Park, etc., Assoc., 67 Mo. App. 653.

Nebraska.— Schars *v.* Barnd, 27 Nebr. 94, 42 N. W. 906.

New Jersey.— Thompson *v.* Morris Canal, etc., Co., 17 N. J. L. 480.

New York.— Post *v.* West Shore R. Co., 123 N. Y. 580, 26 N. E. 31; Perkins *v.* State, 113 N. Y. 660, 21 N. E. 397; Meisch *v.* Rochester Electric R. Co., 72 Hun 604, 25 N. Y. Suppl. 244; Wilson *v.* Troy, 60 Hun 183, 14 N. Y. Suppl. 721; Smith *v.* Felt, 50 Barb. 612; Heald *v.* Macgowan, 14 N. Y. Suppl. 280; Ryan *v.* Burger, etc., Brewing Co., 13 N. Y. Suppl. 660; Avery *v.* New York Cent., etc., R. Co., 2 N. Y. Suppl. 101.

North Carolina.— Denby *v.* Hairston, 8 N. C. 315.

Texas.— Gulf, etc., R. Co. *v.* Hudson, 77 Tex. 494, 14 S. W. 158; Cook *v.* Garza, 9 Tex. 358; Missouri Pac. R. Co. *v.* Peay, 7 Tex. Civ. App. 400, 26 S. W. 768.

West Virginia.—Miller *v.* Shenandoah Pulp Co., 38 W. Va. 558, 18 S. E. 740.

Wisconsin.— Koenigs *v.* Jung, 73 Wis. 178, 40 N. W. 801.

See 15 Cent. Dig. tit. "Damages," § 397 *et seq.*

Breach of contract.— It has been held in Indiana that the question of excessive damages cannot arise in an action *ex contractu.* Smith *v.* Barber, 153 Ind. 322, 53 N. E. 1014; White *v.* McGrew, 129 Ind. 83, 28 N. E. 322; Smith *v.* State, 117 Ind. 167, 19 N. E. 744; McKinney *v.* State, 117 Ind. 26, 19 N. E. 613; Clark Civil Tp. *v.* Brookshire, 114 Ind. 437, 16 N. E. 132; Moore *v.* State, 114 Ind. 414, 16 N. E. 836; McCormick Harvesting Mach., etc., Co. *v.* Gray, 114 Ind. 340, 16 N. E. 787. *Compare* Weigley *v.* Kneeland, 172 N. Y. 625, 65 N. E. 1123 [*affirming* 60 N. Y. App. Div. 614, 69 N. Y. Suppl. 657], holding that where, in an action for damages for breach of a contract to deliver bonds and stocks, there is evidence on which the jury may properly find the value of the bonds and stocks to be the sum — less than par — indicated by the verdict, the verdict should not be set aside as excessive, since, in the absence of evidence of a less value, they would be presumed to be of the value appearing on their face. And see Joyce Dam. § 108.

50. Pielke *v.* Chicago, etc., R. Co., 6 Dak. 444, 43 N. W. 813; Chicago, etc., R. Co. *v.* Jarrett, 59 Miss. 470; Galveston, etc., R. Co. *v.* Buckley, 1 Tex. App. Civ. Cas. § 687.

51. *Florida.*— Jacksonville, etc., R. Co. *v.* Garrison, 30 Fla. 431, 11 So. 932; Jacksonville, etc., R. Co. *v.* Roberts, 22 Fla. 324.

Illinois.— Chicago, etc., R. Co. *v.* Eichman, 47 Ill. App. 156.

Indiana.— Washburn *v.* Roberts, 72 Ind. 213; Stevens *v.* McClure, 56 Ind. 384.

Iowa.— Harwick *v.* Weddington, 73 Iowa 300, 34 N. W. 868; Fawcett *v.* Woods, 5 Iowa 400.

Kansas.— Wichita, etc., R. Co. *v.* Gibbs, 47 Kan. 274, 27 Pac. 991.

Maine.— Thayer *v.* Eaton, (1888) 12 Atl. 879.

Minnesota.— Mitchell *v.* Mitchell, 60 Minn. 12, 61 N. W. 682.

Mississippi.— Chicago, etc., R. Co. *v.* Jarrett, 59 Miss. 470.

precise rule for ascertaining damages in such a case can be given, and the matter should therefore be left to the judgment of the jury to say what the plaintiff should have in money, in view of the discomfort and annoyance to which he has been subjected.[52]

C. Personal Injuries — 1. Injuries to Limbs — a. In General. Thus a verdict will not be set aside as excessive where the personal injuries complained of have resulted in a serious injury to limbs,[53] unless it is the result of passion or

Missouri.— Franz *v.* Hilterbrand, 45 Mo. 121; Schnette *v.* Sutter, 23 Mo. 240.

Montana.— Cunningham *v.* Quirk, 10 Mont. 462, 26 Pac. 184.

New York.— Pitt *v.* Kellogg, 58 Hun 603, 11 N. Y. Suppl. 526; Nixon *v.* Stillwell, 52 Hun 353, 1 Silv. Supreme 181, 5 N. Y. Suppl. 248; Farnsworth *v.* Western Union Tel. Co., 3 Silv. Supreme 30, 6 N. Y. Suppl. 735.

Pennsylvania.—Nunan *v.* Bourquin, 7 Phila. 239.

Rhode Island.— Burdick *v.* Weeden, 9 R. I. 139.

South Carolina.—Josey *v.* Wilmington, etc., R. Co., 11 Rich. 399.

Texas.— Gulf, etc., R. Co. *v.* Johnson, 71 Tex. 619, 9 S. W. 602, 1 L. R. A. 730; Texas, etc., R. Co. *v.* Ervay, 3 Tex. App. Civ. Cas. § 47.

Wisconsin.— Page *v.* Sumpter, 53 Wis. 652, 11 N. W. 60.

See 15 Cent. Dig. tit. "Damages," § 397 *et seq.*

52. Clark *v.* Bales, 15 Ark. 452; Singer Mfg. Co. *v.* Holdfodt, 86 Ill. 455, 29 Am. Rep. 43; Huftalin *v.* Misner, 70 Ill. 55; East St. Louis *v.* Wiggins Ferry Co., 11 Ill. App. 254; Standard Oil Co. *v.* Kinnaird, 13 Ky. L. Rep. 270.

53. *Alabama.*— Birmingham *v.* Lewis, 92 Ala. 352, 9 So. 243.

Arkansas.— Little Rock, etc., Co. *v.* Cagle, 53 Ark. 347, 14 S. W. 89.

Colorado.— Union Gold Min. Co. *v.* Crawford, 29 Colo. 511, 69 Pac. 600; Colorado, etc., R. Co. *v.* O'Brien, 16 Colo. 219, 27 Pac. 701; Hallack *v.* Johnson, 12 Colo. 244, 20 Pac. 700.

Dakota.— Larson *v.* Grand Forks, 3 Dak. 307, 19 N. W. 414.

Georgia.— Seaboard Air Line R. Co. *v.* Phillips, 117 Ga. 98, 43 S. E. 494; Georgia R., etc., Co. *v.* Keating, 99 Ga. 308, 25 S. E. 669; Atlanta *v.* Martin, 88 Ga. 21, 13 S. E. 805; Ocean Steamship Co. *v.* Matthews, 86 Ga. 418, 12 S. E. 632; Griffin *v.* Johnson, 84 Ga. 279, 10 S. E. 719; Western, etc., R. Co. *v.* Lewis, 84 Ga. 211, 10 S. E. 736.

Illinois.— Chicago City R. Co. *v.* Mumford, 97 Ill. 560; Aurora *v.* Hillman, 90 Ill. 61; Chicago *v.* Brophy, 79 Ill. 277; North Line Packet Co. *v.* Binninger, 70 Ill. 571; Illinois Steel Co. *v.* Mann, 100 Ill. App. 367 [*affirmed* in 197 Ill. 186, 64 N. E. 328]; Momence Stone Co. *v.* Groves, 100 Ill. App. 98 [*affirmed* in 197 Ill. 88, 64 N. E. 335]; Pennsylvania Co. *v.* Reidy, 99 Ill. App. 477 [*affirmed* in 198 Ill. 9, 64 N. E. 698].

Indiana.— Fowler *v.* Linquist, 138 Ind. 566, 37 N. E. 133.

Iowa.— Bryant *v.* Omaha, etc., R., etc., Co., 98 Iowa 483, 67 N. W. 392; Henry *v.* Sioux City, etc., R. Co., 75 Iowa 84, 39 N. W. 193, 9 Am. St. Rep. 457; Marion *v.* Chicago, etc., R. Co., 64 Iowa 568, 21 N. W. 86; Funston *v.* Chicago, etc., R. Co., 61 Iowa 452, 16 N. W. 518; Garlick *v.* Pella, 53 Iowa 646, 6 N. W. 3; Collins *v.* Council Bluffs, 32 Iowa 324, 7 Am. Rep. 200.

Kansas.— Kansas City *v.* Manning, 50 Kan. 373, 31 Pac. 1104; Atchison, etc., R. Co. *v.* Moore, 31 Kan. 197, 1 Pac. 644.

Kentucky.— Louisville, etc., R. Co. *v.* Mitchell, 87 Ky. 327, 8 S. W. 706; Louisville, etc., R. Co. *v.* Moore, 83 Ky. 675; Maysville, etc., R. Co. *v.* Herrick, 13 Bush 122; Danville, etc., Turnpike Road Co. *v.* Stewart, 2 Metc. 119; Louisville R. Co. *v.* Casey, 71 S. W. 876, 24 Ky. L. Rep. 1527; Louisville, etc., R. Co. *v.* Chism, 47 S. W. 251, 20 Ky. L. Rep. 584.

Louisiana.— Jackson *v.* St. Louis, etc., R. Co., 52 La. Ann. 1706, 28 So. 241; Lampkins *v.* Vicksburg, etc., Co., 42 La. Ann. 997, 8 So. 530; Shea *v.* Reems, 36 La. Ann. 966; Choppin *v.* New Orleans, etc., R. Co., 17 La. Ann. 19.

Minnesota.— Thompson *v.* Great Northern R. Co., 79 Minn. 291, 82 N. W. 637; Rogers *v.* Chicago Great Western R. Co., 65 Minn. 308, 67 N. W. 1003; Sobieski *v.* St. Paul, etc., R. Co., 41 Minn. 169, 42 N. W. 863; Tierney *v.* Minneapolis, etc., R. Co., 33 Minn. 311, 23 N. W. 229, 53 Am. Rep. 35.

Missouri.— Bolton *v.* Missouri Pac. R. Co., 172 Mo. 92, 72 S. W. 530; Pauck *v.* St. Louis Dressed Beef, etc., Co., 166 Mo. 639, 66 S. W. 1070; Oglesby *v.* Missouri Pac. R. Co., 150 Mo. 137, 37 S. W. 829, 51 S. W. 758; Hollenbeck *v.* Missouri Pac. R. Co., 141 Mo. 97, 38 S. W. 723, 41 S. W. 887; Hollenbeck *v.* Missouri Pac. R. Co., (1896) 34 S. W. 494; Rodney *v.* St. Louis, etc., R. Co., 127 Mo. 676, 28 S. W. 887, 30 S. W. 150.

Montana.— Kennon *v.* Gilmer, 9 Mont. 108, 22 Pac. 448.

Nebraska.— New Omaha Thomson-Houston Electric Light Co. *v.* Rombold, (1903) 93 N. W. 966; St. Joseph, etc., R. Co. *v.* Hedge, 44 Nebr. 448, 62 N. W. 887; Lincoln *v.* Staley, 32 Nebr. 63, 48 N. W. 887.

New Jersey.— Wiczynski *v.* American Sugar-Refining Co., (Sup. 1901) 49 Atl. 530.

New York.— Fullerton *v.* Metropolitan St. R. Co., 170 N. Y. 592, 63 N. E. 1116 [*affirming* 63 N. Y. App. Div. 1, 71 N. Y. Suppl. 326]; Tully *v.* New York, etc., Steamship Co., 162 N. Y. 614, 57 N. E. 1127 [*affirming* 10 N. Y. App. Div. 463, 42 N. Y. Suppl. 29]; Cosselmon *v.* Dunfee, 59 N. Y. App. Div. 467, 69 N. Y. Suppl. 271; Williamson *v.* Brooklyn Heights R. Co., 53 N. Y. App. Div. 399, 65 N. Y. Suppl. 1054.

Rhode Island.— Elliott *v.* Newport St. R.

prejudice, or indicates a gross misconception of the law or evidence as applicable to the particular case.[54]

b. Injury to Arm. Since an injury to the arm is usually accompanied by an incapacity to labor, the courts have usually taken such fact into consideration, and have hesitated as to setting aside a verdict which is given on such grounds as excessive.[55]

c. Injury to Hands. For the same reason any serious or permanent injury to the hands will be considered by the court in setting aside a verdict on the ground

Co., 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208.

Tennessee.— Ornamental Iron, etc., Co. *v.* Green, 108 Tenn. 161, 65 S. W. 399.

Texas.— St. Louis, etc., R. Co. *v.* Woolum, 84 Tex. 570, 19 S. W. 782; Ft. Worth *v.* Johnson, 84 Tex. 137, 19 S. W. 361; Texas, etc., R. Co. *v.* Brick, 83 Tex. 598, 20 S. W. 511; Texas, etc., R. Co. *v.* Brick, 83 Tex. 526, 18 S. W. 947, 29 Am. St. Rep. 675; International, etc., R. Co. *v.* Hinzie, 82 Tex. 623, 18 S. W. 681; Ft. Worth, etc., R. Co. *v.* Robertson, (Sup. 1891) 16 S. W. 1093, 14 L. R. A. 781.

Utah.— Chipman *v.* Union Pac. R. Co., 12 Utah 68, 41 Pac. 562; Bowers *v.* Union Pac. R. Co., 4 Utah 215, 7 Pac. 251.

Virginia.— Newport News, etc., R. Co. *v.* Bradford, 100 Va. 231, 40 S. E. 900; Norfolk *v.* Johnakin, 94 Va. 285, 26 S. E. 830; Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226; Danville, etc., R. Co. *v.* Brown, 90 Va. 340, 18 S. E. 278.

Washington.— Uren *v.* Golden Tunnel Min. Co., 24 Wash. 261, 64 Pac. 174; Roth *v.* Union Depot Co., 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855; Lorence *v.* Ellensburgh, 13 Wash. 341, 43 Pac. 20, 52 Am. St. Rep. 42.

Wisconsin.— Rueping *v.* Chicago, etc., R. Co., 116 Wis. 625, 93 N. W. 843; Yerkes *v.* Northern Pac. R. Co., 112 Wis. 184, 88 N. W. 33, 88 Am. St. Rep. 961; Baltzer *v.* Chicago, etc., R. Co., 89 Wis. 257, 60 N. W. 716; McDonald *v.* Ashland, 78 Wis. 251, 47 N. W. 434; Nadau *v.* White River Lumber Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29.

United States.— The Iroquois, 113 Fed. 964; Western Union Tel. Co. *v.* Engler, 75 Fed. 102, 21 C. C. A. 246; Engler *v.* Western Union Tel. Co., 69 Fed. 185; The Alejandro, 56 Fed 621, 6 C. C. A. 54; The William Branfoot *v.* Hamilton, 52 Fed. 390, 3 C. C. A. 155; The A. Heaton, 43 Fed. 592; Shumacher *v.* St. Louis, etc., R. Co., 39 Fed. 174; The Noddleburn, 28 Fed. 855; The D. S. Gregory, 7 Fed. Cas. No. 4,100, 2 Ben. 226.

See 15 Cent. Dig. tit. "Damages," § 357 *et seq.*

54. Kroener *v.* Chicago, etc., R. Co., 88 Iowa 16, 55 N. W. 20; Kennon *v.* Gilmer, 5 Mont. 257, 5 Pac. 847, 51 Am. Rep. 45; Tully *v.* New York, etc., Steamship Co., 10 N. Y. App. Div. 463, 42 N. Y. Suppl. 29; Peri *v.* New York Cent., etc., R. Co., 87 Hun (N. Y.) 499, 34 N. Y. Suppl. 1009; Bailey *v.* Rome, etc., R. Co., 80 Hun (N. Y.) 4, 29 N. Y. Suppl. 816; Pfeffer *v.* Buffalo R. Co., 4 Misc. (N. Y.) 465, 24 N. Y. Suppl. 490; Holden *v.* Pennsylvania R. Co., 7 Kulp (Pa.) 52.

55. *Arkansas.*— Little Rock, etc., R. Co. *v.* Harkey, (1891) 15 S. W. 456.

California.— Robinson *v.* Western Pac. R. Co., 48 Cal. 409.

Illinois.— Joliet *v.* Looney, 159 Ill. 471, 42 N. E. 854; Ottawa *v.* Sweely, 65 Ill. 434; Regan *v.* Reed, 96 Ill. App. 460; Gundlach *v.* Schott, 95 Ill. App. 110 [*affirmed* in 192 Ill. 509, 61 N. E. 332]; William D. Gibson Co. *v.* Glizozinski, 76 Ill. App. 400; La Salle *v.* Porterfield, 38 Ill. App. 553; Anglo-American Packing, etc., Co. *v.* Baier, 31 Ill. App. 653. And see Illinois Cent. R. Co. *v.* O'Connor, 90 Ill. App. 142 [*reversed* in 189 Ill. 559, 59 N. E. 1098].

Indiana.— Ohio, etc., R. Co. *v.* Judy, 120 Ind. 397, 22 N. E. 252; New York, etc., R. Co. *v.* Doane, 115 Ind. 435, 17 N. E. 913, 7 Am. St. Rep. 451, 1 L. R. A. 157; Pittsburgh, etc., R. Co. *v.* Sponier, 85 Ind. 165; Nappance *v.* Ruckman, 7 Ind. App. 361, 34 N. E. 609.

Iowa.— Van Winter *v.* Henry County, 61 Iowa 684, 17 N. W. 94.

Kentucky.— Henderson *v.* White, 49 S. W. 764, 20 Ky. L. Rep. 1525; Newport News, etc., R. Co. *v.* Campbell, 25 S. W. 267, 15 Ky. L. Rep. 714; Louisville Bagging Mfg. Co. *v.* Dolan, 13 Ky. L. Rep. 493; Louisville Gas Co. *v.* Gutenkuntz, 6 Ky. L. Rep. 464. And see Chesapeake, etc., R. Co. *v.* Dodge, 66 S. W. 606, 23 Ky. L. Rep. 1959, second application to set aside verdict.

Louisiana.— Ketchum *v.* Texas, etc., R. Co., 38 La. Ann. 777.

Michigan.— Detzur *v.* B. Stroh Brewing Co., 119 Mich. 282, 77 N. W. 948, 44 L. R. A. 500.

Minnesota.— Stauning *v.* Great Northern R. Co., 88 Minn. 480, 93 N. W. 518; Schultz *v.* Faribault Consol. Gas, etc., Co., 82 Minn. 100, 84 N. W. 631.

Missouri.— Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; Baker *v.* Independence, 93 Mo. App. 165; Honeycutt *v.* St. Louis, etc., R. Co., 40 Mo. App. 674; McMillan *v.* Union Press Brick Works, 6 Mo. App. 434.

Montana.— Sweeney *v.* Butte, 15 Mont. 274, 39 Pac. 286.

New York.— Hutchinson *v.* Atlantic Ave. R. Co., 161 N. Y. 635, 57 N. E. 1112 [*affirming* 33 N. Y. App. Div. 569, 53 N. Y. Suppl. 1076]; Wagner *v.* Metropolitan St. R. Co., 79 N. Y. App. Div. 591, 80 N. Y. Suppl. 191; Baird *v.* New York Cent., etc., R. Co., 64 N. Y. App. Div. 14, 71 N. Y. Suppl. 734; Stewart *v.* Long Island R. Co., 54 N. Y. App. Div. 623, 66 N. Y. Suppl. 436; Barrett *v.* New York Cent., etc., R. Co., 45

that it is excessive.[56] The reason of this rule being based upon the fact that by reason of the injury the plaintiff has been rendered less capacitated for earning his own living,[57] it is only where the verdict is grossly excessive that the appellate court will interfere to reduce or set it aside.[58]

d. Loss of Both Legs. In cases where a plaintiff has suffered by reason of the wrongful act sued for such a serious injury as the loss of both legs, the jury are apt to be more or less governed by prejudice or bias in delivering their verdict, yet even in such cases the verdict will not be set aside by the court,[59]

N. Y. App. Div. 225, 61 N. Y. Suppl. 9; Mentz *v.* Second Ave. R. Co., 2 Rob. 356; Mohr *v.* Wetherill, 33 Misc. 791, 67 N. Y. Suppl. 590; Wilson *v.* Broadway, etc., R. Co., 8 Misc. 450, 28 N. Y. Suppl. 781; Vredenburgh *v.* New York Cent., etc., R. Co., 12 N. Y. Suppl. 18.

Oklahoma.— Long *v.* McWilliams, 11 Okla. 562, 69 Pac. 882.

Tennessee.— American Lead Pencil Co. *v.* Davis, 108 Tenn. 251, 66 S. W. 1129.

Texas.— Sherman *v.* Nairey, 77 Tex. 291, 13 S. W. 1028; Missouri Pac. R. Co. *v.* Jones, 75 Tex. 151, 12 S. W. 972, 16 Am. St. Rep. 879; Texas, etc., Co. *v.* Garcia, 62 Tex. 285; Texas, etc., R. Co. *v.* Lowry, 61 Tex. 149; Texas, etc., R. Co. *v.* O'Donnell, 58 Tex. 27; Galveston, etc., R. Co. *v.* Bohan, (Civ. App. 1898) 47 S. W. 1050; International, etc., R. Co. *v.* Hall, 1 Tex. Civ. App. 221, 21 S. W. 1024; Galveston, etc., R. Co. *v.* Wesch, (Civ. App. 1893) 21 S. W. 313.

Wisconsin.— Meyer *v.* Milwaukee Electric R., etc., Co., 116 Wis. 336, 93 N. W. 6; McCoy *v.* Milwaukee St. R. Co., 88 Wis. 56, 59 N. W. 453; Stetler *v.* Chicago, etc., R. Co., 49 Wis. 609, 6 N. W. 303; Schmidt *v.* Milwaukee, etc., R. Co., 23 Wis. 186, 99 Am. Dec. 158.

United States.— Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 41 Fed. 316.

See 15 Cent. Dig. tit. "Damages," § 361.

Permanent deformity.— Where the negligence of a surgeon called to attend a fractured arm caused it to unite at the wrong place, causing a permanent deformity unless refractured, when there is no certainty of the bones uniting, a judgment for five hundred dollars is not excessive. Gerken *v.* Plimpton, 62 N. Y. App. Div. 35, 70 N. Y. Suppl. 793.

56. *Arkansas.*— St. Louis, etc., R. Co. *v.* Waren, 65 Ark. 619, 48 S. W. 222.

Georgia.— Central R. Co. *v.* De Bray, 71 Ga. 406.

Illinois.— South Chicago City R. Co. *v.* Dufresne, 102 Ill. App. 493; Rock Island Sash, etc., Works *v.* Pohlman, 99 Ill. App. 670.

Indiana.— Haynes *v.* Erk, 6 Ind. App. 332, 33 N. E. 637.

Iowa.— Strong *v.* Iowa Cent. R. Co., 94 Iowa 380, 62 N. W. 799; Sprague *v.* Atlee, 81 Iowa 1, 46 N. W. 756.

Kentucky.— Louisville Water Co. *v.* Upton, 36 S. W. 520, 18 Ky. L. Rep. 326.

Louisiana.— Jackson *v.* St. Louis South Western R. Co., 52 La. Ann. 1706, 28 So. 241.

Minnesota.— Gray *v.* Commutator Co., 85 Minn. 463, 89 N. W. 322; Stiller *v.* Bohn Mfg. Co., 80 Minn. 1, 82 N. W. 981; Gahagan *v.* Aerometer Co., 67 Minn. 252, 69 N. W. 914; Barg *v.* Bousfield, 65 Minn. 355, 68 N. W. 45.

New York.— Sesselmann *v.* Metropolitan St. R. Co., 76 N. Y. App. Div. 336, 78 N. Y. Suppl. 482; Eldridge *v.* Atlas Steamship Co., 58 Hun 96, 11 N. Y. Suppl. 468.

Ohio.— Michigan Cent. R. Co. *v.* Waterworth, 21 Ohio Cir. Ct. 495, 11 Ohio Cir. Dec. 621.

Texas.— Galveston, etc., R. Co. *v.* Courtney, 30 Tex. Civ. App. 544, 71 S. W. 397; Greenville Oil, etc., Co. *v.* Harkey, 20 Tex. Civ. App. 225, 48 S. W. 1005; International, etc., R. Co. *v.* Bonatz, (Civ. App. 1898) 48 S. W. 767; Campbell *v.* McCoy, 3 Tex. Civ. App. 298, 23 S. W. 34.

Utah.— Chapman *v.* Southern Pac. Co., 12 Utah 30, 41 Pac. 551.

Virginia.— Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226.

Wisconsin.— Neilon *v.* Marinette, etc., Paper Co., 75 Wis. 579, 44 N. W. 772.

United States.— Withcofsky *v.* Wier, 32 Fed. 301.

See 15 Cent. Dig. tit. "Damages," § 361.

57. *Illinois.*— South Chicago City R. Co. *v.* Dufresne, 102 Ill. App. 493; Rock Island Sash, etc., Works *v.* Pohlman, 99 Ill. App. 670.

Minnesota.— Gray *v.* Commutator Co., 85 Minn. 463, 89 N. W. 322.

New York.— Sesselmann *v.* Metropolitan St. R. Co., 76 N. Y. App. Div. 336, 78 N. Y. Suppl. 482.

Ohio.— Michigan Cent. R. Co. *v.* Waterworth, 21 Ohio Cir. Ct. 495, 11 Ohio Cir. Dec. 621.

Texas.— Galveston, etc., R. Co. *v.* Courtney, 30 Tex. Civ. App. 544, 71 S. W. 307; Ft. Worth, etc., R. Co. *v.* Bowen, 30 Tex. Civ. App. 14, 68 S. W. 700; Greenville Oil, etc., Co. *v.* Harkey, 20 Tex. Civ. App. 225, 48 S. W. 1005; International, etc., R. Co. *v.* Bonatz, (Civ. App. 1898) 48 S. W. 767.

See 15 Cent. Dig. tit. "Damages," § 361.

58. St. Louis, etc., R. Co. *v.* Waren, 65 Ark. 619, 48 S. W. 222; Stiller *v.* Bohn Mfg. Co., 80 Minn. 1, 82 N. W. 981; Gahagan *v.* Aerometer Co., 67 Minn. 252, 69 N. W. 914.

59. *Arizona.*— Hobson *v.* New Mexico, etc., R. Co., (1886) 11 Pac. 545.

Colorado.— Colorado Midland R. Co. *v.* O'Brien, 16 Colo. 219, 27 Pac. 701.

Kentucky.— Illinois Cent. R. Co. *v.* Stewart, 63 S. W. 596, 23 Ky. L. Rep. 637.

unless the damages as rendered by the jury are so clearly excessive as to shock the sense of justice.[60]

2. Paralysis or Injury to the Nervous System. In cases of paralysis or injury to the nervous system a verdict will rarely be considered excessive.[61] So in injuries to the spine that have resulted from a personal injury, the court is little inclined to interfere with a verdict on the ground that it is excessive.[62]

3. Epileptic Fits. Where as the result of a personal injury the plaintiff has become subject to epileptic fits and his general health ruined, a verdict will not be set aside as excessive.[63]

Minnesota.— Fonda *v.* St. Paul City R. Co., 77 Minn. 536, 79 N. W. 1043.

Texas.— Gulf, etc., R. Co. *v.* Shelton, 30 Tex. Civ. App. 72, 69 S. W. 653 [rehearing *denied* in (Civ. App. 1902) 70 S. W. 359].

See 15 Cent. Dig. tit. "Damages," § 382.

60. Chicago, etc., R. Co. *v.* Jackson, 55 Ill. 492, 8 Am. Rep. 661; Pfeffer *v.* Buffalo R. Co., 4 Misc. (N. Y.) 465, 24 N. Y. Suppl. 490; Heddles *v.* Chicago, etc., R. Co., 74 Wis. 239, 42 N. W. 237.

61. *District of Columbia.*— Woods *v.* Trinity Parish, 21 D. C. 540.

Illinois.— Chicago *v.* Herz, 87 Ill. 541; Elgin *v.* Nofs, 103 Ill. App. 11; West Chicago St. R. Co. *v.* Lieserowitz, 99 Ill. App. 591 [*affirmed* in 197 Ill. 607, 64 N. E. 718]; Illinois Cent. R. Co. *v.* Robinson, 58 Ill. App. 181; Chicago, etc., R. Co. *v.* Fisher, 38 Ill. App. 33.

Kansas.— Atchison, etc., R. Co. *v.* Lee, 8 Kan. App. 24, 54 Pac. 4.

Minnesota.— Bishop *v.* St. Paul City R. Co., 48 Minn. 26, 50 N. W. 927.

Missouri.— Cobb *v.* St. Louis, etc., R. Co., 149 Mo. 609, 50 S. W. 894; Smith *v.* Chicago, etc., R. Co., 119 Mo. 246, 23 S. W. 784; Gratiot *v.* Missouri Pac. R. Co., 116 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189 [*affirming* (1891) 16 S. W. 384]; Mellor *v.* Missouri Pac. R. Co., (1890) 14 S. W. 758.

New York.— Lacs *v.* Everard's Breweries, 61 N. Y. App. Div. 431, 70 N. Y. Suppl. 672; Harrold *v.* New York El. R. Co., 24 Hun 184; Degnan *v.* Brooklyn City R. Co., 14 Misc. 388, 35 N. Y. Suppl. 1047; Stephens *v.* Hudson Valley Knitting Co., 20 N. Y. Suppl. 916; Alexander *v.* Rochester City, etc., R. Co., 12 N. Y. Suppl. 685.

Pennsylvania.— Willis *v.* Second Ave. Traction Co., 189 Pa. St. 430, 42 Atl. 1.

Texas.— Missouri Pac. R. Co. *v.* Mitchell, 72 Tex. 171, 10 S. W. 411; Galveston, etc., R. Co. *v.* Nass, (Civ. App. 1900) 57 S. W. 910; Atchison, etc., R. Co. *v.* Click, (Civ. App. 1895) 32 S. W. 226; Gulf, etc., R. Co. *v.* Pendery, (Civ. App. 1894) 27 S. W. 213.

Washington.— Sutton *v.* Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847.

Wisconsin.— Nicoud *v.* Wagner, 106 Wis. 67, 81 N. W. 999.

United States.— The Homer, 99 Fed. 795; Cleveland, etc., R. Co. *v.* Brown, 56 Fed. 804, 6 C. C. A. 142; McNeil *v.* The Para, 56 Fed. 241; Taylor *v.* Pennsylvania Co., 50 Fed. 755; Osborne *v.* Detroit, 32 Fed. 36.

See 15 Cent. Dig. tit. "Damages," § 374.

62. *Alabama.*— Alabama Great Southern R. Co. *v.* Bailey, 112 Ala. 167, 20 So. 313.

California.— Smith *v.* Whittier, 95 Cal. 279, 30 Pac. 529.

Illinois.— Illinois Cent. R. Co. *v.* Parks, 88 Ill. 373; Lanark *v.* Dougherty, 45 Ill. App. 266; Wabash Western R. Co. *v.* Friedman, 41 Ill. App. 270 [*reversed* on other grounds in 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111]; Chicago, etc., R. Co. *v.* Fisher, 38 Ill. App. 33.

Indiana.— Terre Haute, etc., R. Co. *v.* Sheeks, 155 Ind. 74, 56 N. E. 434.

Kentucky.— Louisville, etc., R. Co. *v.* McEwan, 51 S. W. 619, 21 Ky. L. Rep. 487; Louisville, etc., R. Co. *v.* Abell, 14 Ky. L. Rep. 239.

Louisiana.— Wardle *v.* New Orleans City R. Co., 35 La. Ann. 202.

Minnesota.— Macy *v.* St. Paul, etc., R. Co., 35 Minn. 200, 28 N. W. 249; Waldron *v.* St. Paul, 33 Minn. 87, 22 N. W. 4.

Missouri.— Barr *v.* Kansas, 121 Mo. 22, 25 S. W. 562.

New York.— Tierney *v.* Syracuse, etc., R. Co., 85 Hun 146, 32 N. Y. Suppl. 627; Stouter *v.* Manhattan R. Co., 3 Silv. Supreme 413, 6 N. Y. Suppl. 163.

Texas.— Missouri, etc., R. Co. *v.* Nail, 24 Tex. Civ. App. 114, 58 S. W. 165.

United States.— McCord *v.* The Tiber, 15 Fed. Cas. No. 8,715, 6 Biss. 409.

See 15 Cent. Dig. tit. "Damages," § 387.

Progressive and incurable disease.— A verdict of ten thousand dollars for personal injuries is not excessive, the evidence showing that plaintiff had sustained a fracture of two ribs, contusion on the whole chest, bruises on the back, head, and hand, and had developed pleurisy from the rib fracture, and a nervous tremor, indicating chronic sclerosis of the spinal cord and brain, which was progressive and incurable. Clark *v.* Brooklyn Heights R. Co., 78 N. Y. App. Div. 478, 79 N. Y. Suppl. 811.

63. Gidionsen *v.* Union Depot R. Co., 129 Mo. 392, 31 S. W. 800; International, etc., R. Co. *v.* Brazzil, 78 Tex. 314, 14 S. W. 609.

Chance of recovery.— In McKenna *v.* North Hudson County R. Co., 64 N. J. L. 106, 45 Atl. 776, it was held that a verdict for nine thousand dollars damages against a street-railroad company would be held excessive where it appeared that plaintiff at the time of the accident was a machinist, twenty-nine years of age, earning from forty-seven to seventy-five dollars per month, although there was evidence that since the accident he had been nervous, sleepless, and troubled with defective eyesight, hearing, and smell, headache, and loss of memory, and that he is liable at any time to epilepsy and paresis, the

4. Loss or Impairment of Sight or Hearing. Where there has been a total loss of sight or hearing, or where such faculties have been materially impaired, the courts have, in view of the affliction, considered verdicts as compensation rather than as excessive damages,[64] and in no case will they be set aside unless they are grossly inadequate or savor of malice.

5. Permanent Injuries. In actions for personal injuries in deciding whether a verdict is excessive or not, the court will usually take into consideration whether the injuries are permanent or only temporary.[65] Where it appears from the evi-

result of a fracture of the skull, since there was also evidence that his chances for recovery were very fair, and that he might be able to do as much work as before the accident.

64. *California.*— Clare *v.* Sacramento Electric Power, etc., Co., 122 Cal. 504, 55 Pac. 326.

Georgia.— Davis *v.* Central R. Co., 60 Ga. 329.

Illinois.— Chicago Gen. R. Co. *v.* McNamara, 94 Ill. App. 188; Illinois Cent. R. Co. *v.* Treat, 75 Ill. App. 327. And see Illinois Steel Co. *v.* Sitar, 98 Ill. App. 300 [*affirmed* in 199 Ill. 116, 64 N. E. 984]; Stearns *v.* Reidy, 33 Ill. App. 246 [*affirmed* in 135 Ill. 119, 25 N. E. 762].

Indiana.— Van Camp Hardware, etc., Co. *v.* O'Brien, 28 Ind. App. 152, 62 N. E. 464; Famous Mfg. Co. *v.* Harmon, 28 Ind. App. 117, 62 N. E. 306.

Minnesota.— Kennedy *v.* Chicago, etc., R. Co., 57 Minn. 227, 58 N. W. 878.

Missouri.— Bane *v.* Irwin, 172 Mo. 306, 72 S. W. 522; Jones *v.* St. Louis Southwestern R. Co., 125 Mo. 666, 28 S. W. 883, 46 Am. St. Rep. 514, 26 L. R. A. 718; Johnson *v.* Missouri Pac. R. Co., 96 Mo. 340, 9 S. W. 790, 9 Am. St. Rep. 351.

New Jersey.— West *v.* New Jersey R., etc., Co., 32 N. J. L. 91.

New York.— Stewart *v.* Long Island R. Co., 166 N. Y. 604, 59 N. E. 1130 [*affirming* 54 N. Y. App. Div. 623, 66 N. Y. Suppl. 436].

Rhode Island.— Cummings *v.* National, etc., Worsted Mills, (1902) 53 Atl. 280.

Texas.— Texas Pac. R. Co. *v.* Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60; Houston, etc., R. Co. *v.* Lowe, (Sup. 1889) 11 S. W. 1065; Missouri, etc., R. Co. *v.* Flood, (Civ. App. 1902) 70 S. W. 331; Texas, etc., R. Co. *v.* Bowlin, (Civ. App. 1895) 32 S. W. 918; Missouri, etc., R. Co. *v.* Huff, (Civ. App. 1895) 32 S. W. 551. And see Missouri, etc., R. Co. *v.* Parker, 20 Tex. Civ. App. 470, 49 S. W. 717, 50 S. W. 606.

Wisconsin.— Bridge *v.* Oshkosh, 71 Wis. 363, 37 N. W. 409.

United States.— Mather *v.* Rillston, 156 U. S. 391, 15 S. Ct. 464, 39 L. ed. 464; The Pioneer, 78 Fed. 600.

See 15 Cent. Dig. tit "Damages," § 385.

Damages excessive — One eye.— In De La Vergne Refrigerating Mach. Co. *v.* Stahl, 24 Tex. Civ. App. 471, 60 S. W. 319, it was held that a judgment for eight thousand dollars awarded to plaintiff, who was twenty-four years of age, for the loss of an eye, with the usual consequences of such injury, is excessive.

65. *Alabama.*— Birmingham R., etc., Co. *v.* Ward, 124 Ala. 409, 27 So. 471; Kansas City, etc., R. Co. *v.* Lackey, 114 Ala. 152, 21 So. 444; Alabama Great Southern R. Co. *v.* Bailey, 112 Ala. 167, 20 So. 313.

Arkansas.— St. Louis, etc., R. Co. *v.* Baker, 67 Ark. 531, 55 S. W. 941.

California.— Sheyer *v.* Lowell, 134 Cal. 357, 66 Pac. 307; Wahlgren *v.* Market St. R. Co., 132 Cal. 656, 62 Pac. 308, 64 Pac. 993.

Colorado.— Deep Min., etc., Co. *v.* Fitzgerald, 21 Colo. 533, 43 Pac. 210.

Georgia.— Macon Consol. St. R. Co. *v.* Barnes, 113 Ga. 212, 38 S. E. 756.

Illinois.— Chicago City R. Co. *v.* Morse, 197 Ill. 327, 64 N. E. 304 [*affirming* 98 Ill. App. 662]; Spring Valley *v.* Gavin, 182 Ill. 232, 54 N. E. 1035; North Chicago St. R. Co. *v.* Zeiger, 182 Ill. 9, 54 N. E. 1006, 74 Am. St. Rep. 157; Chicago, etc., R. Co. *v.* Blaul, 175 Ill. 183, 51 N. E. 895; Lake St. El. R. Co. *v.* Burgess, 99 Ill. App. 499; Pennsylvania Co. *v.* Reidy, 99 Ill. App. 477 [*affirmed* in 198 Ill. 9, 64 N. E. 698]; Chicago, etc., R. Co. *v.* Murphy, 99 Ill. App. 126 [*affirmed* in 198 Ill. 462, 64 N. E. 1011].

Indiana.— Terre Haute, etc., R. Co. *v.* Sheeks, 155 Ind. 74, 56 N. E. 434.

Iowa.— Keyes *v.* Cedar Falls, 107 Iowa 509, 78 N. W. 227.

Kansas.— James *v.* Hayes, 63 Kan. 133, 65 Pac. 241; Wichita *v.* Stallings, (Sup. 1898) 54 Pac. 689; Atchison, etc., R. Co. *v.* Lee, 8 Kan. App. 24, 54 Pac. 4; Topeka *v.* Bradshaw, (App. 1897) 48 Pac. 751.

Kentucky.— Louisville, etc., R. Co. *v.* Davis, 71 S. W. 658, 24 Ky. L. Rep. 1415; Covington *v.* Diehl, 59 S. W. 492, 22 Ky. L. Rep. 955; Louisville, etc., R. Co. *v.* Lyon, 58 S. W. 434, 22 Ky. L. Rep. 544; Baltimore, etc., R. Co. *v.* Hausman, 54 S. W. 841, 21 Ky. L. Rep. 1264; Henderson *v.* White, 49 S. W. 764, 20 Ky. L. Rep. 1525.

Louisiana.— Joseph *v.* Edison Electric Co., 104 La. 634, 29 So. 223.

Michigan.— Boyle *v.* Saginaw, 124 Mich. 348, 82 N. W. 1057.

Minnesota.— Ljungberg *v.* North Mankato, 87 Minn. 484, 92 N. W. 401; Herbert *v.* St. Paul City R. Co., 85 Minn. 341, 88 N. W. 996; Lammers *v.* Great Northern R. Co., 82 Minn. 120, 84 N. W. 728; Schultz *v.* Faribault Consol. Gas, etc., Co., 82 Minn. 100, 84 N. W. 631; Durose *v.* St. Paul City R. Co., 80 Minn. 512, 83 N. W. 397; Weiner *v.* Minneapolis St. R. Co., 80 Minn. 312, 83 N. W. 181.

Missouri.— Oglesby *v.* Missouri Pac. R. Co., 150 Mo. 137, 37 S. W. 829, 51 S. W. 758; Hollenbeck *v.* Missouri Pac. R. Co., 141

dence that the injury complained of has proved or is liable to prove permanent, the appellate courts are little inclined to interfere on the ground of excessive damages.[66] Indeed the courts have gone so far as to refuse interference on the ground of excessive damages not only where there is a probability of permanent

Mo. 97, 38 S. W. 723, 41 S. W. 887; Mabrey *v.* Cape Girardeau, etc., Gravel Road Co., (App. 1902) 69 S. W. 394; Stoetzele *v.* Swearingen, 90 Mo. App. 588; Covell *v.* Wabash R. Co., 82 Mo. App. 180.

New Jersey.— Hanley *v.* North Jersey St. R. Co., (Sup. 1900) 47 Atl. 445; McKenna *v.* North Hudson County R. Co., 64 N. J. L. 106, 45 Atl. 776; Burr *v.* Pennsylvania R. Co., 64 N. J. L. 30, 44 Atl. 845. And see Fox *v.* Wharton, 64 N. J. L. 453, 45 Atl. 793.

New York.— Koehne *v.* New York, etc., R. Co., 165 N. Y. 603, 58 N. E. 1089; Coxhead *v.* Johnson, 162 N. Y. 640, 57 N. E. 1107; Clegg *v.* Metropolitan St. R. Co., 159 N. Y. 550, 54 N. E. 1089; Sidmonds *v.* Brooklyn Heights R. Co., 69 N. Y. App. Div. 471, 74 N. Y. Suppl. 989; Ivey *v.* Brooklyn Heights R. Co., 63 N. Y. App. Div. 311, 71 N. Y. Suppl. 633; Radjaviller *v.* Third Ave. R. Co., 58 N. Y. App. Div. 11, 68 N. Y. Suppl. 617; Smith *v.* Nassau Electric R. Co., 57 N. Y. App. Div. 152, 67 N. Y. Suppl. 1044.

Ohio.— Toledo *v.* Radbone, 23 Ohio Cir. Ct. 268; Lake Shore, etc., R. Co. *v.* Topliff, 18 Ohio Cir. Ct. 709; Toledo Consol. St. R. Co. *v.* Rohner, 6 Ohio Cir. Dec. 706. And see Wheeling, etc., R. Co. *v.* Suhrwiar, 22 Ohio Cir. Ct. 560.

Oklahoma.— Long *v.* McWilliams, 11 Okla. 562, 69 Pac. 882.

Tennessee.— Ritt *v.* True Tag Paint Co., 108 Tenn. 646, 69 S. W. 324; West Memphis Packet Co. *v.* White, 99 Tenn. 256, 41 S. W. 583, 38 L. R. A. 427.

Texas.— Galveston, etc., R. Co. *v.* Abbey, 29 Tex. Civ. App. 211, 68 S. W. 293; San Antonio Gas Co. *v.* Singleton, 24 Tex. Civ. App. 341, 59 S. W. 920; Galveston, etc., R. Co. *v.* Kief, (Civ. App. 1900) 58 S. W. 625; St. Louis Southwestern R. Co. *v.* Germany, (Civ. App. 1900) 56 S. W. 586; International, etc., R. Co. *v.* Dalwigh, (Civ. App. 1900), 56 S. W. 136; Gulf, etc., R. Co. *v.* Warner, 22 Tex. Civ. App. 167, 54 S. W. 1064; International, etc., R. Co. *v.* Elkins, (Civ. App. 1899) 54 S. W. 931.

Utah.— Chipman *v.* Union Pac. R. Co., 12 Utah 68, 41 Pac. 562; Chapman *v.* Southern Pac. Co., 12 Utah 30, 41 Pac. 551.

Virginia.—Norfolk *v.* Johnakin, 94 Va. 285, 26 S. E. 830.

Washington.— Durham *v.* Spokane, 27 Wash. 615, 68 Pac. 383.

Wisconsin.— Collins *v.* Janesville, 107 Wis. 436, 83 N. W. 695; Renne *v.* U. S. Leather Co., 107 Wis. 305, 83 N. W. 473; McMahon *v.* Eau Claire Water Works Co., 95 Wis. 640, 70 N. W. 829.

United States.— The Anchoria, 113 Fed. 982; The Iroquois, 113 Fed. 964; Western Union Tel. Co. *v.* Engler, 75 Fed. 102, 21 C. C. A. 246.

See 15 Cent. Dig. tit. "Damages," § 372.

66. *Alabama.*—Southern R. Co. *v.* Crowder, 130 Ala. 256, 30 So. 592; Kansas City, etc., R. Co. *v.* Lackey, 114 Ala. 152, 21 So. 444.

Arkansas.— Fordyce *v.* Jackson, 56 Ark. 594, 20 S. W. 528, 597.

California.— Dolan *v.* Sierra R. Co., 135 Cal. 435, 67 Pac. 686; Wahlgren *v.* Market St. R. Co., 132 Cal. 656, 62 Pac. 308, 64 Pac. 993; Howland *v.* Oakland Consol. St. R. Co., 110 Cal. 513, 42 Pac. 983; Morgan *v.* Southern Pac. Co., 95 Cal. 501, 30 Pac. 601.

Colorado.— Union Gold Min. Co. *v.* Crawford, 29 Colo. 511, 69 Pac. 600.

Georgia.— Macon Consol. St. R. Co. *v.* Barnes, 113 Ga. 212, 38 S. E. 756.

Illinois.— Spring Valley *v.* Gavin, 182 Ill. 232, 54 N. E. 1035 [*affirming* 81 Ill. App. 456]; Chicago, etc., R. Co. *v.* Blaul, 175 Ill. 183, 51 N. E. 895 [*affirming* 70 Ill. App. 518]; Elgin *v.* Renwick, 86 Ill. 498; Chicago *v.* Langlass, 66 Ill. 361; Pittsburgh, etc., R. Co. *v.* Thompson, 56 Ill. 138; Springfield Consol. R. Co. *v.* Puntenney, 101 Ill. App. 95 [*affirmed* in 200 Ill. 9, 65 N. E. 442].

Indiana.— Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Kelsey *v.* Hay, 84 Ind. 189; Decatur *v.* Stoops, 21 Ind. App. 397, 52 N. E. 623.

Iowa.— Pence *v.* Wabash R. Co., 116 Iowa 279, 90 N. W. 59; Stomne *v.* Hanford Produce Co., 108 Iowa 137, 78 N. W. 841; Keyes *v.* Cedar Falls, 107 Iowa 509, 78 N. W. 227; Fleming *v.* Shenandoah, 71 Iowa 456, 32 N. W. 456; Deppe *v.* Chicago, etc., R. Co., 38 Iowa 592; Rowell *v.* Williams, 29 Iowa 210.

Kansas.—Wichita *v.* Stallings, (Sup. 1898) 54 Pac. 689; Topeka *v.* Bradshaw, (App. 1897) 48 Pac. 751.

Kentucky.— Continental Tobacco Co. *v.* Knoop, 71 S. W. 3, 24 Ky. L. Rep. 1268; Illinois Cent. R. Co. *v.* Taylor, 70 S. W. 825, 24 Ky. L. Rep. 1169; Louisville, etc., R. Co. *v.* Cooper, 65 S. W. 795, 23 Ky. L. Rep. 1658; Louisville, etc., R. Co. *v.* Bowlds, 64 S. W. 957, 23 Ky. L. Rep. 1202; Bowling Green Stone Co. *v.* Capshaw, 64 S. W. 507, 23 Ky. L. Rep. 945.

Massachusetts.— Shaw *v.* Boston, etc., R. Corp., 8 Gray 45.

Minnesota.— Howe *v.* Minneapolis, etc., R. Co., 62 Minn. 71, 64 N. W. 102, 54 Am. St. Rep. 616, 30 L. R. A. 684; Galloway *v.* Chicago, etc., R. Co., 56 Minn. 346, 57 N. W. 1058, 45 Am. St. Rep. 468, 23 L. R. A. 442; Watson *v.* Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742; Greene *v.* Minneapolis, etc., R. Co., 31 Minn. 248, 17 N. W. 378, 47 Am. Rep. 785.

Missouri.— Oglesby *v.* Missouri Pac. R. Co., 150 Mo. 137, 37 S. W. 829, 51 S. W. 758; Hollenbeck *v.* Missouri Pac. R. Co., 141 Mo. 97, 38 S. W. 723, 41 S. W. 887; Gorham *v.* Kansas City, etc., R. Co., 113 Mo. 408, 20 S. W. 1060; Covell *v.* Wabash R. Co., 82 Mo. App. 180.

injury, but where the evidence shows that a possibility exists.[67] Even where the evidence is conflicting as to the permanency of the injury[68] or where the recovery is doubtful the courts will not set aside a verdict as excessive.[69]

6. Impairment of Earning Capacity — a. In General. Where by reason of a personal injury the earning capacity of the plaintiff has been impaired, the courts will rarely set aside a verdict that shows any proportion to the earning capacity

Nevada.— Taylor *v.* Nevada-California-Oregon R. Co., 26 Nev. 415, 69 Pac. 858.

New Jersey.— Smith *v.* P. Lorillard Co., 67 N. J. L. 361, 51 Atl. 928; Burr *v.* Pennsylvania R. Co., 64 N. J. L. 30, 44 Atl. 845.

New York.— Koehne *v.* New York, etc., R. Co., 165 N. Y. 603, 58 N. E. 1089 [*affirming* 32 N. Y. App. Div. 419, 52 N. Y. Suppl. 1088]; Bertsch *v.* Metropolitan St. R. Co., 68 N. Y. App. Div. 228, 74 N. Y. Suppl. 238; Jarvis *v.* Metropolitan St. R. Co., 65 N. Y. App. Div. 490, 72 N. Y. Suppl. 829; Baird *v.* New York Cent., etc., R. Co., 64 N. Y. App. Div. 14, 71 N. Y. Suppl. 734 [*affirmed* in 172 N. Y. 637, 65 N. E. 1113].

Ohio.— Lake Shore, etc., R. Co. *v.* Topliff, 18 Ohio Cir. Ct. 709.

Oregon.— Skottowe *v.* Oregon Short Line, etc., R. Co., 22 Oreg. 430, 30 Pac. 222, 16 L. R. A. 593; Stone *v.* Pendleton, 21 Oreg. 332, 43 Atl. 643.

Rhode Island.— Blackwell *v.* O'Gorman Co., 22 R. I. 638, 49 Atl. 28.

Tennessee.— Rift *v.* True Tag Paint Co., 108 Tenn. 646, 69 S. W. 324; West Memphis Packet Co. *v.* White, 99 Tenn. 256, 41 S. W. 583, 38 L. R. A. 427; East Tennessee, etc., R. Co. *v.* Staub, 7 Lea 397.

Texas.— St. Louis, etc., R. Co. *v.* McClain, 80 Tex. 85, 15 S. W. 789; Texas, etc., R. Co. *v.* Brown, 78 Tex. 397, 14 S. W. 1034; Howard Oil Co. *v.* Davis, 76 Tex. 630, 13 S. W. 665; Ft. Worth St. R. Co. *v.* Witten, 74 Tex. 202, 11 S. W. 1091; Dallas, etc., R. Co. *v.* Able, 72 Tex. 150, 9 S. W. 871; Texas Pac. R. Co. *v.* Davidson, 68 Tex. 370, 4 S. W. 636; Galveston City R. Co. *v.* Hewitt, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32; Gulf, etc., R. Co. *v.* Dorsey, 66 Tex. 148, 18 S. W. 444.

Utah.— Daniels *v.* Union Pac. R. Co., 6 Utah 357, 23 Pac. 762; Griffiths *v.* Clift, 4 Utah 462, 11 Pac. 609.

Washington.— Jordan *v.* Seattle, 30 Wash. 298, 70 Pac. 743; Durham *v.* Spokane, 27 Wash. 615, 68 Pac. 383.

Wisconsin.— McMahon *v.* Eau Claire Water Works, 95 Wis. 640, 70 N. W. 829; Smalley *v.* Appleton, 75 Wis. 18, 43 N. W. 826; Cummings *v.* National Furnace Co., 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; Karasich *v.* Hasbrouck, 28 Wis. 569.

United States.— The Anchoria, 113 Fed. 982; The Raleigh, 41 Fed. 527.

See 15 Cent. Dig. tit. "Damages," § 372 *et seq.*

A verdict of five thousand dollars in a child's favor for negligence is not excessive, where it has sustained permanent injuries, among which are a double fracture of a limb, injury to the spine, and partial paralysis, that is probably permanent, of the limbs and lower organs. Roanoke *v.* Shull, 97 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791.

67. *Alabama.*— Birmingham *v.* Lewis, 92 Ala. 352, 9 So. 243.

Illinois.— Chicago, etc., R. Co. *v.* Sullivan, 21 Ill. App. 580; Hyde Park *v.* Robinson, 18 Ill. App. 494.

Indiana.—Evansville *v.* Wilter, 86 Ind. 414.

Iowa.—Morgan *v.* Fremont County, 92 Iowa 644, 61 N. W. 231.

Kentucky.— Louisville, etc., R. Co. *v.* Brannan, 13 Ky. L. Rep. 334.

Missouri.— Clark *v.* Chicago, etc., R. Co., 127 Mo. 197, 29 S. W. 1013; Hanlon *v.* Missouri Pac. R. Co., 104 Mo. 381, 16 S. W. 233; Hall *v.* St. Joseph Water Co., 48 Mo. App. 356; Wills *v.* Cape Girardeau Southwestern R. Co., 44 Mo. App. 51.

New York.— Kirk *v.* Homer, 77 Hun 459, 28 N. Y. Suppl. 1009; Groves *v.* Rochester, 39 Hun 5; Quinn *v.* Long Island R. Co., 34 Hun 331; Mooney *v.* Hudson River R. Co., 1 Sweeny 325; Ferguson *v.* Ehret, 14 Misc. 454, 35 N. Y. Suppl. 1020.

Texas.— Missouri Pac. R. Co. *v.* Aiken, 71 Tex. 373, 9 S. W. 437; Missouri Pac. R. Co. *v.* Jarrard, 65 Tex. 560; International, etc., R. Co. *v.* Stewart, 57 Tex. 166; Missouri, etc., R. Co. *v.* Cook, 12 Tex. Civ. App. 203, 33 S. W. 669.

Wisconsin.— McDermott *v.* Chicago, etc., R. Co., 85 Wis. 102, 55 N. W. 179; Heucke *v.* Milwaukee City R. Co., 69 Wis. 401, 34 N. W. 243; Hall *v.* Fond du Lac, 42 Wis. 274.

United States.— Southern Pac. Co. *v.* Rauth, 49 Fed. 696, 1 C. C. A. 416.

See 15 Cent. Dig. tit. "Damages," § 372 *et seq.*

Some evidence of permanent injury.—Plaintiff was struck by a window frame and some bricks falling from the upper story of a building. His head was cut and he was badly bruised. He was confined to his bed for two weeks, and to the house for three weeks longer. After the accident he was subject to violent headaches several times a week, and to fits of dizziness, neither of which had he been subject to before the accident, and there was some evidence that these conditions would be permanent. It was held that a verdict for one thousand dollars was not excessive. Bishof *v.* Leahy, 54 N. Y. App. Div. 619, 66 N. Y. Suppl. 342.

68. Black *v.* Missouri Pac. R. Co., 172 Mo. 177, 72 S. W. 559; Missouri Pac. R. Co. *v.* Aiken, 71 Tex. 373, 9 S. W. 437; McDermott *v.* Chicago, etc., R. Co., 85 Wis. 102, 55 N. W. 179; Heucke *v.* Milwaukee City R. Co., 69 Wis. 401, 34 N. W. 243.

69. Chicago, etc., R. Co. *v.* Sullivan, 21 Ill. App. 580; Evansville *v.* Wilter, 86 Ind. 414.

as shown by the evidence.[70] Especially is this the case where the injury complained of has resulted in a lifelong incapacity to labor.[71]

70. *Alabama.*— Richmond, etc., R. Co. *v.* Farmer, 97 Ala. 141, 12 So. 86.

District of Columbia.— Woodbury *v.* District of Columbia, 5 Mackey 127.

Georgia.— Georgia R., etc., Co. *v.* Keating, 99 Ga. 308, 25 S. E. 669; Americus *v.* Chapman, 94 Ga. 711, 20 S. E. 3; Richmond, etc., R. Co. *v.* Childress, 86 Ga. 85, 12 S. E. 301; Northeastern R. Co. *v.* Chandler, 84 Ga. 37, 10 S. E. 586; Coast Line R. Co. *v.* Boston, 83 Ga. 387, 9 S. E. 1108; Atlanta, etc., R. Co. *v.* Smith, 81 Ga. 620, 8 S. E. 446; Western, etc., R. Co. *v.* Drysdale, 51 Ga. 644.

Illinois.— Sorgenfrei *v.* Schroeder, 75 Ill. 397; Brookside Coal Min. Co. *v.* Hajnal, 101 Ill. App. 175; Frazer *v.* Schroeder, 60 Ill. App. 519; West Chicago St. R. Co. *v.* Bode, 51 Ill. App. 440; North Chicago St. R. Co. *v.* Eldridge, 51 Ill. App. 430; Chicago *v.* Sanders, 50 Ill. App. 136; Pennsylvania Co. *v.* Versten, 41 Ill. App. 345.

Iowa.— Miller *v.* Boone County, 95 Iowa 5, 63 N. W. 352; Harker *v.* Burlington, etc., R. Co., 88 Iowa 409, 55 N. W. 316, 45 Am. St. Rep. 242; Wesley *v.* Chicago, etc., R. Co., 84 Iowa 441, 51 N. W. 163; Pence *v.* Chicago, etc., R. Co., 79 Iowa 389, 44 N. W. 686; Weber *v.* Creston, 75 Iowa 16, 39 N. W. 126; Knapp *v.* Sioux City, etc., R. Co., 71 Iowa 41, 32 N. W. 18; Belair *v.* Chicago, etc., R. Co., 43 Iowa 662.

Kansas.— Southern Kan. R. Co. *v.* Walsh, 45 Kan. 653, 26 Pac. 45.

Kentucky.— Baltimore, etc., R. Co. *v.* Hausman, 54 S. W. 841, 21 Ky. L. Rep. 1264; Louisville, etc., R. Co. *v.* Constantine, 14 Ky. L. Rep. 432.

Michigan.— Kinney *v.* Folkerts, 84 Mich. 616, 48 N. W. 283.

Minnesota.— Cooper *v.* St. Paul City R. Co., 54 Minn. 379, 56 N. W. 42.

Missouri.— Lemoine *v.* Cook, 36 Mo. App. 193; Drain *v.* St. Louis, etc., R. Co., 10 Mo. App. 531.

Nevada.— Solen *v.* Virginia, etc., R. Co., 13 Nev. 106.

New York.— Hill *v.* Starin, 65 N. Y. App. Div. 361, 73 N. Y. Suppl. 91; French *v.* Brooklyn Heights R. Co., 57 N. Y. App. Div. 204, 68 N. Y. Suppl. 287; Mayer *v.* Liebmann, 16 N. Y. App. Div. 54, 44 N. Y. Suppl. 1067; Dieffenbach *v.* New York, etc., R. Co., 5 N. Y. App. Div. 91, 38 N. Y. Suppl. 788; Miller *v.* Manhattan R. Co., 73 Hun 512, 26 N. Y. Suppl. 162; Soderman *v.* Troy Steel, etc., Co., 70 Hun 449, 24 N. Y. Suppl. 401.

Ohio.— Toledo Consol. St. R. Co. *v.* Rohner, 6 Ohio Cir. Dec. 706.

Oklahoma.— Oklahoma City *v.* Welsh, 3 Okla. 288, 41 Pac. 598.

Texas.— San Antonio, etc., R. Co. *v.* Brooking, (Civ. App. 1899) 51 S. W. 537; Galveston, etc., R. Co. *v.* Hynes, 21 Tex. Civ. App. 34, 50 S. W. 624; Texas, etc., R. Co. *v.* Johnson, (Civ. App. 1896) 34 S. W. 186; Houston City St. R. Co. *v.* Ross, (Civ. App. 1894) 28 S. W. 254; Houston City St. R. Co. *v.* Richart, (Civ. App. 1894) 27 S. W. 918.

Virginia.— Richmond R., etc., Co. *v.* Garthright, 92 Va. 627, 24 S. E. 267, 53 Am. St. Rep. 839, 32 L. R. A. 220.

Washington.— Sears *v.* Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081; Columbia, etc., R. Co. *v.* Hawthorne, 3 Wash. Terr. 353, 19 Pac. 25.

Wisconsin.— Meracle *v.* Down, 64 Wis. 323, 25 N. W. 412; Houfe *v.* Fulton, 34 Wis. 608, 17 Am. Rep. 463; Duffy *v.* Chicago, etc., R. Co., 34 Wis. 188.

United States.— Lowry *v.* Mt. Adams, etc., R. Co., 68 Fed. 827.

See 15 Cent. Dig. tit. "Damages," § 386.

Household work.— Where before the injury plaintiff was a strong, healthy woman, able to do, and doing, all of her housework, but by reason of the injury she had been confined to the house most of the time since it occurred, for several months was compelled to keep her knee in a plaster cast, suffered great pain at the time of the trial, could not bend her knee in the natural way, and was only able to walk a short distance at a time, a verdict of six hundred dollars is not excessive. Belvidere *v.* Crichton, 81 Ill. App. 595. See also Lockport *v.* Richards, 81 Ill. App. 533.

No established business.— A verdict for twenty-five thousand dollars for loss of a leg is excessive where plaintiff had no established business, but earned, from such employment as he could obtain, about twelve dollars per week, although he suffered great pain by reason of his injury. Tully *v.* New York, etc., Steamship Co., 10 N. Y. App. Div. 463, 42 N. Y. Suppl. 29.

71. *California.*— Roche *v.* Redington, 125 Cal. 174, 57 Pac. 890.

Illinois.— Illinois Iron, etc., Co. *v.* Weber, 89 Ill. App. 368; Chicago City R. Co. *v.* Leach, 80 Ill. App. 354.

Missouri.— Perrette *v.* Kansas City, 162 Mo. 238, 62 S. W. 448.

Nevada.— Taylor *v.* Nevada-California-Oregon R. Co., 26 Nev. 415, 69 Pac. 858.

New Jersey.— Hires *v.* Atlantic City R. Co., 66 N. J. L. 30, 48 Atl. 1002.

New York.— Eichholz *v.* Niagara Falls Hydraulic Power, etc., Co., 68 N. Y. App. Div. 441, 73 N. Y. Suppl. 842; Perry *v.* Metropolitan St. R. Co., 68 N. Y. App. Div. 351, 74 N. Y. Suppl. 1; Weingarten *v.* Metropolitan St. R. Co., 62 N. Y. App. Div. 364, 70 N. Y. Suppl. 1113; Keiffert *v.* Nassau Electric R. Co., 51 N. Y. App. Div. 301, 64 N. Y. Suppl. 922.

Ohio.— Wheeling, etc., R. Co. *v.* Suhrwiar, 20 Ohio Cir. Ct. 558, 10 Ohio Cir. Dec. 715; Toledo Electric St. R. Co. *v.* Tucker, 13 Ohio Cir. Ct. 411, 7 Ohio Cir. Dec. 169. And see Lake Shore, etc., R. Co. *v.* Starkey, 18 Ohio Cir. Ct. 700, 6 Ohio Cir. Dec. 5.

Texas.— Sabine, etc., R. Co. *v.* Ewing, 7 Tex. Civ. App. 8, 26 S. W. 638; Mexican Cent. R. Co. *v.* Lauricella, (Civ. App. 1894) 26 S. W. 301.

Washington.— Smith *v.* Spokane, 16 Wash. 403, 47 Pac. 888; Ogle *v.* Jones, 16 Wash.

b. Loss of Earnings or Services of Family in Action by Husband. Where an action is brought by a husband or father for the loss of earnings or services of his wife or infant child, the question whether the verdict will be deemed excessive depends first, upon the age and earning capacity of the party injured;[72] second, upon the expenses incurred;[73] and thirdly, upon the nature and extent of the injuries as inflicted.[74] The court should take into consideration all the elements of the particular case, and where the damages awarded are entirely out of proportion to the injury inflicted the verdict should either be set aside or reduced.[75]

7. Excessive Damages Reduced. Where the damages awarded by the jury are excessive, but the plaintiff is entitled to recover, the court in the exercise of its control over the verdict may suggest a reduction of the damages; or where the suggestion is not accepted may order a new trial on the ground of excessive damages alone.[76] The trial court may require a verdict to be abated on the ground

319, 47 Pac. 747; Sears *v.* Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081; Columbia, etc., R. Co. *v.* Hawthorne, 3 Wash. Terr. 353, 19 Pac. 25.

Wisconsin.— Renne *v.* U. S. Leather Co., 107 Wis. 305, 83 N. W. 473; Duffy *v.* Chicago, etc., R. Co., 34 Wis. 188.

United States.— Lafourche Packet Co. *v.* Henderson, 94 Fed. 871, 36 C. C. A. 519; The Pioneer, 78 Fed. 600.

See 15 Cent. Dig. tit. "Damages," § 386.

One-half earning capacity.— Four thousand dollars is not excessive damages for injury to a comparatively young man, with sound body, long expectancy of life, and good earning capacity, which causes long and protracted suffering, permanently disfigures and cripples him, and leaves him with only about one-half his former ability to earn a living. Arkansas River Packet Co. *v.* Hobbs, 105 Tenn. 29, 58 S. W. 278.

72. Brookside Coal Min. Co. *v.* Dolph, 101 Ill. App. 174; Hurt *v.* St. Louis, etc., R. Co., 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374; Cregin *v.* Brooklyn Crosstown R. Co., 18 Hun (N. Y.) 368; Cannon *v.* Brooklyn City R. Co., 14 Misc. (N. Y.) 400, 35 N. Y. Suppl. 1039; Cuming *v.* Brooklyn, etc., R. Co., 5 N. Y. Suppl. 476; Texas, etc., R. Co. *v.* Wood, (Tex. Civ. App. 1893) 24 S. W. 569.

73. Furnish *v.* Missouri Pac. R. Co., 102 Mo. 669, 15 S. W. 315, 22 Am. St. Rep. 800; Kitchell *v.* Brooklyn Heights R. Co., 10 Misc. (N. Y.) 277, 30 N. Y. Suppl. 1079; Cuming *v.* Brooklyn, etc., R. Co., 5 N. Y. Suppl. 476; Houston, etc., R. Co. *v.* Miller, 49 Tex. 322.

74. Baltimore, etc., R. Co. *v.* Keck, 89 Ill. App. 72; Furnish *v.* Missouri Pac. R. Co., 102 Mo. 669, 15 S. W. 315, 22 Am. St. Rep. 800; Allen *v.* Manhattan R. Co., 60 N. Y. Super. Ct. 230, 17 N. Y. Suppl. 187; Cannon *v.* Brooklyn City R. Co., 14 Misc. (N. Y.) 400, 35 N. Y. Suppl. 1039; Kitchell *v.* Brooklyn Heights R. Co., 10 Misc. (N. Y.) 277, 30 N. Y. Suppl. 1079; Houston, etc., R. Co. *v.* Miller, 49 Tex. 322; Gulf, etc., R. Co. *v.* Sandifer, 29 Tex. Civ. App. 356, 69 S. W. 461; Texas, etc., R. Co. *v.* Wood, (Tex. Civ. App. 1893) 24 S. W. 569. Where plaintiff's wife, a stout, healthy woman, was cut and bruised and injured internally about the stomach and bowels, suffering a prolapsus of the womb and frequent menstrual irregularities, it was held that such injuries authorized a verdict for three thousand five hundred dollars in favor of her husband. Sherman, etc., R. Co. *v.* Eaves, 25 Tex. Civ. App. 409, 61 S. W. 550.

Incapacity for wifely duties.— A verdict of seven thousand two hundred and fifty dollars for the loss of services of plaintiff's wife, who was forty-eight years old, is not excessive, as showing the jury to have been influenced by improper motives, where she was practically incapacitated for discharging nearly all wifely duties. Zingrebe *v.* Union R. Co., 56 N. Y. App. Div. 555, 67 N. Y. Suppl. 554.

75. Baltimore, etc., R. Co. *v.* Keck, 89 Ill. App. 72.

Injury not permanent.— A verdict for five thousand dollars against a railroad company, in favor of a father, for personal injuries to his child, where no permanent injury results, is excessive. Alabama Great Southern R. Co. *v.* Burgess, 119 Ala. 555, 25 So. 251, 72 Am. St. Rep. 943.

Verdict reduced.— Where plaintiff, a fifteen-year-old boy, was thrown from a wagon by a collision with a street-car, and suffered bruises and abrasions on the hip which caused lameness and soreness for a time but no disease of the hip-joint itself, a verdict for seven hundred dollars should be reduced to four hundred dollars. Durose *v.* St. Paul City R. Co., 80 Minn. 512, 83 N. W. 397.

76. *Illinois.*— Chicago, etc., R. Co. *v.* Jackson, 55 Ill. 492, 8 Am. Rep. 661; Chicago *v.* Doolan, 99 Ill. App. 143; West Chicago St. R. Co. *v.* Musa, 80 Ill. App. 223; Chicago City R. Co. *v.* Anderson, 80 Ill. App. 71.

Indiana.— Nickey *v.* Zonker, 22 Ind. App. 211, 53 N. E. 478.

Iowa.— Stanley *v.* Core, 119 Iowa 417, 93 N. W. 343; Wimber *v.* Iowa Cent. R. Co., 114 Iowa 551, 87 N. W. 505; Connors *v.* Chingren, 111 Iowa 437, 82 N. W. 934.

Kentucky.— Louisville, etc., R. Co. *v.* Creighton, 106 Ky. 42, 50 S. W. 227, 20 Ky. L. Rep. 1691, 1898.

Louisiana.— Budge *v.* Morgan's Louisiana, etc., R., etc., Co., 108 La. 349, 32 So. 535, 58 L. R. A. 333.

Michigan.— Ribich *v.* Lake Superior Smelt-

that it is excessive, although it is not excessive to a degree which necessarily implies that it was returned under the influence of passion or prejudice.[77] It seems that in some cases the consent of the plaintiff is taken into consideration in reducing damages, although it would seem that the court should itself judge of the reduction in question.[78]

8. INADEQUATE DAMAGES. Courts are usually indisposed to increase verdicts for damages rendered by juries, for the reason that they rarely underestimate them; still such verdicts are subject to the supervision of the court, and in cases where justice clearly declares that the jury has failed to perform its duty,[79] or where

ing Co., 123 Mich. 401, 82 N. W. 279, 81 Am. St. Rep. 215, 48 L. R. A. 649.

Minnesota.—Durose *v.* St. Paul City R. Co., 80 Minn. 512, 83 N. W. 397; Weiner *v.* Minneapolis St. R. Co., 80 Minn. 312, 83 N. W. 181.

Missouri.— Chitty *v.* St. Louis, etc., R. Co., 166 Mo. 435, 65 S. W. 959; Nicholds *v.* Chrystal Plate Glass Co., 126 Mo. 55, 28 S. W. 891.

New Jersey.— Forhman *v.* Consolidated Traction Co., (Sup. 1900) 46 Atl. 783.

New York.— Austin *v.* Bartlett, 67 N. Y. App. Div. 312, 73 N. Y. Suppl. 156; Henn *v.* Long Island R. Co., 51 N. Y. App. Div. 292, 65 N. Y. Suppl. 21; Coppins *v.* New York Cent., etc., R. Co., 48 Hun 292; Ryder *v.* New York, 50 N. Y. Super. Ct. 220; Silberstein *v.* Houston St., etc., R. Co., 4 N. Y. Suppl. 843. And see O'Donnell *v.* American Sugar-Refining Co., 41 N. Y. App. Div. 307, 58 N. Y. Suppl. 640.

Texas.— San Antonio, etc., R. Co. *v.* Connell, 27 Tex. Civ. App. 533, 66 S. W. 246.

Washington.— Cogswell *v.* West St., etc., Electric R. Co., 5 Wash. 46, 31 Pac. 411.

Wisconsin.— Taylor *v.* Chicago, etc., R. Co., 103 Wis. 27, 79 N. W. 17; Heddles *v.* Chicago, etc., R. Co., 74 Wis. 239, 42 N. W. 237.

England.— Davidson *v.* Molyneux, 17 L. T. Rep. N. S. 289.

Canada.— York *v.* Canada Atlantic Steamship Co., 22 Can. Supreme Ct. 167; Miller *v.* Manitoba Lumber, etc., Co., 6 Manitoba 487; Clarke *v.* Murray, T. Wood (Manitoba) 127; Byrd *v.* Corner, 2 Montreal Q. B. 262; Risser *v.* Hart, 5 Nova Scotia 727; Dodge *v.* Windsor, etc., R. Co., 2 Nova Scotia Dec. 537; Clarke *v.* Fullerton, 2 Nova Scotia Dec. 348; Collier *v.* Michigan Cent. R. Co., 27 Ont. App. 630; Dancey *v.* Grand Trunk R. Co., 19 Ont. App. 664; Edmonds *v.* Hamilton Provident, etc., Soc., 18 Ont. App. 347; Emond *v.* Gravel, 12 Quebec 69. In Pratt *v.* Charbonneau, 7 Montreal L. Rep. 24, 34 L. C. Jur. 124, it was held that where damages have been appraised by the court of first instance, and the court of review has reduced the amount, the court of appeal would not interfere with the award of the intermediate court unless it appears that gross injustice has been done.

As to reducing amount of damages in appellate court see APPEAL AND ERROR, 3 Cyc. 430.

Reduction to nominal damages.—Where defendant had induced a person with whom a deed had been intrusted as an escrow to prove and record it, and the jury found that in so inducing her he was actuated by a fraudulent and malicious motive toward plaintiff, the latter had a good cause of action, and the jury were not confined to the actual pecuniary damages which plaintiff had sustained in consequence. It was held that the deed, although registered, could not operate to pass the title, and as plaintiff had proved no actual legal damage the verdict should be reduced to nominal damages. Derry *v.* Derry, 19 N. Brunsw. 621.

77. Carl *v.* Pierce, 20 Ohio Cir. Ct. 68, 10 Ohio Cir. Dec. 711.

78. Where, in an action for damages for the non-delivery of a telegram announcing the death of plaintiff's son, the jury awarded such large damages as to indicate that it was the result of passion, prejudice, corruption, or caprice, the action of the court in reducing the verdict to a proper amount with the consent of the plaintiff is proper, and a new trial is not necessary. Western Union Tel. Co. *v.* Frith, 105 Tenn. 167, 58 S. W. 118.

Reducing verdict.— In Miller *v.* Manitoba Lumber, etc., Co., 6 Manitoba 487, a verdict was rendered which could not be impeached except upon the ground of excessive damages, and it was held that the court might with the plaintiff's consent reduce the damages.

Where a verdict is found against the charge of the judge, and the uncontradicted evidence of the only witness examined at the trial for a larger amount than the evidence warrants, the court will either order a new trial, or if the plaintiff consents, reduce the damages to the sum warranted by the evidence. The court have power so to reduce the damages with the consent of the plaintiff alone, and against the will of the defendant. The question of costs in such cases will depend on the particular circumstances. Risser *v.* Hart, 5 Nova Scotia 727.

Where a verdict is so flagrantly excessive as to be only accounted for on the grounds of prejudice, passion, or misconception, a remittitur by the trial court as a condition of entering judgment does not remove the prejudice, passion, or misconception. These elements may have entered and probably did enter into the finding of other facts important to the issue, if not to the issue itself. Pittsburg, etc., R. Co. *v.* Story, 104 Ill. App. 132; North Chicago St. R. Co. *v.* Hoffart, 82 Ill. App. 539; Nicholson *v.* O'Donald, 79 Ill. App. 195.

79. Sullivan *v.* Vicksburg, etc., R. Co., 39 La. Ann. 800, 2 So. 586, 4 Am. St. Rep. 239; Scheen *v.* Poland, 34 La. Ann. 1107; Decoux

the amount awarded is so small that it is evident the jury must have overlooked some material element of damage, the courts have extended such relief, either by increasing the verdict or granting a new trial.[80] The more general proceeding in such cases, however, is to set aside the verdict as being inadequate under the circumstances.[81]

XI. MEASURE OF DAMAGES.[82]

A. In General. The elementary rule for the measure of damages rests upon the principle of compensation to the party injured for the loss sustained, with the least burden to the party guilty of the breach consistent with the idea of fair compensation, and with the duty upon the party injured to exercise reasonable care to mitigate the injury, according to the opportunities that may fairly be or appear to be within his reach.[83] The measure of damages is governed, not by a fanciful price, but by the actual loss sustained,[84] and the same rule obtains whether the loss be claimed for injury to property, personal injury, or breach of contract.[85]

B. For Injuries to Person — 1. In General. In actions for personal injuries the law does not attempt to fix any precise rule for the measurement of damages, but from the necessity of the case leaves their assessment to the good sense and discretion of the jury.[86] The damages recoverable are dependent upon the cir-

v. Lieux, 33 La. Ann. 392; Richardson *v.* Zuntz, 26 La. Ann. 313.

Judgment restored after reduction.—In Cossette *v.* Dun, 18 Can. Supreme Ct. 222, where the superior court had awarded two thousand dollars to plaintiff for a false report given by a mercantile agency concerning him, the court of appeal reduced this sum to five hundred dollars, but on appeal to the supreme court the judgment of the superior court was restored, the court following Levi *v.* Reed, 6 Can. Supreme Ct. 482.

80. *Mississippi.*— Moseley *v.* Jamison, 68 Miss. 336, 8 So. 744.

Missouri.— Welch *v.* McAllister, 13 Mo. App. 89.

New York.— Sloane *v.* McCauley, 33 Misc. 652, 68 N. Y. Suppl. 187.

England.— Phillips *v.* South Western R. Co., 4 Q. B. D. 406.

Canada.— Leger *v.* Leger, 3 L. C. L. J. 60; Church *v.* Ottawa, 25 Ont. 298, 22 Ont. App. 348. And see Beauregard *v.* Daigneault, 11 Montreal Leg. N. 403.

See 15 Cent. Dig. tit. "Damages," § 370.

A verdict for one cent in damages as the value of a dog found by the jury to have been killed by defendant's negligence should have been set aside as flagrantly against the evidence, as no witness put the value of the dog below the sum of two hundred and fifty dollars. Henderson *v.* Louisville R. Co., 68 S. W. 645, 24 Ky. L. Rep. 394.

Conflict of evidence.—Where plaintiff, a boy of seven years, was struck by defendant's street-car, and his physicians testified that he was losing his mind because of an injury at the base of his brain, while defendant's physician was confident that no such symptoms were present, judgment for one thousand dollars in favor of plaintiff will not be set aside as inadequate. Simonsen *v.* Brooklyn Heights R. Co., 53 N. Y. App. Div. 478, 65 N. Y. Suppl. 1077.

81. *Minnesota.*— Henderson *v.* St. Paul, etc., R. Co., 52 Minn. 479, 55 N. W. 53.

Missouri.— Donovan *v.* Gay, 97 Mo. 440, 11 S. W. 44; Fairgrieve *v.* Moberly, 29 Mo. App. 141.

Nebraska.—Ellsworth *v.* Fairbury, 41 Nebr. 881, 60 N. W. 336.

New Jersey.— Miller *v.* Delaware, etc., R. Co., 58 N. J. L. 428, 33 Atl. 950.

New York.— Brown *v.* Foster, 1 N. Y. App. Div. 578, 37 N. Y. Suppl. 502; Robbins *v.* Hudson River R. Co., 7 Bosw. 1; Smith *v.* Dittman, 16 Daly 427, 11 N. Y. Suppl. 769; Kelly *v.* Rochester, 15 N. Y. Suppl. 29.

Ohio.— Bailey *v.* Cincinnati, 1 Handy 438, 12 Ohio Dec. (Reprint) 225.

Texas.— Michalke *v.* Galveston, etc., R. Co., (Civ. App. 1894) 27 S. W. 164.

Wisconsin.— Robinson *v.* Waupaca, 77 Wis. 544, 46 N. W. 809; Whitney *v.* Milwaukee, 65 Wis. 409, 27 N. W. 39.

See 15 Cent. Dig. tit. "Damages," § 370.

82. **Compensatory damages** see *supra*, VII. **Exemplary damages** see *supra*, IX.

83. McDonald *v.* Unaka Timber Co., 88 Tenn. 38, 12 S. W. 420; International, etc., R. Co. *v.* Nicholson, 61 Tex. 550.

84. International, etc., R. Co. *v.* Nicholson, 61 Tex. 550. See also *supra*, VII, A.

85. See *infra*, XI, B, C, D.

86. *California.*— Wheaton *v.* North Beach, etc., R. Co., 36 Cal. 590; Boyce *v.* California Stage Co., 25 Cal. 460; Aldrich *v.* Palmer, 24 Cal. 513.

Georgia.— Brunswick Light, etc., Co. *v.* Gale, 91 Ga. 813, 18 S. E. 11.

Illinois.— Chicago, etc., R. Co. *v.* Warner, 108 Ill. 538.

Iowa.— Morris *v.* Chicago, etc., R. Co., 45 Iowa 29.

Louisiana.— Frank *v.* New Orleans, etc., Co., 20 La. Ann. 25.

Missouri.— Furnish *v.* Missouri Pac. R. Co., 102 Mo. 669, 15 S. W. 315, 22 Am. St.

cumstances of each particular case, and although the discretion of the jury must be largely depended on, the amount of the recovery must be based on evidence.[87] While, however, there is no absolute measure of damages in actions for personal injuries, the damages awarded should bear a fair basis of compensation for the injury sustained,[88] and should include everything of which a party has been deprived as a direct and natural consequence of the injury.[89] The jury should take into consideration the age and condition in life of the plaintiff, the physical injury inflicted, the bodily pain and mental anguish endured, all expenses incurred in the treatment of the case, and any and all damages which it may appear from the evidence have resulted or will result from the injury.[90] Whether the injury is temporary or permanent and whether a capacity to earn money has been reduced by the accident may also be taken into consideration.[91]

2. PHYSICAL AND MENTAL SUFFERING — a. In General. In estimating damages in cases of injury to the person, the jury may take into consideration the physical pain[92] and mental suffering[93] undergone by the plaintiff as a result of the injury inflicted; and although physical pain and mental anguish cannot be measured by money, and no established rule has been laid down for such measure, yet when properly shown in evidence they have always been considered an element of damage.[94] While mental suffering as distinguished from bodily pain is usually

Rep. 800; Voegeli *v.* Pickel Marble, etc., Co., 56 Mo. App. 678.

Nebraska.—St. Joseph, etc., R. Co. *v.* Hedge, 44 Nebr. 448, 62 N. W. 887.

Pennsylvania.— Pennsylvania R. Co. *v.* Allen, 53 Pa. St. 276.

Texas.— Western Union Tel. Co. *v.* Simpson, 73 Tex. 422, 11 S. W. 385.

Virginia.— Norfolk, etc., R. Co. *v.* Shott, 92 Va. 34, 22 S. E. 811.

United States.—Frericks *v.* Bermes, 22 Fed. 424.

See 15 Cent. Dig. tit. "Damages," § 222 *et seq.*

Discretion limited.— In Waldhier *v.* Hannibal, etc., R. Co., 87 Mo. 37, it was held that while the amount of damages in an action for personal injuries must be left largely to the discretion of the jury, they are not at liberty to give any amount they please.

87. *Illinois.*— Pittsburg, etc., R. Co. *v.* Story, 63 Ill. App. 239.

Iowa.— Morris *v.* Chicago, etc., R. Co., 45 Iowa 29.

Nebraska.—St. Joseph, etc., R. Co. *v.* Hedge, 44 Nebr. 448, 62 N. W. 887.

Pennsylvania.— Pennsylvania R. Co. *v.* Allen, 53 Pa. St. 276.

Texas.— Western Union Tel. Co. *v.* Simpson, 73 Tex. 422, 11 S. W. 385.

United States.— Kennon *v.* Gilmer, 131 U. S. 22, 9 S. Ct. 696, 33 L. ed. 110.

See 15 Cent. Dig. tit. "Damages," § 222 *et seq.*

Reasonable compensation.— Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87; Parody *v.* Chicago, etc., R. Co., 15 Fed. 205, 5 McCrary 38; Harris *v.* Union Pac. R. Co., 13 Fed. 591, 4 McCrary 454.

Single allowance.— Where, in an action for damages for personal injuries, at the request of defendant, the jury returned special findings, showing an allowance for pain and suffering and a further allowance for mental suffering and distress, the two items will be treated as equivalent to a single allowance for mental and physical pain and suffering, such finding being supported by evidence. Atchison, etc., R. Co. *v.* Lee, 8 Kan. App. 24, 54 Pac. 4.

88. Wabash, etc., R. Co. *v.* Morgan, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85.

89. Kentucky Cent. R. Co. *v.* McMurtry, 3 Ky. L. Rep. 625; Huizega *v.* Cutler, etc., Co., 51 Mich. 272, 16 N. W. 643.

90. Ford *v.* Charles Warner Co., 1 Marv. (Del.) 88, 37 Atl. 39; Memphis, etc., R. Co. *v.* Whitfield, 44 Miss. 466, 7 Am. Rep. 699; Russell *v.* Columbia, 74 Mo. 480, 41 Am. Rep. 325; Whalen *v.* St. Louis, etc., R. Co., 60 Mo. 323. See *infra*, XI, B, 2 *et seq.*

91. Wabash, etc., R. Co. *v.* Morgan, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85. See *infra*, XI, B, 5, 6.

92. See *supra*, VII, D, 2.

93. See *supra*, VII, D, 3.

94. Johnson *v.* Wells, 6 Nev. 224, 3 Am. Rep. 245. Where pain is claimed as an element of damages, the impossibility of definitely measuring the damages by a money standard is no ground for denying pecuniary relief. Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587, 22 So. 169.

Consideration of motive.— In Craker *v.* Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504 [*overruling* Wilson *v.* Young, 31 Wis. 574], it was held that in actions for personal torts, in awarding the compensatory damages recoverable of the principal for the agent's act, no distinction is to be made between other forms of mental suffering and that which consists in "a sense of wrong or insult" arising from an act really or apparently "dictated by a spirit of willful injustice or by a deliberate intention to vex, degrade or insult."

Time of suffering.— The pain of being fastened for half an hour in the wreck of a rail-

an element of damages in an action for personal injury,[95] some of the courts have declared that in order to warrant a recovery therefor a personal injury, however slight, must have resulted,[96] and such mental anguish must be the direct, necessary, and proximate result of the physical injuries sustained.[97] Mere anxiety of mind, unconnected with bodily injury, cannot as a general rule be included in the assessment of damages, unless the injury complained of is accompanied by circumstances of malice or wanton disregard of the rights of others.[98] The jury must consider the mental anguish which accompanies the injury itself, and are not allowed to take into consideration any sentimental anguish that may accompany or flow from the injury.[99]

b. Future Suffering. In an action for personal injuries, compensation is not limited to actual pain and suffering before trial, but extends to such future suffering

road train may be considered in the question of damages. Quinn *v.* Long Island R. Co., 34 Hun (N. Y.) 331.

95. See *supra*, VII, D, 3, a.

A person of unsound mind may recover damages for mental suffering resulting from personal injuries. Gulf, etc., R. Co. *v.* Holzheuser, (Tex. Civ. App. 1898) 45 S. W. 188.

Not discretionary.— Where recoverable damages include injury to the feelings, compensation therefor is a matter of right, and not, like punitive damages, in the discretion of the jury. Gatzow *v.* Buening, 106 Wis. 1, 81 N. W. 1003, 80 Am. St. Rep. 1, 49 L. R. A. 475.

Worry as element of mental suffering.— Where, in an action for injuries, plaintiff had testified as to her injuries, it was proper to allow her to state that she worried a good deal about her condition, since worry is an element of mental suffering, and such suffering cannot be excluded in estimating the extent of injury for which compensation is to be awarded. Webb *v.* Yonkers R. Co., 51 N. Y. App. Div. 194, 64 N. Y. Suppl. 491.

96. Canning *v.* Williamstown, 1 Cush. (Mass.) 451. So where in an action to recover damages for a personal injury the plaintiff testified, "I was not hurt," yet the facts as he detailed them showed that he did sustain physical injury, and that he meant that he had sustained no serious injury, the court did not err in telling the jury that they might consider the mental suffering as an element of damage. City Transfer Co. *v.* Robinson, 12 Ky. L. Rep. 555.

In an action for assault with intent to rape, compensation for mental suffering may be recovered, although there was no battery. Leach *v.* Leach, 11 Tex. Civ. App. 699, 33 S. W. 703.

97. See *supra*, VII, D, 3, a.

In an action to recover for being bitten by a dog, pain and solicitude occasioned by the bite, including apprehension of poison and evil results therefrom, may be considered in estimating damages, although the dog was not shown to be rabid. Godeau *v.* Blood, 52 Vt. 251, 36 Am. Rep. 751.

No damages can be given by reason of peril and fright, not accompanied by some actual injury caused thereby and traceable directly thereto. Hall *v.* Manson, 90 Iowa 585, 58 N. W. 881; Atchison, etc., R. Co. *v.* McGinnis, 46 Kan. 109, 26 Pac. 453. In San Antonio, etc., R. Co. *v.* Corley, (Tex. Civ. App. 1894) 26 S. W. 903, it was held that "mental agony" specified in the petition of a personal injury case as one of the elements of damages included "peril" and "fright."

98. Illinois Cent. R. Co. *v.* Siddons, 53 Ill. App. 607; Randolph *v.* Hannibal, etc., R. Co., 18 Mo. App. 609; Morse *v.* Duncan, 14 Fed. 396. See also *supra*, VII, D, 3, e.

Mental suffering alone, not connected with the bodily injury, but arising from a different source, cannot be considered. Indianapolis, etc., R. Co. *v.* Stables, 62 Ill. 313; Pittsburg, etc., R. Co. *v.* Story, 63 Ill. App. 239.

The jury may infer mental pain from the inevitable physical pain, on "the known and experienced connection between facts proved and the fact in controversy." Cook *v.* Missouri Pac. R. Co., 19 Mo. App. 329.

99. Augusta, etc., R. Co. *v.* Randall, 85 Ga. 297, 11 S. E. 706. And see *supra*, VII, D, 3, a.

Anxiety of mind about the safety of others who may be in danger of injury from the same cause cannot be considered. Keyes *v.* Minneapolis, etc., R. Co., 36 Minn. 290, 30 N. W. 888.

Disfigurement of person.— Anguish of mind, wholly sentimental, arising from contemplation of a disfigurement of person, cannot be considered in an action for personal injuries. Chicago, etc., R. Co. *v.* Hines, 45 Ill. App. 299; Chicago, etc., R. Co. *v.* Caulfield, 63 Fed. 396, 11 C. C. A. 552. *Compare* Rockwell *v.* Eldred, 7 Pa. Super. Ct. 95; Heddles *v.* Chicago, etc., R. Co., 77 Wis. 228, 46 N. W. 115, 20 Am. St. Rep. 106. And see *supra*, VII, D, 3, c.

Future of family.— In Texas Mexican R. Co. *v.* Douglass, 69 Tex. 694, 7 S. W. 77, it was held error to permit plaintiff to testify that since his injury his mind has been troubled by feelings of fear as to the future of his family, such mental suffering not being the natural result of the injury. So in an action for personal injuries, a recovery cannot be had on account of mental suffering of the injured party, because of his fear of dying as a result of the injuries and leaving his wife and children without means of living. Atchison, etc., R. Co. *v.* Chance, 57 Kan. 40, 45 Pac. 60.

as must necessarily result from the injury inflicted.[1] The jury should assess damages for all injuries, past and prospective, bodily and mental, believed to be the necessary results of the injury inflicted.[2] What compensation may be fairly said to be adequate, on the evidence in any particular case, is a question of very great difficulty;[3] but only such future damages can be recovered as the evidence makes reasonably certain will necessarily result from the injury sustained.[4]

1. *Alabama.*— Bay Shore R. Co. *v.* Harris, 67 Ala. 6; South, etc., R. Co. *v.* McLendon, 63 Ala. 266; Barbour County *v.* Horn, 48 Ala. 566.

Arkansas.— St. Louis South Western R. Co. *v.* Dobbins, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147.

Delaware.—Wallace *v.* Wilmington, etc., R. Co., 8 Houst. 529, 18 Atl. 818.

Georgia.— Ball *v.* Mabry, 91 Ga. 781, 18 S. E. 64.

Illinois.— Central R. Co. *v.* Serfass, 153 Ill. 379, 39 N. E. 119; Chicago, etc., R. Co. *v.* Payzant, 87 Ill. 125; Peoria Bridge Assoc. *v.* Loomis, 20 Ill. 235, 71 Am. Dec. 263; Illinois Cent. R. Co. *v.* Cole, 62 Ill. App. 480; Chicago, etc., R. Co. *v.* Avery, 10 Ill. App. 210.

Indiana.— Ohio, etc., R. Co. *v.* Cosby, 107 Ind. 32, 7 N. E. 373; Elkhart *v.* Ritter, 66 Ind. 136; Nappanee *v.* Ruckman, 7 Ind. App. 361, 34 N. E. 609.

Iowa.— Stafford *v.* Oskaloosa, 64 Iowa 251, 20 N. W. 174; Russ *v.* The War Eagle, 14 Iowa 363.

Kansas.— Townsend *v.* Paola, 41 Kan. 591, 21 Pac. 596; Kansas Pac. R. Co. *v.* Pointer, 9 Kan. 620.

Kentucky.— Alexander *v.* Humber, 8 Ky. L. Rep. 619.

Louisiana.— Wardle *v.* New Orleans City R. Co., 35 La. Ann. 202.

Michigan.— Sherwood *v.* Chicago, etc., R. Co., 82 Mich. 374, 46 N. W. 773.

Minnesota.— Johnson *v.* Northern Pac. R. Co., 47 Minn. 430, 50 N. W. 473.

Mississippi.— Memphis, etc., R. Co. *v.* Whitfield, 44 Miss. 466, 7 Am. Rep. 699.

Missouri.— Gorham *v.* Kansas City, etc., R. Co., 113 Mo. 408, 20 S. W. 1060; Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; Russell *v.* Columbia, 74 Mo. 480, 41 Am. Rep. 325.

New Hampshire.—Holyoke *v.* Grand Trunk R. Co., 48 N. H. 541; Towle *v.* Blake, 48 N. H. 92; Hopkins *v.* Atlantic, etc., R. Co., 36 N. H. 9, 72 Am. Dec. 287.

New Jersey.— Klein *v.* Jewett, 26 N. J. Eq. 474.

New York.—Kane *v.* New York, etc., R. Co., 132 N. Y. 160, 30 N. E. 256 [*affirming* 9 N. Y. Suppl. 879]; Sheehan *v.* Edgar, 58 N. Y. 631; Matteson *v.* New York Cent. R. Co., 62 Barb. 364; McSwyny *v.* Broadway, etc., R. Co., 7 N. Y. Suppl. 456; Hickinbottom *v.* Delaware, etc., R. Co., 15 N. Y. St. 11.

Pennsylvania.— Scott Tp. *v.* Montgomery, 95 Pa. St. 444; Menges *v.* Muncy Creek, 38 Leg. Int. 318.

Texas.— San Antonio, etc., R. Co. *v.* Weigers, 22 Tex. Civ. App. 344, 54 S. W. 910.

Vermont.—Fulsome *v.* Concord, 46 Vt. 135.

United States.— Washington, etc., R. Co. *v.* Harmon, 147 U. S. 571, 13 S. Ct. 557, 37 L. ed. 284; Eddy *v.* Wallace, 49 Fed. 801, 1 C. C. A. 435; Secord *v.* St. Paul, etc., R. Co., 18 Fed. 221, 5 McCrary 515; Bierbach *v.* Goodyear Rubber Co., 14 Fed. 826; Fort *v.* Union Pac. R. Co., 9 Fed. Cas. No. 4,952, 2 Dill. 259 [*affirmed* in 17 Wall. (U. S.) 553, 21 L. ed. 739].

See 15 Cent. Dig. tit. "Damages," § 236; and *supra*, VII, C, 2, c, (IV).

Duration of illness.— In awarding damages to a married woman, in an action by a husband and wife for an injury sustained by the defendant's negligence, the jury may consider the length of time she will be ill in consequence. Hunt *v.* Hoyt, 20 Ill. 544.

Length of life.— In assessing damages for past and future sufferings, the jury may judge of the probable length of plaintiff's life, his physical and mental condition having been proved, and his recovery not being likely. Waterman *v.* Chicago, etc., R. Co., 82 Wis. 613, 52 N. W. 247, 1136.

Presumption as to future pain.— In an action for personal injuries, evidence that plaintiff's injury caused an incurable spinal disease, and that during the whole time from the accident to the trial, nineteen months, his suffering had been continuous, is sufficient to warrant the jury in allowing damages for future pain. Weiler *v.* Manhattan R. Co., 53 Hun (N. Y.) 372, 6 N. Y. Suppl. 320.

Second operation.— Where a second amputation of a leg for an injury to which damages are claimed will soon be necessary, the fact is properly considered as an element of damages. Cumming *v.* Brooklyn City R. Co., 38 Hun (N. Y.) 362.

2. Hansberger *v.* Sedalia Electric R., etc., Co., 82 Mo. App. 566; Holyoke *v.* Grand Trunk R. Co., 48 N. H. 541; Hickinbottom *v.* Delaware, etc., R. Co., 15 N. Y. St. 11; Denver, etc., R. Co. *v.* Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77.

3. Illinois Cent. R. Co. *v.* Cole, 62 Ill. App. 480.

4. *Georgia.*— Atlanta, etc., R. Co. *v.* Johnson, 66 Ga. 259.

Illinois.— Lake Shore, etc., R. Co. *v.* Johnson, 135 Ill. 641, 26 N. E. 510.

Indiana.— Ohio, etc., R. Co. *v.* Cosby, 107 Ind. 32, 7 N. E. 373; Cleveland, etc., R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312.

Iowa.— Fry *v.* Dubuque, etc., R. Co., 45 Iowa 416.

Kentucky.— Louisville, etc., R. Co. *v.* Abell, 14 Ky. L. Rep. 239.

Missouri.—Ross *v.* Kansas City, 48 Mo. App. 440.

New York.—Ayres *v.* Delaware, etc., R. Co., 158 N. Y. 254, 53 N. E. 22; Filer *v.* New

3. Loss of Time.[5] Where a party has by reason of personal injuries lost time from his ordinary employment through the negligence of another person he is entitled to damages therefor.[6]

4. Expenses Incurred[7] — a. In General. As a general rule, in cases of personal injury, a party is entitled to the medical expenses and treatment incurred, and the jury should take such expenses into consideration in estimating the same.[8] This consideration should also extend to the nursing and attendance upon the injured party, so far as the same is reasonably necessary as the result of the injury inflicted,[9] and in estimating such damages it is not necessary that such fees should have been paid where the evidence shows that they are due and payable.[10] While the question of gratuitous service has not been firmly settled, it seems that the jury in estimating the damages may allow for services thus performed,[11] and

York Cent. R. Co., 49 N. Y. 42; Curtis *v.* Rochester, etc., R. Co., 18 N. Y. 534, 75 Am. Dec. 258; Bateman *v.* New York Cent., etc., R. Co., 47 Hun 429; Aaron *v.* Second Ave. R. Co., 2 Daly 127.

Wisconsin.—Kueera *v.* Merrill Lumber Co., 91 Wis. 637, 65 N. W. 374; Stutz *v.* Chicago, etc., R. Co., 73 Wis. 147, 40 N. W. 653, 9 Am. St. Rep. 769.

See 15 Cent. Dig. tit. "Damages," § 236.

"Reasonable probability."— In an action for injuries suffered from a brick falling on plaintiff's head from a building in course of erection, it was error to instruct that plaintiff was entitled to compensation "for the pain and suffering which she had endured, also for the pain which she might be likely" to, or that there is "a reasonable probability" that she will, endure, for she can recover only for such future pain as the evidence shows that she is reasonably certain to endure. Smith *v.* Milwaukee Builders', etc., Exch., 91 Wis. 360, 64 N. W. 1041, 51 Am. St. Rep. 912, 30 L. R. A. 504.

5. As to impairment of earning capacity see *supra*, VII, F; *infra*, XI, B, 5.

6. See *supra*, VII, E.

Time measured by actual loss of wages.— The measure of damages for personal injuries, causing loss of time, is the wages actually lost, and not the market value of the average wages of a person of plaintiff's average capacity, working in the same employment. Braithwaite *v.* Hall, 168 Mass. 38, 46 N. E. 398.

7. As to expenses incurred generally see *supra*, VII, I.

8. See *supra*, VII, I, 5.

Board as an expense.— In Graeber *v.* Derwin, 43 Cal. 495, it was held in an action for personal injuries that the jury could not include in their admeasurement of damages money paid by the plaintiff for his board during the time he was disabled.

Payment of wages.— In an action to recover for personal injuries, the defendant is not relieved by the fact that a third person continued to pay the plaintiff wages during his disability. The plaintiff is entitled to recover the expenses of his cure, the value of his time, and for other elements of damages that result from the injury complained of. Drinkwater *v.* Dinsmore, 16 Hun (N. Y.) 250.

Special treatment.— Plaintiff can recover the expenses incurred on a trip to a distant city, where, by the advice of her physician, she went for special treatment of troubles produced by the injury. Sherwood *v.* Chicago, etc., R. Co., 82 Mich. 374, 46 N. W. 773.

9. *Illinois.*— Chicago, etc., R. Co. *v.* Holland, 122 Ill. 461, 13 N. E. 145.

Maine.— Sanford *v.* Augusta, 32 Me. 536.

New Hampshire.— Holyoke *v.* Grand Trunk R. Co., 48 N. H. 541.

Pennsylvania.— Hawes *v.* O'Reilly, 126 Pa. St. 440, 17 Atl. 642.

South Carolina.— Hart *v.* Charlotte, etc., R. Co., 33 S. C. 427, 12 S. E. 9, 10 L. R. A. 794.

Wisconsin.— Hulehan *v.* Green Bay, etc., R. Co., 68 Wis. 520, 32 N. W. 529.

See 15 Cent. Dig. tit. "Damages," § 243; and *supra*, VII, I, 5.

Value of husband's services.— It has been held that where a husband, while not allowed to introduce evidence as to the amount of salary or wages which he might have earned by working at his trade or profession, might recover the value of the services of a competent servant or nurse to perform the same duties. Salida *v.* McKinna, 16 Colo. 523, 27 Pac. 810; Hazard Powder Co. *v.* Volger, 58 Fed. 152, 158, 7 C. C. A. 130, 136.

10. See *supra*, VII, I, 5.

Physician not qualified.— In Chicago *v.* Honey, 10 Ill. App. 535, the plaintiff sought to recover a bill for medical attendance which had not been paid. From the evidence it appeared that the attending physician was not qualified to practice under the statutes of the state, and in such case it was held that the amount of the bill was not an element of damages to be considered by the jury. To the same effect see San Antonio St. R. Co. *v.* Muth, 7 Tex. Civ. App. 443, 27 S. W. 752.

Unskilful treatment.— In Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323, upon the question of damages, the increased amount paid to a surgeon to effect a cure, by means of injuries resulting from the unskilful treatment of another surgeon, was properly considered by the jury. See also Toledo Electric St. R. Co. *v.* Tucker, 13 Ohio Cir. Ct. 411, 7 Ohio Cir. Dec. 169.

11. Brosnan *v.* Sweetser, 127 Ind. 1, 26 N. E. 555; Pennsylvania Co. *v.* Marion, 104 Ind. 239, 3 N. E. 874; Varnham *v.* Council

in some states compensation will be allowed for services performed by members of the plaintiff's own family.[12]

b. Recovery by Married Woman. As a general rule a married woman cannot recover expenses incurred by reason of a personal injury, since such expenses are presumed in law to result to the husband.[13] While this may be stated as the general rule, in some jurisdictions a married woman has been allowed to recover expenses for personal injuries under such circumstances;[14] and her right of recovery for such expenses will never be denied where they are liable to become a charge upon her separate estate.[15]

5. Impairment of Earning Capacity[16] — a. In General. Where the result of the injury has been such as to impair the earning capacity of the plaintiff the jury in estimating the damages may take such fact into consideration,[17] but the rule as to the admeasurement of damages in such cases is very difficult to be defined. Various courts have adopted different rules varying somewhat according to the circumstances of the particular case presented for investigation.[18]

Bluffs, 52 Iowa 698, 3 N. W. 792. *Compare* Peppercorn *v.* Black River Falls, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818. And see *supra*, VII, I, 5.

12. See *supra*, VII, I, 5.

13. Tompkins *v.* West, 56 Conn. 478, 16 Atl. 237; Belyea *v.* Minneapolis, etc., R. Co., 61 Minn. 224, 63 N. W. 627; Burnham *v.* Webster, 54 N. Y. Super. Ct. 30; Mt. Adams, etc., R. Co. *v.* Wysong, 8 Ohio Cir. Ct. 211.

14. Columbus *v.* Strassner, 138 Ind. 301, 34 N. E. 5, 37 N. E. 719; Schulte *v.* Holliday, 54 Mich. 73, 19 N. W. 752.

15. Shelby County *v.* Castetter, 7 Ind. App. 309, 33 N. E. 986, 34 N. E. 687; Moody *v.* Osgood, 50 Barb. (N. Y.) 628.

16. Loss of time see *supra*, VII, E; XI, B, 3.

17. See *supra*, VII, F.

No additional recovery.— In an action for damages for personal injuries plaintiff cannot recover for his own loss of time and capacity to labor, and in addition what he has to pay another to supply that loss of labor. Blackman *v.* Gardiner, etc., Bridge, 75 Me. 214. Loss to a person injured of profits in conducting a business in which he hired other persons to work is not a necessary consequence of the injury. The extent of his recovery on such ground would be what his services were worth in conducting the business. Silsby *v.* Michigan Car Co., 95 Mich. 204, 54 N. W. 761.

No evidence of earning ability.— Where it appears that plaintiff's right arm has been rendered useless by the accident, it is proper to instruct the jury to take into consideration in estimating the damages plaintiff's future inability to labor or transact business, although at the time of the injury he was not engaged in any business or occupation and there was no evidence of his earning ability. Fisher *v.* Jansen, 128 Ill. 549, 21 N. E. 598.

The administrator in whose name an action for personal injuries has been revived may recover the same damages the intestate could have recovered had she lived, including damages for mental and physical suffering up to the time of death, and for diminution of earning power during a period of life which she would probably have lived had the accident not occurred. Maher *v.* Philadelphia Traction Co., 181 Pa. St. 617, 37 Atl. 571.

18. Thus it has been held that the measure of damages for the loss of earning power is not a sum the income from which would be equal to the difference between the amount he could have earned if uninjured and that which he is able to earn in his injured condition. Morrison *v.* Long Island R. Co., 3 N. Y. App. Div. 205, 38 N. Y. Suppl. 393. In an action against a city for personal injury from a defective sidewalk, the measure of damages was considered to be the direct expenses, the inconvenience, pain, and pecuniary loss sustained and likely to be sustained during life, and the plaintiff's actual permanent loss of earning power from the accident; and it was held that the wages which he might be receiving would not go in mitigation of damages, but might be considered with other things to prove his earning powers. McLaughlin *v.* Corry, 77 Pa. St. 109, 18 Am. Rep. 432. In Baltimore etc., R. Co. *v.* Henthorne, 73 Fed. 634, 19 C. C. A. 623, it was held that the proper measure of damages for loss of earning capacity of one who has been injured by another's wrongful act is the sum required to purchase for such person an annuity equal to the difference between his probable yearly earnings during his entire life in his actual condition and as he would have been had he not suffered the injury.

Fluctuating profits.— In an action for personal injuries it is error to permit plaintiff to make an estimate of the annual value of his labor, and the jury to find a verdict, based on the business of a steam thresher in which plaintiff at one time had an interest, but which he had parted with before he met his injuries, where no allowance was made for the cost and wear of machinery, where the amounts earned in the business fluctuated widely, and where plaintiff had partners who divided with him, but it did not appear in what proportions. Boston, etc., R. Co. *v.* O'Reilly, 158 U. S. 334, 15 S. Ct. 830, 39 L. ed. 1006.

Reference to mortuary tables.— In an ac-

The jury may consider evidence as to plaintiff's age, probable expectancy of life, and earnings, but cannot fix a basis of computation without regard to plaintiff's capacity, if any, to earn money since the injuries and in the future, nor should such facts be considered otherwise than as circumstances to be weighed in arriving at a fair pecuniary compensation for the loss to plaintiff from the injuries received.[19]

b. Age, Condition in Life, and Earning Capacity. In estimating the damages the jury should take into consideration the age[20] and condition in life of the party injured.[21] They should also take into consideration the ordinary business of the plaintiff and his manner of living,[22] together with a consideration of the

tion for personal injuries, the jury was instructed that, if plaintiff is "permanently injured, you may refer to the mortality tables in evidence to ascertain the number of years which a man of plaintiff's age may be expected to live. Then ascertain from this what his earning capacity is for one year. If his earning capacity has been diminished, then take the proportion of what he could have earned and multiply it by the number of years of his expectancy." It was held proper. Columbus *v.* Sims, 94 Ga. 483, 20 S. E. 332.

19. Galveston, etc., R. Co. *v.* Cooper, 2 Tex. Civ. App. 42, 20 S. W. 990; Grant *v.* Union Pac. R. Co., 45 Fed. 673. In a personal injury case, a physician called by plaintiff testified that if the injured foot was used "as we ordinarily use ours" the irritation would produce an open ulcer. He had previously testified that the foot was permanently weakened. It was held that the evidence, being admissible on the question of impairment of earning capacity, was not objectionable as permitting a recovery both for the permanent impairment of the foot and for the consequences of an attempt to use it in the ordinary fashion, it not appearing that the jury had in fact so interpreted it. McCoy *v.* Munro, 76 N. Y. App. Div. 435, 78 N. Y. Suppl. 849.

20. Smith *v.* Middleton, 66 S. W. 388, 23 Ky. L. Rep. 2010, 56 L. R. A. 484; Schmitz *v.* St. Louis, etc., R. Co., 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; Russell *v.* Columbia, 74 Mo. 480, 41 Am. Rep. 325; Whalen *v.* St. Louis, etc., R. Co., 60 Mo. 323; Thomas *v.* Wabash, etc., R. Co., 20 Mo. App. 485; Sioux City, etc., R. Co. *v.* Smith, 22 Nebr. 775, 36 N. W. 285; Robertson *v.* Cornelson, 34 Fed. 716; The Oriflamme, 18 Fed. Cas. No. 10,572, 3 Sawy. 397.

Where there was no permanent injury inflicted, and no proof as to plaintiff's age, her age is not an element to be considered by the jury in estimating the damages. Hinds *v.* Marshall, 22 Mo. App. 208.

21. *Iowa.*— Rice *v.* Des Moines, 40 Iowa 638.

Missouri.— Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; Russell *v.* Columbia, 74 Mo. 480, 41 Am. Rep. 325; Whalen *v.* St. Louis, etc., R. Co., 60 Mo. 323; Mitchell *v.* Plattsburg, 33 Mo. App. 555.

Nebraska.— Sioux City R. Co. *v.* Smith, 22 Nebr. 775, 36 N. W. 285.

New York.— Caldwell *v.* Murphy, 1 Duer 233.

United States.— Robertson *v.* Cornelson, 34 Fed. 716.

Defendant may show the nature of his employment, and his dependence thereon for support, as affecting the recovery. Moore *v.* Central R. Co., 47 Iowa 688.

Disfigurement of the person caused by an injury is a proper subject of damages, but in estimating them it is proper to consider the condition and circumstances of the party disfigured. The Oriflamme, 18 Fed. Cas. No. 10,572, 3 Sawy. 397.

Injury to social position.— In an action for false imprisonment and compelling plaintiff by assault and menaces to execute and deliver a promissory note, compensatory damages may include delay in business, permanent disability and disfigurement, bodily pain, mental anguish from a sense of humiliation, and any injury to the plaintiff's business, profession, reputation, or social position. Stewart *v.* Maddox, 63 Ind. 51.

Wealth of parties.— In assessing damages the jury cannot take into consideration the "condition in life" of the parties, that is, whether they are rich or poor. Malone *v.* Hawley, 46 Cal. 409; Shea *v.* Potrero, etc., R. Co., 44 Cal. 414.

22. Seaboard Mfg. Co. *v.* Woodson, 98 Ala. 378, 11 So. 733; Southern Pac. Co. *v.* Hall, 100 Fed. 760, 41 C. C. A. 50; Lombard *v.* Chicago, 15 Fed. Cas. No. 8,470, 4 Biss. 460. The rule that the reduction of one's earning powers, mental or physical, may be considered in estimating his damages in case of personal injury was applied where a passenger, a dealer in lands, was injured by a collision on a railroad; and it was held that the loss of anticipated profits from a quantity of land on hand was not mere speculative profits, but a proper subject of compensation in damages. Pennsylvania R. Co. *v.* Dale, 76 Pa. St. 47.

Particular profession.— In an action for personal injuries plaintiff will not be entitled to recover special damages on account of his particular calling or profession. Holyoke *v.* Grand Trunk R. Co., 48 N. H. 541. Where the evidence shows that plaintiff was a practising lawyer, that his injury confined him to the house for four days, and rendered his shoulder so stiff that he could write for only a few minutes at a time, and that this

earnings of the plaintiff at his trade or profession before and after the injury was inflicted.[23]

c. Recovery by Married Woman. The question whether a married woman living with her husband can recover damages for an injury which incapacitates her for labor is one not well settled by the courts. The better opinion on this subject seems to be that she has such an interest in her working capacity as to entitle her to the damages claimed.[24] Some of the courts have drawn the dis-

disability interfered with the practice of his profession, it is proper to instruct the jury in determining the damages to consider the nature and extent of plaintiff's injuries, the loss of time occasioned thereby, and any disability to labor or engage in his usual vocation. Chicago, etc., R. Co. *v.* Butler, 10 Ind. App. 244, 38 N. E. 1.

No license.— In an action by a woman who kept a lying-in hospital, where she delivered, nursed, and boarded her patients, to recover damages for personal injuries, it is not error for the trial court to exclude from the recovery the money earned by her as midwife, on the ground that she had no license, and to permit the question of her losses as nurse and boarding-house keeper to go to the jury. Chicago, etc., R. Co. *v.* Lambert, 119 Ill. 255, 10 N. E. 219.

Skill at another trade.— The fact that a person when injured was engaged as a section-hand and was earning but one dollar and twenty-five cents a day will not prevent his pleading and proving that he was skilled in another trade and capable of earning more at such trade. Chicago, etc., R. Co. *v.* Long, 26 Tex. Civ. App. 601, 65 S. W. 882.

23. *Alabama.*—Seaboard Mfg. Co. *v.* Woodson, 98 Ala. 378, 11 So. 733; Alabama, etc., R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28.

Illinois.— Chicago, etc., R. Co. *v.* Meech, 59 Ill. App. 69.

Indiana.— Linton Coal, etc., Co. *v.* Persons, 15 Ind. App. 69, 43 N. E. 651.

Iowa.— Rice *v.* Des Moines, 40 Iowa 638.

Nebraska.— Sioux City, etc., R. Co. *v.* Smith, 22 Nebr. 775, 36 N. W. 285.

New York.— Brignoli *v.* Chicago, etc., R. Co., 4 Daly 182; Palmer *v.* Conant, 58 Hun 333, 11 N. Y. Suppl. 917.

Texas.— Gulf, etc., R. Co. *v.* Abbott, (Civ. App. 1893) 24 S. W. 299.

United States.— Southern Pac. Co. *v.* Hall, 100 Fed. 760, 41 C. C. A. 50; Parshall *v.* Minneapolis, etc., R. Co., 35 Fed. 649.

See 15 Cent. Dig. tit. "Damages," § 237; and *supra*, VII, F.

Diminution of ordinary receipts.— In an action for injuries to the plaintiff, caused by the negligence of the defendant's servants in operating a railroad, evidence of the nature and extent of the plaintiff's business, and the loss resulting to him from inability to attend to it by reason of the injury may properly be admitted; and it is not error to instruct the jury that "if a man has an ordinary business yielding ordinary receipts, he will be entitled to recover the diminution of those receipts resulting from such injury." Kinney *v.* Crocker, 18 Wis. 74.

Evidence of amount of earnings.—A teacher of languages, in his suit for an injury caused by defendant's negligence, may show on the question of damages the number of his pupils and the amount of his earnings in the years prior to the accident. Simonin *v.* New York, etc., R. Co., 36 Hun (N. Y.) 214.

Present worth.— Where future payments for the loss of earning power are to be anticipated and capitalized in a verdict, the plaintiff is entitled only to their present worth. Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. Rep. 705.

Wages continued.—Evidence that the hearing in one of plaintiff's ears had been permanently destroyed, that the sight of one eye had been seriously impaired, and that his nervous system had received a shock from which he might never recover, and which at the time of the trial impaired his capacity for transacting his former business, warrants the granting of substantial damages, although the wages of plaintiff were not cut off or diminished by the injury, and he has not been subjected to any pecuniary loss. Clare *v.* Sacramento Electric Powder, etc., Co., 122 Cal. 504, 55 Pac. 326.

24. *Georgia.*— Powell *v.* Augusta, etc., R. Co., 77 Ga. 192, 3 S. E. 757.

Idaho.— Giffen *v.* Lewiston, 6 Ida. 231, 55 Pac. 545.

Illinois.— Joliet *v.* Conway, 119 Ill. 489, 10 N. E. 223.

Massachusetts.— Jordan *v.* Middlesex R. Co., 138 Mass. 425.

Pennsylvania.— Readdy *v.* Shamokin, 137 Pa. St. 98, 20 Atl. 396.

See 15 Cent. Dig. tit. "Damages," § 238.

Domestic services.— In a suit by a husband for personal injuries to his wife, brought since the act of 1860, providing that earnings of any married woman from her labor shall be her sole and separate property, he can recover only for the loss of her society, and for the loss of such domestic services as are usually performed by a wife in the household of her husband, having regard to their surroundings and condition in life, but for the loss of her earning power over and above such services an action can be maintained only by the wife, without regard to whether such earning power is expended in the service of her husband or of another. London *v.* Cunningham, 1 Misc. (N. Y.) 408, 20 N. Y. Suppl. 882.

Injuries before marriage.— In an action by a husband and wife to recover for injuries sustained by the wife before her marriage, the jury may take into consideration the loss of the wife's capacity to earn money, as the right of the wife to be supported by her hus-

tinction between the separate and independent employment on the part of the wife and a mere claim of recovery while under the husband's protection. In such latter cases it has been held that where a married woman lives with her husband and has no business of her own, there can be no recovery for impaired capacity for labor.[25]

6. PERMANENT INJURIES — a. In General. In assessing damages the jury may take into consideration whether the injury complained of is permanent or merely temporary in its nature, and award damages according to the circumstances of the particular case under consideration.[26] In order to justify the assessment of damages for future or permanent disability, it must appear that a continued or permanent disability is reasonably certain to result from the injury complained of.[27]

band cannot affect her right to recover for the impairment of that to which the husband never became entitled. Reading *v.* Pennsylvania R. Co., 52 N. J. L. 264, 19 Atl. 321.

Personal services.— In Minick *v.* Troy, 19 Hun (N. Y.) 253, it was held that although, in an action to recover damages against a city, a married woman could not recover on the ground of her inability to render services which belong to her husband, yet she might recover for the loss of such as are personal to herself.

25. Hall *v.* Manson, 90 Iowa 585, 58 N. W. 881; Atchison, etc., R. Co. *v.* McGinnis, 46 Kan. 109, 26 Pac. 453; Walter *v.* Kensinger, 13 Pa. Co. Ct. 222.

Duties of housewife.— Thus it has been held that a married woman cannot recover damages for an injury which renders her less capable of attending to household work. Hall *v.* Manson, 90 Iowa 585, 58 N. W. 881; Walter *v.* Kensinger, 13 Pa. Co. Ct. 22.

No independent employment.— A married woman cannot recover damages, in an action in her own right, for an injury to her person, for the permanent diminution of her earning capacity, if at the time of the injury she was living with her husband, and was not engaged in any independent employment. Such suit must be in the husband's name under the Pennsylvania act of June 3, 1887. Carr *v.* Easton, 7 Pa. Co. Ct. 403.

26. *Colorado.*— Wall *v.* Livezay, 6 Colo. 465.

Delaware.— Mills *v.* Wilmington City R. Co., 1 Marv. 269, 40 Atl. 1114; Robinson *v.* Simpson, 8 Houst. 398, 32 Atl. 287.

Georgia.— Georgia Pac. R. Co. *v.* Freeman, 83 Ga. 583, 10 S. E. 277.

Illinois.— Central R. Co. *v.* Serfass, 153 Ill. 379, 39 N. E. 119 [*affirming* 53 Ill. App. 448]; St. Louis Consol. Coal Co. *v.* Haenni, 146 Ill. 614, 35 N. E. 162; Peoria Bridge Assoc. *v.* Loomis, 20 Ill. 235, 71 Am. Dec. 263; Frink *v.* Schroyer, 18 Ill. 416; Chicago, etc., R. Co. *v.* Fisher, 38 Ill. App. 33.

Indiana.— Indiana Car Co. *v.* Parker, 100 Ind. 181; Pittsburgh, etc., R. Co. *v.* Sponier, 85 Ind. 165.

Kentucky.— Alexander *v.* Humber, 86 Ky. 565, 6 S. W. 453, 9 Ky. L. Rep. 734.

Maryland.— Pittsburg, etc., R. Co. *v.* Andrews, 39 Md. 329, 17 Am. Rep. 568.

Michigan.— Goodale *v.* Portage Lake Bridge Co., 55 Mich. 413, 21 N. W. 866.

Missouri.— Schmitz *v.* St. Louis, etc., R. Co., 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; Gorham *v.* Kansas City, etc., R. Co., 113 Mo. 408, 20 S. W. 1060.

Nebraska.— Sioux City, etc., R. Co. *v.* Smith, 22 Nebr. 775, 36 N. W. 285.

Nevada.— Cohen *v.* Eureka, etc., R. Co., 14 Nev. 376.

New York.— Matteson *v.* New York Cent. R. Co., 62 Barb. 364; Caldwell *v.* Murphy, 1 Duer 233.

Pennsylvania.— Breary *v.* Traction Co., 5 Pa. Dist. 95.

Texas.— Missouri, etc., R. Co. *v.* McGlamory, (Civ. App. 1896) 34 S. W. 359; International, etc., R. Co. *v.* Kentle, 2 Tex. App. Civ. Cas. § 303.

Utah.— Palmquist *v.* Mine, etc., Supply Co., 25 Utah 257, 70 Pac. 994.

West Virginia.— Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

Wisconsin.— Reinke *v.* Bentley, 90 Wis. 457, 63 N. W. 1055; Heddles *v.* Chicago, etc., R. Co., 77 Wis. 228, 46 N. W. 115, 20 Am. St. Rep. 106.

United States.— Denver, etc., R. *v.* Harris, 122 U. S. 597, 7 S. Ct. 1286, 30 L. ed. 1146; Whelan *v.* New York, etc., R. Co., 38 Fed. 15; Anthony *v.* Louisville, etc., R. Co., 27 Fed. 724; Sunney *v.* Holt, 15 Fed. 880; Fuller *v.* Galion Citizens' Nat. Bank, 15 Fed. 875; Goble *v.* Delaware, etc., R. Co., 10 Fed. Cas. No. 5,488*a*.

See 15 Cent. Dig. tit. "Damages," § 235.

Future loss.— A permanent injury may be considered, especially when it will cause a future loss from inability to labor. Chicago, etc., R. Co. *v.* Avery, 10 Ill. App. 210.

27. Ohio, etc., R. Co. *v.* Cosby, 107 Ind. 32, 7 N. E. 373; Cleveland, etc., R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312; Elkhart *v.* Ritter, 66 Ind. 136; Chicago, etc., R. Co. *v.* Kennedy, 2 Kan. App. 693, 43 Pac. 802; Groundwater *v.* Washington, 92 Wis. 56, 65 N. W. 871; White *v.* Milwaukee City R. Co., 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154. Although no witness states that plaintiff will suffer in the future, it is proper to authorize the jury to consider such future pain and suffering as it is reasonably certain from the evidence that he will be obliged to endure as a result of his injury, there being testimony that he is permanently injured, that as a result he has hernia, curable only by an operation, and that he is partially paralyzed

b. Disfigurement of Person.[28] In estimating damages in cases of personal injury where a disfigurement or deformity of the person has occurred, the jury may take such fact into consideration.[29]

7. Injuries to Health. In estimating the damages the jury may take into consideration the effect upon the health of the party injured[30] and may consider not only the present but also the future effect upon the health of the party injured.[31]

8. Suit by Husband For Injuries to Wife. While as a general rule the husband may recover for the loss of his wife's services on account of a personal injury,[32] yet in estimating the amount of damages the jury should take into consideration the nature of the services and the circumstances under which they were rendered.[33] The jury in estimating damages should also consider the necessary expenses incurred,[34] unless such expenses are made a charge upon the separate estate of the

and has frequent attacks of vomiting blood. Smith *v.* Sioux City, 119 Iowa 50, 93 N. W. 81.

28. Disfigurement of person as an element of damages for mental anguish see *supra*, VII, D, 3, c.

29. *Alabama.*— Birmingham *v.* Lewis, 92 Ala. 352, 9 So. 243.

Arkansas.— St. Louis, etc., R. Co. *v.* Dobbins, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147.

Georgia.— Atlanta, etc., R. Co. *v.* Wood, 48 Ga. 565.

Kentucky.— Reliance Textile, etc., Works *v.* Mitchell, 71 S. W. 425, 24 Ky. L. Rep. 1286.

Michigan.— Sherwood *v.* Chicago, etc., R. Co., 82 Mich. 374, 46 N. W. 773.

Missouri.— Schmitz *v.* St. Louis, etc., R. Co., 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250.

Wisconsin.— Heddles *v.* Chicago, etc., R. Co., 77 Wis. 228, 46 N. W. 115, 20 Am. St. Rep. 106.

United States.— The Oriflamme, 18 Fed. Cas. No. 10,572, 3 Sawy. 397.

30. *Arkansas.*— St. Louis, etc., R. Co. *v.* Cantrell, 37 Ark. 519, 40 Am. Rep. 105.

Illinois.— Sandwich *v.* Dolan, 141 Ill. 430, 31 N. E. 416; Lake Shore, etc., R. Co. *v.* Johnsen, 135 Ill. 641, 26 N. E. 510.

Maryland.— McMahon *v.* Northern Cent. R. Co., 39 Md. 438; Pittsburg, etc., R. Co. *v.* Andrews, 39 Md. 329, 17 Am. Rep. 568; Bannon *v.* Baltimore, etc., R. Co., 24 Md. 108. And see Stockton *v.* Frey, 4 Gill 406, 45 Am. Dec. 138.

Mississippi.— Memphis, etc., R. Co. *v.* Whitfield, 44 Miss. 466, 7 Am. Rep. 699.

New York.— Beckwith *v.* New York Cent. R. Co., 64 Barb. 299.

Ohio.— Walker *v.* Springfield, 3 Ohio Dec. (Reprint) 567.

United States.— Davidson *v.* Southern Pac. Co., 44 Fed. 476; Saldana *v.* Galveston, etc., R. Co., 43 Fed. 862; Secord *v.* St. Paul, etc., R. Co., 18 Fed. 221, 5 McCrary 515; Keep *v.* Indianapolis, etc., R. Co., 9 Fed. 625, 3 McCrary 208.

See 15 Cent. Dig. tit. "Damages," § 223; and also *supra*, XI, B, 6.

31. Sandwich *v.* Dolan, 141 Ill. 430, 31 N. E. 416; Kansas Pac. R. Co. *v.* Pointer, 9 Kan. 620; Memphis, etc., R. Co. *v.* Whitfield, 44 Miss. 466, 7 Am. Rep. 699; Davidson *v.* Southern Pac. Co., 44 Fed. 476.

32. *Georgia.*— Metropolitan St. R. Co. *v.* Johnson, 91 Ga. 466, 18 S. E. 816.

Indiana.— Citizens' St. R. Co. *v.* Twiname, 121 Ind. 375, 23 N. E. 159, 7 L. R. A. 352.

New Hampshire.— Hopkins *v.* Atlantic, etc., R. Co., 36 N. H. 9, 72 Am. Dec. 287.

New York.— Cregin *v.* Brooklyn Crosstown R. Co., 18 Hun 368; Sloan *v.* New York Cent., etc., R. Co., 1 Hun 540, 4 Thomps. & C. 135.

Vermont.— Lindsey *v.* Danville, 46 Vt. 144.

Washington.— Hawkins *v.* Front St. Cable R. Co., 3 Wash. 592, 28 Pac. 1021, 28 Am. St. Rep. 72, 16 L. R. A. 808.

See 15 Cent. Dig. tit. "Damages," § 226.

Money belonging to wife.— In an action by a husband for the loss of services of his wife, injured through a defect of a highway, he cannot recover for money expended that belonged to her. Walden *v.* Clark, 50 Vt. 383.

33. Metropolitan St. R. Co. *v.* Johnson, 91 Ga. 466, 18 S. E. 816.

Millinery business.— In an action for injuries to plaintiff's wife, where the complaint alleges that plaintiff was conducting a large millinery business, and his wife acted as manager thereof, that by reason of her injuries he was deprived of her services as such manager, to his damage, plaintiff can recover for such loss of service, and evidence tending to show the amount of damage sustained on that account is admissible. Citizens' St. R. Co. *v.* Twiname, 121 Ind. 375, 23 N. E. 159, 7 L. R. A. 352.

34. Hopkins *v.* Atlantic, etc., R. Co., 36 N. H. 9, 72 Am. Dec. 287. In an action by the husband against a town for the loss of the wife's services, etc., the result of injuries received by her, occasioned by reason of the insufficiency of a highway, he may recover the sum paid for necessary labor substituted for the ordinary service of the wife, and for his own services in attending upon her. Lindsey *v.* Danville, 46 Vt. 144.

Value of husband's services.—While a husband may, in an action for damages resulting from injuries sustained by his wife by reason of the negligence and carelessness of another, in some cases recover for the loss of his own time in attending and nursing his wife, the value of his time while so engaged is determinable with reference to its value as a nurse; and he cannot recover, in addition, for the loss of his time, as such, its value in

wife.[35] While mental anguish in some states is considered an element of damages when the suit is on the part of the husband for injuries to the wife,[36] yet the more favored rule[37] and the one of more general acceptation[38] denies compensation for such cause.

9. Suit by Parent For Injuries to Child. In an action by a parent to recover damages for an injury to an infant child, the jury may assess damages for all reasonable expenses incurred by the parent in treatment of the injury;[39] and where the injury is of such a serious nature as to render the infant a burden upon the hands of his parent the latter may recover for the additional expense to which he is subjected.[40] The parent may also recover damages for the loss of the infant's service.[41] The weight of authority in England is to the effect that in an action by a parent for injuries to his minor child under his care, the gravamen of the action is the loss of service; as incidental to which he may recover the expense of nursing and healing the child. But if the child be of such tender years that it was incapable of rendering any service whatever there could be no recovery even for the expenses.[42] But in this country a more liberal rule has been adopted; and the best considered cases hold that inasmuch as it is a duty enjoined by the law of the land as well as by the laws of nature upon the parent to care for and heal his injured minor child, he who wilfully or negligently occasioned the injury

his ordinary occupation, nor for the reasonable value of his time which he may have lost from his business. Western Union Tel. Co. *v.* Morris, 10 Kan. App. 61, 61 Pac. 972. So it was held in Walker *v.* Philadelphia, 195 Pa. St. 168, 45 Atl. 657, 78 Am. St. Rep. 801, that the recovery to which a husband was entitled against one through whose negligence his wife is injured, because of his employment of a person to wait on her, is the ordinary wages for such attendance, not what such person could have earned in the employment which she gave up so that she might wait on the wife.

35. See *supra*, XI, B, 5, c.

36. Missouri Pac. R. Co. *v.* White, 80 Tex. 202, 15 S. W. 808; Brown *v.* Sullivan, 71 Tex. 470, 10 S. W. 288; Campbell *v.* Harris, 4 Tex. Civ. App. 636, 23 S. W. 35. In an action by a husband and wife against a physician for an injury to the wife in delivering her of a child, damages may be given for the mental suffering of the wife produced by the destruction of the child. Smith *v.* Overby, 30 Ga. 241.

37. Stone *v.* Evans, 32 Minn. 243, 20 N. W. 149.

38. Smith *v.* Grant, 56 Me. 255; Hooper *v.* Haskell, 56 Me. 251; Hyatt *v.* Adams, 16 Mich. 180; Stone *v.* Evans, 32 Minn. 243, 20 N. W. 149.

Mental anguish as an element of damages see *supra*, VII, D, 3.

39. *California.*— Karr *v.* Parks, 44 Cal. 46, but not for expense of removing deformity after original wound was cured and healed.

Louisiana.— Black *v.* Carrollton R. Co., 10 La. Ann. 33, 63 Am. Dec. 586.

Maryland.— Hartford County Com'rs *v.* Hamilton, 60 Md. 340, 45 Am. Rep. 739.

Massachusetts.— Dennis *v.* Clark, 2 Cush. 347, 48 Am. Dec. 671.

Missouri.— Frick *v.* St. Louis, etc., R. Co., 75 Mo. 542; Matthews *v.* Missouri Pac. R. Co., 26 Mo. App. 75.

Ohio.— Cincinnati Omnibus Co. *v.* Kuhnell, 9 Ohio Dec. (Reprint) 197, 11 Cinc. L. Bul. 189.

Pennsylvania.—Oakland R. Co. *v.* Fielding, 48 Pa. St. 320; Pennsylvania R. Co. *v.* Kelly, 31 Pa. St. 372.

Texas.— Houston, etc., R. Co. *v.* Miller, 49 Tex. 322.

See 15 Cent. Dig. tit. "Damages," § 228.

40. Lang *v.* New York, etc., R. Co., 51 Hun (N. Y.) 603, 4 N. Y. Suppl. 565; Texas, etc., R. Co. *v.* Morin, 66 Tex. 133, 18 S. W. 345.

41. *Maryland.*— Hussey *v.* Ryan, 64 Md. 426, 2 Atl. 729, 54 Am. Rep. 772.

Missouri.— Frick *v.* St. Louis, etc., R. Co., 75 Mo. 542; Mauerman *v.* St. Louis, etc., R. Co., 41 Mo. App. 348; Mathews *v.* Missouri Pac. R. Co., 26 Mo. App. 75.

New York.— Traver *v.* Eighth Ave. R. Co., 4 Abb. Dec. 422, 3 Keyes 497, 3 Transcr. App. 203, 6 Abb. Pr. N. S. 46.

Ohio.— Cincinnati Omnibus Co. *v.* Kuhnell, 9 Ohio Dec. (Reprint) 197, 11 Cinc. L. Bul. 189.

Pennsylvania.— Oakland R. Co. *v.* Fielding, 48 Pa. St. 320; Pennsylvania R. Co. *v.* Kelly, 31 Pa. St. 372.

Texas.— Houston, etc., R. Co. *v.* Miller, 49 Tex. 322.

See 15 Cent. Dig. tit. "Damages," § 228.

Loss of own time.— One suing for the loss of service of his child, injured by defendant's negligence, may recover for his own time spent in nursing the child. Connell *v.* Putnam, 58 N. H. 534.

Prospective medical services.— In an action founded on loss of services resulting from injuries inflicted on a minor child a parent cannot recover for prospective medical services. Cuming *v.* Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65.

42. Sykes *v.* Lawlor, 49 Cal. 236; Dennis *v.* Clark, 2 Cush. (Mass.) 347, 48 Am. Dec. 671 [*citing* Carr *v.* Clarke, 2 Chit. 260, 18 E. C. L. 623; Grinnell *v.* Wells, 2 D. & L.

should be held responsible for the expenses incurred without reference to the capacity of the child to render service to the parents.[43] It seems, however, that the parent is only entitled to recover for the loss of services up to the time that the infant shall acquire his majority;[44] although in an action brought by the infant in his own behalf the jury may take into consideration his loss of earnings after he shall have attained his majority.[45] The right of a parent to recover in case of physical injuries to a minor child is founded solely upon the assumption

610, 8 Jur. 1101, 14 L. J. C. P. 19, 7 M. & G. 1033, 8 Scott N. R. 741, 49 E. C. L. 1033; Satterthwaite *v.* Dewhurst, 4 Dougl. 315, 5 East 47 note, 7 Rev. Rep. 654 note, 26 E. C. L. 497].

43. Sykes *v.* Lawlor, 49 Cal. 236; Dennis *v.* Clark, 2 Cush. (Mass.) 347, 48 Am. Dec. 671. See also Karr *v.* Parks, 44 Cal. 46.

In an action to recover damages for the death of a child five years of age, it was error to instruct the jury, if they should find for plaintiff, to fix the damage at a fair equivalent in money for the power of deceased to earn money, lost by reason of the destruction of his life, and that in fixing the damages they should "take into consideration the age of the deceased at the time of his death, his earning capacity, and the probable duration of his life," as the words "his earning capacity" were probably misleading, and should have been omitted, in view of the tender years of decedent. Smith *v.* Middleton, 66 S. W. 388, 23 Ky. L. Rep. 2010, 56 L. R. A. 484.

Increased wages.— Where plaintiff's infant son received injuries while in defendant's employ, which caused loss of time and rendered him unable to perform home duties formerly performed, and there was evidence that defendant paid him for some work after the injury at a less rate than before, a loss sufficient to authorize a recovery was established, although the boy may have received more wages after the injury than before. Central Mfg. Co. *v.* Cotton, 108 Tenn. 63, 65 S. W. 403.

44. Hussey *v.* Ryan, 64 Md. 426, 2 Atl. 729, 54 Am. Rep. 772; Harford County Com'rs *v.* Hamilton, 60 Md. 340, 45 Am. Rep. 739; Frick *v.* St. Louis, etc., R. Co., 75 Mo. 542; Texas, etc., R. Co. *v.* Morin, 66 Tex. 225, 18 S. W. 503; Gulf, etc., R. Co. *v.* Evansich, 63 Tex. 54; Houston, etc., R. Co. *v.* Miller, 49 Tex. 322; Ft. Worth, etc., R. Co. *v.* Robertson, (Tex. 1891) 16 S. W. 1093, 14 L. R. A. 781; Peppercorn *v.* Black River Falls, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818.

See 15 Cent. Dig. tit. "Damages," § 228.

No recovery for nursing.— A mother is entitled to recover, as damages for an injury to her minor son, occasioned by the negligence of defendant, for the loss of the son's services until he is twenty-one years of age, the cost of medical attendance, whether the same has been paid or not, and for the diminished ability of the son to earn money, in consequence of the injury, up to the time of his twenty-first year. But the mother is not entitled to recover the loss to her from having to nurse her son, and being prevented from earning anything outside. Cincinnati Omnibus Co. *v.* Kuhnell, 9 Ohio Dec. (Reprint) 197, 11 Cinc. L. Bul. 189.

No recovery for support.— In an action brought by a mother to recover damages for injuries sustained by her minor son through defendant's negligence, she will be entitled to have the wages he could have earned during his minority assessed as damages in her favor, without deduction for his support, which legally devolved upon her. Mauerman *v.* St. Louis, etc., R. Co., 41 Mo. App. 348.

Permanent injury.— Where a boy nine years old is injured so as to be a cripple for life, it is proper for the jury in estimating damages to consider the resulting impairment of capacity to earn a living after his majority. Schmitz *v.* St. Louis, etc., R. Co., 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250.

45. Where an injury to a minor child results in the loss of its services for a period during its minority, the parent may recover for loss of services during the minority, and the child for their loss after coming of age. Traver *v.* Eighth Ave. R. Co., 4 Abb. Dec. (N. Y.) 422, 3 Keyes (N. Y.) 497, 3 Transcr. App. (N. Y.) 203, 6 Abb. Pr. N. S. (N. Y.) 46. So in an action by an infant in the care and custody of its father for personal injuries it is error to instruct the jury that his lessened earning capacity is an element of damages, unless it is limited to the period from which the child would be entitled to his own earnings. Chicago, etc., R. Co. *v.* Krayenbuhl, (Nebr. 1902) 91 N. W. 880. In Rosenkranz *v.* Lindell R. Co., 108 Mo. 9, 17, 18 S. W. 890, 32 Am. St. Rep. 588, the court said: "The impairment of the earning capacity of one in his infancy is as great a damage to him, as though he had not been injured until the day he reached his majority. That he would have an equal right to compensation logically follows. This plaintiff had never earned anything, and what his ability to labor or his capacity for earning money in business pursuits will be in the future no one can tell with any certainty. It is properly held in such case, in the absence of the existence of direct evidence, that much must be left to the judgment, common experience and 'enlightened conscience of the jurors, guided by the facts and circumstances in the case.'" In Western, etc., R. Co. *v.* Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320, it was held that for a personal injury to a child nine years of age, including loss of a member, the law furnishes no measure of damages other than the enlightened conscience of impartial jurors, guided by all the facts and circumstances of the particular case. Among the results of the injury to be considered are pain and suffering, dis-

that such injury has wrought pecuniary loss to the parent, and is not affected by the extent of the pain and suffering of the child,[46] or the mental anguish he may have endured.[47]

10. Suit by Personal Representative. In actions by a personal representative to recover damages for injuries to the deceased, damages may be allowed for pain and suffering,[48] for loss of time,[49] and for all items of expense which were a proper charge and which were paid in consequence of the injury;[50] but it seems that in such cases his death must have resulted from some other cause than the injuries which he has suffered.[51]

C. For Injuries to Property — 1. Personalty — a. In General. In measuring the damages for injury to or destruction of personal property, the jury should take into consideration the character of the injury and under what circumstances rendered as well as the length of time that damages have been withheld.[52] It seems, however, that evidence furnishing a basis for a money estimate must be produced in all cases before substantial damages can be recovered for the injury claimed.[53] Where property has been lost or destroyed through the negligent act of another, the usual rule as to the measure of damages is the reasonable worth of the property at the time of its destruction;[54] and the courts have in some

figurement and mutilation of the person, and impaired capacity to pursue the ordinary avocations of life at and after attainment of majority.

Compensation for deformity.— Where the injuries to a four-year-old child had resulted in permanent deformity and in weakness, reducing her earning capacity, she was entitled not only to damages for bodily and mental suffering, but for the deformed and weakened condition. Reliance Textile, etc., Works *v.* Mitchell, 71 S. W. 425, 24 Ky. L. Rep. 1286.

46. Sawyer *v.* Sauer, 10 Kan. 519.

47. *Kentucky.*— Covington, etc., R. Co. *v.* Packer, 9 Bush 455, 15 Am. Rep. 725.

Maryland.— Harford County Com'rs *v.* Hamilton, 60 Md. 340, 45 Am. Rep. 739.

New York.— Cowden *v.* Wright, 24 Wend. 429, 35 Am. Dec. 633.

Pennsylvania.— Pennsylvania R. Co. *v.* Kelly, 31 Pa. St. 372.

Texas.— Galveston *v.* Barbour, 62 Tex. 172, 50 Am. Rep. 519.

See 15 Cent. Dig. tit. "Damages," § 228.

48. Quinn *v.* Johnson Forge Co., 9 Houst. (Del.) 338, 32 Atl. 858; Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462; Atchison, etc., R. Co. *v.* Rowe, 56 Kan. 411, 43 Pac. 683.

49. Quinn *v.* Johnson Forge Co., 9 Houst. (Del.) 338, 32 Atl. 858.

50. Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462.

51. Chicago, etc., R. Co. *v.* O'Connor, 119 Ill. 586, 9 N. E. 263; Holton *v.* Daly, 106 Ill. 131. Where the plaintiff, in an action for damages sustained from personal injuries, dies before the trial from a cause other than such injuries, and the action is revived in the name of his personal representative, damages for the permanent deprivation of health and of the capacity to work and enjoy life should be limited to the period between the injury and the death. Atchison, etc., R. Co. *v.* Chance, 57 Kan. 40, 45 Pac. 60.

52. Western, etc., R. Co. *v.* McCauley, 68 Ga. 818.

In case of loss of wearing apparel the owner is entitled to recover the value of such articles to him, and is not confined in his measure of damages to what the articles would have sold for in open market. Parmelee *v.* Raymond, 43 Ill. App. 609.

No market value.— Property may have a value for which the owner may recover, if it be negligently destroyed, although it may have no market value. Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354, 18 Am. Rep. 362.

53. Sheedy *v.* Union Press-Brick Works, 25 Mo. App. 527.

54. *Alabama.*—Fail *v.* Presley, 50 Ala. 342.

Colorado.— Bourke *v.* Whiting, 19 Colo. 1, 34 Pac. 172.

Connecticut.—Parrott *v.* Housatonic R. Co., 47 Conn. 575.

Iowa.— Johnson *v.* Chicago, etc., R. Co., 77 Iowa 666, 42 N. W. 512.

Kentucky.— Bronson *v.* Green, 2 Duv. 234.

Maryland.— Baltimore Third Nat. Bank *v.* Boyd, 44 Md. 47, 22 Am. Rep. 35.

Massachusetts.— Parsons *v.* Pettingell, 11 Allen 507; Barnard *v.* Poor, 21 Pick. 378.

Missouri.— Wilson *v.* Drumrite, 24 Mo. 304.

New York.— Price *v.* Keyes, 1 Hun 177.

North Carolina.—Rippey *v.* Miller, 46 N. C. 479, 62 Am. Dec. 177.

Oregon.— Prettyman *v.* Oregon R., etc., Co., 13 Oreg. 341, 10 Pac. 634.

Pennsylvania.— Young *v.* Watters, 5 Pa. Co. Ct. 127.

South Carolina.— Bailey *v.* Jeffords, 2 Speers 271; Richardson *v.* Dukes, 4 McCord 156.

Tennessee.— Burke *v.* Louisville, etc., R. Co., 7 Heisk. 451, 19 Am. Rep. 618; Polk *v.* Faucher, 1 Head 336.

Texas.— Galveston, etc., R. Co. *v.* Matula, (Sup. 1892) 19 S. W. 376; Gulf, etc., R. Co., *v.* Johnson, (Civ. App. 1894) 25 S. W. 1015; Galveston, etc., R. Co. *v.* Rheiner, (Civ. App. 1894) 25 S. W. 971; Texas, etc., R. Co. *v.* Land, 3 Tex. App. Civ. Cas. § 50; Ft. Worth, etc., R. Co. *v.* Scott, 2 Tex. App. Civ. Cas.

instances allowed interest for the use of the property.[55] The general rule adopted as a measure of damages for injury to property is the difference between its value before and after the injury alleged,[56] although in some cases the rule of restoration has received the sanction of the courts.[57]

b. Animals.[58] In cases of injury to animals the question of damages depends somewhat upon the question whether there is a market for the animal injured or destroyed. Where there is a market for the animal injured or destroyed, the measure of damages is the difference between its market value before and after the injury.[59] When no circumstances of aggravation appear, the courts have held that the damages should be confined to the value of the animal at the time of the injury[60] or its reduction in value by reason of such injury.[61] Where an animal is

§ 140; Texas, etc., R. Co. *v.* Williams, 1 Tex. App. Civ. Cas. § 249.

Virginia.— Reynold *v.* Waller, 1 Wash. 164.

See 15 Cent. Dig. tit. "Damages," § 266.

Where grain is stored in an elevator, and receipts are given therefor, and the elevator is burned, the measure of damages is the value of the grain at the time it was demanded, with six per cent interest thereafter. Dierkson *v.* Cass County Mill, etc., Co., 42 Iowa 38.

Where wagons and harness are destroyed, their cost, less a reasonable amount for wear and tear, is proper evidence of their value. Union Pac., etc., R. Co. *v.* Williams, 3 Colo. App. 526, 34 Pac. 731. So where defendants negligently destroyed plaintiff's wagon while he was engaged in hauling goods from the station the measure of damages is the damage done to the wagon, the loss on the trip in which plaintiff was engaged, and the loss of the use of the wagon until such time as by proper diligence it could be repaired or replaced. Shelbyville Laternal Branch R. Co. *v.* Lewark, 4 Ind. 471.

55. *Alabama.*— Fail *v.* Presley, 50 Ala. 342.

Connecticut.—Parrott *v.* Housatonic R. Co., 47 Conn. 575.

Illinois.— Ohio Northern Transp. Co. *v.* Sellick, 52 Ill. 249; Chicago, etc., R. Co. *v.* Ames, 40 Ill. 249.

Iowa.— Johnson *v.* Chicago, etc., R. Co., 77 Iowa 666, 42 N. W. 512.

Maryland.— Baltimore Bldg. Assoc. No. 2 *v.* Grant, 41 Md. 560.

North Carolina.— Rippey *v.* Miller, 46 N. C. 479, 62 Am. Dec. 177.

Texas.— Galveston, etc., R. Co. *v.* Matula, (Sup. 1892) 19 S. W. 376.

United States.— National Steam Nav. Co. *v.* Dyer, 105 U. S. 24, 26 L. ed. 1001.

See also *supra*, VII, M, 6; and, generally, REPLEVIN; TRESPASS.

56. Krebs Mfg. Co. *v.* Brown, 108 Ala. 508, 18 So. 659, 54 Am. St. Rep. 188; Young *v.* Cureton, 87 Ala. 727, 6 So. 352; Hot Springs R. Co. *v.* Tyler, 36 Ark. 205; Willis *v.* Branch, 94 N. C. 142.

57. Harvey *v.* Sides Silver Min. Co., 1 Nev. 539, 90 Am. Dec. 510.

Burning building.— The measure of damages for the burning of a building is the reasonable cost of restoring it to its former condition. Anderson *v.* Miller, 96 Tenn. 35, 33 S. W. 615, 94 Am. St. Rep. 812, 31 L. R. A. 604.

Removal of fences.—Where a fence belonging to plaintiff was wrongfully included in land set off by the sheriff in executing a writ of possession, and the fence was torn down and carried away by the person in whose favor the decree was rendered and others, plaintiff was entitled to recover against them such a sum as it would cost to replace the fence with one of like material and construction. Jackel *v.* Reiman, 78 Tex. 588, 14 S. W. 1001. See also Waters *v.* Greenleaf-Johnson Lumber Co., 115 N. C. 648, 20 S. E. 718.

58. See also ANIMALS, 2 Cyc. 426 *et seq.*

59. Shaw *v.* Missouri, etc., Dairy Co., 56 Mo. App. 521; Galveston Wharf Co. *v.* McYoung, 2 Tex. App. Civ. Cas. § 642.

Necessity of death.— In an action for damages for an injury to live stock, which necessitated their killing, only the actual amount which was realized from the sale, after a reasonable allowance for the time and trouble required in effecting the sale, should be deducted from the value of the stock. Dean *v.* Chicago, etc., R. Co., 43 Wis. 305.

60. *Arkansas.*— St. Louis, etc., R. Co. *v.* Biggs, 50 Ark. 169, 6 S. W. 724.

Illinois.— Toledo, etc., R. Co. *v.* Arnold, 43 Ill. 418.

Texas.— Houston, etc., R. Co. *v.* Loughbridge, 1 Tex. App. Civ. Cas. § 1300; Galveston, etc., R. Co. *v.* Turner, 1 Tex. App. Civ. Cas. § 641.

Vermont.— Bardwell *v.* Jamaica, 15 Vt. 438.

United States.— McKay *v.* Irvine, 10 Fed. 725, 11 Biss. 168.

See 15 Cent. Dig. tit. "Damages," § 269.

Love and affection.— In Crawford *v.* International, etc., R. Co., (Tex. Civ. App. 1894) 27 S. W. 263, which was an action for damages for killing a horse, a charge that the measure of damages was the market value of the horse at the time it was killed, and that damages for the love and affection plaintiff had for the horse should not be given, was held to be correct.

Recovery for use of animal killed.— While a party is entitled to recover for the value of the animal killed, he is not entitled to recover for the use or hire of such animal from the time of the loss to the date of the finding. Atlanta Cotton-Seed Oil Mills *v.* Coffey, 80 Ga. 145, 4 S. E. 759, 12 Am. St. Rep. 244; Edwards *v.* Beebe, 48 Barb. (N. Y.) 106.

61. Davidson *v.* Michigan Cent. R. Co., 49 Mich. 428, 13 N. W. 804.

killed and its body possesses a monetary value, the measure of damages is the difference between the value of the animal alive and its monetary value after death.[62] Where the animal is only injured, the measure of damages is to be measured by the difference in value before and after the injury inflicted;[63] but the owner is entitled to recover for all reasonable care and expense attendant upon the injury.[64] At times the courts have taken into consideration the duration of the disability occasioned by the injury[65] and the value of the time spent and the reasonable expense incurred;[66] and again they have considered the market value of the animal injured and have measured the damages from such standard.[67]

2. Real Property — a. In General. As a general rule the measure of damages in actions for injuries to real property is the difference in value before and after the injury to the premises,[68] although some of the courts have considered the measure of damages as the difference in the rental value of the property injured.[69]

Loss of milk.— A party suing for killing and wounding his cows may recover for the loss of milk from the wounded cows while they were recovering. Donahoo *v.* Scott, (Tex. Civ. App. 1895) 30 S. W. 385.

62. Boing *v.* Raleigh, etc., R. Co., 91 N. C. 199; Roberts *v.* Richmond, etc., R. Co., 88 N. C. 560. See also Godwin *v.* Wilmington, etc., R. Co., 104 N. C. 146, 10 S. E. 136.

Consideration of greater value.— In an action for double damages for the killing of a bull, which was more valuable for breeding purposes than for meat, such greater value should be taken into consideration in the assessment of the damages. Young *v.* Kansas City, etc., R. Co., 52 Mo. App. 530.

63. St. Louis, etc., R. Co. *v.* Biggs, 50 Ark. 169, 6 S. W. 724.

64. *Arkansas.*— St. Louis, etc., R. Co. *v.* Biggs, 50 Ark. 169, 6 S. W. 724.

Massachusetts.— Gillett *v.* Western R. Corp., 8 Allen 560.

Minnesota.— Keyes *v.* Minneapolis, etc., R. Co., 36 Minn. 290, 30 N. W. 888.

Missouri.— Streett *v.* Laumier, 34 Mo. 469.

Texas.— Ft. Worth, etc., R. Co. *v.* Ratliffe, 2 Tex. App. Civ. Cas. § 681.

See 15 Cent. Dig. tit. "Damages," § 280; and *supra*, VII, I, 3.

65. Atlanta, etc., R. Co. *v.* Hudson, 62 Ga. 679; Johnson *v.* Holyoke, 105 Mass. 80, 7 Am. Rep. 545.

66. Gillett *v.* Western R. Corp., 8 Allen (Mass.) 560; Ft. Worth, etc., R. Co. *v.* Ratliffe, 2 Tex. App. Civ. Cas. § 681.

67. Thus where milch cows were wounded by defendant, whereby the use of the same for milk was lessened, it was held that plaintiff could recover as damages the market value of the milk, or if it had no market value its reasonable value to him with interest. Hoskins *v.* Huling, 2 Tex. App. Civ. Cas. § 155.

68. *California.*— Chipman *v.* Hibberd, 6 Cal. 162.

Illinois.— St. Louis, etc., R. Co. *v.* Haller, 82 Ill. 208; Chicago, etc., R. Co. *v.* Baker, 73 Ill. 316.

Iowa.— Cadle *v.* Muscatine Western, etc., R. Co., 44 Iowa 11.

Kentucky.— Maysville *v.* Stanton, 14 S. W. 675, 12 Ky. L. Rep. 586.

Maine.— Rockland Water Co. *v.* Tillson, 69 Me. 255. *Compare* Worcester *v.* Great Falls Mfg. Co., 41 Me. 159, 66 Am. Dec. 217.

New Hampshire.— Wallace *v.* Goodall, 18 N. H. 439.

New York.— Argotsinger *v.* Vines, 82 N. Y. 308; Nixon *v.* Stillwell, 52 Hun 353, 5 N. Y. Suppl. 248; Honsee *v.* Hammond, 39 Barb. 89; Agate *v.* Lowendein, 6 Daly 291.

Pennsylvania.— Shenango, etc., R. Co. *v.* Brahm, 79 Pa. St. 447; Pennsylvania R. Co. *v.* Heister, 8 Pa. St. 445.

Texas.— Pacific Express Co. *v.* Lasker Real-Estate Assoc., 81 Tex. 81, 16 S. W. 792; Ft. Worth, etc., R. Co. *v.* Hogsett, 67 Tex. 685, 4 S. W. 365; Owens *v.* Missouri Pac. R. Co., 67 Tex. 679, 4 S. W. 593.

See 15 Cent. Dig. tit. "Damages," § 273.

Restoration to former condition.— Where defendant trespassed upon plaintiff's lot and injured his fences, walks, trees, and house by digging up the ground and laying pipes, the measure of damages was not necessarily the difference in the value of the property before and after the trespass, but such sum as would restore the property to its former condition, such additional sum as would compensate plaintiff for the use of the property of which he was deprived, and the value of such part of it as could not be restored. Graessle *v.* Carpenter, 70 Iowa 166, 30 N. W. 392.

69. Selma, etc., R. Co. *v.* Knapp, 42 Ala. 480; Kansas City, etc., R. Co. *v.* Cook, 57 Ark. 387, 21 S. W. 1066; Hull *v.* Chicago, etc., R. Co., 65 Iowa 713, 22 N. W. 940; Elder *v.* Lykens Valley Coal Co., 157 Pa. St. 490, 27 Atl. 545, 37 Am. St. Rep. 742. In an action for damages to a house, occasioned by the melting of ice stored in the adjoining building, plaintiff cannot recover for the depreciation in the rental value up to the time of the trial, the permanent depreciation in the value of the property, and also the cost of repairing the house, so that in the future it will be unaffected by the proximity of the ice, as the two latter elements are inconsistent and practically give plaintiff double damages. Barrick *v.* Schifferdecker, 123 N. Y. 52, 25 N. E. 365 [*reversing* 48 Hun 355, 1 N. Y. Suppl. 21].

Rental value of buildings.— The courts

In order, however, for the court to consider the difference in rental value there must be some evidence to that effect, and mere speculative rent will not be considered.[70] In some cases the cost of repair or restoration has been adopted as the measure of damages;[71] but in such event the cost of repair must be reasonable and bear some proportion to the injury sustained.[72]

b. By Excavation and Carrying Away Soil. As a general rule the measure of damages for unlawful excavation or removal of soil from real estate is the diminution in value of the land,[73] although some courts have held that the real measure is the value of the land removed[74] or the cost of restoring it to its former condition.[75]

c. By Obstruction to Premises or Place of Business.[76] The measure of damages in case of obstruction to premises or places of business has usually been held to be the difference in the rental value or the receipts and profits before and after the injury complained of,[77] and the value of the business obstructed is a

have been inclined in measuring damages to take into consideration the rental value of buildings during the time that a party has been deprived of their use. Nims *v.* Troy, 59 N. Y. 500.

The application of this rule depends upon whether the injury or loss is partial or total. Where the loss is partial or limited the reduction in rental value has been accepted as the measure of damages. Baltimore, etc., R. Co. *v.* Boyd, 67 Md. 32, 10 Atl. 315, 1 Am. St. Rep. 362; Howes *v.* Grush, 131 Mass. 207. Where the injury or loss is permanent the measure of damages is the value of the property injured or destroyed. Studenmire *v.* De Bardelaben, 85 Ala. 85, 4 So. 723; Baldwin *v.* Chicago, etc., R. Co., 35 Minn. 354, 29 N. W. 5; Agate *v.* Lowenbein, 6 Daly (N. Y.) 291.

70. Bennett *v.* Clemence, 6 Allen (Mass.) 10.

In estimating the damages for the wrongful shutting off of gas from premises, the jury should consider not only the depreciation of the rental value of the premises as compared with neighboring property, but should also consider the change of arrangement necessitated by the disuse of gas. Baltimore Gaslight Co. *v.* Colliday, 25 Md. 1.

71. Harrison *v.* Kiser, 79 Ga. 588, 4 S. E. 320; Graessle *v.* Carpenter, 70 Iowa 166, 30 N. W. 392; Vermilya *v.* Chicago, etc., R. Co., 66 Iowa 606, 24 N. W. 234, 55 Am. Rep. 279; Marvin *v.* Pardee, 64 Barb. (N. Y.) 353; Whipple *v.* Wauskuck Co., 12 R. I. 321.

In an action for damages to residence property by reason of dirt being deposited thereon, thereby demolishing the outhouses, fences, and shrubbery, the measure of damages is not the difference between the market value of the lot just before and after the injury, but it is the amount it would take to put the premises in as "good" a condition as before the injury, allowing deductions therefrom for any increased value of the lot arising from the deposit of the dirt thereon. Koch *v.* Sackman-Phillips Invest. Co., 9 Wash. 405, 37 Pac. 703.

72. Vermilya *v.* Chicago, etc., R. Co., 66 Iowa 606, 24 N. W. 234, 55 Am. Rep. 279; Seely *v.* Alden, 61 Pa. St. 302, 100 Am. Dec. 642. Although the difference in value before and after the injury to premises is the proper measure of damages, complaint cannot be made by defendant that the cost of repairs was adopted as the measure, the amount paid being reasonable, and the premises not being put in better condition than before they were injured. Berg *v.* Parsons, 90 Hun (N. Y.) 267, 35 N. Y. Suppl. 780.

73. *Indiana.*— Moellering *v.* Evans, 121 Ind. 195, 22 N. E. 989, 6 L. R. A. 449.

Massachusetts.— Gilmore *v.* Driscoll, 122 Mass. 199, 23 Am. Rep. 312.

Minnesota.— Karst *v.* St. Paul, etc., R. Co., 22 Minn. 118.

New Jersey.—McGuire *v.* Grant, 25 N. J. L. 356, 67 Am. Dec. 49.

Ohio.— Keating *v.* Cincinnati, 38 Ohio St. 141, 43 Am. Rep. 421.

Compare St. Louis Manganese Co. *v.* Miller, (Ark. 1889) 11 S. W. 958.

See 15 Cent. Dig. tit. "Damages," § 275.

74. Jones *v.* Gooday, 1 Dowl. N. S. 50, 10 L. J. Exch. 275, 8 M. & W. 146. In Mueller *v.* St. Louis, etc., R. Co., 31 Mo. 262, it was held in an action of trespass for damages for wrongfully entering upon lands and taking and carrying away the soil, etc., that the proper measure of damages is not the actual damage sustained but the value of the land removed.

75. Walters *v.* Chamberlin, 65 Mich. 333, 32 N. W. 440.

76. **Interruption of business as an element of damages** see *supra*, VII, H.

77. Jackson *v.* Kiel, 13 Colo. 378, 22 Pac. 504, 16 Am. St. Rep. 207, 6 L. R. A. 254; French *v.* Connecticut River Lumber Co., 145 Mass. 261, 14 N. E. 113. In an action by a grantee to recover damages of his grantor for his refusal for a number of years to remove a large amount of heavy machinery, whereby plaintiff is deprived of the use of the property, he may recover the annual loss by reason of his inability to use it or obtain any income therefrom, but not for loss of capital, value, dilapidation, or destruction. Barclay *v.* Grove, (Pa. 1888) 11 Atl. 888.

In a suit for damages for obstructing a ferry landing, where it appears that the lease under which the ferry was operated had ex-

proper item of damages to be taken into consideration by the jury in arriving at a conclusion.[78]

d. By Removal of Lateral Support. In measuring the damages for unlawful removal of lateral support, the courts have considered the diminution in value of the land injured rather than the cost of repairs.[79]

e. From Fire. In cases of damages resulting from fire the courts have differed in their measure; some holding that the plaintiff can recover whatever amount of damages he is shown to have sustained,[80] while other courts have held that the measure of damages is the difference in the value of the land before and after the fire occurred.[81]

f. From Overflow. In measuring the damages for the overflow of land the

pired, the measure of damages is the actual loss by the obstruction, as shown by the loss of tolls. Jones *v.* Pittsburgh, etc., R. Co., (Pa. 1887) 11 Atl. 608; Pittsburgh, etc., R. Co. *v.* Jones, 111 Pa. St. 204, 2 Atl. 410, 56 Am. Rep. 260. See also Mason *v.* Harper's Ferry Bridge Co., 20 W. Va. 223.

Special damages.— While the measure of damages for placing cars in front of plaintiff's premises is in general the depreciation in the value of the use of the property during the time the cars are there, special damages may also be recovered where they are warranted by the facts and are pleaded with particularity and certainty. Houston, etc., R. Co. *v.* Lackey, 12 Tex. Civ. App. 229, 33 S. W. 768.

78. Marquart *v.* La Farge, 5 Duer (N. Y.) 559.

79. Keating *v.* Cincinnati, 38 Ohio St. 141, 13 Am. Rep. 421; Crown *v.* McKee, 23 Pittsb. Leg. J. (Pa.) 137. And see 1 Cyc. 785.

By reason of the undermining of plaintiff's land by defendant, and the consequent subsidence of the natural strata of rock below the surface thereof, it became impracticable to erect on the land very heavy buildings, for which purpose it was otherwise adapted, except by the construction of foundations of extraordinary depth, extending below the disturbed strata. It was held that the damages recoverable for the injuries were to be measured by the diminution in the market value of the property, not by the cost of construction of such foundation walls, although less than such diminution. Barnett *v.* St. Anthony Falls Water-Power Co., 33 Minn. 265, 22 N. W. 535.

Consent of owner.— Where a lot owner in excavating on his lot injures the wall of the adjacent owner standing three inches back from the line, such adjacent owner cannot recover even nominal damages for injury to his building on account of the displacement of the three inches of ground, if such displacement was with his consent. Covington *v.* Geyler, 93 Ky. 275, 19 S. W. 741, 14 Ky. L. Rep. 145.

Where a city excavates a street so negligently as to take away the support of an abutting lot, and to cause the soil thereof to slide into the street, the owner is entitled to recover for damage to the buildings on the lot, unless their own weight contributed to the sliding of the soil and their consequent injuries. Parke *v.* Seattle, 5 Wash. 1, 31 Pac. 310, 32 Pac. 82, 34 Am. St. Rep. 839, 20 L. R. A. 68.

80. Waters *v.* Brown, 44 Mo. 302.

Meadow land.— Where a meadow is destroyed by fire, the measure of damages is the cost of reseeding the meadow and its rental value until it is restored; and it is error to charge that in determining the damages its condition before the fire should be compared with its condition thereafter. St. Louis, etc., R. Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595. Where in an action for the burning of land the evidence of damages relied on tends to show its depreciation in value as meadow land, it is not error to charge the jury to find such sum as will compensate for the injury done to the turf and roots, taking into consideration the purposes to which the land was appropriated or adapted, instead of declaring the damages to be the difference in the market value of the land immediately before and after the injury. Gulf, etc., R. Co. *v.* Jagoe, (Tex. Civ. App. 1895) 32 S. W. 717.

Standing timber.— In estimating the damages done to the land burned over it is proper to consider timber standing on the land. Stertz *v.* Stewart, 74 Wis. 160, 42 N. W. 214.

81. Terre Haute, etc., R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. 534; Missouri, etc., R. Co. *v.* Goode, 7 Tex. Civ. App. 245, 26 S. W. 441; Missouri, etc., R. Co. *v.* Pfluger, (Tex. Civ. App. 1894) 25 S. W. 792; Missouri Pac. Co. *v.* Rabb, 3 Tex. App. Civ. Cas. § 37; Missouri Pac. R. Co. *v.* Patterson, 2 Tex. App. Civ. Cas. § 808; Texas, etc., R. Co. *v.* Tippit, 2 Tex. App. Civ. Cas. § 807.

In an action for the burning of grass, and injury to the land as the result of the burning, the measure of damages for the injury to the land is the difference between its value before the fire, exclusive of the value of the grass, and its value after the fire. Gulf, etc., R. Co. *v.* Hendricks, (Tex. Civ. App. 1894) 25 S. W. 433.

The difference between the market value of a house and lot before and after a fire, by which the house is destroyed, is the measure of the damage occasioned by the fire, where there is any evidence that the house and lot together have a market value. Pacific Express Co. *v.* Smith, (Tex. 1891) 16 S. W. 998.

courts have not been consistent in their rulings. As a general rule it may be stated that the measure of damages for a wrongful act of this kind is the actual damage which the land has sustained by the overflow.[82] In some cases the courts have held that the measure of damages should be the difference in the market value of the land before and after the overflow;[83] while in other cases the fair rental value of the land has been considered the criterion by which the damages should be measured.[84]

g. Injuries to Growing Crops. In an action for injury to a growing crop the measure of damages is the value of the crop in its condition at the time of the

82. *Alabama.*— Union Springs *v.* Jones, 58 Ala. 654.

Georgia.— Phinizy *v.* Augusta, 47 Ga. 260.

Indiana.— Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. 686.

Iowa.— Van Pelt *v.* Davenport, 42 Iowa 308, 20 Am. Rep. 622.

New York.— Chase *v.* New York Cent. R. Co., 24 Barb. 273.

North Carolina.— Burnett *v.* Nicholson, 86 N. C. 99.

Pennsylvania.— Eshleman *v.* Martic Tp., 152 Pa. St. 68, 25 Atl. 178; Schuylkill Nav. Co. *v.* Farr, 4 Watts & S. 362; Anonymous, 4 Dall. 147, 1 L. ed. 778.

Texas.— Broussard *v.* Sabine, etc., R. Co., 80 Tex. 329, 16 S. W. 30; Green *v.* Taylor, etc., R. Co., 79 Tex. 604, 15 S. W. 685; Gulf, etc., R. Co. *v.* Pool, 70 Tex. 713, 8 S. W. 535; Galveston, etc., R. Co. *v.* Becht, (Civ. App. 1893) 21 S. W. 971; Galveston, etc., R. Co. *v.* Bibb, 3 Tex. App. Civ. Cas. § 272.

See 15 Cent. Dig. tit. "Damages," § 276½.

Annual damage.— The proper issue to be submitted to the jury, in a suit to recover damages resulting from ponding water upon plaintiff's land, owing to a mill dam erected by defendant, is the amount of damage annually sustained by plaintiff thereby. Hester *v.* Broach, 84 N. C. 251. See also Gulf, etc., R. Co. *v.* Helsley, 62 Tex. 593. In an action to recover damages for the overflow of plaintiff's lands, whereby his crops were destroyed, the measure of damages should be the yearly value of the land for cultivation and not the yearly rental. Georgia R., etc., Co. *v.* Berry, 78 Ga. 744, 4 S. E. 10.

Proximate damages.— A railroad company, overflowing lands by water carried by ditches along its road from a place whence it would not otherwise have come, is liable for all proximate damages, although caused by heavy and unusual rain falls. Illinois Cent. R. Co. *v.* Heisner, 45 Ill. App. 143. So in San Antonio, etc., R. Co. *v.* Gwynn, (Tex. App. 1891) 15 S. W. 509, it was held that in an action against a railroad company for accumulating surface water on plaintiff's land plaintiff is entitled to recover for the sickness of the family occasioned thereby, and his expenses incurred because of such sickness.

83. *Indiana.*— Louisville, etc., R. Co. *v.* Sparks, 12 Ind. App. 410, 40 N. E. 546; Young *v.* Gentis, 7 Ind. App. 199, 32 N. E. 796.

Iowa.— Sullens *v.* Chicago, etc., R. Co., 74 Iowa 659, 38 N. W. 545, 7 Am. St. Rep. 501; Drake *v.* Chicago, etc., R. Co., 63 Iowa 302, 19 N. W. 215, 50 Am. Rep. 746. And see Willitts *v.* Chicago, etc., R. Co., 88 Iowa 281, 55 N. W. 313, 21 L. R. A. 608.

New York.— Higgins *v.* New York, etc., R. Co., 78 Hun 567, 29 N. Y. Suppl. 563.

North Carolina.— Ridley *v.* Seaboard, etc., R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708; Adams *v.* Durham, etc., R. Co., 110 N. C. 325, 14 S. E. 857; Spilman *v.* Roanoke Nav. Co., 74 N. C. 675.

Pennsylvania.—Riddle *v.* Delaware County, 156 Pa. St. 643, 27 Atl. 569; Schuylkill Nav. Co. *v.* Farr, 4 Watts & S. 362.

South Carolina.— Gentry *v.* Richmond, etc., R. Co., 38 S. C. 284, 16 S. E. 893 [*distinguishing* Devereux *v.* Champion Cotton Press Co., 17 S. C. 66; Hammond *v.* Port Royal, etc., R. Co., 15 S. C. 10].

Texas.— International, etc., R. Co. *v.* Davis, (Civ. App. 1895) 29 S. W. 483; Texas Cent. R. Co. *v.* Clifton, 2 Tex. App. Civ. Cas. § 489.

See 15 Cent. Dig. tit. "Damages," § 276½.

The rule for assessing damages for overflowing land by the construction of a railroad levee is to take the actual value of the land at the completion of the work, supposing the consequences to be known, compare it with what the value would have been if the overflow had remained as before the construction of the embankment, and fix the damages at the difference. St. Louis, etc., R. Co. *v.* Morris, 35 Ark. 622.

84. *Delaware.*— Harrigan *v.* Wilmington, 8 Houst. 140, 12 Atl. 779.

Georgia.— Georgia R., etc., Co. *v.* Berry, 78 Ga. 744, 4 S. E. 10.

Illinois.— Chicago *v.* Huenerbein, 85 Ill. 594, 28 Am. Rep. 626.

Indiana.— South Band *v.* Paxon, 67 Ind. 228.

Iowa.— Sullens *v.* Chicago, etc., R. Co., 74 Iowa 659, 38 N. W. 545, 7 Am. St. Rep. 501.

New York.—Jutte *v.* Hughes, 67 N. Y. 267; Gillett *v.* Kinderhook, 77 Hun 604, 28 N. Y. Suppl. 1044.

Vermont.— Willey *v.* Hunter, 57 Vt. 479.

See 15 Cent. Dig. tit. "Damages," § 276½.

In a case of flowage of lands where the crops are not up the damage should be estimated upon the basis of the rental value and the costs of seed and labor in breaking up and planting or sowing. Kankakee, etc., R. Co. *v.* Horan, 17 Ill. App. 650.

injury,[85] although in some cases the courts have allowed interest from the date of destruction.[86] While the general rule is as above stated, other standards of measurement have been adopted, such as the market value of the crop less the cost of producing, harvesting, and marketing it;[87] but the measure of damages will not be extended to the conjectural value of the crops at the time of their maturity.[88]

Where farm land is flooded by another's fault, so as to render it useless for crops for that season, the owner is entitled to damages measured by the difference between the rental value of the land before and after the flooding. Reichert *v.* Baekenstross, 71 Hun (N. Y.) 516, 24 N. Y. Suppl. 1009.

85. *Alabama.*— Gresham *v.* Taylor, 51 Ala. 505.

Arkansas.— St. Louis, etc., R. Co. *v.* Paup, (1893) 22 S. W. 213; St. Louis, etc., R. Co. *v.* Lyman, 57 Ark. 512, 22 S. W. 170.

Colorado.—Colorado Consol. Land, etc., Co. *v.* Hartman, 5 Colo. App. 150, 38 Pac. 62.

Kansas.— Gripton *v.* Thompson, 32 Kan. 367, 4 Pac. 698.

Massachusetts.— King *v.* Fowler, 14 Piek. 238.

Minnesota.— Byrne *v.* Minneapolis, etc., R. Co., 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 668; Lommeland *v.* St. Paul, etc., R. Co., 35 Minn. 412, 29 N. W. 119.

New York.— Richardson *v.* Northrup, 66 Barb. 85.

Pennsylvania.— Brown *v.* Torrenee, 88 Pa. St. 186.

Texas.— Galveston, etc., R. Co. *v.* Horne, 69 Tex. 643, 9 S. W. 440; Texas, etc., R. Co. *v.* Bayliss, 62 Tex. 570; Gulf, etc., R. Co. *v.* Carter, (Civ. App. 1894) 25 S. W. 1023; Missouri, etc., R. Co. *v.* Pfluger, (Civ. App. 1894) 25 S. W. 792; Gulf, etc., R. Co. *v.* Nicholson, (Civ. App. 1894) 25 S. W. 54; Missouri Pac. R. Co. *v.* Wise, 3 Tex. App. Civ. Cas. § 386; Missouri Pac. R. Co. *v.* Johnson, 3 Tex. App. Civ. Cas. § 275; International, etc., R. Co. *v.* Saul, 2 Tex. App. Civ. Cas. § 698; Ft. Worth, etc., R. Co. *v.* Scott, 2 Tex. App. Civ. Cas. § 140; Wamble *v.* Graves, 1 Tex. App. Civ. Cas. § 481; Texas, etc., R. Co. *v.* Reid, 1 Tex. App. Civ. Cas. § 296; International, etc., R. Co. *v.* Malone, 1 Tex. App. Civ. Cas. § 232.

Wisconsin.— Folsom *v.* Apple River Log-Driving Co., 41 Wis. 602.

See 15 Cent. Dig. tit. "Damages," § 281.

Cattle-guards.— In an action for injury to crops because of a railroad company's failure to erect proper cattle-guards, plaintiff is entitled to recover the value of the crops and also reasonable compensation for the time and labor necessarily expended in trying to prevent further damage. St. Louis, etc., R. Co. *v.* Ritz, 33 Kan. 404, 6 Pac. 533.

Evidence of fertility of land.— In an action for injury to growing crops which in their present condition have no market value, evidence that the land on which the crops were growing was very fertile and productive and had for a series of years produced vegetables which were larger and brought better prices than the average is admissible in order to provide an estimate of the value of the crop as it was when destroyed. Economy Light, etc., Co. *v.* Cutting, 49 Ill. App. 422.

86. St. Louis, etc., R. Co. *v.* Lyman, 57 Ark. 512, 22 S. W. 170; Galveston, etc., R. Co. *v.* Horne, 69 Tex. 643, 9 S. W. 440; Missouri, etc., R. Co. *v.* Pfluger, (Tex. Civ. App. 1894) 25 S. W. 792; Missouri Pac. R. Co. *v.* Wise, 3 Tex. App. Civ. Cas. § 386; Texas, etc., R. Co. *v.* Reid, 1 Tex. App. Civ. Cas. § 296.

A growing crop of wheat has an approximate value at every stage of its growth, and in trespass for the wrongful act of another in plowing it under the measure of damages is its value at the time of the wrongful act with interest thereon. Clark *v.* Banks, 6 Houst. (Del.) 584.

87. Shotwell *v.* Dodge, 8 Wash. 337, 36 Pac. 254. Where in an action for the destruction of a growing crop the only evidence offered by which the value of the crop could be ascertained was the cost of planting and cultivating up to the time of the destruction the judgment will be reversed, as the proper method of determining the value of such crop is to prove its probable yield under proper cultivation, the value of the yield when matured and ready for sale, the expense of producing it, harvesting it, and preparing it for, and transporting it to, market. Galveston, etc., R. Co. *v.* Ryan, (Tex. Civ. App. 1893) 21 S. W. 1013; Galveston, etc., R. Co. *v.* Borsky, 2 Tex. Civ. App. 545, 21 S. W. 1011. In Smith *v.* Chicago, etc., R. Co., 38 Iowa 518, the measure of damages against a railroad company for injuries to growing crops caused by defendant's failure to construct cattle-guards was held to be the market value of the crops when matured, less the expense of fitting them for market from the time of the injury, and diminished by the value of the portion of the crops saved.

88. Gresham *v.* Taylor, 51 Ala. 505; International, etc., R. Co. *v.* Benitos, 59 Tex. 326; Taul *v.* Shanklin, 1 Tex. App. Civ. Cas. § 1135. Where growing corn was destroyed by cattle after the owner had expended on the crop all the labor it was necessary to expend before harvesting, it was held that, although the destruction of the corn at that stage of its growth was the loss of all the corn that would have matured had it not been destroyed, the owner could recover only the value of the corn at the time of the injury. Richardson *v.* Northrup, 66 Barb. (N. Y.) 85. In an action to recover damages for injuries done to growing crops by the defendant's hogs, it was held to be error to admit evidence of what the crops injured in June would have been worth in the fall if uninjured. Hays *v.* Crist, 4 Kan. 350.

In those cases where the crop is of a permanent nature, such as growing grass, and its destruction has injured the land itself, it has been held that the measure of damages is the diminished value of the land after the injury;[89] but if the thing destroyed, although it is part of the realty, has a value which can be accurately measured and ascertained, without reference to the value of the soil in which it stands or out of which it grows, the recovery must be for the value of the thing thus destroyed, and not for the difference in the value of the land before and after such destruction.[90]

h. Injury to Riparian Owners.[91] Riparian rights are property and are valuable, and although they must be enjoyed in due subjection to the rights of the property they cannot be arbitrarily or capriciously destroyed or impaired, and where damages are claimed for loss of such rights they may be recovered.[92] The measure of damages in such cases depends upon the amount of injury inflicted and the nature of the rights violated.[93] While the courts have not been agreed as to whether the true measure of damages would be the depreciation in value of the property or the cost of restoration,[94] they have been inclined to the latter view,[95] unless the cost of remedying the injury equals or exceeds the cost of the thing injured, in which case such value becomes the measure of damages.[96]

D. For Breach of Contract — 1. In General. While in some of the earlier cases a discretion was allowed the jury in fixing the damages in view of all the circumstances of the case,[97] yet under the present practice the measure of damages

89. Ft. Worth, etc., R. Co. *v.* Wallace, 74 Tex. 581, 12 S. W. 227; Ft. Worth, etc., R. Co. *v.* Hogsett, 67 Tex. 685, 4 S. W. 365; Galveston, etc., R. Co. *v.* Seymour, 63 Tex. 345; Gulf, etc., R. Co. *v.* Helsley, 62 Tex. 593; Missouri, etc., R. Co. *v.* Goode, 7 Tex. Civ. App. 245, 26 S. W. 441; Texas, etc., R. Co. *v.* Land, 3 Tex. App. Civ. Cas. § 50.

In an action against a railroad company for burning plaintiff's grass evidence of the value of the grass for grazing purposes is admissible. Galveston, etc., R. Co. *v.* Rheiner, (Tex. Civ. App. 1894) 25 S. W. 971.

Permanent injury.— Where an overflow of land only damages the crops thereon and causes no permanent injury to the land except as showing a liability on its part to further similar overflows, it is error to instruct the jury that they may compensate the owner for permanent injury to his land by estimating its value before and after the overflow. Gulf, etc., R. Co. *v.* Haskell, 4 Tex. Civ. App. 550, 23 S. W. 546.

90. Whitbeck *v.* New York Cent. R. Co., 36 Barb. (N. Y.) 644.

91. See *supra*, VII, H, 5; and, generally, Waters.

92. *Minnesota.*— Brisbine *v.* St. Paul, etc., R. Co., 23 Minn. 114.

New York.— Rumsey *v.* New York, etc., R. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. Rep. 600, 15 L. R. A. 618.

Rhode Island.— Providence Steam Engine Co. *v.* Providence, etc., Co., 12 R. I. 348, 34 Am. Rep. 652.

Wisconsin.— Delaplaine *v.* Chicago, etc., R. Co., 42 Wis. 214, 24 Am. Rep. 386; Chapman *v.* Oshkosh, etc., R. Co., 33 Wis. 629; Holton *v.* Milwaukee, 31 Wis. 27.

United States.— Yates *v.* Milwaukee, 10 Wall. 497, 19 L. ed. 984.

93. Delaplaine *v.* Chicago, etc., R. Co., 42 Wis. 214, 24 Am. Rep. 386; Chapman *v.* Oshkosh, etc., R. Co., 33 Wis. 629; Lyon *v.* Fishmongers' Co., 1 App. Cas. 662, 46 L. J. Ch. 68, 35 L. T. Rep. N. S. 569, 25 Wkly. Rep. 165.

94. Easterbrook *v.* Erie R. Co., 51 Barb. (N. Y.) 94; Lentz *v.* Carnegie, 145 Pa. St. 612, 23 Atl. 219, 27 Am. St. Rep. 717; Sabine, etc., R. Co. *v.* Joachimi, 58 Tex. 456; Jones *v.* Gooday, 1 Dowl. N. S. 50, 10 L. J. Exch. 275, 8 M. & W. 146.

Filling of pond.— The measure of damages sustained by a riparian owner by the unlawful filling of a pond is the depreciation thereby occasioned in the value of his property, and both the effect upon its present and upon its permanent value should be considered. Finley *v.* Hershey, 41 Iowa 389.

Reduction in rental value.— The true rule of damages in such case is to estimate the injury sustained from the diversion of the water in the use of the land for the purposes to which it was devoted, or for which it would have been used but for the refusal of the defendant upon notice to discontinue the diversion. As a means of computation a reduction in rental value from this cause may be shown. Clark *v.* Pennsylvania R. Co., 145 Pa. St. 438, 22 Atl. 989, 27 Am. St. Rep. 710.

95. Hartshorn *v.* Chaddock, 135 N. Y. 116, 31 N. E. 997, 17 L. R. A. 426; Lentz *v.* Carnegie, 145 Pa. St. 612, 23 Atl. 219, 27 Am. St. Rep. 717; Sabine, etc., R. Co. *v.* Joachimi, 58 Tex. 456.

96. Hartshorn *v.* Chaddock, 135 N. Y. 116, 31 N. E. 997, 17 L. R. A. 426; Lentz *v.* Carnegie, 145 Pa. St. 612, 23 Atl. 219, 27 Am. St. Rep. 717.

97. Seaton *v.* New Orleans Second Municipality, 3 La. Ann. 44; Benson *v.* Atwood, 13 Md. 20, 71 Am. Dec. 611; Millar *v.* Hillard, Cheves (S. C.) 149.

is a question of law to be determined by strict legal rules.[98] Where parties have fixed the measure of damages in the contract itself such measure will usually be adopted;[99] and so where the parties to a contract of sale have such knowledge of special circumstances affecting the question of damages as that it may be fairly inferred they contemplated a particular rule for estimating them and entered into the contract on that basis, that rule should be adopted.[1] The general rule as to the measure of damages in case of a breach of contract, where there is no bad faith or fraud in evidence, is the amount of damages which naturally result or flow from the breach complained of; and must be such as the parties contemplated as a probable consequence of a breach, and which are capable of being reasonably ascertained.[2] In other words the measure of damages is the damage which actually results from the breach, and which will compensate the party for the injury sustained,[3] together with the expense or cost to which he may have been subjected as a consequence of the breach.[4] In such actions the question is not what the plaintiff paid because of the breach but the value of that for which he paid.[5] Remote, speculative, or consequential damages are not allowed, unless they

98. Batchelder *v.* Sturgis, 3 Cush. (Mass.) 201; Leland *v.* Stone, 10 Mass. 459; McDowell *v.* Oyer, 21 Pa. St. 417; Walker *v.* Smith, 28 Fed. Cas. No. 17,086, 1 Wash. 152; Alder *v.* Keighley, 15 L. J. Exch. 100, 15 M. & W. 117.

99. *Connecticut.*—Tyler *v.* Marsh, 1 Day 1.

Illinois.— Chicago *v.* Sexton, 115 Ill. 230, 2 N. E. 263; Dobbins *v.* Higgins, 78 Ill. 440; Folliott *v.* Hunt, 21 Ill. 654.

Massachusetts.— Leland *v.* Stone, 10 Mass. 459.

Ohio.— Doolittle *v.* McCullough, 12 Ohio St. 360.

Oregon.— Zachary *v.* Swanger, 1 Oreg. 92.

Pennsylvania.— Dunham *v.* Haggerty, 110 Pa. St. 560, 1 Atl. 667.

Tennessee.— McWhirter *v.* Douglas, 1 Coldw. 591.

Texas.— Equitable Mortg. Co. *v.* Weddington, 2 Tex. Civ. App. 373, 21 S. W. 576.

Wisconsin.—Nash *v.* Hoxie, 59 Wis. 384, 18 N. W. 408.

England.— Alder *v.* Keightly, 15 L. J. Exch. 100, 15 M. & W. 117.

See 15 Cent. Dig. tit. "Damages," § 287; and *supra*, VIII.

No measure.— The general rule as to the measure of damages in an action for breach of contract is the actual loss sustained; but where from the nature of the contract no possible mode is left of ascertaining the damage the court will adopt the only measure of damages which remains, and that is the price agreed to be paid. Coffee *v.* Meiggs, 9 Cal. 363; Baldwin *v.* Bennett, 4 Cal. 392.

1. Eagle Tube Co. *v.* Edward Barr Co., 16 Daly (N. Y.) 212, 10 N. Y. Suppl. 113 [*citing* Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487].

2. See *supra*, VII, C, 3.

Amount of hire of similar property.— Where A contracted to furnish B a boat at a specified time to be used in conveying excursionists to and from different points, an excursion train being expected to arrive at the time fixed, it was held that if A knew of the excursion and the use to which B intended to put the boat, the measure of damages would be what a boat like A's would be worth at such a time. Mace *v.* Ramsey, 74 N. C. 11.

3. See *supra*, VII, C, 3.

Damages accruing after institution of suit. — In Gulf, etc., R. Co. *v.* Dunman, 85 Tex. 176, 19 S. W. 1073, plaintiff conveyed certain land to defendant in consideration of defendant's agreement to fill a certain tank belonging to plaintiff with water at fixed intervals. Defendant failed to perform. It was held that plaintiff's measure of damages, accruing after termination of the contract by institution of suit, is the reasonable value of the use of the land and privileges.

4. Orr *v.* Bigelow, 14 N. Y. 556; Samuels *v.* Fidelity, etc., Co., 49 Hun (N. Y.) 122, 1 N. Y. Suppl. 850; Mitchell *v.* Cornell, 44 N. Y. Super. Ct. 401; Deyo *v.* Waggoner, 19 Johns. (N. Y.) 241; Collins *v.* Baumgardner, 52 Pa. St. 461; Osborne *v.* Ayers, (Tex. Civ. App. 1895) 32 S. W. 73; Westfall *v.* Perry, (Tex. Civ. App. 1893) 23 S. W. 740; Welder *v.* Dunn, 2 Tex. App. Civ. Cas. § 96; Kelly *v.* U. S., 31 Ct. Cl. 361; Cole *v.* U. S., 23 Ct. Cl. 341. See also *supra*, VII, I, 4, a.

Deduction for expenses.— In an action on a covenant to convey certain tobacco to New Orleans and sell for the best possible price, the criterion of damages is the best possible price that the tobacco would bring, deducting expenses incident to the sale. Harris *v.* Ogg, 1 J. J. Marsh. (Ky.) 408.

5. Chamberlain *v.* Baltimore, etc., R. Co., 66 Md. 518, 18 Atl. 267; Dodd *v.* Jones, 137 Mass. 322; Turner *v.* McDonald, 4 Ohio Cir. Ct. 397.

In case of uncertainty as to the value of an amount claimed the rule is to assess on the basis of the lowest sum. Jones' Appeal, 62 Pa. St. 324.

Nothing paid.— The rule of damages for the breach of special contracts, where nothing has been paid, is to give the difference between what was to be paid by one party and the value of what was to be done by the other party. Royalton *v.* Royalton, etc., Turnpike Co., 14 Vt. 311.

can be traced solely to the breach of the contract, or are capable of exact computation.[6] Thus speculative profits are too remote to be included in the estimate of such damages.[7]

2. PARTIAL PERFORMANCE. In cases where there has been a partial performance of the contract before the breach, the defendant should be charged with the costs and expenses of the plaintiff in completing that part of the contract remaining unperformed,[8] provided such expenses are reasonable[9] and are not too remotely connected with the breach complained of.[10]

3. DELAY IN PERFORMANCE. Where there has been a delay in the performance of a contract, the owner of the property may recover as damages the value of its

6. Willingham *v.* Hooven, 74 Ga. 233, 58 Am. Rep. 435; Hazlip *v.* Austill, 4 Ky. L. Rep. 982; Holloway *v.* Stephens, 2 Thomps. & C. (N. Y.) 658; Mitchell *v.* Cornell, 44 N. Y. Super. Ct. 401; Deyo *v.* Waggoner, 19 Johns. (N. Y.) 241; McConaghy *v.* Pemberton, 168 Pa. St. 121, 31 Atl. 996. And see *supra*, VII, C, 3, d.

Contract to forbear or dismiss suit.— The damages for a breach of an agreement to forbear to collect a debt cannot be greater than the amount of such debt with interest and costs, and cannot include damages arising from a forced sale on execution. Indiana, etc., R. Co. *v.* Scearce, 23 Ind. 223. In Deyo *v.* Waggoner, 19 Johns. (N. Y.) 241, A for a consideration of five dollars promised to forbear the payment of a note given by B for six months. A did not forbear, but sued B on the note within the time stipulated. It was held in an action for a breach of this agreement that A was entitled to recover the five dollars paid by him and the costs in the suit on the note, but not for any consequential damages, or for the trouble, inconvenience, and expense he had been put to in being obliged to leave his business and in raising money to pay the note.

Expenses in acquiring professional knowledge.— In an action by an artist to recover the value of a portrait of children, painted for a father, who refused to accept it, it is error to instruct the jury to give as damages what the picture was worth, and what the artist's services were worth, taking into consideration the exhausting studies necessary to acquire skill as an artist and the time consumed and expenses incurred in acquiring professional knowledge and distinction. Turner *v.* Mason, 65 Mich. 662, 32 N. W. 846.

The idleness of workmen, delay in business, and expenses in attempting to procure elsewhere the articles contracted for are not to be considered in estimating damages for the non-fulfilment of a contract. Walker *v.* Ellis, 1 Sneed (Tenn.) 515.

7. Beckley *v.* Munson, 22 Conn. 299; Hay *v.* Williams, 8 Ky. L. Rep. 434; Arrowsmith *v.* Gordon, 3 La. Ann. 105; Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635. And see *supra*, VII, G, 2.

The reason stated for discarding expected profits as an element in the estimation of the loss is that the party charged is not presumed to have made his contract with reference to such results, unless the special circumstances are communicated to him at the time; but where they are such as he ought to have contemplated, as a reasonable and probable result of his breach, they will affect the measure of damages in favor of the complaining party. Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635.

8. *Michigan.*— Nester *v.* Swift, 50 Mich. 42, 14 N. W. 692.

Minnesota.— Carli *v.* Seymour, 26 Minn. 276, 3 N. W. 348.

Nebraska.— Von Dorn *v.* Mengedoht, 41 Nebr. 525, 59 N. W. 800.

New York.— New York *v.* Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839.

Oregon.— Savage *v.* Glenn, 10 Oreg. 440.

See 15 Cent. Dig. tit. "Damages," § 306 *et seq.*

Allowance for inferior work.— In Bush *v.* Jones, 2 Tenn. Ch. 190, it was held that the measure of damages in cases of partial performance of a special agreement is ordinarily the difference between the contract price and the value of the work done, estimating the latter upon the basis of the contract price for the class of work contracted for and allowing for inferior work accordingly.

Service of city employees.— Where a city completed the construction of waterworks after the contractors had failed to carry out their contract, as it had a right to do under such contract, in a suit by the city on the contractors' bond, it was held that a charge was properly made for the services of men permanently in the employ of the city, they having done much extra work for which the contractors would have had to pay an equal amount, and that sums of money paid in settlement of claims for damages from blasting, etc., were chargeable, although no notice was given to the contractors before settling. Newton *v.* Devlin, 134 Mass. 490.

9. New York *v.* Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839.

10. Newton *v.* Devlin, 134 Mass. 490.

Conjectures of witnesses.— Where a slave was hired for the purpose of making a crop and then taken away by the owner, it seems that the measure of damages is the hire of the slave, the rent of the land, all the expenses incurred, and actual loss sustained, rather than the conjecture of a witness as to what the crop would have been worth. Hobbs *v.* Davis, 30 Ga. 423.

use during the period covered by the delay;[11] and such damages have usually been measured by a sum equal to the rental value of the property during the period of delay.[12] It seems, however, that in order to recover the rental value of the property during the time of delay, some evidence of opportunity to rent must be introduced in evidence.[13] Where no time is specified in the contract as to the completion of the work, it should be performed within a reasonable time, and the measure of damages for an unreasonable delay is the difference between the market value of the property at the time of delivery and when it should have been delivered under the terms of the contract.[14] Where there has been a delay under a contract for the construction of vessels, the measure of damages will usually be the ordinary hire of the vessel during the time of delay,[15] and there can be no recovery for speculative or prospective profits claimed as a result of the delay.[16]

4. Defects in Performance. Where a contract has been defectively performed and damages are claimed for such reason, the damages should be measured by the difference between the value of the property in its defective condition and its value if it had been completed in compliance with the contract;[17] and

11. *Illinois.*— Snell *v.* Cottingham, 72 Ill. 161.

Indiana.— Singer *v.* Farnsworth, 2 Ind. 597.

Michigan.— John Hutchinson Mfg. Co. *v.* Pinch, 91 Mich. 156, 51 N. W. 930, 30 Am. St. Rep. 463.

Missouri.— Cochran *v.* People's R. Co., 113 Mo. 359, 21 S. W. 6; Dengler *v.* Auer, 55 Mo. App. 548; McConey *v.* Wallace, 22 Mo. App. 377.

New York.— Ruff *v.* Rinaldo, 55 N. Y. 664; Wagner *v.* Corkhill, 40 Barb. 175.

Pennsylvania.— Finch *v.* Heermans, 5 Luz. Leg. Reg. 125.

See 15 Cent. Dig. tit. "Damages," § 309 *et seq.*

12. *Colorado.*— McIntire *v.* Barnes, 4 Colo. 285.

District of Columbia.— Washington, etc., R. Co. *v.* American Car Co., 5 App. Cas. 524.

Illinois.— Korf *v.* Lull, 70 Ill. 420; Galbraith *v.* Chicago Architectural Iron Works, 50 Ill. App. 247.

Iowa.— Novelty Iron Works *v.* Capital City Oatmeal Co., 88 Iowa 524, 55 N. W. 518.

Maryland.— New York Cent. Trust Co. *v.* Arctic Ice Mach. Mfg. Co., 77 Md. 202, 26 Atl. 493.

Nebraska.— Consaul *v.* Sheldon, 35 Nebr. 247, 52 N. W. 1104.

New York.— Wagner *v.* Corkhill, 40 Barb. 175; Ansonia Brass, etc., Co. *v.* Gerlach, 8 Misc. 256, 28 N. Y. Suppl. 546; Reich *v.* Colwell Lead Co., 21 N. Y. Suppl. 495; Scribner *v.* Jacobs, 9 N. Y. Suppl. 856.

Oregon.— Savage *v.* Glenn, 10 Oreg. 440.

Pennsylvania.— Rogers *v.* Bemus, 69 Pa. St. 432.

See 15 Cent. Dig. tit. "Damages," § 311.

Rental value of machines.— In an action for a breach of contract to furnish ice machines by a certain time, the set-off of the fair rental value of the machines for the time they were used before acceptance cannot be estimated on the actual number of days they were worked, when it appears they were not worked the whole of each day; but the total product during that time, divided by the full daily capacity of the machines, will show the number of days that ought to be reckoned. Maryland Ice Co. *v.* Arctic Ice Mach. Mfg. Co., 79 Md. 103, 29 Atl. 69.

13. Wagner *v.* Corkhill, 40 Barb. (N. Y.) 175; McCarthy *v.* Gallagher, 4 Misc. (N. Y.) 188, 23 N. Y. Suppl. 884. In Horgan *v.* McKenzie, 17 N. Y. Suppl. 174, it was held that, where the plaintiff had rented part of the premises before the time for completing the contract for repairs, and had also rented other portions of the premises after the repairs were made, loss of rent as an item of damage could not be allowed.

It is not sufficient to prove merely the conjectural rental value to entitle a recovery on that ground. The plaintiff must show what amount in rents he would probably in fact have recovered. Savage *v.* Glenn, 10 Oreg. 440.

14. Whalon *v.* Aldrich, 8 Minn. 346.

15. Brown *v.* Foster, 51 Pa. St. 165; Finch *v.* Heermans, 5 Luz. Leg. Reg. (Pa.) 125.

Liability after reasonable delay.— A mechanic undertaking to make and deliver a crank to a steamer as soon as possible is only liable for damages caused by her detention during the time actually necessary to obtain a suitable crank after a reasonable period has elapsed for the performance of his agreement. Cable *v.* Leeds, 6 La. Ann. 293.

16. Taylor *v.* Maguire, 13 Mo. 517; Rogers *v.* Beard, 36 Barb. (N. Y.) 31. In Wood *v.* Derbyshire, 2 Del. Co. (Pa.) 247, it was held that in an action of covenant on a sealed instrument for failure to construct and deliver a vessel (a barge) within a specified time, the just measure of damages is the difference between the profit which ought to have been made on the boat so to be built and that on other boats which plaintiff might have been obliged to hire pending the delivery of the former vessel.

17. *Indiana.*— Sunman *v.* Clark, 120 Ind. 142, 22 N. E. 113.

Massachusetts.— White *v.* McLaren, 151 Mass. 553, 24 N. E. 911; Wiley *v.* Athol, 150

this rule obtains even where the property as delivered has no market value.[18] The measure of damages in such cases has been held to be the costs and expenses reasonably necessary to make the work conform to the requirements of the contract, on the principle that plaintiff is entitled to work such as he contracted for.[19]

5. PREVENTION OF PERFORMANCE. Where a party has contracted to perform certain work and is prevented by the other party to the contract from entering on or completing the same the measure of damages is usually considered to be the amount that might have been realized had the contract been carried to completion.[20] The compensation agreed upon is *prima facie* the measure of dam-

Mass. 426, 23 N. E. 311, 6 L. R. A. 342; Norway Plains Sav. Bank *v.* Moors, 134 Mass. 129; Moulton *v.* McOwen, 103 Mass. 587.

Michigan.— White *v.* Brockway, 40 Mich. 209.

New York.— Barretts, etc., Dyeing Establishment Co. *v.* Wharton, 101 N. Y. 631, 4 N. E. 344; Morton *v.* Harrison, 52 N. Y. Super. Ct. 305.

North Carolina.— Twitty *v.* McGuire, 7 N. C. 501.

Oregon.—Chamberlain *v.* Hibbard, 26 Oreg. 428, 38 Pac. 437.

Texas.— Fagan *v.* Whitcomb, (App. 1889) 14 S. W. 1018.

See 15 Cent. Dig. tit. "Damages," § 320 *et seq.*

18. Sunman *v.* Clark, 120 Ind. 142, 22 N. E. 113; Mack *v.* Snell, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. Rep. 534; Somerby *v.* Tappan, Wright (Ohio) 229.

19. *Indiana.*—Howe Mach. Co. *v.* Reber, 66 Ind. 498.

Iowa.— Smith *v.* Bristol, 33 Iowa 24.

Louisiana.— Leathers *v.* Sweeney, 41 La. Ann. 287, 5 So. 662.

Missouri.— Wright *v.* Sanderson, 20 Mo. App. 534.

New York.— Malony *v.* Brady, 18 N. Y. Suppl. 757.

Ohio.— Somerby *v.* Tappan, Wright 229.

United States.— Stillwell, etc., Mfg. Co. *v.* Phelps, 130 U. S. 520, 9 S. Ct. 601, 32 L. ed. 1030.

See 15 Cent. Dig. tit. "Damages," § 320 *et seq.*

Decrease in value after repair.— Where in an action to recover for sawing logs the defense rests upon bad sawing, the measure of plaintiff's recovery was held to be the contract price, deducting therefrom the cost of resawing the logs and the decrease in value still existing after such resawing. Grice *v.* Noble, 66 Mich. 700, 33 N. W. 768.

Loss of profit during delay.—Where A contracted to put up certain machinery in a mill and promised to pay plaintiffs all damages which they should sustain by reason of its insufficiency, it was held that if the machinery was insufficient plaintiffs were entitled to recover such sum as would be sufficient to put the machinery in such condition as was contemplated by the contract, and such sum as the mill would have earned during the time it was necessarily delayed in consequence of the breakage or defects in the machinery, taking the fair, ordinary net profits. Davis *v.* Talcott, 14 Barb. (N. Y.) 611. See also Wade *v.* Haycock, 25 Pa. St. 382. So also it was held in Blanchard *v.* Ely, 21 Wend. (N. Y.) 342, 34 Am. Dec. 250, which was an action to recover the price stipulated for building a steamboat, that the plaintiff might recover the full amount, without any deduction for damages to the defendant for the loss of trips and the profits resulting therefrom on account of defects in the boat or its machinery.

Rebuilding not in conformance with contract.— If the machinist has failed to fulfil his contract as to capacity, and has abandoned it, but the mill has not thereupon been shut down and adjusted to such capacity, he is not liable for the time that would reasonably have been required for that purpose, nor for the time actually consumed, more than two years after, for repairs and rebuilding not made to conform to his contract. Williams *v.* Island City Milling Co., 25 Oreg. 573, 37 Pac. 49.

20. *Alabama.*—Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60.

Florida.— Brent *v.* Parker, 23 Fla. 200, 1 So. 780.

Illinois.— Demme, etc., Furniture Co. *v.* McCabe, 49 Ill. App. 453; Cook County *v.* Sexton, 16 Ill. App. 93.

Iowa.— Marquis *v.* Laurctson, 76 Iowa 23, 40 N. W. 73.

Kentucky.—Henderson Bridge Co. *v.* O'Connor, 88 Ky. 303, 11 S. W. 18, 957, 11 Ky. L. Rep. 146; Smith *v.* Perry, 13 Ky. L. Rep. 683.

Maryland.— Black *v.* Woodrow, 39 Md. 194; Rittenhouse *v.* Baltimore, 25 Md. 336.

Mississippi.—Friedlander *v.* Pugh, 43 Miss. 111, 5 Am. Rep. 478.

Nebraska.— Von Dorn *v.* Mengedoht, 41 Nebr. 525, 59 N. W. 800.

New York.— Jones *v.* Judd, 4 N. Y. 411; Rosepaugh *v.* Vredenburgh, 16 Hun 60; Stanton *v.* Miller, 14 Hun 383; Moran *v.* McSwegan, 33 N. Y. Super. Ct. 350.

Ohio.— Doolittle *v.* McCullough, 12 Ohio St. 360; Turner *v.* McDonald, 4 Ohio Cir. Ct. 397.

Tennessee.—Toomey *v.* Atyoe, 95 Tenn. 373, 32 S. W. 254.

Texas.— Ball *v.* Britton, 58 Tex. 57; Hood *v.* Raines, 19 Tex. 400.

Vermont.— Hathaway *v.* Sabin, 63 Vt. 527, 22 Atl. 633; Curtis *v.* Smith, 48 Vt. 116; Preble *v.* Bottom, 27 Vt. 249.

Wisconsin.— Wood *v.* Schettler, 23 Wis. 501.

United States.— U. S. *v.* Smith, 94 U. S.

ages,[21] and the plaintiff is entitled to recover any direct loss occasioned by the defendant's failure to perform the contract,[22] including such reasonable expenses as he has incurred in preparing to perform the contract[23] and the loss of such material as he may have on hand at the time the defendant refused to permit

214, 24 L. ed. 115; Ferris *v.* U. S., 28 Ct. Cl. 332; Harvey *v.* U. S., 8 Ct. Cl. 501; Figh *v.* U. S., 8 Ct. Cl. 319.

See 15 Cent. Dig. tit. "Damages," § 326 *et seq.*

Value of property not completed.— In Allen *v.* Thrall, 36 Vt. 711, it was held that where a party had prevented the completion of a contract to furnish machines that plaintiff's right to recover in respect to the unfinished machines was not the value of his labor and the material bestowed upon them, but that his damages also included the prevention of completion; and in estimating such damages the value to plaintiff of the unfinished machines in his possession might be considered.

Value of services over contract price.— In Doughty *v.* O'Donnell, 4 Daly (N. Y.) 60, it was held that in an action to recover for personal services in foreclosing a chattel mortgage, where it appeared that the defendant wilfully prevented the performance of the contract, plaintiff might recover the value of his services, although they were in excess of the compensation as fixed by the contract.

21. *Arkansas.*—Brodie *v.* Watkins, 33 Ark. 545, 34 Am. Rep. 49; Walworth *v.* Pool, 9 Ark. 394.

Colorado.— McClair *v.* Austin, 17 Colo. 576, 31 Pac. 225.

Indiana.— Louisville, etc., R. Co. *v.* Hollerbach, 105 Ind. 137, 5 N. E. 28.

Kentucky.— Wood *v.* Morgan, 6 Bush 507; Western *v.* Sharp, 14 B. Mon. 144; Jewell *v.* Blandford, 7 Dana 472; Chamberlin *v.* McCallister, 6 Dana 352.

Mississippi.—Friedlander *v.* Pugh, 43 Miss. 111, 5 Am. Rep. 478.

Missouri.— Steinburg *v.* Gebhardt, 41 Mo. 519.

Wisconsin.— Danley *v.* Williams, 16 Wis. 581.

United States.— Hardy *v.* U. S., 9 Ct. Cl. 244.

See 15 Cent. Dig. tit. "Damages," § 326 *et seq.*

22. *Arkansas.*—O'Connell *v.* Rosso, 56 Ark. 603, 20 S. W. 531.

California.— O'Connell *v.* Main St., etc., Hotel Co., 90 Cal. 515, 27 Pac. 373.

Illinois.— Alphin *v.* Working, 132 Ill. 484, 24 N. E. 54; Kenwood Bridge Co. *v.* Dunderdale, 50 Ill. App. 581.

Indiana.— Louisville, etc., R. Co. *v.* Hollerbach, 105 Ind. 137, 5 N. E. 28.

Iowa.— Howe Mach. Co. *v.* Bryson, 44 Iowa 159, 24 Am. Rep. 735.

Kansas.— Osborne *v.* Stassen, 25 Kan. 736.

Kentucky.— Western *v.* Sharp, 14 B. Mon. 144.

Louisiana.— Schleiber *v.* Diclman, 44 La. Ann. 462, 10 So. 934; Moore *v.* Howard, 18 La. Ann. 635.

Michigan.— Loud *v.* Campbell, 26 Mich. 239.

Minnesota.— Glaspie *v.* Glascow, 28 Minn. 158, 9 N. W. 669; Morrison *v.* Lovejoy, 6 Minn. 319.

Mississippi.— New Orleans, etc., R. Co. *v.* Echols, 54 Miss. 264.

Missouri.— Hammond *v.* Beeson, 112 Mo. 190, 20 S. W. 474.

New Hampshire.—Hutt *v.* Hickey, 67 N. H. 411, 29 Atl. 456.

New York.— Nason Mfg. Co. *v.* Stephens, 127 N. Y. 602, 28 N. E. 411; Durkee *v.* Mott, 8 Barb. 423; Meylert *v.* Gas Consumers' Ben. Co., 14 N. Y. Suppl. 148; Sharp Pub. Co. *v.* Grant, 1 N. Y. City Ct. 314.

Pennsylvania.—Rogers *v.* Davidson, 142 Pa. St. 436, 21 Atl. 1083.

Texas.— Long *v.* McCauley, (Sup. 1887) 3 S. W. 689; Porter *v.* Burkett, 65 Tex. 383.

Vermont.— Chamberlin *v.* Scott, 33 Vt. 80.

Virginia.— Kendall Bank Note Co. *v.* Sinking Fund Com'rs, 79 Va. 563.

Wisconsin.— Salvo *v.* Duncan, 49 Wis. 151, 4 N. W. 1074.

United States.—Taylor Mfg. Co. *v.* Hatcher Mfg. Co., 39 Fed. 440, 3 L. R. A. 587; Insley *v.* Shepard, 31 Fed. 869; Hambly *v.* Delaware, etc., R. Co., 21 Fed. 541; Kellogg Bridge Co. *v.* U. S., 15 Ct. Cl. 206.

See 15 Cent. Dig. tit. "Damages," § 326 *et seq.*; and *supra*, VII, B, C.

23. *Arkansas.*—O'Connell *v.* Rosso, 56 Ark. 603, 20 S. W. 531.

California.— O'Connell *v.* Main St., etc., Hotel Co., 90 Cal. 515, 27 Pac. 373.

Illinois.— Kenwood Bridge Co. *v.* Dunderdale, 50 Ill. App. 581.

Missouri.— Hammond *v.* Beeson, 112 Mo. 190, 20 S. W. 474; Athletic Baseball Assoc. *v.* St. Louis Sportsman's Park, etc., Assoc., 67 Mo. App. 653.

New Hampshire.—Hutt *v.* Hickey, 67 N. H. 411, 29 Atl. 456.

New York.— Durkee *v.* Mott, 8 Barb. 423; Meylert *v.* Gas Consumers' Ben. Co., 14 N. Y. Suppl. 262.

Pennsylvania.— Rogers *v.* Davidson, 142 Pa. St. 436, 21 Atl. 1083.

Vermont.— Chamberlin *v.* Scott, 33 Vt. 80.

United States.— Bulkley *v.* U. S., 19 Wall. 37, 22 L. ed. 62; Taylor Mfg. Co. *v.* Hatcher Mfg. Co., 39 Fed. 440, 3 L. R. A. 587.

See 15 Cent. Dig. tit. "Damages," § 326 *et seq.*; and *supra*, VII, I, 4, b.

Partial use of preparatory work.— Where in an action for a breach of contract to cut and haul logs the evidence showed that the contractor had used the preparatory work after its completion for the delivery of part of the logs, an instruction that such contractor was entitled to the cost of his preparatory work, without any deduction of the value that he had derived from its use prior

him to perform his agreement.[24] If profits form a constituent element of the contract and their loss is a natural and proximate result of the breach, and such as may be reasonably presumed to have been contemplated by the contract and the parties, they are usually considered the measure of damages;[25] but in order to warrant a recovery they must be such as may be estimated with reasonable certainty, and where they are merely speculative, conjectural, or too remote they will not be allowed.[26] If the proof shows that profits would have been realized had the party not been prevented from performing the contract they are recoverable, and the measure of profits as damages is the difference between the cost of doing the work and the price agreed to be paid.[27] In considering items of profit or expense the courts are inclined to regard the magnitude of the contract and other elements of loss that may affect the defendant[28] as well as the release from

to his discharge, was erroneous. Brent *v.* Parker, 23 Fla. 200, 1 So. 780.

24. Alphin *v.* Working, 132 Ill. 484, 24 N. E. 54; New Orleans, etc., R. Co. *v.* Echols, 54 Miss. 264.

25. See *supra*, VII, G, 2.

26. Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60; Beck *v.* West, 87 Ala. 213, 6 So. 70; Brigham *v.* Carlisle, 78 Ala. 243, 56 Am. Rep. 28; Moore *v.* Howard, 18 La. Ann. 635; McMaster *v.* State, 108 N. Y. 542, 15 N. E. 417; Masterton *v.* Brooklyn, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; U. S. *v.* Behan, 110 U. S. 338, 4 S. Ct. 81, 28 L. ed. 168; Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 526, 14 L. ed. 157; Taylor Mfg. Co. *v.* Hatcher Mfg. Co., 39 Fed. 440, 3 L. R. A. 587; Hunt *v.* Oregon Pac. R. Co., 38 Fed. 481, 13 Sawy. 516, 1 L. R. A. 842. See also *supra*, VII, G, 2.

27. *Alabama.*— Tennessee, etc., R. Co. *v.* Danforth, 112 Ala. 80, 20 So. 502; Bonifay *v.* Hassell, 100 Ala. 269, 14 So. 46; Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60; George *v.* Cahawba, etc., R. Co., 8 Ala. 234.

Arkansas.— Gibney *v.* Turner, 52 Ark. 117, 12 S. W. 201.

California.— Winans *v.* Sierra Lumber Co., 66 Cal. 61, 4 Pac. 952.

Illinois.— Ryan *v.* Miller, 52 Ill. App. 191.

Indiana.— Cincinnati, etc., R. Co. *v.* Lutes, 112 Ind. 276, 11 N. E. 784, 14 N. E. 706; Dunn *v.* Johnson, 33 Ind. 54, 5 Am. Rep. 177.

Kentucky.— Thompson *v.* Jackson, 14 B. Mon. 114.

Maine.— Morgan *v.* Hefler, 68 Me. 131.

Maryland.—Baltimore, etc., R. Co. *v.* Stewart, 79 Md. 487, 29 Atl. 964.

Michigan.— Greenwood *v.* Davis, 106 Mich. 230, 64 N. W. 26; Scheible *v.* Klein, 89 Mich. 376, 50 N. W. 857; Rayburn *v.* Comstock, 80 Mich. 448, 45 N. W. 378; Leonard *v.* Beaudry, 68 Mich. 312, 36 N. W. 88.

Minnesota.— Silberstein *v.* Duluth News-Tribune Co., 68 Minn. 430, 71 N. W. 622.

Missouri.— Crescent Mfg. Co. *v.* N. O. Nelson Mfg. Co., 100 Mo. 325, 13 S. W. 503; Gabriel *v.* Akinville Pressed Brick, etc., Co., 57 Mo. App. 520.

New Jersey.— Boyd *v.* Meighan, 48 N. J. L. 404, 4 Atl. 778.

New York.— Devlin *v.* New York, 63 N. Y. 8; Devlin *v.* New York, 4 Misc. 106, 23 N. Y. Suppl. 888; Riley *v.* Black, 1 Misc. 288, 20 N. Y. Suppl. 695; Thomas *v.* Cauldwell, 26 N. Y. Suppl. 785; Graves *v.* Hunt, 8 N. Y. St. 308; Masterton *v.* Brooklyn, 7 Hill 61, 42 Am. Dec. 38.

North Carolina.— Oldham *v.* Kerchner, 79 N. C. 106, 28 Am. Rep. 302; Clements *v.* State, 77 N. C. 142.

Tennessee.— Singleton *v.* Wilson, 85 Tenn. 344, 2 S. W. 801.

West Virginia.— Hare *v.* Parkersburg, 24 W. Va. 554; Patton *v.* Elk River Nav. Co., 13 W. Va. 259.

Wisconsin.— Walsh *v.* Myers, 92 Wis. 397, 66 N. W. 250; Allen *v.* Murray, 87 Wis. 41, 57 N. W. 979; Nash *v.* Hoxie, 59 Wis. 384, 18 N. W. 408.

United States.— U. S. *v.* Speed, 8 Wall. 77, 19 L. ed. 449; Stout *v.* U. S., 27 Ct. Cl. 385; Floyd *v.* U. S., 2 Ct. Cl. 429; Myers *v.* York, etc., R. Co., 17 Fed. Cas. No. 9,997, 2 Curt. 28.

See 15 Cent. Dig. tit. "Damages," § 326 *et seq.*; and *supra*, VII, G, 2.

28. Seaton *v.* New Orleans Second Municipality, 3 La. Ann. 44; Ferris *v.* U. S., 28 Ct. Cl. 332; Smith *v.* U. S., 11 Ct. Cl. 707.

Evidence of subcontracts.— Where a railroad company had prevented a contractor from performing his part of an agreement, it was held that the difference between the amount of his contract and of certain subcontracts that he had entered into was not a proper rule of damages and that no evidence in regard to them could be admitted. Story *v.* New York, etc., R. Co., 6 N. Y. 85.

Rise in price of labor.— Where a contractor was delayed in the performance of his contract by the neglect of the government to furnish building material, he is entitled to recover damages for losses sustained on his contract from a rise in the price of labor during the delay. Bitting *v.* U. S., 25 Ct. Cl. 502.

Forced sale.— In Rittenhouse *v.* Baltimore, 25 Md. 336, where a contractor had engaged to construct the brick work of a public building under the authority of a city ordinance, it was held that on the repeal of the city ordinance he was entitled to recover for a quantity of brick held in possession at the time he contracted, and which he afterward sold at a less price than that charged at the time that the contract was made.

care, trouble, risk, and responsibility attending a full execution of the contract on the part of the plaintiff.[29]

6. Contract For Work, Labor, or Services. In an action for the breach of a contract for work, labor, or services, the plaintiff is entitled to recover for all loss resulting as a natural and necessary result of the breach.[30] Where there has been a breach of contract to perform a specific piece of work or service the plaintiff is entitled to recover what it would reasonably cost to perform the same[31] or what

29. Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60; U. S. *v.* Speed, 8 Wall. (U. S.) 77, 19 L. ed. 449; Insley *v.* Shepard, 31 Fed. 869.

30. *Alabama.*— Baltzell *v.* Moritz, 85 Ala. 123, 4 So. 835; Fail *v.* McRee, 36 Ala. 61.

Georgia.— Water Lot Co. *v.* Leonard, 30 Ga. 560; Baldwin *v.* Lessner, 8 Ga. 71.

Illinois.— Rockford, etc., R. Co. *v.* Beckemeier, 72 Ill. 267.

Indiana.— Spence *v.* Owen County, 117 Ind. 573, 18 N. E. 513; Glass *v.* Garber, 55 Ind. 336; Ellison *v.* Dove, 8 Blackf. 571.

Iowa.— Amsden *v.* Dubuque, etc., R. Co., 28 Iowa 542.

Kansas.—Missouri, etc., R. Co. *v.* Ft. Scott, 15 Kan. 435.

Kentucky.— Hazlip *v.* Austill, 4 Ky. L. Rep. 982.

Maine.— Fowler *v.* Kennebec, etc., R. Co., 31 Me. 197.

Maryland.— Baltimore, etc., R. Co. *v.* Resley, 7 Md. 297.

Massachusetts.—Marston *v.* Singapore Rattan Co., 163 Mass. 296, 39 N. E. 1113; Kenworthy *v.* Stevens, 132 Mass. 123.

Michigan.—Hosmer *v.* Wilson, 7 Mich. 294, 74 Am. Dec. 716.

Missouri.— Black River Lumber Co. *v.* Warner, 93 Mo. 374, 6 S. W. 210; Clark *v.* Marshall, 34 Mo. 429.

Nebraska.— Esterly Harvesting Mach. Co. *v.* Frolkey, 34 Nebr. 110, 51 N. W. 594.

New Hampshire.— Robinson *v.* Gilman, 43 N. H. 485.

New Jersey.— Trenwith *v.* Gilvery, 50 N. J. L. 18, 11 Atl. 325 [*affirmed* in 50 N. J. L. 680, 17 Atl. 1104]; Lehneis *v.* Egg Harbor Commercial Bank, (Ch. 1893) 26 Atl. 797.

New York.— Beach *v.* Crain, 2 N. Y. 86, 49 Am. Dec. 369; Savery *v.* Ingersoll, 46 Hun 176; Hoard *v.* Garner, 3 Sandf. 179; Morrell *v.* Long Island R. Co., 15 Daly 127, 3 N. Y. Suppl. 928; King *v.* Brown, 2 Hill 485.

North Carolina.— Bell *v.* Walker, 50 N. C. 43.

Oregon.—Blagen *v.* Thompson, 23 Oreg. 239, 31 Pac. 647, 18 L. R. A. 315.

Pennsylvania.—Hutchinson's Appeal, (1889) 16 Atl. 761; McDowell's Appeal, 123 Pa. St. 381, 16 Atl. 753.

Texas.— Wilson *v.* Graham, 14 Tex. 222; White *v.* Affleck, 1 Tex. Unrep. Cas. 78.

Vermont.—Keyes *v.* Western Vermont Slate Co., 34 Vt. 81.

United States.— Knowlton *v.* Oliver, 28 Fed. 516.

See 15 Cent. Dig. tit. "Damages," § 292.

Attempt at performance.— In an action by an advertising agent for breach of a contract under which he was to place all of defendants' advertising as defendants might direct in consideration of certain commissions on the amount of advertising, the plaintiff can, in the absence of proof of special damage, recover commissions only for such advertisements as were actually published, and not for advertisements which he contracted to publish but was unable to place on account of defendants' withdrawing their advertisements from him. Savage *v.* Drs. K. & K.'s U. S. Medical, etc., Assoc., 59 Mich. 400, 26 N. W. 652.

Theatrical engagement.— When a theatrical contract is broken the damages recoverable are; (1) The value of the labor done under it, and (2) such further damage as may be legally assessed for the breach; and this must be such only as arises from facts existing at the time of the breach. Escott *v.* Cram, 13 Pittsb. Leg. J. (Pa.) 412. In Schonberg *v.* Cheney, 3 Hun (N. Y.) 677, it was held that where defendant, the owner of a theater, agreed with plaintiff to produce a play written by plaintiff, on a certain date, and to pay him twenty dollars for each time of its performance, defendant was only bound to produce the play once, and was only liable in damages for the amount to be paid for one exhibition.

Warranty.— Where the defendant agreed if a harvester failed to do good work to furnish another in its place, on his failure so to do the measure of damages is the value of the new machine. Plano Mfg. Co. *v.* Kesler, 15 Ind. App. 110, 43 N. E. 925.

31. *California.*— Taylor *v.* North Pac. Coast R. Co., 56 Cal. 317.

Illinois.— St. Louis, etc., R. Co. *v.* Lurton, 72 Ill. 118.

Massachusetts.— Goddard *v.* Barnard, 16 Gray 205; Lawton *v.* Fitchburg, etc., R. Co., 8 Cush. 230, 54 Am. Dec. 753.

Minnesota.— Anderson *v.* Nordstrom, 60 Minn. 231, 61 N. W. 1132.

Missouri.—Gathwright *v.* Callaway County, 10 Mo. 663.

New York.— Kidd *v.* McCormick, 83 N. Y. 391; Deeves *v.* Richardson, etc., Co., 59 N. Y. Super. Ct. 423, 14 N. Y. Suppl. 633.

Ohio.— Cincinnati, etc., R. Co. *v.* Carthage, 36 Ohio St. 631.

Texas.— Sherman *v.* Connor, 88 Tex. 35, 29 S. W. 1053.

Vermont.—Forsyth *v.* Mann, 68 Vt. 116, 34 Atl. 481, 52 L. R. A. 788.

See 15 Cent. Dig. tit. "Damages," § 292.

Value of new contract.— Where a firm which has entered into a contract with a city for the construction of waterworks fails to begin the work the amount of damages to

it would reasonably cost the plaintiff to restore the property to its original condition.[32]

7. Contract For Board, Lodging, or Support. One who has entered into a contract for board, lodging, or support is not entitled as a matter of course to recover the whole price stipulated to be paid to the end of the period specified in the contract, but only for such damages as properly and necessarily result from the breach of the contract.[33] In such cases the measure of damages is the profits that would have resulted over and above the cost of the board during the time when other boarders could not have been obtained.[34] Where damages are claimed for a breach of contract of support during life, the measure thereof must necessarily depend upon the terms of the contract and the relative situations of the parties.[35] It seems, however, if a contract by one person to support another for life is entirely broken the person entitled to support may recover damages for the full value of the contract,[36] which damages are not measured by the consideration

which the city is entitled is at least equal to the difference between the contract price and the compensation provided for in a new contract made in pursuance of a bid, secured by a subsequent advertisement of the same work. Goldsboro *v.* Moffett, 49 Fed. 213.

Value of repairs.— Where a contractor for keeping a public bridge in repair commits a breach of his contract and the county court has caused the necessary repairs to be made, the rule of damages in an action for the breach is the value of the repairs needed and not the sum the county might have spent for them. State *v.* Ingram, 27 N. C. 441.

32. Smith *v.* Los Angeles, etc., R. Co., 98 Cal. 210, 33 Pac. 53.

33. De Lavalette *v.* Wendt, 11 Hun (N. Y.) 432; Strakosch *v.* Wray, 6 Misc. (N. Y.) 207, 26 N. Y. Suppl. 537; Crane *v.* Powell, 19 N. Y. Suppl. 220; Wilson *v.* Martin, 1 Den. (N. Y.) 602. In Haggin *v.* Price, 8 Dana (Ky.) 48, A agreed to board B a year for five hundred dollars, and B quit in three months without cause. It was held that A could only recover *pro rata* for the time B continued to board with him, and compensation for the loss of the contract to the end of the year.

No deduction for absence.— Where plaintiff contracted to furnish defendant with board and lodging at a stipulated price, "with no deduction in case of absence," and defendant left before the expiration of the time agreed upon without notice to plaintiff, the latter may recover the contract price for the time the rooms remained vacant after defendant's departure, and is not limited to the profits she might have made had defendant carried out his agreement. Wilkinson *v.* Davies, 146 N. Y. 25, 40 N. E. 501.

Suit before expiration of term.—Where one after engaging rooms with board for a definite term vacates the rooms in violation of his contract and is sued, damages are recoverable up to the time of trial, not merely to the time of the commencement of the action, the action having been brought before the expiration of the term. Cummins *v.* Hanson, 10 Daly (N. Y.) 493.

34. Lydecker *v.* Valentine, 71 Hun (N. Y.) 194, 24 N. Y. Suppl. 567; Strakosch *v.* Wray, 6 Misc. (N. Y.) 207, 26 N. Y. Suppl. 537; Crane *v.* Powell, 19 N. Y. Suppl. 220.

A party cannot refuse to rent rooms to other lodgers, leaving them idle, and then recover against defendant as for use and occupation, for the reason that he has no right to conduct himself in such a manner as to make the damages unnecessarily burdensome. De Lavalette *v.* Wendt, 11 Hun (N. Y.) 432; Wilson *v.* Martin, 1 Den. (N. Y.) 602. The measure of damages for breach of a contract by which defendant agreed to board with plaintiff for one year, where he broke the agreement after boarding only a few days, and the plaintiff some time afterward and before the expiration of the year gave up the house, would be the profits she would have made up to the time she gave up the house had the defendant performed his contract, after deducting the profits on boarders put in defendant's rooms. Wetmore *v.* Jaffray, 9 Hun (N. Y.) 140.

35. In an action for failure to support and bury decedent according to contract, it is proper to allow plaintiff to show the reasonable worth of keeping decedent to the time of his death and of providing a decent burial. Baughan *v.* Brown, 122 Ind. 115, 23 N. E. 695. The measure of damages for the breach of a contract under which defendant for a sum paid was to keep and maintain in his own family the infant daughter of plaintiff for life and in case of her death to pay her funeral expenses, the infant being dead at the institution of the action, is the difference between the value of the care and maintenance actually given and the value of such care, etc., stipulated for in the contract. Vancleave *v.* Clark, 118 Ind. 61, 20 N. E. 527, 3 L. R. A. 519. The measure of damages where plaintiff seeks to recover on an agreement to support and maintain another during the term of his natural life is the amount which his board and nursing during his last illness were reasonably worth less the value of any services rendered by him. Shakespeare *v.* Markham, 10 Hun (N. Y.) 311.

36. Parker *v.* Russell, 133 Mass. 74; Amos *v.* Oakley, 131 Mass. 413; Schell *v.* Plumb, 55 N. Y. 592; Morrison *v.* McAtee, 23 Oreg. 530, 32 Pac. 400. Where plaintiff had lived with

that is expressed in the contract, but are measured by the value of the services rendered.[37]

8. Contract Restricting Competition. In a contract restricting competition an exclusive right to profits may be reasonably supposed to have entered into the contemplation of the parties at the time the contract was made;[38] hence the party is as a general rule entitled to all damages necessarily resulting from a breach of such contract.[39] In such cases the measure of damages has been held to be the reasonable and certain profits that would have resulted to the plaintiff had the contract been performed;[40] but this does not extend to speculative or remote profits depending upon market values and the amount of sales.[41]

and been maintained by defendant for several years under a verbal contract by which in return for his services plaintiff was to be maintained during the rest of his life, it was held that on a breach of the contract by defendant plaintiff's measure of damages was not the value of his services over the value of the maintenance furnished for the period he had lived with defendant, but that he could recover the expense of his support which defendant had failed to furnish according to contract before the commencement of the action, and the prospective expense for such maintenance during the remainder of his life. Carpenter *v.* Carpenter, 66 Hun (N. Y.) 177, 20 N. Y. Suppl. 928. In Freeman *v.* Fogg, 82 Me. 408, 19 Atl. 907, it was held that the damages for breach of contract for a life-support are such sum as if invested at a reasonable rate of interest will yield an annual income during the plaintiff's life sufficient for his support, leaving nothing remaining at the time of his death.

37. Stanton *v.* Miller, 14 Hun (N. Y.) 383; Graham *v.* Graham, 34 Pa. St. 475.

Expectancy of life.— Where a mother conveyed land to her daughter in consideration of a life-support, such maintenance is measured by the mother's expectant life rather than by the value of the land conveyed to the daughter in consideration thereof. Shover *v.* Myrick, 4 Ind. App. 7, 30 N. E. 207.

38. Vidalat *v.* New Orleans, 43 La. Ann. 1121, 10 So. 175.

39. Terry *v.* Eslava, 1 Port. (Ala.) 273, 26 Am. Dec. 626; Vidalat *v.* New Orleans, 43 La. Ann. 1121, 10 So. 175; Dean *v.* Emerson, 102 Mass. 480; Westfall *v.* Mapes, 3 Grant (Pa.) 198. Where one who had been sued for an infringement of a patent for putting up cemented hams agreed that in consideration of the dismissal of the suit and of a right to the partial use of the patent for a year he would not manufacture or put up cemented hams during the existence of the patent, it was held in an action on such contract that the measure of damages was properly declared to be the amount that the plaintiff's hams had depreciated in price by the cemented hams put up and sold for defendants, after the expiration of the year mentioned in the contract, and before the commencement of the suit. Billings *v.* Ames, 32 Mo. 265.

Cost of handling goods.— On the breach of an agreement between a railroad company and an elevator company that the latter should have the handling of all grain transported over the railroad, the measure of damages is the difference between the cost of handling the grain in the elevator and the price stipulated to be paid. Richmond *v.* Dubuque, etc., R. Co., 26 Iowa 191.

Evidence of loss.— Although an agreement not to engage in business in competition with plaintiff is broken by defendant, causing it to be believed that he is a member of a competing firm, the damages would not include all loss of business caused by the competition of that firm, and plaintiff cannot recover substantial damages for such a breach, without evidence of a loss of business resulting from an understanding that defendant is a member of the firm. Daniels *v.* Brodie, 54 Ark. 216, 15 S. W. 467, 11 L. R. A. 81.

40. *Louisiana.*— Vidalat *v.* New Orleans, 43 La. Ann. 1121, 10 So. 175.

Maine.— Frye *v.* Maine Cent. R. Co., 67 Me. 414.

Missouri.— Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 73 Mo. 389, 39 Am. Rep. 519; Peltz *v.* Eichele, 62 Mo. 171.

New York.— Wakeman *v.* Wheeler, etc., Mfg. Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676.

Wisconsin.— Dr. Harter Medicine Co. *v.* Hopkins, 83 Wis. 309, 53 N. W. 501.

See 15 Cent. Dig. tit. "Damages," § 302.

Foreign market.— Where A agreed to give to B the exclusive sale for the export of machines, but broke the contract by selling directly to exporters, it was held in B's action against A that evidence of B's profits on similar machines at about the same time was admissible on the question of damages, but that B could not recover moneys expended in creating a market abroad. Carr *v.* Hills Archimedean Lawn Mower Co., 12 Daly (N. Y.) 332.

41. Wilson Sewing Mach. Co. *v.* Sloan, 50 Iowa 367; Howe Mach. Co. *v.* Bryson, 44 Iowa 159, 24 Am. Rep. 735; Carr *v.* Hills Archimedean Lawn Mower Co., 12 Daly (N. Y.) 332. In Frye *v.* Maine Cent. R. Co., 67 Me. 414, the plaintiff agreed with defendant railroad company to run a stage connecting with its road, for the conveyance of "travel coming from or going to" the railroad, in which agreement the times of leaving and arrival were set forth. The company in consideration therefor agreed to give him the "exclusive right of ticketing" between the termini of the stage line, for a certain length of time. It was held that the measure of plaintiff's damages for the breach of the

9. Contract For Division of Profits and Losses. Where the parties to a contract have entered into an agreement to share the profits, losses, and expenses resulting therefrom, the measure of damages for its breach is the amount of profits which the plaintiff would have received under the contract if the same had been carried to completion.[42] The measure of damages is the market value of the property when the contract is completed;[43] and while the plaintiff may be allowed for actual expenditures and services,[44] there can be no allowance upon expected sales or doubtful offers.[45]

contract was the profits which he was in fact able to make upon the transportation of the passengers, taking into account the situation and use of his property and the carrying on of other business over the same road, but that he could not recover damages suffered by him in the steamboat business at the end of the stage line. See also *supra*, VII, G, 2.

42. *Alabama.*— Beck *v.* West, 87 Ala. 213, 6 So. 70; Robinson *v.* Bullock, 66 Ala. 548.

Maryland.— Morrison *v.* Galloway, 2 Harr. & J. 461.

New York.— Bagley *v.* Smith, 10 N. Y. 489, 61 Am. Dec. 756; Crittenden *v.* Johnston, 7 N. Y. App. Div. 258, 40 N. Y. Suppl. 87.

Pennsylvania.— Hoy *v.* Gronoble, 34 Pa. St. 9, 75 Am. Dec. 628.

Wisconsin.— Treat *v.* Hiles, 81 Wis. 280, 50 N. W. 896.

See 15 Cent. Dig. tit. "Damages," § 301; and, generally, Joint Adventures.

Amount of privilege.— In an action for the breach of an agreement to allow the plaintiff to work the defendant's farm on shares, the measure of damages depends on the question, How much is such a privilege (whether it is called a lease or right of occupation, or by whatever name) worth? And such action may be maintained immediately on the refusal of the defendant to perform his part of the agreement. Taylor *v.* Bradley, 39 N. Y. 129, 100 Am. Dec. 415.

Corporate stock.— In Murphy *v.* Craig, 76 Mich. 155, 42 N. W. 1097, plaintiff and defendant bought two boilers to be sold and the proceeds divided between them. One of the boilers was sold and the proceeds were divided. Defendant sold the other boiler, receiving one thousand two hundred and fifty dollars in the capital stock of a corporation in payment, any part of which he refused to deliver to plaintiff. It was held that plaintiff could recover in assumpsit as damages for breach of contract one half of the value of the stock.

Enhanced value.— Where hides of plaintiff were to be delivered to another to be tanned and returned, and the net proceeds of the sales, after deducting costs and expenses, were to be the profit or loss to the tanner, and the latter made an assignment to defendant for the benefit of his creditors, the measure of damages in an action by plaintiff was the value of his interest in the hides and not the enhanced value thereof when manufactured into leather. Hyde *v.* Cookson, 21 Barb. (N. Y.) 92.

Partnership accounts.— In an action by a clerk against his employer, on an agreement whereby the former was to receive as compensation a certain portion of the net profits of the business, it was held that the rule for ascertaining damages was precisely the same as that which applied to partnership accounts. Wiggins *v.* Graham, 51 Mo. 17.

43. Beckwith *v.* Talbot, 2 Colo. 639.

Demand at subsequent period.— The measure of damages for the breach of a covenant to give the superintendent of a farm a certain portion of the crop "raised and secured" in a certain year is the value of his share when he was first entitled to it, although he demanded the same at a subsequent period when the articles had risen. Owens *v.* Durham, 5 Dana (Ky.) 536.

Increase of business.— Where one contracted to pay another for three years twenty per cent of the gross receipts from the sales of compressed yeast which the latter was to manufacture for the former, the measure of damages for the breach is such sum as the latter might have made as his share of the contract during that time, less what he might have reasonably earned, and in estimating the same, sales made since the contract may be considered with other evidence showing the probability of an increase or decrease of business. Goldman *v.* Wolff, 6 Mo. App. 490.

44. Reed *v.* McConnell, 62 Hun (N. Y.) 153, 16 N. Y. Suppl. 586.

No evidence of value of time.— In an action for breach of a contract to form a partnership, whereby plaintiff was to contribute her labor as against a hennery plant to be furnished by defendant, evidence of the *per diem* value of plaintiff's services while awaiting the completion by defendant of his agreement cannot be considered in estimating the damages, where there was no evidence introduced to show the value of the time lost or the kind of employment out of which plaintiff could have made the sum claimed. Rockwell Stock, etc., Co. *v.* Castroni, 6 Colo. App. 521, 42 Pac. 180.

Removal of family.— In an action to recover damages for the breach of a special contract by which upon certain terms and conditions therein mentioned defendant agreed to furnish and keep plaintiff supplied with a stock of goods for carrying on business in the defendant's store, and plaintiff undertook to carry on the same for one-half the profits for the term of two years, it was held that in estimating the damages it was competent for the arbitrators to whom the action was referred to allow plaintiff compensation for the loss of his time and for the expenses of removing his family to and from the place where the business was to be carried on. Johnson *v.* Arnold, 2 Cush. (Mass.) 46.

45. Beck *v.* West, 87 Ala. 213, 6 So. 70.

10. Failure to Pay Money. The measure of damages in case of failure to pay money under a contract depends somewhat upon the terms of the contract itself and the present worth of the money as contracted for,[46] but such measure of damages has usually been regulated by the legal rate of interest during the time of delay.[47] Where the breach of contract consists in a failure to pay the debt of another, the measure of damages has usually been considered the amount lost in pursuance of the contract on the part of the injured party;[48] and especially does this rule obtain where the payment is not contracted in money for a specific debt, but involves property rights that are or may be endangered by a breach.[49]

11. Failure to Pay in Property. Where the contract provides that a sum

46. Thayer *v.* Hedges, 23 Ind. 141; Mason *v.* Biddle, 6 J. J. Marsh. (Ky.) 30; Stockton *v.* Scobie, 1 J. J. Marsh. (Ky.) 6; Coggeshall *v.* Coggeshall, 2 Strobh. (S. C.) 51.

Amount payable in gold.— In Kaufman *v.* Myers, 38 Ga. 133, it was held in a proceeding by a distress warrant to recover an amount due for rent, payable under the contract in "American gold coin," that plaintiff could recover the market value of that amount of coin reckoned in United States legal tender treasury notes. In Brown *v.* Welch, 26 Ind. 116, under a contract for the payment of a sum of money in gold, or if paid in paper the amount thereof necessary to purchase the gold at the place of payment, it was not incumbent on the promisor in case he failed to pay the stipulated sum in gold to pay a greater sum in legal tender notes.

Confederate money.— In Hudspeth *v.* Johnson, 34 Ga. 403, it was held that where an officer had been negligent in collecting an execution after the depreciation in value of Confederate money he was not liable for the whole amount in United States currency, but only for such amount as the jury might decide that the Confederate money so collected was worth at that time.

English money.— In Reiser *v.* Parker, 20 Fed. Cas. No. 11,685, 1 Lowell 262, which was an action to recover English money payable in the United States, it was held that the measure of damages was the intrinsic value of the English money measured by our own.

47. *California.*— Guy *v.* Franklin, 5 Cal. 416.

Connecticut.— Lathrop *v.* Atwood, 21 Conn. 117.

Indiana.— Thayer *v.* Hedges, 23 Ind. 141; Brown *v.* Maulsby, 17 Ind. 10.

Kentucky.— Stockton *v.* Scobie, 1 J. J. Marsh. 6.

Louisiana.— Griffin *v.* His Creditors, 6 Rob. 216.

Massachusetts.— Furnas *v.* Durgin, 119 Mass. 500, 20 Am. Rep. 341.

Minnesota.— Mason *v.* Callender, 2 Minn. 350, 72 Am. Dec. 102.

Missouri.— Sturgess *v.* Crum, 29 Mo. App. 644.

New Hampshire.— Richards *v.* Whittle, 16 N. H. 259.

New York.— Murray *v.* Gale, 52 Barb. 427; Cady *v.* Allen, 22 Barb. 388.

Ohio.— Woodbridge *v.* Brophy, 2 Ohio Dec. (Reprint) 279, 2 West. L. Month. 274.

South Carolina.— Gatewood *v.* Moses, 5 Rich. 244.

Tennessee.— Morrison *v.* Searight, 4 Baxt. 476.

Texas.— Close *v.* Fields, 13 Tex. 623.

Vermont.— Ferris *v.* Barlow, 2 Aik. 106.

Washington.— Arnott *v.* Spokane, 6 Wash. 442, 33 Pac. 1063.

United States.— Loudon *v.* Shelby County Taxing Dist., 104 U. S. 771, 26 L. ed. 923; Memphis *v.* Brown, 16 Fed. Cas. No. 9,415, 1 Flipp. 188.

See 15 Cent. Dig. tit. "Damages," § 339 *et seq.*; and *supra*, VII, M, 3.

Interest at contract price.— In Beckwith *v.* Hartford, etc., R. Co., 29 Conn. 268, 76 Am. Dec. 599, it was held that where a railroad company by legislative authority had issued bonds with the interest payable semiannually, at a rate of interest beyond the legal rate, the measure of damages was the contract price and not the legal rate of interest.

Two sums contracted for.— In White *v.* Green, 3 T. B. Mon. (Ky.) 155, it was held that where a party had contracted to pay one of two sums, one in paper and the other in specie, the damage upon the breach of such contract is the value of the less valuable of the two with interest.

48. *Illinois.*— Nelson *v.* Ravens, 3 Ill. App. 565.

Indiana.— Weddle *v.* Stone, 12 Ind. 625.

Michigan.— Pratt *v.* Bates, 40 Mich. 37.

Minnesota.— Merriam *v.* Pine City Lumber Co., 23 Minn. 314.

Missouri.— Sturgess *v.* Crum, 29 Mo. App. 644.

New Hampshire.— Richards *v.* Whittle, 16 N. H. 259.

New York.— Wright *v.* Chapin, 87 Hun 144, 33 N. Y. Suppl. 1068.

See 15 Cent. Dig. tit. "Damages," § 341.

49. Lowe *v.* Turpie, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; Atherton *v.* Williams, 19 Ind. 105; Somers *v.* Wright, 115 Mass. 292. In Cady *v.* Allen, 22 Barb. (N. Y.) 388, it was held that upon the breach of a contract to pay all claims against a certain lot, which was at the time subject to the lien of an existing judgment, the measure of the damages was the amount of the judgment with interest.

Contract to loan money.— Where a person agrees to make a loan to another if the title to land offered as security is perfected, and the latter being induced thereby complies with the requirements, he may on breach of the

shall be paid in a specified article of property, there has been much division of opinion as to the true measure of damages.[50] Some of the courts have measured the damages by the value of the property at the time of the stipulated delivery[51] or demand,[52] while others have assessed the value of the property at the time of the contract.[53] The question of damages in such cases has usually been governed

agreement recover such damages as are caused by the breach and which may reasonably be supposed to have entered into the contemplation of the parties. Equitable Mortg. Co. *v.* Thorn, (Tex. Civ. App. 1894) 26 S. W. 276.

50. See *infra*, XI, E, 2.

In an action for breach of a contract to pay for wheat in certain quantities of flour and bran, the value of the flour and bran and not the value of the wheat is the measure of damages. Lucas *v.* Heaton, 1 Ind. 264.

In a suit on a promissory note for salt, assigned under the statute, brought by the assignee against the assignor, the value of the salt as assessed by the jury in the suit by the assignee against the obligor, is the measure of damages. McKinney *v.* McConnel, 1 Bibb (Ky.) 239.

51. *Alabama.*— McGehee *v.* Posey, 42 Ala. 330.

Maine.— Smith *v.* Berry, 18 Me. 122.

Missouri.— Thomas *v.* Starling, 1 Mo. 583.

North Carolina.— Whitsett *v.* Forehand, 79 N. C. 230.

Pennsylvania.— Malaun *v.* Ammon, 1 Grant 123.

South Carolina.— Justrobe *v.* Price, Harp. 111.

Tennessee.— Elsey *v.* Stamps, 10 Lea 709.

See 15 Cent. Dig. tit. "Damages," § 344 *et seq.*

Market value.—Under an agreement to pay or deliver a certain quantity and quality of a commodity — gold coin or anything else — upon failure to perform the promisee may recover the market value of the article at the time and place when and where it should have been delivered; but when the agreement is to pay so many dollars, whether in a commodity or in money, the amount of money agreed to be paid is the only measure of damages for a breach of the covenant. Murray *v.* Gale, 52 Barb. (N. Y.) 427.

Place of delivery not fixed by contract.— The measure of damages for the breach of a special contract, by which plaintiff loaned to defendant a specified quantity of cotton of a certain quality and defendant agreed to deliver to plaintiff on a certain future day the same quantity of cotton of like quality, is the value of the cotton on the day fixed for delivery; and this rule is not varied because the place of delivery is not fixed by the contract, nor because the cotton is to be returned in kind. Bozeman *v.* Rose, 40 Ala. 212.

Stipulation as to price.— In an action on a contract providing for the payment of a debt in wheat of a certain quality, to be delivered in specified amounts at specified times annually, at a stipulated price per bushel, the measure of damages is its actual value when due and not merely its value at the price stipulated. Starr *v.* Light, 22 Wis. 433, 99 Am. Dec. 55.

52. Safely *v.* Gilmore, 21 Iowa 588, 89 Am. Dec. 592; West *v.* Wentworth, 3 Cow. (N. Y.) 82.

Extraordinary price at time of demand.— In Miller *v.* Cassady, 25 Iowa 323, it was held that, where a party had stored wheat for another during several years whereby the latter was to pay him five bushels of wheat for every one hundred bushels stored, a rule of damages allowing the plaintiff for the value of the wheat at the time he demanded it, the wheat at that time bearing an extraordinary price, was erroneous.

No proof of demand.—Wherever a contract is entered into for the delivery of a specific article, the value of that article at the time fixed for the delivery is the amount of damages to be recovered on a breach of the contract; and if no time is fixed for the delivery and no demand proved the commencement of the suit must be considered the demand, and the value of the article at the time of commencing the action with interest is the proper rule of estimation. Davis *v.* Richardson, 1 Bay (S. C.) 105.

Time of demand.— Where plaintiff sold property to A, relying for security on the undertaking of defendants to deliver to plaintiff certain goods at specified prices on demand, and these goods at the time of the demand had fallen in value below the prices so specified, in an action for the non-delivery of such goods it was held that the plaintiff was entitled to stand in the same situation as if he had paid defendants the amount of the property sold to A; and consequently if the goods had risen in value after the demand plaintiff would have been entitled to recover the value of them at the time of trial, but where they had fallen after the contract he could recover only their value at the time of the demand. West *v.* Pritchard, 19 Conn. 212.

53. *Connecticut.*— Brooks *v.* Hubbard, 3 Conn. 58, 8 Am. Dec. 154; Babbet *v.* Belding, 1 Root 445.

Indiana.— Terrell *v.* Frazier, 79 Ind. 473.

Iowa.— Hise *v.* Foster, 17 Iowa 23.

Kentucky.— Clay *v.* Huston, 1 Bibb 461.

New York.— Pinney *v.* Gleason, 5 Wend. 393, 21 Am. Dec. 223.

South Carolina.— Fleming *v.* Robertson, 3 Rich. 118.

Tennessee.— Ross *v.* Carter, 1 Humphr. 415.

Vermont.—Harrington *v.* Wells, 12 Vt. 505.

See 15 Cent. Dig. tit. "Damages," § 344 *et seq.*

by the market price at the time of delivery;[54] but some courts have allowed the highest market value between the breach and the time of trial.[55] Where the obligation is in the alternative, that is, to pay in money or in property, the sum stipulated rather than the market value of the commodity has been considered the true measure of damages.[56]

12. Failure to Deliver or Convey Property — a. In General. Where there has been a failure to deliver or convey property according to contract, the value of the property has usually been considered the measure of damages.[57] In other

Change in market value.— Where a debtor in consideration of forbearance agrees to deliver to the creditor goods at a future day to a specified amount, to be applied in payment of his debt to that extent, and he breaks his agreement, the creditor is entitled to recover as damages for the breach of the agreement the amount so agreed to be paid, although the market value of the goods is the same or even less than the price at which they were to be received. Fletcher *v.* Derrickson, 3 Bosw. (N. Y.) 181.

54. Phillips *v.* Ocmulgee Mills, 55 Ga. 633; Parks *v.* Marshall, 10 Ind. 20; Meserve *v.* Ammidon, 109 Mass. 415; Murray *v.* Gale, 52 Barb. (N. Y.) 427. And see Shepherd *v.* Johnson, 2 East 211. Where defendants agreed to pay to plaintiffs a perpetual annual rent of a certain number of ounces of silver of a specified fineness or an equivalent in gold, it was held that this was a contract for the delivery of a commodity and not for the payment of money, and that the measure of damages for its breach was the market value of the silver or gold at the time when it should have been delivered with interest. Essex Co. *v.* Pacific Mills, 14 Allen (Mass.) 389. In Pepper *v.* Peytavin, 12 Mart. (La.) 671, it was held that the creditor of an obligation payable in produce may on default of the debtor buy produce of the same kind at the market price and claim an equal sum in damages or claim them without making the purchase, as the debtor has no interest therein.

Cost of transportation.— On the breach of a contract to deliver an article of merchantable quality at a specified place distant from market, the measure of damages is the market price of the article at the nearest markets and the necessary cost of transportation from thence to the place specified. Furlong *v.* Polleys, 30 Me. 491, 50 Am. Dec. 635.

55. Cortelyou *v.* Lansing, 2 Cai. Cas. (N. Y.) 200 [*followed* in West *v.* Wentworth, 3 Cow. (N. Y.) 82]; Ranger *v.* Hearne, 37 Tex. 30; Brasher *v.* Davidson, 31 Tex. 190, 98 Am. Dec. 525 [*following* Calvit *v.* McFadden, 13 Tex. 324; Randon *v.* Barton, 4 Tex. 289]. See also Shepherd *v.* Johnson, 2 East 211.

Rise in contract price.— In an action for not delivering whisky by a certain day according to contract, the rise in price owing to excise laws passed since the date of the contract will not alter the rule for estimating damages. Edgar *v.* Boies, 11 Serg. & R. (Pa.) 445.

56. Trowbridge *v.* Holcomb, 4 Ohio St. 38.

Obligation payable in judgments.— In Pieree *v.* Spader, 13 Ind. 458, it was held, however, that in an action on a note for an amount payable in judgments the value of the judgments was the measure of damages.

57. *Alabama.*— Bozeman *v.* Rose, 51 Ala. 321; McGehee *v.* Posey, 42 Ala. 330; Moore *v.* Fleming, 34 Ala. 491.

California.— Rayner *v.* Jones, 90 Cal. 78, 27 Pac. 24.

Connecticut.— West *v.* Pritchard, 19 Conn. 212; Brooks *v.* Hubbard, 3 Conn. 58, 8 Am. Dec. 154; Treat *v.* Carrington, 1 Root 356; Collins *v.* Hubbard, 1 Root 354.

Indiana.— Terrell *v.* Frazier, 79 Ind. 473; Williams *v.* Jones, 12 Ind. 561; Parks *v.* Marshall, 10 Ind. 20; Lucas *v.* Heaton, 1 Ind. 264.

Iowa.— Safely *v.* Gilmore, 21 Iowa 588, 89 Am. Dec. 592; Bonnon *v.* Urton, 3 Greene 288.

Kentucky.— Marr *v.* Prather, 3 Mete. 196; Sirlott *v.* Tandy, 3 Dana 142; Mudd *v.* Phillips, Litt. Sel. Cas. 50; Clay *v.* Huston, 1 Bibb 461; McKinney *v.* McConnel, 1 Bibb 239.

Maine.— Smith *v.* Berry, 18 Me. 122.

Minnesota.— Bennett *v.* Phelps, 12 Minn. 326.

New York.— Murray *v.* Gale, 52 Barb. 427; Fletcher *v.* Derrickson, 3 Bosw. 181; Pinney *v.* Gleason, 5 Wend. 393, 21 Am. Dec. 223.

North Carolina.— Whitsett *v.* Forehand, 79 N. C. 230.

Ohio.— Courcier *v.* Graham, 1 Ohio 330.

Pennsylvania.— White *v.* Tompkins, 52 Pa. St. 363; Bash *v.* Bash, 9 Pa. St. 260; Jack *v.* McKee, 9 Pa. St. 235.

South Dakota.— Cosand *v.* Bunker, 2 S. D. 294, 50 N. W. 84.

Tennessee.— Elsey *v.* Stamps, 10 Lea 709; Hixon *v.* Hixon, 7 Humphr. 33; Ross *v.* Carter, 1 Humphr. 415; McDonald *v.* Hodge, 5 Hayw. 85.

Vermont.—Harrington *v.* Wells, 12 Vt. 505.

Wisconsin.— Starr *v.* Light, 22 Wis. 433, 99 Am. Dec. 55.

United States.— Rabaud *v.* D'Wolf, 20 Fed. Cas. No. 11,519, 1 Paine 580.

See 15 Cent. Dig. tit. "Damages," § 344 *et seq.*

Time of delivery.— The measure of damages for the breach of a contract to deliver one half of all fruit to be raised in a certain orchard is the value of one half of the fruit at the time it was fit for delivery. Smock *v.* Smock, 37 Mo. App. 56.

words the measure of damages has been considered compensation,[58] which has been held to include the interest upon the amount involved.[59]

b. Stocks or Bonds. No definite rule can be laid down as to the measure of damages for the refusal to deliver corporate stocks or bonds.[60] The measure of damages has been variously announced as the value of the stock at the time it should have been delivered,[61] the value of the stock at the time of demand,[62] and

58. Utter *v.* Chapman, 38 Cal. 659; Dean *v.* Ritter, 18 Mo. 182; Fenton *v.* Perkins, 3 Mo. 23; Pennsylvania R. Co. *v.* Titusville, etc., Plank Road Co., 71 Pa. St. 350; Shenk *v.* Mingle, 13 Serg. & R. (Pa.) 29; Medbery *v.* Sweet, 3 Pinn. (Wis.) 210, 3 Chandl. (Wis.) 231.

Difference in price.— The measure of damages for the breach of an agreement to take back a soda-water fountain and deliver another is the difference between the cost of a similar machine actually purchased and the new machine mentioned in the agreement. A. D. Puffer, etc., Mfg. Co. *v.* Lucas, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682.

59. *Connecticut.*— West *v.* Pritchard, 19 Conn. 212.

Iowa.— Bonnon *v.* Urton, 3 Greene 228.

Kentucky.— Marr *v.* Prather, 3 Metc. 196; Mudd *v.* Phillips, Litt. Sel. Cas. 50; Pope *v.* Campbell, Hard. 31, 3 Am. Dec. 722.

Missouri.— Bowman *v.* Branson, 111 Mo. 343, 19 S. W. 634.

Pennsylvania.— White *v.* Tompkins, 52 Pa. St. 365; Dewald's Estate, 7 Wkly. Notes Cas. 422.

South Carolina.— Davis *v.* Richardson, 1 Bay 105.

See 15 Cent. Dig. tit. "Damages," § 344 *et seq.*; and *supra*, VII, M, 4.

Expenses and interest.— The measure of plaintiff's damages for the detention of a boiler which defendant had agreed to deliver is the loss incurred in ascertaining what had become of the boiler, the expense incurred in preparing fixtures for the boiler, and interest on the value of the boiler during the time of its detention. Davis *v.* Cincinnati, etc., R. Co., 1 Disn. (Ohio) 23, 12 Ohio Dec. (Reprint) 463.

60. In Bowker *v.* Goodwin, 7 Nev. 135, it was held that the measure of damages for the failure to deliver a certain number of shares of stock was their market value either at the time of the conversion, when the stock should have been delivered, or at the time of the trial, according to circumstances, and in no case would its value as connected with other property or as modified by some peculiar circumstances affect the measure of damages.

The cases on this subject are in dire confusion dependent in a measure upon the modifications of the doctrine of "higher intermediate value." See *infra*, XI, E, 2.

61. *Maine.*— Porter *v.* Buckfield Branch R. Co., 32 Me. 539.

Maryland.— Alexander *v.* Webster, 6 Md. 359.

New Hampshire.— Pinkerton *v.* Manchester, etc., R. Co., 42 N. H. 424.

New York.— Day *v.* Perkins, 2 Sandf. Ch. 359.

Ohio.— Fosdick *v.* Green, 1 Cinc. Super. Ct. 537.

Virginia.— Orange, etc., R. Co. *v.* Fulvey, 17 Gratt. 366; Enders *v.* Board of Public Works, 1 Gratt. 364.

United States.— Shepherd *v.* Hampton, 3 Wheat. 200, 4 L. ed. 369; Taylor *v.* Turner, 23 Fed. Cas. No. 13,770, 2 Cranch C. C. 203.

See 15 Cent. Dig. tit. "Damages," § 349.

Agreement as to value.— Where a person, in consideration of property (not money) to be assigned by another, agrees to give a certain number of shares of stock having on the day of the contract a fixed market value, and refusing to give the stock is sued at law for a breach of the contract, evidence of the value of the stock at any other time than at the date of the contract is rightly excluded, its value at that date being agreed on and admitted. Humaston *v.* American Tel. Co., 20 Wall. (U. S.) 20, 22 L. ed. 279.

Face value of bond.— Where the contract provided for the delivery of a bond issued by a railroad company, and guaranteed the payment of the bond in full, the measure of damages for the breach of the contract to deliver was the value of the bond as thus guaranteed by defendant, and as against defendant was the face of the bond and interest. Shelton *v.* French, 33 Conn. 489.

Nominal damages.—In an action for breach of a contract to deliver corporate stock, the measure of plaintiff's damages is the actual value of the stock, and if it appears that no corporation was formed and no stock was ever issued, or if stock was issued that it was valueless, plaintiff can recover only nominal damages. Gibson *v.* Whip Pub. Co., 28 Mo. App. 450.

62. Eastern R. Co. *v.* Benedict, 10 Gray (Mass.) 212; Wyman *v.* American Powder Co., 8 Cush. (Mass.) 168; Pinkerton *v.* Manchester, etc., R. Co., 42 N. H. 424; Noonan *v.* Ilsley, 17 Wis. 314, 84 Am. Dec. 742.

Highest value after demand.— In a suit against a bank for refusing to deliver certificates of stock subscribed and paid for the measure of damages is the value of the stock or the highest price in market at any time after demand and refusal to permit a transfer and to issue scrip to the purchaser. Arnold *v.* Suffolk Bank, 27 Barb. (N. Y.) 424.

Where there has been failure to return borrowed stock after demand therefor has been properly made, the measure of damages is the market value of the stock at the time of demand. McKenney *v.* Haines, 63 Me. 74; Fosdick *v.* Greene, 27 Ohio St. 484, 22 Am. Rep. 328.

the highest value of the stock between the refusal to deliver and the time of trial.[63]

E. For Conversion of Personalty — 1. In General.[64] Where property has been wrongfully converted to the use of another the measure of damages has been usually held to be the value of the property at the time of the conversion together with the interest from the date of detention,[65] unless the property has been returned,[66] or the conversion is merely nominal and results in no serious injury or loss to the owner.[67]

2. Doctrine of "Higher Intermediate Value" — a. In General. In cases of conversion of property or the unlawful detention of the same, where such prop-

63. Arnold *v.* Suffolk Bank, 27 Barb. (N. Y.) 424; Musgrave *v.* Beckendorff, 53 Pa. St. 310; Reitenbaugh *v.* Ludwick, 31 Pa. St. 131; San Antonio, etc., R. Co. *v.* Wilson, 4 Tex. Civ. App. 178, 23 S. W. 282; San Antonio, etc., R. Co. *v.* Wagner, (Tex. Civ. App. 1893) 21 S. W. 167; San Antonio, etc., R. Co. *v.* Busch, (Tex. Civ. App. 1893) 21 S. W. 164.

Addition of dividends.— In Montgomery Bank *v.* Reese, 26 Pa. St. 143, it was held that the measure of damages for withholding bank-stock from a party entitled to it is the highest market value of the stock between the breach and the trial, less the par value, and that any dividends that may have been declared are to be added to this if the stock was paid for.

No deduction for interest.— On a subscription to mortgage bonds of a railroad extension to be built, the measure of damages for a breach of contract to deliver said bonds is their highest market value at any time from the completion of the extension to the time of trial with interest. The fact that such bonds do not bear interest for three years does not warrant a deduction of three years' interest from the damages, since to that extent the market value must have been impaired already. San Antonio, etc., R. Co. *v.* Busch, (Tex. Civ. App. 1893) 23 S. W. 308.

64. See, generally, Trover and Conversion.

65. *California.*— Barrante *v.* Garratt, 50 Cal. 112.

Colorado.— Sutton *v.* Dana, 15 Colo. 98, 25 Pac. 90.

Connecticut.— Hurd *v.* Hubbell, 26 Conn. 389.

Delaware.— Vaughan *v.* Webster, 5 Harr. 256.

Florida.— Skinner *v.* Pinney, 19 Fla. 42, 45 Am. Rep. 1; Robinson *v.* Hartridge, 13 Fla. 501.

Georgia.— Riley *v.* Martin, 35 Ga. 136. And see Newton Mfg. Co. *v.* White, 53 Ga. 395.

Illinois.— Tripp *v.* Grouner, 60 Ill. 474; Sturges *v.* Keith, 57 Ill. 451, 11 Am. Rep. 28.

Indiana.— Yater *v.* Mullen, 24 Ind. 277. And see Tea *v.* Gates, 10 Ind. 164.

Iowa.— Russell *v.* Huiskamp, 77 Iowa 727, 42 N. W. 525; Robinson *v.* Hurley, 11 Iowa 410, 79 Am. Dec. 479.

Kentucky.— Justice *v.* Mendell, 14 B. Mon. 12; Daniel *v.* Holland, 4 J. J. Marsh. 18; Freeman *v.* Luckett, 2 J. J. Marsh. 390.

Maine.— Robinson *v.* Barrows, 48 Me. 186; Hayden *v.* Bartlett, 35 Me. 203.

Maryland.— Hopper *v.* Haines, 71 Md. 64, 18 Atl. 29, 20 Atl. 159; Stirling *v.* Garritee, 18 Md. 468.

Massachusetts.— Beecher *v.* Denniston, 13 Gray 354.

Michigan.— Allen *v.* Kinyon, 41 Mich. 281, 1 N. W. 863; Symes *v.* Oliver, 13 Mich. 9.

Missouri.— Spencer *v.* Vance, 57 Mo. 427; Carter *v.* Feland, 17 Mo. 383.

Nevada.— Newman *v.* Kane, 9 Nev. 234.

New York.— Wehle *v.* Haviland, 69 N. Y. 448; Mechanics', etc., Bank *v.* Farmers', etc., Nat. Bank, 60 N. Y. 40; Griswold *v.* Haven, 25 N. Y. 595, 82 Am. Dec. 380; King *v.* Orser, 4 Duer 431.

Ohio.— Dixon *v.* Caldwell, 15 Ohio St. 412, 86 Am. Dec. 487.

Texas.—Schoolher *v.* Hutchins, 66 Tex. 324, 1 S. W. 266; Carter *v.* Roland, 53 Tex. 540; Hatcher *v.* Pelham, 31 Tex. 201.

Vermont.— Crumb *v.* Oaks, 38 Vt. 566; Thrall *v.* Lathrop, 30 Vt. 307, 73 Am. Dec. 306.

Wisconsin.— Ingram *v.* Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762; Tenney *v.* State Bank, 20 Wis. 152.

United States.— Dows *v.* Milwaukee Nat. Exch. Bank, 91 U. S. 618, 23 L. ed. 214.

See, generally, Trover and Conversion; and *infra*, XI, E, 2.

66. Renfro *v.* Hughes, 69 Ala. 581 [*following* Ewing *v.* Blount, 20 Ala. 694]; Williams *v.* Crumb, 27 Ala. 468; Davenport *v.* Ledger, 80 Ill. 574; Anderson *v.* Sloane, 72 Wis. 566, 40 N. W. 214, 7 Am. St. Rep. 885.

Return of property after conversion see *supra*, VII, J, 4.

67. The measure of damages for the conversion of a mere certificate of stock cannot be placed at the value of the shares which it represents if the ownership of the shares themselves is not affected. Daggett *v.* Davis, 53 Mich. 35, 18 N. W. 548, 51 Am. Rep. 91. In Mowry *v.* Wood, 12 Wis. 413 [*quoted* in Daggett *v.* Davis, 53 Mich. 35, 18 N. W. 548, 51 Am. Rep. 91], the owner of a certificate issued by the state, and which entitled the holder to receive from the state a deed of certain lands when specified payments were made, was held entitled to recover, in an action for its conversion, not the value of his interest in the land under the certificate, but such sum as would recompense him for any actual loss he had sustained, and for the trouble and expense of establishing and per-

erty is of fluctuating value, a rule for the measure of damages has arisen called "the rule of higher intermediate value." Under the early interpretation of this rule a party was allowed the highest value of the property between the time of conversion and the time of trial.[68] This early interpretation of the rule has, however, been much modified by subsequent decisions,[69] and the doctrine as applied to stock deals has been allowed as a measure of damages only for such time after the injury as the plaintiff might by the exercise of due diligence have replaced himself in the market.[70]

b. Fluctuating Property — (i) *In General.* In actions for the conversion of property other than stocks, which is of a fluctuating value, the authorities are too conflicting to lay down any general rule. In some states it has been held that the measure of damages in such cases is the value of the property at the time of conversion,[71] together with interest thereon;[72] in other states the measure of damages in such cases has been held to be the highest value of the property from the time of the conversion up to the time of trial;[73] while still other states

petuating the evidence of his title. In other words he was held entitled to recover only his actual damages.

68. See cases cited *infra*, note 69 *et seq.*

The early English cases do not establish a definite rule on this subject. Harrison *v.* Harrison, 1 C. & P. 412, 12 E. C. L. 242; Shepherd *v.* Johnson, 2 East 211; McArthur *v.* Seaforth, 2 Taunt. 257. See 2 Joyce Dam. § 1146 *et seq.*; 2 Sedgwick Dam. § 508. But such rule as applied to stock transactions has now been adopted in that country. Galigher *v.* Jones, 129 U. S. 193, 9 S. Ct. 335, 32 L. ed. 658 [*citing* France *v.* Gaudet, L. R. 6 Q. B. 199, 40 L. J. Q. B. 121, 19 Wkly. Rep. 622; Owen *v.* Routh, 14 C. B. 327, 2 C. L. R. 365, 18 Jur. 356, 23 L. J. C. P. 105, 2 Wkly. Rep. 222, 78 E. C. L. 327; Loder *v.* Kekute, 3 C. B. N. S. 128, 4 Jur. N. S. 93, 27 L. J. C. P. 27, 5 Wkly. Rep. 884, 91 E. C. L. 128; Cud *v.* Rutter, 1 P. Wms. 570, 24 Eng. Reprint 521].

In New York the question of higher intermediate value has been frequently applied where some of the earlier cases adopted it as the true rule for the measure of damages in such cases. Romaine *v.* Van Allen, 26 N. Y. 309; Morgan *v.* Gregg, 46 Barb. 183; Cortelyou *v.* Lansing, 2 Cai. Cas. 200; West *v.* Wentworth, 3 Cow. 82.

69. Lobdell *v.* Stowell, 51 N. Y. 70; Markham *v.* Jaudon, 41 N. Y. 235; Burt *v.* Dutcher, 34 N. Y. 493; Scott *v.* Rogers, 31 N. Y. 676.

70. Wright *v.* Metropolis Bank, 110 N. Y. 237, 18 N. E. 79, 6 Am. St. Rep. 356, 1 L. R. A. 289; Colt *v.* Owens, 90 N. Y. 368; Gruman *v.* Smith, 81 N. Y. 25; Baker *v.* Drake, 66 N. Y. 518, 23 Am. Rep. 80, 53 N. Y. 211, 13 Am. Rep. 507. See also Galigher *v.* Jones, 129 U. S. 193, 9 S. Ct. 335, 32 L. ed. 658. In Wright *v.* Metropolis Bank, 110 N. Y. 237, 249, 18 N. E. 79, 6 Am. St. Rep. 356, 1 L. R. A. 289, the court said: "It is the natural and proximate loss which the plaintiff is to be indemnified for, and that cannot be said to extend to the highest price before trial, but only to the highest price reached within a reasonable time after the plaintiff has learned of the conversion of his stock within which he could go in the market and repurchase it. What is a reasonable time when the facts are undisputed and different inferences cannot reasonably be drawn from the same facts, is a question of law."

71. *Arkansas.*— Peterson *v.* Gresham, 25 Ark. 380; McNeill *v.* Arnold, 22 Ark. 477.

Colorado.— Continental Divide Min. Invest. Co. *v.* Bliley, 23 Colo. 160, 46 Pac. 633.

Florida.— Moody *v.* Caulk, 14 Fla. 50.

Illinois.— Sturges *v.* Keith, 57 Ill. 451, 11 Am. Rep. 28.

Iowa.— Gravel *v.* Clough, 81 Iowa 272, 46 N. W. 1092; Brown *v.* Allen, 35 Iowa 306.

Kentucky.— Lillard *v.* Whitaker, 3 Bibb 92.

Maryland.— Baltimore Third Nat. Bank *v.* Boyd, 44 Md. 47, 22 Am. Rep. 35; Baltimore Mar. Ins. Co. *v.* Dalrymple, 25 Md. 269.

Massachusetts.—Greenfield Bank *v.* Leavitt, 17 Pick. 1, 28 Am. Dec. 268; Kennedy *v.* Whitwell, 4 Pick. 466.

Michigan.— Jackson *v.* Evans, 44 Mich. 510, 7 N. W. 79; Symes *v.* Oliver, 13 Mich. 9.

Mississippi.— Whitfield *v.* Whitfield, 40 Miss. 352.

Missouri.— Walker *v.* Borland, 21 Mo. 289.

Nevada.— Boylan *v.* Huguet, 8 Nev. 345.

New Hampshire.— Frothingham *v.* Morse, 45 N. H. 545.

Pennsylvania.— Jacoby *v.* Laussatt, 6 Serg. & R. 300.

England.— Mercer *v.* Jones, 3 Campb. 477. *Compare* Greening *v.* Wilkinson, 1 C. & P. 625, 28 Rev. Rep. 790, 12 E. C. L. 355.

72. *Florida.*— Moody *v.* Caulk, 14 Fla. 50.

Illinois.— Sturges *v.* Keith, 57 Ill. 451, 11 Am. Rep. 28.

Maryland.— Alexander *v.* Webster, 6 Md. 359.

Massachusetts.— Greenfield Bank *v.* Leavitt, 17 Pick. 1, 28 Am. Dec. 268; Kennedy *v.* Whitwell, 4 Pick. 466.

Michigan.— Symes *v.* Oliver, 13 Mich. 9.

Mississippi.— Whitfield *v.* Whitfield, 40 Miss. 352.

Missouri.— Walker *v.* Borland, 21 Mo. 289.

Nevada.— Boylan *v.* Huguet, 8 Nev. 345.

Pennsylvania.— Jacoby *v.* Laussatt, 6 Serg. & R. 300.

73. *Alabama.*— Burks *v.* Hubbard, 69 Ala. 379; Street *v.* Nelson, 67 Ala. 504; Loeb *v.*

have adopted the rule of value within a reasonable time after notice of conversion.[74]

(II) *Conversion of Stock.* In actions for conversion of stock, the weight of authority seems to support the rule allowing the recovery of the highest value of such stock from the time of the conversion up to a reasonable time after knowledge of such conversion;[75] but while this rule has been more generally received as the measure of damages, cases are not lacking where the value of the stock at the time of conversion has been considered the true criterion of damages,[76] and it

Flash, 65 Ala. 526; Tatum *v.* Manning, 9 Ala. 144. In this state the courts are inclined to leave the time of highest value to the discretion of the jury. Renfro *v.* Hughes, 69 Ala. 581, and cases just above cited.

California.— Hamer *v.* Hathaway, 33 Cal. 117; Douglass *v.* Kraft, 9 Cal. 562. This rule was modified by subsequent decisions and statute to bring it within the doctrine of reasonable diligence in prosecuting the action. Civ. Code, § 3336; Barrante *v.* Garratt, 50 Cal. 112; Page *v.* Fowler, 39 Cal. 412, 2 Am. Rep. 462.

Georgia.— In this state it has been held that the plaintiff must elect the kind of verdict which he will take, and so where an action was brought for the conversion of mules, the plaintiff was compelled to elect whether he would take the value of the property at the time of conversion and also the hire of the mules, or whether he would take the highest value of the property between the time of the conversion and trial, without the hire or interest. Jaques *v.* Stewart, 81 Ga. 81, 6 S. E. 815.

North Dakota.— In this state the measure of damages has been regulated by statute, bringing the rule within the doctrine of reasonable diligence in prosecuting the claim. Rev. Codes, § 5000; Fargo First Nat. Bank *v.* Minneapolis, etc., Elevator Co., 8 N. D. 430, 79 N. W. 874; Pickert *v.* Rugg, 1 N. D. 230, 46 N. W. 446.

South Carolina.—Carter *v.* Du Pre, 18 S. C. 179; Kid *v.* Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702. In Rogers *v.* Randall, 2 Speers 38, it was held that the jury have a discretion between the highest and lowest estimates. To same effect see Harley *v.* Platts, 6 Rich. 310.

Texas.— Stephenson *v.* Price, 30 Tex. 715. In Hatcher *v.* Pelham, 31 Tex. 201, the court said that the measure of damages in such cases was dependent upon "the peculiar circumstances of the case," and as the question in this case depended upon the value of Confederate money, it was held that the measure of damages should be estimated at the time of the conversion with interest.

Wisconsin.— Webster *v.* Moe, 35 Wis. 75; Weymouth *v.* Chicago, etc., R. Co., 17 Wis. 550, 84 Am. Dec. 763. These decisions have been subsequently modified by statute, and the doctrine of the highest intermediate value has been disapproved. Laws (1873), c. 263; Ingram *v.* Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762.

Wyoming.— Hilliard Flume, etc., Co. *v.* Woods, 1 Wyo. 396.

England.— In Greening *v.* Wilkinson, 1 C. & P. 625, 28 Rev. Rep. 790, 12 E. C. L. 355, it was held that it was within the discretion of the jury to assess the value at any time subsequent to the conversion. *Compare* France *v.* Gaudet, L. R. 6 Q. B. 199, 40 L. J. Q. B. 121, 19 Wkly. Rep. 622.

74. Indiana.— In this state the doctrine has been adopted without qualification in stock transactions (Citizens' St. R. Co. *v.* Robbins, 144 Ind. 671, 42 N. E. 916, 43 N. E. 649), although there is an intimation of the rule of highest intermediate value as to other property in one of the earlier cases (Ellis *v.* Wire, 33 Ind. 127, 5 Am. Rep. 189 [*citing* Greening *v.* Wilkinson, 1 C. & P. 625, 28 Rev. Rep. 790, 12 E. C. L. 355]).

New Jersey.— Dimock *v.* U. S. National Bank, 55 N. J. L. 296, 25 Atl. 926, 39 Am. St. Rep. 643.

New York.— Matthews *v.* Coe, 49 N. Y. 57. For a full discussion of the New York doctrine on this question see Baker *v.* Drake, 53 N. Y. 211, 13 Am. Rep. 507, which, although involving the question of stocks, lays down the foundation and reasons of the rule in its general application. In Mechanics', etc., Bank *v.* Farmers', etc., Nat. Bank, 60 N. Y. 40, which was an action for the conversion of wheat, it was held that in the absence of special circumstances the value of the wheat at the time of conversion, together with interest, furnished the measure of damages. And see Ormsby *v.* Vermont Copper Min. Co., 56 N. Y. 623.

The United States supreme court seems to have adopted this rule of value, at least so far as stocks are concerned. Galigher *v.* Jones, 129 U. S. 193, 9 S. Ct. 335, 32 L. ed. 658.

75. *California.*— Ralston *v.* State Bank, 112 Cal. 208, 44 Pac. 476.

Indiana.—Citizens' St. R. Co. *v.* Robbins, 144 Ind. 671, 42 N. E. 916, 43 N. E. 649.

New Jersey.—Dimock *v.* U. S. National Bank, 55 N. J. L. 296, 25 Atl. 926, 39 Am. St. Rep. 643.

New York.— Wright *v.* Metropolis Bank, 110 N. Y. 237, 18 N. E. 79, 6 Am. St. Rep. 356, 1 L. R. A. 289; Colt *v.* Owens, 90 N. Y. 368; Gruman *v.* Smith, 81 N. Y. 25; Baker *v.* Drake, 53 N. Y. 211, 13 Am. Rep. 507.

Tennessee.— Morris *v.* Wood, (Ch. App. 1896) 35 S. W. 1013.

United States.— Galigher *v.* Jones, 129 U. S. 193, 9 S. Ct. 335, 32 L. ed. 658.

76. Freeman *v.* Harwood, 49 Me. 195; Baltimore Mar. Ins. Co. *v.* Dalrymple, 25 Md. 269; Boylan *v.* Huguet, 8 Nev. 345; Penn-

has been held that where there is a refusal to deliver stock upon demand, the value of such stock should be the market value of the same at the time of demand.[77] Some of the states have adhered to the original rule of highest intermediate value, even in stock transactions,[78] although as a general rule it will be found that such decisions are of a qualified nature or that the doctrine therein announced has been modified by more recent holdings. In some states statutes have been passed allowing the highest market value of the property at any time between the conversion and the verdict without interest;[79] but even under such statutes, it has been held that the action must be prosecuted with reasonable diligence, otherwise the measure of damages will be the value of the property at the time of conversion, with interest.[80]

F. Against Public Officials. As a general rule where an action is brought against a public officer for damages for neglect of duty or misconduct, the measure of damages is compensatory and is measured by the actual injury sustained or the amount of property lost.[81]

XII. PLEADING.[82]

A. Complaint or Declaration — 1. Form and Requisites — a. In General. A complaint under which evidence of the alleged damage may be received must allege facts constituting a cause of action,[83] alleging damages as a mere con-

sylvania Co. for Ins. on Lives, etc. *v.* Philadelphia, etc., R. Co., 153 Pa. St. 160, 25 Atl. 1043.

77. McKenney *v.* Haines, 63 Me. 74; Fisher *v.* Brown, 104 Mass. 259, 6 Am. Rep. 235; Wyman *v.* American Powder Co., 8 Cush. (Mass.) 168; Hussey *v.* Manufacturers', etc., Bank, 10 Pick. (Mass.) 415; Pinkerton *v.* Manchester, etc., R. Co., 42 N. H. 424. In an action for a refusal to permit a party to subscribe to the stock of a bank, it was held that the measure of damages was the value of the stock at the time it should have been transferred or delivered. Gray *v.* Portland Bank, 3 Mass. 364, 3 Am. Dec. 156.

Accrued dividends.— In Baltimore City Pass. R. Co. *v.* Sewell, 35 Md. 238, 6 Am. Rep. 402, there was a refusal to issue certificates of stock when demanded. It was held that the plaintiff was entitled to recover the value of the stock at the time that the demand was made, together with all dividends which had accrued and interest up to the date of trial.

78. Moody *v.* Caulk, 14 Fla. 50; Whitfield *v.* Whitfield, 40 Miss. 352. See also Ingram *v.* Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762.

Pennsylvania doctrine.— In Neiler *v.* Kelley, 69 Pa. St. 403, 408, the court said: "The general rule as to the measure of damages in an action of trover, undoubtedly is well settled to be the value of the goods at the time of conversion, to which may be added interest up to the time of trial, unless there were some circumstances of outrage in the case, when the jury may give more. . . . This rule may be considered to have been, to some extent, modified as to stocks, railroad bonds and other securities of a similar nature. . . . The rule, however, is not changed but only modified to this extent, that wherever there is a duty or obligation devolved upon a defendant to deliver such stocks or securities at a particular time, and that duty or obligation has not been fulfilled, then the plaintiff is entitled to recover the highest price in the market between that time and the time of the trial." See also Pennsylvania Co. for Ins. on Lives, etc. *v.* Philadelphia, etc., R. Co., 153 Pa. St. 160, 25 Atl. 1043; Work *v.* Bennett, 70 Pa. St. 484.

79. Ralston *v.* State Bank, 112 Cal. 208, 44 Pac. 476; Fromm *v.* Sierra Nevada Silver Min. Co., 61 Cal. 629; Cal. Civ. Code, § 3336; Fargo First Nat. Bank *v.* Minneapolis, etc., Elevator Co., 8 N. D. 430, 79 N. W. 874; Pickert *v.* Rugg, 1 N. D. 230, 46 N. W. 446; N. D. Rev. Codes, § 5000; Ingram *v.* Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762; Wis. Laws (1873), c. 263.

80. Ralston *v.* State Bank, 112 Cal. 208, 44 Pac. 476; Ingram *v.* Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762.

81. *Georgia.*— Spain *v.* Clements, 63 Ga. 786.

Illinois.—French *v.* Snyder, 30 Ill. 339, 83 Am. Dec. 193.

Iowa.— Plummer *v.* Harbut, 5 Iowa 308.

Kansas.— Crane *v.* Stone, 15 Kan. 94.

Kentucky.— Com. *v.* Lightfoot, 7 B. Mon. 298.

Louisiana.— Bogel *v.* Bell, 15 La. Ann. 163.

Value at seizure and interest.— In Phelps *v.* Owens, 11 Cal. 22, it was held that in an action against a sheriff for wrongfully seizing and selling property under an execution, in the absence of wantonness or oppression, the measure of damages was the value of the property at the time it was seized and legal interest on such amount from the time of seizure up to the time of the rendition of the verdict.

82. See, generally, PLEADING.

83. McKay *v.* Henderson, 71 S. W. 625, 24 Ky. L. Rep. 1484; Mayne *v.* Chicago, etc., R. Co., (Okla. 1902) 69 Pac. 933.

clusion of the pleader being insufficient.[84] It must show facts sufficient to form a basis for estimating damages,[85] although of course the sufficiency of the phrascology employed in stating such facts is dependent entirely upon the particular case before the pleader;[86] and so far at least as general damages are concerned little technicality of averment is required.[87] So too it may be said that a complaint will be construed as a whole,[88] and while a complaint must allege loss which is recognized in law as the proper subject of damages,[89] a complaint alleging damages too remote or consequential to be recoverable is not demurrable if under the allegation therein it is possible that plaintiff may be able to prove damages which are recoverable;[90] and the court will, after verdict, construe a complaint as alleging damages which are recoverable if the language employed will admit thereof.[91]

b. Necessity of Averment of Damages. Although a complaint may state facts sufficient to sustain a judgment, yet it is essential that it allege damages or ask a recovery in a certain sum, and a complaint which does not allege or ask damages is defective,[92] although it has been held that where the declaration failed

An allegation of a breach of contract and a demand of damages therefor sufficiently indicates that they have not been paid. Belt *v.* Washington Water Power Co., 24 Wash. 387, 64 Pac. 525.

Where an action is for damages to property, the plaintiff's right or interest therein must be stated according to the facts. Davis *v.* Jewett, 13 N. H. 88.

84. Thompson *v.* Gould, 16 Abb. Pr. N. S. (N. Y.) 424.

85. Wessinger *v.* Mausur, etc., Implement Co., 75 Miss. 64, 21 So. 757; Carson *v.* Texas Installment Co., (Tex. Civ. App. 1896) 34 S. W. 762.

A complaint for an injury to a reversionary interest in land must allege such an injury as must necessarily have affected the reversion or it must show one that may possibly have done so and connect it with an averment that the reversion was actually injured thereby. Potts *v.* Clarke, 20 N. J. L. 536.

A complaint setting forth items of damages proper to be considered in ascertaining the amount that should be awarded for a personal injury sufficiently states a cause of action without alleging an injury of a permanent character, although there may have been such an injury. Frazier *v.* Malcolm, 62 S. W. 13, 22 Ky. L. Rep. 1876.

86. **For forms of complaint held to sufficiently state a cause of action and furnish data by which damages may be determined** see the following cases:

Indiana.— Phenix Ins. Co. *v.* Pennsylvania R. Co., 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405; Ohio, etc., R. Co. *v.* Nickless, 71 Ind. 271. See also Child *v.* Swain, 69 Ind. 230.

Ohio.— Jenkinson *v.* Stoneman, 4 Ohio Dec. (Reprint) 289, 1 Clev. L. Rep. 218.

Oregon.—Sunnyside Land Co. *v.* Willamette Bridge R. Co., 20 Oreg. 544, 26 Pac. 835.

Texas — McLane *v.* Maurer, 22 Tex. Civ. App. 75, 66 S. W. 693, 1108; San Antonio *v.* Pizzini, (Civ. App. 1900) 58 S. W. 635; Erwin *v.* Hayden, (Civ. App. 1897) 43 S. W. 610; Serafina *v.* Galveston, etc., R. Co., (Civ. App. 1897) 42 S. W. 142; Engelhardt *v.* Batla, (Civ. App. 1895) 31 S. W. 324; Galveston, etc., R. Co. *v.* Rheiner, (Civ. App. 1894) 25 S. W. 971.

Vermont.— Parker *v.* Burgess, 64 Vt. 442, 24 Atl. 743.

See 15 Cent. Dig. tit. "Damages." § 407.

For joint complaint by husband and wife for injury to the wife see HUSBAND AND WIFE.

87. See Smith *v.* Jones, 11 Tex. Civ. App. 18, 31 S. W. 306. See *infra*, XII, A, 1, e, (I).

88. Cooley *v.* Kansas City, etc., R. Co., 149 Mo. 487, 51 S. W. 101; Pecke *v.* Hydraulic Constr. Co., 23 N. Y. App. Div. 393, 48 N. Y. Suppl. 225; A. C. Conn Co. *v.* Little Suamico Lumber, etc., Co., 55 Wis. 580, 13 N. W. 464. See also Birmingham, etc., R. Co. *v.* Cuzzart, 133 Ala. 262, 31 So. 979; Oliver *v.* Perkins, 92 Mich. 304, 52 N. W. 609; Buer *v.* Prescott, (Tex. Sup. 1890) 14 S. W. 138; Motz *v.* Paradis, 4 Quebec 291.

Redundant and irrelevant matters may of course be stricken out of the complaint. Lovejoy *v.* Morrison, 10 Minn. 136.

Where the complaint is somewhat ambiguous, but the irregularity could have been reached by special demurrer, it will, if no objection is made thereto on the trial, be held sufficient upon appeal; and a construction will be given it preventing a variance between the allegations therein and the evidence admitted if the defect does not, in the opinion of the court, affect the substantial rights of the parties. Eachus *v.* Los Angeles, 130 Cal. 492, 62 Pac. 829, 80 Am. St. Rep. 147.

89. Simmer *v.* St. Paul, 23 Minn. 408. And see Saunders *v.* Brosius, 52 Mo. 50.

90. Briandt *v.* Philadelphia, 12 Phila. (Pa.) 393. If a complaint claims damages on a ground for which the plaintiff is entitled to no damages, but has a sufficient allegation of damages to which he is entitled, it is not demurrable, as the allegations for which no recovery can be had may be treated as surplusage. Duffield *v.* Great Western R. Co., 4 Can. L. J. 47.

91. Willer *v.* Oregon R., etc., Co., 15 Oreg. 153, 13 Pac. 768.

92. Pittsburg Coal Min. Co. *v.* Greenwood, 39 Cal. 71. See also Bohall *v.* Diller, 41 Cal. 532.

to so allege reference might be had to the writ.[93] But a complaint which prays for judgment in a specified amount is sufficient, although it fails to allege in express terms that the plaintiff was damaged.[94] It is unnecessary to insert a claim for damages at the end of each count or paragraph of the complaint. It is sufficient to state the amount demanded at the conclusion thereof.[95]

c. Mistake in Designation of Rule or of Kind of Damages. Where the facts are so clearly stated in the complaint that the law attaches a well defined meaning thereto, an error or mistake of the pleader as to the true rule or theory by which his damages should be determined or of their kind is not fatal;[96] and while a complaint must not state inconsistent theories of the damages sustained, it may state two theories as to the measure thereof, dependent upon how the jury shall find the facts.[97]

d. Method of Alleging Damages to Both Person and Property. Where the cause of an injury to a plaintiff and his property is one and the same act, the averment as to the damages may be properly included in one count.[98]

e. Particular and Necessary Averments — (i) *Of General Damages.* Where by reason of a certain wrong or from the breach of a contract the law would impute certain damages as the natural, necessary, and logical consequence of the acts of the defendant, such damages need not be specifically set forth in the complaint, but are, upon a proper averment of such breach or wrong, recoverable under a claim for damages generally.[99] Hence where a wilful wrong is committed

93. Farley *v.* Nelson, 4 Ala. 183; Elliott *v.* Smith, 1 Ala. 74.

Where the cause of action is a legal liability, certain and defined, and cannot in any way be augmented, the right of recovery cannot, upon any correct principle of reasoning, be affected either by omitting or stating the precise sum in the declaration or writ. Farley *v.* Nelson, 4 Ala. 183; Elliott *v.* Smith, 1 Ala. 74.

94. Riser *v.* Walton, 78 Cal. 490, 21 Pac. 362; Jonas *v.* Hirshburg, 18 Ind. App. 581, 48 N. E. 656; Weaver *v.* Mississippi, etc., Boom Co., 28 Minn. 542, 11 N. W. 113; Bank of British Columbia *v.* Port Townsend, 16 Wash. 450, 47 Pac. 896. But *compare* Treusch *v.* Kamke, 63 Md. 274; Gilcrest *v.* Nantker, 42 Nebr. 564, 60 N. W. 906, action for false representations.

95. Montgomery *v.* Locke, (Cal. 1886) 11 Pac. 874; Spears *v.* Ward, 48 Ind. 541; Hoffman *v.* Dickinson, 31 W. Va. 142, 6 S. E. 53; Postlewaite *v.* Wise, 17 W. Va. 1.

96. Colrick *v.* Swinburne, 105 N. Y. 503, 12 N. E. 427; Kraft *v.* Rice, 45 N. Y. App. Div. 569, 61 N. Y. Suppl. 368; Hudson *v.* Archer, 4 S. D. 128, 55 N. W. 1099; International, etc., R. Co. *v.* Gordon, 72 Tex. 44, 11 S. W. 1033; Harmon *v.* Callahan, (Tex. Civ. App. 1896) 35 S. W. 705.

97. Shores Lumber Co. *v.* Starke, 100 Wis. 498, 76 N. W. 366.

98. Chicago West Div. R. Co. *v.* Ingraham, 131 Ill. 659, 23 N. E. 350; Lamb *v.* St. Louis Cable, etc., R. Co., 33 Mo. App. 489.

Special demurrer.— But it has been held that a complaint in an action for injury to plaintiff's person and health, and also to his real and personal property, which alleges damages generally, is subject to special demurrer for not stating the amount claimed as injury to his property as distinguished from the injury to his person. Foerst *v.* Kelso, 131 Cal. 376, 63 Pac. 681.

99. *Connecticut.*— Ives *v.* Carter, 24 Conn. 392.

District of Columbia.— Hartman *v.* Ruby, 16 App. Cas. 45.

Illinois.— Greene *v.* Williams, 45 Ill. 206; Franklin Printing, etc., Co. *v.* Behrens, 80 Ill. App. 313.

Indiana.— Hadley *v.* Prather, 64 Ind. 137; Richter *v.* Meyers, 5 Ind. App. 33, 31 N. E. 582.

Kentucky.— Smith *v.* Perry, 13 Ky. L. Rep. 683.

Maryland.— Howard *v.* Wilmington, etc., R. Co., 1 Gill 311.

Massachusetts.— Rice *v.* Coolidge, 121 Mass. 393, 23 Am. Rep. 279; Prentiss *v.* Barnes, 6 Allen 410; Peckham *v.* Holman, 11 Pick. 484.

Michigan.— Peters *v.* Cooper, 95 Mich. 191, 54 N. W. 694.

Mississippi.—Heirn *v.* McCaughan, 32 Miss. 17, 66 Am. Dec. 588.

Missouri.— Moore *v.* Mountcastle, 72 Mo. 605.

Nebraska.— Riverside Coal Co. *v.* Holmes, 36 Nebr. 858, 55 N. W. 255; Kingsley *v.* Butterfield, 35 Nebr. 228, 52 N. W. 1101.

New York.— Jutte *v.* Hughes, 67 N. Y. 267; Laraway *v.* Perkins, 10 N. Y. 371; Vanderslice *v.* Newton, 4 N. Y. 130; Russell *v.* Corning Mfg. Co., 49 N. Y. App. Div. 610, 63 N. Y. Suppl. 640; Alfaro *v.* Davidson, 40 N. Y. Super. Ct. 87; Fitch *v.* Fitch, 35 N. Y. Super. Ct. 302; Fagen *v.* Davison, 2 Duer 153; Driggs *v.* Dwight, 17 Wend. 71, 31 Am. Dec. 283.

North Carolina.— See Hammond *v.* Schiff, 100 N. C. 161, 6 S. E. 753.

Ohio.— Farrelly *v.* Cincinnati, 2 Disn. 516;

evidence of matters tending to aggravate the damages, when necessarily or legally arising from the act complained of, is admissible without special averment.[1]

(II) *Of Special Damages.* If the damages sought to be recovered are those known as special damages,[2] that is, those of an unusual and extraordinary nature, and not the common consequence of the wrong complained of or implied by law, it is necessary in order to prevent surprise to the defendant that the declaration state specifically and in detail the damages sought to be recovered;[3] and an omis-

McFarland *v.* Roby, 4 Ohio Dec. (Reprint) 211, 1 Clev. L. Rep. 118.

Oregon.— Bussard *v.* Hibler, 42 Oreg. 500, 71 Pac. 642.

Pennsylvania.—Haldeman *v.* Martin, 10 Pa. St. 369; Hood *v.* Palm, 8 Pa. St. 237; Hart *v.* Evans, 8 Pa. St. 13.

Texas.—San Antonio, etc., R. Co. *v.* Gwynn, (App. 1891) 15 S. W. 509; Texas, etc., R. Co. *v.* Kane, 2 Tex. App. Civ. Cas. § 18; Tompkins *v.* Hart, 2 Tex. Unrep. Cas. 348.

Vermont.— Parker *v.* Burgess, 64 Vt. 442, 24 Atl. 743; Hutchinson *v.* Granger, 13 Vt. 386.

See 15 Cent. Dig. tit. "Damages," § 430.

Damages for the destruction of shade trees surrounding a dwelling are recoverable in a complaint claiming damages for the negligent burning of the dwelling-house and outhouse, as such damages would naturally and reasonably result from the burning of the house itself. Wrought-Iron Range Co. *v.* Graham, 80 Fed. 474, 25 C. C. A. 570.

1. Illinois Cent. R. Co. *v.* Siddons, 53 Ill. App. 607; Tyson *v.* Booth, 100 Mass. 258; Martachowski *v.* Orawitz, 8 Kulp (Pa.) 370; Jackson *v.* Bell, 5 S. D. 257, 58 N. W. 671.

2. See *supra*, V.

3. *California.*—Montgomery *v.* Locke, (1886) 11 Pac. 874; Nunan *v.* San Francisco, 38 Cal. 689; Stevenson *v.* Smith, 28 Cal. 102, 87 Am. Dec. 107; Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288.

Colorado.— Denver, etc., R. Co. *v.* Pulaski Irrigating Ditch Co., 19 Colo. 367, 35 Pac. 910.

Connecticut.— Morris *v.* Winchester Repeating Arms Co., 73 Conn. 680, 49 Atl. 180; Taylor *v.* Keeler, 50 Conn. 346; Tomlinson *v.* Derby, 43 Conn. 562; Taylor *v.* Monroe, 43 Conn. 36.

Illinois.— Olmstead *v.* Burke, 25 Ill. 86; Koch *v.* Merk, 48 Ill. App. 26; Buckley *v.* Holmes, 19 Ill. App. 530; Moline Water Power Co. *v.* Waters, 10 Ill. App. 159.

Indiana.— Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719; Lindley *v.* Dempsey, 45 Ind. 246.

Iowa.— Rosenberger *v.* Marsh, 108 Iowa 47, 78 N. W. 837; Wilson *v.* Dean, 10 Iowa 432.

Kentucky.— South Covington, etc., R. Co. *v.* Ware, 84 Ky. 267, 1 S. W. 493, 8 Ky. L. Rep. 493; Louisville, etc., R. Co. *v.* Reynolds, 71 S. W. 516, 24 Ky. L. Rep. 1402.

Louisiana.— Arrowsmith *v.* Gordon, 3 La. Ann. 105.

Maine.— Hunter *v.* Stewart, 47 Me. 419; Lufkin *v.* Patterson, 38 Me. 282; Furlong *v.* Polleys, 30 Me. 491, 50 Am. Dec. 635.

Maryland.— Ellicott *v.* Lamborne, 2 Md. 131.

Massachusetts.— Warner *v.* Bacon, 8 Gray 397, 69 Am. Dec. 253; Dickinson *v.* Boyle, 17 Pick. 78, 28 Am. Dec. 281.

Minnesota.— Cushing *v.* Seymour, 30 Minn. 301, 15 N. W. 249; Spencer *v.* St. Paul, etc., R. Co., 21 Minn. 362; Brackett *v.* Edgerton, 14 Minn. 174, 100 Am. Dec. 211.

Mississippi.— Burrage *v.* Melson, 48 Miss. 237; Vicksburg, etc., R. Co. *v.* Ragsdale, 46 Miss. 458.

Missouri.— Brown *v.* Chicago, etc., R. Co., 80 Mo. 457; Krueger *v.* Chicago, etc., R. Co., 94 Mo. App. 458, 68 S. W. 220; Cook *v.* Clary, 48 Mo. App. 166.

Montana.— Root *v.* Butte, etc., R. Co., 20 Mont. 354, 51 Pac. 155.

Nebraska.— Chicago, etc., R. Co. *v.* Emmert, 53 Nebr. 237, 73 N. W. 540, 68 Am. St. Rep. 602. See also Omaha Coal, etc., Co. *v.* Fay, 37 Nebr. 68, 55 N. W. 211.

New Hampshire.— Stevens *v.* Lyford, 7 N. H. 360.

New Jersey.— Drischman *v.* McManemin, 68 N. J. L. 337, 53 Atl. 548; Ryerson *v.* Marseillis, 16 N. J. L. 450.

New York.— Vanderslice *v.* Newton, 4 N. Y. 130; Hallock *v.* Belcher, 42 Barb. 199; Baldwin *v.* New York, etc., Nav. Co., 4 Daly 314; Toplitz *v.* King Bridge Co., 20 Misc. 576, 46 N. Y. Suppl. 418 [*affirming* 20 Misc. 720, 45 N. Y. Suppl. 1149]; Brady *v.* Cassidy, 9 Misc. 107, 29 N. Y. Suppl. 45; Curtis *v.* Ritzman, 7 Misc. 254, 27 N. Y. Suppl. 259; Hoffman *v.* Ruddiman, 5 Misc. 326, 25 N. Y. Suppl. 508; Molony *v.* Dows, 15 How. Pr. 261; Barnard *v.* Benoind, 19 Alb. L. J. 77.

Pennsylvania.—Pastorius *v.* Fisher, 1 Rawle 27.

South Carolina.— McDaniel *v.* Terrill, 1 Nott & M. 343; Alston *v.* Huggins, 3 Brev. 185.

Tennessee.— J. M. James Co. *v.* Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255; Citizens' St. R. Co. *v.* Burke, 98 Tenn. 650, 40 S. W. 1085; Rose *v.* Perry, 8 Yerg. 156.

Texas.— Comminge *v.* Stevenson, 76 Tex. 642, 13 S. W. 556; Randall *v.* Rosenthal, (Civ. App. 1895) 31 S. W. 822; Gulf, etc., R. Co. *v.* Maetze, 2 Tex. App. Civ. Cas. § 631; Mayo *v.* Savoni, 1 Tex. App. Civ. Cas. § 216.

Utah.— Croco *v.* Oregon Short Line R. Co., 18 Utah 311, 54 Pac. 985, 44 L. R. A. 285.

Vermont.— Hill *v.* Smith, 32 Vt. 433.

United States.— Loewer *v.* Harris, 57 Fed. 368, 6 C. C. A. 394; The Director, 26 Fed. 708; Bas *v.* Steele, 2 Fed. Cas. No. 1,088, 3 Wash. 381.

Canada.—Ashdown *v.* Manitoba Free Press Co., 20 Can. Supreme Ct. 43; Domville *v.* Keevan, (East. T. 1871) Stevens N. Brunsw.

sion to so plead cannot be supplied by statements in a bill of particulars.[4] But an allegation of general damages for a breach of contract does not preclude an allegation of special damage incurred in preparing to execute the same.[5]

(III) *Of Damages Accruing After Commencement of Suit.* The assessment of damages is usually governed by the situation or condition of affairs existing at the time the action is brought;[6] hence for a recovery of loss or damages occurring thereafter plaintiff should amend or file a supplementary petition.[7] In some jurisdictions, however, this is rendered unnecessary by statute.[8]

(IV) *Of Interest or Liquidated Damages.* Interest is generally regarded as an incident to the debt and may be recovered under the general allegation of damages without being specially claimed,[9] although if interest beyond the legal rate is sought as damages by virtue of a special contract between the parties the declaration must declare specially therefor.[10] So too a penalty construed by the court as liquidated damages is an incident to and follows the principal in the same manner as interest, and may be awarded without special averment,[11] although the action must be brought on the contract and not on the common counts.[12]

(V) *Of Punitive or Exemplary Damages.* While it is essential that the facts alleged and proved be such as will warrant the assessment of punitive or exemplary damages,[13] such damages are not special in the sense that they need ordinarily be claimed *eo nomine* in the complaint, but may be recovered under a claim for damages generally.[14] It has, however, in one jurisdiction been declared

Dig. 248; Shaver *v.* Great Western R. Co., 6 U. C. C. P. 321; Henderson *v.* Nichols, 5 U. C. Q. B. 398.

See 15 Cent. Dig. tit. "Damages," § 434.

Rule in equity.— The rule that special damages must be pleaded applies to a pleading in equity the same as in law. Hooper *v.* Armstrong, 69 Ala. 343.

4. Toplitz *v.* King Bridge Co., 20 Misc. (N. Y.) 576, 46 N. Y. Suppl. 418.

5. Hill *v.* Anderson, 9 Ohio S. & C. Pl. Dec. 480. See also Denison *v.* Lewis, 5 App. Cas. (D. C.) 328.

6. Campbell *v.* Short, 35 La. Ann. 465.

7. Foote *v.* Burlington Gas Light Co., 103 Iowa 576, 72 N. W. 755; Campbell *v.* Short, 35 La. Ann. 465.

8. Hicks *v.* Drew, 117 Cal. 305, 49 Pac. 189.

9. *Alabama.*— Roberts *v.* Fleming, 31 Ala. 683.

Illinois.— McConnel *v.* Thomas, 3 Ill. 313; Grand Lodge, A. O. U. W. *v.* Bagley, 60 Ill. App. 589.

Minnesota.—Cooper *v.* Reaney, 4 Minn. 528.

Missouri.—Padley *v.* Catterlin, 64 Mo. App. 629.

Texas.— International, etc., R. Co. *v.* Lewis, (Civ. App. 1893) 23 S. W. 323.

But see Winney *v.* Sandwich Mfg. Co., 86 Iowa 608, 53 N. W. 421, 18 L. R. A. 524 [*reversing* (1891) 50 N. W. 565] (holding that where the complaint in an action for a breach of warranty asked interest on the damages only from the commencement of the suit, it was error for the court to instruct the jury to allow interest from the date of the sale of the article warranted, although it appeared that the entire verdict was less than the aggregated claim for damages); Shepard *v.* Pratt. 16 Kan. 209 (holding that in that state where the demand was liquidated and a sum certain was claimed, no interest was recoverable unless claimed in the declaration, and the time from which it was to be computed stated).

See 15 Cent. Dig. tit. "Damages," § 438.

10. Camp *v.* Ocala First Nat. Bank, (Fla. 1902) 33 So. 241. And see Talcott *v.* Marston, 3 Minn. 339.

11. Smith *v.* Whitaker, 23 Ill. 367.

12. Butterfield *v.* Seligman, 17 Mich. 95. See also Woodlief *v.* Logan, 51 La. Ann. 1935, 26 So. 627.

13. Louisville, etc., R. Co. *v.* Wurl, 62 Ill. App. 381; Harmon *v.* Callahan, (Tex. Civ. App. 1896) 35 S. W. 705. See also Lander *v.* Ware, 1 Strobh. (S. C.) 15.

14. *Alabama.*— Alabama Great Southern R. Co. *v.* Arnold, 84 Ala. 159, 4 So. 359, 5 Am. St. Rep. 354; Wilkinson *v.* Searcy, 76 Ala. 176.

Georgia.— Savannah, etc., R. Co. *v.* Holland, 82 Ga. 257, 10 S. E. 200, 14 Am. St. Rep. 158.

Iowa.— Gustafson *v.* Wind, 62 Iowa 281, 17 N. W. 523.

Maine.— Wilkinson *v.* Drew, 75 Me. 360.

Michigan.— See Sherman *v.* Kilpatrick, 58 Mich. 310, 25 N. W. 298.

Mississippi.— Southern Express Co. *v.* Brown, 67 Miss. 260, 7 So. 318, 8 So. 425, 19 Am. St. Rep. 306.

South Carolina.—Machen *v.* Western Union Tel. Co., 63 S. C. 363, 41 S. E. 448; Glover *v.* Charleston, etc., R. Co., 57 S. C. 228, 35 S. E. 510.

Tennessee.— Louisville, etc., R. Co. *v.* Ray, (Sup. 1898) 46 S. W. 554.

Texas.— Hoggland *v.* Cothren, 25 Tex. 345.

Vermont.— Hoadley *v.* Watson, 45 Vt. 289, 12 Am. Rep. 197.

Virginia.— Richmond Pass., etc., Co. *v.* Robinson, 100 Va. 394, 41 S. E. 719.

See 15 Cent. Dig. tit. "Damages," § 420.

the better practice to claim such damages separately in the petition,[15] although a failure so to do was held not fatal on demurrer.[16] So in at least one jurisdiction such separate allegations are expressly required by statute,[17] and defendant's pecuniary condition cannot be shown if this statute is not complied with;[18] but this does not apply to an action instituted before its passage, although the trial is had thereafter.[19]

(vi) *Of Statutory Damages.* Where damages sought to be recovered arise by virtue of statute, or the amount thereof is determined or augmented by reason of statutory enactments, the complaint must allege facts sufficient to bring the case clearly within such statute,[20] and as defendant should be apprised of the extent of the demand against him it is the better practice, and in most jurisdictions necessary, that reference be made thereto,[21] especially if the injured party has also a remedy at common law;[22] and if the complaint contains counts both at common law and under the statute, and entire damages are assessed by the jury, the statutory augmentation cannot be allowed;[23] although if a case on such pleadings is tried without a jury, the court may, if it finds that the plaintiff is so entitled, give the statutory damages, even if there has been no election of counts by the plaintiff.[24]

2. Sufficiency — a. In General. The failure to make an averment of special damages is fatal to the pleader only when the cause of action depends upon the existence of such special damages, and the right to maintain the action depends upon their existence; upon breach of a contract a right of action arises which carries with it at least nominal damages, and therefore a failure to allege special damages is not ground for a dismissal of the action.[25] Hence where the complaint, whether it be for general or special damage, is objected to because of vagueness, indefiniteness, or insufficiency, it cannot, if it alleges a contract and breach thereof, be assailed by general demurrer or motion for nonsuit,[26] as plaintiff would at least be entitled to nominal damages.[27] Nor for a like reason should a failure to prove special damages as alleged prevent a recovery of nominal damages.[28] So too a party is entitled to at least nominal damages where a simple trespass is shown to

15. Zeliff *v.* Jennings, 61 Tex. 458; Galveston, etc., R. Co. *v.* Le Gierse, 51 Tex. 189; Wallace *v.* Finberg, 46 Tex. 35. And see Land *v.* Klein, 21 Tex. Civ. App. 3, 50 S. W. 638.

16. Texas, etc., R. Co. *v.* Pollard, 2 Tex. App. Civ. Cas. § 481.

17. St. Louis Clothing Co. *v.* J. D. Hail Dry-Goods Co., 156 Mo. 393, 56 S. W. 1112.

18. Berryman *v.* Cox, 73 Mo. App. 67.

19. Lamberson *v.* Long, 66 Mo. App. 253.

20. Brosehart *v.* Tuttle, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33; Henniker *v.* Contoocook Valley R. Co., 29 N. H. 146.

21. Chipman *v.* Emerie, 5 Cal. 239; Bayard *v.* Smith, 17 Wend. (N. Y.) 88 (holding that it is enough if the complaint states facts bringing the case within the statute and generally referring to it); Brown *v.* Bristol, 1 Cow. (N. Y.) 176; Newcomb *v.* Butterfield, 8 Johns. (N. Y.) 342; Hughes *v.* Stevens, 36 Pa. St. 320; Morrison *v.* Gross, 1 Browne (Pa.) 1. See also Livingston *v.* Platner, 1 Cow. (N. Y.) 175.

22. Palmer *v.* York Bank, 18 Me. 166, 36 Am. Dec. 710.

23. Brewster *v.* Link, 28 Mo. 147; Lowe *v.* Harrison, 8 Mo. 350; Benton *v.* Dale, 1 Cow. (N. Y.) 160.

Where the judgment is to be doubled by the court, it is not error that it be rendered for an amount exceeding the damages alleged in any one count of the declaration. Withington *v.* Hilderbrand, 1 Mo. 280. And where the statute makes it the duty of the court to double damages in certain actions, the complaint need not ask the court so to do. Feedler *v.* Schroeder, 59 Mo. 364.

24. Babbitt *v.* Calkins, 49 Mich. 394, 13 N. W. 790.

25. McCarty *v.* Beach, 10 Cal. 461; Roberts *v.* Glass, 112 Ga. 456, 37 S. E. 704; Fagen *v.* Davison, 2 Duer (N. Y.) 153. See also Clemons *v.* Davis, 4 Hun (N. Y.) 260, 6 Thomps. & C. (N. Y.) 523.

26. Slater *v.* Kimbro, 91 Ga. 217, 18 S. E. 296, 44 Am. St. Rep. 19; Kenny *v.* Collier, 79 Ga. 743, 8 S. E. 58; B. L. Blair Co. *v.* Rose, 26 Ind. App. 487, 60 N. E. 10; Sabine, etc., R. Co. *v.* Hadnot, 67 Tex. 503, 4 S. W. 138; Gulf, etc., R. Co. *v.* Pettit, 3 Tex. Civ. App. 588, 22 S. W. 761. See also Hancock *v.* Hubbell, 71 Cal. 537, 12 Pac. 618; Melick *v.* Foster, 64 N. J. L. 394, 45 Atl. 911; Johnson *v.* Cherokee Land, etc., Co., 82 Tex. 338, 18 S. W. 476; A. C. Conn Co. *v.* Little Suamico Lumber, etc., Mfg. Co., 55 Wis. 580, 13 N. W. 464.

27. Wilson *v.* Clarke, 20 Minn. 367; Cowley *v.* Davidson, 10 Minn. 392; Sunnyside Land Co. *v.* Willamette Bridge R. Co., 20 Oreg. 544, 26 Pac. 835; Johnson *v.* Gilmore, 6 S. D. 276, 60 N. W. 1070.

28. Humphrey *v.* Irvin, (Pa. 1886) 6 Atl. 479; Pastorius *v.* Fisher, 1 Rawle (Pa.) 27.

have been committed against him,[29] although it has been held that where the action is for exemplary damages no judgment for actual damages can be rendered.[30]

b. Averment of Special Damages — (i) *In General.* As the sufficiency of the allegations of special damages must necessarily be determined by the facts and circumstances of the particular case, no general rule can be formulated by which the sufficiency of the complaint may be judged; it is necessary that facts showing how the special damages arose be stated,[31] although it is not required that one should set forth his evidence;[32] and where such damages are properly pleaded they may be recovered, although the prayer for relief be a general one.[33] Inasmuch as the purpose of alleging such damages with particularity is to prevent surprise to the opposite party,[34] it may be broadly stated that where the allegations are definite enough to fully apprise such party of the probable evidence which will be introduced by the pleader, and to enable him to prepare his defense accordingly, the allegations will be deemed sufficient;[35] nor will the obvious purpose of the pleader to allege special damages be controlled by an informality in stating the items constituting such damages.[36]

(ii) *For Personal Injuries.* While the rules of good pleading require that the facts which constitute special damage, where the plaintiff has sustained personal injuries, shall be stated specifically,[37] it is neither necessary nor proper to set forth the evidence on which the pleader relies.[38] And where the complaint

29. Harris *v.* Sneeden, 104 N. C. 369, 10 S. E. 477.

30. Cobb *v.* Columbia, etc., R. Co., 37 S. C. 194, 15 S. E. 878.

31. *California.*—Acheson *v.* Western Union Tel. Co., 96 Cal. 641, 31 Pac. 583. And see Witmer Bros. Co. *v.* Weid, 108 Cal. 569, 41 Pac. 491.

Connecticut.— Sanford *v.* Peck, 63 Conn. 486, 27 Atl. 1057.

Georgia.— Southern R. Co. *v.* Ward, 110 Ga. 793, 36 S. E. 78.

Illinois.— Buckley *v.* Holmes, 19 Ill. App. 530.

Michigan.— Maltby *v.* Plummer, 71 Mich. 578, 40 N. W. 3.

Missouri.—Patee *v.* McCabe-Bierman Wagon Co., 97 Mo. App. 356, 71 S. W. 374.

New Jersey.—Marentille *v.* Oliver, 2 N. J. L. 358.

New York.— Kraft *v.* Rice, 45 N. Y. App. Div. 569, 61 N. Y. Suppl. 368; Roldan *v.* Power, 14 Misc. 480, 35 N. Y. Suppl. 697.

Pennsylvania.— Berlin Iron Bridge Co. *v.* Bonta, 180 Pa. St. 448, 36 Atl. 876.

Texas.— The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117; Randall *v.* Rosenthal, (Civ. App. 1895) 31 S. W. 822. See also Lewis *v.* Merchant, (App. 1890) 16 S. W. 538.

United States.— The Director, 26 Fed. 708. And see 15 Cent. Dig. tit. "Damages," § 497.

A complaint should itemize the damages to the extent at least that the opposite party be notified of the substantial particulars (Fontaine *v.* Baxley, 90 Ga. 416, 17 S. E. 1015); and where it does not do so, although it might be sufficient on a general demurrer, it is insufficient as against a special demurrer (Sedberry *v.* Verplanck, (Tex. Civ. App. 1895) 31 S. W. 242).

A petition alleging that plaintiff expended " —— dollars for medical attention" is insufficient to support a recovery for this item. Lloyd *v.* Knadler, 58 S. W. 803, 22 Ky. L. Rep. 776.

32. Knittel *v.* Schmidt, 16 Tex. Civ. App. 7, 40 S. W. 507; Conover *v.* Manke, 71 Wis. 108, 36 N. W. 616.

33. Everton *v.* Esgate, 24 Nebr. 235, 38 N. W. 794; Nokken *v.* Avery Mfg. Co., 11 N. D. 399, 92 N. W. 487.

34. See *supra*, XII, A, 1, e, (II).

35. See, generally, the following cases:

Iowa.— Kreyci *v.* Chicago, etc., R. Co., 117 Iowa 344, 90 N. W. 708.

Michigan.— Chandler *v.* Allison, 10 Mich. 460.

New York.—Miller *v.* Benoit, 29 N. Y. App. Div. 252, 51 N. Y. Suppl. 368 [*affirmed* in 164 N. Y. 590, 58 N. E. 1090].

Pennsylvania.— Hazzard *v.* Preston, 12 Pa. Co. Ct. 372.

Texas.— A. J. Anderson Electric Co. *v.* Cleburne Water, etc., Co., (Civ. App. 1898) 44 S. W. 929; Long *v.* McCauley, (Sup. 1887) 3 S. W. 689.

An averment that plaintiff's family was made sick by stagnant water, caused by flooding of plaintiff's land by the railroad, is sufficiently definite, without specifically naming every member thereof who is so afflicted. Texas, etc., R. Co. *v.* Maddox, 26 Tex. Civ. App. 297, 63 S. W. 134.

36. Burnside *v.* Grand Trunk R. Co., 47 N. H. 554, 93 Am. Dec. 474.

37. Houston, etc., R. Co. *v.* Shafer, 54 Tex. 641.

The degree of particularity in actions of tort is said to be less than where the action is on a contract. Missouri, etc., R. Co. *v.* Simmons, 12 Tex. Civ. App. 500, 33 S. W. 1096.

38. Houston, etc., R. Co. *v.* Shafer, 54 Tex. 641.

Nor as it is said is it necessary to specify every muscle that ached and every nerve that

clearly shows the nature and manner in which the injuries complained of were received, so that there does not exist any uncertainty as to the cause of the special damage complained of, or of the effect which the injury produced, the complaint will be held sufficient.[39]

c. To Authorize Exemplary Damages. In those jurisdictions where exemplary damages can be recovered only when actual damages are shown,[40] a complaint failing to allege damages of the latter kind is insufficient, regardless of the allegations of the former;[41] and as the theory of such damages is that of punishment to the wrong-doer,[42] the complaint must allege acts or circumstances indicating either fraud, malice, gross negligence, or oppression;[43] but no specific form of allegation is required, and an averment that the acts were wantonly, wilfully, and maliciously done is sufficient to authorize a recovery of such damages.[44]

3. Amount Recoverable as Affected by Allegation of Damages. While the evidence offered need not support every allegation of injury and damage set forth in the complaint,[45] and the damages may of course usually be less than the amount asked,[46] and must not exceed the sum fixed by specific proof, where such amount is determined with certainty, regardless of the amount asked in the complaint,[47] it is well settled that the amount of the recovery cannot exceed that

throbbed. Hanson *v.* Anderson, 90 Wis. 195, 62 N. W. 1055.

39. Hoehnan *v.* New York Dry Goods Co., (Ida. 1902) 67 Pac. 798; Illinois Cent. R. Co. *v.* Cheek, 152 Ind. 663, 53 N. E. 641; Houston, etc., R. Co. *v.* Shafer, 54 Tex. 641; Missouri, etc., R. Co. *v.* Simmons, 12 Tex. Civ. App. 500, 33 S. W. 1096; San Antonio St. R. Co. *v.* Muth, 7 Tex. Civ. App. 443, 27 S. W. 752; Hanson *v.* Anderson, 90 Wis. 195, 62 N. W. 1055.

An allegation that plaintiff was greatly disturbed in body, to her great damage, is a sufficient statement of a physical injury. Watkins *v.* Kaolin Mfg. Co., 131 N. C. 536, 42 S. E. 983, 60 L. R. A. 617.

40. See *supra*, IX.

41. Carson *v.* Texas Installment Co., (Tex. Civ. App. 1896) 34 S. W. 762.

42. See *supra*, IX, A.

43. Connor *v.* Sewell, 90 Tex. 275, 38 S. W. 35 (holding that a complaint alleging that a trespass was committed forcibly and unlawfully is insufficient to sustain a complaint for exemplary damages); International, etc., R. Co. *v.* Garcia, 70 Tex. 207, 7 S. W. 802.

Where exemplary damages are sought for the breach of a contract the facts should be stated attending the breach, so that it can be ascertained from the pleadings whether they constituted malice and fraud, and whether the circumstances connected with the breach amounted to a tort; and the allegation that the defendant broke the contract "wilfully, fraudulently and with malice" is not of itself sufficient. Hooks *v.* Fitzenrieter, 76 Tex. 277, 13 S. W. 230.

44. *Iowa.*— Cameron *v.* Bryan, 89 Iowa 214, 56 N. W. 434. Under Code (1873), § 2727, it is held that exemplary damages cannot be recovered by a tenant for his wrongful dispossession of the leased premises (Jones *v.* Marshall, 56 Iowa 739, 10 N. W. 264), or in an action for personal injuries (Johnson *v.* Chicago, etc., R. Co., 51 Iowa 25, 50 N. W. 543) unless malice is alleged. See, however, Mallett *v.* Beale, 66 Iowa 70, 23 N. W. 269.

Kansas.—Potter *v.* Stamfli, 2 Kan. App. 788, 44 Pac. 46.

Mississippi.— Silver *v.* Kent, 60 Miss. 124.

South Carolina.— Brasington *v.* South Bound R. Co., 62 S. C. 325, 40 S. E. 665, 89 Am. St. Rep. 905.

Texas.— Moore *v.* Smith, (Sup. 1892) 19 S. W. 781; Gross *v.* Hays, 73 Tex. 515, 11 S. W. 523; Cone *v.* Lewis, 64 Tex. 331, 53 Am. Rep. 767; Long Mfg. Co. *v.* Gray, 13 Tex. Civ. App. 172, 35 S. W. 32; San Antonio, etc., R. Co. *v.* Kniffen, 4 Tex. Civ. App. 484, 23 S. W. 457. See also Shirley *v.* Waco Tap R. Co., 78 Tex. 131, 10 S. W. 543.

Virginia.— See Wood *v.* American Nat. Bank, 100 Va. 306, 40 S. E. 931.

United States.— Scott *v.* Donald, 165 U. S. 58, 17 S. Ct. 265, 41 L. ed. 632.

See 15 Cent. Dig. tit. "Damages," § 420.

Where a meritorious cause of action for exemplary damages is shown by the complaint, and a prayer for a designated amount as exemplary damages is made, a request that they be awarded "as expenses of bringing these proceedings" may be treated as surplusage. Jacobus *v.* Congregation, etc., 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141.

45. *Iowa.*— Ankrum *v.* Marshalltown, 105 Iowa 493, 75 N. W. 360.

Michigan.— La Duke *v.* Exeter Tp., 97 Mich. 450, 56 N. W. 851, 37 Am. St. Rep. 357.

South Carolina.— Hammond *v.* North Eastern R. Co., 6 S. C. 130, 24 Am. Rep. 467.

Texas.— St. Louis Southwestern R. Co. *v.* Brown, 30 Tex. Civ. App. 57, 69 S. W. 1010.

Vermont.— Mallory *v.* Leach, 35 Vt. 156, 82 Am. Dec. 625.

46. Pledger *v.* Wade, 1 Bay (S. C.) 35.

The fact that the amount claimed may seem ludicrously or maliciously excessive will not justify a dismissal of the complaint, but plaintiff may recover such amount as he may show himself entitled to. Henry *v.* Shepherd, 52 Miss. 125.

47. Rickhoff *v.* Northern Pac., etc., Irr. Co., 10 Wash. 139, 38 Pac. 881.

claimed in the complaint[48] or counter-claim,[49] although from the merits of the case it is probable that a greater sum could have been recovered had it been asked.[50] This is true whether the judgment be entered upon a finding of a jury or by default,[51] and it is improper after judgment to allow an amendment to the complaint increasing the sum claimed.[52] But the legal interest[53] or costs[54] may be included, although such inclusion swells the recovery to an amount beyond that alleged in the complaint. So the amount demanded in negotiating for a settlement for a personal injury before the plaintiff has brought his action does not limit or restrict his recovery in the action.[55] Proof of certain of the damages which go to make up the whole sum claimed should be limited to the amount paid for such items as alleged in the complaint, but if evidence showing a greater expenditure for a particular item is given, the defendant must ask a special charge of the court as to the matter or he cannot afterward complain.[56]

B. Bill of Particulars. In some jurisdictions if the pleadings regarding the injury sustained are defective because of generality, defendant should demand a bill of particulars or present a motion to make the complaint more specific.[57]

C. Demurrer. In an action to recover damages stipulated to be paid on the

48. *Alabama.*— North Birmingham St. R. Co. *v.* Calderwood, 89 Ala. 247, 7 So. 360, 18 Am. St. Rep. 105; McWhorter *v.* Sayre, 2 Stew. 225.

Arkansas.— Pleasants *v.* State Bank, 8 Ark. 456.

California.— Palmer *v.* Reynolds, 3 Cal. 396.

Connecticut.— Treat *v.* Barber, 7 Conn. 274.

Illinois.— Foreman *v.* Sawyer, 73 Ill. 484; Rives *v.* Kumler, 27 Ill. 291; Walcott *v.* Holcomb, 24 Ill. 331.

Indiana.— Murphy *v.* Evans, 11 Ind. 517.

Michigan.— Abernethy *v.* Van Buren Tp., 52 Mich. 383, 18 N. W. 116.

Mississippi.— Potter *v.* Prescott, 2 How. 686.

Missouri.— Smith *v.* Royse, 165 Mo. 654, 65 S. W. 994; Horton *v.* St. Louis, etc., R. Co., 83 Mo. 541; Beckwith *v.* Boyce, 12 Mo. 440; Cox *v.* St. Louis, 11 Mo. 431; Frank *v.* Curtis, 58 Mo. App. 349.

New York.— Campbell *v.* Tappen, 28 Misc. 553, 59 N. Y. Suppl. 601; Hurd *v.* Leavenworth, Code Rep. N. S. 278; Fish *v.* Dodge, 4 Den. 311, 47 Am. Dec. 254.

Texas.— Gregory *v.* Coleman, 3 Tex. Civ. App. 166, 22 S. W. 181; Missouri Pac. R. Co. *v.* Turner, 2 Tex. App. Civ. Cas. § 815. And see Texas, etc., R. Co. *v.* Huffman, 83 Tex. 286, 18 S. W. 741.

Washington.— Northern Pac. R. Co. *v.* Hess, 2 Wash. 383, 26 Pac. 866.

West Virginia.— Enoch *v.* Livingston, etc., Min., etc., Co., 23 W. Va. 314.

Compare Thompson *v.* French, 10 Yerg. (Tenn.) 452.

See 15 Cent. Dig. tit. "Damages," § 449.

49. Annis *v.* Upton, 66 Barb. (N. Y.) 370.

50. Murphy *v.* Evans, 11 Ind. 517; Willis *v.* Whitsitt, 67 Tex. 673, 4 S. W. 253; Gulf, etc., R. Co. *v.* Simonton, 2 Tex. Civ. App. 558, 22 S. W. 285.

51. Mailhouse *v.* Inloes, 18 Md. 328; White *v.* Snow, 71 N. C. 232.

If the cause of action, together with other claims, has been referred to arbitrators under a rule of court, it is not error to render judgment for an amount exceeding the *ad damnum* in the writ, upon an award of such arbitrators. Day *v.* Berkshire Woollen Co., 1 Gray (Mass.) 420.

A general prayer for damages at the close of the complaint controls in determining whether or not the amount of the judgment is excessive, and not the amount at the conclusion of each count (Schultz *v.* Third Ave. R. Co., 89 N. Y. 242 [*reversing* on other grounds 46 N. Y. Super. Ct. 211]) or that stated in the body of the declaration under a *videlicet* (Chicago, etc., R. Co. *v.* O'Brien, 34 Ill. App. 155).

52. Cox *v.* Burlington, etc., R. Co., 77 Iowa 478, 42 N. W. 429.

Construction of amendment.— Where the plaintiff amends his complaint before going to trial and makes a claim for ten thousand dollars instead of five thousand dollars damages, the amendment will be held to cover all the damages, and it is error to instruct the jury that they may find for the plaintiff in any sum less than fifteen thousand dollars. Stafford *v.* Oskaloosa, 57 Iowa 748, 11 N. W. 668.

Effect of defective answer on amount of recovery.— Where the answer is so defective that a judgment rendered on the pleadings only would allow plaintiff the full amount claimed in his petition, yet if he does not so ask judgment, but goes into the merits of his case and presents his evidence and obtains a verdict for a less amount than he has claimed, judgment cannot, after the reception of such evidence, be entered on the pleadings for the substantial amount claimed. Reniff *v.* The Cynthia, 18 Cal. 669.

53. Grand Lodge A. O. U. W. *v.* Bagley, 164 Ill. 340, 45 N. E. 538. See also Fleming *v.* Stearns, 79 Iowa 256, 44 N. W. 376.

54. Allen *v.* Smith, 12 N. J. L. 159.

55. Western, etc., R. Co. *v.* Carlton, 28 Ga. 180.

56. Dallas *v.* Jones, (Tex. Civ. App. 1898) 54 S. W. 606.

57. Bolte *v.* Third Ave. R. Co., 38 N. Y. App. Div. 234, 56 N. Y. Suppl. 1038; Gulf,

happening of a certain contingency, judgment may be rendered for the stipulated sum whenever it is admitted by demurrer that the event upon which it was to be paid has happened;[58] but where the complaint is for damages for a personal injury, it has been held that while a demurrer admits the truth of every material and well pleaded statement of fact, and is therefore conclusive so far as the right to maintain the action and recover nominal damages is concerned, it is only a *prima facie* admission as to substantial damages.[59]

D. Plea or Answer — 1. In General. A denial that plaintiff has suffered damages in the exact sum alleged in the complaint is insufficient to make an issue as to damages.[60] But where the action is brought for unliquidated damages, an answer containing a general denial, together with a special denial that the plaintiff has been damaged in the amount claimed, has been held sufficient to raise such issue.[61] In some jurisdictions it is held that the failure to deny the amount of damages alleged to have been sustained does not admit them, and the plaintiff must prove the amount sustained by him or he will be entitled only to nominal damages;[62] and that in any event, defendant by not denying damages cannot be held to admit greater damages than on the face of the complaint he is legally liable to pay.[63] Under the practice of other states, however, where there is no issue made as to the damages alleged to have been sustained by plaintiff no proof as to damages is required, but plaintiff may be awarded the amount he claims.[64] Matters set up by way of recoupment are taken to be admitted, if not denied in the replication.[65]

2. Matters in Mitigation. Matters in mitigation of damages may in most jurisdictions be shown under an answer containing a general denial only, and need not be specially pleaded,[66] but in some jurisdictions the opposite rule prevails.[67]

etc., R. Co. *v.* Kelly, (Tex. Civ. App. 1896) 34 S. W. 140; Lemieux *v.* Phelps, 1 Montreal Super. Ct. 305.

The information, when thus demanded, should be as full and specific as the facts admit of, and cannot be refused on the score of inconvenience. Russell *v.* Giblin, 8 N. Y. St. 336.

58. Applegate *v.* Jacoby, 9 Dana (Ky.) 206.

59. Crogan *v.* Schiele, 53 Conn. 186, 1 Atl. 899, 5 Atl. 673, 55 Am. Rep. 88, holding that the burden of proof in such an instance is, however, upon the defendant to show the non-existence of the substantial damages claimed.

60. Huston *v.* Twin, etc., Turnpike Road Co., 45 Cal. 550; Higgins *v.* Wortell, 18 Cal. 330.

61. Conway *v.* U. S., 95 Fed. 615, 37 C. C. A. 200.

62. Vanderslice *v.* Newton, 4 N. Y. 130; Howell *v.* Bennett, 74 Hun (N. Y.) 555, 26 N. Y. Suppl. 627; Woodruff *v.* Cook, 25 Barb. (N. Y.) 505; Stuart *v.* Binsse, 10 Bosw. (N. Y.) 436; McKensie *v.* Farrell, 4 Bosw. (N. Y.) 192; Hackett *v.* Richards, 3 E. D. Smith (N. Y.) 13; Connoss *v.* Meir, 2 E. D. Smith (N. Y.) 314; Gilbert *v.* Rounds, 14 How. Pr. (N. Y.) 46. See McCord *v.* Doniphan Branch R. Co., 21 Mo. App. 92, holding that in an action for damages for trespass in digging and carrying away earth from the plaintiff's land, the plaintiff is entitled to nominal damages only, under an answer which after a general denial admits the taking, and pleads a license, but does not admit any amount of damage.

63. Cristman *v.* Paul, 16 How. Pr. (N. Y.) 17.

64. Johnson *v.* Vance, 86 Cal. 110, 24 Pac. 862; Huston *v.* Twin, etc., Turnpike Road Co., 45 Cal. 550; Dimick *v.* Campbell, 31 Cal. 238; Parker *v.* Lanier, 82 Ga. 216, 6 S. E. 57.

65. Chicago Legal News Co. *v.* Browne, 5 Ill. App. 250.

66. *California.*— Hicks *v.* Drew, 117 Cal. 305, 49 Pac. 189.

Indiana.— Stewart *v.* Muse, 62 Ind. 385; Blizzard *v.* Applegate, 61 Ind. 368; Smith *v.* Lisher, 23 Ind. 500. To a similar effect see Allis *v.* Nanson, 41 Ind. 154.

Kentucky.— Legrand *v.* Baker, 6 T. B. Mon. 235.

Massachusetts.— Mayo *v.* Springfield, 138 Mass. 70.

Michigan.— Osborn *v.* Lovell, 36 Mich. 246.

Missouri.— Boggess *v.* Metropolitan St. R. Co., 118 Mo. 328, 23 S. W. 159, 24 S. W. 210; Beck *v.* Dowell, 40 Mo. App. 71.

New Jersey.— Hopple *v.* Higbee, 23 N. J. L. 342.

New Mexico.— Huning *v.* Chavez, 7 N. M. 128, 34 Pac. 44.

Texas.— Mexican Cent. R. Co. *v.* Goodman, (Civ. App. 1897) 43 S. W. 580; Waxahachie *v.* Connor, (Civ. App. 1896) 35 S. W. 692.

See 15 Cent. Dig. tit. "Damages," § 453.

67. Vierling *v.* Binder, 113 Iowa 337, 85 N. W. 621; McKyring *v.* Bull, 16 N. Y. 297, 69 Am. Dec. 696; Mitchell *v.* Cody, 6 Misc. (N. Y.) 307, 26 N. Y. Suppl. 781; Reed *v.* Union Cent. L. Ins. Co., 21 Utah 295, 61 Pac. 21. *Compare* Dunlap *v.* Snyder, 17 Barb. (N. Y.) 561.

E. Issues and Proof[68] — **1. In General.** The damages recovered must be warranted by the pleadings,[69] and a defendant is entitled to know from the declaration the character of the injury for which he must answer. Evidence of damages for an injury not mentioned therein or for which no claim for damages is alleged,[70] or for which the claim has been abandoned,[71] cannot be admitted.[72] So in an action for personal injury where plaintiff describes in his petition the different parts of his body injured, it is presumed that this specification covers the whole cause of action, and proof of an injury to a wholly different part of the body cannot be shown;[73] and an analogous rule has been applied to allegations of damages to property,[74] or of a breach of a contract.[75]

2. Matters Admissible Under Particular Averments — a. Of General Damages. As damages naturally or necessarily arising from a certain act or state of facts need not be specially pleaded,[76] a general allegation of damages will authorize

68. **Admissibility of evidence generally** in actions for damages see *infra*, XIII, B.

69. Wilkinson *v.* Detroit Steel, etc., Works, 73 Mich. 405, 41 N. W. 490; Gulf, etc., R. Co. *v.* Frederickson, (Tex. Sup. 1892) 19 S. W. 124.

70. *California.*— Lathrope *v.* Flood, 135 Cal. 458, 67 Pac. 683, 57 L. R. A. 215.

Connecticut.— Taylor *v.* Keeler, 50 Conn. 346.

Illinois.— O'Connor *v.* Prendergast, 99 Ill. App. 531; Chicago City R. Co. *v.* Gregg, 69 Ill. App. 77.

Massachusetts.— McDonnell *v.* Cambridge R. Co., 151 Mass. 159, 23 N. E. 841; Hunter *v.* Farren, 127 Mass. 481, 34 Am. Rep. 423.

Montana.— Carron *v.* Clark, 14 Mont. 301, 36 Pac. 178.

New York.— Hess *v.* Metropolitan St. R. Co., 27 Misc. 823, 57 N. Y. Suppl. 222.

Texas.— Houston, etc., R. Co. *v.* Lackey, 12 Tex. Civ. App. 229, 33 S. W. 768.

United States.— Cincinnati Siemens-Lungren Gas Illuminating Co. *v.* Western Siemens-Lungren Co., 152 U. S. 200, 14 S. Ct. 523, 38 L. ed. 411.

An allegation of injury to a "pasture" will permit, however, proof of injury to the ground or sod as well as to the grass, as the term "pasture" includes both. Gulf, etc., R. Co. *v.* Jones, 1 Tex. Civ. App. 372, 21 S. W. 145.

Evidence of the qualities or uses of a thing which add to its value is admissible when recovery is sought for the loss, destruction, or injury of such thing, without an allegation of such qualities or uses. Lanning *v.* Chicago, etc., R. Co., 68 Iowa 502, 27 N. W. 478.

If injury to both person and property is caused by the same act, and no averment of damages is made for the injury to the latter, evidence thereof cannot be received. Freeland *v.* Brooklyn Heights R. Co., 54 N. Y. App. Div. 90, 66 N. Y. Suppl. 321.

Immaterial variance.— In the absence of direct proof that the defendant has been misled, proof of an anteflection instead of an alleged retroflection of the womb is if a variance at all harmless. Missouri, etc., R. Co. *v.* Turley, 1 Indian Terr. 275, 37 S. W. 52.

Where a petition claims damages for injuries to furniture, injuries to articles not properly included within that term, such as coffee, sugar, and apples, cannot be shown. Whitmore *v.* Bowman, 4 Greene (Iowa) 148.

Where the manner of erecting a building adjoining that of plaintiff is complained of as causing the damage to his property, proof that plaintiff's property has been damaged by the fact of the erection of the building mentioned in the declaration cannot be given. Wilson *v.* Hinsley, 13 Md. 64.

71. Whorley *v.* Tennessee Centennial Exposition Co., (Tenn. Ch. App. 1901) 62 S. W. 346.

72. **Proof of partial loss under allegation of total loss.**— Under an allegation of total loss of materials for the building of a tank, by reason of the failure of a railroad company to use water therefrom, the plaintiff may show a partial loss or deterioration in the value of said materials, as such proof could not prejudice defendant. New Orleans, etc., R. Co. *v.* Echols, 54 Miss. 264.

73. Texas State Fair *v.* Marti, 30 Tex. Civ. App. 132, 69 S. W. 432; International, etc., R. Co. *v.* Beasley, 9 Tex. Civ. App. 569, 29 S. W. 1121.

"Otherwise injured," etc.— In one jurisdiction it was held that where allegation of specific personal injuries is made a further allegation that plaintiff was "otherwise greatly hurt and wounded" does not authorize proof of injuries, other than those specifically alleged (Chesapeake, etc., R. Co. *v.* Hanmer, 66 S. W. 375, 23 Ky. L. Rep. 1846), although in another jurisdiction the rule seems to be otherwise (Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816). And where, after a specific designation of an injury, a general allegation that plaintiff was otherwise internally and permanently injured is made, it has been held that the defendant is required merely to meet evidence tending to show that the internal and permanent injuries related to and resulted from the alleged specific injury. O'Connor *v.* Prendergast, 99 Ill. App. 531. See also Fuller *v.* Jackson, 92 Mich. 197, 52 N. W. 1075. But see Salina *v.* Kerr, 7 Kan. App. 223, 52 Pac. 901.

74. Stewart *v.* Baltimore, etc., R. Co., 33 W. Va. 88, 10 S. E. 26.

75. Rathborne, etc., R. Co. *v.* Wheelihan, 82 Minn. 30, 84 N. W. 638.

76. See *supra*, XII, A, 1, e, (I).

proof of all damages necessarily resulting or which may be legally implied from the act complained of;[77] and the fact that the pleader unnecessarily specifies items of general damages will not preclude him from giving evidence of other general damage not specified.[78]

b. Of Special Damages. As, however, it is necessary to make specific averments of special damages,[79] any attempt to introduce evidence of such damages under a general averment of damages would present a fatal variance between the pleadings and proof, and is therefore not permissible,[80] although proof of special injuries not alleged is often competent for the purpose of showing the extent of the injuries, and not as an item of damages.[81] So too special damages must be proved as alleged,[82] and therefore averments of special damages of a certain nature will not authorize proof of special damages not suggested by such averments;[83]

77. *Connecticut.*— Bristol Mfg. Co. *v.* Gridley, 28 Conn. 201.

Indiana.— Neal *v.* Shewalter, 5 Ind. App. 147, 31 N. E. 848.

Iowa.— Hunt *v.* Iowa Cent. R. Co., 86 Iowa 15, 52 N. W. 668, 41 Am. St. Rep. 473.

Kentucky.— Louisville, etc., R. Co. *v.* Neafus, 93 Ky. 53, 18 S. W. 1030, 13 Ky. L. Rep. 951.

Massachusetts.— Emery *v.* Lowell, 109 Mass. 197.

New York.— Jamieson *v.* New York, etc., R. Co., 162 N. Y. 630, 57 N. E. 1113 [*affirming* 11 N. Y. App. Div. 50, 42 N. Y. Suppl. 915]; Hansee *v.* Brooklyn El. R. Co., 66 Hun 384, 21 N. Y. Suppl. 230.

Texas.— Moehring *v.* Hall, 66 Tex. 240, 1 S. W. 258; Texas, etc., R. Co. *v.* Durrett, 57 Tex. 48.

Utah.— North Point Consol. Irr. Co. *v.* Utah, etc., Canal Co., 23 Utah 199, 63 Pac. 812.

78. Hutchinson *v.* Granger, 13 Vt. 386. See also Bibb County *v.* Ham, 110 Ga. 340, 35 S. E. 656; Hetzel *v.* Baltimore, etc., R. Co., 169 U. S. 26, 18 S. Ct. 255, 42 L. ed. 648 [*reversing* 7 App. Cas. (D. C.) 524].

79. See *supra*, XII, A, 1, e, (II).

80. *Alabama.*— Dowdall *v.* King, 97 Ala. 635, 12 So. 405; Union Springs *v.* Jones, 58 Ala. 654; Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59.

California.— Hancock *v.* Hubbell, 71 Cal. 537, 12 Pac. 618; Potter *v.* Froment, 47 Cal. 165; Gay *v.* Winter, 34 Cal. 153; Dabovich *v.* Emeric, 12 Cal. 171.

Colorado.— Pueblo *v.* Griffin, 10 Colo. 366, 15 Pac. 616; Tucker *v.* Parks, 7 Colo. 62, 298, 1 Pac. 427, 3 Pac. 486.

Connecticut.— Sanford *v.* Peek, 63 Conn. 486, 27 Atl. 1057; Tomlinson *v.* Derby, 43 Conn. 562.

Dakota.— Thompson *v.* Webber, 4 Dak. 240, 29 N. W. 671.

Illinois.— Adams *v.* Gardner, 78 Ill. 568; Woodworth *v.* Woodburn, 20 Ill. 184; Illinois Cent. R. Co. *v.* Siddons, 53 Ill. App. 607; Lukens *v.* Beernick, 41 Ill. App. 583; Myer, etc., Co. *v.* Davies, 17 Ill. App. 228; Chicago West Div. R. Co. *v.* Klauber, 9 Ill. App. 613.

Indian Territory.— Gulf, etc., R. Co. *v.* Warlick, 1 Indian Terr. 10, 35 S. W. 235.

Iowa.— Gamble *v.* Mullin, 74 Iowa 99, 36 N. W. 909; Bush *v.* Chapman, 2 Greene 549.

Kentucky.— Kentucky Tobacco Assoc. *v.* Ashby, 9 Ky. L. Rep. 109.

Maryland.— McTavish *v.* Carroll, 13 Md. 429.

Michigan.—Roberts *v.* Fitzgerald, 33 Mich. 4.

Nevada.— Buckley *v.* Buckley, 12 Nev. 423.

New Hampshire.— Willey *v.* Paul, 49 N. H. 397.

New York.— Gumb *v.* Twenty-Third St. R. Co., 114 N. Y. 411, 21 N. E. 993; Bogert *v.* Burkhalter, 2 Barb. 525; Jutte *v.* Hughes, 40 N. Y. Super. Ct. 126; Aberhall *v.* Roach, 3 E. D. Smith 345; Schmitt *v.* Dry Dock, etc., R. Co., 3 N. Y. St. 257; Stapenhorst *v.* American Mfg. Co., 15 Abb. Pr. N. S. 355; Solms *v.* Lias, 16 Abb. Pr. 311.

Ohio.— McCrory *v.* Skinner, 2 Ohio Dec. (Reprint) 268, 2 West. L. Month. 203.

Pennsylvania.— Stanfield *v.* Phillips, 78 Pa. St. 73; Laing *v.* Colder, 8 Pa. St. 479, 49 Am. Dec. 533.

Texas.— Harris *v.* Finberg, 46 Tex. 79; Gulf, etc., R. Co. *v.* McAulay, (Civ. App. 1894) 26 S. W. 475; Gulf, etc., R. Co. *v.* Gilbert, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320; Dolores Land, etc., Co. *v.* Jones, 3 Tex. App. Civ. Cas. § 270.

Virginia.— Norfolk, etc., R. Co. *v.* Reeves, 97 Va. 284, 33 S. E. 606; Lee *v.* Hill, 84 Va. 919, 6 S. E. 473.

United States.— Boyden *v.* Burke, 14 How. 575, 14 L. ed. 548.

Canada.— Rowe *v.* Titus, 6 N. Brunsw. 326; Kyle *v.* Buffalo, etc., R. Co., 16 U. C. C. P. 76.

See 15 Cent. Dig. tit. "Damages," § 434.

81. Southern Bell Tel. Co. *v.* Lynch, 95 Ga. 529, 20 S. E. 500; Bopp *v.* New York Electric Vehicle Transp. Co., 78 N. Y. App. Div. 337, 79 N. Y. Suppl. 1035; Bruce *v.* Beall, 99 Tenn. 303, 41 S. W. 445. And see *infra*, XII, E, 2, e, (II), (C), (D), (G).

82. Barrett *v.* Western Union Tel. Co., 42 Mo. App. 542.

83. Pollock *v.* Gantt, 69 Ala. 373, 44 Am. Rep. 519; Roberts *v.* Hyde, 15 La. Ann. 51; Graves *v.* Severens, 40 Vt. 636.

Under an allegation that one's clothing was "saturated with blood" it is not permissible to prove that his clothing was "cut" so that he could not wear it, and that it was reason-

nor is an averment of an expenditure sustained by evidence of liability incurred.[84]

c. Of Personal Injuries — (i) *Statement of Rule.* Where damages are claimed for a personal injury the only difficulty lies in the proper application of the well-settled rule that all the results of the act or injury complained of need not be set forth in detail to be admissible, so long as such results are necessarily or legally implied from the injuries alleged,[85] while all effects not the natural and

ably worth twenty-five dollars. Schmitt *v.* Dry Dock, etc., R. Co., 2 N. Y. City Ct. 359.

84. McLaughlin *v.* San Francisco, etc., R. Co., 113 Cal. 590, 45 Pac. 839; Gammon *v.* Havelock, 40 Ill. App. 268; Muth *v.* St. Louis, etc., R. Co., 87 Mo. App. 422.

85. General application of rule see the following cases:

Georgia.— Southern Bell Tel., etc., Co. *v.* Jordan, 87 Ga. 69, 13 S. E. 202.

Illinois.— Chicago, etc., R. Co. *v.* Sullivan, (1888) 17 N. E. 460; Chicago, etc., R. Co. *v.* McDonnell, 91 Ill. App. 488; West Chicago St. R. Co. *v.* Levy, 82 Ill. App. 202.

Indiana.— Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 414, 61 N. E. 936; Ft. Wayne *v.* Duryee, 9 Ind. App. 620, 37 N. E. 299.

Michigan.— Snyder *v.* Albion, 113 Mich. 275, 71 N. W. 475.

Nebraska.— Harshman *v.* Rose, 50 Nebr. 113, 69 N. W. 755.

New York.— Hoyt *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 249, 76 N. Y. Suppl. 832; Radjaviller *v.* Third Ave. R. Co., 58 N. Y. App. Div. 11, 68 N. Y. Suppl. 617; Cabot *v.* McKane, 1 N. Y. St. 495.

South Carolina.— Youngblood *v.* South Carolina, etc., R. Co., 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824.

Texas.— Houston, etc., R. Co. *v.* Shafer, 54 Tex. 641; San Antonio *v.* Porter, 24 Tex. Civ. App. 444, 59 S. W. 922; Sherman, etc., R. Co. *v.* Bell, (Civ. App. 1900) 58 S. W. 147; Missouri, etc., R. Co. *v.* Edling, 18 Tex. Civ. App. 171, 45 S. W. 406.

Utah.— Croco *v.* Oregon Short Line R. Co., 18 Utah 311, 54 Pac. 985, 44 L. R. A. 285.

West Virginia.— Yeager *v.* Bluefield, 40 W. Va. 484, 21 S. E. 752.

Wisconsin.— Maitland *v.* Gilbert Paper Co., 97 Wis. 476, 72 N. W. 1124, 65 Am. St. Rep. 137.

United States.— Denver, etc., R. Co. *v.* Harris, 122 U. S. 597, 7 S. Ct. 1286, 30 L. ed. 1146.

See 15 Cent. Dig. tit. "Damages," § 441.

Bright's disease.— Ohio, etc., R. Co. *v.* Hecht, 115 Ind. 443, 17 N. E. 297.

Consumption.— Montgomery *v.* Lansing City Electric R. Co., 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 287 [*approving* Johnson *v.* McKee, 27 Mich. 471].

Diabetes.— Eichholz *v.* Niagara Falls Hydraulic Power, etc., Mfg. Co., 68 N. Y. App. Div. 441, 73 N. Y. Suppl. 842.

Epilepsy.— Fye *v.* Chapin, 121 Mich. 675, 80 N. W. 797. See also Levison *v.* Bernheimer, 31 Misc. (N. Y.) 26, 62 N. Y. Suppl. 1128.

Impairment of the power of speech.— Garbaczewski *v.* Third Ave. R. Co., 5 N. Y. App. Div. 186, 39 N. Y. Suppl. 33.

Incapacity for marriage.— Proof that plaintiff's injuries were so serious as might prevent her from marrying may be shown under an averment that she was "bruised, hurt and wounded, and that divers bones of her body were broken, and that she was grievously wounded internally, and became sick, sore, lame and disordered." Lake Shore, etc., R. Co. *v.* Ward, 135 Ill. 511, 518, 26 N. E. 520. So too the loss of a general prospect of marriage by reason of an injury which disfigures the plaintiff may be taken into consideration as an element of special damage without a special allegation. Smith *v.* Pittsburgh, etc., R. Co., 90 Fed. 783.

Increased injury.— Campbell *v.* Los Angeles Traction Co., 137 Cal. 565, 70 Pac. 624.

Injury to the ovaries may be shown under an allegation that plaintiff's leg and back were greatly bruised and injured, and that she received terrible nervous shocks and became sick, sore, and lame (Chicago, etc., R. Co. *v.* McDonnell, 194 Ill. 82, 62 N. E. 308 [*affirming* 91 Ill. App. 488]); or under an allegation of serious internal and permanent injuries where there is no motion to make the complaint more specific (Gulf, etc., R. Co. *v.* Pendery, 14 Tex. Civ. App. 60, 36 S. W. 793).

Injuries to the womb.— Wolf *v.* Third Ave. R. Co., 67 N. Y. App. Div. 605, 74 N. Y. Suppl. 336.

Loss of hearing.— Evidence of a loss of hearing is admissible under a complaint alleging that by reason of the explosion of a powder-house two hundred and fifty feet from where plaintiff lived she received great and permanent injury and was made sick, sore, lame, and disabled, and continued so, although it does not specify deafness as one of her injuries (Cibulski *v.* Hutton, 47 N. Y. App. Div. 107, 62 N. Y. Suppl. 166); so too proof of the fact of injury to the spine on the sense of hearing is admissible where the complaint alleges injury to the spine (Missouri, etc., R. Co. *v.* Hawk, 30 Tex. Civ. App. 142, 69 S. W. 1037).

Loss of weight.— San Antonio R. Co. *v.* Weigers, 22 Tex. Civ. App. 344, 54 S. W. 910.

Miscarriage.— Proof that a miscarriage was the result of an injury may be shown under an allegation that plaintiff sustained serious physical injuries, causing great pain and suffering and impairment of bodily health, strength, and ability to labor (Chicago City R. Co. *v.* Cooney, 196 Ill. 466, 63 N. E. 1029

necessary result of the injury complained of constitute special damages, and hence must be specially averred.[86]

(II) *Application of Rule*—(A) *Future Pain and Inconvenience.* The future effect of an injury, and the pain and suffering which it will presumably cause in the future need not, if they are the legal result of the injury, be specially averred, but proof thereof is admissible under the general allegation of damages;[87] and an allegation that plaintiff has not yet recovered from his injuries is sufficient to present to the jury the question of future disability.[88]

(B) *Heart Disease.* It has been held that proof that the injury resulted in a permanent disorder of the heart is admissible, under an allegation that plaintiff's head, side, and ribs,[89] or his spine, chest, head, and limb,[90] were injured.

(C) *Injury or Impairment of Eyesight.* Proof of injury or impairment of the eyesight may of course be shown without being specifically averred, if such result is necessarily implied from the injuries alleged,[91] but there is little uni-

[*affirming* 95 Ill. App. 471]); also under an allegation that plaintiff received internal injuries of a permanent nature, that she was hurt in and about the breast, waist, and abdomen, and that she had unnatural internal bleeding (Clukey *v.* Seattle Electric Co., 27 Wash. 70, 67 Pac. 379). For other illustrations see Tobin *v.* Fairport, 12 N. Y. Suppl. 224; Missouri Pac. R. Co. *v.* Mitchell, 72 Tex. 171, 10 S. W. 411.

Pleurisy.— Hunter *v.* Third Ave. R. Co., 21 Misc. (N. Y.) 1, 46 N. Y. Suppl. 1010 [*affirming* 20 Misc. 432, 45 N. Y. Suppl. 1044].

Rheumatism.— Chicago Gen. R. Co. *v.* Kriz, 94 Ill. App. 277.

Sympathetic affections.— Illinois Cent. R. Co. *v.* Griffin, 80 Fed. 278, 25 C. C. A. 413.

Tumor.— Baltimore, etc., R. Co. *v.* Slanker, 180 Ill. 357, 54 N. E. 309 [*affirming* 77 Ill. App. 567].

Varicose veins.— Joliet *v.* Johnson, 177 Ill. 178, 52 N. E. 498 [*affirming* 71 Ill. App. 423].

Specific allegation of urinary affection is not necessary to admit evidence thereof. For allegations of bodily injuries sufficient to admit proof of such trouble see Samuels *v.* California St. Cable R. Co., 124 Cal. 294, 56 Pac. 1115; Atlanta R. Co. *v.* Maddox, 117 Ga. 181, 43 S. E. 425; Central R. Co. *v.* Mitchell, 63 Ga. 173; Finn *v.* Adrian, 93 Mich. 504, 53 N. W. 614; Missouri, etc., R. Co. *v.* Follin, 29 Tex. Civ. App. 512, 68 S. W. 810; Missouri, etc., R. Co. *v.* Mayfield, 29 Tex. Civ. App. 477, 68 S. W. 807.

86. *Illinois.*— O'Connor *v.* Prendergast, 99 Ill. App. 531; North Chicago St. R. Co. *v.* Cotton, 41 Ill. App. 311.

Kansas.—Atchison, etc., R. Co. *v.* Willey, 57 Kan. 764, 48 Pac. 25.

Michigan.— Beath *v.* Rapid R. Co., 119 Mich. 512, 78 N. W. 537; Hall *v.* Cadillac, 114 Mich. 99, 72 N. W. 33.

Missouri.— Muth *v.* St. Louis, etc., R. Co., 87 Mo. App. 422.

New York.— Ramson *v.* Metropolitan St. R. Co., 78 N. Y. App. Div. 101, 79 N. Y. Suppl. 588; Ackman *v.* Third Ave. R. Co., 52 N. Y. App. Div. 483, 65 N. Y. Suppl. 97.

Texas.— Ft. Worth, etc., R. Co. *v.* Rogers, 21 Tex. Civ. App. 605, 53 S. W. 366. See also San Antonio, etc., R. Co. *v.* Adams, 6 Tex. Civ. App. 102, 24 S. W. 839.

See 15 Cent. Dig. tit. "Damages," § 441.

A permanent stricture of the bowels, caused by the negligent administration of an enema to plaintiff, by a physician of defendant, cannot be shown under an allegation that damages arose from the negligent crushing of his foot by defendant's cars, there being no causal connection between the two injuries. Galveston, etc., R. Co. *v.* Scott, 17 Tex. Civ. App. 321, 44 S. W. 589.

For insufficient allegations to admit proof of loss or injury to sexual powers see Page *v.* Delaware, etc., Canal Co., 76 N. Y. App. Div. 160, 78 N. Y. Suppl. 454; Jones *v.* Niagara Junction R. Co., 63 N. Y. App. Div. 607, 71 N. Y. Suppl. 647; Missouri, etc., R. Co. *v.* Cook, 8 Tex. Civ. App. 376, 27 S. W. 769.

Proof that plaintiff suffers from dementia cannot be shown under an allegation that her skull was fractured and that she was severely wounded, bruised, and contused in various parts of her person, and received severe internal injuries incapacitating her from attending to her duties. Sealy *v.* Metropolitan St. R. Co., 78 N. Y. App. Div. 530, 79 N. Y. Suppl. 677.

87. *Indiana.*— Lake Lighting Co. *v.* Lewis, 29 Ind. App. 164, 64 N. E. 35.

Kansas.— Edgerton *v.* O'Neil, 4 Kan. App. 73, 46 Pac. 206.

Maine.— Bradbury *v.* Benton, 69 Me. 194.

Missouri.— Gerdes *v.* Christopher, etc., Architectural Iron, etc., Co., 124 Mo. 347, 25 S. W. 557.

New York.— Schuler *v.* Third Ave. R. Co., 1 Misc. 351, 20 N. Y. Suppl. 683.

Texas.— See Texas, etc., R. Co. *v.* Goldman, (Civ. App. 1899) 51 S. W. 275.

88. Meier *v.* Shrunk, 79 Iowa 17, 44 N. W. 209. But *compare* Shultz *v.* Griffith, 103 Iowa 150, 72 N. W. 445, 40 L. R. A. 117.

89. Myers *v.* Erie R. Co., 44 N. Y. App. Div. 11, 60 N. Y. Suppl. 422.

90. Gulf, etc., R. Co. *v.* McMannewitz, 70 Tex. 73, 8 S. W. 66. *Compare* Kleiner *v.* Third Ave. R. Co., 162 N. Y. 193, 56 N. E. 497.

91. West Chicago St. R. Co. *v.* Levy, 182 Ill. 525, 55 N. E. 554; Bodie *v.* Charleston, etc., R. Co., 61 S. C. 468, 39 S. E. 715; Man-

formity in the reported cases as to the nature of the injuries from which this result should be implied. It has been held in some cases that it should not be implied from an allegation of injury to the spine,[92] or from an allegation of injury to the head and brain.[93] On the other hand some courts have held such proof admissible under allegations of serious and lasting bodily injuries to the head, limbs, and nervous system,[94] or serious and painful internal and other bodily injuries.[95] So too evidence of injury to the eyes may be shown as tending to prove an alleged injury to the spine or nervous system,[96] although not itself considered an element of damage.[97]

(D) *Impairment of Earning Capacity.* Where the injury alleged will necessarily render a person less capable of performing his usual business duties in the future, proof of the impairment of his general earning capacity may ordinarily be given under the general allegation of the injury, and damages resulting therefrom, such as the inability to attend to his ordinary business, without a special averment that plaintiff will be unable to earn as much in the future as in the past,[98] or without specially averring the nature of his occupation or employment,[99]

ley *v.* Delaware, etc., Canal Co., 69 Vt. 101, 37 Atl. 279.

92. International, etc., R. Co. *v.* Thompson, (Tex. Civ. App. 1896) 37 S. W. 24.

93. Geoghehan *v.* Third Ave. R. Co., 51 N. Y. App. Div. 369, 64 N. Y. Suppl. 630.

94. Mullady *v.* Brooklyn Heights R. Co., 65 N. Y. App. Div. 549, 72 N. Y. Suppl. 911.

95. Quirk *v.* Siegel-Cooper Co., 43 N. Y. App. Div. 464, 60 N. Y. Suppl. 228 [*affirming* 26 Misc. 244, 56 N. Y. Suppl. 29]. And see Curran *v.* A. H. Stange Co., 98 Wis. 598, 74 N. W. 377; Brooklyn Heights R. Co. *v.* McLaury, 107 Fed. 644, 46 C. C. A. 523, where such proof was admitted under allegations concluding with "other serious and grievous injuries."

96. Missouri, etc., R. Co. *v.* Hawk, 30 Tex. Civ. App. 142, 69 S. W. 1037.

97. Louisville, etc., R. Co. *v.* Richmond, 67 S. W. 25, 23 Ky. L. Rep. 2394; International, etc., R. Co. *v.* Thompson, (Tex. Civ. App. 1896) 37 S. W. 24.

An allegation that an injury has seriously impaired one's eyesight is sufficient to lay a foundation for evidence as to the nature and extent of such injury. Missouri, etc., R. Co. *v.* Huff, (Tex. Civ. App. 1895) 32 S. W. 551.

98. *California.*— Treadwell *v.* Whittier, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498.

Illinois.— Illinois Steel Co. *v.* Ostrowski, 194 Ill. 376, 62 N. E. 822; Chicago City R. Co. *v.* Anderson, 182 Ill. 298, 55 N. E. 366 [*affirming* 80 Ill. App. 71]; North Chicago St. R. Co. *v.* Brown, 178 Ill. 187, 52 N. E. 864 [*affirming* 76 Ill. App. 654]; Chicago, etc., R. Co. *v.* Meech, 163 Ill. 305, 45 N. E. 290; Bloomington *v.* Chamberlain, 104 Ill. 268; Swift *v.* O'Neill, 88 Ill. App. 162 [*affirmed* in 187 Ill. 337, 58 N. E. 416]; North Chicago St. R. Co. *v.* Barber, 77 Ill. App. 257.

Indiana.— Warsaw *v.* Fisher, 24 Ind. App. 46, 55 N. E. 42.

Iowa.— Bailey *v.* Centerville, 108 Iowa 20, 78 N. W. 831, holding that such proof was admissible under an allegation of permanent injury to plaintiff's leg, in the absence of a motion to make the complaint more specific. See Homan *v.* Franklin County, 90 Iowa 185, 57 N. W. 703.

Michigan.— McKormick *v.* West Bay City, 110 Mich. 265, 68 N. W. 148; Moore *v.* Kalamazoo, 109 Mich. 176, 66 N. W. 1089; Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616. *Compare* Joslin *v.* Grand Rapids Ice Co., 50 Mich. 516, 15 N. W. 887, 45 Am. Rep. 54.

Minnesota.— Palmer *v.* Winona R., etc., Co., 78 Minn. 138, 80 N. W. 869.

Missouri.— Gerdes *v.* Christopher, etc., Architectural Iron, etc., Co., 124 Mo. 347, 25 S. W. 557; Gurley *v.* Missouri Pac. R. Co., 122 Mo. 141, 26 S. W. 953; Schmitz *v.* St. Louis, etc., R. Co., 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; Smith *v.* Chicago, etc., R. Co., 119 Mo. 246, 22 S. W. 784; Bartley *v.* Trorlicht, 49 Mo. App. 214. See also Mason *v.* St. Louis, etc., R. Co., 75 Mo. App. 1.

Montana.— Hamilton *v.* Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

New York.— Keiffert *v.* Nassau Electric R. Co., 51 N. Y. App. Div. 301, 64 N. Y. Suppl. 922; Miller *v.* Manhattan R. Co., 73 Hun 512, 26 N. Y. Suppl. 162; Cleveland *v.* New Jersey Steam-boat Co., 53 Hun 638, 7 N. Y. Suppl. 28; Belcher *v.* Manhattan R. Co., 48 Hun 621, 1 N. Y. Suppl. 349. See also Frobisher *v.* Fifth Ave. Transp. Co., 151 N. Y. 431, 45 N. E. 839 [*affirming* 81 Hun 544, 30 N. Y. Suppl. 1099]. *Compare* Saffer *v.* Dry Dock, etc., R. Co., 53 Hun 629, 5 N. Y. Suppl. 700; Gilligan *v.* New York, etc., R. Co., 1 E. D. Smith 453.

Texas.— Galveston, etc., R. Co. *v.* Clark, 21 Tex. Civ. App. 167, 51 S. W. 276; San Antonio, etc., R. Co. *v.* Beam, (Civ. App. 1899) 50 S. W. 411; Christie *v.* Galveston City R. Co., (Civ. App. 1897) 39 S. W. 638; Missouri, etc., R. Co. *v.* Johnson, (Civ. App. 1896) 37 S. W. 771; Texas, etc., R. Co. *v.* Bigham, (Civ. App. 1896) 36 S. W. 1111; Texas, etc., R. Co. *v.* Bowlin, (Civ. App. 1895) 32 S. W. 918. See also Texas Cent. R. Co. *v.* Burnett, 80 Tex. 536, 16 S. W. 320.

Wisconsin.— Bierbach *v.* Goodyear Rubber Co., 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19 [*following* Luck *v.* Ripon, 52 Wis. 196, 8 N. W. 815].

See 15 Cent. Dig. tit. "Damages," § 443.

99. Chicago, etc., R. Co. *v.* Meech, 163 Ill. 305, 45 N. E. 290; Columbia, etc., R. Co. *v.*

although a few courts seem to require a greater strictness and definiteness in the allegation.[1] Proof of impairment of capacity to fulfil the obligation of a certain contract or to pursue a special employment, it has been held, cannot be given without a special averment.[2]

(E) *Loss of Time.* In some jurisdictions it is necessary, in order to admit proof of loss of time, or loss of earnings for a time,[3] that the same be specially pleaded.[4] In others it would seem that proof of this nature is admissible without a special allegation,[5] more particularly where the injury suffered would necessarily import a loss of time.[6] The *quantum* of damages or value of the time or earnings lost need not, however, be specifically stated.[7] So it has been held that evidence of such loss is admissible under allegations of inability and incapacity to perform one's usual and ordinary business or occupation for a given length of time.[8]

Hawthorne, 3 Wash. Terr. 353, 19 Pac. 25 (holding that this was true in the absence of a motion to make the complaint more definite or for a bill of particulars); Wade *v.* Leroy, 20 How. (U. S.) 34, 15 L. ed. 813; Southern Pac. Co. *v.* Hall, 100 Fed. 760, 41 C. C. A. 50.

1. Tomlinson *v.* Derby, 43 Conn. 562; Taylor *v.* Monroe, 43 Conn. 36; Baldwin *v.* Western R. Corp., 4 Gray (Mass.) 333; Fitchburg R. Co. *v.* Donnelly, 87 Fed. 135, 30 C. C. A. 580. See also Finken *v.* Elm City Brass Co., 73 Conn. 423, 47 Atl. 670.

2. Wabash Western R. Co. *v.* Friedman, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111; Chicago *v.* O'Brennan, 65 Ill. 160; North Chicago St. R. Co. *v.* Barber, 77 Ill. App. 257; Missouri, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1896) 37 S. W. 771.

But it is not error to admit proof of this nature where it is clearly shown that it was not intended as an item of damage, or where the purpose of its introduction is not clear, as it is admissible for the purpose of showing the extent of the injury, although under the pleadings it might not be admissible for the purpose of augmenting the damages. Consolidated Kansas City Smelting, etc., Co. *v.* Tinchert, 5 Kan. App. 130, 48 Pac. 889; Wade *v.* Leroy, 20 How. (U. S.) 34, 15 L. ed. 813; Conner *v.* Pioneer Fire-Proof Constr. Co., 29 Fed. 629. See also Denver *v.* Human, 9 Colo. App. 144, 47 Pac. 911.

3. A distinction between "loss of time" and "loss of earnings for that time" does not exist in law, as the damages to be awarded in either case is a pecuniary value of the time lost; and either expression sufficiently indicates the measure of damages. In common acceptation they are one and the same thing. Slaughter *v.* Metropolitan St. R. Co., 116 Mo. 269, 23 S. W. 760.

4. Jesse *v.* Shuck, 12 S. W. 304, 11 Ky. L. Rep. 463 (holding that the length of time lost must be particularly set forth); Louisville, etc., R. Co. *v.* Mason, 72 S. W. 27, 24 Ky. L. Rep. 1623 (holding that a complaint alleging that plaintiff since his injury had been unable to do ordinary farm-work and that he had been damaged in a certain sum was insufficient to authorize a recovery for loss of time); Joslin *v.* Grand Rapids Ice Co., 50 Mich. 516, 15 N. W. 887, 45 Am. Rep. 54; Slaughter *v.* Metropolitan St. R. Co., 116 Mo. 269, 23 S. W. 760; Coontz *v.* Missouri Pac. R. Co., 115 Mo. 669, 22 S. W. 572; Paquin *v.* St. Louis, etc., R. Co., 90 Mo. App. 118; Texas, etc., R. Co. *v.* Buckalew, (Tex. Civ. App. 1896) 34 S. W. 165.

5. Abilene *v.* Wright, 4 Kan. App. 708, 46 Pac. 715; Doherty *v.* Lord, 8 Misc. (N. Y.) 227, 28 N. Y. Suppl. 720 [*affirming* 5 Misc. 596, 25 N. Y. Suppl. 752]; Hubert *v.* Bedell, 21 N. Y. Suppl. 305; Looram *v.* Second Ave. R. Co., 11 N. Y. St. 652; Cabot *v.* McKane, 1 N. Y. St. 495. And see Popp *v.* New York Cent., etc., R. Co., 4 Silv. Supreme (N. Y.) 243, 7 N. Y. Suppl. 249.

If the plaintiff is a married woman the rule has been held to be different, and such damages must be specifically pleaded (Mellwitz *v.* Manhattan R. Co., 17 N. Y. Suppl. 112), although it has been held that if defendant does not avail himself of the right of motion to make the petition more specific he cannot afterward object because of its generality (Dickens *v.* Des Moines, 74 Iowa 216, 37 N. W. 165).

6. Chicago City R. Co. *v.* Hastings, 136 Ill. 251, 26 N. E. 594 [*affirming* 35 Ill. App. 434].

7. Mabrey *v.* Cape Girardeau, etc., Gravel Road Co., (Mo. App. 1902) 69 S. W. 394; Lesser *v.* St. Louis, etc., R. Co., 85 Mo. App. 326; Cooney *v.* Southern Electric R. Co., 80 Mo. App. 226; Knittel *v.* Schmidt, 16 Tex. Civ. App. 7, 40 S. W. 507.

A specific allegation of loss of time occasioned by the defendant's failure to comply with an agreement would admit proof of time spent by the plaintiff individually in awaiting the arrival of the goods, as well as the expenses of hiring a doctor and in making preparation therefor. Moffett-West Drug Co. *v.* Byrd, 1 Indian Terr. 612, 43 S. W. 864.

8. *Illinois.*— Chatsworth *v.* Rowe, 166 Ill. 114, 46 N. E. 763 [*affirming* 66 Ill. App. 55].

Iowa.— Meier *v.* Shrunk, 79 Iowa 17, 44 N. W. 209.

Kansas.—Hiawatha *v.* Warren, 8 Kan. App. 209, 55 Pac. 484.

Michigan.— Williams *v.* Edmunds, 75 Mich. 92, 42 N. W. 534.

New York.— Carples *v.* New York, etc., R. Co., 16 N. Y. App. Div. 158, 44 N. Y. Suppl. 670.

Texas.— Houston, etc., R. Co. *v.* Ray, (Civ. App. 1894) 28 S. W. 256; Galveston, etc., R. Co. *v.* Templeton, (Civ. App. 1894) 25 S. W. 135; Campbell *v.* Wing, 5 Tex. Civ. App. 431, 24 S. W. 360; Ft. Worth, etc., R. Co. *v.*

Nor is an allegation in the complaint of the character of plaintiff's occupation indispensable.[9]

(F) *Medical Attendance and Nursing.* In perhaps the greater number of jurisdictions it is essential to the admissibility of proof of payment or incurment of doctor's bills occasioned by personal injury that these facts be specially alleged;[10] in some jurisdictions, however, particularly if the injury is a severe one, such expenses are considered as a reasonably necessary result of the injury, and may be proved under a general allegation of damages.[11] The precise amount expended need not be alleged; an allegation of expense for medical attendance is sufficient,[12] at least in the absence of a motion to make more specific;[13] nor need the day or place at which the services were rendered be averred.[14] If the amount expended is alleged the complaint need not in the absence of a special demurrer allege that such expenditures were reasonable.[15]

(G) *Mental or Nervous Affection.* As the mind and nervous system are so intimately connected with the body, and so likely to be affected by physical injuries, proof of impairments of these faculties are usually held admissible under allegations in substance of grievous or permanent physical injury.[16]

(H) *Pain, Mental Anguish, and Suffering.* In most jurisdictions it is held that the law implies that pain and injury to the feelings necessarily follow bodily harm, and that therefore proof of mental anguish may be given under a general allegation of bodily injuries of this nature.[17]

(I) *Permanency of Injury.* If it is expressly averred that the injuries are

Thompson, 2 Tex. Civ. App. 170, 21 S. W. 137.

And *compare* Atlanta Consol. R. Co. *v.* Beauchamp, 93 Ga. 6, 19 S. E. 24; Collins *v.* Dodge, 37 Minn. 503, 35 N. W. 368.

9. Flanagan *v.* Baltimore, etc., R. Co., 83 Iowa 639, 50 N. W. 60.

10. Illinois Cent. R. Co. *v.* Hanberry, 66 S. W. 417, 23 Ky. L. Rep. 1867; Macon *v.* Paducah St. R. Co., 62 S. W. 496, 23 Ky. L. Rep. 46; Louisville, etc., R. Co. *v.* Hudson, 1 Ky. L. Rep. 66; O'Leary *v.* Rowan, 31 Mo. 117; Houston City St. R. Co. *v.* Richart, (Tex. Civ. App. 1894) 27 S. W. 920; Mickelson *v.* New East Tintic R. Co., 23 Utah 42, 64 Pac. 463.

See 15 Cent. Dig. tit. "Damages," § 445.

11. Evansville, etc., R. Co. *v.* Holcomb, 9 Ind. App. 198, 36 N. E. 39; Hawes *v.* O'Reilly, 126 Pa. St. 440, 17 Atl. 642; Folsom *v.* Underhill, 36 Vt. 580.

12. Kupferschmid *v.* Southern Electric R. Co., 70 Mo. App. 438; Houston, etc., R. Co. *v.* Stuart, (Tex. Civ. App. 1898) 48 S. W. 799. See also Atchison, etc., R. Co. *v.* Click, (Tex. Civ. App. 1895) 32 S. W. 226. *Compare* Western Union Tel. Co. *v.* Griffith, 111 Ga. 551, 36 S. E. 859.

13. Toledo Electric St. R. Co. *v.* Westenhuber, 22 Ohio Cir. Ct. 67, 12 Ohio Cir. Dec. 22; Toledo Electric St. R. Co. *v.* Tucker, 13 Ohio Cir. Ct. 411, 7 Ohio Cir. Dec. 169.

14. St. Louis, etc., R. Co. *v.* Stonecypher, 25 Tex. Civ. App. 569, 63 S. W. 946.

15. Texas, etc., R. Co. *v.* Lee, (Tex. Civ. App. 1899) 51 S. W. 351.

Medicine used by a physician in giving medical attention may properly be recovered, under a claim in a petition for expenses incurred for "nursing and medical attendance." Knapp *v.* Sioux City, etc., R. Co., 71 Iowa 41, 32 N. W. 18.

16. Chicago *v.* McLean, 133 Ill. 148, 24 N. E. 527, 8 L. R. A. 765; Chicago, etc., R. Co. *v.* Sullivan, 21 Ill. App. 580 [*affirmed* in (Sup. 1888) 17 N. E. 460]; Keyser *v.* Chicago, etc., R. Co., 66 Mich. 390, 33 N. W. 867; Gurley *v.* Missouri Pac. R. Co., 122 Mo. 141, 26 S. W. 953; Missouri, etc., R. Co. *v.* Walden, (Tex. Civ. App. 1898) 46 S. W. 87. *Compare* Atchison, etc., R. Co. *v.* Willey, 57 Kan. 764, 48 Pac. 25.

Affection of the sciatic nerve may be shown under an allegation of injury to the hip, hip-joint, pelvis, and thigh. Beath *v.* Rapid R. Co., 119 Mich. 512, 78 N. W. 537. See also Williams *v.* Cleveland, etc., R. Co., 102 Mich. 537, 61 N. W. 52.

Nervous prostration may be shown under an allegation that plaintiff was severely hurt, lamed, and bruised in and about her back, shoulders, and head, and has been and is sick, lame, sore, and unfitted for manual labor, and has suffered great pain in body and mind. Babcock *v.* St. Paul, etc., R. Co., 36 Minn. 147, 30 N. W. 449.

17. *California.*— See Shatto *v.* Crocker, 87 Cal. 629, 25 Pac. 921.

Georgia.— Central R., etc., Co. *v.* Lanier, 83 Ga. 587, 10 S. E. 279.

Indiana.— Wright *v.* Compton, 53 Ind. 337.

Kansas.— Ft. Scott, etc., R. Co. *v.* Lightburn, 9 Kan. App. 642, 58 Pac. 1033.

Missouri.— Brown *v.* Hannibal, etc., R. Co., 99 Mo. 310, 12 S. W. 655.

New York.—Caldwell *v.* Central Park, etc., R. Co., 7 Misc. 67, 27 N. Y. Suppl. 397.

Texas.— Texas, etc., R. Co. *v.* Curry, 64 Tex. 85; Triolo *v.* Foster, (Civ. App. 1900) 57 S. W. 698.

Washington.— Robinson *v.* Marino, 3 Wash. 434, 28 Pac. 752, 28 Am. St. Rep. 50.

Wisconsin.— McCoy *v.* Milwaukee St. R. Co., 88 Wis. 56, 59 N. W. 453.

permanent, proof thereof is of course admissible;[18] and the authorities all concede that no express averment to this effect is necessary to authorize the introduction of evidence that it is so; the averment of facts from which the permanency of the injury would be necessarily implied brings the case within this rule and is sufficient. It is difficult, however, to deduce from the decisions a general rule as to the sufficiency of an averment of injuries to invoke the application of the rule, and while in many cases statements to the effect that permanent injuries may be shown under a general allegation of damages are found,[19] other cases seem to require more specific averments.[20]

d. Of Injury to Property — Rents. Loss of rents arising from injuries to property are special damages, and proof thereof cannot be admitted unless such loss is specially averred,[21] and an averment of loss of profits is insufficient to admit proof of loss of rents.[22]

3. As Affected by Nature of Damage — a. Expenses Paid or Incurred — (i) *In General.* As to whether or not expenses incurred because of an injury must be alleged to admit evidence thereof, depends of course upon whether or not such expense, when viewed from a standpoint of substantive law, constitutes general or special damages. It has been held that proof of expenditures for the hiring of a substitute while one was disabled because of a personal injury,[23] proof of the cost of an artificial limb,[24] proof of expenses incurred in endeavoring to keep

See 15 Cent. Dig. tit. "Damages," § 446.

The amount of damages arising from mental anguish need not be proved in any specific sum. International, etc., R. Co. *v.* Rhoades, (Tex. Civ. App. 1899) 51 S. W. 517.

Where mental suffering is alleged, a recovery for the shame and mortification of being obliged to use a crutch and cane is permissible. Beath *v.* Rapid R. Co., 119 Mich. 512, 78 N. W. 537.

18. Edwards *v.* Three Rivers, 102 Mich. 153, 60 N. W. 454.

19. In the following cases evidence of the permanency of the injury was held to be admissible without an express averment that it was such:

Idaho.— McLean *v.* Lewiston, (1902) 69 Pac. 478.

Illinois.— West Chicago St. R. Co. *v.* McCallum, 169 Ill. 240, 48 N. E. 424 (allegations that plaintiff was made sick, sore, lame, bruised, hurt, and wounded for a long space of time, etc.); North Chicago City R. Co. *v.* Gastka, 128 Ill. 613, 21 N. E. 522, 4 L. R. A. 481 [*affirming* 27 Ill. App. 518] (allegation that divers bones were broken, and that plaintiff's legs were crushed, contused, mangled, lacerated, and broken, and that he became sick, sore, lame, disordered, etc.); Chicago *v.* Sheehan, 113 Ill. 658; Eagle Packet Co. *v.* Defries, 94 Ill. 598, 34 Am. Rep. 245; Ava *v.* Grenawalt, 73 Ill. App. 633.

Indiana.— Wabash R. Co. *v.* Savage, 110 Ind. 156, 5 N. E. 85.

Nebraska.— Harvard *v.* Stiles, 54 Nebr. 26, 74 N. W. 399.

New York.— Toumey *v.* O'Reilly, 142 N. Y. 678, 37 N. E. 825 [*affirming* 3 Misc. 302, 22 N. Y. Suppl. 930]; Rosevelt *v.* Manhattan R. Co., 133 N. Y. 537, 30 N. E. 1148 [*affirming* 59 N. Y. Super. Ct. 197, 13 N. Y. Suppl. 598]; Lynch *v.* Third Ave. R. Co., 59 N. Y. Super. Ct. 71, 13 N. Y. Suppl. 236; Tyler *v.* Third Ave. R. Co., 18 Misc. 165, 41 N. Y. Suppl. 523; Duggan *v.* Third Ave. R. Co., 9 Misc. 158, 29 N. Y. Suppl. 13 [*affirming* 8 Misc. 89, 28 N. Y. Suppl. 598]; Doherty *v.* Lord, 8 Misc. 227, 28 N. Y. Suppl. 720 [*affirming* 5 Misc. 596, 25 N. Y. Suppl. 752]; Schuler *v.* Third Ave. R. Co., 1 Misc. 351, 20 N. Y. Suppl. 683 [*affirming* 17 N. Y. Suppl. 834].

Texas.— San Antonio, etc., R. Co. *v.* Weigers, 22 Tex. Civ. App. 344, 54 S. W. 910.

See 15 Cent. Dig. tit. "Damages," § 442.

Evidence that a horse was permanently injured may be given under an allegation that he was greatly injured and damaged and became sick, bruised, lame, and injured, and so remained for a long space of time, to wit, for the space of two months. La Duke *v.* Exeter Tp., 97 Mich. 450, 56 N. W. 851, 37 Am. St. Rep. 357.

20. See French *v.* Wilkinson, 93 Mich. 322, 53 N. W. 530 (where it was held error to admit evidence of a permanent injury when no permanency of injury or disfigurement was alleged); Clark *v.* Metropolitan St. R. Co., 68 N. Y. App. Div. 49, 74 N. Y. Suppl. 267.

21. Plimpton *v.* Gardiner, 64 Me. 360; Parker *v.* Lowell, 11 Gray (Mass.) 353; Adams *v.* Barry, 10 Gray (Mass.) 361; Wampach *v.* St. Paul, etc., R. Co., 21 Minn. 364.

22. Plimpton *v.* Gardiner, 64 Me. 360.

What allegation of loss of rent sufficient.— An allegation that plaintiff has been damaged by difficulty in renting his property as well as by depreciation in its value, because of the maintenance of a disreputable house adjoining, is sufficient to admit evidence of loss in the rental value. Besso *v.* Southworth, 71 Tex. 765, 10 S. W. 523, 10 Am. St. Rep. 814.

23. Haszlacher *v.* Third Ave. R. Co., 56 N. Y. Suppl. 380.

24. North Chicago St. R. Co. *v.* Cotton, 41 Ill. App. 311; Southern Pac. Co. *v.* Hall, 100 Fed. 760, 41 C. C. A. 50.

water from overflowing a certain tract of land, the only damage claimed to result from the overflow itself,[25] proof of expenses incurred for doctoring and taking care of injured chattels,[26] or proof of expenses incurred in rounding up or driving off cattle trespassing on plaintiff's land[27] cannot be introduced unless specially averred. But under an allegation of expenses incurred or paid because of an injury, proof of liabilities incurred and the amount and nature thereof is admissible in the absence of a motion to make the complaint more specific.[28]

(II) *Attorney's Fees.* Attorney's fees not usually being a necessary or legally implied result of a wrong, cannot be shown unless such expenditure is specially averred.[29]

b. Loss of Profits to Business. Whether or not proof of loss of profits may be shown under a general allegation of damages depends of course upon whether or not such damages are upon the facts involved to be considered general or special.[30] In some jurisdictions it is held that where the wrong complained of occasions the breach of a contract the loss of profits arising from the breach may be recovered under a general allegation of damage.[31] But loss of profits in a business, arising from an injury to one's person, cannot ordinarily be shown without being specially pleaded.[32] A recovery cannot be had for prospective loss of profits only, if no actual damage is alleged or sought to be proved.[33]

XIII. Evidence.[34]

A. Presumptions and Burden of Proof — 1. Presumptions. Where a legal right is invaded the law will presume some damage.[35] So too in a question of doubt as to the nature of damages the law will presume that a bond provides for a penalty as distinguished from liquidated damages.[36] Where plaintiff suf-

25. Robinson *v.* Shanks, 118 Ind. 125, 20 N. E. 713.

26. Patten *v.* Libbey, 32 Me. 378; Harper *v.* Missouri, etc., R. Co., 70 Mo. App. 604.

27. Dolores Land, etc., Co. *v.* Jones, 3 Tex. App. Civ. Cas. § 270.

28. See Chicago *v.* Edson, 43 Ill. App. 417; Fox *v.* Chicago, etc., R. Co., 86 Iowa 368, 53 N. W. 259, 17 L. R. A. 289; Plunkett *v.* Minneapolis, etc., R. Co., 79 Wis. 222, 48 N. W. 519.

29. Strang *v.* Whitehead, 12 Wend. (N. Y.) 64; Durnett *v.* Whaley, 2 Tex. Unrep. Cas. 487. But *compare* Cooper *v.* Cappel, 29 La. Ann. 213, holding that in an action for damages for trespass, such expenses may be proved without special averment.

30. **As to when loss of profits are a legitimate element of damages** and as to when they are considered general or special damages see *supra*, VII, G.

Where the declaration directly alleges loss of profits to a business done at a mill alleged to be obstructed by the interruption of a watercourse, proof of the nature and amount of such profits is admissible. Taylor *v.* Dustin, 43 N. H. 493.

31. Burrell *v.* New York, etc., Salt Co., 14 Mich. 34; Ennis *v.* Buckeye Pub. Co., 44 Minn. 105, 46 N. W. 314; Wisner *v.* Barber, 10 Oreg. 342. See also Clifford *v.* Richardson, 18 Vt. 620.

Readiness to comply with contract. — A party cannot recover an allowance for mill rent as an item of the profits which he would have made by virtue of a contract to furnish him logs to be made into lumber, unless he pleads that he has held the mill in readiness to do such sawing during the time of the contract; and an allegation that he has at all times and in all things kept and performed his contract is not sufficient. Morrison *v.* Lovejoy, 6 Minn. 319.

In an action of trespass for the taking of personal property, a plaintiff may recover, under the general averment of damages, profits he would have made by doing certain labor upon such property and by its appreciation in price. Bucknam *v.* Nash, 12 Me. 474. *Compare* Beidler *v.* Fish, 14 Ill. App. 623.

32. Silsby *v.* Michigan Car Co., 95 Mich. 204, 54 N. W. 761. See also Lombardi *v.* California St. R. Co., 124 Cal. 311, 57 Pac. 66. But *compare* O'Connor *v.* National Ice Co., 56 N. Y. Super. Ct. 410, 4 N. Y. Suppl. 537.

33. Petrie *v.* Lane, 67 Mich. 454, 35 N. W. 70.

34. See, generally, Evidence.

35. *Maine.* — Winslow *v.* Lane, 63 Me. 161.

Maryland. — Howard *v.* Wilmington, etc., R. Co., 1 Gill 311.

New Hampshire. — Woodman *v.* Tufts, 9 N. H. 88.

Pennsylvania. — Ripka *v.* Sergeant, 7 Watts & S. 9, 42 Am. Dec. 214.

South Carolina. — Terrell *v.* McDaniel, 1 Nott & M. 343.

And see Actions, 1 Cyc. 660; and *supra*, II.

36. Johnson *v.* Cook, 24 Wash. 474, 64 Pac. 729.

fered from a disease or affliction at the time of the injury, there is no presumption of law that the disease alone caused the death rather than that the disease, augmented and aggravated by the injury, produced the result.[37]

2. Burden of Proof. Where an action is for damages which are uncertain or have not been admitted the burden of establishing the amount thereof[38] and that they resulted from the act of the defendant[39] is upon the plaintiff. But where defendant claims damages by way of recoupment or sets up matters in reduction or mitigation, the burden is upon him to establish his claim and the amount thereof by evidence of sufficient certainty to enable the jury to intelligently determine the same.[40]

B. Admissibility — 1. In General — a. In Behalf of Plaintiff. In actions for damages the general and well-settled rules of evidence apply in that the testimony must conform to the pleadings, be responsive to the issue,[41] and be relevant to the nature or kind of damages claimed.[42] All testimony tending to establish a

37. Louisville, etc., R. Co. *v.* Jones, 83 Ala. 376, 3 So. 902.

38. *Alabama.*— Buist *v.* Guice, 96 Ala. 255, 11 So. 280.

Maine.— Winslow *v.* Lane, 63 Me. 161.

New York.— Weigley *v.* Kneeland, 18 N. Y. App. Div. 47, 45 N. Y. Suppl. 388; Benner *v.* Phœnix Towing, etc., Co., 80 Hun 412, 30 N. Y. Suppl. 290.

Oklahoma.— Smock *v.* Carter, 6 Okla. 300, 50 Pac. 262.

Tennessee.—Douglas *v.* McWhirter, 9 Heisk. 69.

See 15 Cent. Dig. tit. "Damages," § 454.

Where nature of damage is in question.— Where the legal interpretation of the agreement is taken alone to show that the damages should be considered as liquidated as distinguished from a penalty, the burden of proof is upon the party claiming them to be a penalty to show that the latter was the intention of the contracting party. De Graff, etc., Co. *v.* Wickham, 89 Iowa 720, 52 N. W. 503, 57 N. W. 420.

39. Walrath *v.* Redfield, 11 Barb. (N. Y.) 368.

Where the aggregate damage is due to several causes, and only a portion thereof is occasioned by the act of defendant, the burden is upon the plaintiff to show what part arose from defendant's acts as distinguished from the damage occasioned by other causes. Priest *v.* Nichols, 116 Mass. 401 [*cited* and *distinguished* in Lemley *v.* Golden Censer Co., 16 Ill. App. 457]. But if from the nature of the case the jury cannot ascertain with certainty the amount of damages arising from the acts of the defendant, it is their province to estimate as best they can from the whole evidence the amount occasioned by the defendant. Elgin *v.* Welch, 16 Ill. App. 483. See also Chicago, etc., R. Co. *v.* Yarborough, (Tex. Civ. App. 1896) 35 S. W. 422.

40. *California.*— Green *v.* Barney, (1894) 36 Pac. 1026; Utter *v.* Chapman, 43 Cal. 279. See also Ellis *v.* Tone, 58 Cal. 289.

Colorado.— Hindrey *v.* Williams, 9 Colo. 371, 12 Pac. 436.

Connecticut.— Gold *v.* Ives, 29 Conn. 119. And see Crane *v.* Eastern Transp. Line, 48 Conn. 361.

Iowa.— Decorah First Nat. Bank *v.* Haug, 52 Iowa 538, 3 N. W. 627.

North Carolina.— Oldham *v.* Kerchner, 81 N. C. 430.

Pennsylvania.— Filbert *v.* Philadelphia, 181 Pa. St. 530, 37 Atl. 545; Harris' Appeal, (1888) 12 Atl. 743.

Virginia.— James *v.* Kibler, 94 Va. 165, 26 S. E. 417.

See 15 Cent. Dig. tit. "Damages." § 454.

Breach of contract of employment.—Where the action is for a breach of a contract of employment, the burden is upon the defendant to show that the plaintiff could have obtained other work. School Dist. No. 4 *v.* Stilley, 36 Ill. App. 133; Dunn *v.* Johnson, 33 Ind. 54, 5 Am. Rep. 177.

If the plaintiff's injury or damage has been increased or aggravated by his inattention, negligence, or inactivity, the burden is upon defendant to show it. Citizens' St. R. Co. *v.* Hobbs, 15 Ind. App. 610, 43 N. E. 479, 44 N. E. 377; Colrick *v.* Swinburne, 105 N. Y. 503, 12 N. E. 427.

41. *California.*— Biggerstaff *v.* Briggs, (1884) 4 Pac. 371.

Colorado.— Old *v.* Keener, 22 Colo. 6, 43 Pac. 127.

Connecticut.— Wolcott *v.* Dwight, 2 Day 405.

Georgia.— Augusta *v.* Lombard, 93 Ga. 284, 20 S. E. 312.

Maryland.— Gent *v.* Cole, 38 Md. 110.

Minnesota.— Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79.

New York.— Rosevelt *v.* Manhattan R. Co., 59 N. Y. Super. Ct. 197, 13 N. Y. Suppl. 598.

Pennsylvania.— Herd *v.* Thompson, 149 Pa. St. 434, 24 Atl. 282.

United States.— Grand Tower Min., etc., Co. *v.* Phillips, 23 Wall. 471, 23 L. ed. 71.

See also Mutual Union Tel. Co. *v.* Katkamp, 103 Ill. 420; Hayden *v.* Hertzinger, 3 La. Ann. 293.

See 15 Cent. Dig. tit. "Damages," § 460.

Issues and proof generally in actions for damages see *supra*, XII, E.

42. Thus where exemplary or vindictive damages are not claimed evidence authorizing the same is irrelevant. Swift *v.* East

legitimate item of damage is of course, under proper pleadings, relevant and admissible.[43] Error in admitting incompetent testimony on the measure of damages is not cured by an instruction to disregard the same where from the verdict rendered it is not clear but that such evidence nevertheless influenced the jury in their findings;[44] but if it clearly did not so influence the jury, its admission is not reversible error, although not withdrawn from the jury.[45]

b. In Behalf of Defendant. All evidence having a legitimate tendency to meet the evidence of loss or injury should be received in rebuttal.[46] But the reception of irrelevant testimony on the part of the plaintiff will not authorize the admission of irrelevant rebuttal testimony.[47]

2. In Particular Kinds of Actions — a. Ex Contractu. In actions for breach of contract, the admissibility of evidence concerning the damages therefor is governed by the general rules of evidence.[48] Generally speaking all evidence bearing

Waterloo Hotel Co., 40 Iowa 322; Krippner *v.* Biebl, 28 Minn. 139, 9 N. W. 671.

In an action for damages on account of the suffering of plaintiff evidence that defendant paid the physician's bill is irrelevant. Middle Georgia, etc., R. Co. *v.* Reynolds, 99 Ga. 638, 26 S. E. 61.

43. See, generally, Bennett *v.* Gibbons, 55 Conn. 450, 12 Atl. 99; Morehouse *v.* Northrop, 33 Conn. 380, 89 Am. Dec. 211; Dailey *v.* Grimes, 27 Md. 440; Bloomer *v.* Morss, 68 N. Y. 623; Clinton *v.* Townsend, 1 Thomps. & C. (N. Y.) 330; Dethlefs *v.* Tamsen, 7 Daly (N. Y.) 354.

If there are two methods of admeasuring the damages, the determination of the proper one depending upon circumstances, all competent evidence of both should be received, and that which is applicable to the method selected should be applied. Hartshorn *v.* Chaddock, 135 N. Y. 116, 31 N. E. 997, 17 L. R. A. 426.

Failure or defect of title.— Inasmuch as the rule of estimating damages for a failure or defect of title to a portion of a tract of land conveyed is the relative value of the part to which the defect applies as compared to the whole, and is to be estimated with regard to the price fixed by the parties for the whole tract, evidence of peculiar advantages or disadvantages of the part lost is admissible on behalf of either party, and reasonable latitude should be given to the extent of such inquiry. Beaupland *v.* McKeen, 28 Pa. St. 124, 70 Am. Dec. 115, holding, however, that the expense of erecting improvements on an adjoining tract of land is an undue latitude, and that an admission of such evidence is error.

In an action for non-delivery of certain bonds, of which there are no sales and hence no market value, evidence is admissible to show what such bonds are worth as collateral security, and also to show that the obligors pay the principal thereof in gold, as such evidence tends to show what sum the plaintiff has lost by the wrongful act of the defendant. Simpkins *v.* Low, 49 Barb. (N. Y.) 382.

Where the damages can be disclosed by a showing of facts such evidence is preferable to expert testimony. Chouteau *v.* Jupiter Iron-Works, 94 Mo. 388, 7 S. W. 467.

44. Sinker *v.* Diggins, 76 Mich. 557, 43 N. W. 674. And see Rogers *v.* Beard, 20 How. Pr. (N. Y.) 98.

45. East Tennessee, etc., R. Co. *v.* Warmack, 86 Ga. 351, 12 S. E. 813. See also St. Louis, etc., R. Co. *v.* Philadelphia F. Assoc., 55 Ark. 163, 18 S. W. 43; Sullivan *v.* Lowell, etc., St. R. Co., 162 Mass. 536, 39 N. E. 185; Hardin *v.* Ledbetter, 103 N. C. 90, 9 S. E. 641.

46. *Kentucky.*— Ludlow *v.* Steffen, 44 S. W. 119, 19 Ky. L. Rep. 1671.

Massachusetts.— Howe *v.* Weymouth, 155 Mass. 439, 29 N. E. 646.

New Jersey.— Consolidated Traction Co. *v.* Mullin, 63 N. J. L. 22, 42 Atl. 764.

New York.— Raven *v.* Smith, 71 Hun 613, 24 N. Y. Suppl. 600; Van Buren *v.* Fishkill Water-Works, 50 Hun 448, 3 N. Y. Suppl. 336; Watkins *v.* Rush, 2 Lans. 234; Lahah *v.* Greig, 12 N. Y. St. 355.

Pennsylvania.— McKenna *v.* Citizens' Natural Gas Co., 201 Pa. St. 146, 50 Atl. 922; Morris, etc., Mutual Coal Co. *v.* Delaware, etc., R. Co., 2 Lack. Leg. N. 195.

Texas.— Wells-Fargo Express Co. *v.* Samuels, 11 Tex. Civ. App. 15, 31 S. W. 305; Missouri Pac. R. Co. *v.* Wise, 3 Tex. App. Civ. Cas. § 386.

Wisconsin.— Rhyner *v.* Carver, 84 Wis. 181, 53 N. W. 849.

England.— Skull *v.* Glenister, 16 C. B. N. S. 81, 33 L. J. C. P. 185, 9 L. T. Rep. N. S. 763, 12 Wkly. Rep. 554, 111 E. C. L. 81.

See 15 Cent. Dig. tit. "Damages," § 460.

In an action for a breach of promise, the defendant is not bound in offering evidence in mitigation of damages to declare that he offers it for that purpose; if the evidence is competent for this purpose it must be received, although it is incompetent for other purposes (Button *v.* McCauley, 1 Abb. Dec. (N. Y.) 282, 4 Transcr. App. (N. Y.) 447, 5 Abb. Pr. N. S. (N. Y.) 29); although it has been held that where evidence offered for the purpose of constituting a complete defense to an action is inadmissible under the pleadings, it must be again offered if the party desires to avail himself of it in mitigation of damages (Travis *v.* Barger, 24 Barb. (N. Y.) 614).

47. Avary *v.* Searcy, 50 Ala. 54.

48. See, generally, Evidence.

Where other contracts or memoranda are

directly upon the damages occasioned by the breach and constituting legitimate items of damage is admissible;[49] and as all damages which the parties in reasonable contemplation can be presumed to have foreseen would be the probable consequence of the breach are recoverable[50] evidence thereof is admissible.[51] The evidence must of course be confined to matters relevant to the contract in suit,[52] and evidence of previous contractual relations between the parties,[53] or of an agreement between the plaintiff and a third party concerning the subject-matter of the contract,[54] cannot be shown for the purpose of estimating the damages, unless the contract is one where such agreement would have been in contemplation of the parties at the time of making the original contract.[55]

b. Ex Delicto — (i) *For Personal Injuries* — (a) *Statement of Rule.* In actions for personal injuries a considerable latitude in the introduction of evidence is of course necessarily allowed, and inasmuch as evidence which would be material and relevant in one case would upon the facts of another be entirely irrelevant and immaterial, it follows that no rule of inclusion or exclusion can be formulated; but broadly speaking, it may be said that all evidence tending to

connected with the one in suit by a reference thereto, or have existed between the same parties concerning a similar subject-matter, evidence of the terms of such former contract may be shown for the purpose of furnishing a basis for estimating damages for a breach of the latter. Bridgewater Gas Co. *v.* Home Gas Fuel Co., 59 Fed. 40, 7 C. C. A. 652. See also Downey *v.* Hatter, (Tex. Civ. App. 1898) 48 S. W. 32; Hare *v.* Parkersburg, 25 W. Va. 554.

49. See, generally, the following cases:

Alabama.— Beck *v.* West, 87 Ala. 213, 6 So. 70.

Georgia.—Armour *v.* Ross, 110 Ga. 403, 35 S. E. 787.

Indiana.— Seavey *v.* Shurick, 110 Ind. 494, 11 N. E. 597.

Massachusetts.— McCormick *v.* Stowell, 138 Mass. 431.

Oregon.— Pendelton *v.* Saunders, 19 Oreg. 9, 24 Pac. 506.

Wisconsin.— Colburn *v.* Chicago, etc., R. Co., 109 Wis. 377, 85 N. W. 354.

United States.— Terre Haute, etc., R. Co. *v.* Struble, 109 U. S. 381, 3 S. Ct. 270, 27 L. ed. 970.

See 15 Cent. Dig. tit. "Damages," § 469.

50. See *supra*, VII, C, 3.

51. *Alabama.* — Alabama Iron-Works *v.* Hurley, 86 Ala. 217, 5 So. 418.

Georgia.—Dempsey *v.* Hertsfield, 30 Ga. 866.

Illinois.— See National Surety Co. *v.* T. B. Townsend Brick, etc., Co., 176 Ill. 156, 52 N. E. 938 [*affirming* 74 Ill. App. 312].

Indiana.— Evans *v.* Elliott, 20 Ind. 283, 83 Am. Dec. 319. See also Avan *v.* Frey, 69 Ind. 91.

Iowa.— Kramer *v.* Messner, 101 Iowa 88, 69 N. W. 1142.

Massachusetts.— Manning *v.* Fitch, 138 Mass. 273.

Nebraska.— Schneider *v.* Patterson, 38 Nebr. 680, 57 N. W. 398.

North Carolina.— Mace *v.* Ramsey, 74 N. C. 11; Henson *v.* Chastine, 48 N. C. 550.

Pennsylvania.— Pittsburg Coal Co. *v.* Foster, 59 Pa. St. 365.

Rhode Island.— Forbes *v.* Howard, 4 R. I. 364.

Tennessee.— See Whorley *v.* Tennessee Centennial Exposition Co., (Ch. App. 1901) 62 S. W. 346.

See 15 Cent. Dig. tit. "Damages," § 469.

For breach of a contract with an insurance company by an agent his measure of damages is of course the amount he has actually lost in consequence of the breach, so far as they can be determined with sufficient certainty, and testimony as to the probable value of renewals for the remainder of his term of employment on policies already obtained is competent in arriving at this result (Lewis *v.* Atlas Mut. L. Ins. Co., 61 Mo. 534. See also Ensworth *v.* New York L. Ins. Co., 8 Fed. Cas. No. 4,496, 1 Flipp. 92); but an estimate of his probable earnings derived from proof of the amount of his collections and commissions before the breach, without further proof relating thereto, would be too speculative to be admissible (Lewis *v.* Atlas Mut. L. Ins. Co., 61 Mo. 534).

52. Beck *v.* West, 87 Ala. 213, 6 So. 70; Electric Implement Co. *v.* San Jose, etc., R. Co., (Cal. 1892) 31 Pac. 455; Rowan *v.* Sharps' Rifle Mfg. Co., 31 Conn. 1; Hughes *v.* Robinson, 60 Mo. App. 194. See also Borden Min. Co. *v.* Barry, 17 Md. 419; Craighead *v.* Wells, 21 Mo. 404. When brought on a *quantum meruit* the field for the admission of evidence is of course broadened. Ham *v.* Goodrich, 37 N. H. 185. And see, generally, Assumpsit, Action of, 4 Cyc. 317.

53. Addams *v.* Tutton, 39 Pa. St. 447.

54. Snell *v.* Cottingham, 72 Ill. 161.

Evidence of an agreement after the breach, between the plaintiff and third persons, for the performance of the same service, is admissible for the purpose of affecting the damages, where such services have been performed under the agreement; but if the agreement has never been executed, evidence thereof is incompetent, as it is nothing more than a mere statement of what the plaintiff would be willing to give, and, if admitted, would open the door to fraud. Lamoreaux *v.* Rolfe, 36 N. H. 33.

55. Eldredge *v.* Smith, 13 Allen (Mass.) 140.

establish the nature, character, and extent of the injuries which are the direct consequence of the defendant's acts, is admissible;[56] but evidence of matters not the logical result of the injury is inadmissible in the absence of evidence connecting them with the injury.[57] So too evidence may be objectionable because of its vagueness.[58] All evidence, either in rebuttal or sought to be elicited on cross-examination, tending to show that the injuries are not so serious as claimed,[59] or that if so serious they could not have been caused by the accident complained of,[60] is competent and should be admitted.

56. See, generally, the following cases:

Alabama.— Birmingham R., etc., Co. *v.* Ellard, 135 Ala. 433, 33 So. 276; Alabama Great Southern R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65; Alabama Great Southern R. Co. *v.* Yarbrough, 83 Ala. 238, 3 So. 447, 3 Am. St. Rep. 715.

Georgia.— Wilson *v.* White, 71 Ga. 506, 51 Am. Rep. 269.

Illinois.— Warren *v.* Wright, 103 Ill. 298; Tinsley *v.* Rowe, 17 Ill. App. 326.

Indiana.— Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 414, 61 N. E. 936; Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; Evansville, etc., R. Co. *v.* Guyton, 115 Ind. 450, 17 N. E. 101, 7 Am. St. Rep. 458.

Iowa.— Pringle *v.* Chicago, etc., R. Co., 64 Iowa 613, 21 N. W. 108.

Kentucky.— Illinois Cent. R. Co. *v.* Stewart, 63 S. W. 596, 23 Ky. L. Rep. 637; South Covington, etc., R. Co. *v.* Bolt, 59 S. W. 26, 22 Ky. L. Rep. 906.

Michigan.— Palmer *v.* Michigan Cent. R. Co., 93 Mich. 363, 53 N. W. 397, 32 Am. St. Rep. 507, 17 L. R. A. 636; Keyser *v.* Chicago, etc., R. Co., 66 Mich. 390, 33 N. W. 867.

Missouri.— Bigelow *v.* Metropolitan St. R. Co., 48 Mo. App. 367.

New Hampshire.— Valley *v.* Concord, etc., R. Co., 68 N. H. 546, 38 Atl. 383.

New York.— Wolf *v.* Third Ave. R. Co., 67 N. Y. App. Div. 605, 74 N. Y. Suppl. 336; McCready *v.* Staten Island Electric R. Co., 51 N. Y. App. Div. 338, 64 N. Y. Suppl 996; Wright *v.* New York Cent. R. Co., 28 Barb. 80; Griffith *v.* Utica, etc., R. Co., 17 N. Y. Suppl. 692. See also Gillespie *v.* Coney Island, etc., R. Co., 16 N. Y. Suppl. 850.

Texas.— Missouri, etc., R. Co. *v.* Oslin, 26 Tex. Civ. App. 370, 63 S. W. 1039; International, etc., R. Co. *v.* Zapp, (Civ. App. 1899) 49 S. W. 673; Gulf, etc., R. Co. *v.* Pendery, 14 Tex. Civ. App. 60, 36 S. W. 793.

Wisconsin.— Block *v.* Milwaukee St. R. Co., 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365; Wright *v.* Ft. Howard, 60 Wis. 119, 19 N. W. 750, 50 Am. Rep. 350.

See 15 Cent. Dig. tit. "Damages," § 478 *et seq.*

The following evidence has been held admissible: That plaintiff has used opiates to alleviate the pain caused by his injury (Missouri, etc., R. Co. *v.* Hanson, 13 Tex. Civ. App. 552, 36 S. W. 289. And see Chattanooga, etc., R. Co. *v.* Liddell, 85 Ga. 482, 11 S. E. 853, 21 Am. St. Rep. 169, holding that while such evidence was admissible to show suffering, it was not to be considered as a damage); the number of visits by a physician (Fleming *v.* Shenandoah, 67 Iowa 505, 26 N. W. 752, 56 Am. Rep. 354); the number of persons who nursed the injured party (Ohio, etc., R. Co. *v.* Heaton, 137 Ind. 1, 35 N. E. 687) to show the severity of the injury; the weight of an artificial leg which the plaintiff was obliged to wear to show the extent and character of the injury (Carrow *v.* Barre R. Co., 74 Vt. 176, 52 Atl. 537).

57. Chicago *v.* Allen, 43 Ill. 496; West Chicago St. R. Co. *v.* Dougherty, 89 Ill. App. 362; Sweeny *v.* Union R. Co., 31 Misc. (N. Y.) 472, 64 N. Y. Suppl. 453; Harrison *v.* Denver, etc., R. Co., 7 Utah 523, 27 Pac. 728; Rhyner *v.* Menasha, 107 Wis. 201, 83 N. W. 303.

58. Locke *v.* International, etc., R. Co., 25 Tex. Civ. App. 145, 60 S. W. 314, where evidence of plaintiff's loss of capacity "for the enjoyment of the pleasures of life" was held to be properly excluded on this ground.

59. *Alabama.*— Abbott *v.* Mobile, 119 Ala. 595, 24 So. 565.

Georgia.— Stevens *v.* Central R., etc., Co., 80 Ga. 19, 5 S. E. 253; Gamble *v.* Central R. Co., 74 Ga. 586.

Illinois.— See Joliet St. R. Co. *v.* Call, 143 Ill. 177, 32 N. E. 389.

Indiana.— Columbus *v.* Strassner, 124 Ind. 482, 25 N. E. 65.

Iowa.— Hood *v.* Chicago, etc., R. Co., 95 Iowa 331, 64 N. W. 261.

Kansas.— Schlitz Brewing Co. *v.* Duncan, 6 Kan. App. 178, 51 Pac. 310.

Texas.— Collins *v.* Clark, 30 Tex. Civ. App. 341, 72 S. W. 97.

The use of artificial limbs by persons who have been injured, and their ability to pursue many ordinary vocations by the use of such limbs, may be shown as tending to mitigate damages. Hamilton *v.* Pitsburgh, etc., R. Co., 104 Ill. App. 207.

A statement to an insurance company, made for the purpose of obtaining benefits under an accident policy, that the injured party had claimed benefits for two weeks only is not admissible on the question of the extent of his injuries, in an action against a city therefor, where it does not appear that the policy allowed benefits except during total disability. Wills Point *v.* Williams, 26 Tex. Civ. App. 194, 63 S. W. 1038.

60. Yaeger *v.* Southern California R. Co., (Cal. 1897) 51 Pac. 190. See also Birmingham R., etc., Co. *v.* Ellard, 135 Ala. 433, 33 So. 276.

A section of a human body showing the exact location of ribs may in the discretion of

(B) *Application of Rule*—(1) APPEARANCE OF INJURED PARTY. Testimony of a witness concerning the appearance of an injured party where he has had opportunity to observe his physical condition is admissible upon the question of damages and is not objectionable as being an opinion or conclusion.[61]

(2) CHARACTER AND HABITS OF INJURED PARTY—(a) ON BEHALF OF PLAINTIFF. In some jurisdictions it is held that plaintiff in an action for personal injury may show his previous habits of sobriety and industry,[62] while in other jurisdictions the opposite view is held.[63]

(b) ON BEHALF OF DEFENDANT. Whether or not the vicious or immoral habits or character of plaintiff can be shown by defendant depends largely upon the nature of the damages claimed in the complaint and the certainty of the resultant physical effect of the wrong.[64] Such evidence to be admissible must clearly show the connection or relation between the habit and the injury.[65] Hence evidence of the disreputable character of the injured party is usually immaterial so far as the action for bodily injury is concerned.[66] So too it is held that the intemperate habits of plaintiff prior to an injury cannot be shown in mitigation,[67] although evidence that the injury has been aggravated by a subsequent indulgence in such practices may be shown.[68] But where the complaint also claims damages for loss of wages which one would have received, and loss from being incapacitated from pursuing his usual trade or business, defendant has a right to show any facts concerning plaintiff's habits or conduct which might throw light on the probability of his securing employment or the continuity of the same, or show that by previous intemperance he had partially incapacitated himself from performing labor.[69] So it has been held that where plaintiff claims damages for humiliation from exposure of her person, evidence of her disreputable character is admissible.[70]

(3) DOMESTIC RELATIONS OF INJURED PARTY. Inasmuch as the damages for a personal injury must be only such as the injured party himself has sustained, it follows that evidence that such party has a family not only has no legitimate

the court be excluded as unnecessary and offensive when introduced by defendant to contradict evidence of the plaintiff suing for an injury to a rib. Knowles *v.* Crampton, 55 Conn. 336, 11 Atl. 593.

61. Bailey *v.* Centerville, 108 Iowa 20, 78 N. W. 831; Winter *v.* Central Iowa R. Co., 74 Iowa 448, 38 N. W. 154; Louisville, etc., R. Co. *v.* Richerson, 14 Ky. L. Rep. 925. See also West Chicago St. R. Co. *v.* Kennedy-Cahill, 165 Ill. 496, 46 N. E. 368 [*affirming* 64 Ill. App. 539]; City R. Co. *v.* Wiggins, (Tex. Civ. App. 1899) 52 S. W. 577.

62. Texas Mexican R. Co. *v.* Douglas, 73 Tex. 325, 11 S. W. 333; Metropolitan St. R. Co. *v.* Kennedy, 82 Fed. 158, 27 C. C. A. 136.

63. Pennsylvania R. Co. *v.* Books, 57 Pa. St. 339, 98 Am. Dec. 229.

64. Thus if the evidence shows that the injuries which a plaintiff claims as the result of a fall might have resulted from sexual excesses, evidence showing that the injured party has been a prostitute and has led a fast life is admissible, and the cause of the ultimate condition of the plaintiff should be submitted to the jury. State *v.* Detroit, 113 Mich. 643, 72 N. W. 8.

65. Parker *v.* Enslow, 102 Ill. 272, 40 Am. Rep. 588, holding that evidence that an injured party was a drunkard is not admissible in an action to recover for an injury to his eyes caused by an explosion, where no evidence is offered showing that his eyes were affected by his intemperance.

In an action of trespass for biting and bruising plaintiff's finger, whereby amputation became necessary, defendant cannot show that the plaintiff was a habitual drunkard, upon the theory that the jury might infer that the loss resulted from a state of health produced by his intemperance rather than by the injury. Wheat *v.* Lowe, 7 Ala. 311. See also Lord *v.* Mobile, 113 Ala. 360, 21 So. 366.

66. Joliet St. R. Co. *v.* Call, 42 Ill. App. 41; Indianapolis, etc., R. Co. *v.* Bush, 101 Ind. 582.

67. Baltimore, etc., R. Co. *v.* Boteler, 38 Md. 568; Sullivan *v.* Marin, 175 Mass. 422, 56 N. E. 600. See also Linton *v.* Hurley, 14 Gray (Mass.) 191; Devoe *v.* Van Vranken, 29 Hun (N. Y.) 201.

68. Boggess *v.* Metropolitan St. R. Co., 118 Mo. 328, 23 S. W. 159, 24 S. W. 210.

69. Kingston *v.* Ft. Wayne, etc., R. Co., 112 Mich. 40, 70 N. W. 315, 74 N. W. 230, 40 L. R. A. 131; Cleveland, etc., R. Co. *v.* Sutherland, 19 Ohio St. 151.

If no issue is made as to plaintiff's incapacity to earn a livelihood prior to the accident, evidence of his intemperance would then be inadmissible in mitigation of damages. Union Pac. R. Co. *v.* Reese, 56 Fed. 288, 5 C. C. A. 510.

70. Houston, etc., R. Co. *v.* Ritter, (Tex. Civ. App. 1897) 41 S. W. 753.

bearing upon the issue, but is likely to have a tendency to arouse the sympathies of the jury, and unduly enhance the damages, and is therefore irrelevant and incompetent.[71] Where, however, from the instructions given by the court regarding such evidence and the verdict rendered it is probable that the jury was in no way influenced by its introduction in estimating the damages, the error in admitting it is not fatal.[72]

(4) Diseased Condition of Plaintiff. Evidence of the diseased condition of plaintiff is immaterial in the absence of evidence connecting such condition with the injury,[73] although such condition may be considered on behalf of defendant as showing that it would tend to retard plaintiff's recovery[74] or shorten his probable period of life and diminish his earning capacity.[75]

(5) Financial Condition of Party Injured. As the damages recoverable should depend upon the nature of the injury received, and not upon the wealth or poverty of plaintiff, it follows that evidence of the pecuniary condition or financial embarrassment of the party injured is irrelevant and inadmissible for

71. *Alabama.*— Louisville, etc., R. Co. *v.* Binion, 107 Ala. 645, 18 So. 75.

Florida.— Louisville, etc., R. Co. *v.* Collinsworth, (1902) 33 So. 513.

Illinois.— Pittsburg, etc., R. Co. *v.* Powers, 74 Ill. 341; Chicago *v.* O'Brennan, 65 Ill. 160; Quincy Horse R., etc., Co. *v.* Omer, 101 Ill. App. 155; Chicago, etc., R. Co. *v.* Few, 15 Ill. App. 125.

Kansas.— Kansas City, etc., R. Co. *v.* Eagan, 64 Kan. 421, 67 Pac. 887; Kansas Pac. R. Co. *v.* Pointer, 9 Kan. 620.

Maryland.— Stockton *v.* Frey, 4 Gill 406, 45 Am. Dec. 138.

Massachusetts.— Shaw *v.* Boston, etc., R. Corp., 8 Gray 45.

Missouri.— Williams *v.* St. Louis, etc., R. Co., 123 Mo. 573, 27 S. W. 387; Mahaney *v.* St. Louis, etc., R. Co., 108 Mo. 191, 18 S. W. 895; Dayharsh *v.* Hannibal, etc., R. Co., 103 Mo. 570, 15 S. W. 554, 23 Am. St. Rep. 900; Stephens *v.* Hannibal, etc., R. Co., 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336; Sykes *v.* St. Louis, etc., R. Co., 88 Mo. App. 193. But see Winters *v.* Hannibal, etc., R. Co., 39 Mo. 468.

Pennsylvania.— Pennsylvania R. Co. *v.* Books, 57 Pa. St. 339, 98 Am. Dec. 229.

Tennessee.— Louisville, etc., R. Co. *v.* Gower, 85 Tenn. 465, 3 S. W. 824.

Texas.— Dreiss *v.* Friedrich, 57 Tex. 70; Gulf, etc., R. Co. *v.* Hamilton, (Civ. App. 1897) 42 S. W. 358. But see San Antonio, etc., R. Co. *v.* Robinson, 73 Tex. 277, 11 S. W. 327.

West Virginia.— Sesler *v.* Rolfe Coal, etc., Co., 51 W. Va. 318, 41 S. E. 216.

Wisconsin.— Crouse *v.* Chicago, etc., R. Co., 102 Wis. 196, 78 N. W. 446, 778; Kreuziger *v.* Chicago, etc., R. Co., 73 Wis. 158, 40 N. W. 657.

United States.— Pennsylvania Co. *v.* Roy, 102 U. S. 451, 26 L. ed. 141; Baltimore, etc., R. Co. *v.* Camp, 81 Fed. 807, 26 C. C. A. 626.

See 15 Cent. Dig. tit. "Damages," § 496.

Limitations of rule.— It has been held in one jurisdiction, that where one of the direct and proximate results flowing from the injury is to deprive the plaintiff of the capacity of meeting the obligations imposed upon him by law of supporting his family, evidence concerning his family was admissible, and should be considered by the jury in estimating the amount of damages. Youngblood *v.* South Carolina, etc., R. Co., 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824.

The fact that plaintiff is a widow has been held to be admissible as tending to show that whatever time was lost by disability was her own. Werner *v.* Chicago, etc., R. Co., 105 Wis. 300, 81 N. W. 416.

72. Joliet *v.* Conway, 119 Ill. 489, 10 N. E. 223; Kinsley *v.* Morse, 40 Kan. 577, 20 Pac. 217; Central Pass. R. Co. *v.* Kuhn, 86 Ky. 578, 6 S. W. 441, 9 Ky. L. Rep. 725, 9 Am. St. Rep. 309. See also Johns *v.* Charlotte, etc., R. Co., 39 S. C. 162, 17 S. E. 698, 39 Am. St. Rep. 709, 20 L. R. A. 520.

Where the verdict is not in excess of what the other evidence in the case would clearly warrant, it has been held that the court should not reverse because of the admission of such evidence even though an instruction to disregard it is not given. Moore *v.* Huntington, 31 W. Va. 842, 8 S. E. 512. See also Hewitt *v.* Flint, etc., R. Co., 67 Mich. 61, 34 N. W. 659.

On the other hand if no specific instructions are given as to the measure of damages, and the verdict in view of the facts, although not perhaps clearly excessive, is nevertheless at least very substantial, a mere instruction that the jury should not consider such evidence in fixing the amount of the verdict does not cure the error. Stephens *v.* Hannibal, etc., R. Co., 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336.

73. Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99; Zimmer *v.* Third Ave. R. Co., 36 N. Y. App. Div. 265, 55 N. Y. Suppl. 308; St. Louis, etc., R. Co. *v.* Farr, 56 Fed. 994, 6 C. C. A. 211. See also Redfield *v.* Redfield, 75 Iowa 435, 39 N. W. 688.

Where the disease is claimed to be the result of an injury, it may be shown that on a former trial of the same cause such result was not mentioned. Freeport *v.* Isbell, 93 Ill. 381; West Chicago St. R. Co. *v.* Dougherty, 89 Ill. App. 362.

74. Fuller *v.* Jackson, 92 Mich. 197, 52 N. W. 1075.

75. Bunting *v.* Hogsett, 139 Pa. St. 363, 21 Atl. 33, 23 Am. St. Rep. 192, 12 L. R. A. 268.

the purpose of estimating the damages,[76] unless the case justifies the imposition of exemplary damages;[77] and although he may show the nature of his business and the wages he commonly earned,[78] he cannot show that he has no other means of support than such labor, as this would in an indirect way bring his poverty before the jury.[79]

(6) Expectancy of Life — (a) Right to Show. Where the injury is such as to permanently diminish one's earning capacity, and will end only with his life or with his inability to labor on account of old age, it is clear that the expectancy of life should be considered in estimating the amount of damages sustained, and proper evidence thereof is admissible.[80] Nor is it necessary to confine such expectation to a particularly dangerous employment, where it is not shown that plaintiff will continue in such employment.[81] The admissibility of such evidence for the purpose of showing the length of time plaintiff is likely to suffer has, however, been denied.[82]

(b) Nature of Evidence — aa. *In General.* While various forms of life-tables are usually used for the purpose of assisting the jury in estimating the expecta-

76. *Alabama.*— Barbour County *v.* Horn, 48 Ala. 566.

California.— Malone *v.* Hawley, 46 Cal. 409; Shea *v.* Potrero, etc., R. Co., 44 Cal. 414.

Illinois.— Eagle Packet Co. *v.* Defries, 94 Ill. 598, 34 Am. Rep. 245; La Salle *v.* Thorndike, 7 Ill. App. 282; Warren *v.* Wright, 5 Ill. App. 429.

Indiana.— See Graves *v.* Thomas, 95 Ind. 361, 48 Am. Rep. 727, in which case, although there is some language derogatory to the text, yet inasmuch as it is not clear for just what purpose such evidence was admitted, the case cannot be said to sustain a contrary doctrine.

Kansas.— Parsons *v.* Lindsay, 26 Kan. 426; Kansas Pac. R. Co. *v.* Pointer, 9 Kan. 620; Ft. Scott, etc., R. Co. *v.* Lightburn, 9 Kan. App. 642, 58 Pac. 1033; Junction City *v.* Blades, 1 Kan. App. 85, 41 Pac. 677.

Michigan.— Van Dusen *v.* Letellier, 78 Mich. 492, 44 N. W. 572.

Mississippi.— Southern R. Co. *v.* McLellan, 80 Miss. 700, 32 So. 283.

New York.—Schwanzer *v.* Brooklyn Heights R. Co., 18 N. Y. App. Div. 205, 45 N. Y. Suppl. 889.

Texas.— Missouri Pac. R. Co. *v.* Lyde, 57 Tex. 505; Belton *v.* Lockett, (Civ. App. 1900) 57 S. W. 687; Trinity, etc., R. Co. *v.* O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389.

United States.— Pennsylvania Co. *v.* Roy, 102 U. S. 451, 26 L. ed. 141.

See 15 Cent. Dig. tit. "Damages," § 498.

Where the action is by a minor, evidence of the pecuniary condition of his parents is not admissible for the purpose of affecting the amount of damages (Baltimore, etc., R. Co. *v.* Shipley, 31 Md. 368; Vosburg *v.* Putney, 78 Wis. 84, 47 N. W. 99), although the occupation of the father and his means of support may be shown for the purpose of showing that the minor's position and reasonable expectations in life were such as would render a similar pursuit probable and necessary for a livelihood; and therefore a general objection to the admissibility of such evidence is properly overruled (Baltimore, etc., R. Co. *v.* Shipley, 31 Md. 368).

77. Beck *v.* Dowell, 111 Mo. 506, 20 S. W. 209, 33 Am. St. Rep. 547 [*affirming* 40 Mo. App. 71].

For admissibility of evidence concerning exemplary damages see *infra*, XIII, B, 3, a.

78. Missouri Pac. R. Co. *v.* Lyde, 57 Tex. 505. And see *infra*, XIII, B, 2, b, (I), (B), (10) *et seq.*

79. Van Dusen *v.* Letellier, 78 Mich. 492, 44 N. W. 572. And see Missouri, etc., R. Co. *v.* Hannig, 91 Tex. 347, 43 S. W. 508 [*reversing* (Civ. App. 1897) 41 S. W. 196].

80. Powell *v.* Augusta, etc., R. Co., 77 Ga. 192, 3 S. E. 757; Atlanta, etc., R. Co. *v.* Johnson, 66 Ga. 259; Knapp *v.* Sioux City, etc., R. Co., 71 Iowa 41, 32 N. W. 18.

In Texas the weight of authority is that such evidence is admissible where the injury is shown to be permanent (Gulf, etc., R. Co. *v.* Mangham, 95 Tex. 413, 67 S. W. 765; Missouri, etc., R. Co. *v.* Scarborough, 29 Tex. Civ. App. 194, 68 S. W. 196; Missouri, etc., R. Co. *v.* St. Clair, 21 Tex. Civ. App. 345, 51 S. W. 666; Missouri, etc., R. Co. *v.* McGlamory, (Civ. App. 1896) 34 S. W. 350; Missouri, etc., R. Co. *v.* Simmons, 12 Tex. Civ. App. 500, 33 S. W. 1096; Galveston, etc., R. Co. *v.* Cooper, 2 Tex. Civ. App. 42, 20 S. W. 990), although a few cases have held that such evidence is not admissible unless the injury has resulted in death or total disability (Texas Mexican R. Co. *v.* Douglass, 69 Tex. 694, 7 S. W. 77; St. Louis, etc., R. Co. *v.* Nelson, (Civ. App. 1899) 49 S. W. 710).

81. Louisville, etc., R. Co. *v.* Gordan, 72 S. W. 311, 24 Ky. L. Rep. 1819.

Where the injury is to plaintiff's hand, and his ability to prosecute his business is only partially affected thereby, his life expectancy cannot be shown. Honey Grove *v.* Lamaster, (Tex. Civ. App. 1899) 50 S. W. 1053.

82. Chicago, etc., R. Co. *v.* Johnson, 36 Ill. App. 564.

Where the plaintiff is a minor, the evidence as to his expectancy of life must be based on his actual age, and not on the age of majority,

tion of life,[83] they are not essential. The jury may make their estimate from the other evidence as to the age, health, habits, and physical condition of plaintiff.[84]

bb. *Mortality Tables.* Standard and recognized mortality tables[85] are usually held admissible where a proper foundation is laid for their introduction[86] and proper instruction given as to their use[87] as an aid to the jury in determining the life expectancy of an injured party and thereby estimating his damages when there is proper evidence of the permanency of the injury.[88] They are of course

although if there is no evidence of his emancipation there can be no recovery for the loss of earning prior to his majority. Swift *v.* Holoubek, 55 Nebr. 228, 75 N. W. 584.

83. See *infra*, note 85 *et seq.*

84. Deisen *v.* Chicago, etc., R. Co., 43 Minn. 454, 45 N. W. 864.

So evidence of the age of the plaintiff's mother is competent for the purpose of showing his expectancy of life. Missouri, etc., R. Co. *v.* Rose, (Tex. Civ. App. 1898) 49 S. W. 133.

An agent of life insurance for six months is not competent as an expert to testify on the expectation of life. Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391.

85. **The Carlisle tables** are perhaps more favored and relied upon by the courts than any of the other mortuary tables, inasmuch as, although they were made a century ago, they were based on statistics of the general population of two parishes of England, covering a period of about nine years, and not on selected lives; and in some jurisdictions it would seem that the court confines evidence of this nature to the Carlisle tables only. See Kerrigan *v.* Pennsylvania R. Co., 194 Pa. St. 98, 44 Atl. 1069; Steinbrunner *v.* Pittsburgh, etc., R. Co., 146 Pa. St. 504, 23 Atl. 239, 28 Am. St. Rep. 806. Although other courts admit other tables. See *infra*, this note. In the following cases Carlisle tables have been held admissible:

Georgia.— Northeastern R. Co. *v.* Chandler, 84 Ga. 37, 10 S. E. 586.

Indiana.— Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343.

Iowa.— Blair *v.* Madison County, 81 Iowa 313, 46 N. W. 1093; Chase *v.* Burlington, etc., R. Co., 76 Iowa 675, 39 N. W. 196; Knapp *v.* Sioux City, etc., R. Co., 71 Iowa 41, 32 N. W. 18; McDonald *v.* Chicago, etc., R. Co., 26 Iowa 124, 95 Am. Dec. 114; Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391.

Nebraska.— Lincoln *v.* Smith, 28 Nebr. 762, 45 N. W. 41.

Pennsylvania.—Steinbrunner *v.* Pittsburgh, etc., R. Co., 146 Pa. St. 504, 23 Atl. 239, 28 Am. St. Rep. 806 [*followed* in McCue *v.* Knoxville, 146 Pa. St. 580, 23 Atl. 439]. But see Rummele *v.* Allegheny Heating Co., (1888) 16 Atl. 78.

See 15 Cent. Dig. tit. "Damages," § 489.

The American mortality tables were admitted in Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34, 13 So. 130; Louisville, etc., R. Co. *v.* Mothershed, 97 Ala. 261, 12 So. 714; Richmond, etc., R. Co. *v.* Hissong, 97 Ala. 187, 13 So. 209; Mary Lee Coal, etc., Co. *v.* Chambliss, 97 Ala. 171, 11 So. 897; Birmingham Mineral R. Co. *v.* Wilmer, 97 Ala. 165, 12 So. 886; Greer *v.* Louisville, etc., R. Co., 94 Ky. 169, 21 S. W. 649, 14 Ky. L. Rep. 876, 42 Am. St. Rep. 345; Mississippi, etc., R. Co. *v.* Ayres, 16 Lea (Tenn.) 725.

Northampton tables were held admissible in Davis *v.* Standish, 26 Hun (N. Y.) 608; Sauter *v.* New York Cent., etc., R. Co., 6 Hun (N. Y.) 446.

Sufficient authentication of tables.— In at least one jurisdiction it is said that the admission in evidence of the Carlisle or any other similar tables for the purpose of showing the expectation of life shall be received upon judicial notice of their genuineness and authoritativeness, and that legal proof thereof was not required. Scheffler *v.* Minneapolis, etc., R. Co., 32 Minn. 518, 21 N. W. 711. In other jurisdictions, while it does not appear affirmatively in the reported decisions that the court would not take judicial notice of the authenticity of such tables, it has been held that they were sufficiently authenticated by being presented in the Encyclopedia Britannica (Haden *v.* Sioux City, etc., R. Co., 99 Iowa 735, 48 N. W. 733; Worden *v.* Humeston, etc., R. Co., 76 Iowa 310, 41 N. W. 26); in Johnson's New Universal Encyclopedia (Seagel *v.* Chicago, etc., R. Co., 83 Iowa 380, 49 N. W. 990; Gorman *v.* Minneapolis, etc., R. Co., 78 Iowa 509, 43 N. W. 303), or when printed in a law-book of general acceptance and authority in the courts of the state where offered (Sellars *v.* Foster, 27 Nebr. 118, 42 N. W. 907). So too a showing that the table is used by all life-insurance companies as a basis for life expectancy is sufficient (Gulf, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1894) 26 S. W. 644), and if not properly authenticated the error is not prejudicial where the table is more favorable to the party excepting than a properly authenticated table (Sellars *v.* Foster, 27 Nebr. 118, 42 N. W. 907).

86. Thus mortality tables are not proper evidence unless evidence has been introduced showing plaintiff's incapacity to earn money (Macon, etc., R. Co. *v.* Moore, 99 Ga. 229, 25 S. E. 460), and unless plaintiff's age has been proved (Atlantic, etc., R. Co. *v.* Beauchamp, 93 Ga. 6, 19 S. E. 24).

87. See *infra*, XIV, B, 3, b, (II), (D).

88. *Georgia.*— Central R. Co. *v.* Richards, 62 Ga. 306.

Illinois.— Joliet *v.* Blower, 155 Ill. 414, 40 N. E. 619 [*affirming* 49 Ill. App. 464].

Iowa.—Stomne *v.* Hanford Produce Co., 108 Iowa 137, 78 N. W. 841.

Michigan.— Haines *v.* Lake Shore, etc., R. Co., 129 Mich. 475, 89 N. W. 349.

inadmissible in the absence of evidence tending to show that the injuries complained of are permanent.[89]

(7) Expenses Incurred. As expenses necessarily or naturally following an injury are a legitimate item of damages,[90] it follows that under proper averments[91] evidence tending to accurately show the actual or reasonable amount of such expenditures is ordinarily admissible;[92] and while it is for the jury to determine whether or not future attendance will be required, evidence tending to show the value of such services is admissible,[93] and where the action is brought by a parent for the loss of a minor's services, and for expenses incurred in caring for him, evidence of the extent of the injury is admissible to show the extent of the trouble and expenses probably incurred.[94]

(8) Exclamations of Pain and Suffering. Declarations or exclamations of pain or suffering caused by an injury when made at the time of the happening thereof or so soon thereafter as to be considered part of the *res gestæ* are of course admissible as such.[95] It is not, however, necessary that they fall within the above rule of evidence to be admissible. All such declarations and exclamations of present pain or suffering as would ordinarily and probably be caused by such injury are admissible as original evidence[96] when made under ordinary circum-

Pennsylvania.— Campbell *v.* York, 172 Pa. St. 205, 33 Atl. 879.

Texas.— San Antonio, etc., R. Co. *v.* Moore, (Civ. App. 1903) 72 S. W. 226; Galveston, etc., R. Co. *v.* Mortson, (Civ. App. 1902) 71 S. W. 770; Galveston, etc., R. Co. *v.* Hubbard, (Civ. App. 1902) 70 S. W. 112; Gulf, etc., R. Co. *v.* Mangham, 29 Tex. Civ. App. 486, 69 S. W. 80; Galveston, etc., R. Co. *v.* Cooper, 2 Tex. Civ. App. 42, 20 S. W. 990.

United States.— Whelan *v.* New York, etc., R. Co., 38 Fed. 15.

See 15 Cent. Dig. tit. "Damages," § 489.

89. Foster *v.* Bellaire, 127 Mich. 13, 86 N. W. 383; Mott *v.* Detroit, etc., R. Co., 120 Mich. 127, 79 N. W. 3.

Although it must be admitted that there is little uniformity among the courts as to the sufficiency of evidence of permanency of the injury to render the tables of computations admissible, from some cases it would seem that if the evidence would warrant a finding that the injury was permanent they are admissible (Collins Park, etc., R. Co. *v.* Ware, 112 Ga. 663, 37 S. E. 975; Ronn *v.* Des Moines, 78 Iowa 63, 42 N. W. 582. But see Leach *v.* Detroit, etc., R. Co., 125 Mich. 373, 84 N. W. 316); and they have been admitted to be used or disregarded by the jury according to its conclusion as to the question of permanency (Richmond, etc., R. Co. *v.* Garner, 91 Ga. 27, 16 S. E. 110; Wilkins *v.* Flint, 128 Mich. 262, 87 N. W. 195).

90. See *supra*, VII, I.

91. See *supra*, XII, E, 2, c, (II), (F); XII, E, 3, a.

92. Gumb *v.* Twenty-Third St. R. Co., 58 N. Y. Super. Ct. 1, 9 N. Y. Suppl. 316; International, etc., R. Co. *v.* Brett, 61 Tex. 483; San Antonio *v.* Porter, 24 Tex. Civ. App. 444, 59 S. W. 922. Such evidence may be given by physicians themselves (Atchison *v.* Rose, 43 Kan. 605, 23 Pac. 561), or the bills presented by those furnishing medicines (Missouri Pac. R. Co. *v.* Palmer, 55 Nebr. 559, 76 N. W. 169); and while evidence of the reasonableness of the amount paid is ordinarily necessary to support a recovery yet evidence of the amount actually paid is admissible (Clarke *v.* Westcott, 2 N. Y. App. Div. 503, 37 N. Y. Suppl. 1111).

If the action is brought by a married woman evidence of the value of medical services is admissible, where it is shown that credit was extended to her solely. Vergin *v.* Saginaw, 125 Mich. 499, 84 N. W. 1075.

Where the injury is such that the services of a trained nurse will be necessary for some time in the future, testimony of a physician as to the expenses of hiring such nurse is admissible. Turner *v.* Boston, etc., R. Co., 158 Mass. 261, 33 N. E. 520. So too the fact that the plaintiff prior to the accident which resulted in a severe injury to his arm had lost his other arm may be shown for the purpose of proving that the services of a nurse were necessary. Baker *v.* Hagey, 177 Pa. St. 128, 35 Atl. 705, 55 Am. St. Rep. 712.

93. Kendall *v.* Albia, 73 Iowa 241, 34 N. W. 833.

94. Arnold *v.* Norton, 25 Conn. 92.

95. Harris *v.* Detroit City R. Co., 76 Mich. 227, 42 N. W. 1111; Houston, etc., R. Co. *v.* Shafer, 54 Tex. 641.

96. *Arkansas.*— St. Louis, etc., R. Co. *v.* Murray, 55 Ark. 248, 18 S. W. 50, 29 Am. St. Rep. 32, 16 L. R. A. 787.

Dakota.— Sanders *v.* Reister, 1 Dak. 151, 46 N. W. 680.

Illinois.— Bloomington *v.* Osterle, 139 Ill. 120, 28 N. E. 1068.

Indiana.— Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343; Jackson County *v.* Nichols, 139 Ind. 611, 38 N. E. 526; Cleveland, etc., R. Co. *v.* Prewitt, 134 Ind. 557, 33 N. E. 367; Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Carthage Turnpike Co. *v.* Andrews, 102 Ind. 138, 1 N. E. 364, 52 Am. Rep. 653; Elkhart *v.* Ritter, 66 Ind. 136; Island Coal Co. *v.* Risher, 13 Ind. App. 98, 40

stances, although it be a considerable time after the injury; declarations of past pain and suffering[97] or such declarations when made after the controversy has arisen or suit has been brought[98] are not ordinarily admissible.

(9) Statements of Injured Party to Physician. While mere narratives of past events concerning the injury[99] or statements of the injured party as to the cause of his condition[1] cannot be shown, although made to a physician, as such, the rule is well settled that a physician or attendant may testify to the injured party's statement as to his symptoms, ills, and the locality and character of his pain, when made for the purpose of medical advice and treatment, as such statements are made with a view to be being acted on in a matter of grave personal concern, in relation to which the party injured has a strong and direct interest to adhere to the truth.[2] When, however, the statements to the physician are made after the suit is brought, considerations arise destroying the force and effect of the reasons on which such evidence is admissible.[3]

N. E. 158; Anderson *v.* Citizens' St. R. Co., 12 Ind. App. 194, 38 N. E. 1109; Sturgeon *v.* Sturgeon, 4 Ind. App. 232, 30 N. E. 805.

Iowa.— Blair *v.* Madison County, 81 Iowa 313, 46 N. W. 1093.

Maine.— Kennard *v.* Burton, 25 Me. 39, 43 Am. Dec. 249.

Michigan.— Beath *v.* Rapid R. Co., 119 Mich. 512, 78 N. W. 537; Lacas *v.* Detroit City R. Co., 92 Mich. 412, 52 N. W. 745; Girard *v.* Kalamazoo, 92 Mich. 610, 52 N. W. 1021.

Minnesota.—Firkins *v.* Chicago Great Western R. Co., 61 Minn. 31, 63 N. W. 172; Holly *v.* Bennett, 46 Minn. 386, 49 N. W. 189.

Missouri.— Clark *v.* Hill, 69 Mo. App. 541.

Nebraska.— Omaha St. R. Co. *v.* Emminger, 57 Nebr. 240, 77 N. W. 675.

North Dakota.— Bennett *v.* Northern Pac. R. Co., 2 N. D. 112, 49 N. W. 708, 13 L. R. A. 465.

Texas.— Texas, etc., R. Co. *v.* Lee, (Civ. App. 1899) 51 S. W. 351.

Wisconsin.— Bridge *v.* Oshkosh, 71 Wis. 363, 37 N. W. 409, 67 Wis. 195, 29 N. W. 910.

See 15 Cent. Dig. tit. "Damages," § 485.

In New York, prior to the time when the parties were allowed to be witnesses, mere expressions and complaint of pain and suffering were admissible. Caldwell *v.* Murphy, 11 N. Y. 416 [*affirming* 1 Duer 233, and *approved* in De Long *v.* Delaware, etc., Co., 37 Hun 282]. Since the adoption of the code, evidence of exclamations, screams, or groans indicative of pain made by the party injured is admissible (Hagenlocher *v.* Coney Island, etc., R. Co., 99 N. Y. 136, 1 N. E. 536); but mere statements of pain not made to a physician and unaccompanied by groans or exclamations have been held inadmissible (Roche *v.* Brooklyn City, etc., R. Co., 105 N. Y. 294, 11 N. E. 630, 59 Am. Rep. 506).

97. Winter *v.* Central Iowa R. Co., 74 Iowa 448, 38 N. W. 154; Ferguson *v.* Davis County, 57 Iowa 601, 10 N. W. 906; Lacas *v.* Detroit City R. Co., 92 Mich. 412, 52 N. W. 745; Laughlin *v.* Grand Rapids St. R. Co., 80 Mich. 154, 44 N. W. 1049.

98. Mott *v.* Detroit, etc., R. Co., 120 Mich. 127, 79 N. W. 3; Laughlin *v.* Grand Rapids St. R. Co., 80 Mich. 154, 44 N. W. 1049. But see Murphy *v.* New York Cent. R. Co., 66 Barb. (N. Y.) 125.

Exclamations of pain made by a child of tender years in his own home and not in the presence of any medical attendant, and under circumstances indicating that they are the natural and ordinary exclamations of pain, are admissible, although made during the pendency of the action, as the reason for the exclusion of such evidence is clearly inapplicable. Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616.

99. Birmingham Union R. Co. *v.* Hale, 90 Ala. 8, 8 So. 142, 24 Am. St. Rep. 748.

1. Illinois Cent. R. Co. *v.* Sutton, 42 Ill. 438, 92 Am. Dec. 81.

2. *Alabama.*— Birmingham Union R. Co. *v.* Hale, 90 Ala. 8, 8 So. 142, 24 Am. St. Rep. 748.

Connecticut.— Wilson *v.* Granby, 47 Conn. 59, 36 Am. Rep. 51.

Indiana.— Wabash County *v.* Pearson, 120 Ind. 426, 22 N. E. 134, 16 Am. St. Rep. 325; Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

Iowa.— Aryman *v.* Marshalltown, 90 Iowa 350, 57 N. W. 867.

Massachusetts.— Fay *v.* Harlan, 128 Mass. 244, 35 Am. Rep. 372.

Minnesota.— Brusch *v.* St. Paul City R. Co., 52 Minn. 512, 55 N. W. 57.

New York.— Matteson *v.* New York Cent. R. Co., 62 Barb. 364.

Texas.— Pullman Palace-Car Co. *v.* Smith, 79 Tex. 468, 14 S. W. 993, 23 Am. St. Rep. 356, 13 L. R. A. 215.

Wisconsin.— Block *v.* Milwaukee St. R. Co., 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365; Bridge *v.* Oshkosh, 67 Wis. 195, 29 N. W. 910.

United States.— Northern Pac. R. Co. *v.* Urlin, 158 U. S. 271, 15 S. Ct. 840, 39 L. ed. 977.

See 15 Cent. Dig. tit. "Damages," § 486.

3. It has been held that if the statements are made for the purpose of receiving medical advice, the evidence is competent, notwithstanding an action has been contemplated or instituted, although this may be shown as affecting the weight thereof (Cleveland,

(10) Impairment of Earning Capacity — (a) In General. All evidence tending to show the impairment or destruction of the plaintiff's earning capacity is pertinent upon the question of damages and ordinarily admissible.[4]

(b) Incapacity to Attend to Business — aa. *In General.* For this purpose evidence of his general earning capacity in his vocation, the wages he has been previously earning, the nature and extent of his business, and the consequent loss arising from his total or partial inability to pursue the same in his accustomed manner is admissible,[5] either when offered by himself or by others in a position

etc., R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312; Hatch *v.* Fuller, 131 Mass. 574; Barber *v.* Merriam, 11 Allen (Mass.) 322. See also Stone *v.* Chicago, etc., R. Co., 88 Wis. 98, 59 N. W. 457; Union Pac. Co. *v.* Novak, 61 Fed. 573, 9 C. C. A. 629); but where made to a physician with a view of being testified to by him, such statements if admitted would be to allow a party to give in evidence his declarations made, not under oath, to bolster up and confirm his own statements, and are usually held inadmissible (Jones *v.* Portland, 88 Mich. 598, 50 N. W. 731, 16 L. R. A. 437; Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321; Davidson *v.* Cornell, 132 N. Y. 228, 30 N. E. 573 [*reversing* 10 N. Y. Suppl. 521]; Abbot *v.* Heath, 84 Wis. 314, 54 N. W. 574; Stewart *v.* Everts, 76 Wis. 35, 44 N. W. 1092, 20 Am. St. Rep. 17), although in at least one jurisdiction such circumstances affect the credibility only, and not the competency of such testimony (Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908. And see *dicta* in Cleveland, etc., R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312).

Statements as distinguished from exclamations of suffering.— Some cases appear to draw a distinction between exclamations of the patient of pain and suffering when undergoing an examination by a physician for the purpose of qualifying him to testify upon the trial, and similar statements made by the patient to the physician. Such distinction is drawn by the court in Zingrebe *v.* Union R. Co., 56 N. Y. App. Div. 555, 67 N. Y. Suppl. 554 [*distinguishing* Davidson *v.* Cornell, 132 N. Y. 228, 30 N. E. 573]. See also Matteson *v.* New York Cent. R. Co., 35 N. Y. 487, 91 Am. Dec. 67.

4. Macon Consol. St. R. Co. *v.* Barnes, 113 Ga. 212, 38 S. E. 756; Pence *v.* Wabash R. Co., 116 Iowa 279, 90 N. W. 59; Wilkie *v.* Raleigh, etc., R. Co., 127 N. C. 203, 37 S. E. 204; Wallace *v.* Pennsylvania R. Co., 195 Pa. St. 127, 45 Atl. 685, 52 L. R. A. 33.

Expert testimony as to injuries to the mind is admissible as bearing upon the question of the earning capacity, in an action by a father for personal injuries to his son. Birkel *v.* Chandler, 26 Wash. 241, 66 Pac. 406.

One's personal habits and industrious disposition may be shown for the purpose of showing his probable earnings (Simonson *v.* Chicago, etc., R. Co., 49 Iowa 87); but the evidence should be confined to one's earning capacity, and not to the amount he saves per month (Louisville, etc., R. Co. *v.* Woods, 115 Ala. 527, 22 So. 33).

Samples of plaintiff's former work are admissible for the purpose of showing her skill in such work, and as laying a foundation for evidence that because of the injury her capacity to do such work was destroyed. Youngstown Bridge Co. *v.* Barnes, 98 Tenn. 401, 39 S. W. 714.

5. *Connecticut.*—Finken *v.* Elm City Brass Co., 73 Conn. 423, 47 Atl. 670.

District of Columbia.— Prindle *v.* Campbell, 7 Mackey 598.

Georgia.—Atlanta Consol. St. R. Co. *v.* Bates, 103 Ga. 333, 30 S. E. 41; Broyles *v.* Prisock, 97 Ga. 643, 25 S. E. 389; Atlanta, etc., R. Co. *v.* Johnson, 66 Ga. 259.

Illinois.— Illinois Steel Co. *v.* Ryska, 200 Ill. 280, 65 N. E. 734; Weber Wagon Co. *v.* Kehl, 139 Ill. 644, 29 N. E. 714; Elgin *v.* Anderson, 89 Ill. App. 527; Kankakee *v.* Steinbach, 89 Ill. App. 513.

Indiana.— Louisville, etc., R. Co. *v.* Frawley, 110 Ind. 18, 9 N. E. 594; Elkhart *v.* Ritter, 66 Ind. 136.

Iowa.— Keyes *v.* Cedar Falls, 107 Iowa 509, 78 N. W. 227; Baxter *v.* Chicago, etc., R. Co., 87 Iowa 488, 54 N. W. 350; Kendall *v.* Albia, 73 Iowa 241, 34 N. W. 833; Kline *v.* Kansas City, etc., R. Co., 50 Iowa 656; Hunt *v.* Chicago, etc., R. Co., 26 Iowa 363.

Kansas.— Chicago, etc., R. Co. *v.* Scheinkoenig, 62 Kan. 57, 61 Pac. 414.

Kentucky.— Louisville, etc., R. Co. *v.* Turner, 12 Ky. L. Rep. 606.

Massachusetts.—O'Brien *v.* Look, 171 Mass. 36, 50 N. E. 458; Murdock *v.* New York, etc., Dispatch Express Co., 167 Mass. 549, 46 N. E. 57; Ballou *v.* Farnum, 11 Allen 73.

Michigan.— Hart *v.* New Haven, 130 Mich. 181, 89 N. W. 677; Sias *v.* Reed City, 103 Mich. 312, 61 N. W. 502; Van Duzen *v.* Letellier, 78 Mich. 492, 44 N. W. 572; Woodbury *v.* Owosso, 64 Mich. 239, 31 N. W. 130; Grand Rapids, etc., R. Co. *v.* Martin, 41 Mich. 667, 3 N. W. 173; Allison *v.* Chandler, 11 Mich. 542.

Minnesota.— Dahlberg *v.* Minneapolis, etc., R. Co., 32 Minn. 404, 21 N. W. 545, 50 Am. Rep. 585.

Missouri.— Hayes *v.* St. Louis R. Co., 15 Mo. App. 584.

Nebraska.— Lincoln *v.* Beckman, 23 Nebr. 677, 37 N. W. 593.

New Hampshire.— Taylor *v.* Dustin, 43 N. H. 493.

New Jersey.— East Jersey Water Co. *v.* Bigelow, 60 N. J. L. 201, 38 Atl. 621; New

to know, not as furnishing an arbitrary measure of damages, but as a guide or assistance in enabling the jury to exercise a sound and just discretion in determining the proper amount; nor does the fact that because of the injury plaintiff may engage in intellectual pursuits, which may ultimately prove more remunerative than the labor in which he was engaged, render such evidence immaterial.[6] And he may show that he has not sufficient education to pursue a clerical vocation.[7] So the average earnings in plaintiff's regular employment may be shown, although at the time of the injury he was temporarily engaged in other work;[8] but evidence of his previous earnings in the aggregate should not be received, where they result in part from the use of his capital.[9] So evidence of wages paid for a certain kind of employment is not admissible, where the plaintiff has not followed such employment for a considerable length of time,[10] and there is no reason-

Jersey Express Co. *v.* Nichols, 33 N. J. L. 434, 97 Am. Dec. 722.

New York.— Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622; Beisiegel *v.* New York Cent. R. Co., 40 N. Y. 9; Thomas *v.* Union R. Co., 18 N. Y. App. Div. 185, 45 N. Y. Suppl. 920; Grinnell *v.* Taylor, 85 Hun 85, 32 N. Y. Suppl. 684; Grant *v.* Brooklyn, 41 Barb. 381; Clifford *v.* Dam, 44 N. Y. Super. Ct. 391; Corrigan *v.* Dry Dock, etc., R. Co., 14 Daly 120; Markowitz *v.* Metropolitan St. R. Co., 31 Misc. 175, 63 N. Y. Suppl. 961; Griffith *v.* Utica, etc., R. Co., 17 N. Y. Suppl. 692; Lynch *v.* Brooklyn City R. Co., 5 N. Y. Suppl. 311; Lincoln *v.* Saratoga, etc., R. Co., 23 Wend. 425.

North Carolina.—Wallace *v.* Western North Carolina R. Co., 104 N. C. 442, 10 S. E. 552.

Pennsylvania.— Hanover R. Co. *v.* Coyle, 55 Pa. St. 396.

Rhode Island.— Simmons *v.* Brown, 5 R. I. 299, 73 Am. Dec. 66.

South Dakota.— Olson *v.* Burlington, etc., R. Co., 12 S. D. 326, 81 N. W. 634.

Texas.— Ft. Worth, etc., R. Co. *v.* Measles, 81 Tex. 474, 17 S. W. 124; Hildenbrand *v.* Marshall, 30 Tex. Civ. App. 135, 69 S. W. 492; International, etc., R. Co. *v.* Locke, (Civ. App. 1901) 67 S. W. 1082; San Antonio, etc., R. Co. *v.* Skidmore, 27 Tex. Civ. App. 329, 65 S. W. 215; Gulf, etc., R. Co. *v.* Bell, 24 Tex. Civ. App. 579, 58 S. W. 614; Galveston, etc., R. Co. *v.* Cooper, 2 Tex. Civ. App. 42, 20 S. W. 990.

Vermont.— Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287.

United States.— Nebraska *v.* Campbell, 2 Black 590, 17 L. ed. 271; Wade *v.* Leroy, 20 How. 34, 15 L. ed. 813; Illinois Cent. R. Co. *v.* Davidson, 76 Fed. 517, 22 C. C. A. 306; Wightman *v.* Providence, 29 Fed. Cas. No. 17,630, 1 Cliff. 524.

See 15 Cent. Dig. tit. "Damages," § 490.

A receipt showing his previous salary per month is admissible. Waldie *v.* Brooklyn Heights R. Co., 78 N. Y. App. Div. 557, 79 N. Y. Suppl. 922.

Employment for two years in one vocation is sufficient on which to estimate one's earning capacity. Illinois Steel Co. *v.* Ostrowski, 194 Ill. 376, 62 N. E. 822 [*affirming* 93 Ill. App. 57].

Evidence tending to show that plaintiff's wages are in part charity since the injury is admissible as tending to show diminution of his actual earning capacity. Gulf, etc., R. Co. *v.* Silliphant, 70 Tex. 623, 8 S. W. 673.

Expert testimony of injury to the mind is admissible as bearing on the question of affecting one's earning capacity. Birkel *v.* Chandler, 26 Wash. 241, 66 Pac. 406.

Evidence that a child has no property or source of income, when given in connection with proof of the wages current in the locality, is relevant and admissible upon the question of the impairment of such child's earning capacity. Jeffries *v.* Seaboard Air Line R. Co., 129 N. C. 236, 39 S. E. 836.

If plaintiff has no fixed salary, but has been working on commission, evidence of his average yearly earnings is admissible. Paul *v.* Omaha, etc., R. Co., 82 Mo. App. 500. See also Illinois Cent. R. Co. *v.* Davidson, 76 Fed. 517, 22 C. C. A. 306. So too evidence as to the amount earned by the plaintiff the year preceding and the year after the injury is admissible. Chicago, etc., R. Co. *v.* Meech, 163 Ill. 305, 45 N. E. 290. And see Symons *v.* Metropolitan St. R. Co., 27 Misc. (N. Y.) 502, 58 N. Y. Suppl. 327.

The fact that plaintiff has never actually worked for others does not preclude evidence as to the market value of his services in the particular business in which he is employed. Harmon *v.* Old Colony R. Co., 168 Mass. 377, 47 N. E. 100.

The injured party himself may testify as to such matters. Central R. Co. *v.* Coggin, 73 Ga. 689.

The testimony of a fellow workman is relevant for this purpose. Texas, etc., R. Co. *v.* Volk, 151 U. S. 73, 14 S. Ct. 239, 38 L. ed. 78.

6. Ostrander *v.* Lansing, 115 Mich. 224, 73 N. W. 110.

7. Helton *v.* Alabama Midland R. Co., 97 Ala. 275, 12 So. 276. See also McCoy *v.* Milwaukee, etc., R. Co., 88 Wis. 56, 59 N. W. 453.

8. Galesburg *v.* Hall, 45 Ill. App. 290. And see Missouri, etc., R. Co. *v.* St. Clair, 21 Tex. Civ. App. 345, 51 S. W. 666.

9. Hewlett *v.* Brooklyn Heights R. Co., 63 N. Y. App. Div. 423, 71 N. Y. Suppl. 531; Johnson *v.* Manhattan R. Co., 52 Hun (N. Y.) 111, 4 N. Y. Suppl. 848.

10. West Chicago R. Co. *v.* Maday, 188 Ill. 308, 58 N. E. 933 [*affirming* 88 Ill. App. 49] (where plaintiff did not follow a former em-

able certainty of his being able to return to such former employment,[11] although if such employment was of a nature that he could in all probability return to it, evidence thereof would seem to be admissible, although an intent to return is not shown.[12] So too opinions of witnesses as to what plaintiff would be capable of earning in vocations in which he has never been employed are inadmissible.[13]

bb. *To Professional Work.* Where the plaintiff is engaged in professional pursuits, proof of his earnings in that capacity before the injury and the effect thereof upon his ability to continue his profession, or to do so as profitably as before, is admissible;[14] but as the value of a professional man's time depends to a great extent upon his individual exertions, such evidence should be confined to what he himself has earned, and not to what members of his profession generally are able to earn.[15] Hence it may be shown that in connection with his practice he was a contributor to various professional journals,[16] while on the other hand defendant may show that his practice was an unlawful one and that his professional reputation was bad.[17]

(c) Effect Upon Probable Increase of Earnings — aa. *As Dependent Upon Personal Fitness.* Where a person has fitted himself for, and has the capacity to earn more money in another employment or calling than he is at the time of the injury receiving, evidence of such fact is admissible.[18]

bb. *As Dependent Upon Promotion.* Where by virtue of the contract of employment plaintiff will, if found satisfactory, be promoted or given an increase of salary within a stipulated or reasonable time, this fact is admissible on the question of damages;[19] but where an employee can only show that when a vacancy occurs the place is usually filled by a faithful subordinate, and that he had at the time of the injury such chance of promotion, the evidence is generally held to be but problematical and uncertain and is inadmissible.[20]

(11) Previous and Subsequent Physical Condition. Evidence of the conduct, general health, and physical condition of the plaintiff both before[21] and

ployment for five years before the injury); Hubbard *v.* Mason City, 60 Iowa 400, 14 N. W. 772 (where plaintiff had not been in such employment for two years).

11. Houston, etc., R. Co. *v.* Gee, 27 Tex. Civ. App. 414, 66 S. W. 78.

12. Peterson *v.* Seattle Traction Co., 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586. See also Grimmelman *v.* Union Pac. R. Co., 101 Iowa 74, 70 N. W. 90.

13. Atchison, etc., R. Co. *v.* Chance, 57 Kan. 40, 45 Pac. 60.

14. *District of Columbia.*— Woodbury *v.* District of Columbia, 5 Mackey 127.

Indiana.— Logansport *v.* Justice, 74 Ind. 378, 39 Am. Rep. 79; Indianapolis *v.* Gaston, 58 Ind. 224.

Iowa.— Stafford *v.* Oskaloosa, 64 Iowa 251, 20 N. W. 174.

Missouri.— Grivcaud *v.* St. Louis Cable, etc., R. Co., 33 Mo. App. 458.

New Jersey.— New Jersey Express Co. *v.* Nichols, 32 N. J. L. 166.

New York.— Nash *v.* Sharpe, 19 Hun 365. See 15 Cent. Dig. tit. "Damages," § 490.

15. Turner *v.* Great Northern R. Co., 15 Wash. 213, 46 Pac. 243, 55 Am. St. Rep. 883. And see St. Louis, etc., R. Co. *v.* Ball, 28 Tex. Civ. App. 287, 66 S. W. 879.

A physician's returns to the assessor in pursuance of a statute requiring an inventory under oath of all one's property, including debts due, is not admissible to prove the physician's income from his professional practice in former years, as this evidence could not be said to have any particular bearing upon what his future earnings might have been. Nelson *v.* Boston, etc., R. Co., 155 Mass. 356, 29 N. E. 586.

16. District of Columbia *v.* Woodbury, 136 U. S. 450, 10 S. Ct. 990, 34 L. ed. 472.

17. Jacques *v.* Bridgeport Horse R. Co., 41 Conn. 61, 19 Am. Rep. 483.

18. Chicago *v.* Edson, 43 Ill. App. 417; Rayburn *v.* Central Iowa R. Co., 74 Iowa 637, 35 N. W. 606, 38 N. W. 520. But see Omaha, etc., R. Co. *v.* Ryburn, 40 Nebr. 87, 58 N. W. 541.

19. Bryant *v.* Omaha, etc., R., etc., Co., 98 Iowa 483, 67 N. W. 392.

20. Richmond, etc., R. Co. *v.* Allison, 86 Ga. 145, 12 S. E. 352, 11 L. R. A. 43 (holding that this was especially true where the promotions depended upon, and were controlled to some extent by, political considerations); Chase *v.* Burlington, etc., R. Co., 76 Iowa 675, 39 N. W. 196 (holding that this was true, at least where it was not shown that the injured party was in a direct line of promotion, and whether he need show more than that *quære*); Brown *v.* Chicago, etc., R. Co., 64 Iowa 652, 21 N. W. 193; Richmond, etc., R. Co. *v.* Elliott, 149 U. S. 266, 13 S. Ct. 837, 37 L. ed. 728.

21. *Illinois.*— Warren *v.* Wright, 103 Ill. 298.

Michigan.— Lammiman *v.* Detroit Citizens' St. R. Co., 112 Mich. 602, 71 N. W. 153;

after[22] the infliction of an injury, or a comparison of one's health before and after such time is admissible as tending to prove the extent, nature, and probable effects of the injury;[23] provided of course a sufficient relationship is shown between the subsequent condition and the injury.[24]

(12) To Show Mental Suffering. Inasmuch as a party is a competent witness to testify to his physical sufferings there would seem to be no reason why he may not also give affirmative evidence of his mental anguish as well,[25] although it has been held that this item of damage is a subject of inference to be drawn by the jury and not of direct proof.[26]

(13) To Show Permanency of Injury. Evidence of the condition of plaintiff both before and after the injury has a direct bearing upon the probable permanency of the injury,[27] and where there is other evidence that the injury is permanent, testimony concerning plaintiff's earning capacity before and after the injury may be shown for this purpose.[28] So too testimony of a physician as

Gardner *v.* Detroit St. R. Co., 99 Mich. 182, 58 N. W. 49; Dotton *v.* Albion Common Council, 57 Mich. 575, 24 N. W. 786.

Minnesota.— Isherwood *v.* H. L. Jenkins Lumber Co., 87 Minn. 388, 92 N. W. 230.

Missouri.— Reardon *v.* Missouri Pac. R. Co., 114 Mo. 384, 21 S. W. 731.

New York.—Loudoun *v.* Eighth Ave. R. Co., 16 N. Y. App. Div. 152, 44 N. Y. Suppl. 742.

Wisconsin.— Heddles *v.* Chicago, etc., R. Co., 77 Wis. 228, 46 N. W. 115, 20 Am. St. Rep. 106.

22. *Illinois.*— North Chicago, etc., R. Co. *v.* Gillow, 166 Ill. 444, 46 N. E. 1082 [*affirming* 64 Ill. App. 576].

Indiana.— Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 414, 61 N. E. 936; Terre Haute, etc., R. Co. *v.* Jackson, 81 Ind. 19.

Iowa.— Pringle *v.* Chicago, etc., R. Co., 64 Iowa 613, 21 N. W. 108.

Massachusetts.— Roswell *v.* Leslie, 133 Mass. 589.

Michigan.— Williams *v.* Grand Rapids, 53 Mich. 271, 18 N. W. 811.

Missouri.— Squires *v.* Chillicothe, 89 Mo. 226, 1 S. W. 23.

Wisconsin.— Block *v.* Milwaukee St. R. Co., 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365.

See 15 Cent. Dig. tit. "Damages," § 480.

That a comparison of one's ability to perform his usual work after an injury with his ability before the injury is competent and admissible in showing the extent of the injury see the following cases:

California.— Healy *v.* Visalia, etc., R. Co., 101 Cal. 585, 36 Pac. 125.

Iowa.— Winter *v.* Central Iowa R. Co., 80 Iowa 443, 45 N. W. 737.

Michigan.— McKormick *v.* West Bay City, 110 Mich. 265, 68 N. W. 148.

Texas.— Missouri, etc., R. Co. *v.* Sledge, (Civ. App. 1895) 30 S. W. 1102; Fordyce *v.* Moore, (Civ. App. 1893) 22 S. W. 235.

Wisconsin.— Stutz *v.* Chicago, etc., R. Co., 73 Wis. 147, 40 N. W. 653, 9 Am. St. Rep. 769.

See 15 Cent. Dig. tit. "Damages," § 480.

23. *Alabama.*— Alabama, etc., R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65.

Illinois.— Chicago Terminal Transfer R. Co. *v.* Kotoski, 199 Ill. 383, 65 N. E. 350; West Chicago St. R. Co. *v.* Carr, 170 Ill. 478, 48 N. E. 992.

Indiana.— Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218.

Missouri.— Hall *v.* St. Joseph Water Co., 48 Mo. App. 356.

Texas.— Gulf, etc., R. Co. *v.* Moore, 28 Tex. Civ. App. 603, 68 S. W. 559; Galveston, etc., R. Co. *v.* Goodwin, (Civ. App. 1894) 26 S. W. 1007.

Wisconsin.— Wilber *v.* Follansbee, 97 Wis. 577, 72 N. W. 741, 73 N. W. 559; King *v.* Oshkosh, 75 Wis. 517, 44 N. W. 745; Bridge *v.* Oshkosh, 71 Wis. 363, 37 N. W. 409.

See 15 Cent. Dig. tit. "Damages," § 480.

Evidence of the plaintiff's weight before and after the accident is upon the same theory admissible. Quinn *v.* O'Keefe, 9 N. Y. App. Div. 68, 41 N. Y. Suppl. 116.

24. And evidence of this nature may be properly permitted to go to the jury, to be considered by them in estimating the damages, if they determine that the subsequent impairment of the plaintiff's physical condition resulted from the injury. Armstrong *v.* Ackley, 71 Iowa 76, 32 N. W. 180; Baltimore City Pass. R. Co. *v.* Baer, 90 Md. 97, 44 Atl. 992. So too plaintiff may make a comparison of his health before and after the injury, although his evidence shows that he is suffering from troubles other than those arising from the injury, as the latter fact affects the weight only of his testimony and not its competency. Turner *v.* Ridgeway Tp., 105 Mich. 409, 63 N. W. 406. See *infra*, XIII, C, 2, b, (II), (B), (1).

25. Missouri, etc., R. Co. *v.* Miller, 25 Tex. Civ. App. 460, 61 S. W. 978.

26. City Nat. Bank *v.* Jeffries, 73 Ala. 183. And *compare* Trinity, etc., R. Co. *v.* O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389.

27. Powell *v.* Augusta, etc., R. Co., 77 Ga. 192, 3 S. E. 757.

That plaintiff suffered from convulsions and epileptic fits after the injury and was not so affected before is competent evidence to show that the injury is permanent. Griffith *v.* Baltimore, etc., R. Co., 44 Fed. 574.

28. St. Louis Southwestern R. Co. *v.* Dobbins, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147.

to the proportion of persons with plaintiff's affliction who ultimately recover their health is competent on this point;[29] and where a trial is a considerable period of time after the infliction of the injury, there is no error in allowing plaintiff to directly and affirmatively testify that the injury is permanent.[30]

(14) To Show Proper Medical Attention. As it is incumbent upon an injured party to use ordinary care and diligence in securing medical attention, and not to permit the injury to be aggravated by his own negligence,[31] it follows that evidence that the injured party procured a good and reputable physician and obeyed his directions,[32] or that owing to the peculiar nature of the injury he should not be expected to at once fully realize its gravity, is admissible.[33] So too while evidence of the financial condition of plaintiff cannot ordinarily be offered,[34] yet evidence of such condition is admissible for the purpose of showing the reason for plaintiff's failure to procure such attendance, or to procure medical attendance of the highest grade.[35]

(c) *Testimony of Physician*[36] — (1) In General. The opinion of a physician who has been called to give professional attention to an injured party as to the gravity or extent and probable result of the injury is admissible, whether it be formed from his examination and diagnosis alone, or based also upon statements made to him by the patient for the purpose of securing the proper treatment;[37]

29. Cole *v.* Lake Shore, etc., R. Co., 95 Mich. 77, 54 N. W. 638; Budd *v.* Salt Lake City R. Co., 23 Utah 515, 65 Pac. 486.

30. Alabama, etc., R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28, where on trial nearly two years after the injury plaintiff was allowed to testify that his jaw was permanently injured.

31. See *supra*, VII, K, 4.

Evidence in mitigation.— While it is competent for defendant to show in mitigation of damages that the plaintiff's injuries were wholly or partially the result of improper treatment on the part of his physician, he cannot establish this fact by evidence of the general reputation of such physician (Thorne *v.* California Stage Co., 6 Cal. 232); nor can he show that the husband of the injured party was advised by the attending physician that she was too ill to be moved, where such advice was not in her hearing, and there was no evidence that it was communicated to her (Thrasher *v.* Postel, 79 Wis. 503, 48 N. W. 600).

32. Baker *v.* Borello, 136 Cal. 160, 68 Pac. 591 (holding also that evidence that proper care was not used in employing a physician must be definite and certain); Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Lyons *v.* Erie R. Co., 57 N. Y. 489.

33. Bloomington *v.* Perdue, 99 Ill. 329.

34. See *supra*, XIII, B, 2, b, (I), (B), (5).

35. Alberti *v.* New York, etc., R. Co., 118 N. Y. 77, 23 N. E. 35, 6 L. R. A. 765; Feather *v.* Reading, 155 Pa. St. 187, 26 Atl. 212; St. Louis, etc., R. Co. *v.* Jones, (Tex. Sup. 1890) 14 S. W. 309.

The fact that plaintiff used a patent medicine and applied the same to his wounds is not evidence of want of care, in the absence of evidence as to the curative qualities of the medicine. Gulf, etc., R. Co. *v.* Brown, 4 Tex. Civ. App. 435, 23 S. W. 618.

36. See, generally, Witnesses.

37. *Georgia.*— East Tennessee, etc., R. Co. *v.* Smith, 94 Ga. 580, 20 S. E. 127.

Illinois.— Illinois Cent. R. Co. *v.* Sutton, 42 Ill. 438, 92 Am. Dec. 81.

Indiana.— Ohio, etc., R. Co. *v.* Heaton, 137 Ind. 1, 35 N. E. 687; Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; Louisville, etc., R. Co. *v.* Snider, 117 Ind. 435, 20 N. E. 284, 10 Am. St. Rep. 60, 3 L. R. A. 434; Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

Iowa.— Erickson *v.* Barber, 83 Iowa 367, 49 N. W. 838; Armstrong *v.* Ackley, 71 Iowa 76, 32 N. W. 180. See also Blair *v.* Madison County, 81 Iowa 313, 46 N. W. 1093.

Kansas.— Atchison, etc., R. Co. *v.* Frazier, 27 Kan. 463.

Michigan.— Langworthy *v.* Green Tp., 88 Mich. 207, 50 N. W. 130.

Missouri.— Barr *v.* Kansas City, 121 Mo. 22, 25 S. W. 562.

New Hampshire.— See Nebonne *v.* Concord R. Co., 68 N. H. 296, 44 Atl. 521.

New York.— Wilson *v.* American Bridge Co., 74 N. Y. App. Div. 596, 77 N. Y. Suppl. 820; Knoll *v.* Third Ave. R. Co., 46 N. Y. App. Div. 527, 62 N. Y. Suppl. 16 [*affirmed* in 168 N. Y. 592, 60 N. E. 1113]; Macer *v.* Third Ave. R. Co., 47 N. Y. Super. Ct. 461. See McDonald *v.* New York, etc., R. Co., 13 Misc. 651, 34 N. Y. Suppl. 921.

Pennsylvania.— Reading City Pass. R. Co. *v.* Eckert, (1886) 4 Atl. 530.

Texas.— Texas, etc., R. Co. *v.* Ayres, 83 Tex. 268, 18 S. W. 684; Sabine, etc., R. Co. *v.* Ewing, 7 Tex. Civ. App. 8, 26 S. W. 638.

Wisconsin.— Abbot *v.* Dwinnell, 74 Wis. 514, 43 N. W. 496; Quaife *v.* Chicago, etc., R. Co., 48 Wis. 513, 4 N. W. 658, 33 Am. Rep. 821.

See 15 Cent. Dig. tit. "Damages," § 483.

Testimony of a physician as to the opinion of other consulting physicians with whom he made an examination of plaintiff is ob-

nor is it necessary that the testimony of the physician be confined to the result of the examination. He may go into details concerning the same.[38] So where there is evidence of the permanency of the injury, the fact that the physician was called a considerable period after the infliction thereof does not render his testimony incompetent;[39] but a physician's testimony as to the probable effect of an injury should show that such result is reasonably certain and not a mere likelihood,[40] and must be confined to the particular injury in question.[41] So too defendant has a right to show by medical testimony that the diseased condition probably arose from another source and was not caused by the injury complained of.[42] But while the condition of an injured person, especially soon after the injury, is usually proven by expert medical testimony,[43] there is no rule limiting the evidence to the testimony of witnesses of this class, and the mother of a child may testify to the extent of its injuries;[44] and as the injured party himself is ordinarily the person best acquainted with his own condition,[45] he may testify to such condition and to the extent of his injuries.[46]

(2) Physical Examination of Plaintiff. In an action for personal injuries it is not error to allow an expert witness to examine plaintiff's injuries in the presence of the jury.[47]

(II) *For Injuries to Property* — (A) *In General.* Where property is injured or destroyed the admissibility of evidence to prove the extent of the damages is dependent very largely of course upon the particular facts involved. Hence evidence clearly showing that the damage is not trivial or temporary should not be excluded,[48] and all circumstances connected with the injury bearing upon an item of damage may generally be considered.[49] If the property has a lease or rental value during the time plaintiff is deprived of its use, evidence of a loss of or

jectionable as hearsay. Ponca *v.* Crawford, 18 Nebr. 551, 26 N. W. 365.

The certificate of a physician as to the character and extent of an injury, to be admissible, must be verified. Burlington, etc., R. Co. *v.* Budin, 6 Colo. App. 275, 40 Pac. 503.

38. Sherwood *v.* Chicago, etc., R. Co., 88 Mich. 108, 50 N. W. 101; Ashton *v.* Detroit City R. Co., 78 Mich. 587, 44 N. W. 141.

39. Keyser *v.* Chicago, etc., R. Co., 66 Mich. 390, 33 N. W. 867 (where the physician was called five years after the infliction of the injury); Barkley *v.* New York Cent., etc., R. Co., 35 N. Y. App. Div. 228, 54 N. Y. Suppl. 766; Block *v.* Milwaukee St. R. Co., 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365.

40. Jewell *v.* New York Cent., etc., R. Co., 27 N. Y. App. Div. 500, 50 N. Y. Suppl. 848; Savage *v.* Third Ave. R. Co., 25 Misc. (N. Y.) 426, 54 N. Y. Suppl. 932; McClain *v.* Brooklyn City R. Co., 6 N. Y. St. 49; O'Reilly *v.* Monongahela St. R. Co., 17 Pa. Super. Ct. 626.

41. Lentz *v.* Dallas, 96 Tex. 258, 72 S. W. 59 [*reversing* (Civ. App. 1902) 69 S. W. 166].

42. Edwards *v.* Three Rivers, 96 Mich. 625, 55 N. W. 1003. See also McFadden *v.* Santa Ana, etc., R. Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252.

43. Birkel *v.* Chandler, 26 Wash. 241, 66 Pac. 406.

44. Birkel *v.* Chandler, 26 Wash. 241, 66 Pac. 406.

45. Atchison, etc., R. Co. *v.* Click, (Tex. Civ. App. 1895) 32 S. W. 226.

46. Owens *v.* Kansas City, etc., R. Co., 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39 (holding that an injured party might testify that the nerves of his head, side, and left limb were paralyzed); Atchison, etc., R. Co. *v.* Click, (Tex. Civ. App. 1895) 32 S. W. 226; Wright *v.* Ft. Howard, 60 Wis. 119, 18 N. W. 750, 50 Am. Rep. 350.

Bodily suffering may be testified to by the injured party himself for the purpose of showing the character of the injury (Martin *v.* Sherwood, 74 Conn. 475, 51 Atl. 526), or testimony that the injured party suffered may be given by her husband (Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253).

47. Lanark *v.* Dougherty, 153 Ill. 163, 38 N. E. 892. See also South Bend *v.* Turner, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep. 200, 54 L. R. A. 396; Brown *v.* Chicago, etc., R. Co., (N. D. 1903) 95 N. W. 153.

Further as to physical examination see *infra*, XIV, B, 1. And see, generally, Discovery; Evidence.

48. Natoma Water, etc., Co. *v.* McCoy, 23 Cal. 490.

If the action is for the negligent burning of forest timber, evidence of the character and value of the timber as lumber is admissible on the question of damages. Cleland *v.* Thornton, 43 Cal. 437.

49. *Illinois.*— Ottawa Gas Light, etc., Co. *v.* Graham, 28 Ill. 73, 81 Am. Dec. 263.

Massachusetts.— Handforth *v.* Maynard, 154 Mass. 414, 28 N. E. 348.

Michigan.— Chandler *v.* Allison, 10 Mich. 460.

depreciation in such value is competent.[50] The evidence must, however, ordinarily be confined to the property affected,[51] and the diminished rental value of other property similarly situated belonging to third parties cannot be shown.[52] So a party claiming damages for an obstruction to a road cannot show that other persons were troubled with the same obstruction.[53]

(B) *Particular Kinds of Injuries* — (1) Injuries to Animals. Where the action is for the negligent killing of or injury to an animal, the plaintiff may, on the question of damages, show its pedigree,[54] and testimony as to the value of an injured animal at the time of the trial is competent as bearing upon the extent and permanency of the injury.[55] So too the change in the disposition of an animal may be shown on the question of damages,[56] and evidence of a probable change in its disposition has been held admissible.[57] But the value of the animal must be shown by the best evidence attainable,[58] and it is not permissible to show the value of an injured animal by comparing its appearance with other animals of a stated valuation, where other and better evidence is obtainable.[59]

(2) Injuries to Crops. In an action for an injury to fully matured crops evidence of their value in the entirety is admissible,[60] and while the measure of

New York.— O'Horo *v.* Kelsey, 60 N. Y. App. Div. 604, 70 N. Y. Suppl. 14; Honsee *v.* Hammond, 39 Barb. 89; Ketcham *v.* Newman, 14 Daly 57 [*reversed* on other grounds in 116 N. Y. 422, 22 N. E. 1052].

Wisconsin.— Hutchinson *v.* Chicago, etc., R. Co., 41 Wis. 541.

If there has been no sale of property of a similar character to that claimed to be injured by the construction of a railroad from which the depreciation in value can be ascertained, evidence of the noise and jarring of the earth, and the smoke and dust caused by passing trains, rendering the house uncomfortable and injuring the furniture therein, is admissible as an aid to the injury in estimating the depreciation in value of the property. St. Louis, etc., R. Co. *v.* Haller, 82 Ill. 208.

In showing damages to a dam and fish-trap caused by floating logs evidence of the value of the fish caught is admissible for the purpose of showing the amount of such damages. Gwaltney *v.* Scottish Carolina Timber, etc., Co., 115 N. C. 579, 20 S. E. 465.

If the act complained of is a nuisance to plaintiff's property, as for instance a deposit of refuse and sewage upon his land, evidence of the cost of the removal of such offensive deposit is relevant as bearing on the question of damages. Watson *v.* New Milford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345.

50. Newman *v.* Metropolitan El. R. Co., 10 N. Y. St. 12; Lipscomb *v.* South Bound R. Co., 65 S. C. 148, 43 S. E. 388. See also Daggett *v.* Cohoes, 5 Silv. Supreme (N. Y.) 183, 7 N. Y. Suppl. 882. *Compare* Galveston, etc., R. Co. *v.* Becht, (Tex. Civ. App. 1893) 21 S. W. 971.

51. Chicago, etc., R. Co. *v.* Smith, 6 Ind. App. 262, 33 N. E. 241.

52. Selma, etc., R. Co. *v.* Knapp, 42 Ala. 480.

53. Since to do so might enable him to recover damages for the trouble and inconvenience of strangers. Pettingill *v.* Porter, 3 Allen (Mass.) 349.

The cost of replacing a similar structure is admissible in an action for damages for the destruction of the former. Southern Oil Works *v.* Bickford, 14 Lea (Tenn.) 651. But if the building destroyed is an old and dilapidated one, the witness should not be allowed to testify as to the cost of constructing a new one. Chicago, etc., R. Co. *v.* Davis, 78 Ill. App. 58.

54. Parker *v.* Lake Shore, etc., R. Co., 93 Mich. 607, 53 N. W. 834; Citizens' Rapid-Transit Co. *v.* Dew, 100 Tenn. 317, 45 S. W. 790, 66 Am. St. Rep. 754, 40 L. R. A. 518, holding that the fact that the animal was a dog did not vary the rule. The evidence must, however, be confined to the animal injured, and it is error to admit evidence of the value of a thoroughbred when the animal injured is only of graded stock. Western R. Co. *v.* Lazarus, 88 Ala. 453, 6 So. 877. See also Union Pac., etc., R. Co. *v.* Perkins, 7 Colo. App. 184, 42 Pac. 1047.

55. Cincinnati, etc., R. Co. *v.* Hogan, 16 Ky. L. Rep. 444.

56. Whiteley *v.* China, 61 Me. 199.

57. Baltimore, etc., Turnpike Road Co. *v.* Crowther, 63 Md. 558, 1 Atl. 279, where, in an action for an injury to a horse which caused it to run away, evidence tending to show that the horse would probably thereafter run away every chance it got was held admissible. But see Van Wagoner *v.* New York Cement Co., 36 Hun (N. Y.) 552, where, in determining how much the market value of a horse had suffered because of its having run away, evidence that the value of horses generally depreciated a certain per cent after their having run away was held admissible.

58. Georgia Cent. R. Co. *v.* Main, 135 Ala. 451, 33 So. 480.

All hypothetical questions of value must be supported by proper evidence. Combs *v.* St. Louis, etc., R. Co., 58 Mo. App. 467.

59. Atchison, etc., R. Co. *v.* Harper, 19 Kan. 529.

60. Thus where the action is for the destruction of grain in the stack and corn on

damages in an action for growing crops is their value at the time of their destruction,[61] yet in determining this amount evidence of the probable yield and value of the crop had it progressed to maturity is admissible;[62] and proof of the yield in that part of the field not destroyed,[63] or of the value of matured crops of the variety destroyed,[64] is admissible. But evidence of the cost of putting in and cultivating a like crop to the same state of maturity is inadmissible.[65]

(3) Injuries to Fruit Trees. In an action for the recovery of damages to an orchard evidence of the amount of fruit that trees of like nature would produce in a seasonable year and the market value thereof has been condemned as too uncertain,[66] although later cases in the same jurisdiction hold that direct evidence of the value of the orchard as a part of the realty is admissible, and that one is not confined in his evidence to a showing of the market value of the land before and after the injury.[67] Nor would it seem to be material whether the action is brought for injury to or destruction of a single tree or of an orchard.[68] It has also been held competent, in addition to showing the value of the farm before and after the injury to the trees, to offer testimony as to the income from the orchard for several years prior to the injury.[69]

(4) Injuries to Fences. As the measure of damages for the destruction of a fence is the value thereof, evidence that some other kind of a fence might be as efficient for protection as the one destroyed and would cost less has been held not admissible.[70]

(5) Injuries to Grass and Meadow. Where grass or meadow has been injured or destroyed through the negligence of defendant, the value of the same for hay or grazing purposes is admissible as a basis for estimating the amount of damages,[71] and if the roots of the grass are destroyed evidence of the cost of reseeding the meadow and that no crop could be produced the first year is admissible.[72] As the value of the partial use of a pasture could best be determined by a knowledge of the value of it as an entirety, evidence of such entire value is admissible, where plaintiff has had a partial use thereof,[73] but evidence as to the effect of a fire upon an adjacent meadow is not admissible.[74]

(6) Injuries Caused by Flowage. In an action for damages caused by an

the stalk evidence of the value of the straw and stalks is admissible. Patton *v* St. Louis, etc., R. Co., 87 Mo. 117, 56 Am. Rep. 446.

For the destruction of matured or ungathered cotton evidence of what the cotton would have yielded when gathered, ginned, and bailed (Gulf, etc., R. Co. *v.* Summers, 3 Tex. App. Civ. Cas. § 348) or the estimated worth per bale, together with the estimated value per bale of ginning and baling (Gulf, etc., R. Co. *v.* Sumrow, (Tex. App. 1887) 18 S. W. 135) is competent and admissible.

61. See *supra*, XI, C, 2, g.

62. St. Louis, etc., R. Co. *v.* Lyman, 57 Ark. 512, 22 S. W. 170 [*distinguishing* St. Louis, etc., R. Co. *v.* Yarborough, 56 Ark. 612, 20 S. W. 515]; Chicago, etc., R. Co. *v.* Schaffer, 26 Ill. App. 280; Sanderlin *v.* Shaw, 51 N. C. 225.

63. Adams *v.* Stadler, 78 Ill. App. 432.

64. Gulf, etc., R. Co. *v.* McGowan, 73 Tex. 355, 11 S. W. 336. See also Ethridge *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1897) 39 S. W. 204.

65. Chicago, etc., R. Co. *v.* Barnes, 10 Ind. App. 460, 38 N. E. 428.

66. Missouri Pac. R. Co. *v.* Haynes, 1 Kan. App. 586, 42 Pac. 259.

67. Missouri, etc., R. Co. *v.* Lycan, 57 Kan. 635, 47 Pac. 526; Atchison, etc., R. Co. *v.* Emmerson, (Kan. App. 1897) 50 Pac. 70; Atchison, etc., R. Co. *v.* Hamilton, 6 Kan. App. 447, 50 Pac. 102.

68. Whitbeck *v.* New York Cent. R. Co., 36 Barb. (N. Y.) 644.

69. Rowe *v.* Chicago, etc., R. Co., 102 Iowa 286, 71 N. W. 409 [*followed* in Krejci *v.* Chicago, etc., R. Co., 117 Iowa 344, 90 N. W. 708].

70. The reason being, as is said in this case, that a party has a right to fence his land in the manner he chooses. Ohio, etc., R. Co. *v.* Trapp, 4 Ind. App. 69, 30 N. E. 812. But *compare* Gulf, etc., R. Co. *v.* Wallace, 14 Tex. Civ. App. 386, 37 S. W. 382.

71. Terre Haute, etc., R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. 534; Buttles *v.* Chicago, etc., R. Co., 43 Mo. App. 280; Texas, etc., R. Co. *v.* Ervay, 3 Tex. App. Civ. Cas. § 47. See also Gulf, etc., R. Co. *v.* Kluge, (Tex. App. 1886) 17 S. W. 944.

72. Pittsburgh, etc., R. Co. *v.* Hixon, 110 Ind. 225, 11 N. E. 285.

73. Gulf, etc., R. Co. *v.* Jones, 1 Tex. Civ. App. 372, 21 S. W. 145.

74. Especially where the matter in issue is susceptible of direct proof. Gates *v.* Chicago, etc., R. Co., 44 Mo. App. 488.

overflowage of plaintiff's land, due to the negligent or unlawful act of defendant, it is competent to show the diminished products of the land during the succeeding year as compared with the year previous;[75] and the unfitness of the land to immediately produce crops as it had done previously;[76] and as further showing the effect upon the land for agricultural purposes unsuccessful attempts to raise a crop may be shown.[77] While damages accruing after the commencement of a suit are not recoverable,[78] evidence of injury caused by a similar flowage is admissible as showing the consequences of the act complained of.[79] If the flowage is occasioned by a nuisance, evidence of the previous condition of the land before the erection of the same is competent;[80] and when the nuisance cannot for proper reasons be abated, plaintiff may recover for the costs of rendering his premises secure therefrom.[81] Damages for overflow of land contiguous or in a near-by locality cannot be inquired into,[82] unless the condition of the two tracts with regard to productiveness be proved in every material particular.[83] So where the damages are temporary only, evidence of the general depreciation of the property should not be admitted.[84]

(c) *Expenses Incurred.* Where, because of a wrong or injury to property, expenses are incurred, either in repairing the same or otherwise, evidence thereof is admissible on the question of damages;[85] and while ordinarily it must also be shown that the amount expended is reasonable,[86] yet where the amount thus expended was small and consisted of expenditures fully understood by the jury an omission of such proof was held not to be error.[87] So where the repairs have actually been made, proof of the actual expenditure must be given, and the estimated cost thereof is inadmissible.[88]

(d) *Value Before and After Injury.* Where property has been injured by the unlawful act of another, evidence of its comparative value before and after the injury, if confined within a reasonable space of time, is admissible;[89] but as it

75. Garrett *v.* Edenton, 74 N. C. 388. See also Witheral *v.* Muskegon Booming Co., 68 Mich. 48, 35 N. W. 758, 13 Am. St. Rep. 325.

76. Noe *v.* Chicago, etc., R. Co., 76 Iowa 360, 41 N. W. 42; Sabine, etc., R. Co. *v.* Brousard, 69 Tex. 617, 7 S. W. 374, holding that it was also competent to show the number and value of plaintiff's animals that died after the overflow, and that it was the cause of their death.

77. Georgia R., etc., Co. *v.* Berry, 78 Ga. 744, 4 S. E. 10.

78. Polly *v.* McCall, 37 Ala. 20.

79. Polly *v.* McCall, 37 Ala. 20; Goodrich *v.* Dorset Marble Co., 60 Vt. 280, 13 Atl. 636.

80. Aldworth *v.* Lynn, 153 Mass. 53, 26 N. E. 229, 25 Am. St. Rep. 608, 10 L. R. A. 210.

81. Barden *v.* Portage, 79 Wis. 126, 48 N. W. 210. See Burnett *v.* Nicholson, 86 N. C. 99.

82. Kelliher *v.* Miller, 97 Mass. 71. And see Gentry *v.* Richmond, etc., R. Co., 38 S. C. 284, 16 S. E. 893.

83. Green *v.* Taylor, etc., R. Co., 79 Tex. 604, 15 S. W. 685.

84. Gulf, etc., R. Co. *v.* Frederickson, (Tex. Sup. 1892) 19 S. W. 124.

Proof of appreciation in value of plaintiff's premises by reason of an improvement made by a city is not admissible against a property-owner in an action by him to recover damages for an overflow of water upon his premises caused by such improvement. Covington *v.* Ulrich, 14 Ky. L. Rep. 302.

85. Central R., etc., Co. *v.* Warren, 84 Ga. 329, 10 S. E. 918, holding that, in an action to recover for injuries to a mule, evidence of expense incurred in caring for the animal while it was unable to work is admissible. And see Axlebrood *v.* Rosen, 21 Misc. (N. Y.) 352, 47 N. Y. Suppl. 164.

86. Gumb *v.* Twenty-Third St. R. Co., 114 N. Y. 411, 21 N. E. 993; Edge *v.* Third Ave. R. Co., 57 N. Y. App. Div. 29, 67 N. Y. Suppl. 1002. And see Childs *v.* O'Leary, 174 Mass. 111, 54 N. E. 490.

An objection on this ground is obviated, however, if the party making the repairs is subsequently called to testify that the charges were reasonable. Lynch *v.* Kluber, 20 Misc. (N. Y.) 601, 46 N. Y. Suppl. 428.

87. Chaperon *v.* Portland Electric Co., 41 Oreg. 39, 67 Pac. 928.

88. Lafayette *v.* Gaffney, 47 Hun (N. Y.) 583.

89. Chicago, etc., R. Co. *v.* Burden, 14 Ind. App. 512, 43 N. E. 155; Van Deusen *v.* Young, 29 Barb. (N. Y.) 9; Seely *v.* Alden, 61 Pa. St. 302, 100 Am. Dec. 642. *Compare* Kansas City *v.* Frohwerk, 10 Kan. App. 120, 62 Pac. 432.

The price plaintiff paid for property twelve years before the injury complained of is too remote to be competent for the purpose of determining the damages for an injury

cannot be presumed that a municipality will allow its sewers to remain permanently defective, evidence of the value of the property before and after the sewer became defective would not furnish the proper criterion for estimating the damages.[90]

(E) *Testimony of Amount in Aggregate.* After a party has stated not only that there is damage to his property, but in what particular such damages have arisen, it is sometimes permissible to allow him to make a general estimate of the amount, leaving it to the cross-examiner to develop the assumed amount of each item,[91] but where no such previous evidence has been introduced, a general and sweeping statement as to the amount of damages is not permissible.[92]

3. FOR PARTICULAR PURPOSES — a. To Establish Exemplary Damages and Amount Thereof — (I) *In General.* A plaintiff has of course a right to inquire into the motives of defendant and bring the same before the jury for the purpose of recovering exemplary or punitive damages in all actions where damages of this nature are recoverable,[93] and all acts and circumstances connected with the transaction tending to exhibit or explain the motive of the defendant, and showing that he acted wantonly or maliciously, or was flagrantly or criminally negligent are generally speaking admissible.[94] On the other hand evidence on behalf of defendant tending to show a justification and the absence of gross negligence or malice is admissible.[95] Thus defendant[96] or his agent[97] may testify in person as to what his intent was. Nor can malice be inferred from the mere doing of an unlawful act.[98]

(II) *Pecuniary Condition of Defendant.* Evidence of the pecuniary condition and financial circumstances of defendant is usually held to be relevant

thereto. Denison, etc., R. Co. *v.* Cummins, (Tex. Civ. App. 1897) 42 S. W. 588.

Where attached property is sold at public auction, the price at which it was sold may be shown as affecting the amount of damages, unless the condition of the goods had changed or the sale was too remote from the date of the conversion. Raymond Syndicate *v.* Guttentag, 177 Mass. 562, 59 N. E. 446.

90. Nashville *v.* Comar, 88 Tenn. 415, 12 S. W. 1027, 7 L. R. A. 465.

91. Dougherty *v.* Stewart, 43 Iowa 648; Maxwell *v.* Bay City Bridge Co., 46 Mich. 278, 9 N. W. 410.

92. *Georgia.*— Smith *v.* Eubanks, 72 Ga. 280. See also Johnson *v.* Lovett, 31 Ga. 187.

Indiana.— Mitchell *v.* Allison, 29 Ind. 43.

Iowa.— Dougherty *v.* Stewart, 43 Iowa 648.

New York.— Brown *v.* Elliott, 4 Daly 329.

United States.— Dushane *v.* Benedict, 120 U. S. 630, 7 S. Ct. 696, 30 L. ed. 810.

See 15 Cent. Dig. tit. "Damages," § 460.

93. Merrills *v.* Tariff Mfg. Co., 10 Conn. 384, 27 Am. Dec. 682; Schindel *v.* Schindel, 12 Md. 108; Sutton *v.* Mandeville, 23 Fed. Cas. No. 13,651, 1 Cranch C. C. 187; The Yankee *v.* Gallagher, 30 Fed. Cas. No. 18,124, 1 McAll. 467.

Exemplary damages not being recoverable in a civil action for arson (Gebhart *v.* Burkett, 57 Ind. 378, 26 Am. Rep. 61), nor in an action by a tenant against his landlord for forcibly entering upon and ejecting him, such acts being punishable as a criminal offense (Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476), hence evidence of the motive of such action is not material or admissible.

94. Voltz *v.* Blackmar, 64 N. Y. 440; Cleghorn *v.* New York Cent., etc., R. Co., 56 N. Y. 44, 15 Am. Rep. 375. See also Jones *v.* The Cortes, 17 Cal. 487, 79 Am. Dec. 142.

A record of a former suit between the parties, in which the plaintiff had recovered damages for the wrongful act of the defendant in obstructing and diverting water from a certain race, is admissible in an action against the same defendant for befouling the watercourse, as it tends to show malice in the interference thereof. Price *v.* Lawson, 74 Md. 499, 22 Atl. 206.

The declarations of a defendant that he wished plaintiff's grove of trees had been entirely destroyed is admissible in an action against him for negligently setting out the fire, as tending to show a malicious state of mind. Wilkinson *v.* Drew, 75 Me. 360.

Declarations of counsel made on a former trial, in the course of his argument to the jury, are not competent to prove malice on a subsequent trial. Baltimore, etc., R. Co. *v.* Boyd, 67 Md. 32, 10 Atl. 315, 1 Am. St. Rep. 362.

95. *Alabama.*— Dearing *v.* Moore, 26 Ala. 586.

California.— Dorsey *v.* Manlove, 14 Cal. 553.

Minnesota.—Fay *v.* Davidson, 13 Minn. 523.

Missouri.— Henry *v.* Hug, 76 Mo. 342.

New York.— Voltz *v.* Blackmar, 64 N. Y. 440; Millard *v.* Brown, 35 N. Y. 297.

Vermont.— Camp *v.* Camp, 59 Vt. 667, 10 Atl. 748.

United States.— Boyle *v.* Case, 18 Fed. 880, 9 Sawy. 386.

See 15 Cent. Dig. tit. "Damages," § 473.

96. Norris *v.* Morrill, 40 N. H. 395.

97. Georgia R., etc., Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490.

98. Williams *v.* Newberry, 32 Miss. 256.

and admissible as bearing upon the amount of punitive or exemplary damages which may be awarded;[99] but when no such damages are in issue and recovery of compensatory damages only is permissible the admission of such evidence is error;[1] and where there are several defendants sued jointly in trespass, inasmuch as the same amount of damages must be assessed against all, it is error to instruct the jury that they may take into consideration the pecuniary ability of each individual defendant to pay punitive or exemplary damages.[2]

b. To Show Lost Profits. Whether or not evidence of loss of profits is or is not admissible depends in many cases upon the extremely troublesome and unsettled question of whether or not such profits are a legitimate item of damages.[3] When they are clearly such, evidence bearing thereon is of course admissible;[4] but such evidence must not be uncertain or speculative.[5] So too in some actions,

99. *Colorado.* — Courvoisier *v.* Raymond, 23 Colo. 113, 47 Pac. 284.

Georgia.— *Compare* Georgia R. Co. *v.* Homer, 73 Ga. 251.

Illinois.— Jones *v.* Jones, 71 Ill. 562.

Indiana.—Atkinson *v.* Van Cleave, 25 Ind. App. 508, 57 N. E. 731.

Kentucky.— *Contra,* Givens *v.* Berkley, 108 Ky. 236, 56 S. W. 158, 21 Ky. L. Rep. 1653 [*overruling* Louisville, etc., R. Co. *v.* Mahony, 7 Bush 235; Gore *v.* Chadwick, 6 Dana 477].

Maine.— Webb *v.* Gilman, 80 Me. 177, 13 Atl. 688.

Maryland.— Sloan *v.* Edwards, 61 Md. 89.

Minnesota.—McCarthy *v.* Niskern, 22 Minn. 90.

Mississippi.— Pullman Palace Car Co. *v.* Lawrence, 74 Miss. 782, 22 So. 53.

Missouri.— Dailey *v.* Houston, 58 Mo. 361; Eagleton *v.* Kabrich, 66 Mo. App. 231; Hayes *v.* St. Louis R. Co., 15 Mo. App. 584.

New Hampshire.— Belknap *v.* Boston, etc., R. Co., 49 N. H. 358.

New York.— Fry *v.* Bennett, 4 Duer 247.

Ohio.— Hayner *v.* Cowden, 27 Ohio St. 292, 22 Am. Rep. 303; Steen *v.* Friend, 20 Ohio Cir. Ct. 459, 11 Ohio Cir. Dec. 235.

Tennessee.—Nashville St. R. Co. *v.* O'Bryan, 104 Tenn. 28, 55 S. W. 300; Cumberland Telephone, etc., Co. *v.* Shaw, 102 Tenn. 313, 52 S. W. 163.

Wisconsin — Gilman *v.* Brown, 115 Wis. 1, 91 N. W. 227; Eggett *v.* Allen, 106 Wis. 633, 82 N. W. 556; Spear *v.* Swecney, 88 Wis. 545, 60 N. W. 1060; Meibus *v.* Dodge, 38 Wis. 300, 20 Am. Rep. 6.

Wyoming.— Cosfriff *v.* Miller, 10 Wyo. 190, 68 Pac. 206.

United States.— Brown *v.* Evans, 17 Fed. 912, 8 Sawy. 488.

See 15 Cent. Dig. tit. "Damages," § 474.

1. *Alabama.*— Barbour County *v.* Horn, 48 Ala. 566.

Georgia.— Higgins *v.* Cherokee R. Co., 73 Ga. 149.

Iowa.— Hunt *v.* Chicago, etc., R. Co., 26 Iowa 363.

Minnesota.— Cohen *v.* Goldberg, 65 Minn. 473, 67 N. W. 1149.

Missouri.— Clark *v.* Fairley, 30 Mo. App. 335.

Nebraska.—Rosewater *v.* Hoffman, 24 Nebr. 222, 38 N. W. 857.

New York.— Laidlaw *v.* Sage, 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216 [*reversing* 2 N. Y. App. Div. 374, 37 N. Y. Suppl. 770]; Moody *v.* Osgood, 50 Barb. 628; Englert *v.* Kruse, 14 Daly 247, 8 N. Y. St. 375.

Tennessee.— Dush *v.* Fitzhugh, 2 Lea 307.

Canada.— See Price *v.* Wright, 35 N. Brunsw. 26.

See 15 Cent. Dig. tit. "Damages," § 474.

2. Smith *v.* Wunderlich, 70 Ill. 426 [*approving* Toledo, etc., R. Co. *v.* Smith, 57 Ill. 517]. Where an action is against a railroad company and its conductor for damages for a wrong occasioned by the conductor's negligence, inasmuch as the conductor would be liable individually for any judgment that might be recovered, it follows that evidence of the wealth of the company should not be admitted for the purpose of enhancing damages. Chicago City R. Co. *v.* Henry, 62 Ill. 142.

3. See *supra,* VII, G.

4. *Indiana.*— Boyce *v.* Brady, 61 Ind. 432; Fultz *v.* Wycoff, 25 Ind. 321.

Michigan.—Barrett *v.* Grand Rapids Veneer Works, 110 Mich. 6, 67 N. W. 976; Fell *v.* Newberry, 106 Mich. 542, 64 N. W. 474; Hopkins *v.* Sanford, 41 Mich. 243, 2 N. W. 39.

Minnesota.— Silberstein *v.* Duluth News-Tribune Co., 68 Minn. 430, 71 N. W. 622.

New York.— Marquart *v.* La Farge, 5 Duer 559.

Pennsylvania.— Douty *v.* Bird, 60 Pa. St. 48.

Vermont.— Conway *v.* Fitzgerald, 70 Vt. 103, 39 Atl. 634.

Wisconsin.— Ramsey *v.* Holmes Electric Protective Co., 85 Wis. 174, 55 N. W. 391.

United States.— Hoyt *v.* Fuller, 104 Fed. 192, 43 C. C. A. 466.

See 15 Cent. Dig. tit. "Damages," § 471.

5. *California.*— Tobin *v.* Post, 3 Cal. 373.

Illinois.— Hair *v.* Barnes, 26 Ill. App. 580.

Kansas.— See Missouri, etc., R. Co. *v.* Ft. Scott, 15 Kan. 435.

New York.— Wolf *v.* Hvass, 159 N. Y. 551, 54 N. E. 1095; Masterton *v.* Mt. Vernon, 58 N. Y. 391; Moss *v.* Tompkins, 69 Hun 288, 23 N. Y. Suppl. 623.

Tennessee.—McWhirter *v.* Douglas, 1 Coldw. 591.

United States.— Brent *v.* Thornton, 106 Fed. 35, 45 C. C. A. 214.

Evidence of profits which a railroad would have made during the first two months of its

such as for the breach of a contract of employment to sell certain articles upon commission, or a certain percentage,[6] or for the breach of an agreement not to use certain property or pursue a certain business in competition with plaintiff,[7] evidence of loss of profits is the best and most certain proof of the damage attainable; and in many jurisdictions evidence of profits which would probably have been received is admissible, not as the measure of damages, but as affording the best guide or aid to the jury of which the nature of the case admits in the exercise of a proper discretion in estimating the damages;[8] and for like purpose evidence of the actual past profits and receipts is ordinarily admissible,[9] if not too remote from the injury or wrong complained of.[10]

C. Sufficiency — 1. In General. It is a general rule, applicable in all actions, whether *ex contractu* or *ex delicto*, that the amount of damage which a plaintiff is entitled to recover must not only be alleged, but proved with reasonable certainty by competent evidence as well;[11] although exemplary or punitive damages may be determined from the character and attendant circumstances of the acts themselves, without evidence of an estimate of the amount thereof, or data upon which the amount should be reckoned.[12]

existence cannot be shown by evidence of what it did actually make during the corresponding two months of the succeeding year after it had been in operation for ten months. Florida Northern R. Co. *v.* Southern Supply Co., 112 Ga. 1, 37 S. E. 130.

6. Rio Grande Western R. Co. *v.* Rubenstein, 5 Colo. App. 121, 38 Pac. 76 (holding that in such case evidence of what the plaintiff made under the contract previous to his unlawful discharge, as well as the amount of sales of such article in the same territory by other parties thereafter, is admissible as the best, most direct, and in fact the only legitimate evidence of showing what damages he has actually sustained); Hichhorn *v.* Bradley, 117 Iowa 130, 90 N. W. 592; New York, etc., R. Co. *v.* Carhart, 1 N. Y. St. 426; Pittsburg Gauge Co. *v.* Ashton Valve Co., 184 Pa. St. 36, 39 Atl. 223. See also Wakeman *v.* Wheeler, etc., Mfg. Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676. But see Union Refining Co. *v.* Barton, 77 Ala. 148.

7. Wittenberg *v.* Mollyneaux, 60 Nebr. 583, 83 N. W. 842 (in which case the loss of profits would be the actual and legal result of the breach, and evidence of the plaintiff's business both before and after the breach of the contract is therefore admissible); Hitchcock *v.* Anthony, 83 Fed. 779, 28 C. C. A. 80. And see Ratcliffe *v.* Evans, [1892] 2 Q. B. 524, 56 J. P. 837, 61 L. J. Q. B. 535, 66 L. T. Rep. N. S. 794, 40 Wkly. Rep. 578; Turner *v.* Burns, 24 Ont. 28.

8. Jackson *v.* Stanfield, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; Peshine *v.* Shepperson, 17 Gratt. (Va.) 472, 94 Am. Dec. 468; Shepard *v.* Milwaukee Gas Light Co., 15 Wis. 318, 82 Am. Dec. 679. See also Chandler *v.* Allison, 10 Mich. 460.

The damages for an unlawful seizure of machinery, whereby a mill owner is delayed ten days in putting it in operation, is properly estimated by showing the value of the use of the machinery for the time of the delay occasioned by the seizure. Halcomb *v.* Stubblefield, 76 Tex. 310, 13 S. W. 231. Although evidence of the aggregate sum which the machine would have earned each day is misleading unless connected with evidence as to the expense of running the machine as well. Barney *v.* Douglass, 22 Wis. 464.

9. *Georgia.*— Smith *v.* Eubanks, 72 Ga. 280. See also Juchter *v.* Boehm, 67 Ga. 534.

Iowa.— Willis *v.* Perry, 92 Iowa 297, 60 N. W. 727, 26 L. R. A. 124.

Maryland.— Shafer *v.* Wilson, 44 Md. 268.

Michigan.— Charon *v.* Roby Lumber Co., 66 Mich. 68, 32 N. W. 925; Allison *v.* Chandler, 11 Mich. 542.

New York.— Myers *v.* Sea Beach R. Co., 167 N. Y. 581, 60 N. E. 1117 (holding that plaintiff's testimony from memory, of the amount of his profits both before and after the injury, was admissible); Hangen *v.* Hachemeister, 114 N. Y. 566, 21 N. E. 1046, 11 Am. St. Rep. 691, 5 L. R. A. 137; Bagley *v.* Smith, 10 N. Y. 489, 19 How. Pr. 1, 61 Am. Dec. 756; Alfaro *v.* Davidson, 40 N. Y. Super. Ct. 87; Markowitz *v.* Metropolitan St. R. Co., 31 Misc. 175, 63 N. Y. Suppl. 961 (holding that the rule was not affected by the fact that a person's profits varied from time to time). See also Laufer *v.* Boynton Furnace Co., 84 Hun 311, 32 N. Y. Suppl. 362.

Rhode Island.— Collins *v.* Lavelle, 19 R. I. 45, 31 Atl. 434.

See 15 Cent. Dig. tit. "Damages," § 461.

10. Ellsler *v.* Brooks, 54 N. Y. Super. Ct. 73, holding that in an action for damages for a breach of a contract of employment as an actress, under the agreement that the plaintiff should receive one-half the profits of the business, evidence of the profits of the plaintiff under the same agreement four or five years previous to the contract is too remote. See also Stapenhorst *v.* American Mfg. Co., 36 N. Y. Super. Ct. 392, 46 How. Pr. (N. Y.) 510.

11. See Dunn *v.* Cass Ave., etc., R. Co., 21 Mo. App. 188. See Mitchell *v.* Lawther, 14 N. Brunsw. 79. And see cases cited *infra*, note 13, *et seq.*

12. Mobile Furniture Commission Co. *v.* Little, 108 Ala. 399, 19 So. 443; Wampach *v.* St. Paul, etc., R. Co., 22 Minn. 34. See also

2. In Particular Actions — a. Ex Contractu. In actions for damages for breach of a contract, while it is not ordinarily necessary to prove the exact amount of loss to an absolute certainty,[13] yet whenever substantial damages are claimed, their amount is the subject of proof, and must be shown with reasonable certainty;[14] and evidence, to be sufficient to authorize a recovery, must furnish some criterion or data whereby the jury may make rational deductions and calculations to determine the amount without danger of gross injustice, or reliance on their own speculations or conjecture of the probable loss sustained.[15] The jury are not, however, obliged to follow the evidence introduced absolutely and blindly, nor base their verdict upon the opinion of any one of the witnesses, nor upon an average

Louisville, etc., R. Co. *v.* Donaldson, 43 S. W. 439, 19 Ky. L. Rep. 1384; Burkett *v.* Lanata, 15 La. Ann. 337. For evidence examined and held sufficient to authorize giving exemplary damages see Texarkana Gas, etc., Co. *v.* Orr, 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30; McFadden *v.* Rausch, 119 Pa. St. 507, 13 Atl. 459; Cook *v.* Horstman, 2 Tex. App. Civ. Cas. § 770. For evidence held insufficient to authorize such damages see St. Louis, etc., R. Co. *v.* Hall, 53 Ark. 7, 13 S. W. 138.

13. Hubbard Specialty Mfg. Co. *v.* Minneapolis Wood Designing Co., 47 Minn. 393, 50 N. W. 349. And see Hitchcock *v.* Supreme Tent K. of M., 100 Mich. 40, 58 N. W. 640, 43 Am. St. Rep. 423.

Where the damages are capable of being estimated by a strict money standard, it is incumbent upon the plaintiff to give evidence of his damages in dollars and cents, or his recovery will be confined to nominal damages only. But this is never the case where damages are not susceptible of being reduced to an exact money standard. Barngrover *v.* Maack, 46 Mo. App. 407.

14. *California.*— Parke *v.* Frank, 75 Cal. 364, 17 Pac. 427.

Kansas.— Lyon County School Dist. No. 46 *v.* Lund, 51 Kan. 731, 33 Pac. 595.

Minnesota.— Pullen *v.* Wright, 34 Minn. 314, 26 N. W. 394.

Missouri.— Biglow *v.* Carney, 18 Mo. App. 534.

Ohio.— Johnson *v.* Spiegel, 4 Ohio Cir. Ct. 388.

Pennsylvania.— Forrest *v.* Buchanan, 203 Pa. St. 454, 53 Atl. 267.

Texas.—Raymond *v.* Yarrington, (Civ. App. 1902) 69 S. W. 436.

See 15 Cent. Dig. tit. "Damages," §§ 502, 512.

15. *Alabama.*— Howard *v.* Taylor, 99 Ala. 450, 13 So. 121.

Arkansas.— Bunch *v.* Potts, 57 Ark. 257, 21 S. W. 437.

Colorado.—Knowles *v.* Leggett, 7 Colo. App. 265, 43 Pac. 154.

Delaware.— Truitt *v.* Fahey, 3 Pennew. 573, 52 Atl. 339.

Florida.— Sullivan *v.* McMillan, 26 Fla. 543, 8 So. 450.

Illinois.— Mayer *v.* Mitchell, 59 Ill. App. 26.

Indiana.— McAninch *v.* Hamilton, 1 Ind. App. 429, 27 N. E. 719.

Iowa.— Dye *v.* Wagner, 49 Iowa 458.

Kansas.— Mergenthaler Linotype Co. *v.* Kansas State Printing Co., (1900) 59 Pac. 1066.

Kentucky.— Cundiff *v.* Cundiff, 39 S. W. 433, 18 Ky. L. Rep. 1059.

Louisiana.— Ellerbe *v.* Minor, 49 La. Ann. 863, 21 So. 583.

Massachusetts.— See Smith *v.* Brown, 164 Mass. 584, 42 N. E. 101.

Michigan.— Friedland *v.* McNeil, 33 Mich. 40.

Minnesota.— Hubbard Specialty Mfg. Co. *v.* Minneapolis Wood-Designing Co., 47 Minn. 393, 50 N. W. 349.

Missouri.— McConey *v.* Wallace, 22 Mo. App. 377.

Nebraska.— Wittenberg *v.* Mollyneaux, 55 Nebr. 429, 75 N. W. 835.

New York.— Enright *v.* American Belgian Lamp Co., 26 N. Y. App. Div. 381, 49 N. Y. Suppl. 739; Murdock *v.* Jones, 3 N. Y. App. Div. 221, 38 N. Y. Suppl. 461; Engelsdorf *v.* Sire, 64 Hun 209, 18 N. Y. Suppl. 907; Neary *v.* Bostwick, 2 Hilt. 514; Fox *v.* Decker, 3 E. D. Smith 150; Owen *v.* Matthews, 19 N. Y. Suppl. 813.

Pennsylvania.— Fessler *v.* Love, 48 Pa. St. 407. And see Sulger *v.* Dennis, 2 Binn. 428.

Texas.— Griffith *v.* Lake, (Sup. 1889) 12 S. W. 285; Meade *v.* Rutledge, 11 Tex. 44.

Wisconsin.— Churchill *v.* Price, 44 Wis. 540.

United States.— Teal *v.* Bilby, 123 U. S. 572, 8 S. Ct. 239, 31 L. ed. 263; South African Reduction Co. *v.* Peck, 120 Fed. 88, 56 C. C. A. 494.

Canada.— McLennan *v.* Millington, 5 Brit. Col. 345; Ross *v.* Garrison, 6 U. C. Q. B. O. S. 626.

See 15 Cent. Dig. tit. "Damages," § 512.

For evidence examined and held sufficient to furnish sufficient basis for the jury to estimate damages see the following cases:

Illinois.— Wheeler *v.* Reed, 36 Ill. 81.

Massachusetts.— Speirs *v.* Union Drop Forge Co., 180 Mass. 87, 61 N. E. 825.

Minnesota.— Fairchild *v.* Rogers, 32 Minn. 269, 20 N. W. 191.

Missouri.— Owen *v.* O'Reilly, 20 Mo. 603.

New York.— McSorley *v.* Faulkner, 19 N. Y. Suppl. 911.

Pennsylvania.— Schlitz Brewing Co. *v.* McCann, 118 Pa. St. 314, 12 Atl. 445.

Tennessee.— Taylor *v.* Hunnicut, (Ch. App. 1897) 42 S. W. 225.

of the different amounts of damages testified to, but may consider all the facts properly brought before them at the trial.[16]

b. Ex Delicto — (i) *In General.* Evidence sufficient to authorize a recovery of damages arising *ex delicto* must show the extent and amount thereof or furnish facts and data as a basis upon which the jury may approximate the proper amount with reasonable certainty;[17] and if damages are implied or proved, but no evidence as to the amount is offered, a recovery of nominal damages only can be had.[18] If, however, there is evidence to warrant a jury in finding that the plaintiff has been damaged by the wrongful act, he should not be nonsuited.[19]

(ii) *For Personal Injuries* — (A) *In General.* In actions for personal injuries the existence of the bodily hurt or defect complained of must not be left to mere conjecture, surmise, or speculation.[20] An estimate of the amount of the damages is not, however, essential, it being sufficient to furnish the jury with data sufficient for an intelligent assessment,[21] and in many instances the jury may, upon proof of the injury, fix the amount from their general knowledge;[22] nor is it essential that there be a uniformity of evidence as to the nature of the injury, where its existence and the cause thereof is not disputed.[23]

Texas.— Pierpont Mfg. Co. *v.* Goodman Produce Co., (Civ. App. 1900) 60 S. W. 347; Larrimore *v.* Comanche County, (Civ. App. 1895) 32 S. W. 367.

Wisconsin.— Logemann *v.* Pauly, 100 Wis. 671, 76 N. W. 604.

United States.— Dushane *v.* Benedict, 120 U. S. 630, 7 S. Ct. 696, 30 L. ed. 810.

See 15 Cent. Dig. tit. "Damages," § 512.

16. Bee Printing Co. *v.* Hichborn, 4 Allen (Mass.) 63; Churchill *v.* Price, 44 Wis. 540. See also Murdock *v.* Sumner, 22 Pick. (Mass.) 156; Gonzales' Branch R. Co. *v.* Harvey, (Tex. Civ. App. 1894) 25 S. W. 1025.

17. Williams *v.* Hall, 2 Dana (Ky.) 97; Minor *v.* Wright, 16 La. Ann. 151; Ranson *v.* Labranche, 16 La. Ann. 121; Western Union Tel. Co. *v.* Brown, 62 Tex. 536; Davis *v.* Texas, etc., R. Co., (Tex. Civ. App. 1897) 42 S. W. 1008; Ft. Worth, etc., R. Co. *v.* Burton, (Tex. Civ. App. 1891) 15 S. W. 197; International, etc., R. Co. *v.* Jordan, 1 Tex. App. Civ. Cas. § 859; Kinnear *v.* Robinson, 13 N. Brunsw. 73. See also Paulton *v.* Keith, 23 R. I. 164, 49 Atl. 635. *Compare* Pike *v.* Doyle, 19 La. Ann. 362, applying La. Civ. Code, art. 19, § 3, which vests the jury with discretionary power to assess damages for quasi-offenses where proof of the amount of damages is not definite.

18. Brown *v.* Emerson, 18 Mo. 103. And see Davis *v.* Texas, etc., R. Co., (Tex. Civ. App. 1897) 42 S. W. 1008.

19. Weatherby *v.* Meiklejohn, 61 Wis. 67, 20 N. W. 374. And see Mammoth Springs Roller-Mill Co. *v.* Ellston, (Ark. 1893) 22 S. W. 344.

20. Laidlaw *v.* Sage, 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216; Weidinger *v.* Third Ave. R. Co., 40 N. Y. App. Div. 197, 57 N. Y. Suppl. 851; Haszlacher *v.* Third Ave. R. Co., 60 N. Y. Suppl. 1001.

21. Alabama Great Southern R. Co. *v.* Bailey, 112 Ala. 167, 20 So. 313, holding that evidence that the plaintiff suffered and always would suffer great pain is sufficient data for this purpose.

22. See Feinstein *v.* Jacobs, 15 Misc. (N. Y.) 474, 37 N. Y. Suppl. 345.

To recover damages for the loss of a leg it is not necessary that an estimate of the amount thereof should be given in evidence, as the general knowledge of the jury may be exercised in estimating the same. Baltimore, etc., R. Co. *v.* Keck, 84 Ill. App. 159.

There is no need of direct or express evidence of the value of a wife's services, either by the day, week, or any other stated period, in order to entitle the husband to recover for the loss thereof, as the relation which she sustains to him is a special and peculiar one, and the actual facts and circumstances of each case should guide the jury in estimating for themselves, in the light of their own observation and experience, and to the satisfaction of their own consciences, the amount which would fairly and justly compensate the husband for his loss. Denver Consol. Tramway Co. *v.* Riley, 14 Colo. App. 132, 59 Pac. 476; Metropolitan St. R. Co. *v.* Johnson, 91 Ga. 466, 18 S. E. 816; Kelley *v.* Mayberry Tp., 154 Pa. St. 440, 26 Atl. 595; Gainesville, etc., R. Co. *v.* Lacy, 86 Tex. 244, 24 S. W. 269. *Compare* Munk *v.* Watertown, 67 Hun (N. Y.) 261, 22 N. Y. Suppl. 227. See also Furnish *v.* Missouri Pac. R. Co., 102 Mo. 669, 15 S. W. 315, 22 Am. St. Rep. 800.

Failure to offer evidence that plaintiff was in good health before an accident does not preclude a recovery by the plaintiff for injuries sustained, as prior ill health would not defeat a recovery, but would merely affect the amount of damages. Standard Oil Co. *v.* Bowker, 141 Ind. 12, 40 N. E. 128.

23. Texas, etc., R. Co. *v.* Suggs, 62 Tex. 323. Where an injured person in good faith does certain injudicious acts through a mistaken judgment, it is not necessary to his recovery that he should by evidence discriminate between the actual injuries and their natural consequences, and the injuries with their consequences resulting from such acts, as it would probably be impossible even by expert testimony to accurately describe and

(B) *Of Effect of Injury* — (1) In General. The evidence, to justify a court in submitting to the jury the question of whether or not a certain bodily condition complained of is the result of the injury, should show the connection between the two with reasonable certainty, and not leave it to vague speculation[24] or conjecture.[25] It may be said, however, that evidence of good health prior to the injury, and of suffering or ailments immediately or shortly thereafter, which are shown by competent testimony to be reasonably imputed to it, and are not shown by expert testimony to be an impossible effect of the injury, is sufficient to carry the question to the jury.[26]

(2) As Cause of Disease. Sufficiency of the evidence to prove that a disease from which the injured party is suffering or from which he died was caused by the injury depends of course upon the distinguishing facts of each individual case; the mere fact that a certain diseased condition might consistently arise from the injury is insufficient.[27] The evidence should so exclude other causes, and the circumstances be such that a reasonable inference arises that the injury caused the disease,[28] and if the party is addicted to habits which might induce the disease this fact will be considered.[29] On the other hand a substantial conflict in the testimony as to the cause of the disease, which by a substantial number of equally credible witnesses on both sides is attributed to the injury, will ordinarily carry the question to the jury.[30]

(C) *Of Expectancy of Life.* While affirmative proof of the probable duration of life is admissible,[31] such evidence is not absolutely essential, but the jury may arrive at a conclusion from evidence as to the health of plaintiff and the other facts of the case properly before them.[32]

(D) *Of Future Pain and Suffering.* The evidence, to justify a recovery of damages because of future pain and suffering, must be so certain and definite that its existence is not left to the mere imagination or guess-work of the jury.[33]

apportion the damage occasioned from the injury and that which was occasioned by injudicious treatment. Foels *v.* Tonawanda, 59 Hun (N. Y.) 567, 14 N. Y. Suppl. 46.

24. See Saumby *v.* Rochester, 145 N. Y. 81, 39 N. E. 715; Pratt *v.* Greenwich, etc., R. Co., 57 N. Y. App. Div. 628, 68 N. Y. Suppl. 117; Schwanzer *v.* Brooklyn Heights R. Co., 18 N. Y. App. Div. 205, 45 N. Y. Suppl. 889; Smith *v.* Chicago, etc., R. Co., 107 Wis. 35, 82 N. W. 193.

25. Littlehale *v.* Osgood, 161 Mass. 340, 37 N. E. 375.

26. *Colorado.*— Denver *v.* Hyatt, 28 Colo. 129, 63 Pac. 403.

Iowa.— Quackenbush *v.* Chicago, etc., R. Co., 73 Iowa 458, 35 N. W. 523.

Massachusetts.— Berard *v.* Boston, etc., R. Co., 177 Mass. 179, 58 N. E. 586.

Michigan.— See Styles *v.* Decatur, (1902) 91 N. W. 622.

Nebraska.— Stephenson *v.* Flagg, 41 Nebr. 371, 59 N. W. 785.

New Jersey.— Stein *v.* Koster, 67 N. J. L. 481, 51 Atl. 480.

New York.— Wolf *v.* Third Ave. R. Co., 67 N. Y. App. Div. 605, 74 N. Y. Suppl. 336; Fox *v.* Union Turnpike Co., 59 N. Y. App. Div. 363, 69 N. Y. Suppl. 551; Bowen *v.* New York Cent., etc., R. Co., 89 Hun 594, 35 N. Y. Suppl. 540. See also Lindenmann *v.* Brooklyn Heights R. Co., 69 N. Y. App. Div. 442, 74 N. Y. Suppl. 988.

Where there is a conflict in expert testimony as to the effect of the injury, a verdict for the plaintiff will not ordinarily be disturbed. Chicago, etc., R. Co. *v.* Sullivan, 21 Ill. App. 580 [*affirmed* in (1888) 17 N. E. 460].

27. Trapnell *v.* Red Oak Junction, 76 Iowa 744, 39 N. W. 884.

28. West Chicago St. R. Co. *v.* Foster, 175 Ill. 396, 51 N. E. 690; Houston *v.* Traphagen, 47 N. J. L. 23; Hoey *v.* Metropolitan St. R. Co., 70 N. Y. App. Div 60, 74 N. Y. Suppl. 1113; Newman *v.* Alabama Great Southern R. Co., 38 Fed. 819.

29. Morrow *v.* North Birmingham St. R. Co., (Ala. 1893) 13 So. 775.

30. *Missouri.*— Hanlon *v.* Missouri Pac. R. Co., 104 Mo. 381, 16 S. W. 233.

Nevada.— Schafer *v.* Gilmer, 13 Nev. 330.

New York.—Keane *v.* Waterford, 130 N. Y. 188, 29 N. E. 130 [*affirming* 56 Hun 639, 8 N. Y. Suppl. 790]; Eichholz *v.* Niagara Falls Hydraulic Power, etc., Co., 68 N. Y. App. Div. 441, 73 N. Y. Suppl. 842; McCready *v.* Staten Island Electric R. Co., 51 N. Y. App. Div. 338, 64 N. Y. Suppl. 996.

Pennsylvania.— Reading City Pass. Co. *v.* Eckert, (1886) 4 Atl. 530.

Texas.— Texas, etc., R. Co. *v.* Bailey, (Civ. App. 1894) 27 S. W. 302.

31. See *supra*, XIII, B, 2, b, (I), (B), (6).

32. Gainesville, etc., R. Co. *v.* Lacy, 86 Tex. 244, 24 S. W. 269; Gulf, etc., R. Co. *v.* Compton, 75 Tex. 667, 13 S. W. 667.

33. Webb *v.* Union R. Co., 44 N. Y. App. Div. 413, 60 N. Y. Suppl. 1087; Crawford *v.*

(E) *Of Impaired Earning Capacity.* To authorize a recovery of damages for the impairment of earning capacity the party must show facts from which the jury can intelligently determine the amount.[34] Proof of his earning capacity before the injury and the extent to which it has been affected is sufficient,[35] although ordinarily proof of these two points is required.[36]

(F) *Of Loss of Time.* Where one claims loss of time as an element of damage, as the result of personal injuries, it is incumbent upon him to establish by competent evidence the value of such time, or facts from which the value may be estimated with reasonable accuracy,[37] unless his occupation or business is such that the value of his time is not susceptible of definite proof.[38]

(G) *Of Mental Suffering.* Direct testimony of mental anguish and suffering, while proper,[39] is not indispensable to a recovery therefor. Damages for the same are ordinarily determined from the circumstances of the case as disclosed by the evidence, the amount thereof depending upon the seriousness of the injury;[40] but the evidence must show such suffering to be reasonably certain and not merely imaginary.[41]

(H) *Of Permanency of Injury.* While the evidence, to authorize a recovery because of the permanency of the injury, must establish such condition with rea-

Delaware, etc., R. Co., 55 N. Y. Super. Ct. 255.

Mere testimony of the condition of the plaintiff up to the time of the trial, with no evidence that his condition would continue, has been held to be insufficient to justify the jury in considering this item. Shultz *v.* Griffith, 103 Iowa 150, 72 N. W. 445, 40 L. R. A. 117.

34. McKenna *v.* Citizens' Natural Gas Co., 198 Pa. St. 31, 47 Atl. 990; Houston, etc., R. Co. *v.* Bird, (Tex. Civ. App. 1898) 48 S. W. 756.

For evidence sufficient to authorize the submission of this item of damage to the jury see Hoyt *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 249, 76 N. Y. Suppl. 832; Houston, etc., R. Co. *v.* Harris, 30 Tex. Civ. App. 179, 70 S. W. 335; De la Vergne Refrigerating Mach. Co. *v.* Stahl, 24 Tex. Civ. App. 471, 60 S. W. 319.

Evidence that a married woman made from five to ten dollars a month by taking in sewing is sufficient evidence of a separate employment to allow a recovery for the loss of earning capacity, in an action for personal injury prosecuted by her. Bailey *v.* Centerville, 108 Iowa 20, 78 N. W. 831.

Where the injured party is an infant, and has never developed any earning capacity, the amount of damages therefor after his majority may be left to the judgment, common experience, and enlightened conscience of the jurors, guided by the facts and circumstances of the case. Bartley *v.* Trorlicht, 49 Mo. App. 214. Evidence of the proper value of an infant's services from the time of his injury to his majority must be offered to authorize a recovery therefor. Dunn *v.* Cass Ave., etc., R. Co., 21 Mo. App. 188.

35. McNaughton *v.* Metropolitan St. R. Co., 22 Misc. (N. Y.) 700, 49 N. Y. Suppl. 1102.

36. Louisville, etc., R. Co. *v.* Pearson, 97 Ala. 211, 12 So. 176 (holding that mere testimony that the injured party was saving thirty-five dollars a month, without showing his income or amount of his earnings, is insufficient); Britton *v.* Grand Rapids St. R. Co., 90 Mich. 159, 51 N. W. 276. And see Staal *v.* Grand St., etc., R. Co., 36 Hun (N. Y.) 208.

37. Winter *v.* Central Iowa R. Co., 74 Iowa 448, 38 N. W. 154; Staal *v.* Grand St., etc., R. Co., 107 N. Y. 625, 13 N. E. 624 (holding that where the evidence merely established the fact that before the injury the plaintiff was "healthy" nominal damages only could be awarded for the loss of time); Leeds *v.* Metropolitan Gaslight Co., 90 N. Y. 26; Orsor *v.* Metropolitan Cross Town R. Co., 78 Hun (N. Y.) 169, 28 N. Y. Suppl. 966; Texas, etc., R. Co. *v.* Bigham, (Tex. Civ. App. 1895) 30 S. W. 254; Campbell *v.* Alston, (Tex. Civ. App. 1893) 23 S. W. 33.

Where the injured party is a common laborer the jury may be presumed to be reasonably familiar with the value of such services, and a failure to introduce evidence thereof is not fatal. Loe *v.* Chicago, etc., R. Co., 57 Mo. App. 350.

38. Missouri, etc., R. Co. *v.* Vance, (Tex. Civ. App. 1897) 41 S. W. 167.

39. See *supra*, XIII, B, 2, b, (I), (B), (12).

40. Hoover *v.* Haynes, (Nebr. 1903) 93 N. W. 732; Galveston, etc., R. Co. *v.* Thornsberry, (Tex. 1891) 17 S. W. 521; Galveston, etc., R. Co. *v.* Hubbard, (Tex. Civ. App. 1902) 70 S. W. 112; International, etc., R. Co. *v.* Anchonda, (Tex. Civ. App. 1902) 68 S. W. 743; International, etc., R. Co. *v.* Mitchell, (Tex. Civ. App. 1901) 60 S. W. 996; Missouri, etc., R. Co. *v.* Cox, (Tex. Civ. App. 1900) 55 S. W. 354, 56 S. W. 97; San Antonio *v.* Kreusel, 17 Tex. Civ. App. 594, 43 S. W. 615; Southern Bell Telephone, etc., Co. *v.* Clements, 98 Va. 1, 34 S. E. 951.

41. Missouri, etc., R. Co. *v.* Armstrong, (Tex. Civ. App. 1890) 38 S. W. 368, holding that evidence that plaintiff, because of ejection from a train, borrowed one dollar and sixty-five cents from a minister to continue

sonable certainty,[42] it is well settled that direct expert testimony of the certainty of such effect is not necessary, but the jury may be authorized to take such probability into consideration when from the entire evidence such effect appears to be the probable result of the injury.[43] So too where the evidence concerning the permanent effect of the injury is conflicting the jury may ordinarily consider the same.[44]

(III) *For Injury to Property.* Where plaintiff sues for a loss of or injury to his property, caused by the negligent or unlawful act of defendant, while the complaint should not be dismissed, if the evidence shows damage to any extent,[45] any substantial recovery must not be based on guess-work or inference, but must be supported by evidence of facts, circumstances, and data justifying an inference that the damages awarded are a just and reasonable compensation for the injury suffered;[46] and plaintiff's mere assumption that he has been damaged to a

her journey will not authorize a recovery for mental anguish because of the borrowing.

42. Chicago, etc., R. Co. *v.* Archer, 46 Nebr. 907, 65 N. W. 1043; Carter *v.* Nunda, 55 N. Y. App. Div. 501, 66 N. Y. Suppl. 1059; Weidinger *v.* Third Ave. R. Co., 40 N. Y. App. Div. 197, 57 N. Y Suppl. 851; Miley *v.* Broadway, etc., R. Co., 8 N. Y. Suppl. 455; The Grecian Monarch, 32 Fed. 635.

43. *Illinois.*— Cicero, etc., R. Co. *v.* Brown, 193 Ill. 274, 61 N. E. 1093 [*affirming* 89 Ill. App. 318].

Kansas.— Missouri, etc., R. Co. *v.* Fowler, 61 Kan. 320, 59 Pac. 648.

Nebraska.— Barr *v.* Post, 56 Nebr. 698, 77 N. W. 123.

New York.— Horowitz *v.* Hamburgh-American Packet Co., 18 Misc. 24, 41 N. Y. Suppl. 54; Brooks *v.* Rochester R. Co., 10 Misc. 88, 31 N. Y. Suppl. 179; Tuomey *v.* O'Reilly, etc., Co., 3 Misc. 302, 22 N. Y. Suppl. 930; Rhines *v.* Royalton, 15 N. Y. Suppl. 944 [*distinguishing* Strohm *v.* New York, etc., R. Co., 96 N. Y. 305].

Texas.— Texas, etc., R. Co. *v.* Davidson, 3 Tex. Civ. App. 542, 21 S. W. 68.

See 15 Cent. Dig. tit. "Damages," § 506.

44. Squires *v.* Chillicothe, 89 Mo. 226, 1 S. W. 23; McSwyny *v.* Broadway, etc., R. Co., 4 Silv. Supreme (N. Y.) 495, 7 N. Y. Suppl. 456; Moylan *v.* Second Ave. R. Co., 13 N. Y. Suppl. 494.

45. Leber *v.* Stores, 31 Misc. (N. Y.) 474, 64 N. Y. Suppl. 464 [*affirming* 31 Misc. 804, 62 N. Y. Suppl. 1124]. See also Hartman *v.* Pittsburg Incline Plane Co., 159 Pa. St. 442, 28 Atl. 145. Where the evidence shows substantial damages caused by the negligence of defendants, the failure to distinguish between the items of damage for which defendants were, and for which they were not, responsible does not limit the recovery to nominal damages only. Mark *v.* Hudson River Bridge Co., 103 N. Y. 28, 8 N. E. 243.

46. **For evidence examined and held insufficient as furnishing a basis for estimating damages** see the following cases:

Colorado.— Mackey *v.* Monahan, 13 Colo. App. 144, 56 Pac. 680.

Connecticut.— Fritts *v.* New York, etc., R. Co., 62 Conn. 503, 26 Atl. 347.

Georgia.— Oakley Mills Mfg. Co. *v.* Neese, 54 Ga. 459.

Kansas.— Powers *v.* Clarkson, 11 Kan. 101.

Louisiana.— Trudeau *v.* New Orleans, etc., R. Co., 15 La. Ann. 717.

New York.— Lippert *v.* Leski, 79 N. Y. App. Div. 632, 79 N. Y. Suppl. 1009; Wagner *v.* Conway, 76 N. Y. App. Div. 623, 78 N. Y. Suppl. 420; Goldberg *v.* Besdine, 76 N. Y. App. Div. 451, 78 N. Y. Suppl. 776; Gerard *v.* Prouty, 34 Barb. 454; Schwartz *v.* Schendel, 24 Misc. 733, 53 N. Y. Suppl. 829; Reilly *v.* Merritt, 12 Misc. 111, 33 N. Y. Suppl. 58; Young *v.* Hurd, 1 N. Y. Suppl. 819; Campbell *v.* Campbell, 6 N. Y. St. 806.

Ohio.— Feuerstein *v.* Jackson, 8 Ohio Cir. Ct. 396.

Pennsylvania.— Griffiths *v.* Wilkes-Barre, 6 Kulp 505.

South Carolina.— Waldrop *v.* Greenwood, etc., R. Co., 28 S. C. 157, 5 S. E. 471.

Tennessee.— Roynan *v.* Patterson, (Sup. 1886) 1 S. W. 103.

Texas.— Green *v.* Taylor, etc., R. Co., 79 Tex. 604, 15 S. W. 685; Willis *v.* Morris, 66 Tex. 628, 1 S. W. 799, 59 Am. Rep. 634; Mooring *v.* Campbell, 47 Tex. 37; Texas, etc., R. Co. *v.* McDowell, 7 Tex. Civ. App. 341, 27 S. W. 177; Galveston, etc., R. Co. *v.* Hatch, (Civ. App. 1893) 22 S. W. 10; St. Louis, etc., R. Co. *v.* Pickens, (Civ. App. 1889) 14 S. W. 1071.

Wisconsin.— Hut hinson *v.* Chicago, etc., R. Co., 41 Wis. 541.

See 15 Cent. Dig. tit. "Damages," § 511.

For evidence examined and held so uncertain or contradictory that a verdict for nominal damages would not be disturbed see Blanchard *v.* Loges, 11 Nebr. 460, 9 N. W. 568; O'Neill *v.* Brooklyn Heights R. Co., 71 Hun (N. Y.) 114, 24 N. Y. Suppl. 638.

For evidence examined and held sufficient to justify the recovery see the following cases:

Illinois.— Springfield *v.* Dalby, 139 Ill. 34, 29 N. E. 860.

Kentucky.—Adams Express Co. *v.* Hoeing, 9 Ky. L. Rep. 814.

Missouri.— Dammann *v.* St. Louis, 152 Mo. 186, 53 S. W. 932; Golden *v.* Heman Constr. Co., 100 Mo. App. 20, 71 S. W. 1093.

New York.— Schriver *v.* Johnstown, 71 Hun 232, 24 N. Y. Suppl. 1083; Le Salg *v.* Dougherty, 30 Misc. 455, 62 N. Y. Suppl. 510.

certain amount without stating any facts upon which the estimate is made is too uncertain.[47] So too it must clearly appear that the damage was the result of the act complained of,[48] and that the assessment includes only damage arising from the unlawful act;[49] and where it is clear to the court that the assessment has been made through a misconception of the law the verdict will be set aside.[50]

3. For Particular Purposes — a. Anticipated Profits. As anticipated profits, to be considered as a legitimate item of damage, must be shown with some degree of certainty and not be left to mere conjecture,[51] the facts and circumstances showing the grounds and reason for the expected profits must appear with such certainty and fulness that the jury may estimate their amount without resorting to speculation or conjecture.[52] Mere estimates, speculations, or conjectures of witnesses, not founded upon knowledge of actual facts,[53] or testimony that plain-

See also Avery *v.* New York Cent., etc., R. Co., 2 N. Y. Suppl. 101.

Pennsylvania.— St. Augustine *v.* Philadelphia County, Brightly N. P. 116.

Texas.— Gulf, etc., R. Co. *v.* Witte, 68 Tex. 295, 4 S. W. 490.

Utah.— Johnson *v.* Rio Grande Western R. Co., 7 Utah 346, 26 Pac. 926.

Vermont.— Taylor *v.* Hayes, 63 Vt. 475, 21 Atl. 610.

Virginia.— Norfolk, etc., R. Co. *v.* Draper, 90 Va. 245, 17 S. E. 883.

See 15 Cent. Dig. tit. "Damages," § 511.

Evidence of the value of a pair of pants when new, the time and amount of wear to which they had been subjected, and the extent of the tear forms a sufficient basis for estimating the damages in an action against a party who had negligently left a box on the sidewalk, whereby the pants had been torn. McCarten *v.* Flagler, 69 Hun (N. Y.) 134, 23 N. Y. Suppl. 263.

Sufficient evidence of market value.— Evidence of the mere cost of property by a guest at a hotel, without more, is not sufficient proof of its market value. Watson *v.* Loughran, 112 Ga. 837, 38 S. E. 82. But where the testimony as to the value of an animal negligently killed does not indicate whether the estimate is founded on the market value or on the actual value, and there is nothing to show that an effort was made to ascertain from the witnesses on which basis their valuation was placed the court will not disturb the verdict on the mere supposition that the market value was not the basis on which the valuation was placed. Jacksonville, etc., R. Co. *v.* Wellman, 26 Fla. 344, 7 So. 845. See also Gulf, etc., R. Co. *v.* Gibson, (Tex. Civ. App. 1893) 21 S. W. 936.

47. Claunch *v.* Osborn, (Tex. Civ. App. 1893) 23 S. W. 937; Hoskins *v.* Huling, 2 Tex. App. Civ. Cas. § 155.

The quantity of hay destroyed by a fire is best determined by determining the number of acres of hay land by a reliable survey and the average yield per acre as admitted by the plaintiff rather than by uncertain estimates of the plaintiff and his neighbors of the number of loads stacked and the height of the stacks. Watt *v.* Nevada Cent. R. Co., 23 Nev. 154, 44 Pac. 423, 46 Pac. 52, 726, 62 Am. St. Rep. 772.

48. McGrath *v.* Third Ave. R. Co., 9 N. Y. App. Div. 141, 41 N. Y. Suppl. 93.

49. Texas, etc., R. Co. *v.* Dunn, (Tex. Sup. 1891) 17 S. W. 822.

Possible future injuries should be left to future actions, and damages for permanent injury should not be given merely upon the opinion of witnesses. Gulf, etc., R. Co. *v.* Hepner, 83 Tex. 136, 18 S. W. 441.

50. Stearns *v.* Cook, 28 Ill. App. 511.

51. Boston, etc., R. Co. *v.* O'Reilly, 158 U. S. 334, 15 S. Ct. 830, 39 L. ed. 1006. As to the degree of certainty by which such profits must appear see *supra*, VII, G.

52. *Louisiana.*— Crow *v.* Manning, 45 La. Ann. 1221, 14 So. 122; Gebelin *v.* Hamilton, 18 La. Ann. 646.

Missouri.— Lewis *v.* Atlas Mut. L. Ins. Co., 61 Mo. 534.

New York.— Volkmar *v.* Third Ave. R. Co., 28 Misc. 141, 58 N. Y. Suppl. 1021 [*reversing* 27 Misc. 818, 57 N. Y. Suppl. 1149]; Holloway *v.* Stephens, 46 How. Pr. 363.

North Carolina.— Reavis *v.* Orenshaw, 105 N. C. 369, 10 S. E. 907.

Tennessee.—Feder *v.* Gass, (Ch. App. 1900) 59 S. W. 175.

United States.— Cincinnati Siemens-Lungren Gas Illuminating Co. *v.* Western Siemens-Lungren Co., 152 U. S. 200, 14 S. Ct. 523, 38 L. ed. 411; Central Coal, etc., Co. *v.* Hartman, 111 Fed. 96, 49 C. C. A. 244.

See 15 Cent. Dig. tit. "Damages." § 513.

For evidence examined and held sufficient to authorize a submission of this item to the jury see the following cases:

Colorado.— Goldhammer *v.* Dyer, 7 Colo. App. 29, 42 Pac. 177.

Maryland.— Baltimore, etc., R. Co. *v.* Stewart, 79 Md. 487, 29 Atl. 964.

Michigan.— Leonard *v.* Beaudry, 80 Mich. 163, 45 N. W. 66.

New York.— Dart *v.* Laimbeer, 107 N. Y. 664, 14 N. E. 291; Lavens *v.* Lieb, 12 N. Y. App. Div. 487, 42 N. Y. Suppl. 901; Dethlefs *v.* Tamsen, 7 Daly 354.

Pennsylvania.— Peirson *v.* Duncan, 162 Pa. St. 187, 29 Atl. 733; Stofflet *v.* Stofflet, 160 Pa. St. 529, 28 Atl. 857; Schlitz Brewing Co. *v.* McCann, 118 Pa. St. 314, 12 Atl. 445.

See 15 Cent. Dig. tit. "Damages," § 513.

53. Central Coal, etc., Co. *v.* Hartman, 111 Fed. 96, 49 C. C. A. 244.

tiff "thinks" or "calculates" that he could have made a certain amount,[54] is insufficient.

b. Counsel Fees. So too where counsel fees and the expenses of litigation are sought to be recovered the amount expended therefor must be proved with certainty,[55] and it must be shown that the amount so expended was a fair and reasonable compensation for the services rendered.[56]

c. Medical Expenses. As a general rule mere proof that medical expenses have been incurred, without proof that such expenses are a reasonable charge, is insufficient to authorize their submission to the jury as an element of damage,[57] although in some jurisdictions the courts are inclined to the opposite view.[58] Again some courts hold that if the charges have actually been paid by the plaintiff evidence thereof would be sufficient to carry the item to the jury.[59] As to the sufficiency of testimony of the reasonableness of the charge some courts seem to hold that the testimony of the physician himself as to its reasonableness will suffice;[60] while on the other hand others are inclined to the opposite view.[61]

XIV. PROCEEDINGS FOR ASSESSMENT.

A. Inquest on Default or Interlocutory Judgment — 1. In General. Where defendant fails to appear, or to further plead after demurrer overruled, a procedure deviating from the usual trial must ordinarily be invoked, as such default or failure does not usually[62] *ipso facto* entitle a party to final judgment;

54. Birney *v.* Wabash, etc., R. Co., 20 Mo. App. 470.

55. Johnson *v.* East Tennessee, etc., R. Co., 90 Ga. 810, 17 S. E. 121; Houston, etc., R. Co. *v.* Oram, 49 Tex. 341.

56. Allen *v.* Harris, 113 Ga. 107, 38 S. E. 322, holding that mere proof that payment had been made was not sufficient evidence of their reasonableness.

57. Bowsher *v.* Chicago, etc., R. Co., 113 Iowa 16, 84 N. W. 958; Page *v.* Delaware, etc., Canal Co., 34 N. Y. App. Div. 618, 54 N. Y. Suppl. 442; Schimpf *v.* Sliter, 64 Hun (N. Y.) 463, 19 N. Y. Suppl. 644; Schmitt *v.* Dry Dock, etc., R. Co., 2 N. Y. City Ct. 359; Brown *v.* White, 202 Pa. St. 297, 51 Atl. 962, 58 L. R. A. 321; International, etc., R. Co. *v.* Sampson, (Tex. Civ. App. 1901) 64 S. W. 692; Houston, etc., R. Co. *v.* Richards, (Tex. Civ. App. 1899) 49 S. W. 687; Houston, etc., R. Co. *v.* Pereira, (Tex. Civ. App. 1898) 45 S. W. 767; Houston, etc., R. Co. *v.* Kimbell, (Tex. Civ. App. 1898) 43 S. W. 1049; Wheeler *v.* Tyler South Eastern R. Co., (Tex. Sup. 1898) 43 S. W. 876 [*modifying* (Civ. App. 1897) 41 S. W. 517]; Fry *v.* Hillan, (Tex. Civ. App. 1896) 37 S. W. 359; Gulf, etc., R. Co. *v.* Southwick, (Tex. Civ. App. 1895) 30 S. W. 592.

Evidence of the number of visits of a physician is insufficient to authorize the jury to pass upon the value of such services. Carter *v.* Nunda, 55 N. Y. App. Div. 501, 66 N. Y. Suppl. 1059.

58. See Chicago City R. Co. *v.* Menely, 79 Ill. App. 679; Scullane *v.* Kellogg, 169 Mass. 544, 48 N. E. 622; Farley *v.* Charleston Basket, etc., Co., 51 S. C. 222, 28 S. E. 193, 401; Hart *v.* Charlotte, etc., R. Co., 33 S. C. 427, 12 S. E. 9, 10 L. R. A. 794; Western Gas Constr. Co. *v.* Danner, 97 Fed. 882, 38 C. C. A. 528. Evidence that a physician or surgeon attends and gives professional assistance to an injured party is sufficient to justify a finding that the services are rendered for a pecuniary recompense, which is to be paid by the patient. McGarrahan *v.* New York, etc., R. Co., 171 Mass. 211, 50 N. E. 610.

The testimony of the plaintiff of the amount expended must be certain and specific, as the facts are presumed to be clearly within his knowledge; and a statement by him of the supposed or probable amount is entirely too indefinite to form a basis for a recovery. Salida *v.* McKinna, 16 Colo. 523, 27 Pac. 810; Galveston, etc., R. Co. *v.* White, (Tex. Civ. App. 1895) 32 S. W. 186.

59. Colwell *v.* Manhattan R. Co., 57 Hun (N. Y.) 452, 10 N. Y. Suppl. 636; Morsemann *v.* Manhattan R. Co., 16 Daly (N. Y.) 249, 10 N. Y. Suppl. 105.

60. See Houston, etc., R. Co. *v.* Bird, (Tex. Civ. App. 1898) 48 S. W. 756; Missouri, etc., R. Co. *v.* Dickey, (Tex. Civ. App. 1898) 48 S. W. 626; Galveston, etc., R. Co. *v.* Duelm, (Tex. Civ. App. 1893) 23 S. W. 596.

61. Bedford *v.* Woody, 23 Ind. App. 401, 55 N. E. 499; Gumb *v.* Twenty-Third St. R. Co., 114 N. Y. 411, 21 N. E. 993. And see McNaier *v.* Manhattan R. Co., 4 N. Y. Suppl. 310.

62. According to the practice acts of some jurisdictions, if the complaint is verified or the action is on a writing for the payment of money only, or defendant is notified in the summons of the amount for which plaintiff will take judgment, the same may upon default be entered up without proof. Hartman *v.* Williams, 4 Cal. 254. See also Commercial Union Assur. Co. *v.* Everhart, 88 Va. 952, 14 S. E. 836; Schobacher *v.* Germantown F.

but an interlocutory judgment must be ordinarily entered,[63] and evidence taken or inquiry made as to the *quantum* of damages.[64]

2. By Whom Made — a. In General. The practice of determining the amount of damages in such cases in England, in the absence of statutory modification, seems to have been fairly well settled and defined.[65] In this country there seems to be no universal practice; procedure similar to that of the common law has in some states been invoked, in the absence of express statutory provisions;[66] while in the greater number of states the proper proceedings must be determined by reference to statutes.[67] In some cases a jury is necessary,[68] while under other circumstances the determination of the amount may be made by the court[69] or by some one appointed by it. Thus in some jurisdictions it may submit such determination to an auditor, assessor, or master,[70] or in certain instances to a referee.[71]

b. By Court. As the proceedings by writ of inquiry were productive of expense

Mut. Ins. Co., 59 Wis. 86, 17 N. W. 969; Cahoon *v.* Wisconsin Cent. R. Co., 10 Wis. 290. And see *supra*, XII, D, 1.

63. Form of interlocutory judgment. Where this procedure is invoked the form of the judgment entry is "that the plaintiff ought to recover his damages, but because the court know not what damages the said plaintiff hath sustained, therefore the sheriff is commanded, that by the oaths of twelve honest and lawful men, he inquire into said damages, and return such inquisition into court." Price *v.* Dearborn, 34 N. H. 481 [*quoting* Jacobs L. Dict.]; Hickman *v.* Baltimore, etc., R. Co., 30 W. Va. 296, 4 S. E. 654, 7 S. E. 455.

64. *Arkansas.*— Jetton *v.* Smead, 29 Ark. 372; Outlaw *v.* Yell, 8 Ark. 345.

Kentucky.— Clarke *v.* Seaton, 18 B. Mon. 226.

Maryland.— Cooper *v.* Roche, 36 Md. 563.

Michigan.— Mason *v.* Reynolds, 33 Mich. 60.

Mississippi.— Mobile, etc., R. Co. *v.* McArthur, 43 Miss. 180.

Missouri.— McCutchin *v.* Batterton, 1 Mo. 342.

Nevada.— Ballard *v.* Purcell, 1 Nev. 342.

North Carolina.—Rogers *v.* Moore, 86 N. C. 85; Ramsour *v.* Harshaw, 30 N. C. 480.

Pennsylvania.—Ottensmen *v.* Allespepski, 9 Kulp 170.

Wisconsin.— Gorman *v.* Ball, 18 Wis. 24.

See 15 Cent. Dig. tit. "Damages," § 515.

65. In cases where the defendant suffers judgment to go against him by default or *nil dicit* or by *non sum informatus*, in actions where the specific thing sued for is recovered, as in actions of debt for a sum certain, the judgment is complete; but where damages are to be recovered a jury must be called in to assess them unless the defendant, to save charges, will confess the whole damages laid in the declaration. This process of assessment is called a writ of inquiry, in the execution of which the sheriff sits as a judge and tries by a jury, subject to nearly the same law and conditions as the trial by jury at *nisi prius*, and ascertains the damages which the plaintiff has really sustained; and when his verdict is returned it is entered upon the roll in the manner of a *postea*, and the plaintiff is usually awarded the sum so assessed. Brill *v.* Neele, 1 Chit. 619, 18 E. C. L. 338; 3 Bl. Comm. 397; 4 Minor Inst. 602; Stephen Pl. 133; Tidd Pr. 295. For statements of the English practice see Hickman *v.* Baltimore, etc., R. Co., 30 W. Va. 296, 4 S. E. 654, 7 S. E. 455.

66. Ramsour *v.* Harshaw, 30 N. C. 480. See also Stanley *v.* Anderson, 1 Code Rep. (N. Y.) 52.

67. See *infra*, XIV, A, 2, b *et seq.*

68. See *infra*, XIV, A, 2, d.

69. See *infra*, XIV, A, 2, b.

In an equity suit a writ of inquiry was never ordered, and a sheriff's jury had no jurisdiction to assess the damages; if the court required information on any subject it sent the case to a court of common law on a feigned issue, and had such subject submitted to a jury regularly summoned and impaneled before a judge. Kreitz *v.* Frost, 55 Barb. (N. Y.) 474. See Forsyth *v.* Wheeling, 19 W. Va. 318, where it is held that on the principle that a court of equity, having taken jurisdiction of the subject-matter, will settle all the rights of the parties in relation thereto, if a question of damages sustained prior to the institution of the suit is involved the court should ascertain by a commissioner or an issue *quantum damnificatus* the amount thereof and render judgment accordingly.

70. Price *v.* Dearborn, 34 N. H. 481 [*approved* in Begg *v.* Whittier, 48 Me. 314], holding that it was no objection to the report of such auditor that one of two or more amounts were reported as damages dependent upon questions of law, raised by the facts stated in the report, and submitted to the court for its decision.

71. Ratté *v.* Booth, 16 Ont. Pr. 185.

Under the earlier practice of New York the court would not direct the inquest of damages to be held by the referee unless the examination of some long account was necessary (Boyce *v.* Comstock, Code Rep. N. S. (N. Y.) 290); and in such case a copy of the account itself must be shown the court (Brown *v.* Miller, 1 Barb. (N. Y.) 24). And see Waterbury *v.* Bouker, 10 Hun (N. Y.) 262; Bayerdorfer *v.* Bowles, 27 Misc. (N. Y.) 840, 58 N. Y. Suppl. 202.

and delay,[72] the practice, either by virtue of statute or by judicial innovation,[73] has been changed, and it is now usually conceded that where the action is brought for a sum certain or for a sum that may be made certain by computation,[74] and in many cases where judgment is entered against defendant by default[75] the court may enter up judgment after computation or after proper inquiry as to the amount of damages, and no jury is necessary; and the same rule is applicable on demurrer overruled, as upon default.[76] In the application of this rule the court has dispensed with the jury and assessed the damages where the amount has been conceded by confession or agreement of the parties,[77] in actions on promissory notes,[78] in actions on certificates of deposit,[79] in actions on stock subscriptions,[80] in actions on judgments,[81] in actions on bonds,[82] in actions for statutory penalties,[83] in actions on a covenant for rent in a deed,[84] in actions of replevin where plaintiff fails

72. **The authorities are not agreed as to the original purpose of the writ of inquiry.**— It has in many jurisdictions been considered more as an inquest to inform the conscience of the court than as a necessary proceeding. Dent *v.* Morrison, 1 Mo. 130; U. S. Bank *v.* Thayer, 2 Watts & S. (Pa.) 443; Smith *v.* Vanderhorst, 1 McCord (S. C.) 328, 10 Am. Dec. 674; Warren *v.* Kennedy, 1 Heisk. (Tenn.) 437.

73. Lennon *v.* Rawitzer, 57 Conn. 583, 19 Atl. 334.

74. *Illinois.*— Dunbar *v.* Bonesteel, 4 Ill. 32; Rust *v.* Frothingham, 1 Ill. 331.

Indiana.— Case *v.* Colter, 66 Ind. 336; Medler *v.* Hiatt, 14 Ind. 405; Henrie *v.* Sweasey, 5 Blackf. 273; Harrington *v.* Witherow, 2 Blackf. 37.

Iowa.— Chambers *v.* Lathrop, Morr. 102.

Kansas.— See Douglas *v.* Rinehart, 5 Kan. 392.

Kentucky.— Goff *v.* Hawks, 5 J. J. Marsh. 341.

Maryland.— Maccubbin *v.* Thornton, 1 Harr. & M. 194.

New York.— McCollum *v.* Barker, 3 Johns. 153.

North Carolina.— Adrian *v.* Jackson, 75 N. C. 536.

Tennessee.— Chattanooga Masonic Educational Assoc. *v.* Cook, 3 Head 313.

Texas.— Tarrant County *v.* Lively, 25 Tex. Suppl. 399.

United States.— Renner *v.* Marshall, 1 Wheat. 215, 4 L. ed. 74; McLain *v.* Rutherford, 16 Fed. Cas. No. 8,868*a*, Hempst. 47.

And see Tuttle *v.* Mechanics', etc., Loan Co., 6 Whart. (Pa.) 216.

See 15 Cent. Dig. tit. "Damages," § 520.

75. *Alabama.*— Barclay *v.* Barclay, 42 Ala. 345.

Arkansas.—Calloway *v.* Roane, 7 Ark. 354.

Connecticut.— Morris *v.* Winchester Repeating Arms Co., 73 Conn. 680, 49 Atl. 180; Falken *v.* Housatonic R. Co., 63 Conn. 258, 27 Atl. 1117; Lennon *v.* Rawitzer, 57 Conn. 583, 19 Atl. 334; Fox *v.* Hoyt, 12 Conn. 491, 31 Am. Dec. 760.

Illinois.— Miles *v.* Goodwin, 35 Ill. 53; Quigley *v.* Spear, 33 Ill. 352.

Indiana.— Langdon *v.* Bullock, 8 Ind. 341.

Indian Territory.— Tynon *v.* Crowell, 3 Indian Terr. 346, 58 S. W. 565.

Iowa.— Carleton *v.* Byington, 17 Iowa 579.

Kentucky.— Francis *v.* Francis, 18 B. Mon. 57; Daniel *v.* Judy, 14 B. Mon. 393.

Louisiana.— Daly *v.* Van Benthuysen, 3 La. Ann. 69.

Maine.— Bradstreet *v.* Erskine, 50 Me. 407.

Massachusetts.— Jarvis *v.* Blanchard, 6 Mass. 4.

Washington.— Citizens' Nat. Bank *v.* Columbia County, 23 Wash. 441, 63 Pac. 209.

See 15 Cent. Dig. tit. "Damages," § 520.

76. Hopkins *v.* Ladd, 35 Ill. 178; Pullman Palace Car Co. *v.* Taylor, 65 Ind. 153, 32 Am. Rep. 57; Bradfield *v.* McCormick, 3 Blackf. (Ind.) 161; Hanley *v.* Sutherland, 74 Me. 212.

77. People's Ice Co. *v.* People's Nat. Bank, 133 Ala. 248, 31 So. 804; Allen *v.* White, Minor (Ala.) 365; Applegate *v.* Jacoby, 9 Dana (Ky.) 206.

78. *Alabama.*— Ledbetter, etc., Loan Assoc. *v.* Vinton, 108 Ala. 644, 18 So. 692; Smith *v.* Robinson, 11 Ala. 270.

Arkansas.— See Leach *v.* Smith, 25 Ark. 246.

Illinois.— Wilcox *v.* Woods, 4 Ill. 51; Burlingame *v.* Turner, 2 Ill. 588.

Kansas.— Goff *v.* Russell, 3 Kan. 212.

Pennsylvania.— U. S. Bank *v.* Thayer, 2 Watts & S. 443.

Texas.— Niblett *v.* Shelton, 28 Tex. 548.

See 15 Cent. Dig. tit "Damages," § 520½.

79. Talladega Ins. Co. *v.* Woodward, 44 Ala. 287; Northern Bank *v.* Zepp, 28 Ill. 180.

80. Spangler *v.* Indiana, etc., R. Co., 21 Ill. 276.

81. St. Louis, etc., R. Co. *v.* Miller, 43 Ill. 199; Butcher *v.* Brownsville Bank, 2 Kan. 70, 83 Am. Dec. 446; Hoke *v.* Edwards, 46 N. C. 532.

82. Hall *v.* Fowlks, 8 Ark. 175 (delivery bond); Thompson *v.* Thompson, 58 S. W. 792, 22 Ky. L. Rep. 784 (supersedeas bond); Backus *v.* Cleveland F. & M. Ins. Co., 4 Ohio Dec. (Reprint) 518, 2 Clev. L. Rep. 299 (official bond of a delinquent agent); Durkey *v.* Hammond, 2 Mill (S. C.) 151 (bond for the performance of a covenant).

83. Tennessee Mut. Bldg., etc., Assoc. *v.* State, 99 Ala. 197, 13 So. 687. See also Garey *v.* Edwards, 15 Ala. 105; Austin *v.* Davis, 7 Ont. App. 478.

84. Dent *v.* Morrison, 1 Mo. 130.

to appear,[85] and also on the dissolution of an injunction and dismissal of the bill.[86]

c. By Clerk. In many jurisdictions where the amount may be determined by mere computation, an assessment may be made by the clerk of the court.[87] Such procedure is usually[88] invoked upon motion or at the instance of the court, and rests upon the theory that the act of the clerk is fiduciary and is really that of the court.[89] Hence any assessment which may be referred to the clerk may be made by the court in the first instance if it so desires.[90] But as this practice is usually founded upon statutory provision it cannot be invoked in cases where the authority is not given.[91]

d. By Jury. Where the demand in the complaint is for unliquidated damages and the amount cannot be determined without passing upon and adjudging questions of fact, it is the usual, and in some jurisdictions necessary, practice, to enter an interlocutory judgment, and to issue a writ of inquiry, or by some analogous procedure to have the amount determined and assessed by a jury.[92] This practice has been followed in actions where the declaration contained both special and common counts;[93] in actions on notes payable in current bank-notes,[94] in actions

85. Holkins *v.* Donahue, 4 Ohio Dec. (Reprint) 405, 2 Clev. L. Rep. 114.

86. Buck *v.* Beekly, 45 Ill. 100, relying expressly upon statutory authority. See also Shaffer *v.* Sutton, 49 Ill. 506.

87. *Florida.*— Netso *v.* Foss, 21 Fla. 143.
Illinois.— Meyers *v.* Phillips, 72 Ill. 460; Campbell *v.* Gilman, 26 Ill. 120; Thompson *v.* Haskell, 21 Ill. 215, 74 Am. Dec. 98; Robertson *v.* Hamet, 19 Ill. 161.
Iowa.— Swift *v.* Berry, 9 Iowa 43; Cameron *v.* Armstrong, 8 Iowa 212; Burlington, etc., R. Co. *v.* Marchand, 5 Iowa 468; Burlington, etc., R. Co. *v.* Shaw, 5 Iowa 463.
Mississippi.—Grigsby *v.* Ford, 3 How. 184.
New York.— Kreitz *v.* Frost, 55 Barb. 474.
South Carolina.— Crowther *v.* Sawyer, 2 Speers 573 (holding that a judgment is a liquidated demand, within the meaning of the statute allowing the assessment in such cases by the clerk); State Bank *v.* Vaughan, 2 Hill 556.
See 15 Cent. Dig. tit. "Damages," § 521.

88. Under some statutory provisions it has been held that in certain specified cases the assessment by the clerk was imperative. Croden *v.* Drew, 3 Duer (N. Y.) 652.

89. Dunbar *v.* Bonesteel, 4 Ill. 32; Begg *v.* Whittier, 48 Me. 314; Prentiss *v.* Spalding, 2 Dougl. (Mich.) 84. See also Rife *v.* Ingram, 3 Greene (Iowa) 125; Kelly *v.* Searing, 4 Abb. Pr. (N. Y.) 354.
If the clerk makes a mistake the court will order him to make a new assessment. Burr *v.* Reeve, 1 Johns. (N. Y.) 507.

90. Kent *v.* Bown, 3 Minn. 347.

91. O'Flynn *v.* Holmes, 8 Mich. 95; Reynolds *v.* La Crosse, etc., Packet Co., 10 Minn. 178.

92. *Alabama.*— Manhattan F. Ins. Co. *v.* Fowler, 76 Ala. 372; Wagnon *v.* Turner, 73 Ala. 197; Rhea *v.* Holston Salt, etc., Co., 59 Ala. 182; Young *v.* McLemore, 3 Ala. 295; Driver *v.* Spence, 3 Ala. 98; Phillips *v.* Malone, Minor 110; Martin *v.* Price, Minor 68.
Arkansas.— Hodges *v.* Crawford, 25 Ark. 565; Johnson *v.* Pierce, 12 Ark. 599; Wallace *v.* Henry, 5 Ark. 105.
Illinois.— Whiteside *v.* Bartleson, 1 Ill. 71.
Indiana.— Linn *v.* Schmall, 8 Blackf. 94.
Iowa.— Wiley *v.* Arnold, 1 Greene 365.
Kentucky.— Shirley *v.* Landram, 3 Bush 552; Weathers *v.* Mudd, 12 B. Mon. 112; Thompson *v.* Thompson, 7 B. Mon. 421; Keeton *v.* Scantland, Hard. 149; Louisville, etc., R. Co. *v.* Bates, 8 Ky. L. Rep. 617.
Louisiana.— Liles *v.* New Orleans Canal, etc., Co., 6 Rob. 273; Guillotte *v.* Thompson, 5 Rob. 141; Olivier *v.* Cannon, 18 La. 474.
Mississippi.— Sandford *v.* Campbell, 7 Sm. & M. 107; Grover *v.* Gaunt, 6 Sm. & M. 317.
Missouri.— Brown *v.* King, 39 Mo. 380; Wetzell *v.* Waters, 18 Mo. 396; Pratte *v.* Corl, 9 Mo. 163.
New York.— Canajoharie Dutch Reformed Church *v.* Wood, 8 Barb. 421; Kelsey *v.* Covert, 15 How. Pr. 92.
North Carolina.— Faucette *v.* Ludden, 117 N. C. 170, 23 S. E. 173; Skinner *v.* Terry, 107 N. C. 103, 12 S. E. 118; Witt *v.* Long, 93 N. C. 388; Roulhac *v.* Miller, 90 N. C. 174; White *v.* Snow, 71 N. C. 232; Moore *v.* Mitchell, 61 N. C. 304.
Pennsylvania.— Logan *v.* Jennings, 4 Rawle 355.
South Carolina.— Wilkie *v.* Walton, 2 Speers 473.
Texas.— Galveston, etc., R. Co. *v.* Templeton, 87 Tex. 42, 26 S. W. 1066; Hurlock *v.* Reinhardt, 41 Tex. 580.
Virginia.— Dunbar *v.* Lindenberger, 3 Munf. 169.
Washington.— Baker *v.* Prewitt, 3 Wash. Terr. 474, 19 Pac. 149.
See 15 Cent. Dig. tit. "Damages," §§ 520, 520½.

93. Kennon *v.* McRae, 3 Stew. & P. (Ala.) 249; Johnson *v.* Frank, 16 Ark. 199; Barber *v.* Whitney, 29 Ill. 439; Sherman *v.* Wilson, 7 Blackf. (Ind.) 362.

94. Ellett *v.* Chilton, 5 Ark. 181; McKiel *v.* Porter, 4 Ark. 534.

on obligations payable in currency of an uncertain value,[95] and in actions on bonds conditioned otherwise than for the payment of a specified sum, or where the truth of the breaches assigned should be inquired into.[96] Again in some jurisdictions it has been held necessary to submit to the jury the assessment of interest on the obligation in suit;[97] yet in other jurisdictions it seems that this item may be computed by the court.[98]

e. By Court or Jury at Option of Parties. It is also a well-established practice in many jurisdictions that the assessment will be made either by a jury or by the court at the option of plaintiff, who may state his preference by motion at the rendition of the interlocutory judgment.[99] On the other hand by statute[1] in some jurisdictions defendant may insist upon an assessment by a jury.[2] The right of either of the parties, however, to demand a jury to assess the damages may of course be waived by them and the matter left to the court.[3]

3. Procedure — a. In General. It is irregular and erroneous to assess the damages, as if upon default, while an issue of fact is pending or before the proper

95. Guelberth *v.* Watson, 8 Mo. 663; Williams *v.* Rockwell, 64 N. C. 325; Mississippi, etc., R. Co. *v.* Green, 9 Heisk. (Tenn.) 588; Brill *v.* Neele, 1 Chit. 619, 18 E. C. L. 338.

96. *Arkansas.*— Williams *v.* State, 10 Ark. 256; Lee *v.* Leech, 9 Ark. 423; Nelson *v.* Hubbard, 8 Ark. 477; McKisick *v.* Brodie, 6 Ark. 375; Hawkins *v.* Nunnelly, 6 Ark. 149; Pelham *v.* Page, 6 Ark. 148; Jennings *v.* Ashley, 5 Ark. 128.

Indiana.— Campbell *v.* Woolen, 5 Blackf. 80.

Kansas.— Simmons *v.* Garrett, McCahon 82.

Maryland.— State *v.* Lawson, 2 Gill 62.

Mississippi.— Boykin *v.* State, 50 Miss. 375; York *v.* Crawford, 42 Miss. 508.

New Jersey.—Simmons *v.* Kelly, 39 N. J. L. 438.

North Carolina.— State *v.* Baird, 118 N. C. 854, 24 S. E. 668.

Pennsylvania.— Church *v.* Given, 15 Phila. 188.

Vermont.— Benham *v.* Sage, 1 D. Chipm. 247.

Canada.— Callagher *v.* Strobridge, Draper (U. C.) 158.

See 15 Cent. Dig. tit. "Damages," § 520½.

97. Murray *v.* Conc, 8 Port. (Ala.) 250; Mailhouse *v.* Inloes, 18 Md. 328; Fretwell *v.* Dinsmore, Walk. (Miss.) 484; Smith *v.* Vanderhorst, 1 McCord (S. C.) 328, 10 Am. Dec. 674. See also King *v.* Southern Pac. Co., 109 Cal. 96, 41 Pac. 786, 29 L. R. A. 755.

98. St. Louis, etc., R. Co. *v.* Miller, 43 Ill. 199; Rust *v.* Frothingham, 1 Ill. 331; Mayhew *v.* Thatcher, 6 Wheat. (U. S.) 129, 5 L. ed. 223.

99. *Delaware.*— Silver *v.* Rhodes, 2 Harr. 369.

Iowa.— Burlington, etc., R. Co. *v.* Shaw, 5 Iowa 463.

Missouri.— Darrah *v.* The Lightfoot, 15 Mo. 187; Dent *v.* Morrison, 1 Mo. 130.

New Jersey.— Belton *v.* Gibbon, 12 N. J. L. 76.

New York.— Haines *v.* Davis, 6 How. Pr. 118, Code Rep. N. S. 407.

England.— Holdipp *v.* Otway, 2 Saund. 106.

See 15 Cent. Dig. tit. "Damages," § 520.

1. A provision that a court may assess the damages when a judgment is taken by default, without the intervention of a jury, must be construed as subordinate to a clause in the state constitution providing that the right of trial by jury of all issues of fact in civil proceedings shall be inviolate, and therefore the court may assess the damages only when the defendant has not appeared in court, or when, having appeared, he waives or fails to assert his right to have the assessment made by a jury. Knickerbocker L. Ins. Co. *v.* Hoeske, 32 Md. 317.

2. Pinkel *v.* Domestic Sewing Mach. Co., 89 Ill. 277; Meyers *v.* Phillips, 72 Ill. 460; Crabtree *v.* Green, 36 Ill. 278; Bankers' Reserve L. Assoc. *v.* Finn, 64 Nebr. 105, 89 N. W. 672; Jersey City *v.* Chase, 30 N. J. L. 233; Averill Coal, etc., Co. *v.* Verner, 22 Ohio St. 372.

Under the English practice plaintiff is entitled as a matter of right to a writ of inquiry, and the subsequent assessment of damages by a jury (Blackmore *v.* Flemyng, 7 T. R. 446); while it has been said that defendant, by having suffered default, has no election in the case, and cannot demand a jury (Begg *v.* Whittier, 48 Me. 314; Price *v.* Dearborn, 34 N. H. 481).

3. *Illinois.*— St. Louis, etc., R. Co. *v.* Miller, 43 Ill. 199.

Indiana.— Strough *v.* Gear, 48 Ind. 100.

Massachusetts.— Gallagher *v.* Silberstein, 182 Mass. 20, 64 N. E. 402.

Michigan.— O'Flynn *v.* Holmes, 8 Mich. 95.

Texas.— Johnson *v.* Dowling, 1 Tex. App. Civ. Cas. § 1090.

See 15 Cent. Dig. tit "Damages," § 520.

Such right is waived altogether by failing to submit a motion therefor until after the assessment has been made by the clerk or auditor (Palmer *v.* Harris, 98 Ill. 507; Price *v.* Dearborn, 34 N. H. 481), or by failing to comply with a statute requiring the demand to be made at a certain time or stage of the proceedings (Decatur, etc., Imp. Co. *v.* Crass, 97 Ala. 524, 12 So. 41. And see People *v.* Judges Jackson Cir. Ct., 1 Dougl. (Mich.) 302).

disposition of any pleas made;[4] and it is usually necessary that the record show that an interlocutory judgment by default or its equivalent was entered before the assessment was made.[5]

b. On Writ of Inquiry — (I) *Nature and Requisites.* A writ of inquiry is in substance an order of the court that a jury be sworn to assess damages,[6] and should show the preceding steps that have been taken in the case.[7] It has been held that it can only lawfully issue where the record shows a judgment by default[8] and a rule or order of the court awarding it,[9] although it has also been held that if an inquest of damages has been properly taken it cannot be vitiated by showing that no positive award of the writ was made.[10]

(II) *Proceedings Under* — (A) *Nature of Jury.* Under common-law procedure a jury to assess the damages on a writ of inquiry was a special one consisting of twelve men, summoned by the sheriff for that particular purpose from his county;[11] but under the practice prevailing in some of the states the jury for this purpose may be taken from the regular panel.[12]

(B) *Before Whom Jury Sits.* It was the usual practice at common law for the jury in executing a writ of inquiry to make the assessment in the presence and under the instruction of the sheriff, although it might be made under the supervision of a deputy.[13] In this country it is the practice in some jurisdictions to have the assessment made under the instructions and in the presence of the

4. *Illinois.*— Klein *v.* Wells, 82 Ill. 201; Keeler *v.* Campbell, 24 Ill. 287; McDonnell *v.* Harter, 22 Ill. 28.

Kentucky.— Williams *v.* Cheek, Ky. Dec. 64.

Mississippi.— Dickson *v.* Hoff, 3 How. 165.

New Jersey.— Smethurst *v.* Harwood, 30 N. J. L. 230.

New York.— Washburn *v.* Herrick, 2 Code Rep. 2; Love *v.* Humphrey, 9 Wend. 500, holding that where judgment on demurrer is rendered for the plaintiff on part of a count, but there is an issue of fact upon other counts in the complaint, the assessment cannot be made until after the plaintiff enters a *nolle prosequi* as to the counts upon which the issues of fact are joined. See also Backus *v.* Richardson, 5 Johns. 476.

See 15 Cent. Dig. tit. "Damages," § 515 *et seq.*

5. Romaine *v.* Muscatine County, Morr. (Iowa) 357; Hibbard *v.* Pettibone, 8 Wis. 270; Strong *v.* Catlin, 3 Pinn. (Wis.) 121, 3 Chandl. (Wis.) 130; Fisher *v.* Chase, 2 Pinn. (Wis.) 359, 2 Chandl. (Wis.) 3. But see White *v.* Rankin, 2 Blackf. (Ind.) 78.

6. Brown *v.* King, 1 Bibb (Ky.) 462.

Swearing such jury to do more than is required of them does not vitiate the acts which they properly perform, and therefore, while it is informal, it is not erroneous to swear them to try the issues joined, instead of to determine the amount of damages. Roberts *v.* Swearengen, Hard. (Ky.) 121.

7. Boyer *v.* Jones, 1 Woodw. (Pa.) 498, holding that while it was not necessary that the writ should recite the whole of the plaintiff's declaration, yet where it merely directed the sheriff to inquire as to the damages sustained by plaintiff "by occasion of the premises," where the only "premises" set out consisted in an allegation that defendant had been attached to answer plaintiff in a plea of trespass, it is insufficient, as it does not appear that judgment had been entered.

A mistake of the formal description of the court before which the writ is returned is not fatal, but is cured by the statute of jeofails. Richardson *v.* Backus, 1 Johns. (N. Y.) 59.

8. Nobles *v.* Christmas, 2 How. (Miss.) 885.

After an interlocutory judgment has been set aside an assessment is irregular and will be set aside. Staats *v.* Reynolds, 4 U. C. Q. B. O. S. 5. So too the assessment cannot be made pending a summons to set aside plaintiff's interlocutory judgment. Pace *v.* Meyers, 8 U. C. Q. B. 70.

9. Wright *v.* Williams, 2 Wend. (N. Y.) 632.

10. Brown *v.* King, 1 Bibb (Ky.) 462. See also Eastgate *v.* Hunt, 3 N. Y. Leg. Obs. 77, holding that where special bail was required the writ should not be executed without a rule of the court awarding it, but that on a judgment on demurrer no rule therefor was necessary.

11. Warren *v.* Kennedy, 1 Heisk. (Tenn.) 437. See also Rickards *v.* Swetzer, 3 How. Pr. (N. Y.) 413, 1 Code Rep. (N. Y.) 117.

12. Chase *v.* Lovering, 27 N. H. 295; McKeown *v.* Union Pass. R. Co., 15 Wkly. Notes Cas. (Pa.) 125. See also Ætna Ins. Co. *v.* Phelps, 27 Ill. 71, 81 Am. Dec. 217.

13. Jackson *v.* Rathbone, 3 Cow. (N. Y.) 296 (holding, in an action where the writ was executed before the under sheriff of a city, that the fact that the sheriff and coroner were members of a society against which a suit was brought depending upon the same title as that in issue in the writ of inquiry did not disqualify such officer on the ground of interest); Tillotson *v.* Cheetham, 2 Johns. (N. Y.) 63; Denny *v.* Trapnell, 2 Wils. C. P. 378.

court,[14] and this procedure will generally be adopted where important questions of law are likely to arise, or the questions of law and fact are mixed.[15]

c. Time of Assessment. Under some statutory provisions it has been held that the assessment must be made at the succeeding term after judgment has been entered,[16] although it may usually be made at the same term,[17] or at the discretion of the court at either term.[18]

d. Notice to Defendant. In some jurisdictions the practice rests upon the theory that a defendant who has not entered an appearance must himself keep watch and make it his business to appear upon the assessment of damages, if he would contest the amount thereof;[19] in other jurisdictions, however, either by virtue of statute or by rules of practice, notice to defendant of the assessment proceedings is necessary,[20] and such notice has been held necessary, in the absence of an express provision of the code, where a prior rule of court provided for the same.[21] So too if the general practice has been to order the writ executed at a subsequent term, and an order is made for its execution at the term that it is awarded, notice should be given defendant, although no statute specifically requires it.[22]

e. Hearing in Behalf of Defaulted Party — (i) *Right and Extent of.* The effect of a failure to plead on demurrer overruled,[23] or on a default by defendant, is to admit the cause of action and that something is due plaintiff, although

14. Ætna Ins. Co. *v.* Phelps, 27 Ill. 71, 81 Am. Dec. 217; Bell *v.* Aydelott, 1 Ill. 45; Warren *v.* Kennedy, 1 Heisk. (Tenn.) 437; Lacher *v.* Will, 6 Wis. 282.

15. Tillotson *v.* Cheetham, 2 Johns. (N. Y.) 107. See also Joannes *v.* Fisk, 3 Rob. (N. Y.) 710.

Amount of damages.— The court will not transfer the cause from a sheriff's jury to a justice of the supreme court merely because of the fact that large damages are claimed. Dunkel *v.* Cramer Hill Ferry Co., 61 N. J. L. 208, 41 Atl. 676.

That the defendant's attorney is also the attorney of the sheriff does not show such interest in that official as to necessitate the assessment being made before the court instead of before the sheriff or sheriff's jury. Hays *v.* Berryman, 6 Bosw. (N. Y.) 679.

16. Robins *v.* Pope, 20 Fed. Cas. No. 11,931*a*, Hempst. 219.

17. *Florida.*— Parkhurst *v.* Stone, 36 Fla. 463, 18 So. 596.

Louisiana.— Seris *v.* Bellocq, 17 La. Ann. 146.

Michigan.— Sinnock *v.* Wayne County Cir. Judge, 97 Mich. 475, 56 N. W. 860.

Missouri.— Summers *v.* Tice, 1 Mo. 349; Dent *v.* Morrison, 1 Mo. 130.

New York.— Cook *v.* Tuttle, 2 Wend. 289.

Tennessee.— Boggess *v.* Gamble, 3 Coldw. 148.

See 15 Cent. Dig. tit. "Damages," § 517.

18. Leavenworth *v.* Hicks, 1 Kan. 571; Frost *v.* Bruton, 15 Mo. 619.

Where no assessment had been made for fourteen years, and the original plaintiff and defendant were both dead, the court will refuse to make an order for the ascertainment of the amount against the surety. Cook *v.* Cooper, 4 Harr. (Del.) 189.

19. Cairo, etc., R. Co. *v.* Holbrook, 72 Ill. 419; Leavenworth *v.* Hicks, McCahon (Kan.) 160; Gemmell *v.* Davis, 71 Md. 458, 18 Atl. 955.

20. Sinnock *v.* Wayne County Cir. Judge, 97 Mich. 475, 56 N. W. 860; Mason *v.* Reynolds, 33 Mich. 60; Wheeler *v.* Wilkins, 19 Mich. 78; Davis *v.* Red River Lumber Co., 61 Minn. 534, 63 N. W. 1111; Duncan *v.* Lloyd, 1 Miles 350; Boyer *v.* Jones, 1 Woodw. 498. See Frankfort Bank *v.* Countryman, 11 Wis. 398; Coe *v.* Straus, 11 Wis. 72; Rose *v.* Barr, 2 Wis. 492.

See 15 Cent. Dig. tit. "Damages," § 523.

In New York, under the practice prior to the code, requiring that the same notice as the notice for trial should be given of the assessment of damages by the clerk, or of the execution of the writ of inquiry (Green *v.* Guthrie, 10 Johns. 128), it was necessary, to entitle a defendant to such notice, that he should make some appearance in the case before the expiration of the statutory time for answering (Lynde *v.* West, 12 Wend. 235). And to the same effect under a later provision of the code see Pearl *v.* Robitschek, 2 Daly 50.

Sufficiency of notice.— A notice to defendant that a writ of inquiry will be executed on a certain day "provided an interlocutory judgment shall have been obtained in the cause" is sufficient, inasmuch as the proviso may be rejected as surplusage. Oothout *v.* Booth, 12 Johns. (N. Y.) 151. So too a notice need not necessarily state the place where the assessment will be made. Beeson *v.* Hollister, 11 Mich. 193.

21. Kelsey *v.* Covert, 6 Abb. Pr. (N. Y.) 336 note, 15 How. Pr. (N. Y.) 92.

22. Evans *v.* Bowlin, 9 Mo. 406. See also Cairo, etc., R. Co. *v.* Holbrook, 72 Ill. 419.

23. For after the overruling of a demurrer the case stands, with reference to the evidence necessary for the plaintiff and admissible for the defendant, the same as it would

not any particular sum more than a nominal amount.[24] Defendant may introduce proof to reduce the claim to nominal damages;[25] he may cross-examine the opposite party's witnesses;[26] and in most jurisdictions he may introduce witnesses in his own behalf,[27] may address the jury,[28] may ask instructions of the court concerning the law,[29] may challenge a juror,[30] and may move for a new trial and by a bill of exceptions reserve any questions affecting the damages;[31] but inasmuch as a defendant has a right to appear and object to the introduction of testimony, he cannot after a failure so to do have the judgment struck out because of the admission of illegal testimony on the ground of surprise or irregularity,[32] although it would seem that if such evidence induces a judgment clearly excessive he is entitled to relief.[33]

(II) *Evidence.* The rules of evidence, in the assessment of damages, are in no way relaxed;[34] both parties must confine themselves to such questions of damage and matters of aggravation or mitigation as are authorized by the pleadings.[35] As

have stood upon a default. Havens *v.* Hartford, etc., R. Co., 28 Conn. 69.

24. *Connecticut.*— Shepard *v.* New Haven, etc., Co., 45 Conn. 54; Welch *v.* Wadsworth, 30 Conn. 149, 79 Am. Dec. 239 (where it is said that the rights of the parties, beyond the mere admission of the cause of action, are neither strengthened nor impaired by a judgment by default); Sherwood *v.* Haight, 26 Conn. 432.

Florida.— Russ *v.* Gilbert, 19 Fla. 54.

Indiana.— Sneaghan *v.* Briggs, Wils. 75.

Iowa.— Burlington, etc., R. Co. *v.* Shaw, 5 Iowa 463.

Maine.— Begg *v.* Whittier, 48 Me. 314.

North Carolina.— Parker *v.* Smith, 64 N. C. 291.

South Carolina.— Lanneau *v.* Ervin, 12 Rich. 31.

See 15 Cent. Dig. tit. "Damages," § 525; and, generally, Judgments.

25. Bridges *v.* Stephenson, 10 Ill. App. 369; Hightower *v.* Hawthorn, 12 Fed. Cas. No. 6,478*b*, Hempst. 42.

26. *Florida.*— Watson *v.* Seat, 8 Fla. 446.

Illinois.— North *v.* Kizer, 72 Ill. 172; Herrington *v.* Stevens, 26 Ill. 298; Chicago, etc., R. Co. *v.* Ward, 16 Ill. 522.

Indiana.— Briggs *v.* Sneghan, 45 Ind. 14.

Iowa.— Cook *v.* Walters, 4 Iowa 72.

New York.— Kerker *v.* Carter, 1 Hill 101.

England.— Williams *v.* Cooper, 3 Dowl. P. C. 204.

See 15 Cent. Dig. tit. "Damages," § 525.

On such cross-examination defendant is confined to such questions as tend to reduce the recovery, and cannot, through this avenue, interpose a defense. Foreman Shoe Co. *v.* Lewis, 191 Ill. 155, 60 N. E. 971; Lym *v.* Block, 32 Misc. (N. Y.) 692, 66 N. Y. Suppl. 503; Kerker *v.* Carter, 1 Hill (N. Y.) 101.

27. North *v.* Kizer, 72 Ill. 172; Herrington *v.* Stevens, 26 Ill. 298; Chicago, etc., R. Co. *v.* Ward, 16 Ill. 522 [*overruling* as to right of defendant to introduce evidence on his own behalf and take a bill of exceptions Gillet *v.* Stone, 2 Ill. 539; Morton *v.* Bailey, 2 Ill. 213, 27 Am. Dec. 767]; Briggs *v.* Sneghan, 45 Ind. 14. *Contra*, Cook *v.* Walters, 4 Iowa 72 [*distinguishing* Hutchinson *v.* Sangster, 4 Greene (Iowa) 240] (holding that defendant's prohibition of the right to introduce evidence on his own behalf and ask instruction of the court was clearly determined by the language of the code); St. Louis, etc., R. Co. *v.* Denson, (Tex. Civ. App. 1894) 26 S. W. 265. But see Harman *v.* Goodrich, 1 Greene (Iowa) 13.

28. Watson *v.* Seat, 8 Fla. 446; Briggs *v.* Sneghan, 45 Ind. 14.

29. Herrington *v.* Stevens, 26 Ill. 298; Chicago, etc., R. Co. *v.* Ward, 16 Ill. 522; Briggs *v.* Sneghan, 45 Ind. 14; Roe *v.* Crutchfield, 1 Hen. & M. (Va.) 361.

30. Yoholo *v.* Mitchell, 2 Stew. & P. (Ala.) 125, 127 (where the court say: "In England, pending the rule for judgment, after the execution of the writ of inquiry; the defendant may move to set aside the inquisition on account of an objection to the jury, or mode of returning them, etc. If this is the case he certainly would be authorized at the time the jury was impannelled to make the inquisition, and before they were sworn, to challenge one or more of them for the same objection"); Roe *v.* Crutchfield, 1 Hen. & M. (Va.) 361. See Tillottson *v.* Cheetham, 2 Johns. (N. Y.) 63 [*citing* Rolle Abr. tit. "Trial"], from which it would seem that a challenge cannot be made to one of a sheriff's jury on a writ of damages, because such proceeding is only an inquest of office, and the sheriff does not act judicially.

31. Cairo, etc., R. Co. *v.* Holbrook, 72 Ill. 419; Crommett *v.* Pearson, 18 Me. 344.

32. Green *v.* Hamilton, 16 Md. 317, 77 Am. Am. Dec. 295.

33. State Bank *v.* Vaughan, 2 Hill (S. C.) 556.

34. Shepard *v.* New Haven, etc., Co., 45 Conn. 54. And see *supra*, XIII.

35. Regan *v.* New York, etc., R. Co., 60 Conn. 124, 22 Atl. 503, 25 Am. St. Rep. 306; Munford *v.* Wilson, 19 Mo. 669; Mathews *v.* Sims, 2 Mill (S. C.) 103. In Shepard *v.* New Haven, etc., R. Co., 45 Conn. 54, 58, the court said: "The defendants, by their omission to deny them, are held to have admitted the truth of all well pleaded material allegations in the declaration, and the consequent right of the plaintiff to a judgment for a limited sum, that is, for nominal damages and costs, without the introduction of evidence. This is the extent of the advantage

the default admits a cause of action, proof thereof need not be offered,[36] and plaintiff is entitled to nominal damages without introducing evidence.[37] His petition is not, however, to be taken as true, and if he would recover a greater amount he must prove the same.[38] Generally speaking all evidence conforming to the pleadings and tending to show the amount of the demand or matters in aggravation of the injury is admissible;[39] while under like limitations evidence tending to mitigate or reduce the damages is admissible on behalf of defendant.[40] Evidence of matters which would have constituted a good plea in bar to the cause of action is generally held to be inadmissible.[41] It may, however, happen

gained by the plaintiff from that omission; if he is not satisfied with nominal, and seeks greater damages, he must proceed to prove the amount, and the declaration, so far forth as the increased amount is concerned, remains subject to the rules of pleading and evidence, and the proof must follow the allegations as closely as if the case stood upon the general issue. If therefore, in proving the greater damages, the plaintiff proves that they resulted entirely from a wrong which he has not declared upon, this evidence forces him back to the nominal judgment." And see *supra*, XII, E.

36. Maund *v.* Loeb, 87 Ala. 374, 6 So. 376; Martin *v.* New York, etc., R. Co., 62 Conn. 331, 25 Atl. 239.

In actions on bills of exchange or promissory notes the instrument, after default, need not be proved, although it was formerly considered that it must be produced to satisfy the jury that no money had been paid upon it. Bevis *v.* Lindsell, 2 Str. 1149.

The execution of a bond with a collateral condition need not be proved on an inquiry of the damages after a judgment has been rendered by default, as the cause of action is thereby admitted. Macklin *v.* Ruth, 4 Harr. (Del.) 87.

37. Allen *v.* Lioteau, 9 Mart. (La.) 459; Mankleton *v.* Lilly, 3 N. Y. St. 421; Bates *v.* Loomis, 5 Wend. (N. Y.) 134.

Nominal damages generally see *supra*, VI.

38. Parke *v.* Wardner, 2 Ida. (Hasb.) 285, 13 Pac. 172; Burchett *v.* Herald, 98 Ky. 530, 33 S. W. 85, 17 Ky. L. Rep. 918; Beam *v.* Hayden, 5 Bush (Ky.) 426; Daniel *v.* Judy, 14 B. Mon. (Ky.) 393; Folger *v.* Fields, 12 Cush. (Mass.) 93; Hadlan *v.* Ott, 2 Wash. Terr. 165, 3 Pac. 826.

Any reasonable proof of the amount of the debt or demand is *prima facie* sufficient. Walters *v.* McGirt, 8 Rich (S. C.) 287.

The record should show that the court heard evidence as to the extent of damages (Smith *v.* Curtis, 1 Duv. (Ky.) 281); and a mere entry "that the court does find that the said plaintiff have and recover from the said defendants, the sum," etc., is insufficient (Wetzell *v.* Waters, 18 Mo. 396).

39. Kansas City, etc., R. Co. *v.* Sanders, 98 Ala. 293, 13 So. 57.

The complaint may properly be read to the jury in order that they might know what the facts are, although it is not evidence of the amount of damages plaintiff is entitled to recover. Jennings *v.* Asten, 5 Duer (N. Y.) 695.

The plaintiff's own affidavit of the amount of the damages is admissible in evidence. Keene *v.* Cooper, 14 Fed. Cas. No. 7,641, 2 Cranch C. C. 215; Mandeville *v.* Washington, 16 Fed. Cas. No. 9,017, 1 Cranch C. C. 4.

The evidence on the record in a case in which a demurrer is offered cannot be admitted to a second jury impaneled to assess damages after the overruling of the demurrer, in the absence of statutory enactment, as such admission would be an unauthorized exception to the rule that in trials at common law all testimony must be delivered orally, in the presence of the jury. Young *v.* Foster, 7 Port. (Ala.) 420.

40. *Arkansas.*— Jetton *v.* Smead, 29 Ark. 372; Mizell *v.* McDonald, 25 Ark. 38.

Connecticut.— Batchelder *v.* Bartholomew, 44 Conn. 494; Daily *v.* New York, etc., R. Co., 32 Conn. 356, 87 Am. Dec. 176.

Maine.— Begg *v.* Whittier, 48 Me. 314.

Missouri.— Barclay *v.* Picker, 38 Mo. 143.

New Hampshire.— Willson *v.* Willson, 25 N. H. 229, 57 Am. Dec. 320.

New York.— Saltus *v.* Kipp, 5 Duer 646; Manktelow *v.* Lilly, 25 N. Y. Wkly. Dig. 354.

See 15 Cent. Dig. tit. "Damages," § 526.

41. *Alabama.*— Dunlap *v.* Horton, 49 Ala. 412; Curry *v.* Wilson, 48 Ala. 638; Randolph *v.* Sharpe, 42 Ala. 265; Sterrett *v.* Kaster, 37 Ala. 366; Ewing *v.* Peck, 17 Ala. 339.

Connecticut.—Lambert *v.* Sanford, 55 Conn. 437, 12 Atl. 519.

Illinois.— Cook *v.* Skelton, 20 Ill. 107, 71 Am. Dec. 250.

Iowa.— Carleton *v.* Byington, 17 Iowa 579.

Maryland.— Loney *v.* Bailey, 43 Md. 10.

Michigan.—Grinnell *v.* Bebb, 126 Mich. 157, 85 N. W. 467.

Missouri.— Froust *v.* Bruton, 15 Mo. 619.

New Jersey.— Creamer *v.* Dikeman, 39 N. J. L. 195.

North Carolina.— Banks *v.* Gay Mfg. Co., 108 N. C. 282, 12 S. E. 741; Lee *v.* Knapp, 90 N. C. 171; Garrard *v.* Dollar, 49 N. C. 175, 67 Am. Dec. 271.

South Carolina.— Wilthaus *v.* Ludeeus, 5 Rich. 326.

Tennessee.— Warren *v.* Kennedy, 1 Heisk. 437; Union Bank *v.* Hicks, 4 Humphr. 327.

England.— De Gaillon *v.* L'Aigle, 1 B. & P. 368; Stephens *v.* Pell, 2 C. & M. 710, 2 Dowl. P. C. 629, 3 L. J. Exch. 214, 4 Tyrw. 267.

Canada.—Comstock *v.* Thistle, 7 U. C. C. P. 27.

See 15 Cent. Dig. tit. "Damages," § 526.

A statutory writ of inquiry to assess damages on subsequent breaches of covenants in

that evidence which might if used have been available to prevent a judgment may after judgment be available to reduce the damages to a mere nominal sum.[42]

f. Verdict or Finding. A verdict after default or demurrer overruled must be in favor of plaintiff,[43] and damages in some amount should be awarded, although they may be merely nominal.[44] A finding of the facts is not essential to such verdict;[45] and where the action is against several jointly, some of whom only plead, the assessment should also be made against the defaulting parties by the court or jury who tried the issue.[46]

4. Setting Aside Inquest. If a party is dissatisfied with the assessment he should move the court for its correction,[47] and if he desires a review by the appellate court his objections should be brought up by a bill of exceptions.[48] An inquest or order for the assessment of damages like any other judicial proceeding will be set aside where unjust injury is or would be done to a litigant by allowing it to stand;[49] in which case an affidavit of merits should ordinarily be made by the movant,[50] and in some instances terms may be exacted;[51] but an inquest will not ordinarily be set aside for mere irregularity which may be raised on appeal.[52]

B. Assessment at Trial of Issues — 1. Physical Examination of Plaintiff[53] — a. Power of Court to Order. There is much conflict of opinion as to whether

a bond differs from the common-law writ on default entered, in that in the former any defense may be made to the subject-matter of the new assignment that could have been made originally. Reeb *v.* Bosch, 17 Ill. App. 426.

42. Chamberlin *v.* Murphy, 41 Vt. 110.

Evidence, if offered for the purpose of reducing the liability of the defendant to nominal damages only, should be admitted it seems, although it would have been available to defeat the right of recovery had no default been entered. Gardner *v.* New London, 63 Conn. 267, 28 Atl. 42; Turner *v.* Carter, 1 Head (Tenn.) 520.

43. Ellis *v.* State, 2 Ind. 262; Hanks *v.* Evans, Hard. (Ky.) 45; Reigne *v.* Dewees, 2 Bay (S. C.) 405. And see Dougherty *v.* Glenn, Hard. (Ky.) 291.

44. Johnston *v.* Belfour, 1 Overt (Tenn.) 18; Frazier *v.* Lomax, 9 Fed. Cas. No. 5,072, 1 Cranch C. C. 328. The court will, however, in determining the amount of the verdict be largely controlled by the weight of evidence. See Madison, etc., R. Co. *v.* Herod, 10 Ind. 2.

45. Gates *v.* Clavadetscher, 19 Mo. 125; Hubbell *v.* Weston, 18 Mo. 604.

46. *Florida.*— Netso *v.* Foss, 21 Fla. 143.

Illinois.— Smith *v.* Harris, 12 Ill. 462; Wight *v.* Hoffman, 5 Ill. 362; Wight *v.* Meredith, 5 Ill. 360. And see Kimball *v.* Tanner, 63 Ill. 519.

Michigan.— Storey *v.* Bird, 8 Mich. 316.

New Hampshire.— Bowman *v.* Noyes, 12 N. H. 302.

New York.— Van Schaick *v.* Trotter, 6 Cow. 599. See Hart *v.* De Lord, 17 Johns. 270.

Pennsylvania.— Noble *v.* Laley, 50 Pa. St. 281; O'Neal *v.* O'Neal, 4 Watts & S. 130.

See 15 Cent. Dig. tit. "Damages," § 527.

On the other hand if the parties answering absolve themselves from all liability damages cannot be assessed against a joint defendant who has defaulted. McClure *v.* Hall, 19 Wend. (N. Y.) 25.

47. McCord *v.* Mechanics' Nat. Bank, 84 Ill. 49; Riely *v.* Barton, 32 Ill. App. 524.

The same end cannot be attained by objection to the form of action. Pyne *v.* Van Bergen, 1 Pinn. (Wis.) 533.

48. Riely *v.* Barton, 32 Ill. App. 524; Storer *v.* White, 7 Mass. 448.

49. Snowden *v.* Johnson, 3 N. J. L. 469; Despard *v.* Farnam, 1 Wend. (N. Y.) 287 (holding that where defendant's counsel was excusably absent and the cause could be tried at the same circuit at which the inquest was taken, and defendant offered to pay the costs, the inquest would be set aside); Woods *v.* Hart, 3 Cai. (N. Y.) 96 (holding that an inquisition would be set aside where one had conversed with the jury which was assessing the damages). See also Hodgkinson *v.* Donaldson, 2 U. C. Q. B. 274.

Mere objectionable evidence which does not affect the result is not ground for setting the assessment aside. Pearl *v.* Robitschek, 2 Daly (N. Y.) 50.

That the damages are larger than the upper court would of itself have awarded if the rules of law have been observed by the jury is no ground for setting the inquest aside. Cable *v.* Dakin, 20 Wend. (N. Y.) 172. See also Wheeler *v.* Gove, 3 N. Brunsw. 580; Jessup *v.* Fraser, 1 U. C. Q. B. 390.

The fact that a nisi prius record contains no date of a judgment on demurrer is not ground for setting aside an assessment of damages, as such irregularity must be taken advantage of before the assessment. Gamble *v.* Rees, 7 U. C. Q. B. 406.

50. Randall *v.* United L., etc., Ins. Assoc., 59 N. Y. Super. Ct. 587, 14 N. Y. Suppl. 631; Fowler *v.* Hay, 1 How. Pr. (N. Y.) 40.

51. Reiling *v.* Bolier, 20 Fed. Cas. No. 11,671, 3 Cranch C. C. 212, holding that the assessment would be set aside at the ensuing term upon an affidavit of merits, payment of costs, and offering ready for trial.

52. Burger *v.* Baker, 4 Abb. Pr. (N. Y.) 11.

53. Compelling examination before trial see Discovery.

Competency as evidence see *supra*, XIII, B, 2, b, (I), (C), (2).

or not the court has the power in an action for damages for a personal injury to require the injured party to submit to a physical examination for the purpose of determining the extent thereof. In some of the adjudicated cases the rule of the court is announced without extensive reasoning, while in others the research and deliberations have been exhaustive. So too a variance in the decisions may in some instances be accounted for by a difference in the circumstances under which the examination is requested, as the earlier holdings in some of the states, whether they be for or against the power, have respectively been departed from in later cases.[54] Some of the courts, relying upon the absence of common-law precedents for such a course, and having in view the right of privacy and the sacredness of the person, deny the power;[55] while in perhaps a greater number of jurisdictions the courts, having confidence that the judiciary may be relied upon to prevent an improper shock to the modesty or feelings of delicacy of an injured party, and recognizing that the best evidence possible should always be produced, affirm the power.[56]

54. **Notable instances of the above phase of the evolution of the law** on this subject are shown by the change of judicial opinions in Missouri, Indiana, and New York.

In Missouri, the pioneer case of Loyd *v.* Hannibal, etc., R. Co., 53 Mo. 509, holds that such proceedings were unknown to the practice and to the law, and deny the power of the trial court to enforce such an order. This decision was, however, afterward receded from and the doctrine was thoroughly established in that court that the power exists. Sidekum *v.* Wabash, etc., R. Co., 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549; Shepard *v.* Missouri Pac. R. Co., 85 Mo. 629, 55 Am. Rep. 390; Hill *v.* Sedalia, 64 Mo. App. 494.

In Indiana a similar evolution of the law is shown by an examination of the cases. In Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401, 28 N. E. 860, the court, commenting upon and distinguishing the prior cases, in which the point had been only suggested or raised collaterally, decide that the power does not exist; but in the later case of South Bend *v.* Turner, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep. 200, 54 L. R. A. 396, the court with similar elaborations overrule their former holding and decide that the power exists.

In New York, on the other hand, the evolution of the law was the reverse. In that state, in the earlier case of Walsh *v.* Sayre, 52 How. Pr. 334, the power was affirmed. This case was approved *obiter* in Shaw *v.* Van Rensselaer, 60 How. Pr. 143. But these cases were repudiated and the power denied in McQuigan *v.* Delaware, etc., R. Co., 129 N. Y. 50, 29 N. E. 235, 26 Am. St. Rep. 507, 14 L. R. A. 466; Cole *v.* Fall Brook Coal Co., 87 Hun 584, 34 N. Y. Suppl. 572, although the power was subsequently given by statute. See *infra*, XIV, B, 1, b, (I).

55. *Illinois.*— Peoria, etc., R. Co. *v.* Rice, 144 Ill. 277, 33 N. E. 951; Parker *v.* Enslow, 102 Ill. 272, 40 Am. Rep. 588; Pittsburg, etc., R. Co. *v.* Story, 104 Ill. App. 132; Chicago, etc., R. Co. *v.* Stewart, 104 Ill. App. 37.

Massachusetts.— Stack *v.* New York, etc., R. Co., 177 Mass. 155, 58 N. E. 686, 83 Am. St. Rep. 269, 52 L. R. A. 328.

New York.— McQuigan *v.* Delaware, etc., R. Co., 129 N. Y. 50, 29 N. E. 235, 26 Am. St. Rep. 507, 14 L. R. A. 466; Cole *v.* Fall Brook Coal Co., 87 Hun 584, 34 N. Y. Suppl. 572; McSwyny *v.* Broadway, etc., R. Co., 4 Silv. Supreme 495, 7 N. Y. Suppl. 456.

Texas.— Galveston, etc., R. Co. *v.* Sherwood, (Civ. App. 1902) 67 S. W. 776; Gulf, etc., R. Co. *v.* Pendery, 14 Tex. Civ. App. 60, 36 S. W. 793. Although before the decision of this point by the United States supreme court in Union Pac. R. Co. *v.* Botsford, 141 U. S. 250, 11 S. Ct. 100, 35 L. ed. 734, the rule seems to have been otherwise. See Missouri Pac. R. Co. *v.* Johnson, 72 Tex. 95, 10 S. W. 325.

United States.— Union Pac. R. Co. *v.* Botsford, 141 U. S. 250, 11 S. Ct. 100, 35 L. ed. 734; Illinois Cent. R. Co. *v.* Griffin, 80 Fed. 278, 25 C. C. A. 413.

See 15 Cent. Dig. tit. "Damages," § 531.

Where the question as to the right of privacy and sacredness of the person is eliminated, every reason for the exclusion of the evidence is, in an Indiana case, said to disappear. Cleveland, etc., R. Co. *v.* Huddleston, 151 Ind. 540, 46 N. E. 678, 68 Am. St. Rep. 238, 36 L. R. A. 681, holding that a plaintiff in an action for personal injuries alleged to cause the secretion of albumen and sugar in the urine may be required to produce in court, for analysis, specimens of his urine, accompanied by an affidavit that it was voided by him; the privacy of his person not being thereby invaded.

56. *Alabama.*— Alabama Great Southern R. Co. *v.* Hill, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442.

Arkansas.— St. Louis Southwestern R. Co. *v.* Dobbins, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147.

Georgia.— Richmond, etc., R. Co. *v.* Childress, 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808.

Indiana.— South Bend *v.* Turner, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep. 200, 54 L. R. A. 396; Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401, 28 N. E. 860.

Iowa.— Schroeder *v.* Chicago, etc., R. Co., 47 Iowa 375, a leading case.

b. Right of Defendant to Demand Examination — (i) *In General.* The fact, however, that many courts concede their power to compel an examination does not authorize the defendant to demand the same as a matter of absolute right.[57] In a few jurisdictions, however, it would seem that under certain circumstances such right exists;[58] but in the absence of statute [59] the rule is that the matter rests within the sound discretion of the court.[60] Where the power to order an examination is conceded, the important question, what state of facts is to be presented to make a refusal to so order an abuse of discretion, arises.[61] On such question each case is governed largely by its own facts, the necessity of the examination for the attainment of justice being of course the guiding star.[62] Nor will

Kansas.—Ottawa *v.* Gilliland, 63 Kan. 165, 65 Pac. 252, 88 Am. St. Rep. 232; Atchison, etc., R. Co. *v.* Thul, 29 Kan. 466, 44 Am. Rep. 659.

Kentucky.— Belt Electric Line Co. *v.* Allen, 102 Ky. 551, 44 S. W. 89, 19 Ky. L. Rep. 1656, 80 Am. St. Rep. 374.

Michigan.— Graves *v.* Battle Creek, 95 Mich. 266, 54 N. W. 757, 35 Am. St. Rep. 561, 19 L. R. A. 641.

Missouri.— Shepard *v.* Missouri Pac. R. Co., 85 Mo. 629, 55 Am. Rep. 390; Hill *v.* Sedalia, 64 Mo. App. 494.

Ohio.— Miami, etc., Turnpike Co. *v.* Baily, 37 Ohio St. 104.

Wisconsin.— White *v.* Milwaukee City R. Co., 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154.

See 15 Cent. Dig. tit. "Damages," § 531.

If it becomes a question of probable violence to the refined and delicate feelings of plaintiff on the one hand, and probable injustice to defendant on the other, justice must prevail; and while the court will order the examination with respect to time, place, and persons in every case, with due regard for the feelings of plaintiff, the examination will not be dispensed with at the expense of truth and justice. South Bend *v.* Turner, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep. 200, 54 L. R. A. 396. See also dissenting opinion of Brewer, J., in Union Pac. R. Co. *v.* Botsford, 141 U. S. 250, 11 S. Ct. 1000, 35 L. ed. 734.

57. For, as said in Joliet St. R. Co. *v.* Call, 42 Ill. App. 41, 45 [*affirmed* in 143 Ill. 177, 32 N. E. 389], "If it be a matter of right, then, necessarily, the right extends to all cases wherever a defendant demands his right, and the court is powerless to judge of the necessity or propriety of it, but must enforce the right even where such examination is clearly needless or improper. . . . There are many cases, where to hold it an absolute right to have an examination of a sensitive person in matters of a delicate nature by doctors selected by others, would only enable a wrongdoer to add insult to injury and compel a party to give up substantial rights rather than submit."

58. Sibley *v.* Smith, 46 Ark. 275, 55 Am. Rep. 584, where it is held that if the plaintiff claims that his injuries are of a permanent nature, defendant is entitled as a matter of right to have the opinion of a surgeon based upon a personal examination, unless there be a sufficiency of other expert evidence. See also Schroeder *v.* Chicago, etc., R. Co., 47 Iowa 375.

59. In New York, since 1893, defendant has had this right by statute. See Sewell *v.* Butler, 16 N. Y. App. Div. 77, 44 N. Y. Suppl. 1074, holding that to defeat the examination on the ground of bad faith on the part of defendant, bad faith must appear from the defendant's affidavit, and the circumstances of the case; and a mere statement in the plaintiff's affidavit is insufficient.

60. This discretion is to be exercised only when it appears that the ends of justice require a more ample disclosure of the injury; a refusal to so order not being disturbed except upon an abuse of such discretion.

Alabama.—Alabama Great Southern R. Co. *v.* Hill, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442.

Illinois.— Joliet St. R. Co. *v.* Call, 42 Ill. App. 41 [*affirmed* in 143 Ill. 177, 32 N. E. 389].

Kentucky.— Belt Electric Line Co. *v.* Allen, 102 Ky. 551, 44 S. W. 89, 19 Ky. L. Rep. 1656, 80 Am. St. Rep. 374.

Missouri.—Shepard *v.* Missouri Pac. R. Co., 85 Mo. 629, 55 Am. Rep. 390; Marler *v.* Springfield, 65 Mo. App. 301; Hill *v.* Sedalia, 64 Mo. App. 494.

Wisconsin.— O'Brien *v.* La Crosse, 99 Wis. 421, 75 N. W. 81, 40 L. R. A. 831.

61. Where an injury to the hand is complained of, whereby it is claimed that the plaintiff is unable to voluntarily close the same, it is an abuse of discretion not to compel him to submit to an examination by physicians introduced by the defendant as witnesses, who testified that by virtue of such examination they could tell with reasonable certainty whether or not the hand was stiffened as claimed, and if so, whether or not such condition would probably be permanent. Louisville, etc., R. Co. *v.* Simpson, 64 S. W. 733, 23 Ky. L. Rep. 1044.

62. Joliet St. R. Co. *v.* Call, 143 Ill. 177, 32 N. E. 389 [*affirming* 42 Ill. App. 41]; Terre Haute, etc., R. Co. *v.* Brunker, 128 Ind. 542, 26 N. E. 178; International, etc., R. Co. *v.* Underwood, 64 Tex. 463.

An examination to determine a dispute between opposing physicians as to the extent and character of the injury will not be ordered by the court. French *v.* Brooklyn Heights R. Co., 57 N. Y. App. Div. 204, 68 N. Y. Suppl. 287.

Where it is clearly apparent that plaintiff is an almost helpless cripple because of the

this prerogative be exercised where the plaintiff is willing to submit to a proper and competent examination without such order,[63] or where the examination requested may injure or imperil the health of plaintiff.[64] So too a request for the examination should be submitted at such a time that the granting of the same will not retard the administration of justice, or work an injustice to plaintiff in the presentation of his case and, in the absence of a good excuse for the delay, it will rarely be complied with when made after the commencement of the trial;[65] especially after the plaintiff has offered his evidence in chief.[66] Where the statute provides that the plaintiff, when a female, is entitled to be examined by a physician of her own sex, such plaintiff need not make any special application to be examined by such physician, and an order providing otherwise is erroneous.[67] A physician appointed by the court to make an examination is an officer thereof and should be sworn.[68] As a rule the examiners should be agreed upon by the parties or designated by the court, and it will rarely order the examination to be made by a party of the defendant's choosing only,[69] especially if he be personally objectionable to plaintiff.[70]

injury complained of, it is not an abuse of discretion to refuse to require him to submit to a physical examination. Belle of Nelson Distilling Co. *v.* Riggs, 104 Ky. 1, 45 S. W. 99, 20 Ky. L. Rep. 499.

It will not be ordered where there is abundant evidence of the extent of the injury, or its nature is not seriously questioned. Chicago, etc., R. Co. *v.* Reith, 65 Ill. App. 461; Belt Electric Line Co. *v.* Allen, 102 Ky. 551, 44 S. W. 89, 19 Ky. L. Rep. 1656, 80 Am. St. Rep. 374; Louisville, etc., R. Co. *v.* McClain, 66 S. W. 391, 23 Ky. L. Rep. 1878; Owens *v.* Kansas City, etc., R. Co., 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39. Thus a plaintiff need not submit to a medical examination where she has previously been several times examined by physicians, one of whom is a witness on behalf of defendant. Southern Bell Telephone Co. *v.* Lynch, 95 Ga. 529, 20 S. E. 500.

63. Gulf, etc., R. Co. *v.* Norfleet, 78 Tex. 321, 14 S. W. 703. And see Ft. Worth, etc., R. Co. *v.* White, (Tex. Civ. App. 1899) 51 S. W. 855.

Reëxamination on second trial.— Under a statute providing that the court may on defendant's application order a physical examination of plaintiff if it be shown that defendant is ignorant of the nature of his injuries, if upon the first trial the examination of the plaintiff was made without objection by a physician of defendant's own choice who was permitted to testify without objection on a subsequent trial, defendant is not entitled to a reëxamination of the plaintiff by a physician appointed by the court. Whitaker *v.* Staten Island Midland R. Co., 76 N. Y. App. Div. 351, 78 N. Y. Suppl. 410.

64. O'Brien *v.* La Crosse, 99 Wis. 421, 75 N. W. 81, 40 L. R. A. 831.

Where the examination would require the administration of anæsthetics, it will ordinarily be refused if the plaintiff objects to taking such drugs. Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616.

65. Paul *v.* Omaha, etc., R. Co., 82 Mo. App. 500; Stuart *v.* Havens, 17 Nebr. 211, 22 N. W. 419; Smith *v.* Spokane, 16 Wash. 403, 47 Pac. 888.

66. *Georgia.*— Savannah, etc., R. Co. *v.* Wainwright, 99 Ga. 255, 25 S. E. 622.

Illinois.— Galesburg *v.* Benedict, 22 Ill. App. 111.

Indiana.— Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90.

Kansas.— Southern Kansas R. Co. *v.* Michaels, 57 Kan. 474, 46 Pac. 938.

New York.—Archer *v.* Sixth Ave. R. Co., 52 N. Y. Super. Ct. 378.

Ohio.— Miami, etc., Turnpike Co. *v.* Baily, 37 Ohio St. 104.

Washington.— Myrberg *v.* Baltimore, etc., Min., etc., Co., 25 Wash. 364, 65 Pac. 539.

See 15 Cent. Dig. tit. "Damages," § 531.

67. Lawrence *v.* Samuels, 17 Misc. (N. Y.) 559, 40 N. Y. Suppl. 686, 26 N. Y. Civ. Proc. 10, also holding that an attorney has no right to be present or to have men present at such examination.

68. Lawrence *v.* Samuels, 20 Misc. (N. Y.) 15, 44 N. Y. Suppl. 602.

69. Stuart *v.* Havens, 17 Nebr. 211, 22 N. W. 419; Sioux City, etc., R. Co. *v.* Finlayson, 16 Nebr. 578, 20 N. W. 860, 49 Am. Rep. 724; Houston, etc., R. Co. *v.* Berling, 14 Tex. Civ. App. 544, 37 S. W. 1083; Smith *v.* Spokane, 16 Wash. 403, 47 Pac. 888.

Previous examination by same physician.— Where a physician is appointed by the court as one of a committee to examine into the injuries of the plaintiff, he cannot be objected to as necessarily biased merely because of a former examination of such injuries at the request of the plaintiff. Fullerton *v.* Fordyce, 144 Mo. 519, 44 S. W. 1053.

Where defendant withdraws his request for an examination after the appointment of examiners by the court, but before the examination has been made, such examiners should not be allowed to testify against the objection of the defendant to the examination made by them after the withdrawal of his request. South Covington, etc., R. Co. *v.* Stroh, 66 S. W. 177, 23 Ky. L. Rep. 1807, 57 L. R. A. 875.

70. Stack *v.* New York, etc., R. Co., 177 Mass. 155, 58 N. E. 686, 83 Am. St. Rep. 269, 52 L. R. A. 328; Missouri Pac. R. Co. *v.*

(II) *After Voluntary Exhibition to Jury.* Plaintiff may, with due regard to the proper bounds of propriety and decency, exhibit the injured portion or members of his body to the jury for the purpose of showing the extent of his injuries,[71] but by voluntarily doing so he confers upon defendant a right to require further physical examination of the same;[72] and where an exposure of the injury is in no way indelicate, and seems to be essential to a proper conception of the injury in dispute, it would seem that it is the right and duty of the court to order such an exposure to the jury.[73]

2. **Questions of Law and Fact.** The question as to what constitutes proper and legitimate items of damage in the case at bar is for the court;[74] but where an issue is made by the pleadings and is tried by a jury the estimation and determination of the amount of the injury sustained is usually a question of fact for their sound and reasonable discretion,[75] and they usually assess the damages if any are to be awarded.[76] If the jury which tries the issue of facts fails to make an assessment of damages, it would seem that the practice in some jurisdictions is to award a *venire de novo*,[77] although it has been held more comportable with the liberal practice of this country, and equally promotive of the ends of justice, to direct a reference to a jury for the purpose of assessment only.[78] It is especially true that they must exercise a large discretion in actions for personal injury,[79] and the court will not interfere with the result unless the amount awarded by the

Johnson, 72 Tex. 95, 10 S. W. 325; Gulf, etc., R. Co. *v.* Nelson, 5 Tex. Civ. App. 387, 24 S. W. 588.

71. Faivre *v.* Manderscheid, 117 Iowa 724, 90 N. W. 76; Lacs *v.* Everard's Breweries, 61 N. Y. App. Div. 431, 70 N. Y. Suppl. 672.

See, generally, Evidence.

72. Haynes *v.* Trenton, 123 Mo. 326, 27 S. W. 622; Winner *v.* Lathrop, 67 Hun (N. Y.) 511, 22 N. Y. Suppl. 516; Chicago, etc., R. Co. *v.* Langston, 92 Tex. 709, 50 S. W. 574, 51 S. W. 331. See also *dicta* in Cole *v.* Fall Brook Coal Co., 87 Hun (N. Y.) 584, 34 N. Y. Suppl. 572. But see Mills *v.* Wilmington, etc., R. Co., 1 Marv. (Del.) 269, 40 Atl. 1114.

73. Hall *v.* Manson, 99 Iowa 698, 68 N. W. 922, 34 L. R. A. 207.

And see, generally, Evidence.

74. Bridges *v.* Stickney, 38 Me. 361; Camp *v.* Wabash R. Co., 94 Mo. App. 272, 68 S. W. 96.

75. *District of Columbia.*— District of Columbia *v.* Johnson, 1 Mackey 51.

Illinois.— Chicago, etc., R. Co. *v.* Presbrey, 98 Ill. App. 303.

Kansas.— Osborne *v.* Stassen, 25 Kan. 736.

Missouri.— Steinberg *v.* Gebhardt, 41 Mo. 519.

New York.— Richardson *v.* Northrup, 66 Barb. 85.

Texas.— Galveston Wharf Co. *v.* McYoung, 2 Tex. App. Civ. Cas. § 642.

See 15 Cent. Dig. tit. "Damages," §§ 533, 534.

Whether or not goods have a market value is a question of fact for the jury. Todd *v.* Gamble, 67 Hun (N. Y.) 38, 21 N. Y. Suppl. 739.

76. Goggin *v.* O'Donnell, 62 Ill. 66; Campbell Co. *v.* Angus, 91 Va. 438, 22 S. E. 167; Morris *v.* Baker, 5 Wis. 389; Davis *v.* Davis, 4 U. C. Q. B. O. S. 322; Fox *v.* Williamson, 20 Ont. App. 610.

In Canada it would seem that where the jury is sworn to try the issue, they may also assess damages on all breaches assigned; but under the statute governing the practice they cannot assess damages on the breaches suggested. Hunter *v.* Vernon, 7 U. C. Q. B. 552.

77. Macnemara *v.* Brannock, 4 Harr. & M. (Md.) 480 (where the *venire de novo* was awarded where the jury omitted to assess the damages in an action of slander); Eichorn *v.* Le Maitre, 2 Wils. C. P. 367 (where it is held that a writ of inquiry could not be awarded to supply the omission of the trial jury where an attaint lies). See also Weathers *v.* Mudd, 12 B. Mon. (Ky.) 112, where it is said that this is according to English practice. But see Darrofe *v.* Newbott, 3 Cro. Car. 143; Herbert *v.* Walters, 1 Ld. Raym. 59; Brampton *v.* ——, 1 Rolle 272, from which cases it would seem that this practice depended more upon the nature of the case involved and was not universal.

78. Hanover F. Ins. Co. *v.* Lewis, 23 Fla. 193, 1 So. 863; Weathers *v.* Mudd, 12 B. Mon. (Ky.) 112; Frye *v.* Hinkley, 18 Me. 320. See also Andrews *v.* Hammond, 8 Blackf. (Ind.) 540.

79. *Alabama.*— Louisville, etc., R. Co. *v.* Davis, 99 Ala. 593, 12 So. 786.

Colorado.— Wall *v.* Livezay, 6 Colo. 465.

Idaho.— McLean *v.* Lewiston, (1902) 69 Pac. 478.

Illinois.— Economy Light, etc., Co. *v.* Sheridan, 103 Ill. App. 145.

Michigan.— Shumway *v.* Walworth, etc., Mfg. Co., 98 Mich. 411, 57 N. W. 251.

See 15 Cent. Dig. tit. "Damages," §§ 533, 534.

Where there is a joint injury by a street-car and a cab, the apportionment of damages must be left to the judgment of the jury. Mooney *v.* Third Ave. R. Co., 2 N. Y. City Ct. 366.

verdict is clearly excessive and disproportionate to the injury sustained by the plaintiff.[80]

3. INSTRUCTIONS — a. In General. Instructions applying the law of damages should of course contain no irrelevant statements, especially such as may be construed as an intimation of the court adverse to either litigant;[81] although where the evidence concerning an injury is practically undisputed it is not error for the court to express its opinion as to the inference deducible therefrom.[82] The instructions should be so framed that the jury may readily understand the item of damages to which they allude.[83] In personal injury cases the jury should be fully and fairly informed as to the items or elements of damage they may consider;[84] and no items for which under the evidence there is a clear liability should

80. Davis *v.* Pitman, 7 Fed. Cas. No. 3,647*a*, Hempst. 44.

In estimating prospective damages they should be looked upon as payment in advance, and the amount should therefore be reduced to its present worth. Morrisey *v.* Hughes, 65 Vt. 553, 27 Atl. 205.

It should not be for a less sum than that admitted by the parties. Koebig *v.* Southern Pac. R. Co., 108 Cal. 235, 41 Pac. 469.

The amount of damages which will carry costs should not be considered by the jury in determining their verdict. Day *v.* Woodworth, 13 How. (U. S.) 363, 14 L. ed. 181.

81. Bray *v.* Latham, 81 Ga. 640, 644, 8 S. E. 64, holding that for a judge to say to the jury, "I have charged you fully upon the subject of damages, because the trial judge cannot tell in advance what view the jury will take of the evidence," is error, inasmuch as it might be understood by the jury as an intimation that the judge thought the evidence did not require any charge at all, and that he therefore mentioned it because they might disagree with him.

82. O'Neill *v.* Kinken, 8 N. Y. Suppl. 554. See also Mattice *v.* Brinkman, 74 Mich. 705, 42 N. W. 172.

83. An instruction, in such phraseology that the jury may have understood it to refer to either one of two distinct items of damages proven, is too uncertain. Lurssen *v.* Lloyd, 76 Md. 360, 35 Atl. 294.

An instruction to consider the plaintiff's "condition in life," as shown by the evidence in estimating his damages, has been held not objectionable. Ward *v.* Steffen, 88 Mo. App. 571; Smith *v.* Butler, 48 Mo. App. 663. And see Nutt *v.* Southern Pac. R. Co., 25 Oreg. 291, 35 Pac. 653, where an instruction that the jury should consider plaintiff's "condition and station in life" in estimating the damages was held misleading and susceptible of the construction that they were authorized to consider his wealth or poverty, and rank or station, and should upon a subsequent trial be modified.

Explanation of terms used. — In instructions concerning the law of damages, certain terms or expressions are often used by the court the import or legal significance of which should be explained if their meaning is not likely to be fully comprehended by the jury. Thus where the issue as to whether or not a party is entitled to exemplary damages is submitted to the jury the meaning of the words "actual and exemplary damages" should be explained (King *v.* Sassaman, (Tex. Civ. App. 1899) 54 S. W. 304); but an objection that an instruction uses the word "compensatory" instead of "actual" damages is not well founded, inasmuch as the term "compensatory damages" refers to all other than such as are exemplary (Mogle *v.* Black, 5 Ohio Cir. Ct. 51); and as the term "compensatory damages" includes all those recoverable as a matter of right it is error in an instruction to divide them into three kinds, that is, actual, compensatory, and exemplary (Gatzow *v.* Buening, 106 Wis. 1, 81 N. W. 1003, 8 Am. St. Rep. 1, 49 L. R. A. 475). It is not error to instruct to assess such damages as plaintiff has sustained as the "direct" result, as this word is used synonymously with "natural and proximate." Lovett *v.* Chicago, 35 Ill. App. 570. And in an instruction to assess moneys expended "for professional services, physicians and nurses" the words "physicians and nurses" will be understood as used in apposition with the words "professional services." Duke *v.* Missouri Pac. R. Co., 99 Mo. 347, 12 S. W. 636.

When technical names are applied to the result of an injury complained of, it is proper to charge the jury not to be misled by such terms, but to consider the real condition of plaintiff resulting from the injury. Spear *v.* Sweeney, 88 Wis. 545, 60 N. W. 1060.

Where an instruction would involve a principle of law which has not been explained to the jury, the party offering such instruction should embody the principle therein, and if he fails to do so it may be properly refused. Louisville, etc., R. Co. *v.* Davis, 99 Ala. 593, 12 So. 786, holding that a charge that plaintiff cannot recover for loss of time while confined to his bed because of an injury may be properly refused, although the plaintiff is himself a minor, if there is no reference in the charge to the fact of his minority.

84. For instructions held to be sufficient see the following cases:

California.— Thomas *v.* Gates, 126 Cal. 1, 58 Pac. 315; Redfield *v.* Oakland Consol. St. R. Co., 112 Cal. 220, 43 Pac. 1117.

Illinois.— Chicago R. Co. *v.* Gruss, 200 Ill. 195, 65 N. E. 693; Christian *v.* Irwin, 125 Ill. 619, 17 N. E. 707.

Indiana.— Ohio, etc., R. Co. *v.* Hecht, 115 Ind. 443, 17 N. E. 297; Eureka Block Coal

be ignored.[85] For breach of contracts or injuries to property the proper measure of damages should be set forth with such degree of clearness and certainty that the jury will not be confused or misled.[86]

b. Requisites and Limitations — (i) *In General* — (a) *Should Conform to Pleadings.*[87] An instruction must limit plaintiff in his recovery to such damages as are the effect of the injury complained of in his declaration or complaint,[88] and is erroneous if based upon evidence offered which is unauthorized by the pleadings.[89] Likewise a refusal to instruct the jury to disregard damages shown by evidence unauthorized by the pleadings is error.[90] So too regardless of the amount of damages which the evidence submitted would justify, an instruction

Co. *v.* Wells, 29 Ind. App. 1, 61 N. E. 236, 94 Am. St. Rep. 259; Indianapolis St. R. Co. *v.* Walton, 2 Ind. App. 368, 64 N. E. 630.

Michigan.— Lauer *v.* Palms, 129 Mich. 671, 89 N. W. 694, 58 L. R. A. 67.

Missouri.— Robertson *v.* Wabash R. Co., 152 Mo. 382, 43 S. W. 1082; Rosenkranz *v.* Lindell R. Co., 108 Mo. 9, 18 S. W. 890, 32 Am. St. Rep. 588; Haniford *v.* Kansas City, 103 Mo. 172, 15 S. W. 753; Sidekum *v.* Wabash, etc., R. Co., 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549; Eberly *v.* Chicago, etc., R. Co., 96 Mo. App. 361, 70 S. W. 381.

Montana.— Snook *v.* Anaconda, 26 Mont. 128, 66 Pac. 756.

North Carolina.— Wallace *v.* Western North Carolina R. Co., 104 N. C. 442, 10 S. E. 552.

Pennsylvania.— Baker *v.* Irish, 172 Pa. St. 528, 33 Atl. 558.

South Carolina.— Brasington *v.* South Bound R. Co., 62 S. C. 325, 40 S. E. 665, 89 Am. St. Rep. 905.

Texas.— Galveston, etc., R. Co. *v.* Hampton, 24 Tex. Civ. App. 458, 59 S. W. 928; Missouri, etc., R. Co. *v.* Settle, 19 Tex. Civ. App. 357, 47 S. W. 825.

See 15 Cent. Dig. tit. "Damages," § 548.

85. Ohio, etc., R. Co. *v.* Dickerson, 59 Ind. 317; Graham *v.* Burlington, etc., R. Co., 39 Minn. 81, 38 N. W. 812.

86. For instructions not objectionable see Moore *v.* Kenockee Tp., 75 Mich. 332, 42 N. W. 944, 4 L. R. A. 555; Egan *v.* Faendel, 19 Minn. 231; Lucot *v.* Rodgers, 159 Pa. St. 58, 28 Atl. 242.

For objectionable charges see Bridge *v.* Mason, 45 Barb. (N. Y.) 37 (holding that an instruction for the jury to find so much damages as they would consider such a claim to be worth against "such a man as the indorser was shown to be" was objectionable, in that the charge should clearly refer to his financial standing and not to his character); Trinity, etc., R. Co. *v.* Schofield, 72 Tex. 496, 10 S. W. 575.

For measure of damages in such case see *supra*, XI, C, D.

87. An instruction will be presumed to be confined to the pleadings when such interpretation is consistent with the general rules of construction. Gulf, etc., R. Co. *v.* Box, 81 Tex. 670, 17 S. W. 375.

88. Tift *v.* Jones, 77 Ga. 181, 3 S. E. 399; Zapp *v.* Michaelis, 58 Tex. 270; International, etc., R. Co. *v.* Bibolet, 24 Tex. Civ. App. 4, 57 S. W. 974; Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295. And see Ohio, etc., R. Co. *v.* Webb, 142 Ill. 404, 32 N. E. 527.

If the complaint or declaration contains different counts or paragraphs, some of which allege damages of a special nature, an instruction that the jury should consider such special damages in estimating the amount of recovery, without limiting such instruction to the paragraphs or counts which allege the special damages, is error. Lake Shore, etc., R. Co. *v.* Pauly, 37 Ill. App. 203; Ohio, etc., R. Co. *v.* Stein, 140 Ind. 61, 39 N. E. 246.

Where recovery is sought for two separate and distinct torts, and the evidence establishes plaintiff's right to recover for one of the tortious acts only, an instruction under which the jury could properly base their verdict on either one or both of the alleged wrongful acts is erroneous. Southern R. Co. *v.* Hardin, 107 Ga. 379, 33 S. E. 436. See also Chicago, etc., R. Co. *v.* Binkopski, 72 Ill. App. 22.

Where the complaint alleges different injuries with reasonable certainty and precision, the defendant cannot construe the pleadings most favorable to himself, and require the court to charge in conformity to his construction. Texas Cent. R. Co. *v.* Stuart, 1 Tex. Civ. App. 642, 20 S. W. 962.

89. Johnson *v.* Gorham, 38 Conn. 513; Houston, etc., R. Co. *v.* Rowell, 92 Tex. 147, 46 S. W. 630.

90. Brachfeld *v.* Third Ave. R. Co., 30 Misc. (N. Y.) 425, 62 N. Y. Suppl. 470.

An instruction laying down the rule of damages in case the jury find "the defendant guilty" under the instructions and evidence implies that he is to be found guilty as charged in the declaration. Tudor Iron-Works *v.* Weber, 129 Ill. 535, 21 N. E. 1078.

Where the evidence reveals facts not constituting a legitimate item of damage under the pleadings, it is the duty of the court in its instructions to eliminate such irrelevant matter from the consideration of the jury (Delphi *v.* Lowery, 74 Ind. 520, 30 Am. Rep. 98; Varillat *v.* New Orleans, etc., R. Co., 10 La. Ann. 88; San Antonio, etc., R. Co. *v.* Robinson, 73 Tex. 277, 11 S. W. 327); and it has been held that the omission to do so is not cured by giving to the jury a proper rule of damages without an explicit instruction to disregard the irrelevant matter (Wing *v.*

which does not clearly limit the recovery of damages to the amount claimed in the petition is erroneous.[91]

(B) *Should Lay Down Measure of Damages.* The rules by which damages are to be estimated should be laid down by the court, and it is its duty to explain to the jury the basis on which the assessment should be made, the proper elements of the damages involved, and within what limits they may be estimated in the case involved.[92] Thus a jury cannot be left to determine of their own volition whether a defendant should be punished by an infliction of exemplary damages, without being informed as to what facts and circumstances would render him liable for such damages, or without any other rules to govern them in the application of the evidence.[93] It is improper to lay down an erroneous rule of damages, even though given merely by way of illustration,[94] and not

Chapman, 49 Vt. 33. *Compare* Powell *v.* Augusta, etc., R. Co., 77 Ga. 192, 3 S. E. 757).

91. Foster *v.* Pitts, 63 Ark. 387, 38 S. W. 1114; Charles City Plow, etc., Co. *v.* Jones, 71 Iowa 234, 32 N. W. 280; Spoohn *v.* Missouri Pac. R. Co., 116 Mo. 617, 22 S. W. 690; Missouri, etc., R. Co. *v.* Pawkett, 28 Tex. Civ. App. 583, 68 S. W. 323; Martin-Brown Co. *v.* Pool, (Tex. Civ. App. 1897) 40 S. W. 820.

92. The jury should not be left to determine the amount from conjecture and belief without reference to the legal rules determining the bounds and limits of compensation.

Alabama.— Howard *v.* Taylor, 90 Ala. 241, 8 So. 36.

Illinois.— Comstock *v.* Price, 103 Ill. App. 19; Chicago, etc., R. Co. *v.* Adamick, 33 Ill. App. 412; Lake Shore, etc., R. Co. *v.* May, 33 Ill. App. 366; McGinnis *v.* Befven, 16 Ill. App. 354.

Kentucky.— Parker *v.* Jenkins, 3 Bush 587; Griffith *v.* Depew, 3 A. K. Marsh. 177, 13 Am. Dec. 141; Blood *v.* Herring, 61 S. W. 273, 22 Ky. L. Rep. 1725.

Maryland.— Baltimore, etc., R. Co. *v.* Carr, 71 Md. 135, 17 Atl. 1052.

Michigan.— Detroit Daily Post Co. *v.* McArthur, 16 Mich. 447.

Missouri.— Wheeler *v.* Bowles, 163 Mo. 398, 63 S. W. 675; Badgley *v.* St. Louis, 149 Mo. 122, 50 S. W. 817; Hawes *v.* Kansas City Stock-Yards Co., 103 Mo. 60, 15 S. W. 751; Haysler *v.* Owen, 61 Mo. 270; Matney *v.* Gregg Bros. Grain Co., 19 Mo. App. 107. And see Jaquin *v.* Grand Ave. Cable Co., 57 Mo. App. 320.

Nebraska.— Omaha Coal, etc., Co. *v.* Fay, 37 Nebr. 68, 55 N. W. 211.

Pennsylvania.— Todd *v.* Second Ave. Traction Co., 192 Pa. St. 587, 44 Atl. 337; Penn Iron Co. *v.* Diller, (1885) 1 Atl. 924; Erie City Iron Works *v.* Barber, 102 Pa. St. 156.

Texas.— Glasscock *v.* Shell, 57 Tex. 215; Galveston, etc., R. Co. *v.* Schrader, 1 Tex. App. Civ. Cas. § 1147. See also Hazlewood *v.* Pennypacker, (Civ. App. 1899) 50 S. W. 199.

United States.— Quincy Horse R., etc., Co. *v.* Schulte, 71 Fed. 487, 18 C. C. A. 211.

England.— Hadley *v.* Baxendale, 2 C. L. R. 517, 9 Exch. 341, 18 Jur. 358, 23 L. J. Exch. 179, 2 Wkly. Rep. 302.

See 15 Cent. Dig. tit. "Damages," § 560.

A failure to so instruct the jury is usually ground for reversal, especially if the evidence is uncertain or conflicting (Comstock *v.* Price, 103 Ill. App. 19; McGhee *v.* Smith, 6 Heisk. (Tenn.) 315), although a failure of the court to do so of its own motion has been held not reversible error (Wheeler *v.* Bowles, 163 Mo. 398, 68 S. W. 675. *Compare* Southern R. Co. *v.* O'Bryan, 112 Ga. 127, 37 S. E. 161), especially if it has given a general instruction concerning damages (Ellis *v.* Tone, 58 Cal. 289). Nor where the court has properly instructed the jury as to the different items and measure of damages is it necessary for it on its own motion to submit to the jury a method of computing or estimating the same. Kyd *v.* Cook, 56 Nebr. 71, 76 N. W. 524, 71 Am. St. Rep. 661. See also Coley *v.* North Carolina R. Co., 128 N. C. 534, 38 S. E. 43, 57 L. R. A. 817.

The mere fact that a special verdict is to be returned does not alter the case. Western Union Tel. Co. *v.* Newhouse, 6 Ind. App. 422, 33 N. E. 800.

Although the measure has been once correctly stated by the court, it is error if it again refers to the matter in such a broad and general way as may be taken as an intimation that the proper rule may be disregarded. Philadelphia, etc., R. Co. *v.* Adams, 89 Pa. St. 31, 33 Am. Rep. 721.

If the husband is a nominal party only, and the action is brought by him and his wife for an injury to her, the jury should be clearly instructed that her damages only are recoverable. Brown *v.* Hannibal, etc., R. Co., 23 Mo. App. 209.

93. *Missouri.*— Clark *v.* Fairley, 30 Mo. App. 335.

Ohio.—Kuchenmeister *v.* O'Connor, 8 Ohio Dec. (Reprint) 502, 8 Cinc. L. Bul. 257, 9 Ohio Dec. (Reprint) 159, 11 Cinc. L. Bul. 120.

Oklahoma.— Atchison, etc., R. Co. *v.* Chamberlain, 4 Okla. 542, 46 Pac. 499.

Pennsylvania.— Keil *v.* Chartiers Valley Gas Co., 131 Pa. St. 466, 19 Atl. 78, 17 Am. St. Rep. 823.

Texas.— Galveston, etc., R. Co. *v.* Dunlavy, 56 Tex. 256. And see Beeman St. Clair Co. *v.* Caradine, (Civ. App. 1896) 34 S. W. 980.

94. Gregory *v.* New York, etc., R. Co., 55 Hun (N. Y.) 303, 8 N. Y. Suppl. 525.

intended to be controlling on the judgment of the jury;[95] but where an erroneous application of a certain method of estimating damages is suggested by counsel, the court may explain to the jury the correct application of such method should they desire to utilize the same.[96] It is not objectionable to state a rule arising on the hypothesis of the evidence showing certain facts before any damages can be awarded,[97] or before they can be awarded on a particular theory[98] or for a particular item;[99] and where there are two hypotheses under which the damages may be estimated, depending upon the finding of certain facts by the jury, it is proper for the court to submit the rules applicable to each.[1]

(c) *Should Confine Jury to Consideration of Evidence.* A jury cannot arbitrarily fix the amount of compensatory damages either for the breach of a contractual relation or for a tortious injury, and it is therefore error to instruct that they are the sole judges of the amount recoverable without confining their discretion to a consideration of the evidence adduced;[2] but an instruction that the jury may assess plaintiff's damages at such sum as they believe from the evidence to be just is not ordinarily objectionable on this ground,[3] at least in the

95. Kinney *v.* Folkerts, 78 Mich. 687, 44 N. W. 152. But see Chicago House Wrecking Co. *v.* Birney, 117 Fed. 72, 54 C. C. A. 458.

The court may state the rule of damages in analogous cases to that before it in order to suggest that they do not apply to the particular case in question (Hackett *v.* Boston, etc., R. Co., 35 N. H. 390); or it may give an instruction announcing a rule of damages which was not controverted at the trial (Lake Roland El. R. Co. *v.* McKewen, 80 Md. 593, 31 Atl. 707).

96. Rooney *v.* New York, etc., R. Co., 173 Mass. 222, 53 N. E. 435.

Where a liability is conditional upon the existence of another event or state of facts, the existence of such latter facts must not be disregarded by the court in its instructions. Brent *v.* Parker, 23 Fla. 200, 1 So. 780.

97. Cannon *v.* Lewis, 18 Mont. 402, 45 Pac. 572.

98. Todd *v.* Gamble, 74 Hun (N. Y.) 569, 26 N. Y. Suppl. 662.

99. Chattahoochee Brick Co. *v.* Sullivan, 86 Ga. 50, 12 S. E. 216.

The court may give different ways for estimating damages where they are consistent with each other, and would each produce the same result. Ft. Worth, etc., R. Co. *v.* Andrews, (Tex. Civ. App. 1893) 29 S. W. 920.

1. Seely *v.* Alden, 61 Pa. St. 302, 100 Am. Dec. 642; Gulf, etc., R. Co. *v.* Rowland, (Tex. Civ. App. 1893) 23 S. W. 421; Gulf, etc., R. Co. *v.* Day, (Tex. Civ. App. 1893) 22 S. W. 772.

Where a full and specific enumeration of the various items of damage has been made by the court, it is improper for it to conclude its instruction by allowing the jury to consider such other elements or causes of damage as would be just and proper, inasmuch as the court might be understood as indicating that there was still something else that the jury in its discretion could throw into the award (Wilburn *v.* St. Louis, etc., R. Co., 36 Mo. App. 203); but if it does not enumerate all the evidence and items of damage, a sweeping conclusion of this nature is permissible (Fordyce *v.* Jackson, 56 Ark. 594, 20 S. W. 528, 597).

2. *Georgia.*— Bryan *v.* Acee, 27 Ga. 87. And see Central R. Co. *v.* Senn, 73 Ga. 705.

Idaho.— Holt *v.* Spokane, etc., R. Co., 3 Ida. 703, 35 Pac. 39.

Illinois.— Cleveland, etc., R. Co. *v.* Jenkins, 174 Ill. 398, 51 N. E. 811, 66 Am. St. Rep. 296, 62 L. R. A. 922 [*reversing* 75 Ill. App. 17]; Chicago, etc., R. Co. *v.* Sykes, 96 Ill. 162; Martin *v.* Johnson, 89 Ill. 537; Illinois Cent. R. Co. *v.* Farrell, 86 Ill. App. 436; North Chicago St. R. Co. *v.* Fitzgibbons, 79 Ill. App. 632; East St. Louis, etc., R. Co. *v.* Frazier, 19 Ill. App. 92.

Indiana.— Steele *v.* Davis, 75 Ind. 191; Haskett *v.* Small, 16 Ind. 81. See also Indianapolis *v.* Scott, 72 Ind. 196.

Iowa.— *Compare.*— Stanley *v.* Cedar Rapids, etc., R. Co., 119 Iowa 526, 93 N. W. 489.

Kansas.— Union Pac. R. Co. *v.* Shook, 3 Kan. App. 710, 44 Pac. 685.

Michigan.— Howe *v.* North, 69 Mich. 272, 37 N. W. 213.

Missouri.— Camp *v.* Wabash R. Co., 94 Mo. App. 272, 68 S. W. 96; Morrison *v.* Yancey, 23 Mo. App. 670; Edmunds *v.* St. Louis R. Co., 3 Mo. App. 603.

Pennsylvania.— Sanderson *v.* Pennsylvania Coal Co., 102 Pa. St. 370; O'Reilly *v.* Monongahela St. R. Co., 17 Pa. Super. Ct. 626.

Tennessee.— Girdner *v.* Taylor, 6 Heisk. 244.

Texas.— International, etc., R. Co. *v.* Ormond, 62 Tex. 274; Gulf, etc., R. Co. *v.* Head, (App. 1891) 15 S. W. 504.

See 15 Cent. Dig. tit. "Damages," §§ 537, 538.

3. North Chicago St. R. Co. *v.* Fitzgibbons, 180 Ill. 466, 54 N. E. 483 [*affirming* 79 Ill. App. 632]; Pennsylvania R. Co. *v.* Connell, 127 Ill. 419, 20 N. E. 89; Calumet River R. Co. *v.* Moore, 124 Ill. 329, 15 N. E. 764; Chicago, etc., R. Co. *v.* Woodridge, 72 Ill. App. 551; Lovingston *v.* Bauchens, 34 Ill. App. 544; Lamb *v.* Cedar Rapids, 108 Iowa

absence of a request for a more specific instruction;[4] nor is it reversible error to charge the jury that the amount of compensation is wholly or entirely within their province, when such statement is qualified by a full antecedent or subsequent enumeration of the proper items or elements of damage.[5]

(D) *Must Be Warranted by Evidence* — (1) RULE STATED. It is proper to refuse an instruction concerning the damages recoverable, no matter how sound the proposition of law which it states may be, where there is no evidence properly adduced at the trial upon which the instruction may be predicated, as its tendency would be to confuse or mislead the jury.[6] On a parity of reasoning the giving of an instruction upon an item or element of damages which is unsupported by evidence is equally misleading, and is therefore erroneous.[7]

(2) APPLICATION OF RULE — (a) AS TO LOSS OF TIME. An instruction authorizing the jury to consider loss of time on the part of plaintiff as an element of damages is error in the absence of proof that time has actually been lost,[8] or of the value of such time.[9] It has, however, been held that although the amount lost by plain-

629, 79 N. W. 366; Wade *v.* Columbia Electric St. R., etc., Co., 51 S. C. 296, 29 S. E. 233, 64 Am. St. Rep. 676; Boltz *v.* Sullivan, 101 Wis. 608, 77 N. W. 870. See also Reese *v.* Bates, 94 Va. 321, 26 S. E. 865.

4. St. Louis, etc., R. Co. *v.* Freedman, 18 Tex. Civ. App. 553, 46 S. W. 101.

5. *Illinois.*— Gartside Coal Co. *v.* Turk, 147 Ill. 120, 35 N. E. 467 [*affirming* 47 Ill. App. 332].

Indiana.— Pittsburgh, etc., R. Co. *v.* Carlson, 24 Ind. App. 559, 56 N. E. 251.

Iowa.— Rice *v.* Des Moines, 40 Iowa 638.

Pennsylvania.— McCloskey *v.* Bells Gap R. Co., 156 Pa. St. 254, 27 Atl. 246; Owens *v.* People's Pass R. Co., 155 Pa. St. 334, 26 Atl. 748.

Texas.— Galveston, etc., R. Co. *v.* Abbey, 29 Tex. Civ. App. 211, 68 S. W. 293; Texas Cent. R. Co. *v.* Rowland, 3 Tex. Civ. App. 158, 22 S. W. 134.

6. *Alabama.*—Tennessee, etc., R. Co. *v.* Danforth, 112 Ala. 80, 20 So. 502.

Georgia.— Southern R. Co. *v.* Harden, 101 Ga. 263, 28 S. E. 847.

Illinois.— Rock Island *v.* Starkey, 189 Ill. 515, 59 N. E. 971 [*reversing* 91 Ill. App. 592]; Rock Island *v.* Cuinely, 126 Ill. 408, 18 N. E. 753.

Michigan.— Millard *v.* Truax, 84 Mich. 517, 47 N. W. 1100, 22 Am. St. Rep. 705. And see Runnells *v.* Pentwater, 109 Mich. 512, 67 N. W. 558.

New York.— Miller *v.* Hahn, 23 N. Y. App. Div. 48, 48 N. Y. Suppl. 346; Newman *v.* Metropolitan El. R. Co., 10 N. Y. St. 12.

United States.— National Cordage Co. *v.* Pearson Cordage Co., 55 Fed. 812, 5 C. C. A. 276.

7. *Colorado.*— Jackson *v.* Ackroyd, 15 Colo. 583, 26 Pac. 132.

Georgia.— Georgia Cotton-Oil Co. *v.* Jackson, 112 Ga. 620, 37 S. E. 873; Western, etc., R. Co. *v.* Young, 83 Ga. 512, 10 S. E. 197.

Illinois.— South Chicago City R. Co. *v.* Walters, 70 Ill. App. 271; Chatsworth *v.* Rowe, 53 Ill. App. 387.

Iowa.— Podhaisky *v.* Cedar Rapids, 106 Iowa 543, 76 N. W. 817.

Kansas.— Kansas Pac. R. Co. *v.* Nichols, 9 Kan. 235, 12 Am. Rep. 494.

Missouri.—Harrison *v.* White, 56 Mo. App. 175; Hinds *v.* Marshall, 22 Mo. App. 208.

Nebraska.—Shiverick *v.* R. J. Gunning Co., 59 Nebr. 73, 80 N. W. 264.

New York.—Vanderslice *v.* Newton, 4 N. Y. 130; McKenna *v.* Brooklyn Heights R. Co., 41 N. Y. App. Div. 255, 58 N. Y. Suppl. 462; Gill *v.* Rochester, etc., R. Co., 37 Hun 107; MacGowan *v.* Duff, 14 Daly 315.

North Dakota.—Comaskey *v.* Northern Pac. R. Co., 3 N. D. 276, 55 N. W. 732.

Pennsylvania.—McKenna *v.* Citizens' Natural Gas Co., 201 Pa. St. 146, 50 Atl. 922.

Texas.— Houston, etc., R. Co. *v.* Richards, 20 Tex. Civ. App. 203, 49 S. W. 687; Texas, etc., R. Co. *v.* Berchfield, 12 Tex. Civ. App. 145, 33 S. W. 1022; Gulf, etc., R. Co. *v.* Rossing, (Civ. App. 1894) 26 S. W. 243.

Washington.— Carroll *v.* Caine, (1902) 67 Pac. 993.

The fact of blood-poisoning and of expert testimony that such poisoning is not an ordinary incident if wounds are dressed in a proper manner is not evidence of improper medical treatment, calling for instruction as to disabilities resulting therefrom. McGarrahan *v.* New York, etc., R. Co., 171 Mass. 211, 50 N. E. 610.

8. Montgomery, etc., R. Co. *v.* Mallette, 92 Ala. 209, 9 So. 363.

9. *Georgia.*— Western, etc., R. Co. *v.* Patillo, 99 Ga. 97, 24 S. E. 958.

Iowa.— Elenz *v.* Conrad, 115 Iowa 183, 88 N. W. 337.

Missouri.— Haworth *v.* Kansas City Southern R. Co., 94 Mo. App. 215, 68 S. W. 111; Mammerberg *v.* Metropolitan St. R. Co., 62 Mo. App. 563; O'Brien *v.* Loomis, 43 Mo. App. 29.

New York.— Wood *v.* Watertown, 58 Hun 298, 11 N. Y. Suppl. 864; Klein *v.* Second Ave. R. Co., 54 N. Y. Super. Ct. 164.

Texas.— International, etc., R. Co. *v.* Simcock, 81 Tex. 503, 17 S. W. 47; Texas, etc., R. Co. *v.* Goldman, (Civ. App. 1899) 51 S. W. 275; Houston City St. R. Co. *v.* Artusey, (Civ. App. 1895) 31 S. W. 319; Fordyce *v.* Beecher, 2 Tex. Civ. App. 29, 21 S. W. 179; Fordyce *v.* Chancey, 2 Tex. Civ. App. 24, 21 S. W. 181; International, etc., R. Co. *v.* Lock, (Civ. App. 1892) 20 S. W. 855.

tiff is not shown, yet if no request is made to instruct that the award therefor should be limited to nominal damages, and there is nothing to show that the damages awarded for this item exceeded a nominal sum, defendant cannot complain.[10]

(b) As to Medical Expenses, Nursing, Etc. An instruction authorizing a recovery for expenditures for medical attention, nursing, etc., as elements of damage is erroneous in the absence of evidence of the incurment of such liabilities,[11] and of their necessity and reasonableness.[12] The jury should be charged that the amount recovered for such items must be a reasonable one,[13] although an instruction so worded that the jury could not have been misled is not fatally defective for failing to use the word "reasonable."[14] So too an instruction must not dispense with the specific proof required to be made where such expenditures are sought to be recovered as damages.[15]

(c) As to Permanency and Affected Earning Capacity. An instruction must not ignore the rule of law that the permanency of a disability and the impairment of one's earning capacity must be found with reasonable certainty before damages can be awarded on these grounds,[16] although care should be taken not to

See 15 Cent. Dig. tit. "Damages," § 553.

For evidence sufficient to authorize an instruction as to loss of time as an element of damage see Mabrey *v.* Cape Girardeau, etc., Gravel Road Co., 92 Mo. App. 596, 69 S. W. 394; Rogan *v.* Montana Cent. R. Co., 20 Mont. 503, 52 Pac. 206.

10. Niendorff *v.* Manhattan R. Co., 4 N. Y. App. Div. 46, 38 N. Y. Suppl. 690.

The limitation of the recovery to the time plaintiff was prevented from following his usual avocation need not be expressly made, as such limitation will be understood. Posch *v.* Southern Electric R. Co., 76 Mo. App. 601.

11. *Iowa.*— Trapnell *v.* Red Oak Junction, 76 Iowa 744, 39 N. W. 884; Eckerd *v.* Chicago, etc., R. Co., 70 Iowa 353, 30 N. W. 615; Nichols *v.* Dubuque, etc., R. Co., 68 Iowa 732, 28 N. W. 44; Gardner *v.* Burlington, etc., R. Co., 68 Iowa 588, 27 N. W. 768; Stafford *v.* Oskaloosa, 57 Iowa 748, 11 N. W. 668.

Michigan.—Williams *v.* Petoskey, 108 Mich. 260, 66 N. W. 55; Cousins *v.* Lake Shore, etc., R. Co., 96 Mich. 386, 56 N. W. 14.

Missouri.— Smith *v.* Chicago, etc., R. Co., 108 Mo. 243, 18 S. W. 971; Duke *v.* Missouri Pac. R. Co., 99 Mo. 347, 12 S. W. 636; Minster *v.* Citizens' R. Co., 53 Mo. App. 276; Culberson *v.* Chicago, etc., R. Co., 50 Mo. App. 556; Hunter *v.* Mexico, 49 Mo. App. 17; Rhodes *v.* Nevada, 47 Mo. App. 499; Norton *v.* St. Louis, etc., R. Co., 40 Mo. App. 642.

Ohio.—Andrews *v.* Toledo, etc., R. Co., 8 Ohio Cir. Dec. 584.

Texas.— International, etc., R. Co. *v.* Cook, (Civ. App. 1895) 33 S. W. 888.

See 15 Cent. Dig. tit. "Damages," § 554.

12. **For insufficient facts and circumstances** showing the necessity and reasonableness of such expenses to authorize an instruction submitting them to the jury see the following cases:

Arkansas.— Little Rock, etc., R. Co. *v.* Barry, 58 Ark. 198, 23 S. W. 1097, 25 L. R. A. 386.

Illinois.— North Chicago St. R. Co. *v.* Cook, 145 Ill. 551, 33 N. E. 958 [*affirming* 43 Ill. App. 634].

Indiana.— Chicago, etc., R. Co. *v.* Butler, 10 Ind. App. 244, 38 N. E. 1.

New York.— Scott *v.* Banks, 44 N. Y. App. Div. 28, 60 N. Y. Suppl. 397; West *v.* Manhattan R. Co., 56 N. Y. Super. Ct. 590, 1 N. Y. Suppl. 519.

Texas.— Houston, etc., R. Co. *v.* Rowell, 92 Tex. 147, 46 S. W. 630 [*affirming* (Civ. App. 1898) 45 S. W. 763]; Missouri, etc., R. Co. *v.* Reasor, 28 Tex. Civ. App. 302, 68 S. W. 332; Missouri, etc., R. Co. *v.* Bellew, 22 Tex. Civ. App. 264, 54 S. W. 1079; Atchison, etc., R. Co. *v.* Click, 5 Tex. Civ. App. 224, 23 S. W. 833; Fordyce *v.* Beecher, 2 Tex. Civ. App. 29, 21 S. W. 179.

See 15 Cent. Dig. tit. "Damages," § 554.

For sufficient facts and circumstances to authorize such submission see Murphy *v.* McGraw, 74 Mich. 318, 41 N. W. 917; Mirrielees *v.* Wabash R. Co., 163 Mo. 470, 63 S. W. 718; Feeney *v.* Long Island R. Co., 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544.

13. Missouri, etc., R. Co. *v.* Nail, 24 Tex. Civ. App. 114, 58 S. W. 165.

14. Powers *v.* Penn. Mut. L. Ins. Co., 91 Mo. App. 55. And see Murray *v.* Missouri Pac. R. Co., 101 Mo. 236, 13 S. W. 817, 20 Am. St. Rep. 601 [*distinguishing* Duke *v.* Missouri Pac. R. Co., 99 Mo. 347, 12 S. W. 636].

15. Chatsworth *v.* Rowe, 53 Ill. App. 387.

Necessity of specific proof see *supra*, XIII, C, 3, c.

16. Swift *v.* Raleigh, 54 Ill. App. 44; McBride *v.* St. Paul City R. Co., 72 Minn. 291, 75 N. W. 231; Meeteer *v.* Manhattan R. Co. 63 Hun (N. Y.) 533, 18 N. Y. Suppl. 561; Bailey *v.* Westcott, 14 Daly (N. Y.) 506, 4 N. Y. Suppl. 482; Texas Trunk R. Co. *v.* Ayres, 83 Tex. 268, 18 S. W. 684. And see Kenyon *v.* Mondovi, 98 Wis. 50, 73 N. W. 314.

Sufficiency of such evidence see *supra*, XIII, C, 2, b, (II), (E), (H).

It is sufficient that the jury be charged that their conclusion must be based on the evidence, and that they must follow the evidence and reasonable inferences drawn therefrom,

exact too high a degree of proof,[17] the propriety of an instruction permitting the jury to consider these items in estimating damages, or the refusal of an instruction expressly prohibiting their consideration, being largely dependent upon the nature and certainty of the evidence thereof introduced.[18]

(d) As to Punitive Damages. Where from the evidence introduced the case is one which would not justify the allowance of exemplary or vindictive damages, it is error to refuse to charge that such damages are not recoverable.[19] On the other hand an instruction is equally erroneous which authorizes or permits the jury to find such damages, where they are clearly unwarranted either by the evidence[20] or by law;[21] and under evidence not warranting the recovery of exemplary damages it is improper to instruct the jury that if they find for plaintiff they may award him such damages as they believe him entitled to under the evidence.[22]

and that in order to authorize a recovery for future consequences of such an injury it must appear reasonably certain from the evidence that they will occur. Hoyt *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 249, 76 N. Y. Suppl. 832.

17. Gulf, etc., R. Co. *v.* Harriett, 80 Tex. 73, 15 S. W. 556. And see North Chicago City R. Co. *v.* Gastka, 27 Ill. App. 518; Record *v.* Saratoga Springs, 46 Hun (N. Y.) 448.

18. For insufficient facts to authorize an instruction upon such items or to make a refusal to instruct to disregard the same error see the following cases:

Georgia.— Kane *v.* Savannah, etc., R. Co., 85 Ga. 858, 11 S. E. 493.

Illinois.— Illinois Iron, etc., Co. *v.* Weber, 196 Ill. 526, 63 N. E. 1008 [*reversing* 89 Ill. App. 368].

Iowa.— Fisk *v.* Chicago, etc., R. Co., 74 Iowa 424, 38 N. W. 132.

Missouri.— Britton *v.* St. Louis, 120 Mo. 437, 25 S. W. 366.

New York.— Maimone *v.* Dry Dock, etc., R. Co., 58 N. Y. App. Div. 383, 68 N. Y. Suppl. 1073; Scott *v.* Yonkers R. Co., 51 N. Y. App. Div. 626, 64 N. Y. Suppl. 817; Reardon *v.* Third Ave. R. Co., 24 N. Y. App. Div. 163, 48 N. Y. Suppl. 1005.

Texas.— Texas, etc., R. Co. *v.* Maddox, 26 Tex. Civ. App. 297, 63 S. W. 134.

Wisconsin.— La Fave *v.* Superior, 104 Wis. 454, 80 N. W. 742.

United States.— Western Union Tel. Co. *v.* Morris, 83 Fed. 992, 28 C. C. A. 56.

See 15 Cent. Dig. tit. "Damages," § 553.

For sufficient facts and circumstances to authorize the submission of these items to the jury see the following cases:

Illinois.— Donk Bros. Coal, etc., Co. *v.* Peton, 192 Ill. 41, 61 N. E. 330 [*affirming* 95 Ill. App. 193]; North Chicago St. R. Co. *v.* Shreve, 171 Ill. 438, 49 N. E. 534 [*affirming* 70 Ill. App. 666]; Fisher *v.* Jansen, 128 Ill. 549, 21 N. E. 598 [*affirming* 30 Ill. App. 91].

Indiana.— Louisville, etc., R. Co. *v.* Williams, 20 Ind. App. 576, 51 N. E. 128.

Iowa.— Wimber *v.* Iowa Cent. R. Co., 114 Iowa 551, 87 N. W. 505.

Massachusetts.— Warren *v.* Boston, etc., R. Co., 163 Mass. 484, 40 N. E. 895.

New York.— Jena *v.* Third Ave. R. Co., 50 N. Y. App. Div. 424, 64 N. Y. Suppl. 88; Johnson *v.* Brooklyn, etc., R. Co., 6 N. Y. Suppl. 113.

Pennsylvania.— Langstrom *v.* Mooney, 149 Pa. St. 64, 23 Atl. 1123; Wilson *v.* Pennsylvania R. Co., 132 Pa. St. 27, 18 Atl. 1087.

Texas.— St. Louis Southwestern R. Co. *v.* Laws, (Civ. App. 1901) 61 S. W. 498; Galveston, etc., R. Co. *v.* Smith, (Civ. App. 1894) 28 S. W. 110.

Wisconsin.— Propsom *v.* Leatham, 80 Wis. 608, 50 N. W. 586.

See 15 Cent. Dig. tit. "Damages," § 553.

19. *Alabama.*— Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710; Columbus, etc., R. Co. *v.* Bridges, 86 Ala. 448, 5 So. 864, 11 Am. St. Rep. 58; Alabama, etc., R. Co. *v.* Arnold, 84 Ala. 159, 4 So. 359, 5 Am. St. Rep. 354.

California.— Mabb *v.* Stewart, 133 Cal. 556, 65 Pac. 1085.

Indiana.— Linton Coal, etc., Co. *v.* Persons, 15 Ind. App. 69, 43 N. E. 651.

Pennsylvania.— Pittsburgh Southern R. Co. *v.* Taylor, 104 Pa. St. 306, 49 Am. Rep. 580.

United States.— Merchants', etc., Oil Co. *v.* Kentucky Refining Co., 69 Fed. 218, 16 C. C. A. 212.

20. St. Louis, etc., R. Co. *v.* Manly, 58 Ill. 300; Stephenson *v.* Brown, 147 Pa. St. 300, 23 Atl. 443; Amer *v.* Longstreth, 10 Pa. St. 145. See also Morely *v.* Dunbar, 24 Wis. 183.

21. Chattanooga, etc., R. Co. *v.* McLendon, 86 Ga. 517, 12 S. E. 941.

22. Since under such instruction they, not being presumed to be familiar with the rules of damages, might award punitive damages as well.

California.— Trabing *v.* California Nav., etc., Co., 121 Cal. 137, 53 Pac. 644.

Connecticut.— Oviatt *v.* Pond, 29 Conn. 479.

Illinois.— Galesburg Electric Motor, etc., Co. *v.* Barlow, 98 Ill. App. 334; Stover Mfg. Co. *v.* Millane, 89 Ill. App. 532; La Porte *v.* Wallace, 89 Ill. App. 517; Freeman Wire, etc., Co. *v.* Collins, 53 Ill. App. 29; Heimsoth *v.* Anderson, 16 Ill. App. 151.

Missouri.— State *v.* Harrington, 33 Mo. App. 476; Welsh *v.* Stewart, 31 Mo. App. 376.

New York.— Brooks *v.* New York, etc., R. Co., 30 Hun 47.

Pennsylvania.— Collins *v.* Leafey, 124 Pa.

(E) *Must Not Invade Province of Jury* — (1) In General. An instruction on the award or measure of damages may be objectionable as invading the province of the jury. Thus a charge, the purport and effect of which is to assume the existence and proof of disputed facts,[23] or to restrict or interfere with the discretion of the jury,[24] is erroneous and is properly refused.[25]

(2) Commanding Award of Damages. As the allowance of exemplary damages is within the discretion of the jury, an instruction as to their award should in most jurisdictions be permissive and not mandatory,[26] but the rule is otherwise where only compensatory damages are sought;[27] and while an instruction requiring the jury to consider the question of assessment of damages before they have

St. 203, 16 Atl. 765; Heil *v.* Glanding, 42 Pa. St. 493, 82 Am. Dec. 537; Rose *v.* Story, 1 Pa. St. 190, 44 Am. Dec. 121.

Texas.— See Texas, etc., R. Co. *v.* Jones, (Civ. App. 1894) 29 S. W. 499.

West Virginia.— Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

See 15 Cent. Dig. tit. "Damages," § 543.

An inference of an award of exemplary damages does not follow where no such damages are claimed or pretense made on the part of plaintiff that he is entitled to the same (Pennsylvania Co. *v.* Frana, 112 Ill. 398), or where plaintiff in the presence of the jury expressly disclaims such damages (Taylor *v.* Scherpe, etc., Architectural Iron Co., 133 Mo. 349, 34 S. W. 581). Nor can an award of exemplary damages be inferred from an instruction authorizing such damages as plaintiff has "sustained" (Kentucky Cent. R. Co. *v.* Ackley, 87 Ky. 278, 8 S. W. 691, 10 Ky. L. Rep. 170, 12 Am. St. Rep. 480. See also Chicago, etc., R. Co. *v.* Holland, 122 Ill. 461, 13 N. E. 145), or to the compensation to which he is entitled for injuries to his person (Mecartney *v.* Smith, (Kan. App. 1900) 62 Pac. 540).

23. Sherman *v.* Dutch, 16 Ill. 283; Republican Valley R. Co. *v.* Fink, 18 Nebr. 89, 24 N. W. 691.

For instructions held not to be objectionable on this ground see Illinois Cent. R. Co. *v.* Radford, 64 S. W. 511, 23 Ky. L. Rep. 886; Klutts *v.* St. Louis, etc., R. Co., 75 Mo. 642; Hamilton *v.* Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860, 43 Pac. 713; Comey *v.* Philadelphia Traction Co., 175 Pa. St. 133, 34 Atl. 621. An instruction that if the jury find for plaintiff under the evidence they will take into consideration his injuries inflicted in estimating the damages is not objectionable as assuming the existence of such injuries. St. Louis, etc., R. Co. *v.* Daley, 53 Ill. App. 614; Young *v.* Webb City, 150 Mo. 333, 51 S. W. 709. See also Chicago, etc., R. Co. *v.* Wolf, 137 Ill. 360, 27 N. E. 78; Newman *v.* Dodson, 61 Tex. 91.

24. Crow *v.* State, 23 Ark. 684; Morrison *v.* Broadway, etc., R. Co., 8 N. Y. Suppl. 436; Ellis *v.* Spurgin, 1 Heisk. (Tenn.) 74; Woodfolk *v.* Sweeper, 2 Humphr. (Tenn.) 88. See also Watson *v.* Loughran, 112 Ga. 837, 38 S. E. 82; Decamp *v.* Feay, 5 Serg. & R. (Pa.) 323, 9 Am. Dec. 372.

25. *Alabama.*— Danforth *v.* Tennessee, etc., R. Co., 99 Ala. 331, 13 So. 51; Alabama, etc., R. Co. *v.* Arnold, 80 Ala. 600, 2 So. 337.

Delaware.— Ford *v.* Charles Warner Co., 1 Marv. 88, 37 Atl. 39.

Maine.— Colby *v.* Wiscasset, 61 Me. 304.

Mississippi.— Jones *v.* Illinois Cent. R. Co., (1899) 25 So. 490.

New York.—Eiseman *v.* Heine, 2 N. Y. App. Div. 319, 37 N. Y. Suppl. 861.

Pennsylvania.— Kelly *v.* Duffy, (1887) 11 Atl. 244.

South Carolina.— Quinn *v.* South Carolina R. Co., 29 S. C. 381, 7 S. E. 614, 1 L. R. A. 682.

Washington.— See Ledyard *v.* West St., etc., El. R. Co., 5 Wash. 64, 31 Pac. 417.

26. Huber *v.* Teuber, 3 MacArthur (D. C.) 484, 36 Am. Rep. 110; Wimer *v.* Allbaugh, 78 Iowa 79, 42 N. W. 587, 16 Am. St. Rep. 422; Haberman *v.* Gasser, 104 Wis. 98, 80 N. W. 105; Pickett *v.* Crook, 20 Wis. 358.

A charge that it is the duty to award such damages has been held erroneous on this ground. Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. 341.

A charge that plaintiff "is entitled to" punitive damages is objectionable on this ground. Wabash, etc., R. Co. *v.* Rector, 104 Ill. 296; Carson *v.* Smith, 133 Mo. 606, 34 S. W. 855. But see Goodall *v.* Thurman, 1 Head (Tenn.) 209.

An instruction that the jury "ought" to find punitive damages is error, and is not rendered immaterial by another instruction that if they found wilful neglect they "could" find any sum as punitive damages not exceeding the *ad damnum*. Louisville, etc., R. Co. *v.* Brook, 83 Ky. 129, 4 Am. St. Rep. 135; Kentucky Cent. R. Co. *v.* Gastineau, 83 Ky. 119. But on this point the authorities are not uniform, as the well-considered case of Hooker *v.* Newton, 24 Wis. 292, holds that the use of this term is permissible, and cites by analogy the familiar class of cases where the word "may" when used in statutes is interpreted to mean "must." See also Mayor *v.* Duke, 72 Tex. 445, 10 S. W. 565 (where it was held proper to use the word "should" instead of "may" in charging as to the award of exemplary damages); Nolan *v.* Mendere, 6 Tex. Civ. App. 203, 25 S. W. 28.

For charges held not objectionable on this ground see Loeser *v.* Axtin, 12 Ky. L. Rep. 636; Ames *v.* Hilton, 70 Me. 36.

27. Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323 [*affirming* 95 Ill. App. 120]; Consolidated Coal Co. *v.* Haenni, 146 Ill. 614, 35 N. E. 162 [*qualifying* Peoria *v.* Simpson, 110 Ill. 294, 51 Am. Rep. 683; Chicago, etc., R. Co. *v.*

previously passed upon the issues of the case may be regarded as erroneous, as assuming that there are damages,[28] it is not error, where the wrong is clearly established or admitted, to instruct the jury to ascertain the amount of damages.[29]

(3) Tending to Diminish or Augment Recovery. An instruction should be so worded that it does not have a tendency to limit or restrict a recovery the amount of which is within the discretion of the jury.[30] An instruction is objectionable if from the language employed an improper or exaggerated idea of the amount of recovery is likely to be inferred by the jury, or from which they may be led to infer that the court is of the opinion that the verdict should be a certain sum or as generous as the evidence could possibly warrant.[31] It is not, however,

Chisholm, 79 Ill. 584, so as to limit their application to cases where under the facts the jury are justified in allowing exemplary damages also]; Galveston, etc., R. Co. *v.* Jenkins, 29 Tex. Civ. App. 440, 69 S. W. 233.

28. North Chicago St. R. Co. *v.* Honsinger, 175 Ill. 318, 51 N. E. 613; Felsenthal *v.* Block, 8 Ill. App. 425.

29. North Chicago St. R. Co. *v.* Honsinger, 175 Ill. 318, 51 N. E. 613 [*affirming* 70 Ill. App. 101]; Aurora *v.* Hillman, 90 Ill. 61. See also McFadden *v.* Rausch, 119 Pa. St. 507, 13 Atl. 459.

30. See Louisville, etc., Co. *v.* Binion, 107 Ala. 645, 18 So. 75; Page *v.* Mitchell, 13 Mich. 63, 86 Am. Dec. 75; Bannatyne *v.* Florence Milling, etc., Co., 77 Hun (N. Y.) 289, 28 N. Y. Suppl. 334; Duggan *v.* Baltimore, etc., R. Co., 159 Pa. St. 248, 28 Atl. 182, 39 Am. St. Rep. 672. Hence an instruction which would preclude plaintiff from recovering at least nominal damages (Chapman *v.* Copeland, 55 Miss. 476; Paul *v.* Omaha, etc., R. Co., 82 Mo. App. 500; Baker *v.* Manhattan R. Co., 118 N. Y. 533, 23 N. E. 885), or eliminate from the consideration of the jury a legitimate item of damage (Birmingham R., etc., Co. *v.* Ward, 124 Ala. 409, 27 So. 471; Foster *v.* Rodgers, 27 Ala. 602; Waters *v.* Dumas, 75 Cal. 563, 17 Pac. 685; Weber *v.* Creston, 75 Iowa 16, 39 N. W. 126; Metropolitan St. R. Co. *v.* Hudson, 113 Fed. 449, 51 C. C. A. 283), is erroneous. And where, from any view of the evidence, more than nominal damages should be awarded, it is erroneous for the court to suggest that a recovery of one cent is legally possible. Potter *v.* Swindle, 77 Ga. 419, 3 S. E. 94. *Aliter* where nominal damages might be recovered. In such case the proposition may be put that in a certain contingency there may be a recovery for actual damages, and in a certain other contingency nominal damages only are recoverable. Bradley *v.* Redmond, 42 Iowa 452.

Where certain equities are clearly with defendant, it is not erroneous for the court to say to the jury that it may be considered a hard case under the circumstances to subject the defendant to heavy damages. Grove *v.* Donaldson, 15 Pa. St. 128.

31. *Alabama.*— Hair *v.* Little, 28 Ala. 236.

Illinois.— Peoria *v.* Simpson, 110 Ill. 294, 51 Am. Rep. 683.

Pennsylvania.— Reese *v.* Hershey, 163 Pa. St. 253, 29 Atl. 907, 43 Am. St. Rep. 796.

Texas.— See International, etc., R. Co. *v.* Startz, (Civ. App. 1894) 27 S. W. 759.

Wisconsin.— Guinard *v.* Knapp, etc., Co., 95 Wis. 482, 70 N. W. 671.

An instruction that no sane man would lose a leg for any corporation, but that the jury were not to be guided by such consideration in arriving at the amount of damages, is objectionable on this ground. Dooner *v.* Delaware, etc., Canal Co., 164 Pa. St. 17, 30 Atl. 269.

The poverty of the plaintiff should not be alluded to by the court in an action for personal injury, as such fact has no bearing upon the care to be exercised by defendant and should not be allowed to affect the measure of damages. Union Pac. R. Co. *v.* Young, 57 Kan. 168, 45 Pac. 580.

The use of the term "fully" in a charge that the jury if they found for plaintiff should assess such amount as would fully compensate him means no more than such damages as were proven, and, while unnecessarily used, is not objectionable. Harrington *v.* Eureka Hill Min. Co., 17 Utah 300, 53 Pac. 737.

A charge that the verdict must not exceed the amount claimed in the pleadings is not to be commended, as the jury are apt to take such expression as an intimation on the part of the court that the evidence authorizes a verdict for such sum. Rost *v.* Brooklyn Heights R. Co., 10 N. Y. App. Div. 477, 41 N. Y. Suppl. 1069, 4 N. Y. Annot. Cas. 19; Lee *v.* Yandell, 69 Tex. 34, 6 S. W. 665; Willis *v.* McNeill, 57 Tex. 465. See also Morris *v.* Williford, (Tex. Civ. App. 1902) 70 S. W. 228.

Instructions bringing the amount claimed in the ad damnum prominently before the jury have in some cases been held to constitute reversible error (Glasscock *v.* Shell, 57 Tex. 215), and especially is this true if a statement that the damages awarded must not exceed a certain sum is reiterated in each of a series of statements (Lake Shore, etc., R. Co. *v.* May, 33 Ill. App. 366).

The repetition of an instruction which keeps before the jury an invitation to allow punitive damages is improper. Mensur-Tebbetts Implement Co. *v.* Smith, 65 Ill. App. 319.

To charge that the verdict must not exceed the amount claimed is not error; a reversal will not be ordered unless there is something in the instruction which tends to

error for the court to express an opinion that the evidence justifies more than mere nominal damages.[32]

(F) *Should Exclude Remote or Speculative Damages.* In giving instructions care must be taken to use such phraseology as will not tend to lead the jury into unwarranted speculation as to the amount of damages, or to consider fanciful or remote items.[33] It has been held that a charge to consider the effects "likely" to accrue from an injury is not objectionable on this ground,[34] although the opposite has also been held;[35] but in any event the error if any may be cured by a subsequent charge containing proper restrictions.[36] So too an instruction authorizing compensation for pain which "may" accrue is erroneous,[37] although such inaccuracy may also be cured by a subsequent restrictive statement.[38]

(G) *Must Not Permit Double Recovery.* Care must also be taken to frame an instruction so as not to mislead the jury into awarding damages twice for the same loss,[39] although in determining whether or not such award has likely

lead the jury to understand that they ought to or may be allowed to award the full amount so claimed regardless of a just and proper consideration of the evidence before them (Central R. Co. *v.* Bannister, 195 Ill. 48, 62 N. E. 864; Calumet Electric St. R. Co. *v.* Van Pelt, 173 Ill. 70, 50 N. E. 678; North Chicago St. R. Co. *v.* Burgess, 94 Ill. App. 337; Texas Cent. R. Co. *v.* Stuart, 1 Tex. Civ. App. 642, 20 S. W. 962. See also Lanning *v.* Chicago, etc., R. Co., 68 Iowa 502, 27 N. W. 478); and in determining whether or not the jury were misled the amount of the verdict rendered will be considered by the court (Chattanooga, etc., R. Co. *v.* Owen, 90 Ga. 265, 15 S. E. 835; East St. Louis Connecting, etc., R. Co. *v.* O'Hara, 150 Ill. 580, 37 N. E. 917; Tudor Iron-Works *v.* Weber, 129 Ill. 535, 21 N. E. 1078; Nash *v.* Yonkers R. Co., 63 N. Y. App. Div. 315, 71 N. Y. Suppl. 594. See also Kennedy *v.* Sullivan, 34 Ill. App. 46 [*affirmed* in 136 Ill. 94, 26 N. E. 382]).

32. Matthews *v.* Beach, 5 Sandf. (N. Y.) 256; Oswald *v.* Kennedy, 48 Pa. St. 9.

A charge that the jury might apportion damages with a liberal hand, but should not violate their duty by giving more damages than the plaintiff is fairly entitled to, is not fatally objectionable where the particular items of damage have been fully and ably specified by the court, and the jury have been guarded against considering any illegitimate items of damage. Little Schuylkill Nav. R., etc., Co. *v.* French, 81* Pa. St. 366.

33. Ramsey *v.* Burns, 27 Mont. 115, 69 Pac. 711. See also Ramsey *v.* National Contracting Co., 49 N. Y. App. Div. 11, 63 N. Y. Suppl. 286. "Inconvenience" (Root *v.* Des Moines City R. Co., 113 Iowa 675, 83 N. W. 904) or "personal enjoyment" (Columbus *v.* Strassner, 124 Ind. 482, 25 N. E. 65) are subject to the objection that they are vague terms as a basis for the allowance of damages.

For instructions held not objectionable as authorizing vague or speculative damages see the following cases:

Illinois.— Webster Mfg. Co. *v.* Mulvanny, 168 Ill. 311, 48 N. E. 168.

Indiana.— American Strawboard Co. *v.* Foust, 12 Ind. App. 421, 39 N. E. 891.

Iowa.— Westercamp *v.* Brooks, 115 Iowa 159, 88 N. W. 372.

Missouri.— Rose *v.* McCook, 70 Mo. App. 183.

New Hampshire.— Walker *v.* Boston, etc., R. Co., 71 N. H. 271, 51 Atl. 918.

New York.— Pill *v.* Brooklyn Heights R. Co., 6 Misc. 267, 27 N. Y. Suppl. 230.

Pennsylvania.— McGowan *v.* Bailey, 146 Pa. St. 572, 23 Atl. 387.

34. Union Gold Min. Co. *v.* Crawford, 29 Colo. 511, 69 Pac. 600.

35. Hardy *v.* Milwaukee St. R. Co., 89 Wis. 183, 61 N. W. 771.

36. Cameron *v.* Union Trunk Line, 10 Wash. 507, 39 Pac. 128.

37. Ford *v.* Des Moines, 106 Iowa 94, 75 N. W. 630; Chicago, etc., R. Co. *v.* Bailey, 9 Kan. App. 207, 59 Pac. 659.

38. Kliegel *v.* Aitken, 94 Wis. 432, 69 N. W. 67, 50 Am. St. Rep. 901, 35 L. R. A. 249. Or by restricting the judgment to three fifths of the amount of the verdict. Illinois Cent. R. Co. *v.* Davidson, 76 Fed. 517, 22 C. C. A. 306.

An instruction to allow for a disability which will "probably" continue, if error, is cured where in the same instruction the jury are told that a recovery can be had only for such damages as are caused solely by the accident. Bailey *v.* Centerville, 108 Iowa 20, 78 N. W. 831.

39. **For instructions held objectionable** on this ground see Chicago, etc., R. Co. *v.* Carey, 90 Ill. 514; Texas Cent. R. Co. *v.* Brock, 88 Tex. 310, 31 S. W. 500; Houston City St. R. Co. *v.* Reichart, 87 Tex. 539, 29 S. W. 1040; St. Louis, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1901) 63 S. W. 1064; Missouri, etc., R. Co. *v.* Hannig, 91 Tex. 347, 43 S. W. 508 [*reversing* (Civ. App. 1897) 41 S. W. 196]. See also Platt *v.* Brown, 30 Conn. 336; Sweeney *v.* Montana Cent. R. Co., 19 Mont. 163, 47 Pac. 791.

For instructions held not objectionable on this ground see Atlanta St. R. Co. *v.* Jacobs, 88 Ga. 647, 15 S. E. 825; Terre Haute, etc., R. Co. *v.* Brunker, 128 Ind. 542, 26 N. E. 178; Haden *v.* Sioux City, etc., R. Co., 92 Iowa 226, 60 N. W. 537; St. Louis, etc., R. Co. *v.* Byers, (Tex. Civ. App. 1902) 70 S. W. 515. See also Texas Cent. R. Co. *v.* Stuart, 1 Tex. Civ. App. 642, 20 S. W. 962; Stewart *v.* Ripon, 38 Wis. 584. An instruction that

been made the appellate court will consider the whole charge, evidence and verdict.[40]

(H) *Need Not Be Repetitious.* It is not error to refuse an instruction stating a proper exposition of the law of damages, where the same has in substance been covered by the charge,[41] to restate the same instruction in slightly different terms,[42] or, where it has been given in a sufficiently full manner, to give a special instruction in more detail, covering the same ground of damages.[43]

(II) *Particular Instructions* — (A) *As to Exemplary Damages.* Instructions concerning a recovery of vindictive or punitive damages need be couched in no particular phraseology, although they should clearly state the conditions under which such damages are authorized.[44] Care must, however, be taken to instruct the jury as to the necessary intent or motive of defendant,[45] and the degree of wantoness, negligence, or misconduct necessary to render him liable to such damages;[46] and where the grounds on which such damages may be awarded

plaintiff may recover for the personal injuries sustained, followed by an enumeration of the elements of damage which may be considered, is not objectionable (Lake Shore, etc., R. Co. *v.* Hundt, 140 Ill. 525, 30 N. E. 458; Gulf, etc., R. Co. *v.* Brown, 15 Tex. Civ. App. 93, 40 S. W. 608); nor is it ordinarily objectionable to charge that in estimating the damages the jury may consider, if proven, plaintiff's loss of time and his diminished capacity for labor, as such expressions are usually so used that a jury could not be supposed to understand them as referring to one and the same period or loss (Denver *v.* Hyatt, 28 Colo. 129, 63 Pac. 403; Gulf, etc., R. Co. *v.* Wilson, 79 Tex. 371, 15 S. W. 280, 23 Am. St. Rep. 345, 11 L. R. A. 486; San Antonio, etc., R. Co. *v.* Belt, 24 Tex. Civ. App. 281, 59 S. W. 607; Missouri, etc., R. Co. *v.* White, 22 Tex. Civ. App. 424, 55 S. W. 593; Galveston, etc., R. Co. *v.* Lynch, 22 Tex. Civ. App. 336, 55 S. W. 389; Gulf, etc., R. Co. *v.* Warner, 22 Tex. Civ. App. 167, 54 S. W. 1064; Knittel *v.* Schmidt, 16 Tex. Civ. App. 7, 40 S. W. 507; Texas Cent. R. Co. *v.* Brock, (Tex. Civ. App. 1894) 30 S. W. 274), although an instruction of this nature may be so worded that the objection is tenable (Texas Cent. R. Co. *v.* Brock, 88 Tex. 310, 31 S. W. 500; Texas Brewing Co. *v.* Dickey, 20 Tex. Civ. App. 606, 49 S. W. 935).

An instruction that mental suffering was to be considered in estimating compensatory damages, and that in addition to such damages the jury might award exemplary damages, is not objectionable on the ground that it authorizes an award of vindictive damages twice in the case. Bonelli *v.* Bowen, 70 Miss. 142, 11 So. 791. See also Louisville, etc., R. Co. *v.* Greer, 29 S. W. 337, 16 Ky. L. Rep. 667.

40. Brush Electric Light, etc., Co. *v.* Simonsohn, 107 Ga. 70, 32 S. E. 902; Beaver *v.* Eagle Grove, 116 Iowa 485, 89 N. W. 1100; San Antonio, etc., R. Co. *v.* Corley, 87 Tex. 432, 29 S. W. 231; Missouri, etc., R. Co. *v.* Flood, (Tex. Civ. App. 1902) 70 S. W. 331.

41. *Illinois.*— Chicago City R. Co. *v.* Roach, 180 Ill. 174, 54 N. E. 212 [*affirming* 76 Ill. App. 496]; Jacksonville *v.* Doan, 145 Ill. 23, 33 N. E. 878.

Michigan.— Shearer *v.* Middleton, 88 Mich. 621, 50 N. W. 737.

Montana.— Hamilton *v.* Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

New York.— Mansfield *v.* New York Cent., etc., R. Co., 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566; Hunter *v.* Third Ave. R. Co., 21 Misc. 1, 46 N. Y. Suppl 1010 [*affirming* 20 Misc. 432, 45 N. Y. Suppl. 1044].

North Carolina.—Alexander *v.* Richmond, etc., R. Co., 112 N. C. 720, 16 S. E. 896.

South Carolina.— Devereux *v.* Champion Cotton Press Co., 17 S. C. 66.

Texas.— Texas, etc., R. Co. *v.* Hall, 83 Tex. 675, 19 S. W. 121; Texas Trunk R. Co. *v.* Johnson, 75 Tex. 158, 12 S. W. 482.

United States.— Lehigh, etc., R. Co. *v.* Marchant, 84 Fed. 870, 28 C. C. A. 544.

42. Terre Haute Electric R. Co. *v.* Lauer, 21 Ind. App. 466, 52 N. E. 703.

43. Baltimore, etc., R. Co. *v.* Hellenthal, 88 Fed. 116, 31 C. C. A. 414. See also East Tennessee, etc., R. Co. *v.* Herrman, 92 Ga. 384, 17 S. E. 344.

44. Bixby *v.* Dunlap, 56 N. H. 456, 22 Am. Rep. 475.

For further instructions held sufficient see Louisville, etc., Co. *v.* Ballard, 88 Ky. 159, 10 S. W. 429, 2 L. R. A. 694; Etchberry *v.* Levielle, 2 Hilt. (N. Y.) 40; Reynolds *v.* Braithwaite, 131 Pa. St. 416, 18 Atl. 1110; People's Natural Gas Co. *v.* Millbury, 2 Mona. (Pa.) 145; Watts *v.* South Bound R. Co., 60 S. C. 67, 38 S. E. 240.

45. Baumier *v.* Antiau, 65 Mich. 31, 31 N. W. 888; Seeman *v.* Feeney, 19 Minn. 79. See also Wheeler *v.* Randall, 48 Ill. 182.

46. *Alabama.* — Wilkinson *v.* Searcy, 76 Ala. 176.

Florida.— Florida Southern R. Co. *v.* Hirst, 30 Fla. 1, 11 So. 506, 32 Am. St. Rep. 17, 16 L. R. A. 631.

Iowa.— Wimer *v.* Allbaugh, 78 Iowa 79, 42 N. W. 587, 16 Am. St. Rep. 422. See also White *v.* Spangler, 68 Iowa 222, 26 N. W. 85, as to sufficient definition for "wilfully."

Kentucky.— Brenner *v.* Renner, 6 Ky. L. Rep. 512.

Michigan.— See Stilson *v.* Gibbs, 53 Mich. 280, 18 N. W. 815.

are determined by statute an instruction must clearly conform thereto,[47] and it would seem that the better practice would be to use the phraseology employed.[48] So too an instruction must not tend to mislead the jury into the belief that vindictive damages may be recovered without proof of actual damages.[49]

(B) *As to Permanency.* An instruction should not be given, the purport and effect of which is to confine plaintiff to his probable future earnings in any one capacity or avenue of employment.[50]

(C) *As to Pain and Suffering* — (1) IN GENERAL. As physical pain and mental suffering are legitimate items of damage when caused by an injury,[51] an instruction authorizing the jury to consider the same in actions for personal injury is ordinarily proper;[52] and a charge to consider plaintiff's suffering in body and mind refers only to mental suffering caused by and inseparable from physical pain.[53] As it is impossible to offer specific evidence of the pecuniary amount of such damages,[54] it is proper to instruct that they should be left to the sound discretion[55] and enlightened conscience of impartial jurors;[56] but this does not mean that the jury should be allowed to consider them as an independent item of damage, to be compensated by a sum of money that may be regarded as a pecuniary equivalent.[57]

Mississippi.— See Vicksburg, etc., R. Co. *v.* Scanlan, 63 Miss. 413.

Sec 15 Cent. Dig. tit. "Damages," § 543.

The use of the word "wilful" instead of "gross" in expressing the degree of negligence necessary for an award of punitive damages is immaterial. Louisville, etc., R. Co. *v.* Chism, 47 S. W. 251, 20 Ky. L. Rep. 584.

47. Yerian *v.* Linkletter, 80 Cal. 135, 22 Pac. 70.

48. Chattanooga, etc., R. Co. *v.* Liddell, 85 Ga. 482, 11 S. E. 853, 21 Am. St. Rep. 169. To a similar effect see Mitchell *v.* Andrews, 94 Ga. 611, 20 S. E. 130.

49. Martin *v.* Leslie, 93 Ill. App. 44, holding that an instruction, in an action for conspiracy, that when vindictive damages are allowed they should be commensurate with the offense is objectionable on this ground.

Care must be taken not to eliminate the question of mitigating circumstances, and an instruction that in case of injuries for which a criminal prosecution might be brought exemplary damages may be recovered in a civil action is objectionable on this ground. Badostain *v.* Grazide, 115 Cal. 425, 47 Pac. 118.

50. Trott *v.* Chicago, etc., R. Co., 115 Iowa 80, 86 N. W. 33, 87 N. W. 722; Laird *v.* Chicago, etc., R. Co., 100 Iowa 336, 69 N. W. 414; Macon *v.* Paducah St. R. Co., 62 S. W. 496, 23 Ky. L. Rep. 46; Houston, etc., R. Co. *v.* McCullough, 22 Tex. Civ. App. 208, 55 S. W. 392.

An instruction to consider the permanency of the injury as enhancing the damages cannot be considered as permitting an allowance for future suffering. Collins *v.* Council Bluffs, 32 Iowa 324, 7 Am. Rep. 200. See also O'Neill *v.* Blase, 94 Mo. App. 648, 68 S. W. 764.

51. See *supra*, VII, D, 2, 3.

52. West Chicago St. R. Co. *v.* Lups, 74 Ill. App. 420; Gulf, etc., R. Co. *v.* Silliphant, 70 Tex. 623, 8 S. W. 673; Texas, etc., R. Co. *v.* Scruggs, 23 Tex. Civ. App. 712, 58 S. W. 186. And see Fullerton *v.* Fordyce, 144 Mo. 519, 44 S. W. 1053.

The word "hurt," when used in an instruction that the plaintiff may recover if hurt, is sufficiently broad to authorize a recovery for both mental and physical pain. Pronk *v.* Brooklyn Heights R. Co., 68 N. Y. App. Div. 390, 74 N. Y. Suppl. 375.

53. Western Brewery Co. *v.* Meredith, 166 Ill. 306, 46 N. E. 720. To a similar effect see Cicero, etc., R. Co. *v.* Brown, 193 Ill. 274, 61 N. E. 1093; Chicago, etc., R. Co. *v.* Anderson, 182 Ill. 298, 55 N. E. 366; Cushman *v.* Carbondale Fuel Co., 116 Iowa 618, 88 N. W. 817; Fleming *v.* Shenandoah, 71 Iowa 456, 32 N. W. 456. *Compare* Bovee *v.* Danville, 53 Vt. 183.

54. See *supra*, VII, D, 2, 3.

55. Montgomery, etc., R. Co. *v.* Mallette, 92 Ala. 209, 9 So. 363; Southern Bell Telephone, etc., Co. *v.* Jordan, 87 Ga. 69, 3 S. E. 202.

56. Southern R. Co. *v.* Gresham, 114 Ga. 183, 39 S. E. 883; Augusta, etc., R. Co. *v.* Randall, 85 Ga. 297, 11 S. E. 706; Western, etc., R. Co. *v.* Abbott, 74 Ga. 851.

57. Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. Rep. 705 [*explained* and *distinguished* in Machen *v.* Pittsburg, etc., Pass. R. Co., 13 Pa. Super. Ct. 642]. See Bamford *v.* Pittsburg, etc., Traction Co., 194 Pa. St. 17, 44 Atl. 1068 (holding that where there is no suggestion that pain and suffering have a positive price or market value, an instruction that an allowance may be made therefor by way of compensation is not error); Giblin *v.* McIntyre, 2 Utah 384 (holding that an instruction that "if the jury find for the plaintiff they may, in computing the damages, take into consideration the expenses of his care, and a fair compensation for the physical and mental suffering caused by the injury" did not imply that they should consider mental suffering as a distinct item). Hence where the court has stated that it is difficult to give a money value to pain and suffering, and that perhaps no person would voluntarily endure the pain and suffering involved in the case in question for any amount, it is

(2) Future Pain and Suffering. As it is not incumbent upon an injured party to wait until all his damages from the injury have accrued before bringing his action, it follows that where there is any evidence from which the jury may fairly infer that plaintiff will with reasonable certainty[58] endure pain and suffering after the trial, an instruction permitting the jury to allow damages for the same is proper and should be given;[59] otherwise of course in the absence of such evidence.[60]

(D) *As to Mortality Tables.* Whenever mortality tables are introduced it is the duty of the court to fully instruct the jury concerning the use of and weight which should be accorded such evidence.[61] If both a mortuary and an annuity table are in evidence, an instruction should inform the jury with certainty which of the two should be consulted.[62] So too the jury should be told to take into consideration the plaintiff's decrease in earning capacity from advancing age,[63] and that the full expectancy of life as shown by such tables is not applicable unless plaintiff brings himself clearly within the class of lives tabulated.[64]

(E) *As to Duty to Mitigate Damages.* Where the issue that the damages have been aggravated or increased is involved, it is the duty of the court to

error to add that if the jury find for plaintiff they should fix some sum which would be a compensation for his pain and suffering. Baker *v.* Pennsylvania Co., 142 Pa. St. 503, 21 Atl. 979, 12 L. R. A. 698.

58. Curtiss *v.* Rochester, etc., R. Co., 20 Barb. (N. Y.) 282; Kansas City, etc., R. Co. *v.* Stoner, 49 Fed. 209, 1 C. C. A. 231, holding that an instruction, the meaning of which the jury might understand to be that the result must be absolutely and not reasonably certain, should not be given. To like effect see Yerkes *v.* Northern Pac. R. Co., 112 Wis. 184, 88 N. W. 33, 88 Am. St. Rep. 961.

59. Alexander *v.* Humber, 86 Ky. 565, 6 S. W. 453, 9 Ky. L. Rep. 734; Clarke *v.* Westcott, 158 N. Y. 736, 53 N. E. 1124 [*affirming* 2 N. Y. App. Div. 503, 37 N. Y. Suppl. 1111]; Koetter *v.* Manhattan R. Co., 13 N. Y. Suppl. 458; Mexican Cent. R. Co. *v.* Mitten, 13 Tex. Civ. App. 653, 36 S. W. 282; Nichols *v.* Brabazon, 94 Wis. 549, 69 N. W. 342.

An instruction need not expressly charge that the jury must base their deliberations upon the evidence, where the injury is shown beyond all question to be permanent. Miller *v.* Boone County, 95 Iowa 5, 63 N. W. 352.

60. Wheeler *v.* Boone, 108 Iowa 235, 78 N. W. 909, 44 L. R. A. 821; Mosher *v.* Russell, 44 Hun (N. Y.) 12.

For sufficiency of proof that future pain and suffering will with reasonable certainty accrue, to authorize an instruction taking the same to the jury see Westercamp *v.* Brooks, 115 Iowa 159, 88 N. W. 372; Raben *v.* Central Iowa R. Co., 74 Iowa 732, 34 N. W. 621; Hamilton *v.* Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 866, 43 Pac. 713; Shaier *v.* Broadway Imp. Co., 162 N. Y. 641, 57 N. E. 1124 [*affirming* 22 N. Y. App. Div. 102, 47 N. Y. Suppl. 815]; Radjaviller *v.* Third Ave. R. Co., 58 N. Y. App. Div. 11, 68 N. Y. Suppl. 617; Miller *v.* Ft. Lee Park, etc., Co., 73 Hun (N. Y.) 150, 25 N. Y. Suppl. 924.

61. Savannah, etc., R. Co. *v.* Austin, 104 Ga. 614, 30 S. E. 770.

Proper or necessary instruction.— It must be clearly brought before the jury that while such tables are admissible, they are not conclusive, upon the expectancy of life; but that they may be varied, modified, or even entirely contradicted as to the expectancy of the life of the individual plaintiff by any other competent evidence introduced on the subject, such as proof that plaintiff was unhealthy or diseased at the time of the injury (Friend *v.* Ingersoll, 39 Nebr. 717, 58 N. W. 281), and that their value when applied to a particular case will depend upon other matters, such as the state of health of the person, his habits of life, and his social surroundings (Steinbrunner *v.* Pittsburg, etc., R. Co., 146 Pa. St. 504, 23 Atl. 239, 28 Am. St. Rep. 806); and it has been said that courts and juries as a rule give far more weight to testimony of this nature than it is entitled to, as they are apt to supply the place of proof of expectancy of the particular life by generalization from life-tables (Kerrigan *v.* Pennsylvania R. Co., 194 Pa. St. 98, 44 Atl. 1069). See also Arkansas Midland R. Co. *v.* Griffith, 63 Ark. 491, 39 S. W. 550; Morrison *v.* McAtee, 23 Oreg. 530, 32 Pac. 400.

For suggested forms of charges as to the use of mortality and annuity tables in cases of torts causing death or permanent injury see Florida Cent. R. Co. *v.* Burney, 98 Ga. 1, 26 S. E. 730.

Limiting the jury to such tables and nowhere suggesting that they are at liberty to arrive at a result independently thereof is erroneous. Vicksburg, etc., R. Co. *v.* Putnam, 118 U. S. 545, 7 S. Ct. 1, 30 L. ed. 257.

62. Atlanta, etc., R. Co. *v.* Smith, 94 Ga. 107, 20 S. E. 763.

63. East Tennessee, etc., R. Co. *v.* McClure, 94 Ga. 658, 20 S. E. 93; Savannah, etc., R. Co. *v.* McLeod, 94 Ga. 530, 20 S. E. 434; Central R., etc., Co. *v.* Dottenheim, 92 Ga. 425, 17 S. E. 662.

64. Denman *v.* Johnston, 85 Mich. 387, 48 N. W. 565; Kerrigan *v.* Pennsylvania R. Co., 194 Pa. St. 98, 44 Atl. 1069.

instruct the jury that the plaintiff must have used prudence and reasonable care and diligence not to augment the same,[65] and also to tell them what damages can and cannot be recovered where plaintiff has been negligent.[66]

(F) *Where Injury Aggravates Previous Disability.* Where the plaintiff in a personal injury case has been suffering from a previous disability or infirmity, the court should take care to clearly and fully state the rule of recovery in such cases,[67] and a refusal to so instruct is error.[68]

c. Construction. It is rarely ever that error can be predicated upon a single statement or paragraph of an instruction concerning the law of damages alone, but the meaning of each paragraph or statement of a charge will be determined largely by reference to its context, and the instruction will be considered in its entirety,[69] and in connection with the pleadings and evidence,[70] and will be viewed and interpreted as a jury would most likely understand it and not from a technical legal point of view.[71] Hence it is immaterial that one paragraph of a charge is

65. Akridge *v.* Atlanta, etc., R. Co., 90 Ga. 232, 16 S. E. 81; St. Louis, etc., R. Co. *v.* Ball, (Tex. Civ. App. 1902) 66 S. W. 879. See also Memphis, etc., R. Co. *v.* Hembree, 84 Ala. 182, 4 So. 392; Propsom *v.* Leatham, 80 Wis. 608, 50 N. W. 586. Where there is evidence showing that plaintiff desired to aggravate the damages, it is reversible error to refuse to instruct that he cannot recover for the damages accrued from the act which he sought to bring about. Galveston, etc., R. Co. *v.* Kinnebrew, 7 Tex. Civ. App. 549, 27 S. W. 631.

66. Chicago, etc., R. Co. *v.* Meech, 163 Ill. 305, 45 N. E. 290; Throckmorton *v.* Missouri, etc., R. Co., 14 Tex. Civ. App. 222, 39 S. W. 174. See also Galveston, etc., R. Co. *v.* Hubbard, (Tex. Civ. App. 1902) 70 S. W. 112.

While such instructions must not absolve plaintiff from acts clearly negligent (Crete *v.* Childs, 11 Nebr. 252, 9 N. W. 55), a requirement of him of conduct befitting a reasonably prudent man under like circumstances is sufficient (Moore *v.* Kalamazoo, 109 Mich. 176, 66 N. W. 1089; Smith *v.* Smith, 10 Ohio Dec. (Reprint) 494, 21 Cinc. L. Bul. 295; Vallo *v.* U. S. Express Co., 147 Pa. St. 404, 23 Atl. 594, 30 Am. St. Rep. 741, 14 L. R. A. 743; Page *v.* Sumpter, 53 Wis. 652, 11 N. W. 60); and no particular course of conduct can be mapped out as the only proper one, unless it can be shown that such course would be the only one pursued by a reasonably prudent and diligent person (Blate *v.* Third Ave. R. Co., 44 N. Y. App. Div. 163, 60 N. Y. Suppl. 732).

A failure to instruct that the burden of proving a lack of care upon the part of the plaintiff is on defendant, after a proper instruction as to the necessary care required of plaintiff, is not error, although such instruction might properly be given. Citizens' St. R. Co. *v.* Hobbs, 15 Ind. App. 610, 43 N. E. 479, 44 N. E. 377.

67. Denver *v.* Hyatt, 28 Colo. 129, 63 Pac. 403; Louisville, etc., R. Co. *v.* Kingman, 35 S. W. 264, 18 Ky. L. Rep. 82; Woodward *v.* Boscobel, 84 Wis. 226, 54 N. W. 332.

Such instruction is proper where there is evidence of the infirmity, although plaintiff himself testifies that he had none (Gulf, etc., R. Co. *v.* Brown, 16 Tex. Civ. App. 93, 40 S. W. 608), although of course properly refused in the absence of evidence of such infirmity (Phippen *v.* Bay Cities Consol. R. Co., 110 Mich. 351, 68 N. W. 216. See also Canfield *v.* Chicago, etc., R. Co., 78 Mich. 356, 44 N. W. 385).

68. Rock Island *v.* Starkey, 189 Ill. 515, 59 N. E. 971 [*reversing* 91 Ill. App. 592].

69. *California.*— Ramish *v.* Kirschbraun, 107 Cal. 659, 40 Pac. 1045; Cassin *v.* Marshall, 18 Cal. 689.

District of Columbia.— Johnson *v.* Baltimore, etc., R. Co., 6 Mackey 232.

Georgia.— Savannah, etc., R. Co. *v.* Ladson, 114 Ga. 762, 40 S. E. 699; Atlanta Consol. St. R. Co. *v.* Owings, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798.

Illinois.— Chicago, etc., R. Co. *v.* Cleminger, 178 Ill. 536, 53 N. E. 320 [*affirming* 77 Ill. App. 186]; Bloomington *v.* Tebballs, 17 Ill. App. 455.

Massachusetts.— Howes *v.* Ashfield, 99 Mass. 540.

Michigan.— Grattan *v.* Williamston, 116 Mich. 462, 74 N. W. 668.

North Carolina.— Paschall *v.* Williams, 11 N. C. 292.

Pennsylvania.— Dixon-Woods Co. *v.* Phillips Glass Co., 169 Pa. St. 167, 32 Atl. 432; Rogers *v.* Davidson, 142 Pa. St. 436, 21 Atl. 1083; Lake Shore, etc., R. Co. *v.* Frantz, 127 Pa. St. 297, 18 Atl. 22, 4 L. R. A. 389; Blair Iron, etc., Co. *v.* Lloyd, 3 Wkly. Notes Cas. 103.

Texas.— Sinclair *v.* Stanley, 69 Tex. 718, 7 S. W. 511; East Line, etc., R. Co. *v.* Rushing, 69 Tex. 306, 6 S. W. 834; St. Louis, etc., R. Co. *v.* Duck, (Civ. App. 1902) 69 S. W. 1027; Galveston, etc., R. Co. *v.* Jones, 29 Tex. Civ. App. 214, 68 S. W. 190; Missouri, etc., R. Co. *v.* Milam, 20 Tex. Civ. App. 688, 50 S. W. 417; San Antonio, etc., R. Co. *v.* Kniffen, 4 Tex. Civ. App. 484, 23 S. W. 457.

70. Chambers *v.* Walker, 80 Ga. 642, 6 S. E. 165; Craig *v.* Adair, 22 Ga. 373; La Salle *v.* Porterfield, 138 Ill. 114, 27 N. E. 937; Mabrey *v.* Cape Girardeau, etc., Gravel Road Co., 92 Mo. App. 598, 69 S. W. 394; Bussey *v.* Charleston, etc., R. Co., 52 S. C. 438, 30 S. E. 477.

71. Feary *v.* Metropolitan St. R. Co., 162 Mo. 75, 62 S. W. 452.

confined to a single item of damage, where the other items are properly submitted in the following paragraphs;[72] and expressions which if standing alone would be susceptible of an erroneous construction may by subsequent instructions be cured,[73] although if the several paragraphs or statements are inconsistent or contradictory with each other, and there is nothing to show but that the jury were left in doubt as to which was correct, the error is not cured.[74]

d. Exceptions to Erroneous Instruction. An erroneous omission to include in the instruction the proper elements of damage may be brought up under a general exception,[75] but an objection for this error cannot be first made on appeal,[76] nor can the defendant object to the inclusion of an erroneous item of damages when he himself makes the request for the instruction permitting their award.[77]

4. Verdict — a. Form and Requisites — (i) *In General.* The jury should assess the damages or make sufficient finding of data from which the assessment may be made by the court, and a mere finding for plaintiff is insufficient.[78] So too if a finding indicates that it is based on an erroneous measure of damages it is defective.[79] The verdict must conform to the evidence, instructions, and pleadings,[80] but it need not conform to counts defectively pleaded,[81] and an objection on these grounds will not be sustained upon unnecessary inference.[82] So too it has been held that an objection that a verdict is general and not special cannot

A charge so worded that it might be rightfully understood by a person of legal training, if couched in such language that a jury might be misled, should be given a clearer presentation. Willis *v.* McNeill, 57 Tex. 465.

72. Graves *v.* Hillyer, (Tex. Civ. App. 1899) 48 S. W. 889.

73. *Illinois.*— Lake Shore, etc., R. Co. *v.* Conway, 169 Ill. 505, 48 N. E. 483 [*affirming* 67 Ill. App. 155].

Iowa.— Kendall *v.* Albia, 73 Iowa 241, 34 N. W. 833.

Minnesota.— Doran *v.* Eaton, 40 Minn. 35, 41 N. W. 244.

Texas.— Texas, etc., R. Co. *v.* Woodall, 2 Tex. App. Civ. Cas. § 471.

Wisconsin.— Bading *v.* Milwaukee Electric R., etc., Co., 105 Wis. 480, 81 N. W. 861.

74. For instructions held inconsistent or contradictory see the following cases:

California.—Harrison *v.* Spring Valley Hydraulic Gold Co., 65 Cal. 376, 4 Pac. 381.

District of Columbia.— Scott *v.* Metropolitan R. Co., 4 Mackey 152.

Nebraska.— Wasson *v.* Palmer, 13 Nebr. 376, 14 N. W. 171.

Oregon.— Morrison *v.* McAtee, 23 Oreg. 530, 32 Pac. 400.

Texas.— San Antonio, etc., R. Co. *v.* Robinson, 73 Tex. 277, 11 S. W. 327.

For instructions held not objectionable as inconsistent or conflicting see Rice *v.* Whitmore, 74 Cal. 619, 16 Pac. 501, 5 Am. St. Rep. 479; Lyddon *v.* Dose, 81 Mo. App. 64; Creech *v.* Creech, 98 N. C. 155, 3 S. E. 814.

75. Vail *v.* Reynolds, 118 N. Y. 297, 23 N. E. 301. See Mitchell *v.* Metropolitan El. R. Co., 132 N. Y. 552, 30 N. E. 385 [*affirming* 9 N. Y. Suppl. 130].

76. Richmond *v.* Second Ave. R. Co., 76 Hun (N. Y.) 233, 27 N. Y. Suppl. 780.

77. Suarez *v.* Manhattan R. Co., 15 N. Y. Suppl. 222.

78. Fruits *v.* Elmore, 8 Ind. App. 278, 34 N. E. 829 [*approved* in Thornburg *v.* Buck, 13 Ind. App. 446, 41 N. E. 85].

This is true in the case of a special verdict as well as in the case of a general verdict. Wainright *v.* Burroughs, 1 Ind. App. 393, 27 N. E. 591.

79. Burk *v.* Webb, 32 Mich. 173. The fact that an item was allowed under the name of interest is immaterial where it was a proper item of damage. McCreery *v.* Green, 38 Mich. 172. And see Biencourt *v.* Parker, 27 Tex. 558.

80. Galveston, etc., R. Co. *v.* Dunlavy, 56 Tex. 256. And see Thomas *v.* Junction City Irr. Co., 80 Tex. 550, 16 S. W. 324.

A contingent assessment need not be made where there is an issue of law and of fact in the same cause, and the latter is tried before the former, if such issue of fact goes to the whole declaration. Bates *v.* Green, 19 Wend. (N. Y.) 630.

If the declaration contains two counts, one of which is bad, and damages are assessed generally, the judgment must be reversed (Johnson *v.* Greenough, 33 N. H. 396), although it has been held that where both counts related to the same cause of action, and one of them was defective, a verdict on the whole declaration would be applied to the good count, inasmuch as a judgment rendered thereon would be a bar to the same cause of action however stated (Aldrich *v.* Lyman, 6 R. I. 98).

81. Whitehall *v.* State, 19 Ind. 27.

82. Bishop *v.* St. Paul City R. Co., 48 Minn. 26, 50 N. W. 927; McDonald *v.* Whitney, 39 Fed. 466.

Under the statutes of Texas, if the verdict is not responsive to the issues submitted to the jury, the court will call their attention thereto, and return them for further deliberation. Ft. Worth, etc., R. Co. *v.* Mackney, 83 Tex. 410, 18 S. W. 949.

be raised by an exception that it is a conclusion of law and not a conclusion of fact.[83]

(II) *Necessity of Itemization of Damages.* Where the circumstances of the case are such that successive suits have been or may be brought for injury to the same subject-matter, the court may submit the case on special issues and have the different items of damages distinctly passed upon, so that there would be no danger of a subsequent recovery for the same damage.[84] In some actions statutes[85] have provided for an itemization or special classification of damages, and when this is the case the verdict must comply with such provision.[86]

(III) *Inconsistency, Ambiguity, or Uncertainty.* Where the verdict in an action for damages is so uncertain or ambiguous that it is impossible to tell what sum the jury intended to allow, a new trial must of course be ordered.[87] A verdict in an action for damages is objectionable on the ground of uncertainty, when the exact sum of damages is not *eo nomine* stated or sufficient data is not given from which the amount may be computed with certainty;[88] but it is sufficient when such computation can be made, or the language employed is such that the meaning or intent of the jury to award a specific amount cannot well be misunderstood;[89] and in determining the sufficiency of a verdict as to certainty the

83. Blair *v.* Blair, 131 Ind. 194, 30 N. E. 1076.

84. Texas, etc., R. Co. *v.* Padgett, (Tex. Civ. App. 1896) 36 S. W. 300.

If contributory negligence is a partial defense to the full amount of damages sought, but not to the cause of action, the jury must make allowance for such negligence in determining the amount. Gould *v.* McKenna, 86 Pa. St. 297, 27 Am. Rep. 705.

The fact that the jury separately states the amount intended by it to be awarded for a particular item of injury is not error. Ray *v.* Lake Superior Terminal, etc., R. Co., 99 Wis. 617, 75 N. W. 420. See also Appleton *v.* Lepper, 20 U. C. C. P. 138.

Where the court requires answers to questions specifying the amount of actual damages, the questions must be answered by the verdict, so that it may be shown that the jury as a whole agreed on some amount as the actual damages. Clark *v.* Weir, 37 Kan. 98, 14 Pac. 533.

85. In the absence of such requirements a general assessment is sufficient. Citizens' St. R. Co. *v.* Heath, 29 Ind. App. 395, 62 N. E. 107; Richmond *v.* Whittlesey, 2 Allen (Mass.) 230; Texas Cent. R. Co. *v.* Fisher, 18 Tex. Civ. App. 78, 43 S. W. 584; Booth *v.* Ratté, 21 Can. Supreme Ct. 637; Campbell *v.* Great Western R. Co., 20 U. C. C. P. 345.

Since the itemization is unnecessary, the supreme court, in determining whether or not the damages are excessive, will consider the gross sum only, and disregard the special itemizations. Ohio, etc., R. Co. *v.* Judy, 120 Ind. 397, 22 N. E. 252.

86. Bryant *v.* Glidden, 36 Me. 36; Goodson *v.* Mullen, 92 N. C. 207.

Even if a defendant has a right to demand a specification of the different items he cannot object if he has been in no way injured by the failure so to do. Bonner *v.* Green, 6 Tex. Civ. App. 96, 24 S. W. 835.

87. Carthage Turnpike Co. *v.* Overman, 19 Ind. App. 309, 48 N. E. 874.

This condition arises where special findings are conflicting and inconsistent with the general verdict rendered at the same time (Parkinson Sugar Co. *v.* Riley, 50 Kan. 401, 31 Pac. 1090, 34 Am. St. Rep. 123; Atchison, etc., R. Co. *v.* Dickey, 1 Kan. App. 770, 41 Pac. 1070), although if a special verdict in itself consistent is inconsistent with the general verdict, the latter will be disregarded and the damages assessed according to the former (Hall *v.* Harlow, 66 Ind. 448; Taylor *v.* Lehman, 17 Ind. App. 585, 46 N. E. 84, 47 N. E. 230). But a finding of a specified sum as a particular element of loss does not render a general verdict for a larger sum inconsistent, when the latter could properly include in its estimation other proper and legitimate elements of damage in the case. Indiana Iron Co. *v.* Cray, 19 Ind. App. 565, 48 N. E. 803; Guthrie *v.* Thistle, 5 Okla. 517, 49 Pac. 1003. See also Columbia City *v.* Langohr, 20 Ind. App. 395, 50 N. E. 831.

For verdict objectionable as giving double damages in a personal injury case see Galveston, etc., R. Co. *v.* Porfert, 72 Tex. 344, 10 S. W. 207.

88. Shipps *v.* Atkinson, 8 Ind. App. 505, 36 N. E. 375; Landerman *v.* McKinson, 5 J. J. Marsh. (Ky.) 234; Ward *v.* Davidson, 2 J. J. Marsh. (Ky.) 443; Southerland *v.* Crawford, 2 J. J. Marsh. (Ky.) 369; Ballard *v.* Davis, 1 J. J. Marsh. (Ky.) 376; Du Bose *v.* Battle, (Tex. Civ. App. 1896) 34 S. W. 148; Rentfrow *v.* Lancaster, 10 Tex. Civ. App. 321, 31 S. W. 229; Meeker *v.* Gardella, 1 Wash. 139, 23 Pac. 837.

89. *Florida.*— Simpson *v.* Daniels, 16 Fla. 677.

Indiana.— Dobson *v.* Markle, 77 Ind. 53; Hall *v.* King, 29 Ind. 205; Thornburg *v.* Buck, 13 Ind. App. 446, 41 N. E. 85.

Michigan.— See Wilson *v.* McCrilles, 50 Mich. 347, 15 N. W. 504.

Texas.— Roy *v.* Missouri, etc., R. Co., (Civ. App. 1895) 32 S. W. 72. And see Missouri Pac. R. Co. *v.* White, 76 Tex. 102, 13 S. W. 65, 18 Am. St. Rep. 33.

Wisconsin.— Newton *v.* Allis, 16 Wis. 197.

instructions of the court and the proof given in evidence will be considered in connection therewith.[90]

(iv) *When Against Joint Defendants.* If the suit is against joint tort-feasors, the assessment of damages must be for a lump sum against those found guilty, and cannot, in the absence of statute,[91] be severally apportioned between them;[92] and when compensatory damages only are recoverable, it should be for the amount for which the most culpable is liable.[93] An assessment against a part only of the defendants is equivalent to a finding in favor of the others;[94] but when different parties have each a distinct cause of action, covered by the same judgment, separate assessments should be made.[95]

b. Remedy For Erroneous or Excessive Verdict[96] — (i) *Setting Aside.* A verdict in an action for damages will be set aside when it is directly contrary to the charge of the court and the evidence in the case.[97] It will not, however, be disturbed because of the giving of objectionable instructions, where it is not larger than the legitimate and preponderating evidence clearly warrants,[98] especially where defendant fails to request a charge which would be unobjectionable.[99]

(ii) *Remission of Excess* — (a) *In General.* Where the damages awarded are greater than the amount claimed in the declaration, or from the facts disclosed by the evidence are clearly excessive, and the illegal portion is distinguishable from the legal, the defect may usually be remedied by a remittitur of the excess,[1]

Compare Davidson *v.* Devine, 70 Cal. 519, 11 Pac. 664.

See 15 Cent. Dig. tit. "Damages," § 565.

90. Veck *v.* Holt, 71 Tex. 715, 9 S. W. 743.

91. For in some jurisdictions the statute has modified the rule and given the jury the right to make an apportionment. Central Pass. R. Co. *v.* Kuhn, 86 Ky. 578, 6 S. W. 441, 9 Ky. L. Rep. 725, 9 Am. St. Rep. 309.

92. *Illinois.* — Stevens *v.* Brown, 58 Ill. 289; Partridge *v.* Brady, 7 Ill. App. 639.

Indiana. — Everroad *v.* Gabbert, 83 Ind. 489; Tyrrell *v.* Lockhart, 3 Blackf. 136; Ridge *v.* Wilson, 1 Blackf. 409; Palmer *v.* Crosby, 1 Blackf. 139.

Louisiana. — Howe *v.* New Orleans, 12 La. Ann. 481.

Massachusetts. — Folger *v.* Fields, 12 Cush. 93; Kennebeck Purchase *v.* Boulton, 4 Mass. 419.

South Carolina. — See Quarles *v.* Brannon, 5 Strobh. 151.

Virginia. — Crawford *v.* Morris, 5 Gratt. 90.

England. — Hill *v.* Goodchild, 5 Burr. 2790.

See 15 Cent. Dig. tit. "Damages," § 566.

The irregularity may be cured by entering a *nolle prosequi* against the others and taking judgment against one. Holley *v.* Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702.

93. Clark *v.* Bales, 15 Ark. 452; Bell *v.* Morrison, 27 Miss. 68; Huddeston *v.* West Bellevue, 111 Pa. St. 110, 2 Atl. 200. See Clark *v.* Newsam, 1 Exch. 131, 16 L. J. Exch. 296, 5 R. & Can. Cas. 69.

Where some of the several defendants desisted from further trespass when forbidden by plaintiff, and took no part in any subsequent acts of the trespass, but plaintiff elected to go against all of the defendants jointly, it was held that the damages were properly confined to such trespasses as were committed when all of defendants were upon the land before being forbidden by the plaintiff. McMillan *v.* Fairly, 12 N. Brunsw. 325.

94. Westfield Gas, etc., Co. *v.* Abernathy, 8 Ind. App. 73, 35 N. E. 399. And see Singleton *v.* Sodusky, 7 J. J. Marsh. (Ky.) 341.

95. Forrester *v.* Sisco, 49 Md. 586. See also Ward *v.* Ward, 22 N. J. L. 699.

Where the separate action of each defendant causes a single injury, and the share of each in causing it is separable and may be accurately measured, it would be unreasonable and unjust to assess the damages jointly; and under such circumstances the jury is justified in assessing the damages severally. Long *v.* Swindell, 77 N. C. 176. So too if by consent two distinct cases between the same parties are submitted to the same jury, the assessment should be made according to the evidence in each case. Miller *v.* Hoc. 1 Fla. 189.

96. See, generally, Appeal and Error.

97. St. Louis, etc., R. Co. *v.* Woodard, 69 Ark. 659, 64 S. W. 263.

98. Sherwood *v.* Grand Ave. R. Co., 132 Mo. 339, 33 S. W. 774; Houston, etc., R. Co. *v.* Boozer, 70 Tex. 530, 8 S. W. 119, 8 Am. St. Rep. 615; Houston *v.* Parr, (Tex. Civ. App. 1893) 47 S. W. 393; Carroll *v.* Centralia Water Co., 5 Wash. 613, 32 Pac. 609, 33 Pac. 431.

99. Houston, etc., R. Co. *v.* Boozer, 70 Tex. 530, 8 S. W. 119, 8 Am. St. Rep. 615. See also Seitz *v.* Dry-Dock, etc., R. Co., 16 Daly (N. Y.) 264, 10 N. Y. Suppl. 1.

The fact that final judgment was entered the same day the return of the report of the assessment was filed is not ground for setting aside the verdict. Beeson *v.* Hollister, 11 Mich. 193.

1. *Arkansas.* — Ferguson *v.* Fargason, 38 Ark. 238. See Robertson *v.* Allen, 36 Ark. 553.

if it can be readily calculated with reasonable certainty,[2] whether the action be one of tort or of contract,[3] and although such act of the successful litigant obviates an otherwise prejudicial error.[4] So too the allowance of items of damage not authorized by the pleadings may be cured by remittitur.[5] On an offer to remit it is the duty of the court to look to the evidence in the case, and if therefrom it can clearly distinguish the amount which the succeeding party should recover, and the remission will in no way prejudice the opposing party, it should be allowed.[6] It will not, however, be allowed, where it clearly appears that the object is to defeat an appellate jurisdiction;[7] nor should the practice be carried so far as to allow the court, when a jury has obviously mistaken the law or evidence and rendered a verdict which ought not to stand, to substitute its own judgment for theirs, unless there be some recognized rules and principles of law by which the excess may be ascertained,[8] or to require the defendant to submit to

California.— Muller *v.* Boggs, 25 Cal. 175; Butler *v.* Collins, 12 Cal. 457.

Georgia.— Augusta R. Co. *v.* Glover, 92 Ga. 132, 18 S. E. 406; Raney *v.* McRae, 14 Ga. 589, 40 Am. Dec. 660; Griffin *v.* Witherspoon, 8 Ga. 113.

Illinois.— Winslow *v.* People, 117 Ill. 152, 7 N. E. 135; Linder *v.* Monroe, 33 Ill. 388; Stephens *v.* Sweeney, 7 Ill. 375; Louisville, etc., R. Co. *v.* Harlan, 31 Ill. App. 544. See also Chicago, etc., R. Co. *v.* Grimes, 71 Ill. App. 397.

Indiana.— Murray *v.* Phillips, 59 Ind. 56; Harris *v.* Osenback, 13 Ind. 445; Teagarden *v.* Hetfield, 11 Ind. 522; Johnson *v.* Hawkins, 2 Blackf. 459; Coldren *v.* Miller, 1 Blackf. 296.

Iowa.— McCoy *v.* Freichter, 90 Iowa 1, 57 N. W. 631; Duffy *v.* Dubuque, 63 Iowa 171, 18 N. W. 900, 50 Am. Rep. 743; Iowa Homestead Co. *v.* Duncombe, 51 Iowa 525, 1 N. W. 725; Rose *v.* Des Moines Valley R. Co., 39 Iowa 246; Garber *v.* Morrison, 5 Iowa 476; Roberts *v.* Smith, Morr. 417.

Louisiana.— Mead *v.* Buckner, 2 La. 286.

Maryland.— Attrill *v.* Patterson, 58 Md. 226; Harris *v.* Jaffray, 3 Harr. & J. 543; Lewis *v.* Cooke, 1 Harr. & M. 159.

Massachusetts.— Long *v.* Lamkin, 9 Cush. 361.

Missouri.— Higgs *v.* Hunt, 75 Mo. 106; Hoyt *v.* Reed, 16 Mo. 294.

Nebraska.— Wainwright *v.* Satterfield, 52 Nebr. 403, 72 N. W. 359; St. John *v.* Swanback, 39 Nebr. 841, 58 N. W. 288.

New Hampshire.—Buzzell *v.* Snell, 25 N. H. 474; Chase *v.* Wyeth, 17 N. H. 486.

New York.— Pharis *v.* Gere, 31 Hun 443.

Tennessee.—Fowlkes *v.* Webber, 8 Humphr. 530; Campbell *v.* Hancock, 7 Humphr. 75.

Texas.— Galveston, etc., R. Co. *v.* Duelin, 86 Tex. 450, 25 S. W. 406; Gay *v.* Raines, 21 Tex. 460; Taylor *v.* Hall, 20 Tex. 211; Thomae *v.* Zushlag, 25 Tex. Suppl. 225; San Antonio, etc., R. Co. *v.* Kniffen, 4 Tex. Civ. App. 484, 23 S. W. 457; Beard *v.* Miller, (App. 1890) 16 S. W. 655.

Virginia.— Cahill *v.* Pintomy, 4 Munf. 371; Hook *v.* Turnbull, 6 Call 85.

See also *supra*, X, C, 7.

2. *Indiana.*— Dobenspeck *v.* Armel, 11 Ind. 31.

Massachusetts.— Lambert *v.* Craig, 12 Pick. 199.

Minnesota.— La Crosse, etc., Steam Packet Co. *v.* Robertson, 13 Minn. 291; Dodge *v.* Chandler, 13 Minn. 114.

Missouri.— Schmitz *v.* St. Louis, etc., R. Co., 46 Mo. App. 380.

New Hampshire.— Cross *v.* Wilkins, 43 N. H. 332; Pierce *v.* Wood, 23 N. H. 519.

See 15 Cent. Dig. tit. "Damages," § 576.

This power is sanctioned on the theory that the excess arises either from an error of law or mistake in computation, or of a misapprehension of facts, and that such error does not permeate the entire verdict and may therefore be corrected. Broquet *v.* Tripp, 36 Kan. 700, 14 Pac. 227.

3. Little Rock, etc., R. Co. *v.* Barker, 39 Ark. 491; Ferguson *v.* Fargason, 38 Ark. 238; Corcoran *v.* Harran, 55 Wis. 120, 12 N. W. 468.

4. Union Mercantile Co. *v.* Chandler, 90 Iowa 650, 57 N. W. 595; Whetstone *v.* Shaw, 70 Mo. 575.

5. *California.*— Curtis *v.* Herrick, 14 Cal. 117, 73 Am. Dec. 632.

New Hampshire.— Chase *v.* Wyeth, 17 N. H. 486.

New York.— Corning *v.* Corning, Code Rep. N. S. 351.

Rhode Island.— Francis *v.* Baker, 11 R. I. 103, 23 Am. Rep. 424.

Texas.— Ft. Worth, etc., R. Co. *v.* Measles, 81 Tex. 474, 17 S. W. 124; Houston, etc., R. Co. *v.* Periera, (Civ. App. 1898) 45 S. W. 767; San Antonio, etc., R. Co. *v.* Morgan, (Civ. App. 1898) 45 S. W. 169.

See 15 Cent. Dig. tit. "Damages," § 576.

6. Simpson *v.* Daniels, 16 Fla. 677.

7. The reason being that it would not be just to allow the plaintiff all through the case to determine whether there should be a resort to an appellate court, and preserve such right to himself by seeking a larger verdict than the jury gives, and then by an offer to remit deprive the defendant of the right to appellate jurisdiction. Thompson *v.* Butler, 95 U. S. 694, 24 L. ed. 540; Rogers *v.* Bowerman, 21 Fed. 284; Smith *v.* Memphis, etc., R. Co., 18 Fed. 304.

8. *Indiana.*— Cromwell *v.* Wilkinson, 18 Ind. 365.

harsh or onerous terms or stipulations.[9] Nor will this course be permitted where the verdict is so excessive that it was clearly the result of passion or prejudice.[10]

(B) *Time of Remittitur.* There is little uniformity of practice with regard to the time at which a remittitur may be made. The better practice is to make the offer of remission during the same term at which the judgment is rendered,[11] and thereby defeat any motion for a new trial.[12] In some jurisdictions it must be made at the term at which the judgment is entered,[13] while in others it may be done at a subsequent term.[14] So too in some jurisdictions it cannot be made after an appeal,[15] writ of error,[16] or new trial [17] has been granted, although it may be made after a new trial has been refused;[18] and in some jurisdictions it has been held that the remission may be made after motion for a new trial, or even in the appellate court after a writ of error.[19]

(C) *Sufficiency.* A remittitur, to cure the error of excessive damages, must be actually made, and a mere offer to remit is insufficient.[20] So too it must be for a sum certain.[21] It is the plaintiff's duty to see that a new judgment for the amount of the original, minus the remittance, is properly entered;[22] but if the record does not show the remittitur to have been made in open court, in conformity to a statutory requirement, it may be amended before a writ of error is sued out.[23]

C. Determination and Computation of Amount — 1. Of Interest — a. In General. When allowed interest should be included in the verdict as a part of the whole amount,[24] and not as interest *eo nomine*;[25] hence the court should not add interest from a time anterior to the verdict.[26] For breach of contract interest

Massachusetts.—Lambert *v.* Craig, 12 Pick. 199.

Texas.— Thomas *v.* Womack, 13 Tex. 580.

Wisconsin.— Nudd *v.* Wells, 11 Wis. 407.

United States.— Johnson *v.* Root, 13 Fed. Cas. No. 7,409, 2 Cliff. 108.

Compare Walker *v.* Fuller, 29 Ark. 448; Dougherty *v.* Haggin, 61 Cal. 305.

See 15 Cent. Dig. tit. "Damages," § 576.

9. Schultz *v.* Chicago, etc., R. Co., 48 Wis. 375, 4 N. W. 399, where the court imposed upon the defendant the necessity of paying a specified sum within a certain time together with the costs.

10. Loewenthal *v.* Streng, 90 Ill. 74; Chicago, etc., R. Co. *v.* Binkopski, 72 Ill. App. 22; Wainwright *v.* Satterfield, 52 Nebr. 403, 72 N. W. 359; Thomas *v.* Womack, 13 Tex. 580.

The reason being that in such case the vicious influences which prompted the excessive award manifestly poisoned the whole verdict, and can only be counteracted by sending the case to an impartial jury for trial. Schultz *v.* Chicago, etc., R. Co., 48 Wis. 375, 4 N. W. 399.

11. Lambert *v.* Blackman, 1 Blackf. (Ind.) 59; Harris *v.* Jaffray, 3 Harr. & J. (Md.) 543.

12. Pargoud *v.* Morgan, 2 La. 99; Dicks *v.* Cash, 7 Mart. N. S. (La.) 361.

13. Davenport *v.* Bradley, 4 Conn. 309; Rowan *v.* People, 18 Ill. 159.

14. Starbird *v.* Eaton, 42 Me. 569; Hemmenway *v.* Hickes, 4 Pick. (Mass.) 497.

15. The Ashland, 19 Fed. 336.

16. Chrisman *v.* Davenport, 21 Tex. 483.

17. Hill *v.* Newman, 47 Ind. 187.

18. Hahn *v.* Sweazea, 29 Mo. 199.

19. Bushee *v.* Wright, 1 Pinn. (Wis.) 104. And see Bailey *v.* Heintz, 71 Ill. App. 189.

If the plaintiff is at fault in failing to make the offer of remission at the proper time, he should be compelled to pay the costs occasioned by his negligence. Tilford *v.* Ramsey, 43 Mo. 410.

20. Tyner *v.* Hays, 37 Ark. 599; Coldren *v.* Miller, 1 Blackf. (Ind.) 296; Dula *v.* Cowles, 49 N. C. 519.

21. Central *v.* Wilcoxen, 3 Colo. 566.

22. Schilling *v.* Speck, 26 Mo. 489.

23. Pacific Express Co. *v.* Malin, 132 U. S. 531, 10 S. Ct. 166, 33 L. ed. 450.

24. As has been seen, interest may in some actions be included in the verdict as a part of the damages recoverable (Albion Lead Works *v.* Citizens' Ins. Co., 3 Fed. 197; and *supra*, VII, M), while in others it should not be thus included (Hopper *v.* Chicago, etc., R. Co., 91 Iowa 639, 60 N. W. 487; Brentner *v.* Chicago, etc., R. Co., 68 Iowa 530, 23 N. W. 245, 27 N. W. 605; and *supra*, VII, M).

25. Dozier *v.* Jerman, 30 Mo. 216; Schultz *v.* Christman, 9 Mo. App. 588; Wilson *v.* Atlanta, etc., Airline R. Co., 16 S. C. 587. And see Christian Churches Educational Assoc. *v.* Hitchcock, 4 Kan. 36; State Bank *v.* Bowie, 3 Strobh. (S. C.) 439; Hinckley *v.* Beckwith, 13 Wis. 31.

26. Byington *v.* Lemmons, 4 Fed. Cas. No. 2,264*a*, Hempst. 12.

Where part payment has been made the interest should be calculated on the whole demand up to the time of the first payment, and then after deducting the payment from the amount of the principal the interest should be calculated on the residue up to the rendition of the verdict. Guthrie *v.*

from the time of the breach is recoverable,[27] while for conversion it may be computed from the time suit is brought.[28]

b. Rate Recoverable. Where interest is awarded as an element of damages, it should be estimated at the legal rate[29] existing at the time the verdict is rendered[30] and according to the *lex fori*;[31] and if the statute has fixed no rate it should be at the usual one.[32] Such rate must be applied regardless of the rate drawn by securities in which the money withheld was invested,[33] or which it was drawing on deposit.[34] If the rate has been changed after the wrongful act or injury complained of, but before final determination, the interest should be computed at the former rate up to the time of the change in the law, and at the latter rate for the period thereafter.[35]

2. Of Double or Treble Damages. Statutes allowing double or treble damages mean double or treble the amount of actual injury specially found by the jury as damages.[36] In some jurisdictions it is the practice for the jury to assess the actual single damages, and the court to double or treble them;[37] but a variance from this practice is not ordinarily fatally erroneous.[38] If single damages only

Wickliffe, 1 A. K. Marsh. (Ky.) 584. See also Ashuelot R. Co. *v.* Elliot, 57 N. H. 397, holding that interest, after the maturity of a contract, when awarded by way of damages, should be computed in the usual manner, and not at intervals provided for in the contract.

27. Brackett *v.* Edgerton, 14 Minn. 174, 100 Am. Dec. 211.

28. Macon, etc., R. Co. *v.* Meador, 67 Ga. 672.

If a plaintiff delays his own verdict by moving for a new trial, which motion is subsequently refused, the interest can be computed only to the date when the verdict was first rendered. Williams *v.* Smith, 2 Cai. (N. Y.) 253.

Where a city had plaintiff's damages assessed upon its determination to appropriate his land, but did not make an actual appropriation until five years thereafter, at which time the plaintiff had the option to accept the former assessment or to have a reassessment made, he can recover interest only from the time of the actual appropriation of his premises. Toledo *v.* Groll, 2 Ohio Cir. Ct. 199.

29. Vennum *v.* Gregory, 21 Iowa 326; Sanders *v.* Lake Shore, etc., R. Co., 94 N. Y. 641; Jermain *v.* Lake Shore, etc., R. Co., 31 Hun (N. Y.) 558; Perry *v.* Taylor, 1 Utah 63; Scott *v.* Pequonnock Nat. Bank, 15 Fed. 494, 21 Blatchf. 203.

30. Salter *v.* Utica, etc., R. Co., 86 N. Y. 401.

31. Goddard *v.* Foster, 17 Wall. (U. S.) 123, 21 L. ed. 589.

32. Davis *v.* Greely, 1 Cal. 422.

33. Place *v.* Dodge, 54 Ill. App. 167. And see Thoreson *v.* Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156.

34. Wegner *v.* Second Ward Sav. Bank, 76 Wis. 242, 44 N. W. 1096.

35. White *v.* Lyons, 42 Cal. 279; Jersey City *v.* O'Callaghan, 41 N. J. L. 349; Reese *v.* Rutherfurd, 90 N. Y. 644; Worsham *v.* Vignal, 5 Tex. Civ. App. 471, 24 S. W. 562; Gulf, etc., R. Co. *v.* Humphries, 4 Tex. Civ. App. 333, 23 S. W. 556. See Woodward *v.* Woodward, 28 N. J. Eq. 119.

The rate of interest existing at the time an annuity was created should govern in an action for arrears on such annuity, although the legal rate had been raised before the arrears began to accrue. Thornton *v.* Fitzhugh, 4 Leigh (Va.) 209.

36. Stovall *v.* Smith, 4 B. Mon. (Ky.) 378; Howser *v.* Melcher, 40 Mich. 185; Welsh *v.* Anthony, 16 Pa. St. 254. And see Hugill *v.* Reed, 49 N. J. L. 300, 8 Atl. 287.

Under the Missouri statute allowing treble damages in certain cases of trespass, the verdict must be for the value of the property injured; and a general verdict for damages cannot be trebled by the court. Herron *v.* Hornback, 24 Mo. 492; Labeaume *v.* Woolfolk, 18 Mo. 514; Ewing *v.* Leaton, 17 Mo. 465.

The artificial rule as to computing double or treble costs does not apply to the computation of damages. Welsh *v.* Anthony, 16 Pa. St. 254.

37. *Connecticut.*— Broschart *v.* Tuttle, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33.

Massachusetts.— Clark *v.* Worthington, 12 Pick. 571; Lobdell *v.* New Bedford, 1 Mass. 153.

Michigan.— Swift *v.* Applebone, 23 Mich. 252.

Missouri.— Hollyman *v.* Hannibal, etc., R. Co., 58 Mo. 480; Wood *v.* St. Louis, etc., R. Co., 58 Mo. 109; Brewster *v.* Link, 28 Mo. 147; Withington *v.* Hildebrand, 1 Mo. 280.

New York.— King *v.* Havens, 25 Wend. 420; Anonymous, 4 Wend. 216; Newcomb *v.* Butterfield, 8 Johns. 342.

See 15 Cent. Dig. tit. "Damages," § 575.

38. It would seem to be comparatively unimportant whether the jury doubled or trebled their finding and rendered a verdict for the whole, or returned a verdict for the actual damage only, so long as it is clear which course they have adopted.

Arkansas.— Memphis, etc., R. Co. *v.* Carley, 39 Ark. 246.

California.— Galvin *v.* Gualala Mill Co., 98 Cal. 268, 33 Pac. 93.

Connecticut.— Doane *v.* Cummins, 11 Conn. 152.

are intended by the verdict, this fact should clearly appear, or the presumption will be that the jury have doubled or trebled them,[39] especially where the jury are informed that it is their prerogative to double or treble their finding, and the declaration contains both general and special counts.[40]

3. Time to Which Damages Are Allowed. Whether damages should be assessed only up to the institution of the suit or to the rendition of the verdict, or compensation should also be allowed for injury likely to be occasioned by the wrongful act, depends upon the facts of the particular case; if the damages arising subsequent to the date of the writ are merely incidental to the cause of action, or are so closely connected with it that they would not of themselves be the basis of a distinct action, and will continue independent of any subsequent wrongful act, they should be assessed up to the time of the verdict, and when certain to accrue, for the future as well;[41] but if the future damages are contingent only, or if damages sustained after the date of the writ do not necessarily arise from the injury complained of, and form the basis of a new cause of action, the assessment should be made up to the date of the writ only.[42]

Maine.— Quimby *v.* Carter, 20 Me. 218.

Massachusetts.— Snelling *v.* Garfield, 114 Mass. 443.

Pennsylvania.— Welsh *v.* Anthony, 16 Pa. St. 254.

United States.— Cross *v.* U. S., 6 Fed. Cas. No. 3,434, 1 Gall. 26.

See 15 Cent. Dig. tit. "Damages," § 575.

39. Hughes *v.* Stevens, 36 Pa. St. 320; Campbell *v.* Finney, 3 Watts (Pa.) 84. And see Cross *v.* U. S., 6 Fed. Cas. No. 3,434, 1 Gall. 26.

40. Wymond *v.* Amsbury, 2 Colo. 213; Brewster *v.* Link, 28 Mo. 147.

Under a statute allowing treble damages against a cotenant who without notice enters upon and commits waste upon the common property of his cotenants, the damages are inclusive to that done to the share therein owned by the defendant and should be trebled. Hubbard *v.* Hubbard, 15 Me. 198.

41. *California.*— Hicks *v.* Herring, 17 Cal. 566.

Illinois.— Chicago, etc., R. Co. *v.* Robbins, 159 Ill. 598, 43 N. E. 332; Chicago, etc., R. Co. *v.* Hoag, 90 Ill. 339; Cooper *v.* Randall, 59 Ill. 317.

Maryland.— Jacobs *v.* Davis, 34 Md. 204.

Massachusetts.— Fay *v.* Guynon, 131 Mass. 31.

New Jersey.— McAndrews *v.* Tippett, 39 N. J. L. 105.

New York.— Behrman *v.* Linde, 5 N. Y. Suppl. 898.

North Carolina.— Whissenhunt *v.* Jones, 78 N. C. 361; Dailey *v.* Dismal Swamp Canal Co., 24 N. C. 222.

Pennsylvania.— Karch *v.* Com., 3 Pa. St. 269.

Vermont.— Spear *v.* Stacy, 26 Vt. 61.

Wisconsin.— Birchard *v.* Booth, 4 Wis. 67.

Compare Mason *v.* Alabama Iron Co., 73 Ala. 270; Massie *v.* State Nat. Bank, 11 Tex. Civ. App. 280, 32 S. W. 797.

See 15 Cent. Dig. tit. "Damages," § 567.

Damages in recoupment are not to be restricted to the commencement of a suit, but may be assessed up to the time of trial. Martin *v.* Hill, 42 Ala. 275.

Where a nuisance is of such a character that its continuance is necessarily an injury, and it is of such permanent character that it will continue without change from any cause but human labor, the damages arising therefrom may be estimated in one sum, since the injured person has no means of compelling the individual doing the wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means. Troy *v.* Cheshire R. Co., 23 N. H. 83, 55 Am. Dec. 177.

42. Phelps *v.* New Haven, etc., Co., 43 Conn. 453; Troy *v.* Cheshire R. Co., 23 N. H. 83, 55 Am. Dec. 177; Bradley *v.* Washington, etc., Steam Packet Co., 9 Pet. (U. S.) 107, 9 L. ed. 68. See also Horn *v.* Chandler, 1 Mod. 271; Hambleton *v.* Veere, 2 Saund. 169; Ward *v.* Rich, 1 Vent. 103.

Damages arising after an appeal cannot be assessed on a writ of inquiry after the affirmance of the judgment in the appellate court, but a new action must be brought therefor. O'Kie *v.* Depuy, 3 Pa. Co. Ct. 140.

If suit is brought for the breach of a portion of a contract before the time fixed for its entire performance, the assessment can only include those damages which have arisen up to the time the suit was instituted. Crabtree *v.* Hagenbaugh, 25 Ill. 233, 79 Am. Dec. 324; Wittenberg *v.* Mollyneaux, 59 Nebr. 203, 80 N. W. 824.

Where the institution of the action is in itself the mode taken by the plaintiff to terminate the contract, damages cannot be recovered beyond the commencement of the suit. Clark *v.* National Ben., etc., Co., 67 Fed. 222.

Where facts cognate to those constituting the cause of action arise after the commencement of the suit, the proper course in at least some jurisdictions is to bring them upon the record by a supplemental petition. Musselman *v.* Manly, 42 Ind. 462; Alfter *v.* Hammitt, 54 Mo. App. 303.

DAMAGES ULTRA. Additional damages claimed by a plaintiff not satisfied with those paid into court by the defendant.[1]

DAMN. As a noun, a curse; an oath.[2] As a verb, to deem, think or judge any one, to be guilty, to be criminal — to give judgment, or sentence, or doom of guilt; to adjudge, or declare the penalty or punishment.[3] (See CONDEMN; and, generally, BLASPHEMY; PROFANITY.)

DAMNIFICATION. That which causes damage or loss.[4]

DAMNIFY. To injure or damage any person; to cause a person loss.[5]

DAMNOSA HÆREDITAS. See DESCENT AND DISTRIBUTION.

DAMNOSUS. In old English law, that which produces loss, as distinguished from *injuriosus*, or that which works a wrong.[6]

DAMNUM. In pleading and old English law, damage; loss.[7] (See AD DAMNUM.)

DAMNUM ABSQUE INJURIA.[8] A loss without a wrong.[9] (Damnum Absque Injuria: In General, see ACTIONS; DAMAGES; TORTS. Acts Authorized by

1. Black L. Dict.
2. Century Dict.

As a word of cursing see Carr *v.* Conyers, 84 Ga. 287, 289, 10 S. E. 630, 20 Am. St. Rep. 357.

3. Blaufus *v.* People, 69 N. Y. 107, 111, 25 Am. Rep. 148 [*quoting* Richardson Dict.]. And see Breitenbach *v.* Trowbridge, 64 Mich. 393, 399, 31 N. W. 402, 8 Am. St. Rep. 829; Spiering *v.* Andrae, 45 Wis. 330, 331, 30 Am. Rep. 744.

4. Black L. Dict.
5. English L. Dict.
6. Burrill L. Dict. [*citing* Bracton, fol. 231*b*].
7. Black L. Dict.
8. A necessary law of society see 1 Cyc. 646 note 15.
9. Hession *v.* Wilmington, (Del. 1893) 27 Atl. 830, 834; Gadsden *v.* Georgetown Bank, 5 Rich. (S. C.) 336, 345; Marbury *v.* Madison, 1 Cranch (U. S.) 137, 164, 2 L. ed. 60. And see 1 Cyc. 646.

Blackstone says: "If I can prove the tradesman a bankrupt, the physician a quack, the lawyer a knave, and the divine a heretic, this will destroy their respective actions: for though, there may be damage sufficient accruing from it, yet, if the fact be true, it is *damnum absque injuria* (damage without injury); and where there is no injury, the law gives no remedy. And this is agreeable to the reasoning of the civil law." 3 Bl. Comm. 125.

For applications of the principle see the following cases:

California.— Natoma Water, etc., Co. *v.* Hancock, 101 Cal. 42, 50, 31 Pac. 112, 35 Pac. 334; Reardon *v.* San Francisco, 66 Cal. 492, 504, 6 Pac. 317, 56 Am. Rep. 109.

Connecticut.— New York, etc., R. Co. *v.* Bridgeport Traction Co., 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367; Parker *v.* Griswold, 17 Conn. 288, 302, 42 Am. Dec. 739.

Delaware.— Hession *v.* Wilmington, (Del. 1893) 27 Atl. 830, 834.

Georgia.— Austin *v.* Augusta, etc., R. Co., 108 Ga. 671, 675, 34 S. E. 852, 47 L. R. A. 755; Irwin *v.* Askew, 74 Ga. 581, 585; National Exch. Bank *v.* Sibley, 71 Ga. 726, 734.

Illinois.— Rigney *v.* Chicago, 102 Ill. 64, 80.

Kansas.— Coffey County Com'rs *v.* Venard, 10 Kan. 95, 99.

Maine.— Chase *v.* Silverstone, 62 Me. 175, 176, 16 Am. Rep. 419.

Maryland.— Peters *v.* Van Lear, 4 Gill 249, 255.

Massachusetts.— Parker *v.* Boston, etc., R. Co., 3 Cush. 107, 114, 50 Am. Dec. 709.

Nebraska.— Gottschalk *v.* Chicago, etc., R. Co., 14 Nebr. 550, 557, 16 N. W. 475, 17 N. W. 120; Nebraska City *v.* Lampkin, 6 Nebr. 27, 32.

New Jersey.— Stuhr *v.* Curran, 44 N. J. L. 181, 191, 43 Am. Rep. 353.

New York.— Gilzinger *v.* Saugerties Water Co., 66 Hun 173, 174, 21 N. Y. Suppl. 121 [*citing* Bouvier L. Dict.].

Pennsylvania.— Jones *v.* Erie, etc., R. Co, 151 Pa. St. 30, 47, 25 Atl. 134, 31 Am. St. Rep. 722, 17 L. R. A. 758 [*citing* Pennsylvania R. Co. *v.* Marchant, 119 Pa. St. 541, 559, 13 Atl. 690, 4 Am. St. Rep. 659; Pennsylvania R. Co. *v.* Lippincott, 116 Pa. St. 472, 484, 9 Atl. 871, 2 Am. St. Rep. 618]; Pennsylvania Coal Co. *v.* Sanderson, 113 Pa. St. 126, 146, 6 Atl. 453, 57 Am. Rep. 445; Pennsylvania R. Co. *v.* Miller, 112 Pa. St. 34, 41, 3 Atl. 780; Gramlich *v.* Wurst, 86 Pa. St. 74, 79, 27 Am. Rep. 684; Shrunk *v.* Schuylkill Nav. Co., 14 Serg. & R. 71, 82 [*quoted* in Pennsylvania R. Co. *v.* Lippincott, 116 Pa. St. 472, 484, 9 Atl. 871, 2 Am. St. Rep. 618]; Williams *v.* Kingston Coal Co., 6 Kulp 241, 249 [*citing* 1 Dillon Mun. Corp. § 141]; Hasbrouck *v.* New York, etc., R. Co., 1 C. Pl. 156.

South Carolina.— Gadsden *v.* Georgetown Bank, 5 Rich. (S. C.) 336, 345.

Virginia.— Alexandria, etc., R. Co. *v.* Faunce, 31 Gratt. 761, 764; Graham *v.* Pierce, 19 Gratt. 28, 47, 100 Am. Dec. 658.

West Virginia.— Transportation Co. *v.* Standard Oil Co., 50 W. Va. 611, 615, 40 S. E. 591, 56 L. R. A. 804; Shenandoah Valley R. Co. *v.* Shepherd, 26 W. Va. 672, 681; Spencer *v.* Point Pleasant, etc., R. Co., 23 W. Va. 406, 432.

United States.— Hough *v.* Western Transp. Co., 3 Wall. 20, 36, 18 L. ed. 125 [*quoted* in Rundell *v.* La Campagnie Generale Transatlantique, 100 Fed. 655, 657, 40 C. C. A. 625, 49 L. R. A. 92]; Marbury *v.* Madison, 1 Cranch 137, 164, 2 L. ed. 60.

Statute,[10] see EMINENT DOMAIN; MUNICIPAL CORPORATIONS; NUISANCES; OFFICERS; STREETS AND HIGHWAYS. Injury Caused — By Act of God, see CARRIERS; NEGLIGENCE; SHIPPING; WATERS; By Animal, see ANIMALS; By Use of One's Own Property, see ACTIONS; ADJOINING LANDOWNERS; NUISANCES. Labor Combination, see CONSPIRACY. Obstruction of Light and Air, see ADJOINING LANDOWNERS; EASEMENTS. Privileged Communication, see LIBEL AND SLANDER. Probable Cause For Institution of Action or Prosecution, see MALICIOUS PROSECUTION.)

DAMNUM ABSQUE INJURIA ESSE POTEST. A maxim meaning "There is such a thing as damage without injury."[11]

DAMNUM FATALE. In civil law, damages caused by a fortuitous event or inevitable accident; damages arising from the act of God.[12] (Damnum Fatale: Exceptions in Contracts For Carriage of Goods, see CARRIERS; SHIPPING. Affecting Liability — For Flowage, see WATERS; For Negligence, see NEGLIGENCE; Of Carrier of Goods, see CARRIERS; SHIPPING.)

DAMNUM REI AMISSÆ. In the civil law, a loss arising from a payment made by a party in consequence of an error of law.[13]

DAMNUM SINE INJURIA ESSE POTEST. A maxim meaning "There may be damage or injury inflicted without any act of injustice."[14]

DAMS. See DAM.

DANELAGE. Dane law; the Danish law.[15]

DANGER. Jeopardy;[16] peril.[17] (Danger: As Justification — For Carrying Weapon, see WEAPONS; For Killing Another in Self-Defense, see HOMICIDE. Of the Sea, see INSURANCE; SHIPPING.)

DANGEROUS.[18] Attended with danger, perilous, full of risk, etc.;[19] attended or beset with danger, full of risk, perilous, hazardous;[20] deadly;[21] unsafe.[22] (Dangerous: Animal, see ANIMALS. Crossing, see RAILROADS. Machinery or Appliance, see MASTER AND SERVANT; NEGLIGENCE. Weapon, see ASSAULT AND BATTERY; DANGEROUS WEAPON; HOMICIDE; WEAPONS.)

DANGEROUS CONDITION. As applied to building operations, something more than the accumulation of materials on the neighborhood of a building undergoing

England.— Keeble *v.* Hickeringhall, 3 Salk. 9, 10.

10. **Liability of railroad** for constructing an embankment see 1 Cyc. 771 note 11.

11. Morgan Leg. Max.

12. Bouvier L. Dict. And see Hays *v.* Kennedy, 41 Pa. St. 378, 382, 80 Am. Dec. 627, where the court compares the phrase "Act of God" with "the Roman terms, *fataliter, divinitus, casus fortuitus, damnum fatale,* all of which originally referred to the intervention of the gods, in the sense that the appropriate human agency was powerless." See also Morse *v.* Slue, 1 Vent. 238 [*quoted* in Hays *v.* Kennedy, 41 Pa. St. 378, 381, 80 Am. Dec. 627], where Hale, C. J., classes pirates, storms, etc., as *damnum fatale.*

"The civil law treated . . . robbery . . . as *damnum fatale.*" King *v.* Shepherd, 14 Fed. Cas. No. 7,804, 3 Story 349, 357.

13. Burrill L. Dict. [*citing* 1 Mackeldey Civ. L. p. 164, § 165].

14. Cyclopedic L. Dict. [*citing* Lofft Max.].

15. Burrill L. Dict. [*citing* 1 Bl. Comm. 65].

16. U. S. *v.* Mays, 1 Ida. 763, 770.

17. Pandorf *v.* Hamilton, 17 Q. B. D. 670, 675, 6 Aspin. 44, 55 L. J. Q. B. 546, 55 L. T. Rep. N. S. 499, 35 Wkly. Rep. 70.

18. "Dangerous and enticing machine" see Walsh *v.* Fitchburg R. Co., 145 N. Y. 301, 307, 39 N. E. 1068, 27 L. R. A. 724, 45 Am. St. Rep. 615; Travell *v.* Bannerman, 71 N. Y. App. Div. 439, 441, 75 N. Y. Suppl. 866.

"Dangerous parts of machinery" see Hindle *v.* Birtwistle, [1897] 1 Q. B. 192, 195; Redgrave *v.* Lloyd, [1895] 1 Q. B. 876, 880, 18 Cox C. C. 149, 59 J. P. 293, 64 L. J. M. C. 155, 72 L. T. Rep. N. S. 565, 15 Reports 403, 43 Wkly. Rep. 527.

"Dangerous place" as used in an instruction to a jury see Fernandes *v.* Sacramento City R. Co., 52 Cal. 45, 48.

"Dangerous thing" see 3 Cyc. 1030 note 79.

"Dangerous trade or business" see Atlantic Dock Co. *v.* Libby, 45 N. Y. 499, 502 [*citing* Aiken *v.* Wasson, 24 N. Y. 482, 484]; Atlantic Dock Co. *v.* Leavitt, 50 Barb. (N. Y.) 135, 141.

"Combustible and dangerous materials" see Rex *v.* McGregor, 4 Ont. L. Rep. 198, 202.

19. West *v.* Ward, 77 Iowa 323, 325, 42 N. W. 309, 14 Am. St. Rep. 284.

20. Webster Dict. [*quoted* in Texas, etc., R. Co. *v.* Mother, 5 Tex. Civ. App. 87, 93, 24 S. W. 79].

21. State *v.* Larkin, 24 Mo. App. 410, 411.

22. Coates *v.* Canaan, 51 Vt. 129, 137; Webster Dict. [*quoted* in Texas, etc., R. Co. *v.* Mother, 5 Tex. Civ. App. 87, 93, 24 S. W. 79].

erection or repair, or that excavation, more or less deep, which is needed in order to put down a sidewalk of stone slabs.[23] (See, generally, BUILDERS AND ARCHITECTS.)

DANGEROUS EXPOSURE. As applied to navigation, not the mere possibility of injury through some mischance not reasonably likely to occur, but an exposure that is clearly liable to receive or inflict injury in the ordinary chances, mistakes, and hazards of navigation; such as are to be reasonably apprehended as liable to arise.[24] (See, generally, MARINE INSURANCE; SHIPPING.)

DANGEROUS WEAPON.[25] A weapon likely to produce death or great bodily harm;[26] a weapon capable of producing death or great bodily harm,[27] or dangerous to life.[28] (Dangerous Weapon: Assault and Battery With, see ASSAULT AND BATTERY; HOMICIDE. Carrying, see WEAPONS. Homicide With, see HOMICIDE.

DANGERS OF LAKE NAVIGATION. All the ordinary perils which attend navigation on the lakes, and among others, that which arises from shallowness of the waters at the entrance of harbors formed from them.[29]

DANGERS OF NAVIGATION. Latent dangers, and not such as are, or ought to be, patent, which can be avoided by skill, judgment and foresight of the persons engaged in navigation;[30] an expression equivalent to DANGERS OF THE SEAS,[31] *q. v.* (See, generally, MARINE INSURANCE; SHIPPING.)

DANGERS OF RIVER NAVIGATION. Natural accidents peculiar to that element, which do not happen at the intervention of man;[32] a term which embraces dangers by collision, where there has been no fault, or want of ordinary care and skill on the part of those navigating the injured boat.[33]

DANGERS OF THE RIVER. The natural accidents incident to river navigation, and not such as skill and foresight could avoid;[34] those accidents which are

23. Schweickhardt *v.* St. Louis, 2 Mo. App. 571, 579.

24. The Mary Powell, 31 Fed. 622, 624 [*quoted* in The Michigan, 52 Fed. 501, 504].

25. "Offensive and dangerous weapons would seem to be synonymous terms." McMillan, J., in State *v.* Dineen, 10 Minn. 407 [*citing* 1 Bishop Cr. L. § 200; 1 Russell Crimes 118].

26. U. S. *v.* Reeves, 38 Fed. 404, 406; U. S. *v.* Williams, 2 Fed. 61, 64, 6 Sawy. 244.

27. State *v.* Godfrey, 17 Oreg. 300, 302, 20 Pac. 625, 11 Am. St. Rep. 830. And see State *v.* Scott, 39 La. Ann. 943, 944, 3 So. 83.

28. People *v.* Rego, 36 Hun (N. Y.) 129, 131 [*citing* Abbott L. Dict.]. And see U. S. *v.* Small, 27 Fed. Cas. No. 16,314, 2 Curt. 241.

The term may include: A loaded pistol (State *v.* Baker, 20 R. I. 275, 278, 38 Atl. 653, 78 Am. St. Rep. 863); a sword or pistol (U. S. *v.* Wood, 28 Fed. Cas. No. 16,756, 3 Wash. 440); a large piece of timber (State *v.* Alfred, 44 La. Ann. 582, 10 So. 887). And see 3 Cyc. 1029 note 79. But see State *v.* Nelson, 38 La. Ann. 942, 943, 58 Am. Rep. 202, where it did not include a razor.

When a knife, described in the bill of exceptions as a "jack-knife" will be considered as a dangerous weapon see Com. *v.* O'Brien, 119 Mass. 342, 343, 20 Am. Rep. 325.

29. Western Transp. Co. *v.* Downer, 11 Wall. (U. S.) 129, 133, 20 L. ed. 160 [*quoted* in Insurance Co. of North America *v.* Lake Erie, etc., R. Co., 152 Ind. 333, 53 N. E. 382].

Dangers of Lake Ontario as used in a shipping contract see Fairchild *v.* Slocum, 19 Wend. (N. Y.) 329, 333.

30. Costigan *v.* Michael Transp. Co., 38 Mo. App. 219, 229 [*citing* Hill *v.* Sturgeon, 28 Mo. 323, 327].

31. Baxter *v.* Leland, 2 Fed. Cas. No. 1,124, Abb. Adm. 348, 352.

Loss from dangers of navigation see 6 Cyc. 410 note 41.

32. Hays *v.* Kennedy, 3 Grant (Pa.) 351, 361, dissenting opinion.

33. Hayes *v.* Kennedy, 2 Pittsb. (Pa.) 262, 267, where it is said: "But it seems to me that 'dangers of the river navigation' is a phrase of larger import than 'dangers of the river.'"

34. Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 148, 24 Am. Dec. 716; Hill *v.* Sturgeon, 35 Mo. 212, 213, 86 Am. Dec. 149; Hill *v.* Sturgeon, 28 Mo. 323, 327 [*citing* Coggs *v.* Bernard, 1 Smith Lead. Cas. 270 note]; Williams *v.* Branson, 5 N. C. 417, 419, 4 Am. Dec. 562. See also Whitesides *v.* Thurlkill, 12 Sm. & M. (Miss.) 599, 600, 51 Am. Dec. 128 (where it is said: "By the common law a carrier of goods is regarded as an insurer. . . . But the party may limit and narrow down this common law liability, by express stipulation in his contract. The exception of the 'dangers of the river,' is one instance of this limitation"); Gordon *v.* Little, 8 Serg. & R. (Pa.) 533, 561, 11 Am. Dec. 632 (where Gibson, J., said: "The words 'unavoidable dangers of the river,' seem to me equivalent to the words 'perils of the sea,' in a policy of insurance; and these are well understood to mean those dangers which arise from tempests, storms, rocks and sands: they are, in fact, 'the unavoidable dangers' of the seas;" and Duncan, J., observed that "'inevitable dangers of the river,' is not

peculiar to the element of water;[35] also all hidden obstructions in the river, as rocks, logs, sawyers, and the like which could not be foreseen or avoided by human prudence.[36]

DANGERS OF THE ROADS. As used in a bill of lading, dangers incident to marine roads in which vessels lie at anchor, or, in reference to inland transportation, dangers which are immediately caused by roads, as the overturning of carriages in rough and precipitous places.[37] (See, generally, CARRIERS; SHIPPING.)

DANGERS OF THE SEAS.[38] The DANGERS OF NAVIGATION,[39] *q. v.*; perils of the seas;[40] those perils which are peculiar to the sea;[41] inevitable perils, or accidents, upon that element;[42] those accidents peculiar to navigation, that are of extraordinary nature, or arise from irresistible force, or overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence;[43] dangers that arise upon the sea, which would not include every hazard and danger, from the beginning to the end of the voyage, of whatever kind, or with equal propriety, only those dangers which arise directly and exclusively from that element, of which that is the efficient cause.[44] (Dangers of the Seas: Exceptions in Contracts of Affreightment, see SHIPPING. Insurance Against, see MARINE INSURANCE.)

DANISM. The act of lending money on usury.[45] (See, generally, USURY.)

DANS ET RETINENS NIHIL DAT. A maxim meaning "One who gives and yet retains, does not give effectually."[46]

DANSEUSE. A dancer who appears in public entertainments.[47]

DANS UN PAYS LIBRE, ON CRIE BEAUCOUP, QUIQU'ON SOUFFRE PEU; DANS UN PAYS DE TYRANNIE, ON SE PLAINT PEU QUOIQU'ON SOUFFRE BEAUCOUP.

more definite or certain than 'perils of the sea'").

35. Sampson *v.* Gazzam, 6 Port. (Ala.) 123, 132, 30 Am. Dec. 578.

36. Turney *v.* Wilson, 7 Yerg. (Tenn.) 340, 342, 27 Am. Dec. 515. And see Hibernia Ins. Co. *v.* St. Louis, etc., R. Co., 17 Fed. 478, 480, 5 McCrary 397.

"Low water is not to be classed among the dangers of the river." Mahon *v.* The Olive Branch, 18 La. Ann. 107, 108.

37. De Rothschild *v.* Royal Mail Steam Packet Co., 7 Exch. 734, 743, 21 L. J. Exch. 273.

38. This "expression has a legal signification, somewhat different from what might ordinarily be inferred from the primary meaning of the words." Stephens, etc., Transp. Co. *v.* Tuckerman, 33 N. J. L. 543, 550. And it "is somewhat of an equivocal expression." Merrill *v.* Arey, 17 Fed. Cas. No. 9,468, 3 Ware 215, 218.

39. Baxter *v.* Leland, 2 Fed. Cas. No. 1,124, Abb. Adm. 348, 352.

40. Baxter *v.* Leland, 2 Fed. Cas. No. 1,124, Abb. Adm. 348, 352; Pandorf *v.* Hamilton, 17 Q. B. D. 670, 675, 6 Aspin. 44, 55 L. J. Q. B. 546, 55 L. T. Rep. N. S. 499, 35 Wkly. Rep. 70.

41. Airey *v.* Merrill, 1 Fed. Cas. No. 115, 2 Curt. 8, 9 [*citing* 3 Kent Comm. 275; Story Bailm. § 512], where it is said: "So it has been generally understood. It is true that a broader meaning has, in many cases of insurance, been given to it; and it would not be practicable to fix any definition of the phrase which would be justly applicable to it in all contracts. The words have a strict sense, in which they include only the natural accidents peculiar to the sea. They have also a more extended sense in which they import accidents occurring upon the sea." And see Wilson *v.* The Xantho, 12 App. Cas. 503, 6 Aspin. 207, 56 L. J. Adm. 116, 57 L. T. Rep. N. S. 702, 36 Wkly. Rep. 353.

42. Williams *v.* Grant, 1 Conn. 487, 492, 7 Am. Dec. 235.

43. Stephens, etc., Transp. Co. *v.* Tuckerman, 33 N. J. L. 543, 551; Tuckerman *v.* Stephens, etc., Transp. Co., 32 N. J. L. 320, 323.

This phrase, whether understood in its most limited sense, as importing only a loss by natural accidents peculiar to that element: or whether understood in its more extended sense as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence. The Reeside, 20 Fed. Cas. No. 11,657, 2 Sumn. 567, 571.

Wider in scope than act of God see Stephens, etc., Transp. Co. *v.* Tuckerman, 33 N. J. L. 543, 551. And see ACT OF GOD.

44. Merrill *v.* Arey, 17 Fed. Cas. No. 9,468, 3 Ware 215, 218.

45. Black L. Dict.

46. Trayner Leg. Max.

47. Baron *v.* Placide, 7 La. Ann. 229, 230, where the court in speaking of a contract entered into by a lady said: "Her *emploi* was that of *premiere seconde danseuse*, and she could not be required to appear in any dances which did not enter into that *emploi*, according to the usages of the theatre."

A maxim meaning "In a free country there is much clamor, with little suffering; in a despotic state, there is little complaint but much grievance." [48]

DARKNESS. Without light;[49] and sometimes defined as an absence of light.[50] (See Daylight; Daytime.)

DARRAIGN. To clear a legal account; to answer an accusation; to settle a controversy.[51]

DARREIN, DARREINE, DARREYNE, DAREYNE, DARRAIN, or DARRAIGNE. Last.[52]

DARREIN CONTINUANCE. See Pleading.

DARREIN PRESENTMENT. In old English law, the last presentment.[53]

DARREIN SEISIN. A plea which lay in some cases for the tenant in a writ of right.[54]

DASH. In old pleading, a small horizontal line or mark made or drawn over certain letters to denote a contraction.[55]

DAT or DAT'. An abbreviation of Data (*q. v.*) or Datum (*q. v.*) in old instruments.[56]

DATA. Grounds whereon to proceed; facts from which to draw a conclusion.[57] In old practice and conveyancing, the date of a deed; the time when it was given; that is, executed.[58]

DATE.[59] As a noun, the point of time at which a transaction or event takes place;[60] time;[61] time given or specified, time in some way ascertained and fixed;[62]

48. Tayler L. Gloss.

49. Century Dict.

50. Collett *v.* Northern Pac. R. Co., 23 Wash. 600, 63 Pac. 225, 227. And see Boyse *v.* Rossborough, 6 H. L. Cas. 2, 45, 3 Jur. N. S. 373, 26 L. J. Ch. 256, 5 Wkly. Rep. 414, where it is said: "There is no possibility for mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine."

51. Black L. Dict.

52. Burrill L. Dict.

53. Black L. Dict.

54. Black L. Dict.

55. Burrill L. Dict. See Rex *v.* Harris, 8 Mod. 327, where it is said: "Such dashes have been often used."

In some instances it was drawn through the letters. The letters *b*, *h* and *l*, were dashed through the top; the letter *p* through the bottom. Burrill L. Dict. [*citing* 1 Inst. Cler. 2, 6, 15].

56. Burrill L. Dict.

The Magna Charta of 9 Hen. III, concludes thus: Dat' *apud Westmon' undecimo die Februarii, anno regni nostri nono.* Burrill L. Dict.

Private instruments concluded in the same way. *Dat' London, tali die, anno supradicto.* Burrill L. Dict.

57. Wharton L. Lex.

58. Black L. Dict.

59. Amendment of date of an order appealed from see 2 Cyc. 868 note 50.

Effect of an impossible date in a bill of sale see 2 Cyc. 251 note 68.

Materiality of date in respect to a continuance see 9 Cyc. 128 note 89.

When date in a jurat must be stated, and when its omission is not fatal see 2 Cyc. 29.

60. McLean *v.* Sworts, 69 Minn. 128, 130, 71 N. W. 925, 65 Am. St. Rep. 556; Webster Int. Dict. [*quoted* in State *v.* Henton, 48 Nebr. 488, 67 N. W. 443]. See also Smith *v.* New York, 14 N. Y. Suppl. 449, 450 [*citing* Webster Dict.; Worcester Dict.].

"Date of sale" with reference to land sold for non-payment of taxes see Mitchell *v.* Etter, 22 Ark. 178, 181.

"From such date" as used in a statute in relation to the pay of naval officers see U. S. *v.* Moore, 95 U. S. 760, 763, 24 L. ed. 588.

"Prior in date" as used in insurance policies see Brown *v.* Hartford Ins. Co., 3 Day (Conn.) 58, 67.

61. McLean *v.* Sworts, 69 Minn. 128, 130, 71 N. W. 925, 65 Am. St. Rep. 556.

"Date" as used in pleading see Cromwell *v.* Grunsden, 2 Salk. 462, 463.

62. Bement *v.* Trenton Locomotive, etc., Mfg. Co., 32 N. J. L. 513, 515, where it is said: "The primary signification of the word date, is not time in the abstract, nor time taken absolutely, but, as its derivation plainly indicates, time given or specified, time in some way ascertained and fixed; this is the sense in which the word is commonly used. When we speak of the date of a deed, we do not mean the time when it was actually executed, but the time of its execution, as given or stated in the deed itself. The date of an item, or of a charge in a book account is not necessarily the time when the article charged was, in fact, furnished, but simply the time given or set down in the account, in connection with such charge. And so 'the date of the last work done, or materials furnished, in such claim,' in the absence of anything in the act indicating a different intention, must be taken to mean the time when such work was done or materials furnished, as specified in the plaintiffs' written claim."

Applied to a notice of objections to a voter. — Where a statute in relation to elections enacted, that persons objecting to a voter shall "on or before the 25th day of August" give to the overseers a notice according to the form numbered (4.) in schedule (A.), "or

the day of the month, the month, and the year;[63] that addition to a writing or inscription, coin, etc., which specifies the time (as day, month, and year) when the writing or inscription was given, or executed or made, etc.[64] In letters, the time when they were written or sent; in deeds, contracts, and wills and other papers, the time of execution, and usually the time from which they are to take effect and operate on the rights of persons.[65] As a verb, to note or fix the time of, as of an event or transaction.[66] (Date: Alteration of Instrument as to,[67] see ALTERATIONS OF INSTRUMENTS. In Notice of Protest and Non-Payment, see COMMERCIAL PAPER. Of Acknowledgment,[68] see ACKNOWLEDGMENTS. Of Affidavit,[69] see AFFIDAVITS. Of Bill of Exchange,[70] see COMMERCIAL PAPER. Of Bond,[71] see BONDS. Of Check, see COMMERCIAL PAPER. Of Contract,[72] see CONTRACTS. Of Deed, see DEEDS. Of Execution, see EXECUTIONS. Of Mortgage,[73] see CHATTEL MORTGAGES; MORTGAGES. Of Negotiable Instrument, see COMMERCIAL PAPER. Of Promissory Note,[74] see COMMERCIAL PAPER. Of Sum-

to the like effect," Willes, J., said: "The date here is required for a purpose, and comprises two things — time and the place of abode of the person signing the notice. Although, when a date is mentioned, some time is generally intended, as in speaking of the date of a letter, the term just as much includes place. The time may mean the precise time when the instrument is signed, or it may mean the time when it is given or delivered, so as to become operative. . . . The date here may equally well mean the day on which the objector signed the notice, or the day on which he used it; but it can hardly have been intended that it should mean the latter, for if so he would be obliged to have with him when he served it an ink-horn in order to put on the date, and an almanac to know that it was right." Jones *v.* Jones, L. R. 1 C. P. 140, 143, Harr. & R. 341, Hopw. & P. 320, 12 Jur. N. S. 123, 35 L. J. C. P. 94, 13 L. T. Rep. N. S. 633, 14 Wkly. Rep. 204.

Applied to a stamp act.— Under a statute which imposes a certain duty on bills, "exceeding two months after date" the date means the time expressed on the face of a bill, not the time when it actually issued. Williams *v.* Jarrett, 5 B. & Ad. 32, 35, 2 L. J. K. B. 156, 2 N. & M. 49, 27 E. C. L. 24. And see Sturdy *v.* Henderson, 4 B. & Ald. 592, 6 E. C. L. 615; Upstone *v.* Marchant, 2 B. & C. 10, 3 D. & R. 198, 1 L. J. K. B. O. S. 244, 9 E. C. L. 15; Peacock *v.* Murrell, 2 Stark. 558, 3 E. C. L. 529.

63. Heffner *v.* Heffner, 48 La. Ann. 1088, 1090, 20 So. 281, where it is said: "The date in its ordinary sense imports the day of the month, the month and the year. That is also the legal significance of the date. The day of the month is quite as much a part of the date as the month or the year."

64. Webster Dict. [*quoted* in State *v.* Henton, 48 Nebr. 488, 492, 67 N. W. 443; Jones *v.* Jones, L. R. 1 C. P. 140, Harr. & R. 341, 350, Hopw. & P. 320, 12 Jur. N. S. 123, 35 L. J. C. P. 94, 13 L. T. Rep. N. S. 633, 14 Wkly. Rep. 204]. And see Shipman *v.* Forbes, 97 Cal. 572, 574, 32 Pac. 599.

That a written agreement is valid although undated see 9 Cyc. 302.

65. "To the date is usually added the name of the place where a writing is executed, and this is sometimes included in the term date." Webster Dict. [*quoted* in Jones *v.* Jones, L. R. 1 C. P. 140, Harr. & R. 341, 350, Hopw. & P. 320, 12 Jur. N. S. 123, 35 L. J. C. P. 94, 13 L. T. Rep. N. S. 633, 14 Wkly. Rep. 204].

Custom to give place as well as date see 7 Cyc. 543.

66. Century Dict.

"**Dated on the ground**" when may be regarded as a mere surplusage of words see Preston *v* Hunter, 67 Fed. 996, 999, 15 C. C. A. 148.

67. **Note or bill with a blank date** when indorsee has a right to fill in the date see 2 Cyc. 163.

That the date of an instrument is a material part thereof see 2 Cyc. 201.

68. **That a certificate of acknowledgment** will not be invalidated by mistake as to date nor by the want of a date see 1 Cyc. 572.

69. **That date is not an essential part** of an affidavit see 2 Cyc. 22.

70. **Changing date** of a bill of exchange see 9 Cyc. 127 note 83.

71. **Appeal-bond not fatally defective** because not dated see 2 Cyc. 838.

That a misrecital of date of judgment may not be fatal to bond on appeal see 2 Cyc. 839.

That a bond erroneously dated or without a date will be valid see 5 Cyc. 734.

That an appeal-bond is not invalidated by a clerical error as to date see 2 Cyc. 842 note 53.

That an appeal will not be dismissed because date of the bond was omitted see 3 Cyc. 139 note 44.

Where the date of a judgment is left blank in the bond the bond may be identified. See 2 Cyc. 839 note 35.

72. **When day of execution** of a contract must be stated see 9 Cyc. 716.

73. **Date of mortgage** when will be deemed sufficiently stated see 4 Cyc. 733 note 77.

Date of execution need not be stated in a chattel mortgage. See 6 Cyc. 1006.

74. **Effect of a note bearing date** prior to that of the mortgage see 4 Cyc. 732 note 73.

Note and lease bearing different dates may be construed together see 7 Cyc. 626 note 86.

One day after date as used in a note see 7 Cyc. 840 note 29.

mons or Other Process,[75] see PROCESS. Of Will, see WILLS. Of Writ of Attachment,[76] see ATTACHMENT. Variance—In Action on Bond, see BONDS; In Action on Negotiable Instrument as to Date of Execution, see COMMERCIAL PAPER.)

DATE OF AN INSTRUMENT. The time when the instrument was delivered and takes effect.[77] (See DATE.)

DATE OF ISSUE.[78] In reference to patents, the date from which the patent takes date, or its term begins to run.[79] When applied to notes, bonds, etc., of a series, usually the arbitrary date fixed as the beginning of the term for which they run, without reference to the precise time when convenience or the state of the market may permit of their sale or delivery.[80]

DATE OF ORIGINAL IMPORTATION. As used in a statute relative to merchandise deposited in bond, the date of the arrival of the goods at the interior port of destination.[81] (See, generally, CUSTOMS DUTIES.)

DATIVE TUTORSHIP or **DATIVE CURATORSHIP.** That which is conferred by a family meeting on a person having charge of a minor, or of an interdict.[82]

DA TUA DUM TUA SUNT, POST MORTEM TUNC TUA NON SUNT. A maxim meaning "Give the things which are yours whilst they are yours; after death they are not yours."[83]

DATUM. In old conveyancing, given; dated;[84] a DATE,[85] *q. v.*

DATUR DIGNIORI. A maxim meaning "It is given to the more worthy."[86]

DATUS. In old conveyancing, DATE (*q. v.*) or giving.[87]

DAUGHTER.[88] A female child;[89] an immediate female descendant.[90] (See CHILDREN; and, generally, DESCENT AND DISTRIBUTION; WILLS.)

75. That an omission to place the date of a writ in a specified place may be cured by an amendment see 4 Cyc. 550.

76. Date of the levy of an attachment see 4 Cyc. 610.

Effect of the date of a lien of attachment see 4 Cyc. 623.

77. Jones *v.* Jones, L. R. 1 C. P. 140, 143, Harr. & R. 341, Hopw. & P. 320, 12 Jur. N. S. 123, 35 L. J. C. P. 94, 13 L. T. Rep. N. S. 633, 14 Wkly. Rep. 204.

78. As applied to bankruptcy proceedings. — The time of the delivering out of a fiat in bankruptcy, as an operative instrument, has been held to be the "date of issuing" of it within 2 & 3 Vict. c. 29. Pewtress *v.* Annan, 9 Dowl. P. C. 828, 836 [*cited* in Jones *v.* Jones, L. R. 1 C. P. 140, Harr. & R. 341, 348, Hopw. & P. 320, 12 Jur. N. S. 123, 35 L. J. C. P. 94, 13 L. T. Rep. N. S. 633, 14 Wkly. Rep. 204, where it is said: "The true meaning of the date was there held to be, not merely the day which was put upon the document, but the time of delivering it out of the bankrupt office"].

79. De Florez *v.* Raynolds, 8 Fed. 434, 441, 17 Blatchf. 436, where it is said: "Under § 8 of the Act of 1836, in force when the Act of 1861 was passed, . . the patent could 'take date' from a date earlier, though not exceeding six months earlier, than 'the actual issuing of the patent.' The actual date of issuing was one thing, one date. The date from which the patent took date, or its term began to run, was another thing, another date. The latter date may very properly be called 'the date of issue.' Such latter date need not necessarily be a date expressed on the face of the patent."

80. Yesler *v.* Seattle, 1 Wash. 308, 322, 25 Pac. 1014 [*quoted* in Gage *v.* McCord, (Ariz. 1898) 51 Pac. 977, 979].

81. Farwell *v.* Spalding, 24 Fed. 18, 19.

82. Bothick's Interdiction, 43 La. Ann. 547, 550, 9 So. 477.

83. Wharton L. Lex. [*citing* Bulstr. 18].

84. Burrill L. Dict. [*citing* Coke Litt. 6*a*].

85. Burrill L. Dict.

86. Bouvier L. Dict.

Applied in Woodward *v.* Fox, 2 Vent. 267, 268.

87. Burrill L. Dict. And see Cromwell *v.* Grumsdale, 12 Mod. 193, 194, where Holt, C. J., in speaking of the date of a deed in a declaration said that "the *cujus datus* shall be understood of the delivery, and not the date; *cujus datus* shall be the giving of which was, &c."

"A die datus excludes the day [of date]." Haths *v.* Ash, 2 Salk. 413.

88. Legitimate daughters.—In Kelly *v.* Hammond, 26 Beav. 36, 37, it is said: "The gift is to 'daughters' as a class, and daughters *primâ facie* mean legitimate daughters."

89. Laker *v.* Hordern, 1 Ch. D. 644, 649, 45 L. J. Ch. 315, 34 L. T. Rep. N. S. 88, 24 Wkly. Rep. 543.

"Daughter" as used in a statute not the same as "child" see Schmit *v.* Mitchell, 59 Minn. 251, 255, 61 N. W. 140.

90. And not an adopted daughter, a stepdaughter, or daughter in law. People *v.* Kaiser, 119 Cal. 456, 457, 51 Pac. 702.

A bequest to an "oldest daughter" was construed in Ward *v.* Espy, 6 Humphr. (Tenn.) 447, 449.

"Daughter" as used in an indictment charging carnal intercourse see State *v.* Lawrence, 95 N. C. 659, 660.

DAY.[91] The space of time which elapses while the earth makes a complete revolution upon its axis;[92] twenty-four hours;[93] a CIVIL DAY (*q. v.*) of twenty-four hours, beginning and ending at midnight;[94] a period of time consisting of twenty-four hours, and including the solar day and the night;[95] the space of twenty-four hours from midnight to midnight;[96] the time elapsing from one midnight to the succeeding one;[97] the unit of time, commencing at twelve o'clock

91. "The term day has a well-known signification." Eureka *v.* Diaz, 89 Cal. 467, 470, 26 Pac. 961.

"Days" in a bill of lading means working days, not running days. Cockran *v.* Retberg, 3 Esp. 121, 123.

"Clear days" see Robinson *v.* Foster, 12 Iowa 186, 189; Walsh *v.* Boyle, 30 Md. 262, 267; Rex *v.* Herefordshire, 3 B. & Ald. 581, 5 E. C. L. 335; Parr *v.* Jewell, 16 C. B. 684, 700, 81 E. C. L. 684, per Pollock, C. B. And see 7 Cyc. 188.

Consecutive days.— In Matthews *v.* Arthur, 61 Kan. 455, 59 Pac. 1067, 1068, the court said: "We have no doubt that the word 'days,' when used in a statute which does not express a contrary definition, means consecutive days, and is inclusive of days *non juridicus* as well as secular days."

92. Miner *v.* Goodyear India Rubber Glove Mfg. Co., 62 Conn. 410, 411, 26 Atl. 643 (where it is said: "In the sense of the law a day includes in it the whole twenty-four hours, 'the law generally rejecting all fractions of a day in order to avoid disputes'"); White *v.* Dallas County, 87 Iowa 563, 565, 54 N. W. 368; State *v.* Michel, 52 La. Ann. 936, 941, 27 So. 565, 78 Am. St. Rep. 364, 49 L. R. A. 218 [*citing* People *v.* Hatch, 33 Ill. 9, 137; Abbott L. Dict.; Bouvier L. Dict.]; Bouvier L. Dict. [*quoted* in People *v.* Hatch, 33 Ill. 9, 137]. And see Lester *v.* Garland, 15 Ves. Jr. 248, 257, 10 Rev. Rep. 68, 33 Eng. Reprint 748.

93. Zimmerman *v.* Cowan, 107 Ill. 631, 637, 47 Am. Rep. 476 [*citing* People *v.* Hatch, 33 Ill. 9, 137]; State *v.* Michel, 52 La. Ann. 936, 941, 27 So. 565, 78 Am. St. Rep. 364, 49 L. R. A. 218 [*citing* People *v.* Hatch, 33 Ill. 9, 137; Abbott L. Dict.; Bouvier L. Dict.].

94. Opinion of Justices, 45 N. H. 607, 610 [*quoted* in Corwin *v.* Controller Gen., 6 S. C. 390, 399]; Shaw *v.* Dodge, 5 N. H. 462, 465.

95. Helphenstine *v.* Vincennes Nat. Bank, 65 Ind. 582, 589, 32 Am. Rep. 86 [*citing* Bracton, fol. 264; Coke Litt. 135*a*], where it is said: "Each of the 28th and 29th days of February, in the leap-year, is a day of twenty-four hours' duration; and, where these two days occur in any period of days less than one year, we are clearly of the opinion, that, under the law of this State, they ought to be and must be regarded and computed as two days, and not as one day, for any purpose." But see Swift *v.* Tousey, 5 Ind. 196, 197, where it is said: "Blackstone says that though the bissextile or leap year consists properly of three hundred and sixty-six days, yet by stat. 21 H. 3 the increasing day in the leap year, together with the preceding day, shall be accounted only as one day."

Natural and solar day.— "Though the natural day consists of twenty-four hours; yet, as it comprehends the solar day and the night, we speak of day and night within the period of the natural day, to distinguish the different parts of the day. Hence, the propriety of the expression, the evening of a day, or, the evening following a day; and they have both the same import in common understanding, and are used with equal propriety in reference to the solar day, and the night, as comprehended in the natural day. We make use of language appropriate to the solar day, not because we adopt it, but for the purpose of distinguishing certain portions of the natural day." Fox *v.* Abel, 2 Conn. 541, 543 [*citing* Coke Litt. 135]. And see State *v.* Padgett, 18 S. C. 317, 322 [*citing* Coke Litt. 135], where it is said: "The division of time which most strikes us, is that into day and night. One rotation of the earth in twenty-four hours produces a period of light and a period of darkness of about equal length, and it is entirely conventional at what point of the circle we begin to make the count; but of the two periods, that of light, the artificial day, is the most important to us, and from this or some other cause we habitually, in common parlance, speak of the night which succeeds a day as the night 'of' that day — that is to say, the night that follows, that belong to that day. 'A day is usually intended of a natural day, as in an indictment of burglary we say in the night of the same day.'"

96. State *v.* Brown, 22 Minn. 482, 484, where it is said: "This is the ordinary and popular meaning of the word." And see State *v.* Padgett, 18 S. C. 317, 323 [*citing* Webster Unabr. Dict.], where it is said: "Thus, with us, the day on which a legal instrument is dated, begins and ends at midnight."

97. Haines *v.* State, 7 Tex. App. 30, 33 [*citing* 2 Bl. Comm. 141].

Selling liquor on election day.— In an action under a statute which rendered it unlawful "to sell to any person any intoxicating drink on any day on which elections are now required to be held," the trial judge instructed the jury "as matter of law, distinctly and positively, that any sale of liquor made upon the day upon which elections are held, is a misdemeanor under [a statute cited]; and that the word 'day,' as used in that section, applies to the whole twenty-four hours, beginning at midnight of election morning and ending at midnight of election night." In the supreme court, Sharswood, C. J., said: "We have no doubt that the court were right that the word 'day,' as used in [the statute] includes the whole twenty-four hours of the day upon which an election is held." Kane *v.* Com., 89 Pa. St. 522, 523, 33 Am. Rep. 787 [*quoted* in Rose *v.* State, 107 Ga. 697, 701, 33 S. E. 439]. And see Janks *v.* State, 29 Tex. App. 233, 15 S. W. 815.

P. M. and ending at twelve o'clock P. M., running from midnight to midnight;[98] a division of time.[99] Also, the time from the rising until the setting of the sun, and a short time before rising and after setting.[1] As used in a statute or in a contract, twenty-four hours, and not merely the day as popularly understood, from sunrise to sunset, or during the time the light of the sun is visible.[2] At common law, twenty-four hours, extending from midnight to midnight, including morning, evening and night.[3] As defined by statute, the period of time between any midnight and the midnight following.[4] (See, generally, HOLIDAYS; SUNDAY; TIME.)

98. Benson *v.* Adams, 69 Ind. 353, 354, 35 Am. Rep. 220, where it is said: "In the division of time throughout the world, we believe this is regarded as the civil day." And see Serrell *v.* Rothstein, 49 N. J. Eq. 385, 386, 24 Atl. 369, where it is said: "It is not necessary to consult a calendar to ascertain when a day commences and ends." See also Henderson *v.* Reynolds, 84 Ga. 159, 162, 10 S. E. 734, 7 L. R. A. 327 [*citing* Anderson L. Dict.].

"Different nations begin the day at different times. Lord Coke tells us, the Jews, Chaldeans and Babyloneans begin the day at sunrise; the Umbri in Italy, at mid-day; the Egyptians and Romans, from midnight; and so doth the law of England, in many cases." Fox *v.* Abel, 2 Conn. 541, 546. And see Pulling *v.* People, 8 Barb. (N. Y.) 383, 385 [*citing* Coke Litt. 135*a*, 135*b*], where it is said: "The law of England in many cases, follows the Roman in this respect; and for certain purposes also, it regards only the solar or artificial day. The same is true likewise of the laws of this state."

Presentation of bill to governor.—In speaking of the day on which a bill is presented to the governor, the court said: "A 'day' in this sense begins at 12 o'clock midnight and extends through twenty-four hours to the next twelve o'clock midnight." State *v.* Michel, 52 La. Ann. 936, 941, 27 So. 565, 78 Am. St. Rep. 364, 49 L. R. A. 218 [*citing* Opinion of Justices, 45 N. H. 607, 610; Black L. Dict.; 2 Bl. Comm. 141].

99. Bouvier L. Dict. [*quoted* in People *v.* Hatch, 33 Ill. 9, 137].

1. Bouvier L. Dict. [*quoted* in People *v.* Hatch, 33 Ill. 9, 137], where the term is applied to the artificial as distinguished from the natural day.

Natural distinguished from artificial day.—"The English appear to have always divided days into natural and artificial: but at different periods, have affixed contrary meanings to those terms. The time, from the rising to the setting of the sun, was, by ancient authors, called *dies solaris*, and the night, *dies lunaris*. The solar day was termed the natural day; and the whole twenty-four hours, consisting of the solar day and the night succeeding it, was called the artificial day. But afterwards, and to the present time, the solar day was termed the artificial day, and the twenty-four hours, commencing from the rising of the sun on one day, and continued through the night succeeding, was styled the natural day." Fox *v.* Abel, 2 Conn. 541, 546 [*citing* Coke Litt. 135*a*]. And see Pulling *v.* People, 8 Barb. (N. Y.) 384, 385.

"The natural day has no fixed time of commencement, in which mankind in general, or the different denominations of Christians, are agreed. . . . The solar day is ascertained by fixed and known limits; it is subject to no difficulties, respecting its commencement and close; and is always understood, in common parlance, by the word, day, as distinguished from evening, or night." Fox *v.* Abel, 2 Conn. 541, 548.

2. Benson *v.* Adams, 69 Ind. 353, 354, 35 Am. Rep. 220 [*citing* Sadler *v.* Leigh, 4 Campb. 195; 2 Bl. Comm. 141; Bouvier L. Dict.], where it is said: "The fractions of a day in statutes, or legal proceedings, or in contracts, are not generally considered; but when the rights of parties depend upon the precedence of time in the same day, or upon a given hour or fraction of a day, it may be alleged or proved, as any other fact. But, unless the meaning of the word is in some way restricted, it will be held to include the twenty-four hours."

Applied to legislative session.—In an action by an employee of the legislature to enforce a claim for "extra" services rendered, the court said: "We think it too clear for discussion that the word 'day,' as used in the statute, covers whatever period of the twenty-four hours the legislators choose to remain in session." Robinson *v.* Dunn, 77 Cal. 473, 475, 19 Pac. 878, 11 Am. St. Rep. 297.

Applied to use of a machine.—Where a reaping machine was sold with leave to test the same by using it for one day, the court said: "The purpose of this provision in the contract was to give the purchaser a fair opportunity to test the machine: he was to have it during an entire day. The word day is to be understood with reference to the usage of farmers in the working of such machines." Fuller *v.* Schroeder, 20 Nebr. 631, 646, 31 N. W. 109. See also Fay *v.* Brown, 96 Wis. 434, 441, 71 N. W. 895, where the agreement was to complete a plant capable of constructing and turning out "ten new box cars per day," and the court said: "We agree entirely with the trial court in construing the word 'day' as here used to mean the ordinary working day, and not as meaning twenty-four hours."

"On a day certain" as used in a statute see Reg. *v.* Conyers, 8 Q. B. 981, 992, 10 Jur. 899, 15 L. J. Q. B. 300, 55 E. C. L. 981.

3. Fox *v.* Abel, 2 Conn. 541, 542 [*citing* 2 Bl. Comm. 141].

4. *California.*—Pol. Code, § 3259 [*quoted* in Derby *v.* Modesto, 104 Cal. 515, 522, 38 Pac. 900; Eureka *v.* Diaz, 89 Cal. 467, 470, 26 Pac. 961].

Indiana.—Sexton *v.* Goodwine, (App.

DAY IN COURT. The day on which the cause is reached for trial in pursuance of the forms and methods prescribed by the law.[5]

DAY LABORER. One whose engagement to labor is but a day long.[6] (Day Laborer: Lien For Wages, see AGRICULTURE; LIENS; MASTER AND SERVANT; MECHANICS' LIENS. Right to Exemptions, see EXEMPTIONS.)

DAYLIGHT. That portion of time before sunrise, and after sunset, which is accounted part of the day, in defining the offense of burglary.[7] (See DAYTIME.)

DAY OF TRIAL. The day appointed by law for trial.[8] (See, generally, CRIMINAL LAW; TRIAL.)

DAYS OF GRACE. See COMMERCIAL PAPER.

DAY'S WORK. The number of hours of actual work constituting a day's labor, which may be governed by contract,[9] custom,[10] or statute.[11]

DAYTIME. That portion of the twenty-four hours in which a man's person and countenance are distinguishable.[12] As defined by statute, the period of time

1903) 68 N. E. 929 [*citing* Benson *v.* Adams, 69 Ind. 353, 35 Am. Rep. 220].

Minnesota.— Gen. St. (1894) § 6512.

New York.— Laws (1892), c. 677, § 27; Pulling *v.* People, 8 Barb. 384, 386; Campbell *v.* International L. Ins. Soc., 4 Bosw. 298, 310; Haden *v.* Buddensick, 49 How. Pr. 241, 246; Schwab *v.* Mayforth, 1 N. Y. City Ct. 177, 178.

South Dakota.— Pen. Code (1903), § 41.

Texas.— Janks *v.* State, 29 Tex. App. 233, 235, 15 S. W. 815.

5. Ketchum *v.* Breed, 66 Wis. 85, 92, 26 N. W. 271.

6. Caraker *v.* Matthews, 25 Ga. 571, 576, per Benning, J., in dissenting opinion.

The term will include a locomotive engineer. Sanner *v.* Shivers, 76 Ga. 335, 336.

The term will not include a boss or director of a factory (Kyle *v.* Montgomery, 73 Ga. 337, 343), a commercial traveler (Briscoe *v.* Montgomery, 93 Ga. 602, 604, 20 S. E. 40, 44 Am. St. Rep. 192), or a conductor of a freight or passenger train (Miller *v.* Dugas, 77 Ga. 386, 388, 4 Am. Rep. 90).

7. Black L. Dict. [*citing* 4 Bl. Comm. 224].

"By daylight" as used in a marine policy. — Where a marine insurance policy contained the words: "Privileged to use kerosene oil for lights, lamps to be filled and trimmed by daylight only," the court said: "The words 'by daylight' are intended, not to denote day-time as opposed to night-time, but to prevent the use of any artificial light from which the oil might catch fire." Gunther *v.* Liverpool, etc., Ins. Co., 134 U. S. 110, 115, 10 S. Ct. 448, 33 L. ed. 857.

8. Green *v.* Charlotte, etc., R. Co., 6 S. C. 342, 344.

9. Bachelder *v.* Bickford, 62 Me. 526, 527.

"Days' work," as used in a contract relative to dredging means days actually worked by the machines of several contractors. Potter *v.* Morris, etc., Dredging Co., 59 N. J. Eq. 422, 424, 46 Atl. 537.

10. White *v.* Dallas County, 87 Iowa 563, 565, 54 N. W. 368, where it is said: "As the common law does not define what shall be regarded as a day's work, the parties are left 'to such regulations in that respect as are fixed by the custom of the trade or business to which the contract relates.'"

Repairs on a dwelling.— Where, in an action to recover compensation for repairs to a dwelling, a contest arose over the question as to what constituted a day's work, the court said: "And when we find a universal usage in this business to call ten hours' labor a day's work, we have arrived at the true meaning of the word day, as used in this contract." Hinton *v.* Locke, 5 Hill (N. Y.) 437, 439.

11. Bachelder *v.* Bickford, 62 Me. 526, 527, construing Me. Rev. St. c. 82, § 36. And see White *v.* Dallas County, 87 Iowa 563, 565, 54 N. W. 368.

12. Trull *v.* Wilson, 9 Mass. 154; Linnen *v.* Banfield, 114 Mich. 93, 98, 72 N. W. 1, where it is said: "Daytime . . . means the time from the rising to the setting of the sun, and that portion of the time after the setting of the sun, or before its rising, during which there is sufficient natural light, other than moonlight, so that the countenance of a man may be distinguished." And see Tutton *v.* Darke, 5 H. & N. 647, 649, 6 Jur. N. S. 983, 29 L. J. Exch. 271, 2 L. T. Rep. N. S. 361, where Watson, B., in the course of the argument, observed: "Lord Hale says: (1 Hale P. C. 550) 'it hath been anciently held, that after sunset though daylight be not quite gone, or before sunrising, is *noctanter* to make a burglary, &c. But the later opinion hath been and still obtaineth, that if the sun be set, yet if the countenance of a party can be reasonably discerned by the light of the sun or *crepusculum*, it is not night nor *noctanter* to make a burglary'"); Rex *v.* Tandy, 1 C. & P. 297, 12 E. C. L. 178 (where Park, J., in speaking of the offense of breaking into a dwelling-house in the daytime, said: "To constitute the offence, it must be proved that the house was broken into at a time when there is light enough to distinguish a man's features").

Blackstone says: "As to what is reckoned night, and what day, for this purpose: anciently the day was accounted to begin only at sun-rising, and to end immediately upon sun-set; but the better opinion seems to be, that if there be daylight or *crepusculum* (twilight) enough, begun or left to discern a man's face withal, it is no burglary." 4 Bl. Comm. 224 [*quoted* in State *v.* McKnight, 111 N. C. 690, 691, 16 S. E. 319; Klieforth *v.*

between sunrise and sunset;[13] any time of the twenty-four hours from thirty minutes before sunrise until thirty minutes after sunset.[14] (See BURGLARY; CREPUSCULUM; DAY.)

D. B. E. An abbreviation of the words *de bene esse*.[15] (See, generally, DEPOSITIONS.)

D. B. N. An abbreviation of the words *de bonis non*.[16] (See, generally, EXECUTORS AND ADMINISTRATORS.)

D. C. An abbreviation of the words "district court," and of "District of Columbia."[17]

D. C. L. An abbreviation of the words "doctor of civil or (canon) law."[18]

D. D. An abbreviation of the words *divinitatis doctor*, "doctor of divinity"; also of *dono dedit*, "has presented or given."[19]

DEAD BLOCKS. Bumpers placed on railway cars, to receive the concussion and the shock when moving cars come in contact with stationary cars.[20]

State, 88 Wis. 163, 165, 59 N. W. 507, 43 Am. St. Rep. 934; Nicholls *v.* State, 68 Wis. 416, 420, 32 N. W. 543, 60 Am. Rep. 870].

13. Mont. Pol. Code (1895), § 3145.

14. Tex. Pen. Code, art. 710 [*quoted* in Laws *v.* State, 26 Tex. App. 643, 655, 10 S. W. 220].

15. Black L. Dict.

16. Black L. Dict.

17. Anderson L. Dict.

18. English L. Dict.

19. English L. Dict.

20. Norfolk, etc., R. Co. *v.* Cottrell, 83 Va. 512, 521, 3 S. E. 123, where it is said: "The draw-heads into which the coupling was fastened were so constructed as to yield to pressure, and give on a spring when the cars came together, so as to leave the shock of the collision, wherever it might be, to the dead-blocks, which were so constructed as to receive this inevitable shock without injury. . . . The dead-blocks are constructed on the frame of the car above the draw-heads, which are below, and attached to the trucks."

DEAD BODIES

By Frank W. Jones

CROSS-REFERENCES

For Matters Relating to:
Autopsy, see CORONERS.
Burial-Ground, see CEMETERIES.
Burial of Pauper, see POOR PERSONS.
Constitutionality of Statute Relating to Disinterment, see CONSTITUTIONAL LAW.
Funeral Expenses, see EXECUTORS AND ADMINISTRATORS.
Health Regulations, see HEALTH.
Inquest, see CORONERS.
Place of Burial, see CEMETERIES.

I. DEFINITION.

A dead body has been defined to be a corpse.[1]

II. RIGHT OF PROPERTY IN.

At common law there can be no property in a dead human body;[2] and after

1. Black L. Dict. *Compare* Meads *v.* Dougherty County, 98 Ga. 697, 700, 25 S. E. 915, where it is said: "We do not think those few bleached remnants of a human being fall under the descriptive words 'dead bodies,' as used in the statute."

A corpse has been defined to be the dead body of a human being. 10 Cyc. 1364.

2. *Alabama.*— Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26.

Indiana.— Renihan *v.* Wright, 125 Ind. 536, 25 N. E. 822, 21 Am. St. Rep. 249, 9 L. R. A. 514.

Kentucky.— Neighbors *v.* Neighbors, 65 S. W. 607, 23 Ky. L. Rep. 1433.

Massachusetts.—Weld *v.* Walker, 130 Mass. 422, 39 Am. Rep. 465; Meagher *v.* Driscoll, 99 Mass. 281, 96 Am. Dec. 759; Wonson *v.* Sayward, 13 Pick. 402, 23 Am. Dec. 691.

Missouri.— Guthrie *v.* Weaver, 1 Mo. App. 136.

New Hampshire. — Page *v.* Symonds, 63 N. H. 17.

New Jersey.— Toppin *v.* Moriarty, 59 N. J. Eq. 115, 44 Atl. 469.

New York.—Matter of Brick Presb. Church, 3 Edw. 155; Law of Burial, 4 Bradf. Surr. 503 *et seq.*

Ohio.— Hadsell *v.* Hadsell, 7 Ohio Cir. Ct. 196.

Rhode Island.— Pierce *v.* Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667.

South Carolina.— Griffith *v.* Charlotte, etc., R. Co., 23 S. C. 25, 55 Am. Rep. 1.

England.— Foster *v.* Dodd, L. R. 3 Q. B. 67, 8 B. & S. 842, 37 L. J. Q. B. 28, 17 L. T. Rep. N. S. 614, 16 Wkly. Rep. 155; Williams *v.* Williams, 20 Ch. D. 659; Haynes' Case, 12 Coke 113; Corven's Case, 12 Coke 105; Reg. *v.* Sharpe, 7 Cox C. C. 214, Dears. & B. 160, 3 Jur. N. S. 192, 26 L. J. M. C. 47, 5 Wkly. Rep. 318; Rex *v.* Lynn, 2 T. R. 733, 2 East P. C. 652.

See 15 Cent. Dig. tit. "Dead Bodies," § 1; Bishop Cr. L. § 792; 2 Blackstone Comm. 429; Wharton L. Max. 228 [*citing* 2 East P. C. 652], where Mr. Wharton says: "*Corpus humanum non recipit estimationem.*"

A person has no lien on the corpse for the price of the casket. American Express Co. *v.* Epply, 5 Ohio Dec. (Reprint) 337, 4 Am. L. Rec. 672, 1 Cinc. L. Bul. 79.

Replevin for corpse.— It was held in Keyes *v.* Kunkel, 119 Mich. 550, 78 N. W. 649, 44 L. R. A. 242, that an action of replevin will not lie for a corpse under statutes requiring an affidavit in replevin to state the unlawful taking or detention of personal goods and chattels, and providing that a judgment for defendant shall be for a return of property or for its value.

The remains of deceased persons are not "exports" within the meaning of the term as used in the United States constitution. The term refers only to those things which are profitable. There is not property in any sense in the dead body of a human being. *In re* Wong Yung Quy, 2 Fed. 624, 6 Sawy. 442.

When a coffin has been deposited, with the consent of all persons having any pecuniary interest in it, in the earth for the purpose of interment with the corpse inclosed within it, it is no longer an article of merchandise. Guthrie *v.* Weaver, 1 Mo. App. 136.

In portions of Europe during the semi-barbarous state of society of the middle ages the law permitted a creditor to seize the dead body of his debtor, and in ancient Egypt a son could borrow money by hypothecating his father's corpse; but no evidence appears

burial of such dead body it becomes a part and parcel of the ground to which it was committed.[3]

III. RIGHT TO POSSESSION AND DISPOSITION OF.

A. In General. Nevertheless the right to bury a corpse and preserve its remains is a legal right which the courts will recognize and protect.[4] While the body is not property in the usually recognized sense of the word, yet it may be considered as a sort of quasi-property, to which certain persons may have rights, as they have duties to perform toward it,[5] and the right to dispose of a corpse by decent sepulture includes the right to the possession of the body in the same condition in which death leaves it.[6]

B. Jurisdiction of Courts. In England from an early date the ecclesiastical law governed and conferred exclusive jurisdiction of all matters relating to the burial of corpses upon the ecclesiastical courts.[7] In the United States, how-

to exist in modern jurisprudence of a legal right to convert a dead body to any purpose of pecuniary profit. Law of Burial, 4 Bradf. Surr. (N. Y.) 503 *et seq.*

3. Pulsifer *v.* Douglass, 94 Me. 556, 48 Atl. 118, 53 L. R. A. 238; Meagher *v.* Driscoll, 99 Mass. 281, 96 Am. Dec. 759.

4. *California.*— O'Donnell *v.* Slack, 123 Cal. 285, 55 Pac. 906, 43 L. R. A. 388.

Indiana.— Bogert *v.* Indianapolis, 13 Ind. 134.

Kentucky.— Neighbors *v.* Neighbors, 65 S. W. 607, 23 Ky. L. Rep. 1433.

Maine.— Kanavan's Case, 1 Me. 226.

Michigan.— Doxtator *v.* Chicago, etc., R. Co., 120 Mich. 596, 79 N. W. 922, 45 L. R. A. 535.

Minnesota.— Larson *v.* Chase, 47 Minn. 307, 50 N. W. 238, 28 Am. St. Rep. 370, 14 L. R. A. 85.

Missouri.— Guthrie *v.* Weaver, 1 Mo. App. 136.

New Hampshire.— See Page *v.* Symonds, 63 N. H. 17, 56 Am. Rep. 481.

New York.— Law of Burial, 4 Bradf. Surr. 503 *et seq.*

Ohio.— Farley *v.* Carson, 8 Ohio Dec. (Reprint) 119, 5 Cinc. L. Bul. 786.

Pennsylvania.— Com. *v.* Susquehanna Coal Co., 5 Kulp 195; Fox *v.* Gordon, 16 Phila. 185.

See 15 Cent. Dig. tit. "Dead Bodies," § 1.

5. Neighbors *v.* Neighbors, 65 S. W. 607, 23 Ky. L. Rep. 1433; Pierce *v.* Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667.

6. O'Donnell *v.* Slack, 123 Cal. 285, 55 Pac. 906, 43 L. R. A. 388; Foley *v.* Phelps, 1 N. Y. App. Div. 551, 37 N. Y. Suppl. 471; Farley *v.* Carson, 8 Ohio Dec. (Reprint) 119, 5 Cinc. L. Bul. 786.

In England the law has been laid down that after the death of a man his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried. Reg. *v.* Scott, 2 Q. B. 248 note, 42 E. C. L. 659; Reg. *v.* Fox, 2 Q. B. 246, 1 G. & D. 566, 42 E. C. L. 658; Stag *v.* Punter, 3 Atk. 119, 26 Eng. Reprint 872; Williams *v.* Williams, 20 Ch. D. 659.

Right to possession defined.— In Foley *v.* Phelps, 1 N. Y. App. Div. 550, 551, 37 N. Y. Suppl. 471, the right to the possession of a corpse is thus defined: "The right is to the possession of the corpse in the same condition it was in when death supervened. It is the right to what remains when the breath leaves the body, and not merely to such a hacked, hewed and mutilated corpse as some stranger, an offender against the criminal law, may choose to turn over to an afflicted relative." In Law of Burial, 4 Bradf. Surr. (N. Y.) 503, 529, Ruggles, the referee, said: "The real question is not of the disposable, marketable value of a corpse, or its remains, as an article of traffic, but it is of the sacred and inherent right to its custody, in order decently to bury it, and secure its undisturbed repose. The dogma of the English ecclesiastical law, that a child has no such claim, no such exclusive power, no peculiar interest in the dead body of its parent, is so utterly inconsistent with every enlightened perception of personal right, so inexpressively repulsive to every proper and moral sense, that its adoption would be an eternal disgrace to American jurisprudence."

Mandamus for delivery of body.— Where a prisoner in jail on execution died and the jailer refused to deliver the body to the executors of the deceased, unless they would satisfy certain claims made against him, the court of queen's bench issued a mandamus peremptory in the first instance demanding that the body should be delivered up to the executors. Reg. *v.* Fox, 2 Q. B. 246, 1 G. & D. 566, 42 E. C. L. 658.

7. Renihan *v.* Wright, 125 Ind. 536, 25 N. E. 822, 21 Am. St. Rep. 249, 9 L. R. A. 514; Neighbors *v.* Neighbors, 65 S. W. 607, 23 Ky. L. Rep. 1433; Law of Burial, 4 Bradf. Surr. (N. Y.) 503, etc.; Rex *v.* Coleridge, 2 B. & Ald. 806, 1 Chit. 588, 21 Rev. Rep. 498, 18 E. C. L. 321; Kemp *v.* Wickes, 3 Phillim. 264; 1 Burn Eccl. L. (8th ed.) 251, 271; 3 Coke Inst. 203.

By the old English law the dead body was not recognized as property, but the charge of it belonged exclusively to the church and the ecclesiastical courts. Reg. *v.* Sharpe, 7 Cox C. C. 214, Dears. & B. 160, 3 Jur. N. S. 192, 26 L. J. M. C. 47, 5 Wkly. Rep. 318.

ever, where there are no ecclesiastical courts, the charge of a dead body is regarded as a trust which is subject to regulation by a court of equity to the extent of securing it a proper burial and restraining interference after interment.[8]

C. Persons Having Right and Upon Whom Duty of Burial Devolves — **1. In General.** It is a universally recognized principle that there is a duty owing both to society and to decedent that the body of a deceased person shall be decently buried.[9]

2. At Common Law. The common law casts the duty of providing the sepulture for and the decent interment of the deceased upon the person under whose roof the death takes place;[10] or if the death takes place in the house of a parish or other union, the duty of providing sepulture devolves on such parish or union.[11]

3. In the United States. The right and corresponding duty to select a place of burial and to see to the proper interment of the deceased rests primarily with the next of kin, rather than with a stranger to the blood.[12] Where there is a

8. *Illinois.*— First Evangelical Church *v.* Walsh, 57 Ill. 363, 11 Am. Rep. 21.

Indiana.— Renihan *v.* Wright, 125 Ind. 536, 25 N. E. 822, 21 Am. St. Rep. 249, 9 L. R. A. 514.

Louisiana.— Choppin *v.* Dauphin, 48 La. Ann. 1217, 20 So. 681, 55 Am. St. Rep. 313, 33 L. R. A. 133.

Maine.— Pulsifer *v.* Douglass, 94 Me. 556, 48 Atl. 118, 53 L. R. A. 238.

Massachusetts.—Weld *v.* Walker, 130 Mass. 422, 39 Am. Rep. 465.

New Jersey.— Toppin *v.* Moriarty, 59 N. J. Eq. 115, 44 Atl. 469.

New York.— Mitchell *v.* Thorne, 57 Hun 405, 10 N. Y. Suppl. 682; *In re* Donn, 14 N. Y. Suppl. 189; Secord *v.* Secor, 18 Abb. N. Cas. 78; Snyder *v.* Snyder, 60 How. Pr. 368; Law of Burial, 4 Bradf. Surr. 503 *et seq.*

Ohio.— Smiley *v.* Bartlett, 6 Ohio Cir. Ct. 234.

Pennsylvania.— Com. *v.* Susquehanna Coal Co., 5 Kulp 195; Scott *v.* Riley, 16 Phila. 106; *Ex p.* Girard, 8 Leg. Int. 135.

Rhode Island.— Pierce *v.* Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667.

United States.— Beatty *v.* Kurtz, 2 Pet. 566, 7 L. ed. 521.

See 15 Cent. Dig. tit. "Dead Bodies," § 2.

In every reported case where the remains of a deceased person have been the subject of successful dispute in matters arising after burial, the questions have been addressed to the equitable jurisdiction of the court, and unquestionably a court of equity is the proper forum. Buchanan *v.* Buchanan, 28 Misc. (N. Y.) 261, 59 N. Y. Suppl. 810.

It may well be considered as settled that the courts can compel the proper burial or disposition of any dead body, and, in case of controversy between several parties, determine the rights in the premises. Secord *v.* Secor, 18 Abb. N. Cas. (N. Y.) 78. And if a dispute arises as to the disposal of a dead body, the courts will determine it on principles of equity and such considerations of propriety and justice as arise out of the particular circumstances of the case. Pulsifer *v.* Douglass, 94 Me. 556, 48 Atl. 118, 53 L. R. A. 238; Smiley *v.* Bartlett, 8 Ohio S. & C. Pl. Dec. 154, 6 Ohio N. P. 435; Fox *v.* Gordon, 16 Phila. (Pa.) 119.

9. Sullivan *v.* Horner, 41 N. J. Eq. 299, 7 Atl. 411; Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384; Pierce *v.* Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667; Gilbert *v.* Buzzard, 2 Hagg. Cons. 333; Chapple *v.* Cooper, 13 L. J. Exch. 286, 13 M. & W. 252. Civilized countries have always recognized and protected as sacred the right of christian burial and the undisturbed repose of human bodies when buried. Thompson *v.* State, 105 Tenn. 177, 58 S. W. 213, 80 Am. St. Rep. 875, 51 L. R. A. 833. In Reg. *v.* Stewart, 12 A. & E. 773, 776, 4 P. & D. 349, 40 E. C. L. 383, the court said: "Every person dying in this country, . . . has a right to Christian burial; and that implies the right to be carried from the place where the body lies to the parish cemetery."

By the canon law which prevailed in such matters over so large a part of Europe everyone was to be buried in the parish churchyard, or in his ancestral sepulcher (if any), or in such place as he might elect. A wife was to be buried with her last husband, if more than one. If a person permanently changed his residence, then he was to be buried in the parish churchyard of his new residence. Pierce *v.* Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667.

By the civil law of ancient Rome, the charge of burial was first upon the person to whom it was delegated by the deceased; second, upon the *scripti hærdes* (to whom the property was given), and, if none, then upon the *hærdes legitimi* or *cognati* in order. Pierce *v.* Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667.

10. People *v.* St. Patrick's Cathedral, 58 How. Pr. (N. Y.) 55; Com. *v.* Susquehanna Coal Co., 5 Kulp (Pa.) 195; Fox *v.* Gordon, 16 Phila. (Pa.) 185; Scott *v.* Riley, 16 Phila. (Pa.) 106; Reg. *v.* Stewart, 12 A. & E. 773, 4 P. & D. 349, 40 E. C. L. 383; Perley Mort. L. 38.

11. Reg. *v.* Stewart, 12 A. & E. 773, 4 P. & D. 349, 40 E. C. L. 383.

12. *California.*— Enos *v.* Snyder, 131 Cal. 68, 63 Pac. 170, 82 Am. St. Rep. 330, 53

contest as to the possession of the remains and the determination of the place of burial, the better doctrine is that the primary right to control the burial of a deceased husband or wife is with the wife or husband in preference to the next of kin;[13] but this rule is subject to modification, dependent upon the peculiar

L. R. A. 221. In O'Donnell *v.* Slack, 123 Cal. 285, 55 Pac. 906, 43 L. R. A. 388, the court said that the duty of the burial of the dead is made an express legal obligation (Pen. Code, § 292); but aside from the obligation there is a right, well defined and universally recognized, that in disposing of the body of the deceased the last sad offices belong of right to the next of kin, within which phrase as here employed is included the surviving husband or wife.

Illinois.— Palenzke *v.* Bruning, 98 Ill. App. 644.

Massachusetts.— Burney *v.* Children's Hospital, 169 Mass. 57, 47 N. E. 401, 61 Am. St. Rep. 273, 38 L. R. A. 413.

Nebraska.— McEntee *v.* Bonacum, (1902) 92 N. W. 633, 60 L. R. A. 440.

New York.— Rousseau *v.* Troy, 49 How. Pr. 492; Law of Burial, 4 Bradf. Surr. 503 *et seq.*

Ohio.— Farley *v.* Carson, 8 Ohio Dec. (Reprint) 119, 5 Cinc. L. Bul. 786.

Pennsylvania.— Com. *v.* Susquehanna Coal Co., 5 Kulp 195.

See 15 Cent. Dig. tit. "Dead Bodies," § 3.

In Indiana the rule has been declared to be that the bodies of the dead belong to the surviving relatives in the order of inheritance of the deceased's estate, and that they have the right of disposing of them. Renihan *v.* Wright, 125 Ind. 536, 25 N. E. 822, 21 Am. St. Rep. 249, 9 L. R. A. 514; Bogert *v.* Indianapolis, 13 Ind. 134. And see Mr. Moak's note to *In re* Bettison, 12 Eng. Rep. 658.

Right of selection of place of sepulture.— The duty to bury the dead carries with it the right to determine the place of sepulture, but this right must be exercised with proper observance of what is due to public propriety and to the feelings of relatives, and it may be overruled by other considerations. Fox *v.* Gordon, 16 Phila. (Pa.) 105.

13. *California.*— O'Donnell *v.* Slack, 123 Cal. 285, 55 Pac. 906, 43 L. R. A. 388.

Colorado.— See Cook *v.* Walley, 1 Colo. App. 163, 27 Pac. 950.

Kentucky.— Neighbors *v.* Neighbors, 65 S. W. 607, 23 Ky. L. Rep. 1433.

Maine.— Pulsifer *v.* Douglass, 94 Me. 556, 48 Atl. 118, 53 L. R. A. 238.

Massachusetts.— Weld *v.* Walker, 130 Mass. 422, 39 Am. Rep. 465; Cunningham *v.* Reardon, 98 Mass. 538, 96 Am. Dec. 670; Durell *v.* Hayward, 9 Gray 248, 69 Am. Dec. 284; Lakin *v.* Ames, 10 Cush. 198.

Minnesota.— Larson *v.* Chase, 47 Minn. 307, 50 N. W. 238, 28 Am. St. Rep. 370, 14 L. R. A. 85.

New York.— Foley *v.* Phelps, 1 N. Y. App. Div. 551, 37 N. Y. Suppl. 471; Mitchell *v.* Thorne, 57 Hun 405, 10 N. Y. Suppl. 682; *In re* Richardson, 29 Misc. 367, 60 N. Y. Suppl. 539; Buchanan *v.* Buchanan, 28 Misc. 261, 59 N. Y. Suppl. 810; Secord *v.* Secor, 18 Abb. N. Cas. 78 note; Johnston *v.* Marinus, 18 Abb. N. Cas. 72; Garvey *v.* McCue, 3 Redf. Surr. 313.

Ohio.— Hadsell *v.* Hadsell, 7 Ohio Cir. Ct. 196; Farley *v.* Carson, 8 Ohio Dec. (Reprint) 119, 5 Cinc. L. Bul. 786.

Pennsylvania.— Wynkoop *v.* Wynkoop, 42 Pa. St. 293, 82 Am. Dec. 506; Cooney *v.* Lawrence, 11 Pa. Co. Ct. 79; Fox *v.* Gordon, 16 Phila. 185; Scott *v.* Riley, 16 Phila. 106.

Rhode Island.— Hackett *v.* Hackett, 18 R. I. 155, 26 Atl. 42, 49 Am. St. Rep. 762, 19 L. R. A. 558.

England.— Jenkins *v.* Tucker, 1 H. Bl. 90.

See 15 Cent. Dig. tit. "Dead Bodies," § 1 *et seq.*; 10 Alb. L. J. 71; 19 Am. L. Rev. 263. But *compare* Mr. Moak's note to *In re* Bettison, 12 Eng. Rep. 658, which reaches the conclusion that upon principle where there is a contest between the widow and the heir to the estate the right to determine the place of burial belongs to the heir rather than to the widow; assigning as the reason therefor that the heir could protect the remains from harm if they were buried upon his land, whereas upon the death of the widow the land might pass to strangers who would have no interest in protecting the remains.

Cal. Pen. Code, § 292, declaring on whom devolves the duty of burying the body of a deceased person, is to be considered in a civil case as determining who has the right to bury the body and to have the possession thereof for that purpose. Enos *v.* Snyder, 131 Cal. 68, 63 Pac. 170, 82 Am. St. Rep. 330, 53 L. R. A. 221.

Right of husband.— In Durell *v.* Hayward, 9 Gray (Mass.) 248, 69 Am. Dec. 284, the court said that it was the indisputable and paramount right as well as the duty of a husband to dispose of the body of his deceased wife by decent sepulture in a suitable place. In Fox *v.* Gordon, 16 Phila. (Pa.) 185, 187, the court said: "It may be laid down as a general proposition, however, deducible from all the adjudicated cases upon this subject, as well as from the opinions of the most learned writers, that where the relations subsisting between husband and wife and parent and child are of a normal character, they have respectively the right to determine to the exclusion of all others the place in which shall repose the remains of those who were nearer and dearer to them in life than they were to any others, and in the absence of these relationships the same right belongs to the next of kin of the deceased."

Right of wife.— In Larson *v.* Chase, 47 Minn. 307, 309, 50 N. W. 328, 28 Am. St. Rep. 370, 14 L. R. A. 85, the court said: "The wife is certainly nearer in the point of relationship and affection than any other person. She is the constant companion of her husband during life, bound to him by the closest

circumstances of the case, or the waiver of such right by consent or otherwise.[14] Again, in the absence of testamentary disposition,[15] where the deceased has indicated a preference, selecting the place of interment or expressing a wish that it should take place in a spot fixed upon, the courts will effectuate this expressed desire if possible, even in the face of opposition by the husband, the widow, or the next of kin.[16]

D. Change in Place of Interment — 1. In England. Under the English ecclesiastical law neither the husband, wife, nor relatives can disinter the corpse without first obtaining a faculty from the ordinary.[17]

2. In the United States — a. In General. Except in cases of necessity or for laudable purposes the policy of the law is that the sanctity of the grave should be maintained, and that a body once suitably buried should remain undisturbed.[18]

b. Consent to Original Interment. Where the interment takes place by the consent, express or implied, of those most nearly interested, it is regarded in law as a final sepulture, and the courts as a rule will not allow a disinterment against the will of those who have the right to object,[19] generally the next of kin, on

ties of love, and should have the paramount right to render the last sacred services to his remains after death."

14. Hackett *v.* Hackett, 18 R. I. 155, 26 Atl. 42, 49 Am. St. Rep. 762, 19 L. R. A. 558. See also McEntee *v.* Bonacum, (Nebr. 1902) 92 N. W. 633, 60 L. R. A. 440. In Snyder *v.* Snyder, 60 How. Pr. (N. Y.) 368, 372, the right to select the place of burial was awarded to a son instead of the widow. In this case the son was born of a former marriage, and the widow was a second wife who had been married to the deceased but four years with no children, and the last two years of his life had been spent in a lunatic asylum. In delivering the opinion of the court the judge said: "I mean to recognize the fact that circumstances may exist which should give the widow the preference over the son, but in this case I think the claim of the son is to be preferred." In Fox *v.* Gordon, 16 Phila. (Pa.) 185, 186, the court says: "No general rule to be applied absolutely in all cases can be laid down upon the subject, for what is fit and proper to be done in each case must depend upon the special circumstances of that case. It is a jurisdiction that belongs to equity, and the chancellor will exercise it with great care, having regard to what is due to the natural feelings and sensibilities of individuals as well as to what is required by considerations of public propriety and decency." *Compare* Weld *v.* Walker, 130 Mass. 422, 39 Am. Rep. 465.

15. As to testamentary disposition of remains see Wills. And see Palenzke *v.* Bruning, 98 Ill. App. 644.

16. Thompson *v.* Deeds, 93 Iowa 228, 61 N. W. 842, 35 L. R. A. 56; *In re* Richardson, 29 Misc. (N. Y.) 367, 60 N. Y. Suppl. 539; *In re* Donn, 14 N. Y. Suppl. 189; Johnston *v.* Marinus, 18 Abb. N. Cas. (N. Y.) 72; Smiley *v.* Bartlett, 6 Ohio Cir. Ct. 234; Lowry *v.* Plitt, 2 Wkly. Notes Cas. (Pa.) 675; Fox *v.* Gordon, 16 Phila. (Pa.) 185.

The courts of equity will not interfere to give the right of burial of a dead body to the next of kin of a deceased adult against her expressed request that she should be interred elsewhere. Scott *v.* Riley, 16 Phila. (Pa.) 106.

17. Reg. *v.* Sharpe, 7 Cox C. C. 214, Dears. & B. 160, 3 Jur. N. S. 192, 26 L. J. M. C. 47, 5 Wkly. Rep. 318; *In re* Pope, 5 Eng. L. & Eq. 585; St. Pancras *v.* St. Martin-in-the-Fields Parish, 6 Jur. N. S. 540; *In re* Kerr, [1894] P. 284; St. Michael Bassishaw *v.* Parishioners, [1893] P. 233; St. Botolph without Aldgate *v.* Parishioners, [1892] P. 161.

Disinterment for cremation.— A court will not be justified in granting a faculty to enable the remains to be removed, after burial in consecrated ground, for cremation. Matter of Dixon, [1892] P. 386, 56 J. P. 481.

Under the civil law of Rome a body once buried could not be removed, except by the permission in Rome, of the pontifical college, and in the province of the governor. Pierce *v.* Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667.

18. Choppin *v.* Dauphin, 48 La. Ann. 1217, 20 So. 681, 55 Am. St. Rep. 313, 33 L. R. A. 133; Pulsifer *v.* Douglass, 94 Me. 556, 48 Atl. 118, 53 L. R. A. 238; Wynkoop *v.* Wynkoop, 42 Pa. St. 293, 82 Am. Dec. 506; Gardner *v.* Swan Point Cemetery, 20 R. I. 646, 40 Atl. 871, 78 Am. St. Rep. 897; Hackett *v.* Hackett, 18 R. I. 155, 26 Atl. 42, 49 Am. St. Rep. 762, 19 L. R. A. 558. In Thompson *v.* Deeds, 93 Iowa 228, 230, 61 N. W. 842, 35 L. R. A. 56, the court said: "A proper appreciation of the duty we owe to the dead, and a due regard for the feelings of their friends who survive, and the promotion of the public health and welfare, all require that the bodies of the dead should not be exhumed, except under circumstances of extreme exigency."

The right of custody and disposal of the body before burial is to be distinguished from such right after burial, as in the latter case other considerations than kinship may often arise. Hackett *v.* Hackett, 18 R. I. 155, 26 Atl. 42, 49 Am. St. Rep. 762, 19 L. R. A. 558. This same distinction was noted in Fox *v.* Gordon, 16 Phila. (Pa.) 185.

19. *Iowa.*— Thompson *v.* Deeds, 93 Iowa 228, 61 N. W. 842, 35 L. R. A. 56.

account of a change in feelings or circumstances; and the owners of land where corpses were interred have been enjoined from removing such corpses at the suit of parties next of kin having the right to inter in said land.[20] But where a corpse

Louisiana.— Choppin *v.* Dauphin, 48 La. Ann. 1217, 20 So. 681, 55 Am. St. Rep. 313, 33 L. R. A. 133.

Missouri.— Guthrie *v.* Weaver, 1 Mo. App. 136.

New Jersey.— Toppin *v.* Moriarty, 59 N. J. Eq. 115, 44 Atl. 469; Peters *v.* Peters, 43 N. J. Eq. 140, 10 Atl. 742. See Smith *v.* Shepherd, 64 N. J. Eq. 401, 54 Atl. 806.

New York.— *In re* Donn, 14 N. Y. Suppl. 189; Secord *v.* Secor, 18 Abb. N. Cas. 78 note.

North Carolina.— State *v.* Wilson, 94 N. C. 1015.

Pennsylvania.— Wynkoop *v.* Wynkoop, 42 Pa. St. 293, 82 Am. Dec. 506; Gampher *v.* Poulson, 19 Wkly. Notes Cas. 230; Lowry *v.* Plitt, 2 Wkly. Notes Cas. 675; Fox *v.* Gordon, 16 Phila. 185. See also Lewis *v.* Walker, 165 Pa. St. 30, 30 Atl. 500; *Ex p.* Girard, 8 Leg. Int. 135.

Rhode Island.— Gardener *v.* Swan Point Cemetery, 20 R. I. 646, 40 Atl. 871, 78 Am. St. Rep. 897; Hackett *v.* Hackett, 18 R. I. 155, 26 Atl. 42, 49 Am. St. Rep. 762, 19 L. R. A. 558; Pierce *v.* Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667.

See 15 Cent. Dig. tit. "Dead Bodies," § 5.

Estoppel by consent.— Where a husband consented to his wife's request that she be buried in the same plot as her parents, and she was buried in a plot reserved for them, which plot the parents afterward exchanged for another one in the same cemetery, where a place was prepared for her remains at considerable expense, and the husband had knowledge of the exchange and the preparation made, and offered no objection to the removal until the preparations were complete, it was held that he was precluded from interfering with the transfer of the remains. Toppin *v.* Moriarty, 59 N. J. Eq. 115, 44 Atl. 469. See also *In re* Richardson, 29 Misc. (N. Y.) 367, 60 N. Y. Suppl. 539. While it is the paramount right of a husband to determine upon the place of burial for his wife, yet when that duty has been performed and the body has been buried in the lot of another with the consent both of the husband and of the owner of the lot, the husband has not the right, without the consent of the lot owner, to enter thereon and remove the body. Pulsifer *v.* Douglass, 94 Me. 556, 48 Atl. 118, 53 L. R. A. 238. In Wynkoop *v.* Wynkoop, 42 Pa. St. 293, 82 Am. Dec. 506, it was held that a wife had no authority to have the body of her deceased husband transferred after burial from one cemetery to another, and this decision was based upon the ground that the disposition of the body after burial belongs exclusively to the next of kin. This decision was criticized in Lowry *v.* Plitt, 2 Wkly. Notes Cas. (Pa.) 675, the court stating that the reasoning which transfers this right from the widow is not satisfactory, because it does not seem to be based upon principle or reason and is repugnant to the best feelings of our nature; that such a right must necessarily be in the next of living kin; that moreover it is a matter in which all of the next of kin have an equal interest. In Fox *v.* Gordon, 16 Phila. (Pa.) 185, 191, the court in referring to Wynkoop *v.* Wynkoop, 42 Pa. St. 293, 82 Am. Dec. 506, said: "While we do not agree either with the syllabus or with all the *dicta* of that case, the principle upon which it was ruled must be regarded as the law of this State, and it is applicable to this case." And see Smith *v.* Shepherd, 64 N. J. Eq. 401, 54 Atl. 806; Matter of Bauer, 68 N. Y. App. Div. 212, 74 N. Y. Suppl. 155 [*affirming* 72 N. Y. Suppl. 439].

Expense of changing place of burial.— It has been held in Indiana that a widow is not entitled to an allowance for expenses incurred in removing the body of the decedent from one cemetery to another, where the former grave was suitable, had been selected by the decedent, was nearer his home, and was the one where his first wife was buried, and where his children desired that he should be interred. Watkins *v.* Romine, 106 Ind. 378, 7 N. E. 193.

Interment at husband's request.— A widow's removal of her husband's body from a cemetery lot owned by his daughter, in which he was buried by his own request, may be enjoined by the daughter, if there is no reason for the removal except their disagreement respecting a monument and the care of the grave. Thompson *v.* Deeds, 93 Iowa 228, 61 N. W. 842, 35 L. R. A. 56.

Right of access to grave.— The fact that a widow has no right to remove the remains of her husband from a lot in which they have been placed with the consent of the owner thereof does not affect her right in respect to access or care or adornment of the grave of her deceased husband. Smith *v.* Shepherd, 64 N. J. Eq. 401, 54 Atl. 806.

20. Choppin *v.* Dauphin, 48 La. Ann. 1217, 20 So. 681, 55 Am. St. Rep. 313, 33 L. R. A. 133; Rousseau *v.* Troy, 49 How. Pr. (N. Y.) 492; Northern Liberties First Presb. Church *v.* Philadelphia Second Presb. Church, 2 Brewst. (Pa.) 372.

A tomb owner is without right to cause the removal of the remains of the dead transferred from the places of sepulture first selected by the surviving relatives and deposited by him in the tomb, under his assurance, accepted by such relatives and on the faith of which they permitted the transfer, that the remains should rest forever in the tomb. Choppin *v.* Dauphin, 48 La. Ann. 1217, 20 So. 681, 55 Am. St. Rep. 313, 33 L. R. A. 133.

But the legislature has power to authorize the removal of the remains of the dead from cemeteries and may delegate such power to municipalities. Richards *v.* Northwest Protestant Dutch Church, 32 Barb. (N. Y.) 42; Craig *v.* Pittsburgh First Presb. Church, 88

is interred without the consent of the person having the right to control and select the place of burial, in the absence of testamentary disposition the courts will permit the removal of the corpse by such person, even in the face of opposition by the next of kin or the owner of the land.[21]

c. Statutory Regulations. Some of the states provide by statute for the disinterment and removal of dead bodies with the consent of the owner of the cemetery, the lot owner, and the consent of all the next of kin,[22] and in the absence of such consent, on an order of the court upon a proper showing.[23]

E. Liability For Funeral Expenses[24]**— 1. For Burial of Child.** At common law it was the duty of the father to decently inter his child and defray the necessary expenses thereof if he possessed the means.[25]

2. For Burial of Wife[26]**— a. Common-Law Doctrine.** At common law the husband was bound to bury his deceased wife in a suitable manner and to defray the necessary funeral expenses;[27] and this was the case, even where the wife was

Pa. St. 42. See also Northern Liberties First Presb. Church *v.* Philadelphia Second Presb. Church, 2 Brewst. (Pa.) 372. And see *infra*, III, D, 2, c.

21. *Kentucky.*— Neighbors *v.* Neighbors, 65 S. W. 607, 23 Ky. L. Rep. 1433.

Massachusetts.—Weld *v.* Walker, 130 Mass. 422, 39 Am. Rep. 465.

Ohio.— Hadsell *v.* Hadsell, 7 Ohio Cir. Ct. 196.

Pennsylvania.— Fox *v.* Gordon, 16 Phila. 185.

Rhode Island.— See also Gardner *v.* Swan Point Cemetery, 20 R. I. 646, 40 Atl. 871, 78 Am. St. Rep. 897; Hackett *v.* Hackett, 18 R. I. 155, 26 Atl. 42, 49 Am. St. Rep. 762, 19 L. R. A. 558.

But *compare* Guthrie *v.* Weaver, 1 Mo. App. 136.

See 15 Cent. Dig. tit. "Dead Bodies," § 5.

Consent under mental stress.— Where the wife at the time of her husband's death was in feeble health, and became nearly frantic during the time which preceded the burial, she should not be regarded as consenting that the place of burial be permanent. *In re* Richardson, 29 Misc. (N. Y.) 367, 60 N. Y. Suppl. 539.

Where interment was understood to be temporary.— Under some circumstances a court of equity will permit a husband to remove the body of his deceased wife from the lot of land of another. As for instance where the burial was not with the intention or understanding of the husband that it should be her final resting-place. Pulsifer *v.* Douglass, 94 Me. 556, 48 Atl. 118, 53 L. R. A. 238.

22. Tate *v.* State, 6 Blackf. (Ind.) 110; *In re* Bauer, 68 N. Y. App. Div. 212, 74 N. Y. Suppl. 155; State *v.* Shonhoft, 14 Ohio Cir. Ct. 354; Ind. Rev. St. c. 7, § 37; N. Y. Laws (1900), c. 715; Bates' Ohio St. §§ 1470–1473.

23. *In re* Bauer, 68 N. Y. App. Div. 212, 74 N. Y. Suppl. 155 [*affirming* 36 Misc. 33, 72 N. Y. Suppl. 439]; N. Y. Laws (1900), c. 715. See also *In re* Donn, 14 N. Y. Suppl. 189; Craig *v.* Pittsburgh First Presb. Church, 88 Pa. St. 42, 32 Am. Rep. 417.

Erection of headstone not a waiver.— It was held in Matter of Bauer, 68 N. Y. App. Div. 212, 74 N. Y. Suppl. 155, that the erection of a headstone was not a waiver of the right to apply to the supreme court for permission to remove a dead body, under N. Y. Laws (1895), c. 559, § 51, authorizing the court to grant such permission, when the consent of interested persons cannot be obtained.

Membership corporation law, art 1, § 2, defines the term "membership corporation" as including corporations incorporated under the chapter, or previously incorporated under any laws repealed by the chapter, but as excluding a membership corporation created by special law. Article 3, section 40, referring to cemetery corporations, defines such corporation to be any corporation previously created for cemetery purposes under a law repealed by the chapter or hereafter created under that article; and section 51 authorizes the removal of bodies from a cemetery owned by a cemetery corporation, as defined by that act. It was held that such statute conferred no authority on the court to authorize the removal of a body from a cemetery controlled by a corporation created by special law not repealed by the membership corporation law. *In re* Owens, 79 N. Y. App. Div. 236, 79 N. Y. Suppl. 1114.

24. **Liability of decedent's estate** see Executors and Administrators.

Right of relatives of deceased indigent soldier to collect burial fees see Army and Navy, 3 Cyc. 863 note 22.

25. But he was not bound to incur a debt, to render himself liable, and to place himself in a position to be proceeded against, and to lose the means of maintaining his family in order to defray such expenses. Reg. *v.* Vann, 5 Cox C. C. 379, 2 Den. C. C. 325, 15 Jur. 1090, 21 L. J. M. C. 39, T. & M. 632.

26. **Where deceased was not a married woman.**— It is sometimes provided by statute that where the deceased was not a married woman, but left any kindred, the duty of burial devolves upon the person or persons in the same degree nearest of kin to the deceased, being of adult age, and within the state and possessed of sufficient means to defray the necessary expenses. Enos *v.* Snyder, 131 Cal. 68, 63 Pac. 170, 82 Am. St. Rep. 330, 53 L. R. A. 221.

27. *Alabama.*— Smyley *v.* Reese, 53 Ala. 89, 25 Am. Rep. 598.

voluntarily living apart from the husband.[28] And a person voluntarily paying such expenses was entitled to recover of the husband the amount so expended.[29]

b. General Rule in United States. The well-nigh universal rule in the United States is that the husband is liable for the necessary funeral expenses of his deceased wife, where she left no separate estate.[30]

c. Rule as Affected by Statutory Provisions. In some jurisdictions the rule is laid down that the statutes creating the wife's separate estate do not absolve the husband from his common-law obligation to provide suitable sepulture for his deceased wife and to defray the funeral expenses, where she leaves such separate estate, provided he is solvent;[31] and he is not entitled to any credit on the settlement of his administration of her estate for such expenditures;[32] and where the husband is insolvent such expenses should be deducted from his distributive share of his wife's separate estate.[33] In other jurisdictions, however, it is held that while it is primarily the duty of the husband to bury his deceased wife, nevertheless the wife's separate estate is liable for her funeral expenses, and the husband

California.— Weringer's Estate, 100 Cal. 345, 34 Pac. 825.

Massachusetts. — Cunningham *v.* Reardon, 98 Mass. 538, 96 Am. Dec. 670.

Michigan.— Sears *v.* Giddey, 41 Mich. 590, 2 N. W. 917, 32 Am. Rep. 168.

New York. — Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384.

Ohio.— McClellan *v.* Filson, 44 Ohio St. 184, 5 N. E. 861, 58 Am. Rep. 814.

England.— *In re* McMyn, 33 Ch. D. 575; Jenkins *v.* Tucker, 1 H. Bl. 90; Chapple *v.* Cooper, 13 L. J. Exch. 286, 13 M. & W. 252.

See 15 Cent. Dig. tit. "Dead Bodies," § 6; and Schouler Dom. Rel. § 199.

28. Seybold *v.* Morgan, 43 Ill. App. 39; Ambrose *v.* Kerrison, 10 C. B. 776, 20 L. J. C. P. 135, 70 E. C. L. 776, 4 Eng. L. & Eq. 361; Bradshaw *v.* Beard, 12 C. B. N. S. 344, 8 Jur. N. S. 1228, 31 L. J. C. P. 273, 6 L. T. Rep. N. S. 458, 104 E. C. L. 344.

29. Cunningham *v.* Reardon, 98 Mass. 538, 96 Am. Dec. 670; Ambrose *v.* Kerrison, 10 C. B. 776, 20 L. J. C. P. 135, 70 E. C. L. 776, 4 Eng. L. & Eq. 361; Bradshaw *v.* Beard, 12 C. B. N. S. 344, 8 Jur. N. S. 1228, 31 L. J. C. P. 273, 6 L. T. Rep. N. S. 458, 104 E. C. L. 344; Jenkins *v.* Tucker, 1 H. Bl. 90.

30. *Alabama.*— Smyley *v.* Reese, 53 Ala. 89, 25 Am. Rep. 598.

California.—Pen. Code, § 292; Enos *v.* Snyder, 131 Cal. 68, 63 Pac. 170, 82 Am. St. Rep. 330, 53 L. R. A. 221.

Connecticut.— Staples' Appeal, 52 Conn. 425.

Massachusetts.—Weld *v.* Walker, 130 Mass. 422, 39 Am. Rep. 465; Durell *v.* Hayward, 9 Gray 248, 69 Am. Dec. 284.

New Jersey.— Sullivan *v.* Horner, 41 N. J. Eq. 299, 7 Atl. 411. See also Youngs *v.* Shough, 15 N. J. L. 27.

New York. — Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384; McCue *v.* Garvey, 14 Hun 562.

Ohio.— See Hadsell *v.* Hadsell, 7 Ohio Cir. Ct. 196.

See 15 Cent. Dig. tit. "Dead Bodies," § 6.

31. *Alabama.*— Smyley *v.* Reese, 53 Ala. 89, 25 Am. Rep. 598; Gunn *v.* Samuel, 33 Ala. 201.

Connecticut. — Staples' Appeal, 52 Conn. 425.

Maryland.— Willis *v.* Jones, 57 Md. 362.

New York.— New York City M. E. Church *v.* Jaques, 1 Johns. Ch. 450.

Pennsylvania.—McCormick's Estate, 4 Kulp 15; Weber's Estate, 20 Phila. 8; Darmody's Estate, 13 Phila. 207. See also Sawtelle's Appeal, 84 Pa. St. 306; Costigan's Estate, 13 Phila. 264.

England. — See Bertie *v.* Chesterfield, 9 Mod. 31.

See 15 Cent. Dig. tit. "Dead Bodies," § 6.

A husband is primarily liable for the funeral expenses of his wife, even where she has a separate estate, and her estate is liable only in case the husband is insolvent. Waesch's Estate, 14 Pa. Co. Ct. 387. It was held in Sears *v.* Giddey, 41 Mich. 590, 2 N. W. 917, 32 Am. Rep. 168, that a husband is proximately liable for the expense of his wife's funeral, even where he is not her legatee.

Marking place of burial.— It has been held in California that included in the obligation to give his wife decent burial is the duty of placing some mark of identification over her last resting-place. *In re* Weringer, 100 Cal. 345, 34 Pac. 825.

Provision in wife's will.— The liability of a husband for the funeral expenses of his wife is not discharged as against a creditor by a provision in her will directing payment out of her estate. Such a provision, it is true, gives him the right to call upon her executor for exoneration as between himself and mere legatees, but it can only be after all claims for which he is in any way responsible, whether primarily or as surety, have been fully satisfied. Wheeler's Estate, 4 Pa. Dist. 265.

32. Smyley *v.* Reese, 53 Ala. 89, 25 Am. Rep. 598.

33. Waesch's Estate, 14 Pa. Co. Ct. 387.

In California it has been held that while it is the duty of the husband to bury his deceased wife and to defray the necessary funeral expenses, etc., yet where the husband is poor and the deceased leaves a considerable estate, it is proper for the court to fix a

may charge such estate for any reasonable disbursements made by him on this account.[34]

IV. OFFENSES.[35]

A. Against Right of Burial. It is a misdemeanor for one upon whom the duty is imposed to have a dead body buried to refuse or neglect to perform such duty if he has sufficient means to do so,[36] to deprive a dead body of decent burial by disgraceful exposure, or to dispose of the body in a manner contrary to long sanctioned usage.[37] Thus it is an indictable offense both at common law and by statute[38] to dispose of or to sell a dead body for the purpose of dissection.[39] It is

reasonable amount to be allowed out of her estate toward funeral expenses and a suitable monument. *In re* Weringer, 100 Cal. 345, 34 Pac. 825.

In Pennsylvania it has been held that in the settlement of the estate of a deceased wife, as between the creditor and the decedent her estate was liable for necessaries furnished in her lifetime, and the expense of interment, etc., yet the husband is primarily liable therefor, and can be called upon to reimburse the estate. But to prevent circuity of action this is accomplished by deducting from his distributive share the amount the estate was compelled to pay, and for which he is liable. Weber's Estate, 20 Phila. 8.

34. Constantinides *v.* Walsh, 146 Mass. 281, 15 N. E. 631, 4 Am. St. Rep. 311; Freeman *v.* Coit, 27 Hun (N. Y.) 447; McCue *v.* Garvey, 14 Hun (N. Y.) 562 [*reversing* 3 Redf. Surr. (N. Y.) 313]; Kessler *v.* Hessen, 19 Abb. N. Cas. (N. Y.) 86; Lucas *v.* Hessen, 17 Abb. N. Cas. (N. Y.) 271; Quin *v.* Hill, 4 Dem. Surr. (N. Y.) 69; McClellan *v.* Filson, 44 Ohio St. 184, 5 N. E. 861, 58 Am. Rep. 814. See Gregory *v.* Lockyer, *In re* McMyn, 33 Ch. D. 575, 6 Madd. 90, 22 Rev. Rep. 246.

See 15 Cent. Dig. tit. "Dead Bodies," § 6.

Where wife charges separate estate by will.—Although it is the duty of the husband to defray the burial expenses of his deceased wife, the latter may charge such expenses by her will on her separate estate, and where she does so they cannot be charged to the husband. Jackson *v.* Westerfield, 61 How. Pr. (N. Y.) 399.

35. See, generally, CRIMINAL LAW.

36. Enos *v.* Snyder, 131 Cal. 68, 63 Pac. 170, 82 Am. St. Rep. 330, 53 L. R. A. 221; Kanavan's Case, 1 Me. 226; Reg. *v.* Vann, 5 Cox C. C. 379, 2 Den. C. C. 325, 15 Jur. 1090, 21 L. J. M. C. 39, T. & M. 632; Chapple *v.* Cooper, 2 Den. C. C. 325, 13 L. J. Exch. 286, 13 M. & W. 252. See also Reg. *v.* Stewart, 12 A. & E. 773, 4 P. & D. 349, 40 E. C. L. 383.

37. People *v.* Baumgartner, 135 Cal. 72, 66 Pac. 974. See also Wonson *v.* Sayward, 13 Pick. (Mass.) 402, 23 Am. Dec. 691; Rex *v.* Cheere, 4 B. & C. 902, 7 D. & R. 461, 4 L. J. K. B. O. S. 79, 10 E. C. L. 851; Jones *v.* Ashburnham, 4 East 455, 1 Smith K. B. 188; Rex *v.* Lynn, 2 Leach 560, 2 T. R. 733; Andrews *v.* Cawthorne, Willes 536.

Arrest of dead bodies.—If an officer takes the body of a deceased person by writ or execution he shall be punished by a fine not exceeding five hundred dollars and by imprisonment for not more than six months. Me. Rev. St. (1883) § 26. See also Kanavan's Case, 1 Me. 226.

Casting body in river.—To cast a dead body into a river without the right of christian sepulture is indictable as an offense against common decency. Kanavan's Case, 1 Me. 226.

Cremation of body.—To burn a dead body instead of burying it is not a misdemeanor, unless it is so done as to amount to a public nuisance; if an inquest ought to be held upon a dead body it is a misdemeanor so to dispose of the dead body as to prevent the coroner from holding an inquest. Reg. *v.* Stephenson, 13 Q. B. D. 331, 15 Cox C. C. 679, 49 J. P. 486, 53 L. J. M. C. 176, 52 L. T. Rep. N. S. 267, 33 Wkly. Rep. 44; Reg. *v.* Price, 12 Q. B. D. 247, 15 Cox C. C. 389, 53 L. J. M. C. 51, 33 Wkly. Rep. 45 note.

38. Most of the states, however, by statute provide for the surrender of the dead bodies of persons who are required to be buried at public expense, and of executed felons, to medical colleges and societies for the purpose of dissection. McNamee *v.* People, 31 Mich. 473. Some states by statute also authorize the dissection of dead bodies where the consent of the nearest relatives of the deceased is given. Tenn. Code, § 6775; Thompson *v.* State, 105 Tenn. 177, 58 S. W. 213, 80 Am. St. Rep. 875, 51 L. R. A. 883.

39. Com. *v.* Slack, 19 Pick. (Mass.) 304; Com. *v.* Loring, 8 Pick. (Mass.) 370; McNamee *v.* People, 31 Mich. 473; Reg. *v.* Feist, 8 Cox C. C. 18, Dears. & B. 590, 4 Jur. N. S. 541, 27 L. J. M. C. 164, 6 Wkly. Rep. 546; Rex *v.* Lynn, 2 Leach 560, 2 T. R. 733; Rex *v.* Gilles, R. & R. 272 note.

The selling or disposing of a dead body for gain or profit was a misdemeanor at common law and indictable. 3 Jacob Fisher Dig. 3507. In Thompson *v.* State, 105 Tenn. 177, 183, 58 S. W. 213, 80 Am. St. Rep. 875, 51 L. R. A. 883, the court said: "It may be safely stated that the authorities are harmonious on the proposition that the unauthorized disposition and sale of the dead body of a human being for gain and profit, is a common law misdemeanor of high grade, and *malum in se*." It has been held that the selling for dissection of the dead body of one executed when the death sentence did not so direct was an indictable offense. Rex. *v.* Cundick, D. & R. N. P. 13, 16 E. C. L. 413.

likewise an indictable offense for a person to receive a dead body, knowing that it has been unlawfully removed for the purpose of dissection.[40]

B. Violation of Sepulture. It may be stated as the universal rule of law in civilized countries that it is an indictable offense to disinter and remove dead bodies wantonly or for the sake of gain,[41] and by the old common law, even the fact that the motive of the person removing the body is laudable is no defense.[42] In most of the states of the Union the violation of sepulture is made a specific offense by statute.[43] But these statutes are not directed against and do not apply

An unsuccessful attempt to commit that offense is itself a misdemeanor and punishable at common law. Thompson *v.* State, 105 Tenn. 178, 58 S. W. 213, 80 Am. St. Rep. 875, 51 L. R. A. 883; Clark Cr. L. 104; 1 Russell Crimes 47.

40. State *v.* Johnson, 6 Kan. App. 113, 50 Pac. 907; Com. *v.* Loring, 8 Pick. (Mass.) 370; People *v.* Graves, 5 Park. Cr. (N. Y.) 134; Sehneider *v.* State, 40 Ohio St. 336.

Remains long buried and decomposed.— It has been held that Ohio Rev. St. § 3764, prescribing the penalty against persons, etc., having the unlawful possession of the body of a deceased person, is not directed against cemetery associations or their trustees; nor does it relate to the remains of persons long buried and decomposed. Carter *v.* Zanesville, 59 Ohio St. 170, 52 N. E. 126.

41. Kanavan's Case, 1 Me. 226; Com. *v.* Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377; Com. *v.* Cooley, 10 Pick. (Mass.) 37; Thompson *v.* Hiekey, 59 How. Pr. (N. Y.) 434; Law of Burial, 4 Bradf. Surr. (N. Y.) 503 *et seq.*; Reg. *v.* Twiss, L. R. 4 Q. B. 407, 10 B. & S. 298, 38 L. J. Q. B. 228, 20 L. T. Rep. N. S. 522, 17 Wkly. Rep. 765.

Coffin-stealing larceny.— At common law it is larceny to steal a coffin in which the remains of a human being are interred. State *v.* Doepke, 68 Mo. 208, 30 Am. Rep. 785.

Disinterring dead bodies.— A dead body by law belongs to no one and is therefore under the protection of the public. If it lies in consecrated grounds, the ecclesiastical law will interpose for its protection, but whether in ground consecrated or unconsecrated, indignities offered to human remains in improperly and indecently disinterring them are the grounds of an indictment. Foster *v.* Dodd, L. R. 3 Q. B. 67, 8 B. & S. 842, 37 L. J. Q. B. 28, 17 L. T. Rep. N. S. 614, 16 Wkly. Rep. 155.

42. Thus where a son, actuated by motives of filial affection and religious duty, removed the dead body of his mother from a dissenters' burial-ground for the purpose of interring it in the family grave, together with that of his father, in a consecrated churchyard, he was held liable and his conviction of a misdemeanor proper. Reg. *v.* Sharpe, 7 Cox C. C. 214, Dears. & B. 160, 3 Jur. N. S. 192, 26 L. J. M. C. 47, 5 Wkly. Rep. 318. Where the evidence showed that a person had employed workmen to excavate for building operations a burial-ground attached to a nonconformist place of worship, which had been disused as a burial-ground for some time, and the jury found that during the excavation bones that formed parts of the human body and of the same human skeleton were dug up, but that they were not disturbed in an improper and indecent manner, yet the defendant was found guilty of a misdemeanor at common law, in unlawfully, wilfully, and indecently digging open graves in a burial-ground, and taking and removing parts of bodies of persons buried therein and interfering with and offering indignities to the remains of said bodies. Reg. *v.* Jacobson, 14 Cox C. C. 522.

43. *California.*— People *v.* Baumgartner, 135 Cal. 72, 66 Pac. 974. And see *In re* Wong Yung Quy, 2 Fed. 624, 6 Sawy. 442.

Indiana.— State *v.* McClure, 4 Blackf. 328.

Iowa.— State *v.* Schaeffer, 95 Iowa 379, 64 N. W. 276; State *v.* Pugsley, 75 Iowa 742, 38 N. W. 498.

Kansas.— State *v.* Lowe, 6 Kan. App. 112, 50 Pac. 912.

Kentucky.— Louisville *v.* Nevin, 10 Bush 549, 19 Am. Rep. 78.

Massachusetts.— Com. *v.* Slack, 19 Pick. 304; Com. *v.* Marshall, 11 Pick. 350, 22 Am. Dec. 377; Com. *v.* Cooley, 10 Pick. 37; Com. *v.* Loring, 8 Pick. 370.

Michigan.— McNamee *v.* People, 31 Mich. 473.

Missouri.— State *v.* Fox, 136 Mo. 139, 37 S. W. 794; State *v.* Doepke, 68 Mo. 208, 30 Am. Rep. 785.

New York.— People *v.* Fitzgerald, 105 N. Y. 146, 11 N. E. 378, 59 Am. Rep. 483; Rhodes *v.* Brandt, 21 Hun 1; People *v.* Thompson, 21 N. Y. Wkly. Dig. 345; People *v.* Graves, 5 Park. Cr. 134.

North Carolina.— State *v.* McLean, 121 N. C. 589, 28 S. E. 140, 42 L. R. A. 721; State *v.* Wilson, 94 N. C. 1015.

Ohio.— Carter *v.* Zanesville, 59 Ohio St. 170, 52 N. E. 126; Sehneider *v.* State, 40 Ohio St. 336; Pringle *v.* State, 1 Ohio Dec. (Reprint) 283, 8 West. L. J. 67.

Pennsylvania.— Fox *v.* Gordon, 16 Phila. 185; *Ex p.* Girard, 4 Am. L. J. 97.

Vermont.— State *v.* Little, 1 Vt. 331.

Wisconsin.— Hayes *v.* State, 112 Wis. 304, 87 N. W. 1076; Palmer *v.* Broder, 78 Wis. 483, 47 N. W. 774.

See 15 Cent. Dig. tit. "Dead Bodies," § 8.

Constitutionality of the statute.— "The exhumation and removal of the dead is not a matter of public indifference, harmless in itself, like the style of wearing the hair, as in the Queue Case, but it affects the public health, and its regulation is, like the regulation of slaughter-houses and other noxious pursuits, strictly within the police powers

to exhumations made by public officials, with a view to ascertaining whether a crime has been committed;[44] nor do they apply to a person who having obtained the necessary permit from the constituted authorities removes the dead body of a relative or friend for reinterment.[45]

C. Prosecution For Offenses — 1. Indictment or Information[46] — a. In General. The material elements of the offense charged, as prescribed by the particular statute, must be covered by the allegations in the indictment or information; but it is sufficient if it alleges all the facts which the statute requires to constitute the offense.[47]

of the state." *In re* Wong Yung Quy, 2 Fed. 624, 629, 6 Sawy. 445.

"Disinter" defined.— In People *v.* Baumgartner, 135 Cal. 72, 74, 66 Pac. 974, the court said: "I think there can be little doubt that the common understanding of the act 'to disinter a buried human body' is not only to expose it to the elements where it lies, but to remove it. The statute is aimed at the crime commonly called 'body snatching.' The motive in removing the body may not be material, but the offense is not complete unless the body is removed from its resting-place."

Accomplices.— Under an Indiana statute in order to constitute the offense, it is not necessary that a party to it should be actually present aiding and abetting in the commission of the fact. If with the intention of giving assistance a person be near enough to afford it should it be needed, he is in construction of the law present aiding and abetting. Tate *v.* State, 6 Blackf. (Ind.) 110.

Commission of act conclusive as to intent. — Under N. C. Acts (1895), § 1, c. 90, providing that any person who shall without due process of law, or the consent of the next of kin of the deceased, open any grave for the purpose of removing anything therein interred, shall be guilty of a felony, it was held that the doing the forbidden act itself is conclusive as to the intent with which it was done. State *v.* McLean, 121 N. C. 589, 28 S. E. 140, 42 L. R. A. 721.

Lack of consent, gravamen of offense.— Under the Indiana statute of 1841, it has been held that the unlawful disinterment of a dead body consists not merely in the removal of the dead body, but its removal without the consent of the deceased given during his lifetime, or of his near relatives given since his death. Tate *v.* State, 6 Blackf. (Ind.) 110.

Removal for the purpose of dissection.— It has been held in Massachusetts that the removal of a dead body is not an offense within the meaning of Mass. St. (1830) c. 57, unless done with the intent to use or dispose of the body for the purpose of dissecting. Com. *v.* Slack, 19 Pick. (Mass.) 304.

Where body was not removed.— Where a person merely dug down to a coffin to search the body for valuables without removing the body, it was held that he could not be convicted of a felony, under Cal. Pen. Code, § 290. People *v.* Baumgartner, 135 Cal. 72, 66 Pac. 974.

44. People *v.* Fitzgerald, 105 N. Y. 146, 11 N. E. 378, 59 Am. Rep. 483; Rhodes *v.* Brandt, 21 Hun (N. Y.) 1; Hayes *v.* State, 112 Wis. 304, 87 N. W. 1076; Palmer *v.* Broder, 78 Wis. 483, 47 N. W. 744.

On application of defendant, and on affidavits sufficient to give jurisdiction, the coroner directed the exhumation of a body for the purpose of a *post-mortem* examination to determine whether the deceased was murdered, and the body was accordingly exhumed and a public examination had without impaneling a jury. It was held not to be body-stealing. People *v.* Fitzgerald, 105 N. Y. 146, 11 N. E. 378, 59 Am. Rep. 483, 5 N. Y. Cr. 335.

45. People *v.* Dalton, 58 Cal. 226; Sonntag *v.* Shonhoft, 14 Ohio Cir. Ct. 354; Fox *v.* Gordon, 16 Phila. (Pa.) 185.

46. See, generally, Indictments and Informations. An indictment charging that defendant in a churchyard interrupted and obstructed C, clerk, in reading the order for the burial of the dead and interring a corpse, and unlawfully, and by threats and menaces, hindered the burial of the corpse, is bad in arrest of judgment, for not averring that C was a clerk in holy orders, and lawfully acting as such in the burial of the corpse, and for not setting out the particular threats and menaces used. Rex *v.* Cheere, 4 B. & C. 902, 7 D. & R. 461, 4 L. J. K. B. O. S. 79, 10 E. C. L. 851.

For form of an indictment for feloniously removing the dead body of a human being from the grave for the purpose of dissection or selling see People *v.* Graves, 5 Park. Cr. (N. Y.) 134. See also People *v.* Dalton, 58 Cal. 226.

47. Where the act charged as the offense is set forth in ordinary concise language, and in such manner as to enable a person of common understanding to know what is intended and to enable the court to pronounce judgment upon a conviction according to the right of the case, the indictment is sufficient. People *v.* Dalton, 58 Cal. 226.

Under the Massachusetts statute, which makes it an offense to remove a dead body for the purpose of dissection, it is necessary that the indictment allege that such disinterment was wrongful, or to conclude *contra formam statuti*. Com. *v.* Cooley, 10 Pick. (Mass.) 37.

Surplusage.— Facts alleged in an indictment or information which are not necessary to the commission of the offense charged, and which do not change the offense, but only make its description more definite, may be regarded as mere surplusage. McNamee *v.* People, 31 Mich. 473, where the court said:

b. Stating Offense in Language of Statute. It is sufficient if the charge in the indictment or information pursues the language of the statute creating the offense and prescribing the elements thereof.[48]

c. Allegation of Intent. An indictment drawn under a statute making it an offense to remove a dead body with the intent to use or dispose of it for the purpose of dissection must aver such intent or it will be fatally defective.[49]

d. Description of Body. An indictment or information charging the disinterring of a dead body need not allege that it was the body of a human being; it is sufficient to state the name of the deceased.[50] Nor is it necessary to allege the death of the person whose body defendant is charged with having disinterred, where it is alleged that defendant entered and unlawfully dug up the grave and carried away the body.[51]

e. Designation of Place of Burial. Where the burial-place is described in the indictment as being in a certain town, it is no material defect that the particular graveyard is not designated by name.[52]

f. Negativing Exceptions. It is not necessary for an indictment for a common-law offense to negative exceptions contained in a statute.[53]

2. Evidence[54] — a. Burden of Proof. It is a general rule applicable to the trial of criminal cases that where there is an exception in a general statute it is not incumbent on the prosecution to prove that defendant is not within the exception; the fact being peculiarly within the knowledge of the accused, it is incumbent on him to show that he is not criminally liable for the act, because he is within the exception.[55]

"It cannot vitiate an indictment to include allegations which do not change the offense charged, and only make its description more definite. The prisoner cannot be damnified by that which throws no new burden on him, and, if it makes any difference, only calls for more proof from the prosecution." See also Thompson *v.* State, 105 Tenn. 177, 58 S. W. 213, 80 Am. St. Rep. 875, 51 L. R. A. 883. It has been held in Massachusetts that an indictment for disinterring a dead body need not allege the ownership of the burial-ground in which the body was interred, and that such allegation not being material may be regarded as surplusage, and therefore need not be proved. Com. *v.* Cooley, 10 Pick. 37.

48. Com. *v.* Dalton, 58 Cal. 226.

In Indiana it has been held that the indictment need not allege that the disinterment was unlawful, the term "unlawful" not being used in the statute. State *v.* McClure, 4 Blackf. 328.

In Massachusetts it was held that in an indictment under a statute (St. (1814) c. 175) forbidding any person to dig up a human body "not being authorized by the selectmen of any town in this Commonwealth" it was sufficient to allege that defendant was not authorized by the selectmen of the town where the body had been buried, this evidently being in accordance with the intention of the legislature. Com. *v.* Loring, 8 Pick. 370.

49. Com. *v.* Slack, 19 Pick. (Mass.) 304.

50. State *v.* Little, 1 Vt. 331.

An indictment under Tex. Pen. Code, art. 367, declaring a penalty for one who without authority disinters, removes, or carries away a human body, should state the name of the person whose body was disinterred. Williamson *v.* State, (Cr. App. 1903) 72 S. W. 600. If the indictment does not state or give a reason for not stating whose body was removed it is insufficient. Leach *v.* State, (Cr. App. 1903) 72 S. W. 600.

Failure to allege that body was "a human being."— It was held, in People *v.* Graves, 5 Park. Cr. (N. Y.) 134, that an indictment for the felonious disinterment of the body of B was not defective because of an omission to allege that she was "a human being." That fact would be assumed.

Unchristened infant.—Where the indictment charged the defendant with removing from its grave a certain deceased child of N. H. Burke "that had yet no name given to it," without the consent, etc., it was held to be sufficient. Tate *v.* State, 6 Blackf. (Ind.) 110.

51. People *v.* Graves, 5 Park. Cr. (N. Y.) 134.

52. Where the burial-place was described as "a graveyard in the town of Bristol, Ontario county," it was held that the indictment was not materially defective in failing to designate the particular graveyard. People *v.* Graves, 5 Park. Cr. (N. Y.) 134.

53. State *v.* Doepke, 68 Mo. 209, 30 Am. Rep. 785; State *v.* O'Gorman, 68 Mo. 179. See also McNamee *v.* People, 31 Mich. 473.

54. See, generally, Criminal Law.

55. Thus upon the trial of an indictment under a statute making it an offense for any person without lawful authority to dig up, disinter, remove, or carry away any human body, etc., it is incumbent on defendant to show that he had lawful authority for such act. State *v.* Schaffer, 95 Iowa 379, 64 N. W. 276.

b. Admissibility — (i) *As to Unlawful Disinterment.* In a prosecution for body-stealing it is proper to submit to the jury evidence which tends to show that the body was disinterred without lawful authority.[56]

(ii) *Aiding and Abetting.* It has been held that under an indictment charging defendant as principal evidence is admissible showing him to have been an accessary.[57]

(iii) *As to Intent.* It is always competent to prove facts constituting a motive for the commission of any alleged crime.[58]

c. Weight and Sufficiency — (i) *In General.* It is not necessary to prove an allegation contained in the indictment which is entirely superfluous;[59] but where on the other hand the indictment contains an unnecessary allegation, and such allegation is descriptive of a material allegation, the prosecution is bound to prove it.[60] Under a statute directed against the unlawful receiving of a dead body removed from its grave for the purpose of dissection, the only facts essential to be established to warrant a conviction are that the body was so removed and that defendant received it knowing that it had been so unlawfully removed for such purpose, or knowingly aided, concealed, abetted, or assisted some other person in receiving it.[61]

(ii) *Proof of Corpus Delicti.* Under some statutes the unlawful disinterment of a dead body for the purpose of selling the same, for dissection, or for anatomical experiment constitutes the *corpus delicti* and must be established beyond a reasonable doubt, and suspicion founded upon inconclusive circumstances will not be sufficient.[62]

56. State *v.* Pugsley, 75 Iowa 742, 38 N. W. 498, such as evidence that the disinterment was made secretly during the night, that the body was concealed for several days, and that an attempt was then made to burn it.

57. State *v.* Pugsley, 75 Iowa 742, 38 N. W. 498, for the reason that the distinction between accessaries before the fact and principals was abolished by statute.

58. Thus evidence tending to prove the presence of defendant near the place where the offense was committed, with the intent of giving assistance should it be required, should be submitted to the jury. Tate *v.* State, 6 Blackf. (Ind.) 110.

If intent is material, any fact is competent against the accused which tends to show the motive of the criminal act charged, and in such case the evidence is not incompetent, because it may tend to show the accused guilty of another offense than the one charged. State *v.* Lowe, 6 Kan. App. 110, 50 Pac. 912.

Introduction of policies of insurance. — In a prosecution for body-stealing, where the theory of the state was that the crime was a part of a plan for procuring insurance upon the life of a person who was not in fact dead, and there was evidence tending to establish such theory, it was held that the policies of insurance were properly admitted in evidence. State *v.* Pugsley, 75 Iowa 742, 38 N. W. 498.

59. Com. *v.* Cooley, 10 Pick. (Mass.) 37. In this case, a prosecution for disinterring a dead body, the ownership of the burial-ground in which the offense was committed was alleged in the indictment, and it was held that such ownership need not be proved, since the allegation was entirely superfluous.

60. Pringle *v.* State, 1 Ohio Dec. (Reprint) 283, 7 West. L. J. 67. In this case the indictment charged the violation of a grave without the consent of the relatives "there being a widow and children," and it was held that although the indictment need not have alleged that the deceased left a widow, yet it was descriptive of a material allegation, and the prosecutor having alleged it was bound to prove it.

61. State *v.* Johnson, 6 Kan. App. 119, 50 Pac. 907; Schneider *v.* State, 40 Ohio St. 336. Under an indictment framed under the section of the Massachusetts statute of 1814, which imposed a penalty for receiving, concealing, or disposing of any human body which should be dug up, removed, or carried away contrary to the provisions of a previous section, it was held that evidence tending to prove, but not conclusively proving, that defendant dug up, etc., the body did not entitle him to an acquittal, where it was fully proven that the body was received by him. Com. *v.* Loring, 8 Pick. 370.

Prima facie evidence of guilty possession. — The unexplained possession of a dead body unlawfully removed from its grave, soon after such removal, is *prima facie* evidence of guilty possession and applies equally to a person charged with receiving and the one charged with taking it; and such possession need not be exclusive, but a joint possession may in connection with other circumstances justify a conviction. State *v.* Johnson, 6 Kan. App. 119, 50 Pac. 907.

62. State *v.* Baker, 144 Mo. 323, 46 S. W. 194. In this case a sack or waist with the peculiar buttons on it like those on the one in which the deceased was buried, whose body was missing from the grave, and who had

(III) *Proof of Intent.* The general rule is that where a specific intent is required to make an act an offense, the mere doing of the act will not raise a presumption that it was done for such prohibited purpose; but such specific intent must be proved.[63] It has been held, however, that the specific criminal intent may be presumed from the manner in which the act is performed and from the attending circumstances.[64]

V. CIVIL LIABILITY.

A. At Common Law. Since at common law there can be no such thing as property in human remains,[65] no action for civil damages will lie for an injury to a dead body;[66] although courts of law have afforded remedies through formal legal actions wherever any element of trespass to property real or personal has been associated with the molestation of the remains of the dead.[67]

B. In United States — 1. In General. It follows as a corollary to the well-recognized rule in the United States of the right of possession of a corpse for the purposes of interment and the care of such remains after burial[68] that the invasion or violation of that right furnishes a ground for a civil action for damages.[69]

been dead a year, was found in the brick-yard of defendant, which was accessible to the public. Several witnesses testified that the waist was like the one in which deceased was interred. One witness also testified to the fact that he saw defendant in the graveyard on the night on which it was charged that the body was disinterred. It was held that the evidence was wholly inconclusive and did not suffice to establish the *corpus delicti* of the offense charged in the indictment. See also State *v.* Fox, 136 Mo. 139, 37 S. W. 794.

63. State *v.* Baker, 144 Mo. 323, 46 S. W. 194; State *v.* Fox, 136 Mo. 139, 37 S. W. 794. See also State *v.* Gibson, 111 Mo. 92, 19 S. W. 980; Lawson Presumptive Ev. 271.

A conviction of securing and concealing a dead human body at a college, knowing it to have been unlawfully removed, in violation of Ohio Rev. St. § 7034, is not sustained by mere proof that arrangements participated in by defendant with outside parties had been made for the delivery of bodies at the college, without proof that he contemplated an unlawful delivery, or of his knowledge of the presence of the body in question. Schneider *v.* State, 40 Ohio St. 336.

Where an indictment drawn under Mo. Rev. St. (1899) § 3842, charged defendant with removing a dead body from the grave for the purpose of dissection or for surgical or anatomical experiments, etc., it was held not to be sufficient to show that he removed the body from the grave, but that it was also necessary to show what his purpose was in removing the body; and further that such purpose could not be inferred from the fact that defendant dug up the body and had it in his possession. State *v.* Fox, 148 Mo. 517, 50 S. W. 98.

64. Where the evidence showed that three persons in the night-time dug open a grave and removed therefrom a dead body, that the act was done in a secret and clandestine manner, that the parties engaged in the enterprise were armed with revolvers, and that they were arrested while in the act of removing the body to a hack which they had provided to carry the remains away, it was held that the proof of the criminal intent and the want of authority was manifest in the manner in which the act was performed. State *v.* Schaffer, 95 Iowa 379, 64 N. W. 276.

Commission of act proof of intent.— Under N. C. Acts (1885), c. 90, § 1, providing that any person who shall without due process of law or the consent of the next of kin of the deceased open any grave for the purpose of removing anything therein interred shall be deemed guilty of a felony, it has been held that the forbidden act itself is conclusive proof of the intent with which it is done. State *v.* McLean, 121 N. C. 589, 28 S. E. 140, 42 L. R. A. 721.

65. See *supra*, II.

66. Foley *v.* Phelps, 1 N. Y. App. Div. 551, 37 N. Y. Suppl. 471; Law of Burial, 4 Bradf. Surr. (N. Y.) 503 *et seq.*; Pierce *v.* Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667; Griffin *v.* Charlotte, etc., R. Co., 23 S. C. 25, 55 Am. Rep. 1; Foster *v.* Dodd, L. R. 3 Q. B. 67, 8 B. & S. 842, 37 L. J. Q. B. 28, 17 L. T. Rep. N. S. 614, 16 Wkly. Rep. 155; May *v.* Gilbert, 2 Bulstr. 150; Haynes' Case, 12 Coke 115; Corven's Case, 12 Coke 105; Reg. *v.* Sharpe, 7 Cox C. C. 214, Dears. & B. 160, 3 Jur. N. S. 192, 26 L. J. M. C. 47, 5 Wkly. Rep. 318; Frances *v.* Ley, Cro. Jac. 366; *In re* Bettison, 12 Moak Eng. Rep. 654 note; Rex *v.* Lynn, 2 T. R. 733; 1 Blackstone Comm. 429. And see CEMETERIES, 6 Cyc. 720.

67. *Massachusetts.*— Meagher *v.* Driscoll, 99 Mass. 281, 96 Am. Dec. 759.

Missouri.— Guthrie *v.* Weaver, 1 Mo. App. 136.

New York.— Foley *v.* Phelps, 1 N. Y. App. Div. 551, 37 N. Y. Suppl. 471.

South Carolina.— Griffin *v.* Charlotte, etc., R. Co., 23 S. C. 25, 55 Am. Rep. 1.

England.— 1 Blackstone Comm. 429.

And see CEMETERIES, 6 Cyc. 720.

68. See *supra*, III.

69. It is not a mere idle utterance, but a substantial legal principle, that wherever a

2. Mutilation of Corpse Before Burial — a. Action by Husband, Wife, or Next of Kin. An unauthorized and unlawful[70] mutilation of a corpse before burial gives rise to an action for damages in favor of the surviving husband or wife[71] or next of kin.[72] So the next of kin of a dead person has a cause of action against a carrier for an injury to the body of such deceased person, caused by the negligent act of the carrier while transporting it for hire.[73]

b. Action by Personal Representative. It has been held in some jurisdictions that since there can be no property in a dead body,[74] a personal representative of decedent cannot maintain an action for damages for the wilful or negligent mutilation of the body of the decedent, although he may sue for injury to the wearing apparel of decedent.[75]

3. Interference With Right of Burial.[76] And again it is well settled that the withholding of the body of the deceased human being from those who have a right to the possession of the body for the purpose of proper interment is an

real right is violated a real remedy is afforded by the law. Larson *v.* Chase, 47 Minn. 307, 28 Am. St. Rep. 370, 14 L. R. A. 85. See also Pierce *v.* Swan Point Cemetery, 10 R. I. 227. In Foley *v.* Phelps, 1 N. Y. App. Div. 551, 555, 37 N. Y. Suppl. 471, the court said: "In more recent times the obdurate common-law rule has been very much relaxed, and changed conditions of society, and the necessity for enforcing that protection which is due to the dead, have induced courts to re-examine the grounds upon which the common-law rule reposed, and have led to modifications of its stringency. The old cases in England were decided when matters of burial and the care of the dead were within the jurisdiction of the Ecclesiastical Courts, and they are no longer absolutely controlling."

70. **A physician, however, who performs an autopsy** upon a dead body with ordinary care and skill, and in pursuance of the authority of the coroner or a city ordinance, is not liable in an action to the family of the deceased for the mutilation of the body without their consent. Cook *v.* Walley, 1 Colo. App. 163, 27 Pac. 950; Young *v.* Physicians, etc., College, 81 Md. 358, 32 Atl. 177, 31 L. R. A. 540.

Post-mortem examinations see Coroners, 9 Cyc. 988.

71. Larson *v.* Chase, 47 Minn. 307, 28 Am. St. Rep. 370, 14 L. R. A. 85. Where plaintiff's husband, having fallen through an elevator shaft, was taken to Bellevue hospital where he died three hours later; and plaintiff applied at the hospital for his body and begged those in charge not to allow an autopsy to be performed, and without her knowledge and consent defendant procured, assisted, aided, and abetted in performing an autopsy on her husband's body without any authority of law, it was held that the unlawful and unauthorized mutilation of the body was a clear invasion of plaintiff's right and irrespective of any statutory enactment entitled her to bring an action for damages. Foley *v.* Phelps, 1 N. Y. App. Div. 551, 37 N. Y. Suppl. 471. In Farley *v.* Carson, 8 Ohio Dec. (Reprint) 119, 7 West. L. J. 67, this principle was recognized, but the court held in this case, where the deceased died of abscess of the liver, and the attending physician made an incision shortly after death to ascertain the exact cause of death, there being no dismemberment or removal of any part or organ, that this was not such mutilation of the body as to give the widow cause of action against defendant.

Fragmentary remains — Where amputation was necessary. — A railroad company is not liable for failure to deliver to the representative of a person killed in its service fragments necessarily amputated from his body because of an accident which resulted in his death, because its employees summoned an ambulance and a surgeon, and its surgeon performed the amputation at the hospital to which he was removed by those in charge of the ambulance upon his request not to be taken home, where the fragments were cremated according to the custom of the hospital without the knowledge or direction of the company's surgeon. Doxtator *v.* Chicago, etc., R. Co., 120 Mich. 596, 79 N. W. 922, 45 L. R. A. 535.

72. Burney *v.* Children's Hospital, 169 Mass. 57, 47 N. E. 401, 61 Am. St. Rep. 273, 38 L. R. A. 413. In this case a child died in a Boston hospital, and the hospital authorities, without any authority from the parents of the child, performed an autopsy upon its body. It was held that the father of the child was its natural guardian, and after its death had a right to the possession of the child's body for burial, and that he could maintain an action for damages against the hospital authorities for such unauthorized autopsy.

73. Beam *v.* Cleveland, etc., R. Co., 97 Ill. App. 24, holding that a brother of a deceased person who undertakes to pay for the transportation of his body from the place of his death to that of his burial has such an interest in the dead body as entitles him to damages for an injury to it by the negligent act of the carrier while transporting it for hire.

74. See *supra*, II.

75. Griffith *v.* Charlotte, etc., R. Co., 23 S. C. 25, 55 Am. Rep. 1.

76. **Interference with right of burial** see Cemeteries, 6 Cyc. 719 *et seq.* See also Farley *v.* Carson, 8 Ohio Dec. (Reprint) 119, 5 Cinc. L. Bul. 786.

injury which will give a cause of action against the person or persons so withholding such body.[77]

4. Disinterment and Removal. Since a dead body is not the subject of property at common law,[78] it has been held that the only action that can be maintained for unlawfully disturbing and disinterring a dead body is trespass *quare clausum fregit*.[79]

5. Damages. Substantial damages have in many cases been awarded for the mutilation of dead bodies[80] and the violation of sepulture.[81]

DEAD CULLS. An unavoidable product from the saw, in sawing logs, distinguishable from the higher grades produced.[1] (See Cull; and, generally, Logging.)

DEAD FREIGHT.[2] As applied to shipping, an unliquidated compensation for the loss of freight, recoverable in the absence and place of freight;[3] the freight

77. Renihan *v.* Wright, 125 Ind. 536, 25 N. E. 822, 21 Am. St. Rep. 249, 9 L. R. A. 514; Doxtator *v.* Chicago, etc., R. Co., 120 Mich. 596, 79 N. W. 922, 45 L. R. A. 535; St. Louis Southwestern R. Co. *v.* French, 23 Tex. Civ. App. 511, 57 S. W. 56.

Action by stranger.— A, at the request of B upon his death-bed, promised him, in case he died, to send his body home to be buried with his mother. After B's death A obtained a coffin from the city, purchased a box in which to forward it, and put the coffin with the body into the box and shipped them on board a vessel. He paid to the owners of the vessel the price they had agreed upon with a sister of the deceased since his death to carry the body, if inclosed in such box, to the desired place, the sister having informed him of such agreement. It was held that A had no legal interest in the dead body of B, by reason of which he could maintain an action against the carrier for failure to transport the body to such destination without proof of a special contract with himself. Driscoll *v.* Nicholls, 5 Gray (Mass.) 488.

78. See *supra*, II.

79. See Cemeteries, VIII, A, 2, b [6 Cyc. 721].

Who may maintain action see Cemeteries, VIII, A, 3 [6 Cyc. 721]. See also Wright *v.* Hollywood Cemetery Corp., 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 621; Hamilton *v.* New Albany, 30 Ind. 482; Hook *v.* Joyce, 94 Ky. 450, 22 S. W. 651, 15 Ky. L. Rep. 337, 21 L. R. A. 96; Weld *v.* Walker, 130 Mass. 422, 39 Am. Rep. 465; Meagher *v.* Driscoll, 99 Mass. 281, 96 Am. Dec. 759.

Defense of good faith.— In an action of trespass by next of kin for entering a private burial-ground and removing the dead bodies therefrom, where defendants plead and proved that they were the owners of and in possession of the premises at and prior to the time of the alleged trespass, and that the bodies were removed in good faith and with care and decency, it was held that plaintiff was not entitled to recover. Bonham *v.* Loeb, 107 Ala. 604, 18 So. 300. See Brown *v.* Barlow, 128 Mich. 117, 87 N. W. 56.

80. Larson *v.* Chase, 47 Minn. 307, 50 N. W. 238, 28 Am. St. Rep. 370, 14 L. R. A. 85; Foley *v.* Phelps, 1 N. Y. App. Div. 551, 37 N. Y. Suppl. 471.

81. Jacobus *v.* Congregation, etc., 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141; Thirkfield *v.* Mountain View Cemetery Assoc., 12 Utah 76, 41 Pac. 564. And see Cemeteries, VIII, A, 6, a [6 Cyc. 722].

Excessive damages.— It was held in Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26, that a verdict of one thousand seven hundred dollars for damages for removal of the body of a deceased child from a discontinued graveyard to one provided in lieu thereof without notice to the parents to remove it was excessive. But it was held in Thirkfield *v.* Mountain View Cemetery Assoc., 12 Utah 76, 41 Pac. 564, on a suit against the cemetery company for wilfully removing the body of plaintiff's child from a lot which defendant sold to him, without notice to plaintiff, that a verdict for plaintiff for eleven hundred and fifty dollars would not be set aside as excessive. So in an action for unlawful disinterment of a dead body, where the jury found for plaintiff, and assessed the damages at one cent, on appeal the court refused to disturb the verdict of the lower court, where no special damages and no expense incurred was shown. Hamilton *v.* New Albany, 30 Ind. 482.

Exemplary damages.— See, generally, Cemeteries; Damages. See also Wright *v.* Hollywood Cemetery Corp., 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 621; Meagher *v.* Driscoll, 99 Mass. 281, 96 Am. Dec. 759. While there is a legal right in the bodies of the dead which the courts will recognize and protect, there can be no recovery for mental anguish caused by the dead body of a relative being thrown from a wagon by the negligent operation of a railroad train, in the absence of any injury to the body. Hockenhammer *v.* Lexington, etc., R. Co., 74 S. W. 222, 24 Ky. L. Rep. 2383.

1. Brigham *v.* Martin, 103 Mich. 150, 153, 61 N. W. 276.

2. This "is an expression having a well-known signification." Per Cleasby, B., in Gray *v.* Carr, L. R. 6 Q. B. 522, 528, 1 Aspin. 115, 40 L. J. Q. B. 257, 25 L. T. Rep. N. S. 215, 19 Wkly. Rep. 1173.

3. McLean *v.* Fleming, L. R. 2 H. L. Sc. 128, 133, 25 L. T. Rep. N. S. 317; Phillips *v.* Rodie, 15 East 547, 555, 13 Rev. Rep. 528. And see Gray *v.* Carr, L. R. 6 Q. B. 522, 528,

which would have been payable for that part of the vessel which has not been occupied by merchandise, but ought to have been;[4] the claim which arises in consequence of the failure to furnish a full cargo;[5] the amount of damages unascertained, which the parties are entitled to recover for the non-completion of the cargo;[6] damages in respect of room lost in consequence of the charterers not loading according to the charter-party;[7] a sum to be paid in respect of space not filled according to the charter-party.[8] (See, generally, CARRIERS; SHIPPING.)

DEADHEADS. A term applied to persons other than the president, directors, officers, agents, or employees of a railroad company, who are permitted by the company to travel on the road without paying any fare therefor.[9]

DEADLY WEAPON.[10] Any weapon likely to produce death;[11] any weapon or instrument by which death may be produced;[12] a weapon dangerous to life,[13] likely to produce bodily injury from the use made of it,[14] likely to produce death or great bodily harm,[15] which from the use made of it at the time is likely to produce death or great bodily injury,[16] which in the manner used is capable of

1 Aspin. 115, 40 L. J. Q. B. 257, 25 L. T. Rep. N. S. 215, 19 Wkly. Rep. 1173.

4. Per Cleasby, B., in Gray *v.* Carr, L. R. 6 Q. B. 522, 528, 1 Aspin. 115, 40 L. J. Q. B. 257, 25 L. T. Rep. N. S. 215, 19 Wkly. Rep. 1173.

5. McLean *v.* Fleming, L. R. 2 H. L. Sc. 128, 137, 25 L. T. Rep. N. S. 317, where Lord Colonsay said: "It is so described in the English authorities, and also in the Scotch. Professor Bell so represents it in his 'Commentaries,' and also in his 'Principles,' and we find it in the 'Law Dictionary.' It is a name which has obtained a place in our mercantile language as well as in our law authorities."

6. Phillips *v.* Rodie, 15 East 547, 555, 13 Rev. Rep. 528.

7. Pearson *v.* Göschen, 17 C. B. N. S. 352, 377, 10 Jur. N. S. 903, 33 L. J. C. P. 265, 10 L. T. Rep. N. S. 758, 12 Wkly. Rep. 1116, 112 E. C. L. 352.

8. Pearson *v.* Göschen, 17 C. B. N. S. 352, 377, 10 Jur. N. S. 903, 33 L. J. C. P. 265, 10 L. T. Rep. N. S. 758, 12 Wkly. Rep. 1116, 112 E. C. L. 352 [*citing* Birley *v.* Gladstone, 3 M. & S. 205, 217, 15 Rev. Rep. 465].

9. Gardner *v.* Hall, 61 N. C. 21, 22.

10. Distinguished from "dangerous weapon." — In State *v.* Lynch, 88 Me. 195, 197, 33 Atl. 978, the court said: "While deadly and dangerous are not equivalents, deadly is more than the equivalent and includes the full signification of the statute word. A dangerous weapon may possibly not be deadly, but a deadly weapon, one which is capable of causing death, must be dangerous." And see State *v.* Larkin, 24 Mo. App. 410, 411, where it is said: "What is a dangerous and deadly weapon depends not so much on the article itself, provided it is one that may become dangerous to life, as upon surrounding circumstances, and the intent with which it is carried, and is necessarily, to some extent, a question of fact and not of law." See DANGEROUS WEAPON.

May be a question of law. — State *v.* Sinclair, 120 N. C. 603, 605, 27 S. E. 77; State *v.* Huntley, 91 N. C. 617, 619; State *v.* West, 51 N. C. 505, 509; State *v.* Collins, 30 N. C. 407, 412; State *v.* Craton, 28 N. C. 164, 179; Danforth *v.* State, (Tex. Cr. App. 1902) 69 S. W. 159, 163.

11. Garner *v.* State, 28 Fla. 113, 159, 9 So. 835, 29 Am. St. Rep. 262; Stone *v.* Heggie, (Miss. 1903) 34 So. 146, 147.

12. People *v.* Rodrigo, 69 Cal. 601, 603, 11 Pac. 481; State *v.* Bowles, 146 Mo. 6, 13, 47 S. W. 892, 69 Am. St. Rep. 598.

13. Com. *v.* Duncan, 91 Ky. 592, 595, 16 S. W. 530, 13 Ky. L. Rep. 162; Cosby *v.* Com., 72 S. W. 1089, 1090, 24 Ky. L. Rep. 2050; State *v.* Hammond, 14 S. D. 545, 551, 86 N. W. 627; Bouvier L. Dict.

14. McNary *v.* People, 32 Ill. App. 58, 62. See also State *v.* Sinclair, 120 N. C. 603, 606, 27 S. E. 77; State *v.* Norwood, 115 N. C. 789, 792, 20 S. E. 712, 44 Am. St. Rep. 498 [*citing* State *v.* Huntley, 91 N. C. 617].

15. *California.*— People *v.* Lopez, 135 Cal. 23, 25, 66 Pac. 965; People *v.* Valliere, 123 Cal. 576, 578, 56 Pac. 433.

Florida.— Garner *v.* State, 28 Fla. 113, 159, 9 So. 835, 29 Am. St. Rep. 262; Blige *v.* State, 20 Fla. 742, 751, 51 Am. Rep. 628 [*quoting* Bishop St. Cr.].

Minnesota.— State *v.* Dineen, 10 Minn. 407 [*quoted* in Blige *v.* State, 20 Fla. 742, 751, 51 Am. Rep. 628].

Nebraska.—"As a knife, an ax, or a club." Clary *v.* State, 61 Nebr. 688, 691, 85 N. W. 897; Krchnavy *v.* State, 43 Nebr. 337, 341, 61 N. W. 628 [*citing* Bishop St. Cr. 320].

North Carolina.— State *v.* Collins, 30 N. C. 407, 412; State *v.* Jarrott, 23 N. C. 76, 87.

Texas.— Skidmore *v.* State, 43 Tex. 93, 97; Wilson *v.* State, 15 Tex. App. 150, 155 [*cited* in Blige *v.* State, 20 Fla. 742, 752, 51 Am. Rep. 628]; Briggs *v.* State, 6 Tex. App. 144, 146 [*citing* Kouns *v.* State, 3 Tex. App. 13, 15; 2 Bishop Cr. L. 335].

Washington.— Matter of Rosner, 5 Wash. 488, 32 Pac. 106.

See also ASSAULT AND BATTERY, 3 Cyc. 1029 note 78.

16. Mazzotte *v.* Territory, (Ariz. 1903) 71 Pac. 911, 912. And see Shadle *v.* State, 34 Tex. 572; Pierce *v.* State, 21 Tex. App. 540, 548, 1 S. W. 463; Hunt *v.* State, 6 Tex. App. 663, 664.

producing death or of inflicting great bodily injury or seriously wounding,[17] which is capable of causing death;[18] with which death may be produced,[19] or with which death may be easily and readily produced;[20] such a weapon or instrument as is made and designated for offensive or defensive purposes, or for the destruction of life, or the infliction of injury.[21] (Deadly Weapon: Assault With, see Assault and Battery; Homicide. Offense of Carrying, see Weapons. Homicide With, see Homicide.)

DE ADMENSURATIONE DOTIS. Writ of admeasurement of dower.[22] (See Admeasurement of Dower; and, generally, Dower.)

DE ADMENSURATIONE PASTURÆ. Writ of admeasurement of pasture.[23] (See Admeasurement of Pasture.)

DEAD SLOW. In navigation, a speed of about four knots an hour,—just enough to give a vessel steerage way.[24]

DEAD TIMBER. Timber which is practically lifeless or mortally hurt.[25]

DE ADVISAMENTO CONSILII NOSTRI. Literally, with, or by, the advice of our council. A phrase used in old writs of summons to parliament.[26]

DE ADVISAMENTO ET CONSENSU CONSILII NOSTRI CONSESSIMUS. By the advice and consent of the council we have granted or conceded.[27]

DEAD WALLS. Defined with reference to a railway company, walls which the company is bound by its charter to erect and keep in repair.[28]

DEAD WEIGHT. A heavy or oppressive burden; a weight or burden that has to be borne without aid or compensatory advantage.[29]

17. McReynolds *v.* State, 4 Tex. App. 327, 328. And see State *v.* Huntley, 91 N. C. 617, 620; Skidmore *v.* State, 43 Tex. 93 [*cited* in Stone *v.* Heggie, (Miss. 1903) 34 So. 146, 147]; Pierce *v.* State, 21 Tex. App. 540, 548 [*cited* in Melton *v.* State, 30 Tex. App. 273, 274, 17 S. W. 257].

18. State *v.* Lynch, 88 Me. 195, 198, 33 Atl. 978.

19. Cosby *v.* Com., 72 S. W. 1089, 1090, 24 Ky. L. Rep. 2050; Long *v.* Com., 35 S. W. 919, 18 Ky. L. Rep. 176.

20. Aeers *v.* U. S., 164 U. S. 388, 391, 17 S. Ct. 91, 41 L. ed. 481.

21. Abbott L. Dict. [*cited* in People *v.* Rego, 36 Hun (N. Y.) 129, 131].

"Deadly weapon" may include: An ax (Dollarhide *v.* U. S., Morr. (Iowa) 308, 310, 39 Am. Dec. 460); a club and a knife (McNary *v.* People, 32 Ill. App. 58, 62); "a gun, sword, large knife, or bar of iron, and any other heavy instrument, by a blow from which a grievous hurt would probably be inflicted" (State *v.* West, 51 N. C. 505, 509); a knife (State *v.* Bowles, 146 Mo. 6, 13, 47 S. W. 892, 69 Am. St. Rep. 598); a pistol (Kennedy *v.* State, 85 Ala. 326, 332, 5 So. 300; State *v.* Bollis, 73 Miss. 57, 58, 19 So. 99); a sledge hammer (Philpot *v.* Com., 86 Ky. 595, 596, 6 S. W. 455, 9 Ky. L. Rep. 737). And see 3 Cyc. 1029.

Deadly weapon as used in a statute embraces any deadly weapon with which a person may be wounded by cutting or stabbing. Com. *v.* Branham, 8 Bush (Ky.) 387, 388. See also Philpot *v.* Com., 86 Ky. 595, 596, 6 S. W. 455, 9 Ky. L. Rep. 737.

Weapons not considered "deadly:" A pocketknife. State *v.* Page, 15 S. D. 613, 616. And see 3 Cyc. 1029 note 79.

22. Burrill L. Dict. [*citing* 3 Blackstone Comm. 383; 1 Stephen Comm. 254].

23. Burrill L. Dict.

24. The Oceanic, 61 Fed. 338, 343.

25. U. S. *v.* Pine River Logging, etc., Co., 89 Fed. 907, 915, 32 C. C. A. 406 [*cited* in U. S. *v.* Bonness, 125 Fed. 485, 487].

26. Burrill L. Dict. [*citing* Crabb Hist. Eng. L. 240].

27. The common form of the King's grants. English L. Dict.

28. Per Talfourd, J., in Arnell *v.* London, etc., R. Co., 12 C. B. 697, 719, 74 E. C. L. 697 [*citing* Barnes *v.* Ward, 9 C. B. 392, 67 E. C. L. 392, 2 C. & K. 661, 61 E. C. L. 661, 14 Jur. 334, 19 L. J. C. P. 195].

29. Century Dict.

Applied to assets of banks.— In a statute reviving the charters of certain banks it was enacted that "with a view of enabling the banks effectually to secure their debts, it shall be lawful for their respective boards of directors to consider the whole of the debts due them on the passage of this act, as forming part of their dead weight." New Orleans City Bank *v.* Barbarin, 6 Rob. (La.) 289, 291.

Applied to cargo of a vessel.— Where a charter-party provided that the ship should "with all convenient speed, after loading dead-weight at Malta," sail, etc., Bramwell, L. J., said: "Those words were inserted for the purpose of protecting the shipowner if the ship went to Malta instead of going direct to a Spanish port, and loaded dead-weight there. The fair construction of the document is that the ship might take on board any sort of dead-weight; there is no restriction." Brett, L. J., after alluding to the fact that the ship was under contract to load military stores which were "dead-weight," said: "We are, therefore, entitled to notice that the word 'dead-weight,' which includes these military stores, was put in with a knowledge of the fact that such stores were to be shipped at

DEAD-WOOD.[30] A wooden block fastened to the end of a railroad car;[31] the fixture or part of the respective cars which comes in contact when coupling is done.[32] (See DEAD BLOCK; and, generally, RAILROADS.)

DE ÆTATE PROBANDA. Writ of (about) proving age.[33]

DEAF.[34] Defective in ability to perceive or discriminate sounds; dull of hearing.[35] (Deaf: Persons — As Witnesses, see WITNESSES; Asylums For, see ASYLUMS; Capacity and Status of in General, see INSANE PERSONS; Duty of Carrier Toward, see CARRIERS; Negligence: Causing Injury to, see NEGLIGENCE; RAILROADS.)

DEAFNESS. As defined by statute, inability to hear ordinary conversation.[36]

DEAL. As a noun, as applied to intercourse *inter partes*, any transaction of any kind between them.[37] As a verb, to traffick; to transact business; to trade;[38] to deal with someone, and that someone else other than the seller is the buyer.[39]

Malta." Cunningham *v.* Dunn, 3 C. P. D. 443, 3 Aspin. 359, 48 L. J. C. P. 62, 63, 38 L. T. Rep. N. S. 631.

30. "Double dead-woods."— In Louisville, etc., R. Co. *v.* Boland, 96 Ala. 626, 627, 11 So. 667, 18 L. R. A. 260, the court said: "These 'double-deadwoods' or 'buffers' are horizontal timbers at the end of the car, projecting, one on each side of the drawhead, the latter extending three or four inches beyond the deadwoods. In coupling, the drawhead yields to the impact of the two cars, and the deadwoods or buffers of the opposing cars coming together arrest the force of the blow."

"Double dead-wood" distinguished from "single dead-wood."— In Michigan Cent. R. Co. *v.* Smithson, 45 Mich. 212, 215, 7 N. W. 791, the court said: "A car of this construction has a horizontal timber at the end with projecting blocks bolted to each end of the timber, and the draw-bar for coupling extends but little beyond the faces of these blocks. In coupling, the blocks come together and receive the blow of the cars. The coupling-pin is dropped between the blocks from above. Distinguished from the car with double dead-woods is that known as the single dead-wood, which dispenses with the projecting blocks, and leaves the draw-bar to receive the concussion when the cars are coupled."

31. Fay *v.* Minneapolis, etc., R. Co., 30 Minn. 231, 232, 15 N. W. 241.

32. Grannis *v.* Chicago, etc., R. Co., 81 Iowa 444, 446, 46 N. W. 1067.

33. An old writ which lay to the escheator or sheriff of a county, to summon a jury to inquire whether the heir of a tenant *in capite*, claiming his estate on the ground of full age, was, in fact, of age or not. Burrill L. Dict.

34. "A man who is born deaf, dumb and blind, is looked upon by the law as in the same state with an idiot; he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas." 1 Blackstone Comm. 304.

35. Century Dict.

The expression "deaf," as defined by statute (56 & 57 Vict. c. 42, § 15) means too deaf to be taught in a class of hearing children in an elementary school.

36. Cal. Pol. Code (1899), § 2241.

37. Nelson *v.* State, 111 Wis. 394, 399, 87 N. W. 235, 87 Am. St. Rep. 881 [*citing* Webster Dict.].

"The plain meaning of the word 'deal' unquestionably extends to buying as well as selling; there must be two parties to what is called a 'deal;' a man cannot deal with himself; there must be some one else for him to deal with." McKenzie *v.* Day, [1893] 1 Q. B. 289, 291, 17 Cox C. C. 604, 57 J. P. 216, 62 L. J. M. C. 49, 68 L. T. Rep. N. S. 345, 5 Reports 161, 41 Wkly. Rep. 384.

38. Vernon *v.* Manhattan Co., 17 Wend. (N. Y.) 524, 526 [*quoting* Johnson Quarto Dict.], where it is said: "And the illustration given by Johnson, supposes that this may be a third person: 'It is generally better to deal by speech than by letter; and by a man himself than the mediation of a third person.'"

"To deal in the selling of a thing is to traffic, to trade in the selling of it, to make a business of it. A single act of selling, then, will not constitute a person a merchant; he must deal in the business to be one." State *v.* Martin, 5 Mo. 361, 363.

"To deal in tickets."— In State *v.* Ray, 109 N. C. 736, 738, 14 S. E. 83, 14 L. R. A. 529, the court in construing a statute regulating the sale of railroad tickets said: "The phrases, 'to sell tickets, to deal in tickets,' imply, in business parlance, the business of selling or buying and selling such tickets; they imply not particulars — simply a sale — but a multiplicity of such sales in the sense of a business."

39. McKenzie *v.* Day, [1893] 1 Q. B. 289, 17 Cox C. C. 604, 57 J. P. 216, 62 L. J. M. C. 49, 68 L. T. Rep. N. S. 345, 346, 5 Reports 161, 41 Wkly. Rep. 384, where Lord Coleridge, C. J., said: "I am of opinion, and hold, that 'dealing' unquestionably extends to buying as well as selling, and it means a buyer as well as a seller."

"To deal in metals."— In Com. *v.* Hood, 183 Mass. 196, 198, 66 N. E. 722, it is said: "The keeper of every shop where old metals are bought by him deals there in such metals, and each of the defendants dealt in old gold and silver articles by purchasing them at their shops and sending them away to be refined. Every such purchase was a 'deal,' and the defendants were traffickers or dealers in old gold and silver."

DEALER.[40] A person who buys to sell again, and not one who buys to keep, or makes to sell;[41] one who trades, buys or sells;[42] one whose business it is to buy and sell;[43] one who buys to sell to others at a profit; one who acts between man and man, to have transactions of any kind with;[44] one who distributes;[45] a trader;[46] a keeper;[47] one who makes successive sales as a business.[48] A term which implies an habitual course of dealing.[49] (Dealer: In Liquors, see INTOXICATING LIQUORS. License and Taxation of, see LICENSES.)

40. **Distinguished from "merchant."**— In Kansas City *v.* Ferd Heim Brewing Co., 98 Mo. App. 590, 594, 73 S. W. 302, the court in construing the term "merchant" as used in a city charter and in a statute, said: "It does not follow that because a merchant is a dealer, a dealer is also a merchant. A merchant must have a store, stand, or other place where he sells his goods. A dealer need not have such store, stand, or place to keep and sell his goods. He may buy and sell without such aids to his business. A merchant, under the definition, is not required to be a purchaser; but the dealer, at common law, is both a buyer and seller."

"Dealer and chapman" see *Ex p.* Herbert, 2 Ves. & B. 399, 400.

"Dealer in fresh meat" see State *v.* Carter, 129 N. C. 560, 562, 40 S. E. 11.

"Dealer in live stock" in reference to a privilege tax see Saunders *v.* Russell, 78 Tenn. 293, 297.

"Dealer in second-hand goods" does not embrace a dealer in second-hand books. Eastman *v.* Chicago, 79 Ill. 178, 179.

41. New Orleans *v.* Le Blanc, 34 La. Ann. 596, 597 (where it is said: "He stands between the producer and the consumer, and depends for his profit, not upon the labor which he bestows on his commodities, but upon the skill and foresight with which he watches the markets"); Com. *v.* Gormly, 173 Pa. St. 586, 588, 34 Atl. 282; Com. *v.* Campbell, 33 Pa. St. 380, 381; Norris *v.* Com., 27 Pa. St. 494, 495 [*quoted* in Com. *v.* Robb, 14 Pa. Super. Ct. 597, 602]; Com. *v.* Davis, 11 Pa. Dist. 427; Com. *v.* Hiller, 7 Pa. Dist. 471, 472; Com. *v.* Brinton, 3 Pa. Dist. 783, 784; Barton *v.* Morris, 1 Wkly. Notes Cas. (Pa.) 543, 544; Taylor *v.* Vincent, 80 Tenn. 282, 285, 47 Am. Rep. 338; Egan *v.* State, (Tex. Cr. App. 1902) 68 S. W. 273 [*quoting* Bouvier L. Dict.].

42. Com. *v.* Campbell, 33 Pa. St. 380, 381; Berks County *v.* Bertolet, 13 Pa. St. 522, 523 [*quoted* in Com. *v.* Brinton, 3 Pa. Dist. 783, 784]. See also Quinn *v.* Dimond, 72 Fed. 993, 999.

43. Barton *v.* Morris, 1 Wkly. Notes Cas. (Pa.) 543, 544, where it is said: "It is a term of trade having as distinct and well known signification as that of merchant, mariner or broker. He is the middleman, who stands between the producer and consumer; his profit is not derived from selling the produce of his farm or his factory, but from his skill in knowing when to buy and how to sell the products of others." But *compare* Rex *v.* Excise Com'rs, 2 T. R. 381, 386, where Buller, J., said: "What is meant by a dealer in this act of parliament? I am of opinion that according to the true construction of it a buyer is a dealer for this purpose. This bears no analogy to the case of bankrupts within the bankrupt laws; for there the words of the statutes are 'a person who seeks his living by buying and selling;' therefore to constitute a trader within those acts there must be both a buying and selling. But here the words are in the disjunctive, 'deal in or sell;' and we cannot vary the meaning of them by construing them to be buying and selling; dealing must mean something which does not include selling."

Applied to a dealer in wine.— Where it is enacted "that no person shall deal 'in or sell foreign wine by wholesale, without first taking out a licence for that purpose,'" Ashurst, J., said: "For the purposes of this act I think a man does commence to be a dealer from the moment when he buys the wine with an intention to sell it again." Rex *v.* Excise Com'rs, 2 T. R. 381, 385.

44. Delaware, etc., Canal Co.'s Case, 8 Pa. Co. Ct. 496, 497.

45. Per Alderson, B., in Allen *v.* Sharp, 2 Exch. 352, 357, 17 L. J. Exch. 209.

46. State *v.* Barnes, 126 N. C. 1063, 1064, 35 S. E. 605, where it is said: "Our Revenue Acts appear to have used the words 'dealer' and 'trader' as synonymous, using sometimes one word and sometimes the other, and they have been so held by this Court in State *v.* Yearby, 82 N. C. 561, 33 Am. Rep. 694."

47. Hofheintz *v.* State, (Tex. Cr. App. 1903) 74 S. W. 310, 311, where it is said: ". . . the words 'dealer' and 'keeper' are synonymous, and, in the manner here used, mean the same thing."

48. Overall *v.* Bezeau, 37 Mich. 506.

One sale will not constitute the vender a "dealer." Goodwin *v.* Clark, 65 Me. 280, 284.

A practising physician who "keeps on hand intoxicating drinks or liquors for the purpose of sale or profit" may be deemed a "dealer" in such drinks. State *v.* McBrayer, 98 N. C. 619, 621, 2 S. E. 755. And see Fincannon *v.* State, 93 Ga. 418, 21 S. E. 53; State *v.* Dow, 21 Vt. 484, 487, where it is said: "In order to constitute one a dealer, so as to subject him to the penalty imposed by the statute [in reference to the sale of spirituous liquors] . . . it is not necessary, that he should actually do the business in person, or even that it should be done in his presence, or by his express command."

49. State *v.* Barnes, 126 N. C. 1063, 1064, 35 S. E. 605.

"Dealing in goods, . . . implies not only selling but buying to sell as an avocation or

DEALER IN PISTOLS. A person engaged in the business of buying and selling pistols.[50]

DEALER IN TOBACCO. A person whose business, occupation, employment or vocation, is to deal in tobacco; in other words, a tobacconist.[51]

DEALER'S TALK. Commendatory expressions, such as men habitually use to induce others to enter into a bargain.[52] (See, generally, FRAUD; SALES.)

DEAL IN. To buy and sell for the purpose of gain.[53]

DEAL IN BILLS. As applied to banking, to act between two persons, to intervene, to have to do with, in transactions concerning bills of exchange.[54] (See, generally, BANKS AND BANKING.)

DEALING.[55] Distributing;[56] trading.[57] (See DEAL.)

business." Saunders *v.* Russell, 78 Tenn. 293, 297.

50. Graham *v.* State, 71 Miss. 208, 209, 13 So. 883.

51. Carter *v.* State, 44 Ala. 29, 30, where it is said: "It is not every one that sells tobacco that is required to take out a license, but only 'dealers in tobacco.'" See also Goodwin *v.* Clark, 65 Me. 280, 284; Johnson *v.* Hudson, 11 East 180, 181, 10 Rev. Rep. 465.

52. Tiffany Sales 114. See also Kimball *v.* Bangs, 144 Mass. 321, 324, 11 N. E. 113 (where it is said: "We are of opinion that all the representations alleged in the declaration, which are material, fall within what is known as 'dealer's talk,' and are not sufficient foundation for an action of deceit. The law recognizes the fact that men will naturally overstate the value and qualities of the articles which they have to sell"); Jackson *v.* Collins, 39 Mich. 557, 561 (where it is said: "How far the talk which dealers and purchasers exchange on such occasions should be treated as banter or held to be serious must usually be rather matter of fact than of law. A very large allowance must usually be made for customary exaggerations").

53. Bates *v.* State Bank, 2 Ala. 451, 466, where it is said: "Or it might, without any strained construction, be construed to mean, the taking or receiving of goods, wares or merchandize, to be sold for the owner for a profit, or commission."

54. Montgomery Branch State Bank *v.* Knox, 1 Ala. 148, 151, where it is said: "This power necessarily extends to all transactions with bills of exchange, which are in themselves lawful and considered by the Bank as expedient to enable it to transact its business or increase its profits."

55. "Course of trade and dealing" in respect to commercial paper see Harwood *v.* Lomas, 11 East 127, 128.

"Dealing" or "transaction" in reference to goods under bankruptcy act see Brewin *v.* Short, 5 E. & B. 227, 238, 1 Jur. N. S. 798, 24 L. J. Q. B. 297, 3 Wkly. Rep. 514, 85 E. C. L. 227.

What constitutes "dealing" or "carrying on business" see State *v.* Ray, 109 N. C. 736, 738, 14 S. E. 83, 14 L. R. A. 529 note.

A garnishee order, attaching a debt due to a bankrupt, is not a 'dealing' with the bankrupt within Bankr. Act (1869), § 94. *Ex p.* Pillers, 17 Ch. D. 653, 664, 50 L. J. Ch. 691, 44 L. T. Rep. N. S. 691, 29 Wkly. Rep. 575.

56. Allen *v.* Sharp, 2 Exch. 352, 357, 17 L. J. Exch. 209.

Involves two parties.—In McKenzie *v.* Day, [1893] 1 Q. B. 289, 17 Cox C. C. 604, 57 J. P. 216, 62 L. J. M. C. 49, 68 L. T. Rep. N. S. 345, 5 Reports 161, 41 Wkly. Rep. 384, Lord Coleridge, C. J., in construing a statute in reference to "illegally dealing" in intoxicating liquor said: "The plain meaning of the section is to include the buyer as well as the seller of intoxicating liquor; you must have two parties to a 'dealing.'" In Nelson *v.* State, 111 Wis. 394, 399, 87 N. W. 235, 87 Am. St. Rep. 881 [*citing* Webster Dict.] it is said: "The act of setting out liquor for another to drink at the request of a third person is a dealing with such other as clearly as giving or selling it to him."

57. Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 352, 5 L. ed. 631, where it is said: "The words dealing and trading, are used as equivalent in meaning, and they are connected with 'goods, wares, merchandises, and commodities,' which words, in mercantile language, are always used with reference to corporeal substances, and never to mere choses in action."

Includes business of hawker, pedler, or petty chapman. Merriam *v.* Langdon, 10 Conn. 460, 471.

Used in reference to a partnership.—In Vernon *v.* Manhattan Co., 22 Wend. (N. Y.) 183, 190 [*cited* in Rose *v.* Coffield, 53 Md. 18, 26, 36 Am. Rep. 389; Austin *v.* Holland, 69 N. Y. 571, 574, 25 Am. Rep. 246; Clapp *v.* Rogers, 12 N. Y. 283, 286; Bouker Contracting Co. *v.* Scribner, 52 N. Y. App. Div. 505, 510, 65 N. Y. Suppl. 444], the chancellor said that the word dealing, when used in reference to the notice of a withdrawal of a partner, was a general term "to convey the idea that the person who is entitled to actual notice of the dissolution, must be one who has had business relations with the firm, by which a credit is raised upon the faith of the copartnership." And see Foster *v.* Rison, 17 Gratt. (Va.) 321, 334. See also Jansen *v.* Grimshaw, 26 Ill. App. 287, 292 [*citing* Meyer *v.* Krohn, 114 Ill. 574, 585, 2 N. E. 495], where it is said: "We understand that the 'dealings' . . . need not be confined to any particular sort of transaction but may include any transaction within the ordinary scope of the business of the firm, in the course of which one who deals with the firm is induced to act on the faith

DEALING IN FUTURES. Wagering contracts in regard to the future market value of stocks;[58] a phrase which has acquired the signification of a mere speculation upon chances, where the grain, cotton or stocks dealt in exists only in imagination and where no delivery is contemplated, but the parties expect to settle upon the difference in the market.[59] (See, generally, GAMING.)

DEALING IN GRAIN. Dealing in grain on hand for present delivery for cash or on credit, or dealing in futures by means of contracts of sale or purchase for purposes of speculating upon the course of the market.[60] (See DEALING IN FUTURES.)

DEALING TOGETHER AND INDEBTED TO EACH OTHER. Mutual debts.[61]

DE ALLOCATIONE FACIENDA. Writ for making an allowance.[62]

DE ALTO ET BASSO. Literally, of high and low. A phrase anciently used to denote the absolute submission of all differences to arbitration.[63] (See, generally, ARBITRATION AND AWARD.)

DEAN. An ecclesiastical dignitary next in rank to the bishop, and head of the chapter of a cathedral.[64] (See BISHOP; and, generally, RELIGIOUS SOCIETIES.)

DE ANNO BISSEXTILI. Literally, of the bissextile or leap year. The title of a statute passed in the 21st year of Henry III.[65]

DE ANNUA PENSIONE. Writ of annual pension.[66]

DE ANNUO REDDITU. A writ of annuity.[67]

DEAN OF ARCHES. The chief judicial officer or "official principal" of the Archbishop of Canterbury.[68] (See COURT OF ARCHES.)

DE APOSTATA CAPIENDO. Writ for taking an apostate.[69]

DE ARRESTANDIS BONIS NE DISSIPENTUR. An old writ which lay to seize goods in the hands of a party during the pendency of a suit, to prevent their being made away with.[70] (See, generally, ATTACHMENT.)

DE ARRESTANDO IPSUM QUI PECUNIAM RECEPIT. A writ which lay for the arrest of one who had taken the king's money to serve in the war, and hid himself to escape going.[71]

and belief, well founded, that certain individuals compose the firm and are bound by the contract made in the firm name within the scope of its ordinary business."

58. Maurer *v.* King, 127 Cal. 114, 118, 59 Pac. 290, where it is said: "As explained in Sheehy *v.* Shinn [103 Cal. 325, 37 Pac. 393], these contracts take various forms, one of them being margin sales. Others are variously called by brokers 'puts,' 'calls,' 'options,' etc. In all cases the customer (if the deal is with a broker) pays and risks something for the purpose of securing a profit from an expected rise in the market value of stocks. Often no actual purchase is contemplated, but settlements are made according to market rates."

59. Fortenbury *v.* State, 47 Ark. 188, 192, 14 S. W. 462.

60. In Irwin *v.* Williar, 110 U. S. 499, 506, 4 S. Ct. 160, 28 L. ed. 225, the court said: "'Dealing in grain' is not a technical phrase from which a court can properly infer, as matter of law, authority to bind the firm in every case irrespective of its circumstances; and if, by usage, it has acquired a fixed and definite meaning, as a word of art in trade, that is matter of fact to be established by proof and found by a jury. It may mean one thing at Brazil, in Indiana, another at Baltimore. It may not be the same when standing alone with what it is in connection with a flouring-mill in a small interior town."

61. Pate *v.* Gray, 18 Fed. Cas. No. 10,794*a*, Hempst. 155 [*citing* Gordon *v.* Bowne, 2 Johns. (N. Y.) 150, 155], where it is said: "The words 'mutual debts' in the English statute of 2 Geo. II. c. 22, § 13, and 'dealing together' and being 'indebted to each other,' in the statute of New York, are considered as expressions of the same import."

62. The writ was directed to the lord treasurer and barons of the exchequer. Burrill L. Dict.

It was directed to the treasurer and barons of the exchequer. Bouvier L. Dict.

63. Burrill L. Dict. [*citing* Cowell Inter.; 2 Reeves Hist. Eng. L. 96].

64. Abbott L. Dict. And see 35 Vict. c. 8, § 2.

65. It is nothing more than a sort of writ or direction to the justices of the bench, instructing them how the extraordinary day in the leap year was to be reckoned in cases where persons had a day to appear at the distance of a year. Burrill L. Dict. [*citing* 1 Reeves Hist. Eng. L. 266].

66. Burrill L. Dict.

67. Burrill L. Dict. [*citing* 2 Reeves Hist. Eng. L. 258].

68. Sweet L. Dict., where it is said: "He is the judge of the Court of Arches, and is not really a dean in the modern sense of that word."

69. Burrill L. Dict. [*citing* Fitzherbert Nat. Brev. 233, 234].

70. Burrill L. Dict.

71. Black L. Dict.

DE ASPORTATIS RELIGIOSORUM. The title of 35 Edw. I, passed to check the abuses of clerical possessions.[72]

DE ASSISA PROROGANDA. A writ to put off an assize issuing to the justices where one of the parties is engaged in the service of the king.[73]

72. Black L. Dict. [*citing* 2 Inst. 580, 780, 2 Reeves Hist. Eng. L. 157].

73. Bouvier L. Dict.

DEATH

By Joseph Walker Magrath and Frank W. Jones

CROSS-REFERENCES

For Matters Relating to:

Abatement of:
Action by Death of Party, see ABATEMENT AND REVIVAL; ADMIRALTY.
Appeal by Death of Party, see APPEAL AND ERROR; CRIMINAL LAW.
Bastardy Proceeding by Death of Bastard, see BASTARDS.
Accidental Injuries Resulting in Death, see ACCIDENT INSURANCE.
Actions For Death Caused by Sale of Liquor, see INTOXICATING LIQUORS.
Administration of Estates of Deceased Persons, see EXECUTORS AND ADMINISTRATORS.
Alien's Right of Action For Death, see ALIENS.
Arrest of Defendant in Action For Death, see ARREST.
Civil Death, see CIVIL DEATH; CONVICTS.
Concealment of Death of Child, see CONCEALMENT OF BIRTH OR DEATH.
Death of:
Accused, see CRIMINAL LAW.
Administrator, see EXECUTORS AND ADMINISTRATORS.
Annuitant, see ANNUITIES.
Arbitrator, see ARBITRATION AND AWARD.
Assignee For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS,
Assignor, see ASSIGNMENTS; ASSIGNMENTS FOR BENEFIT OF CREDITORS.
Attachment Debtor, see ATTACHMENT.
Attorney, see ATTORNEY AND CLIENT.
Bankrupt, see BANKRUPTCY.
Client, see AMICUS CURIÆ; ATTORNEY AND CLIENT.
Co-Maker of Note, see COMMERCIAL PAPER.
Corporation, see CORPORATIONS.
Curator Ad Hoc, see ABSENTEES.
Director of Corporation, see CORPORATIONS.
Drawer of Check, see BANKS AND BANKING.
Executor, see EXECUTORS AND ADMINISTRATORS.
Grantee Before Probate of Deed, see ACKNOWLEDGMENTS.
Grantor Before Delivery of Deed, see DEEDS.
Guarantor, see GUARANTY.
Judgment Creditor or Debtor, see EXECUTIONS; JUDGMENTS.
Maker of Note, see COMMERCIAL PAPER.
Master or Parent of Apprentice, see APPRENTICES.
Member of Building and Loan Society, see BUILDING AND LOAN SOCIETIES.
Obligor in Bond, see BONDS.
Partner:
Generally, see PARTNERSHIP.
In Law Firm, see ATTORNEY AND CLIENT.
Party Entitled to Increased Costs, see COSTS.

For Matters Relating to — (*continued*)
Death of — (*continued*)
Party to:
Appeal, see Appeal and Error; Criminal Law.
Arbitration Proceeding, see Arbitration and Award.
Bastardy Proceeding, see Bastards.
Party to Action as Ground For:
Abatement, see Abatement and Revival; Admiralty.
Continuance, see Continuances in Civil Cases.
Payee of Note, see Commercial Paper.
Principal as:
Exoneration of Bail, see Bail.
Revocation of Appointment of Agent, see Principal and Agent.
Stock-Holder, see Corporations.
Surety, see Principal and Surety.
Trustee:
Generally, see Trusts.
In Bankruptcy, see Bankruptcy.
Delivery of Note After Death of Maker, see Commercial Paper.
Dissolution of:
Attachment by Death of Debtor, see Attachment.
Partnership by Death of Partner, see Partnership.
Distress For Rent After Death of Tenant, see Landlord and Tenant.
Insurance Against Death, see Accident Insurance; Life Insurance.
Issuance of Execution After Death of Debtor, see Executions.
Jurisdiction of Admiralty in Actions For Death, see Admiralty.
Punishment by Death, see Criminal Law.
Revival of Action on Death of Party, see Abatement and Revival.
Revocation of Submission to Arbitration by Death of:
Arbitrator, see Arbitration and Award.
Party, see Arbitration and Award.
Suicide, see Accident Insurance; Life Insurance; Suicide.
Survival of Action on Death of Party, see Abatement and Revival.
Suspension of Running of Statute of Limitations by Death; see Adverse Possession; Limitations of Actions.

I. Definition.

Death has been defined as the termination of life.[1]

II. Evidence of Death and Survivorship.[2]

A. As to Death — 1. Presumption of Continuance of Life — a. Rule Stated. As a general rule, when a person is shown or appears to have been living at one time, the presumption is that he is still alive,[3] at least for such time as is not

1. Evans *v.* People, 49 N. Y. 86, 90, where it is said: "And death cannot be caused when there is no life."
"Civil death" see 7 Cyc. 154.
"Death by accident" is defined to be death from any unexpected event which happens as by chance, or which does not take place according to the usual course of things. Lovelace *v.* Travelers' Protective Assoc., 126 Mo. 104, 111, 28 S. W. 877, 47 Am. St. Rep. 638, 30 L. R. A. 209; Horsfall *v.* Pacific Mut. L. Ins. Co., 32 Wash. 132, 135, 72 Pac. 1028 [*citing* 1 Cyc. 248]. See, generally, Accident Insurance, 1 Cyc. 230.

2. See also Descent and Distribution.

3. *District of Columbia.*— Posey *v.* Hanson, 10 App. Cas. 496.
Illinois.— Lowe *v.* Foulke, 103 Ill. 58; Martin *v.* Chicago, etc., R. Co., 92 Ill. App. 133.
Massachusetts.— Hyde Park *v.* Canton, 130 Mass. 505.
Minnesota.— State *v.* Plym, 43 Minn. 385, 45 N. W. 848.
New Hampshire.— Emerson *v.* White, 29 N. H. 482; Smith *v.* Knowlton, 11 N. H. 191.
New York.— Augustus *v.* Graves, 9 Barb. 595. See also Hornberger *v.* Miller, 28 N. Y.

contrary to the laws of nature in respect to the duration of human life.[4] This rule is not confined in its application to any particular class of individuals, but applies to children[5] and persons of advanced age[6] as well as to persons in the prime of life, and to persons in bad health as well as to those whose health is good.[7]

b. A Presumption of Fact. The presumption of continuance of life is at most merely a presumption of fact which is subject to be controlled by facts and circumstances and other legitimate evidence,[8] and it is a presumption by no means of equal strength at all times and under all circumstances.[9]

c. Presumption Rebuttable. The presumption of continuance of life may be overcome by proof of facts and circumstances raising a contradictory presumption.[10]

d. Conflicting Presumptions. In case the presumption of continuance of life conflicts with the presumption of innocence the presumption of innocence must prevail over that of continuance of life;[11] as for instance when a person whose husband or wife has not been absent and unheard-of for a sufficient time to over-

App. Div. 199, 50 N. Y. Suppl. 1079 [*affirmed* in 163 N. Y. 578, 57 N. E. 1112].

Pennsylvania.— Miller *v.* Beates, 3 Serg. & R. 490, 8 Am. Dec. 658.

Texas.— Turner *v.* Scalock, 21 Tex. Civ. App. 594, 597, 54 S. W. 358, where the court said: "Mere lapse of time since the person was last heard from is not sufficient to prove death in the absence of a statute."

England.— Reg. *v.* Willshire, 6 Q. B. D. 366, 14 Cox C. C. 541, 45 J. P. 375, 50 L. J. M. C. 57, 44 L. T. Rep. N. S. 222, 29 Wkly. Rep. 473; *In re* Phene, L. R. 5 Ch. 139, 39 L. J. Ch. 316, 22 L. T. Rep. N. S. 111, 18 Wkly. Rep. 303; *Re* Tindall, 30 Beav. 151; Wilson *v.* Hodges, 2 East 312, 6 Rev. Rep. 427; Pennefather *v.* Pennefather, Ir. R. 6 Eq. 171.

See 15 Cent. Dig. tit. "Death," § 1.

This presumption has been indulged after a lapse of two years (Strœbe *v.* Fehl, 22 Wis. 337), five years (Chicago, etc., R. Co. *v.* Keegan, 185 Ill. 70, 56 N. E. 1088), seventeen years (Lee *v.* Hoye, 1 Gill (Md.) 188), twenty-two years (Shepherdson's Estate, 3 Del. Co. (Pa.) 376; Hall's Deposition, 11 Fed. Cas. No. 5,924, 1 Wall. Jr. 85), twenty-five years (Willis *v.* Ruddock Cypress Co., 108 La. 255, 32 So. 386), thirty years (Dunn *v.* Travis, 56 N. Y. App. Div. 317, 67 N. Y. Suppl. 743; Dworsky *v.* Arndstein, 29 N. Y. App. Div. 274, 51 N. Y. Suppl. 597), and even fifty years, where the persons were young when last heard from (Faulkner *v.* Williman, 16 S. W. 352, 13 Ky. L. Rep. 106).

4. Posey *v.* Hanson, 10 App. Cas. (D. C.) 496; Sprigg *v.* Moale, 28 Md. 497, 92 Am. Dec. 698.

A lapse of eighty years since the acknowledgment of a deed will raise a presumption of the death of the grantor. Young *v.* Shulenberg, 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730 [*affirming* 35 N. Y. App. Div. 39, 54 N. Y. Suppl. 419].

Presumption of life up to one hundred years.— Under both the common and the civil law, a person was presumed to be living for a period of one hundred years from the time of his birth, that being the longest limit of an ordinary life. Matter of Bd. of Education, 173 N. Y. 321, 66 N. E. 11. This rule still prevails in Louisiana, where a person will not be presumed to have died under the age of one hundred years (Willet *v.* Andrews, 51 La. Ann. 486, 25 So. 391; Martinez *v.* Vives, 32 La. Ann. 305; Owens *v.* Mitchell, 5 Mart. N. S. (La.) 667; Sassman *v.* Aime, 9 Mart. (La.) 257; Hayes *v.* Berwick, 2 Mart. (La.) 138, 5 Am. Dec. 727), although the lapse of a century since a person's birth raises a presumption of his death (Miller *v.* McElwee, 12 La. Ann. 476).

In Maryland it has been held that a person will not be presumed to have died under the age of ninety years. Hammond *v.* Inloes, 4 Md. 138.

5. Lewis *v.* People, 87 Ill. App. 588; Manley *v.* Pattison, 73 Miss. 417, 19 So. 236, 55 Am. St. Rep. 481.

6. Watson *v.* Tindal, 24 Ga. 494, 71 Am. Dec. 742; Hall's Deposition, 11 Fed. Cas. No. 5,924, 1 Wall. Jr. 85.

7. Hall's Deposition, 11 Fed. Cas. No. 5,924, 1 Wall. Jr. 85.

8. Hyde Park *v.* Canton, 130 Mass. 505; Davie *v.* Briggs, 97 U. S. 628, 24 L. ed. 1086; *In re* Phene, L. R. 5 Ch. 139, 39 L. J. Ch. 316, 22 L. T. Rep. N. S. 111, 18 Wkly. Rep. 303.

9. Hyde Park *v.* Canton, 130 Mass. 505.

10. Reedy *v.* Millizen, 155 Ill. 636, 40 N. E. 1028.

11. *California.*—Ashbury *v.* Sanders, 8 Cal. 62, 88 Am. Dec. 300.

Illinois.— Reedy *v.* Mullizen, 155 Ill. 636, 40 N. E. 1028.

New Hampshire.— Smith *v.* Knowlton, 11 N. H. 191.

South Carolina.— Chapman *v.* Cooper, 5 Rich. 452.

United States.— Montgomery *v.* Bevans, 17 Fed. Cas. No. 9,735, 1 Sawy. 653.

England.— Rex *v.* Twyning, 2 B. & Ald. 386, 20 Rev. Rep. 480.

But *compare* Hyde Park *v.* Canton, 130 Mass. 505.

come the presumption of life marries again, and is thus guilty of bigamy if the former spouse is alive.[12]

2. Presumption of Death Arising From Absence — a. General Rule. Opposed to the presumption of the continuance of life, and of sufficient force to overcome it,[13] is the presumption of death which arises in the case of a person who has been absent from his last or usual place of residence and from whom no tidings have been received for a considerable length of time.[14]

12. Rex *v.* Twyning, 2 B. & Ald. 386, 20 Rev. Rep. 480. See also Smith *v.* Knowlton, 11 N. H. 191; Chapman *v.* Cooper, 5 Rich. (S. C.) 452.

The correctness of the application of this rule in Rex *v.* Twyning, 2 B. & Ald. 386, 20 Rev. Rep. 480, to a case where a wife married again after her husband had been absent a little over twelve months was questioned in Rex *v.* Harborne, 2 A. & E. 540, 1 Hurl. & W. 36, 4 L. J. M. C. 49, 4 N. & M. 341, 29 E. C. L. 255; but the principal objection seems to have been that in the former case the rule was laid down as a strict rule of law and not a *presumptio juris*, good until rebutted.

13. Smith *v.* Knowlton, 11 N. H. 191. See also cases cited *infra*, note 14; and also II, A, 2, b.

14. *Arkansas.*— Matthews *v.* Simmons, 49 Ark. 468, 5 S. W. 797, where the fact that the person was reported to have died in 1864 or 1865, away from home and family and was never since heard of, was held sufficient to raise a presumption that he was dead in 1887.

California.— Garwood *v.* Hastings, 38 Cal. 216, seventeen years. Sprague, J., dissented on the ground that, as the testimony of the wife that she had not heard from her husband for seventeen years, during which she was absent from his last known place of residence, living under various assumed names, and never bearing that of her husband, suggested the probability that she had endeavored to conceal herself from him, it was insufficient to justify the presumption of his death.

Delaware.— Doe *v.* Stockley, 6 Houst. 447, forty-five or fifty years.

District of Columbia.— Baden *v.* McKenny, 7 Mackey 268, eleven years.

Indiana.— Baugh *v.* Boles, 66 Ind. 376, over fifteen years.

Kentucky.— Louisville Bank *v.* Public School Trustees, 83 Ky. 219 (over twenty years); Taylor *v.* Reisch, 49 S. W. 782, 20 Ky. L. Rep. 1599 (twenty years); Gill *v.* De Witt, 7 Ky. L. Rep. 605 (nine years).

Louisiana.— Jamison *v.* Smith, 35 La. Ann. 609, where the person left his home to join one of the armies of the Civil war and was never thereafter heard from for twenty years.

Maine.— Burleigh *v.* Mullen, 95 Me. 423, 50 Atl. 47 (nine years); Chapman *v.* Kimball, 83 Me. 389, 22 Atl. 254 (over twenty years, the person having been in bad health when last heard from and no trace of him being discovered after inquiry and search).

Massachusetts.— Bowditch *v.* Jordan, 131 Mass. 321, holding that the fact that neither a vessel, in which a person went to sea forty years previously, nor the person has been heard from since will warrant the inference that such person is dead.

Michigan.— Bailey *v.* Bailey, 36 Mich. 181, twenty years.

Mississippi.— Learned *v.* Corley, 43 Miss. 687, holding that where it was shown that a person sailed on a vessel bound for a foreign port and about five days thereafter there was a violent storm at sea, and neither the vessel nor any person on board thereof had been heard of since for a period of more than ten years, the legal presumption of such person's death was fully established.

New Jersey.— Osborne *v.* Allen, 26 N. J. L. 388, sixteen years.

New York.— Sheldon *v.* Ferris, 45 Barb. 124 (eight years); Matter of Barr, 38 Misc. 355, 77 N. Y. Suppl. 935; Karstens *v.* Karstens, 20 Misc. 247, 45 N. Y. Suppl. 966 (fourteen years); King *v.* Paddock, 18 Johns. 141 (holding that where a person sailed from New York for South America, and neither he nor his vessel was heard of afterward, a finding that he is dead is warranted after twelve years).

Ohio.— Youngs *v.* Haffner, 36 Ohio St. 232.

Pennsylvania.— Holmes *v.* Johnson, 42 Pa. St. 159 (holding that where a person had gone to sea and had not been heard of for thirty-eight years, except by a rumor about twenty years before, a legal presumption was raised that he was dead); Innis *v.* Campbell, 1 Rawle 373 (holding a mere lapse of twenty-four years sufficient to raise a presumption of death without proof of inquiry or other circumstances); Miller *v.* Beates, 3 Serg. & R. 490, 8 Am. Dec. 658 (fourteen years and nine months).

Tennessee.— Shown *v.* McMackin, 9 Lea 601, 42 Am. Rep. 680 (over twenty-five years); Ferrell *v.* Grigsby, (Ch. App. 1899) 51 S. W. 114 (twenty years).

England.— *In re* Benjamin, [1902] 1 Ch. 723, 71 L. J. Ch. 319, 86 L. T. Rep. N. S. 387 (eight years); McMahon *v.* McElroy, Ir. R. 5 Eq. 1.

Canada.— Burns *v.* Canada Co., 7 Grant Ch. (U. C.) 587, over twenty-five years.

See 15 Cent. Dig. tit. "Death," § 2; and *infra*, A, 2, b, (I).

A slave who has been carried off and unheard of for seven years will be presumed to be dead. Lewis *v.* Mobley, 20 N. C. 467, 34 Am. Dec. 379.

Strength of inference.— "Considering the great length and breadth of this country, and the migratory character of the people, the presumption has less force than in the

b. Length of Absence — (i) *Usual Period.* The length of absence necessary to raise the presumption of death is not governed by any arbitrary rule,[15] but as some general rule is necessary seven years have been usually established as the time, the lapse of which is sufficient to raise this presumption.[16] In some

country where the law on this subject originated." Smith *v.* Smith, 49 Ala. 156, 158.

The fact that the absentee is treated as a non-resident in proceedings to sell land within the twenty years during which he has been absent and unheard from does not affect the presumption of his death arising from such absence. Ferrell *v.* Grigsby, (Tenn. Ch. App. 1899) 51 S. W. 114.

An admission on the record that parties are alive precludes the presumption of their death arising from continued absence. Doane *v.* McKenny, 2 Nova Scotia 328.

Absence for seven years is not alone sufficient to raise a presumption of death. It must also be made to appear that the person has not been heard from. Brown *v.* Jewett, 18 N. H. 230.

15. Czech *v.* Bean, 35 Misc. (N. Y.) 729, 72 N. Y. Suppl. 402; and cases cited *supra*, note 14.

It is not necessary that any specific period should elapse to lay the foundation for the presumption of death, but it may be drawn whenever the facts of the case will warrant it. Merritt *v.* Thompson, 1 Hilt. (N. Y.) 550.

16. *California.*— Garwood *v.* Hastings, 38 Cal. 216; Ashbury *v.* Sanders, 8 Cal. 62, 68 Am. Dec. 300.

Delaware.— Prettyman *v.* Conaway, 9 Houst. 221, 32 Atl. 15; Crawford *v.* Elliott, 1 Houst. 465.

District of Columbia.— Hamilton *v.* Rathbone, 9 App. Cas. 48.

Georgia.— Watson *v.* Adams, 103 Ga. 733, 30 S. E. 577; Adams *v.* Jones, 39 Ga. 479; Doe *v.* Roe, 1 Ga. 538.

Illinois.— Reedy *v.* Millizen, 155 Ill. 636, 40 N. E. 1028; Whiting *v.* Nicholl, 46 Ill. 230, 92 Am. Dec. 248; Litchfield *v.* Keagy, 78 Ill. App. 398; Robinson *v.* Robinson, 51 Ill. App. 317.

Iowa.— State *v.* Henke, 58 Iowa 457, 12 N. W. 477; Tisdale *v.* Connecticut Mut. L. Ins. Co., 26 Iowa 170, 96 Am. Dec. 136.

Kansas.— Ryan *v.* Tudor, 31 Kan. 366, 2 Pac. 797.

Kentucky.— Mutual Ben. L. Ins. Co. *v.* Martin, 108 Ky. 11, 55 S. W. 694, 21 Ky. L. Rep. 1465; Louisville Bank *v.* Public School Trustees, 83 Ky. 219; Fuson *v.* Bowlin, 30 S. W. 622, 17 Ky. L. Rep. 128; Henderson *v.* Bonar, 11 S. W. 809, 11 Ky. L. Rep. 219.

Maine.— Johnson *v.* Merithew, 80 Me. 111, 13 Atl. 132, 6 Am. St. Rep. 162; Wentworth *v.* Wentworth, 71 Me. 72; White *v.* Mann, 26 Me. 361.

Maryland.— Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443; Tilly *v.* Tilly, 2 Bland 436.

Massachusetts.—Stockbridge, Petitioner, 145 Mass. 517, 14 N. E. 928; Loring *v.* Steineman, 1 Metc. 204.

Minnesota.— Waite *v.* Coaracy, 45 Minn. 159, 47 N. W. 537.

Mississippi.— Learned *v.* Corley, 43 Miss. 687.

Missouri.— Flood *v.* Growney, 126 Mo. 262, 28 S. W. 860; Wheelock *v.* Overshiner, 110 Mo. 100, 19 S. W. 640; Hancock *v.* American L. Ins. Co., 62 Mo. 26; Lajoye *v.* Primm, 3 Mo. 529.

Montana.— *In re* Liter, 19 Mont. 474, 48 Pac. 753.

Nebraska.— Cox *v.* Ellsworth, 18 Nebr. 664, 26 N. W. 460, 53 Am. Rep. 827; Thomas *v.* Thomas, 16 Nebr. 553, 20 N. W. 846.

New Hampshire.— Bennett *v.* Sloman, 70 N. H. 289, 48 Atl. 283; Winship *v.* Conner, 42 N. H. 341; Forsaith *v.* Clark, 21 N. H. 409; Smith *v.* Knowlton, 11 N. H. 191.

New Jersey.— Hoyt *v.* Newbold, 45 N. J. L. 219, 46 Am. Rep. 757; Osborn *v.* Allen, 26 N. J. L. 388; Wambough *v.* Schank, 2 N. J. L. 229; Wilcox *v.* Trenton Potteries Co., 64 N. J. Eq. 173, 53 Atl. 474; Burkhardt *v.* Burkhardt, 63 N. J. Eq. 479, 52 Atl. 296; Hamilton *v.* Ross, 7 N. J. Eq. 465; Smith *v.* Smith, 5 N. J. Eq. 484.

New York.— Matter of Sullivan, 51 Hun 378, 4 N. Y. Suppl. 59; Augustus *v.* Graves, 9 Barb. 595; Ruoff *v.* Greenpoint Sav. Bank, 40 Misc. 549, 82 N. Y. Suppl. 881; Jackson *v.* Claw, 18 Johns. 346; McCartee *v.* Camel, 1 Barb. Ch. 455; Eagle *v.* Emmet, 4 Bradf. Surr. 117.

North Carolina.— Dowd *v.* Watson, 105 N. C. 476, 11 S. E. 589, 18 Am. St. Rep. 920; State University *v.* Harrison, 90 N. C. 385; Spencer *v.* Roper, 35 N. C. 333; Lewis *v.* Mobley, 20 N. C. 467, 34 Am. Dec. 379; Den *v.* Evans, 3 N. C. 222.

Ohio.—Youngs *v.* Heffner, 36 Ohio St. 232; Rosenthal *v.* Mayhugh, 33 Ohio St. 155; Rice *v.* Lumley, 10 Ohio St. 596; Supreme Commandery K. of T. R. *v.* Everding, 20 Ohio Cir. Ct. 689, 11 Ohio Cir. Dec. 419.

Pennsylvania.— Esterly's Appeal, 109 Pa. St. 222; Holmes *v.* Johnson, 42 Pa. St. 159; Whiteside's Appeal, 23 Pa. St. 114; Bradley *v.* Bradley, 4 Whart. 173; Burr *v.* Sim, 4 Whart. 150, 33 Am. Dec. 50; Williams' Estate, 13 Phila. 325; Rhodes' Estate, 10 Pa. Co. Ct. 386; Hoskins *v.* Lindsay, 1 Del. Co. 249; *In re* Clement, 1 Del. Co. 167.

South Carolina.— Griffin *v.* Southern R. Co., 66 S. C. 77, 44 S. E. 562; Boyce *v.* Owens, 1 Hill 8; Burns *v.* Ford, 1 Bailey 507; Craig *v.* Craig, Bailey Eq. 102.

South Dakota.— Burnett *v.* Costello, 15 S. D. 89, 87 N. W. 575.

Tennessee.— Puckett *v.* State, 1 Sneed 355.

Texas.— French *v.* McGinnis, 69 Tex. 19, 9 S. W. 323; Primm *v.* Stewart, 7 Tex. 178; Latham *v.* Toubs, (Civ. App. 1903) 73 S. W. 1060; Turner *v.* Sealock, 21 Tex. Civ. App. 594, 54 S. W. 358.

jurisdictions, as for example Missouri, even a shorter period has been prescribed by statute.[17]

(II) *Abridgment of Period.* The fact that there is a legal presumption of death after seven years' absence does not prevent an inference of death from absence for a shorter period, where there are circumstances which tend to force a conviction that death must have occurred,[18] as that the person has encountered, or probably encountered, such perils as might reasonably be expected to destroy human life, and has been so situated that according to the ordinary course of things he must have been heard of if he had survived,[19] that the circumstances

Vermont.— Hurlburt *v.* Hurlburt, 63 Vt. 667, 22 Atl. 850.

Washington.— Scott *v.* McNeal, 5 Wash. 309, 31 Pac. 873, 34 Am. St. Rep. 863.

West Virginia.— Boggs *v.* Harper, 45 W. Va. 554, 31 S. E. 943.

Wisconsin.— Cowan *v.* Lindsay, 30 Wis. 586.

United States.— Davie *v.* Briggs, 97 U. S. 628, 24 L. ed. 1086; Northwestern Mut. L. Ins. Co. *v.* Stevens, 71 Fed. 258, 18 C. C. A. 107.

England.— *In re* Benjamin, [1902] 1 Ch. 723, 71 L. J. Ch. 319, 86 L. T. Rep. N. S. 387; Wilson *v.* Hodges, 2 East 312, 6 Rev. Rep. 427.

Canada.— Giles *v.* Morrow, 1 Ont. 527.

See 15 Cent. Dig. tit. "Death." § 2.

No presumption of death until lapse of seven years.—*Iowa.*—State *v.* Henke, 58 Iowa 457, 12 N. W. 477.

Massachusetts.— Newman *v.* Jenkins, 10 Pick. 515.

New Jersey.— Smith *v.* Combs, 49 N. J. Eq. 420, 24 Atl. 9.

Ohio.— Supreme Commandery K. of T. R. *v.* Everding, 20 Ohio Cir. Ct. 689, 11 Ohio Cir. Dec. 419.

Canada.— Doe *v.* Strong, 4 U. C. Q. B. 510.

See 15 Cent. Dig. tit. "Death," § 2.

Application of New York statute.— Code Civ. Proc. § 841, providing that a person on whose life an estate in real property depends, who remains without the United States and absents himself for seven years together, is presumed to be dead, in an action concerning the property, relates only to a case where the right to possession of real property depends on the life of a third person, and does not apply to a person who is the owner of the property. Matter of Board of Education, 173 N. Y. 321, 66 N. E. 11 [*dismissing* appeal 77 N. Y. Suppl. 1121].

17. **Four years.**— Mo. Rev. St. (1899) § 3144; Winter *v.* Supreme Lodge K. of P., 96 Mo. App. 1, 69 S. W. 662.

18. *Delaware.*—Garden *v.* Garden, 2 Houst. 574.

Illinois.— Robinson *v.* Robinson, 51 Ill. App. 317.

Iowa.— Tisdale *v.* Connecticut Mut. L. Ins. Co., 26 Iowa 170, 96 Am. Dec. 136.

Louisiana.— Boyd *v.* New England Mut. L. Ins. Co., 34 La. Ann. 848.

Maine.— White *v.* Mann, 26 Me. 361.

Missouri.— Lancaster *v.* Washington L. Ins. Co., 62 Mo. 121; Carpenter *v.* Supreme Council L. of H., etc., 79 Mo. App. 597; Dickens *v.* Miller, 12 Mo. App. 408.

Nebraska.—Cox *v.* Ellsworth, 18 Nebr. 664, 26 N. W. 460, 53 Am. Rep. 827.

New Hampshire.— Smith *v.* Knowlton, 11 N. H. 191.

New York.— Straub *v.* Grand Lodge A. O. U. W., 2 N. Y. App. Div. 138, 37 N. Y. Suppl. 750 [*affirmed* in 158 N. Y. 729, 53 N. E. 1132]; Stouvenel *v.* Stephens, 2 Daly 319; Eagle *v.* Emmet, 4 Bradf. Surr. 117.

Tennessee.— Puckett *v.* State, 1 Sneed 355.

United States.— Davie *v.* Briggs, 97 U. S. 628, 24 L. ed. 1086; Northwestern Mut. L. Ins. Co. *v.* Stevens, 71 Fed. 258, 18 C. C. A. 107.

England.— Hickman *v.* Upsall, L. R. 20 Eq. 136, 23 Wkly. Rep. 776; *In re* Beasney, L. R. 7 Eq. 498, 38 L. J. Ch. 159, 19 L. T. Rep. N. S. 630; Cuthbert *v.* Purrier, 6 Jur. 447, 2 Phil. 199; Danby *v.* Danby, 5 Jur. N. S. 54; Rust *v.* Baker, 8 Sim. 443, 8 Eng. Ch. 443; *In re* Webb, Ir. R. 5 Eq. 235.

See 15 Cent. Dig. tit. "Death," § 2.

The law requires stricter and stronger proof to raise a presumption of death after an absence of less than seven years than would be required where the absence had continued for that length of time. Garden *v.* Garden, 2 Houst. (Del.) 574.

19. *Delaware.*—Garden *v.* Garden, 2 Houst. 574.

Illinois.— Robinson *v.* Robinson, 51 Ill. App. 317.

Louisiana.— Sterrett *v.* Samuel, 108 La. 346, 32 So. 428.

Maine.— White *v.* Mann, 26 Me. 361.

Michigan.— Bailey *v.* Bailey, 36 Mich. 181.

Missouri.—Lancaster *v.* Washington L. Ins. Co., 62 Mo. 121, in which case a person disappeared from a lake steamer under circumstances similar to those in the Ohio case cited *infra*, this note.

New York.— Straub *v.* Grand Lodge A. O. U. W., 2 N. Y. App. Div. 138, 37 N. Y. Suppl. 750 [*affirmed* in 158 N. Y. 729, 53 N. E. 1132]; Merritt *v.* Thompson, 1 Hilt. 550 (holding that where a person sailed on a voyage usually taking four months, and neither he nor the vessel had been heard from for seventeen months, the court would presume his death); *In re* Buckham, 5 N. Y. Suppl. 565 (in which case, where a woman sixty-seven years old and infirm in mind and body disappeared from her house near the North river on a stormy night, and, although every effort was made for several months to ascertain if she was living, nothing could be learned; and according to the medical testimony she could not in all probability have survived under the most favorable circum-

were such as to make it improbable that he would have abandoned his home and family,[20] or that he was when he left home in ill health or in a precarious physical condition.[21]

(III) *Time From Which Period Runs.* The period which must elapse in order to give rise to the presumption of death runs from the time when the last tidings of or from the person were received.[22]

c. Absence From Residence Necessary. It is necessary that the person as to whose death it is sought to raise a presumption shall have been absent from his home or the place where he has established a residence.[23] Thus where a person has changed his residence from one state or country to another, the fact that he has not been heard of in the place of his former residence for seven years raises no presumption of his death,[24] at least in the absence of evidence that inquiries

stances the period that had elapsed since her disappearance, it was held that her death would be presumed); Eagle's Case, 3 Abb. Pr. 218.

Ohio.— Travelers' Ins. Co. *v.* Rosch, 23 Ohio Cir. Ct. 491, holding that where a passenger on an ocean steamer was last seen about ten o'clock at night when the steamer was in midocean, and was never seen nor heard of afterward, although diligent search was made the next morning, this was sufficient to raise a very strong presumption that he was dead, and justified a jury in so finding.

Pennsylvania.—Mutual Ben. Co.'s Petition, 174 Pa. St. 1, 34 Atl. 283, 52 Am. St. Rep. 814.

South Carolina.— Gibbes *v.* Vincent, 11 Rich. 323, holding that where a vessel sailed about the time of a violent storm on her track, and no tidings were heard of her for three years, the death of those on board might be presumed.

United States.— Davie *v.* Briggs, 97 U. S. 628, 24 L. ed. 1086; Northwestern Mut. L. Ins. Co. *v.* Stevens, 71 Fed. 258, 18 C. C. A. 107.

England.— Sillick *v.* Booth, 11 L. J. Ch. 41, 1 Y. & Coll. 117, 20 Eng. Ch. 117; *In re* Johnson, 78 L. T. Rep. N. S. 85 (holding that where a person has undertaken a sea voyage, and neither he nor any one else who was on board the vessel has been heard from, a presumption of death may arise in a shorter period); Watson *v.* King, 1 Stark. 121, 2 E. C. L. 54.

See 15 Cent. Dig. tit. "Death," § 1 *et seq.*

20. Tisdale *v.* Connecticut Mut. L. Ins. Co., 26 Iowa 170, 96 Am. Dec. 136; Hancock *v.* American L. Ins. Co., 62 Mo. 26 (holding that where one steady in habits, attentive to business, and having a fixed and permanent residence and pleasant domestic relations suddenly disappears, the circumstances may warrant a jury in finding his death at the time); Cox *v.* Ellsworth, 18 Nebr. 664, 26 N. W. 460, 53 Am. Rep. 827 (holding that where a man sixty-three years of age, in easy pecuniary circumstances, who had been married seventeen years and had an attractive home and family and business interests of importance, disappeared without notice of intentions, and an extensive search and a large reward offered failed to reveal any trace of him, a jury might presume death after a lapse of five years).

21. Leach *v.* Hall, 95 Iowa 611, 64 N. W. 790 (holding that a son who was of an affectionate disposition and warmly attached to his family and in the habit of writing them frequently when away from home, and when last heard from, six years prior to the death of his father, was sick with consumption would be presumed to have died before his father); Cambreleng *v.* Purton, 12 N. Y. Suppl. 741 [*affirmed* in 125 N. Y. 610, 26 N. E. 907] (holding that where an inebriate who by frequent and protracted periods of intoxication had brought on serious organic diseases, which, his physician testified, he could not possibly survive for more than a year, finally disappeared from home, and was not heard of for seventeen years, although in various proceedings involving his property numerous publications of notices and process were had, it would be presumed that he died within four years); Webster *v.* Birchmore, 13 Ves. Jr. 362, 33 Eng. Reprint 329.

22. Smith *v.* Combs, 49 N. J. Eq. 420, 24 Atl. 9; Morrow *v.* McMahon, 35 Misc. (N. Y.) 348, 71 N. Y. Suppl. 961.

23. Stinchfield *v.* Emerson, 52 Me. 465, 83 Am. Dec. 524; Hyde Park *v.* Canton, 130 Mass. 505, 507 (in which case the court said: "If a man leaves his home and goes into parts unknown, and remains unheard from for the space of seven years, the law authorizes, to those that remain, the presumption of fact that he is dead; but it does not authorize him to presume therefore that any one of those remaining in the place which he left has died").

24. *Maine.*— Wentworth *v.* Wentworth, 71 Me. 72.

New York.— McCartee *v.* Camel, 1 Barb. Ch. 455; Keller *v.* Stuck, 4 Redf. Surr. 294. See also *In re* Board of Education, 173 N. Y. 321, 66 N. E. 11 [*dismissing* appeal, 77 N. Y. Suppl. 1121].

Ohio.— Barr *v.* Chapman, 11 Ohio Dec. (Reprint) 862, 30 Cinc. L. Bul. 264.

Pennsylvania.— Francis *v.* Francis, 180 Pa. St. 644, 37 Atl. 120, 57 Am. St. Rep. 668.

Texas.— Latham *v.* Tombs, (Civ. App. 1903) 73 S. W. 1060 (decided under Rev. St. § 3372); Ross *v.* Blount, 25 Civ. App. 344, 60 S. W. 894.

England.— Mullaly *v.* Walsh, Ir. R. 6 C. L. 314.

See 15 Cent. Dig. tit. "Death," § 1 *et seq.*

have been made for him at his last known place of residence without success;[25] and the mere absence of a person from a place where his relatives reside, but which is not his own place of residence, and the fact that his relatives have not received letters from him for seven years, does not raise any presumption of his death.[26]

d. Absence From State or Country. Some of the statutes creating a presumption of death after an absence, unheard from, for seven years, by their terms apply only to cases of absence from the state or country or beyond the seas;[27] but such statutes do not exclude all presumptive evidence of death unless the person is shown to have left the state or country.[28]

e. Necessity For Efforts to Find Person. There can be no presumption of the death of a person from the mere fact of his absence unless there have been some efforts to find him,[29] such as inquiries at the place where he was last known to be alive,[30] at least where the relations between him and his family are not shown to be such as would reasonably be supposed to induce him to correspond with them if alive,[31] or the person was known to have a fixed place of residence abroad.[32]

f. Who Must Have Been Without Tidings. In order to raise the presumption of a person's death from his absence, it must appear that he has not been heard of by those persons who would naturally have received tidings from him if he had been alive;[33] but the rule does not confine the tidings to his family or any particular class of persons;[34] and a person may be absent and unheard of for

25. McCartee *v.* Camel, 1 Barb. Ch. (N. Y.) 455.

26. Hitz *v.* Ahlgren, 170 Ill. 60, 48 N. E. 1068; Litchfield *v.* Keagy, 78 Ill. App. 398.

27. See Louisville Bank *v.* Public School Trustees, 83 Ky. 219; Spurr *v.* Trimble, 1 A. K. Marsh. (Ky.) 278; Winter *v.* Supreme Lodge K. of P., 96 Mo. App. 1, 69 S. W. 662; Biegler *v.* Supreme Council A. L. of H., 57 Mo. App. 419; Dickens *v.* Miller, 12 Mo. App. 408; Mo. Rev. St. (1899) § 3144; Turner *v.* Sealock, 21 Tex. Civ. App. 594, 54 S. W. 358; Tex. Rev. St. art. 3372.

Effect of statute.— A statute declaring that the death of a person shall be presumed after a certain time if he has remained beyond the sea, absented himself from the state, or concealed himself within the state does not alter the common law so as to require proof of one of these three alternatives, for such proof would necessarily show that the person was living, and thus rebut the very presumption the statute designed to create. All the proof that can be expected or required is that the person has been absent from his family or home and has not been heard from within the period prescribed by the statute. Osborn *v.* Allen, 26 N. J. L. 388.

28. Louisville Bank *v.* Public School Trustees, 83 Ky. 219.

29. Smith *v.* Smith, 49 Ala. 156; Litchfield *v.* Keagy, 78 Ill. App. 398; Dunn *v.* Travis, 56 N. Y. App. Div. 317, 67 N. Y. Suppl. 743; Dworsky *v.* Arndtstein, 29 N. Y. App. Div. 274, 51 N. Y. Suppl. 597; Ulrich's Estate, 14 Phila. (Pa.) 243 (holding that an absence of twenty years was not sufficient to raise the presumption of death, where it was not shown that any attempt had been made to ascertain either by correspondence or advertising in newspapers published in the state where the absentee was believed to have gone whether or not he ever resided there, and if so whether he was living or dead); Doe *v.* Andrews, 15 Q. B. 756, 69 E. C. L. 756; Doe *v.* Deakin, 4 B. & Ald. 433, 23 Rev. Rep. 335, 6 E. C. L. 548. *Compare* Innis *v.* Campbell, 1 Rawle (Pa.) 373.

Necessity for advertisements.— See *In re* Robertson, [1896] P. 8, 65 E. C. L. 16.

30. *District of Columbia* — Posey *v.* Hanson, 10 App. Cas. 496.

New York.— McCartee *v.* Camel, 1 Barb. Ch. 455.

North Carolina.— State University *v.* Harrison, 90 N. C. 385.

Texas.— Nehring *v.* McMurrain, (Civ. App. 1898) 45 S. W. 1032.

England.— Prudential Assur. Co. *v.* Edmonds, 2 App. Cas. 487.

See 15 Cent. Dig. tit. "Death," § 1 *et seq.*

31. Dunn *v.* Travis, 56 N. Y. App. Div. 317, 67 N. Y. Suppl. 743.

32. Wentworth *v.* Wentworth, 71 Me. 72.

33. Wentworth *v.* Wentworth, 71 Me. 72; Manley *v.* Pattison, 73 Miss. 417, 19 So. 236, 55 Am. St. Rep. 543; *In re* Miller, 9 N. Y. Suppl. 639; Matter of Tobin, 15 N. Y. St. 749.

Those who would naturally hear from the absentee are such persons as were nearly related to him or upon relations of friendship with him, and remained at or near the place where they last resided. Thomas *v.* Thomas, 16 Nebr. 553, 20 N. W. 846.

The failure of strangers to hear from a person in any number of years or the fact that his present whereabouts may not be known to one of his acquaintances in a place of former residence who is not shown to have made any inquiry about him does not establish the fact of absence for seven years successively, as required by the Texas statute, and does not therefore authorize the presumption of death. State *v.* Teulon, 41 Tex. 249.

34. Wentworth *v.* Wentworth, 71 Me. 72.

seven years without any presumption of his death arising when he has no near or intimate friends with whom he has been accustomed to correspond.[35]

g. Presumption Rebuttable — (i) *In General.* The presumption of death resulting from absence, unheard of, is not conclusive, but may be rebutted,[36] although the burden of proof is upon the person denying the death.[37]

(ii) *Admissibility of Evidence in Rebuttal.* In order to rebut the presumption of death arising from absence it may be shown that the person supposed to be dead was a fugitive from justice,[38] was in a financial condition which might have induced him to abscond,[39] or was a speculator or visionary in his business.[40] Testimony of persons not members of the family that a person who has not been heard from was living within seven years is admissible,[41] as is also testimony of a witness who saw a person bearing the name of the person supposed to be deceased as to such person's appearance and conversations had with him in regard to his family connections.[42]

(iii) *Sufficiency of Circumstances to Rebut Presumption.* The presumption that a person who has been absent and unheard of for more than seven years is dead necessarily disappears entirely upon his return home alive.[43] The presumption is also overcome by the testimony of several disinterested witnesses who are not contradicted or impeached to the effect that he returned and was seen alive less than seven years before,[44] or even, it has been held, by the testimony of one credible witness who has received a letter in the absentee's handwriting within that time.[45] But proof that a person having the name of the absentee was alive within seven years is not sufficient to overcome the presumption of death in the absence of proof of the identity of such person with the absentee,[46] nor is such presumption rebutted by the fact that a person on whose will the action is founded supposed the absentee to be living at a later period.[47]

(iv) *Question For Jury.* Where there are circumstances tending to rebut the presumption of death, the question whether the person is dead or alive is for the jury on all the evidence.[48]

h. To Whom Presumption Applies. It has been said that a statute creating a

A failure to claim deposits in bank and being otherwise unheard from for over twenty years will raise a presumption of death. Louisville Bank *v.* Public Schools Trustees, 83 Ky. 219.

Where a wife has moved out of the community where she and her husband had lived, the fact that she has not heard from him for over seven years is not sufficient to sustain a presumption of his death, but it must be shown that he had not been heard from by his friends and relatives who remained at or near his last known residence. Thomas *v.* Thomas, 16 Nebr. 553, 20 N. W. 846.

35. *In re* Board of Education, 173 N. Y. 321, 66 N. E. 11.

36. *Kentucky.*— Mutual Ben. L. Ins. Co. *v.* Martin, 108 Ky. 11, 55 S. W. 694, 21 Ky. L. Rep. 1465.

Massachusetts.— *In re* Stockbridge, 145 Mass. 517, 14 N. E. 928; Flynn *v.* Coffee, 12 Allen 133; Loring *v.* Steineman, 1 Metc. 204.

Missouri.— Biegler *v.* Supreme Council A. L. of H., 57 Mo. App. 419; Dickens *v.* Miller, 12 Mo. App. 408.

Montana.— *In re* Liter, 19 Mont. 474, 48 Pac. 753, decided under Code Civ. Proc. § 3226.

New Jersey.— Wambaugh *v.* Schenck, 2 N. J. L. 229.

Ohio.— Youngs *v.* Heffner, 36 Ohio St. 232.

United States.— Scott *v.* McNeal, 154 U. S. 34, 14 S. Ct. 1108, 38 L. ed. 896.

See 15 Cent. Dig. tit. "Death," § 2.

37. Hoyt *v.* Newbold, 45 N. J. L. 219, 46 Am. Rep. 757.

Presumption conclusive in absence of rebutting proof.— Wilcox *v.* Trenton Potteries Co., 64 N. J. Eq. 173, 53 Atl. 474.

38. Mutual Ben. L. Ins. Co. *v.* Martin, 108 Ky. 11, 55 S. W. 694, 21 Ky. L. Rep. 1465.

39. Sensenderfer *v.* Pacific Mut. L. Ins. Co., 19 Fed. 68.

40. Sensenderfer *v.* Pacific Mut. L. Ins. Co., 19 Fed. 68.

41. Flynn *v.* Coffee, 12 Allen (Mass.) 133.

42. Nehring *v.* McMurrain, (Tex. Civ. App. 1898) 45 S. W. 1032.

43. Maylugh *v.* Rosenthal, 1 Cinc. Super. Ct. (Ohio) 492.

44. Thomas *v.* Thomas, 19 Nebr. 81, 27 N. W. 84.

45. Smith *v.* Smith, 49 Ala. 156.

46. Hoyt *v.* Newbold, 45 N. J. L. 219, 223, 46 Am. Rep. 757, in which case the court said: "There should be something more than similarity of names to overcome the presumption of death raised by the statute."

47. Whiteside's Appeal, 23 Pa. St. 114.

48. Mutual Ben. L. Ins. Co. *v.* Martin, 108 Ky. 11, 55 S. W. 694, 21 Ky. L. Rep. 1465.

presumption of death after seven years' absence or concealment refers only to persons having volition and the right of free locomotion.[49]

i. Burden of Proof as to Lack of Tidings. The burden of establishing the presumption of death arising from seven years' absence unheard from rests upon the person who makes the assertion that the person alleged to be dead has not been heard from for that time.[50]

j. Removal With Family. Where a person removed with his wife and child from the neighborhood where he had formerly resided, and was not heard from for over thirty years, it was held that while the law would raise a presumption of his death it would not presume that all his family were dead.[51]

k. Time of Death. With regard to the time when death will be presumed to have occurred, the decisions are by no means uniform. It has been asserted that the presumption is that the person died at the time of his disappearance,[52] or at least a considerable time before the expiration of the seven years;[53] and in the case of a passenger on a ship which was never heard from after the time of sailing, it has been held that the death must be deemed to have occurred within the longest usual duration of the voyage from the port of departure to that of the ship's destination.[54] Again it has been said that the inference of death from seven years' absence does not necessarily imply that death occurred at the end of that period, but the circumstances of each case are to be weighed, and if they warrant an inference of the death of the individual at an earlier date than the close of the seven years' absence, a finding that the death so occurred may stand.[55] The

49. Manley *v.* Pattison, 73 Miss. 417, 19 So. 236, 55 Am. St. Rep. 543, where it was sought to apply such a statute in the case of children of tender age, incapable of absenting themselves from the state or concealing themselves within it, and whose movements were governed by others.

50. Smith *v.* Combs, 49 N. J. Eq. 420, 24 Atl. 9.

51. Campbell *v.* Reed, 24 Pa. St. 498. See also Manley *v.* Pattison, 73 Miss. 417, 421, 19 So. 236, 55 Am. St. Rep. 543, in which case the court said: "The probability of the death of all the members of a family of five is scarcely suggested by proof that certain persons, not shown to have been related to the family nor to have associated with it or any of its members in social or business relations, have not heard from the family since its removal from the town."

52. Godfrey *v.* Schmidt, Cheves Eq. (S. C.) 57. See also *In re* Benjamin, [1902] 1 Ch. 723, 71 L. J. Ch. 319, 86 L. T. Rep. N. S. 387.

Distinction between statutory and common-law presumption.— In Chapman *v.* Cooper, 5 Rich. (S. C.) 452, 459 [*citing* Doe *v.* Nepean, 5 B. & Ad. 86, 2 L. J. K. B. 150, 2 N. & M. 219, 27 E. C. L. 45], Evans, J., delivering the opinion of the court, after stating that in the construction of 1 Jac. 1, c. 11, § 2, of which the South Carolina statute was an exact copy, it has been held that the only presumption which arises is that of death, and none as to the time of death, continued as follows: "Whether that construction arises from the peculiar wording of the statute I know not, but I can see no reason why, when the presumption depends on the common law acquiescence of twenty years and upwards, we should be restrained from giving the presumption the same effect as to time, that we give to other presumptions." Namely, that death occurred at the commencement of the period.

53. See Nepean *v.* Doe, 7 L. J. Exch. 335, 340, 2 M. & W. 894, Thayer Ev. 109, in which case the court said: "When nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty, at what point of time in those seven years he died: of all the points of time, the last day is the most improbable and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of; because, it is considered extraordinary if he was alive, that he should not be heard of. In other words, it is presumed, that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time, during which he was not heard of, has become immaterial by reason of the assumption, that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion, that the death took place some considerable time before the expiration of the seven years."

54. Gerry *v.* Post, 13 How. Pr. (N. Y.) 118; Oppenheim *v.* Wolf, 3 Sandf. Ch. (N. Y.) 571, where the passenger sailed on March 11, 1841, and it was held that his death must be deemed to have occurred before May, 1841.

55. Winter *v.* Supreme Lodge K. of P., 96 Mo. App. 1, 69 S. W. 662; Matter of Ackerman, 2 Redf. Surr. (N. Y.) 521, holding that where a person sixty-six years old, who had been accustomed to call on an executor reg-

majority of the cases, however, are those which assert either that where the presumption of death arises from absence and being unheard of for a number of years there is no presumption as to the time of death,[56] and the party alleging death before the expiration of the seven years must prove it,[57] or that there is no presumption of the person's death at any time during such period but he must be presumed to have died at the expiration thereof.[58] When the true meaning of these latter expressions is considered, it will be seen that they amount to the same thing. The true rule may be properly stated as follows: The presumption of law is always in favor of the continuance of life, but this presumption is overcome by the presumption of death that arises in the case of a person who has been absent and unheard of for seven years. This latter presumption does not, however, arise until the full period has elapsed, and when it does arise there is no reason why it should have a retroactive effect, so as to defeat the other presumption which was in full force during the waiting period.[59]

ularly and frequently for an annuity upon which he was dependent for support, left his home in May, without indicating an intent to be absent, and was never afterward heard from, and his physician testified that, when he disappeared, he was suffering from an incurable disease, under which he could not have survived more than three months, the facts were sufficient to raise a presumption of his death during the fall of the same year.

Where suicide seems probable under circumstances attending the disappearance, a presumption is warranted that death occurred at about the time of the disappearance. Sheldon *v.* Ferris, 45 Barb. (N. Y.) 124 (in which case the absentee had frequently declared his intention to commit suicide); *In re* Ketcham, 5 N. Y. Suppl. 566 (in which case the absentee was arrested when attempting to commit suicide by jumping from a ferry-boat and offered the person who arrested him twenty-five dollars to be allowed to jump overboard, and disappeared the next day and was never heard of again).

56. *District of Columbia.*— Hamilton *v.* Rathbone, 9 App. Cas. 48.

Illinois.— Mosheimer *v.* Ussleman, 36 Ill. 232.

Maine.— Johnson *v.* Merithew, 80 Me. 111, 13 Atl. 132, 6 Am. St. Rep. 162.

Maryland.— Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443.

Missouri.— Hancock *v.* American L. Ins. Co., 62 Mo. 26.

New York.— McCartee *v.* Camel, 1 Barb. Ch. 455.

North Carolina.—Spencer *v.* Roper, 35 N. C. 333; State *v.* Moore, 33 N. C. 160, 53 Am. Dec. 401.

Wisconsin.— Whiteley *v.* Equitable L. Assur. Soc., 72 Wis. 170, 39 N. W. 369.

United States.— Davie *v.* Briggs, 97 U. S. 628, 24 L. ed. 1086.

England.— Nepean *v.* Doe, 7 L. J. Exch. 335, 2 M. & W. 894.

See 15 Cent. Dig. tit. "Death," § 6.

57. Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443; Evans *v.* Stewart, 81 Va. 724; Nepean *v.* Doe, 7 L. J. Exch. 335, 5 M. & W. 894; Doe *v.* Strong, 4 U. C. Q. B. 510.

The evidence need not be direct or positive; it may depend upon circumstances, but it should be of such a character as to make it more probable that the person died at a particular time than that he survived. Hancock *v.* American L. Ins. Co., 62 Mo. 26.

58. *California.*— Ashbury *v.* Sanders, 8 Cal. 62, 68 Am. Dec. 300.

Illinois.— Reedy *v.* Millizen, 155 Ill. 636, 40 N. E. 1028; Whiting *v.* Nicholl, 46 Ill. 230, 92 Am. Dec. 248.

Michigan.— Bailey *v.* Bailey, 36 Mich. 181.

Missouri.— Kauz *v.* Great Council I. O. R. M., 13 Mo. App. 341. See also Dean *v.* Bittner, 77 Mo. 101, holding that where a person disappeared at some unknown date in the year 1809 there is no presumption that he was dead in April, 1816.

New Hampshire.— Smith *v.* Knowlton, 11 N. H. 191.

New Jersey.— Burkhardt *v.* Burkhardt, 63 N. J. Eq. 479, 52 Atl. 296; Clarke *v.* Canfield, 15 N. J. Eq. 119.

New York.— Matter of Sullivan, 51 Hun 378, 4 N. Y. Suppl. 59; *In re* Davenport, 37 Misc. 455, 75 N. Y. Suppl. 934; Eagle's Case, 3 Abb. Pr. 218.

Pennsylvania.— Burr *v.* Sim, 4 Whart. 150, 33 Am. Dec. 50; *In re* Williams, 13 Phila. 325; Rhodes' Estate, 10 Pa. Co. Ct. 386.

South Carolina.—Craig *v.* Craig, Bailey Eq. 102.

United States.— Moffit *v.* Varden, 17 Fed. Cas. No. 9,689, 5 Cranch C. C. 658; Montgomery *v.* Bevans, 17 Fed. Cas. No. 9,735, 1 Sawy. 653.

See 15 Cent. Dig. tit. "Death," § 6.

This presumption may be rebutted by showing from facts and circumstances that death probably occurred before that time. Whiting *v.* Nicholl, 46 Ill. 230, 92 Am. Dec. 248.

59. See Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443. See also Reedy *v.* Millizen, 155 Ill. 636, 638, 40 N. E. 1028, in which case the court said: "When, however, a thing is shown to exist, its continuance is presumed until the contrary is shown or a conflicting presumption arises. Hence, unless it be shown that death occurred prior to the expiration of the seven years' absence, or some conflicting presumption arises from the facts proved which would overcome the presump-

1. When Presumption Does Not Arise. The presumption of death does not in all cases necessarily arise from the mere fact that a person has been absent and unheard of for seven years or more, for there may be a variety of circumstances which will prevent any such presumption;[60] such as improbability that the person who has been absent would have communicated with his home,[61] or the fact that he was a fugitive from justice,[62] or that there was a cloud upon his or her character.[63]

3. Evidence as to Fact of Death — a. Circumstantial Evidence. In civil cases death, like any other fact, may be proved by circumstantial evidence, and it is not necessary to produce an eye-witness of the death.[64]

b. Best Evidence. The rule requiring the best evidence which from the nature of the case must be supposed to exist to be introduced applies to cases where it is sought to prove a person's death.[65]

tion of the continuance of life, the presumption of life would obtain until the full expiration of the period, when the contrary presumption of death, from the continued absence, would arise. While, therefore, it is true that there is no presumption that death occurred at any particular time within the seven years, it is also true that, in the absence of contravening facts or controlling presumptions, it will be presumed that life continued during the entire period."

60. *In re* Miller, 9 N. Y. Suppl. 639 [*affirmed* in 20 N. Y. Suppl. 960 (*affirmed* in 147 N. Y. 713, 42 N. E. 726)], holding that where a woman eighteen years of age, illiterate, with vicious propensities, and abandoned by her parents when quite young, escapes from an orphan asylum in which she is confined, no presumption of death arises from the fact that she has failed to answer advertisements inserted in various papers, and that for more than seven years since her escape all trace of her whereabouts has been lost.

61. *In re* Miller, 9 N. Y. Suppl. 639 [*affirmed* in 20 N. Y. Suppl. 960 (*affirmed* in 147 N. Y. 713, 42 N. E. 726)]; Matter of Tobin, 15 N. Y. St. 749.

62. Ashbury *v.* Sanders, 8 Cal. 62, 68 Am. Dec. 300; O'Kelly *v.* Felker, 71 Ga. 775; Winter *v.* Supreme Lodge K. of P., 96 Mo. App. 1, 69 S. W. 662; Wolff's Estate, 12 Wkly. Notes Cas. (Pa.) 535. But see Mutual Ben. L. Ins. Co. *v.* Martin, 108 Ky. 11, 55 S. W. 694, 21 Ky. L. Rep. 1465, holding that such fact does not as a matter of law prevent the application of a statute creating a presumption of death after seven years' absence, although it is admissible in evidence to rebut the presumption of death.

63. See Schwarzhoff *v.* Necker, 1 Tex. Unrep. Cas. 325.

64. Boyd *v.* New England Mut. L. Ins. Co., 34 La. Ann. 848; Bailey *v.* Bailey, 36 Mich. 181; John Hancock Mut. L. Ins. Co. *v.* Moore, 34 Mich. 41.

Thus the cessation of communication of friends is a fact from which an inference of death more or less strong may arise. And hence on the question as to the death of a certain person a letter addressed to him at the place where he was accustomed to receive letters and returned to the writer as not called for is admissible. Hurlburt *v.* Hurlburt, 63 Vt. 667, 22 Atl. 850.

Similarly absence, without being heard from, although not of sufficient duration to create a legal presumption of death, may yet be one of other attendant and supporting circumstances which taken together would satisfy the mind and conscience of the judge or jury that the person was dead (Boyd *v.* New England Mut. L. Ins. Co., 34 La. Ann. 848); but in such case there must also be evidence of diligent inquiry at the place of the person's last residence in the country and among his relatives and any others who probably would have heard of him if living, and also at the place of his fixed foreign residence if he was known to have any (Bailey *v.* Bailey, 36 Mich. 181).

So also any facts or circumstances relating to the habits, character, condition, affections, attachments, prosperity, and objects in life, which usually control the conduct of men and are the motives of their actions, are competent evidence from which may be inferred the death of one absent and unheard from, whatever may have been the duration of such absence (Reedy *v.* Millizen, 155 Ill. 636, 40 N. E. 1028; Tisdale *v.* Connecticut Mut. L. Ins. Co., 26 Iowa 170, 96 Am. Dec. 136; Stouvenel *v.* Stephens, 2 Daly (N. Y.) 319, holding that where there is evidence of a character, considered by itself, to create a reasonable probability that a party was dead on a certain day, and the evidence that he was seen afterward is contradicted, everything, however slight, which tends to strengthen the former evidence, such as the habits of the person itself, should be received in evidence); but these facts must have occurred or the character have been recognized within such reasonable time prior to the principal fact (death) sought to be proved that they may justly be supposed to afford some light tending to establish or refute it, for remote acts as well as remote consequences are alike excluded from the consideration of the jury (Tisdale *v.* Connecticut Mut. L. Ins. Co., 28 Iowa 12).

65. Martinez *v.* Vives, 32 La. Ann. 305 (holding that testimony as to the death of an absentee is inadmissible when based wholly on letters which are not produced or accounted for); Fosgate *v.* Herkimer Mfg., etc.,

c. Hearsay Evidence. Death may be proved by hearsay evidence;[66] hence evidence that witness was informed by a person since dead of the death of another person is admissible to prove the death of the latter.[67] But evidence of a witness that he was told by another person that a certain person was dead is not sufficient to prove the death, where the person making such statement was not a member of the family of the person supposed to be dead and it is not shown what means he had of knowing the fact.[68]

d. Report and General Belief. Evidence that a person was missing at a particular time and of a report and general belief that he is dead is admissible to establish the fact of death;[69] but a mere rumor that a person died at a certain time has been held to be no evidence of his being dead.[70]

e. Administration on Estate. It has been frequently asserted that letters of administration are in themselves *prima facie* evidence of the death of the person on whose estate they are granted;[71] but they constitute at best evidence of a very weak and unsatisfactory character and are easily overcome;[72] and it has also been asserted that the fact that letters of administration have been granted upon the estate of a person does not afford sufficient[73] or even *prima facie* proof of death.[74] And some courts have gone even farther than this, and have held that while, in an action brought by an executor or administrator touching the collection and settlement of the estate, the letters of administration are admissible and are conclusive evidence of his right to sue for and collect whatever is due the deceased,[75] in a collateral action brought, not as administrator, but in an individual

Co., 9 Barb. (N. Y.) 287 (holding that a newspaper containing an announcement of the death of an individual is not admissible to prove the fact of such person's death). And see EVIDENCE.

66. Anderson *v.* Parker, 6 Cal. 197 (holding that hearsay information of death, derived from the immediate family of the deceased, is *prima facie* sufficient to establish the fact); Jackson *v.* Etz, 5 Cow. (N. Y.) 314; Turner *v.* Scalock, 21 Tex. Civ. App. 594, 54 S. W. 358; Secrist *v.* Green, 3 Wall. (U. S.) 744, 18 L. ed. 153 (holding that testimony of a witness long and intimately acquainted with the family that a certain child died at a certain time as "I am informed and believe" is admissible). See also Scott *v.* Ratliffe, 5 Pet. (U. S.) 81, 8 L. ed. 54.

Hearsay evidence not admissible until after considerable lapse of time.— Stouvenel *v.* Stephens, 2 Daly (N. Y.) 319.

Hearsay evidence of the finding and burial of the body of a person is inadmissible. Jackson *v.* Etz, 5 Cow. (N. Y.) 314.

67. Turner *v.* Scalock, 21 Tex. Civ. App. 594, 54 S. W. 358.

68. Dudley *v.* Grayson, 6 T. B. Mon. (Ky.) 259.

69. Jackson *v.* Etz, 5 Cow. (N. Y.) 314. See also Matthews *v.* Simmons, 49 Ark. 468, 5 S. W. 797 (in which case the fact that a person was reported to have died in 1864 or 1865 and was never heard of afterward was held sufficient to raise a presumption that he was dead in 1887); Woolsey *v.* Williams, 128 Cal. 552, 61 Pac. 670; Sensenderfer *v.* Pacific Mut. Ins. Co., 19 Fed. 68.

Reputation is evidence of death, but only so after a lapse of time. Morton *v.* Barrett, 19 Me. 109.

70. Davis *v.* Gillilan, 71 Mo. App. 498.

71. *Iowa.*— Tisdale *v.* Connecticut Mut. L. Ins. Co., 26 Iowa 170, 96 Am. Dec. 136.

Kansas.— Seibert *v.* True, 8 Kan. 52.

Kentucky.— French *v.* Frazier, 7 J. J. Marsh. 425.

Minnesota.— Pick *v.* Strong, 26 Minn. 303, 3 N. W. 697.

Missouri.— Lancaster *v.* Washington L. Ins. Co., 62 Mo. 121.

New Hampshire.— Jeffers *v.* Radcliff, 10 N. H. 242.

New York.— Ruoff *v.* Greenpoint Sav. Bank, 40 Misc. 549, 82 N. Y. Suppl. 881; *In re* Ketcham, 5 N. Y. Suppl. 566.

Washington.— Brown *v.* Elwell, 17 Wash. 442, 49 Pac. 1068.

United States.— Hurlburt *v.* Van Wormer, 14 Fed. 709; Ketland *v.* Lebering, 14 Fed. Cas. No. 7,744, 2 Wash. 201.

See 15 Cent. Dig. tit. "Death," § 5.

The fact that a person was seen alive three years prior to the granting of letters of administration upon his estate is not sufficient to overcome the presumption of his death arising from the issuance of such letters. Tisdale *v.* Connecticut Mut. L. Ins. Co., 28 Iowa 12.

Aiding presumption arising from absence. — Where letters of administration were granted upon the estate of a person six years after his disappearance, this fact converted into proof the presumption of death which the law would raise from lapse of time. Wanner's Estate, 1 Woodw. (Pa.) 112.

72. Davis *v.* Gillilan, 71 Mo. App. 498.

73. Thompson *v.* Donaldson, 3 Esp. 63, 6 Rev. Rep. 812.

74. Moons *v.* De Bernales, 1 Russ. 301, 46 Eng. Ch. 266.

75. Mutual Ben. L. Ins. Co. *v.* Tisdale, 91 U. S. 238, 23 L. ed. 314 [*reversing* 23 Fed. Cas. No. 14,059].

character, where the right of action depends upon the death of a third person, as in the case of an action upon a policy of life insurance, letters of administration upon the estate of the assured issued by the proper probate court do not afford any legal evidence of his death and are not admissible;[76] and even where the death is admitted, letters of administration are not admissible to prove the time of death.[77]

f. Entries in Family Bible. Testimony of a witness long and intimately acquainted with the family that certain children died at certain times "as appears from entries in the family Bible, and which I believe to be true" is admissible.[78]

g. Recital in Deed. A recital in a deed that the record owner of the fee is dead and that one of the subscribing grantors is her daughter and heir at law is admissible to prove the death of such person, the deed being signed not only by the daughter but by the brothers and sisters of the person alleged to be dead, since the oral declarations of the persons so related would be competent proof of the death.[79]

h. Recital in Ancient Document. Recitals in ancient documents may be evidence of death.[80]

i. Coroner's Inquest. The inquest of a coroner may be used to prove the fact of the death of a person.[81]

j. Sufficiency of Evidence. The usual rules with reference to the weight and sufficiency of evidence[82] apply to evidence introduced upon the question of life or death.[83]

4. Evidence as to Time of Death. Upon the question of the time of death, the age, habits of life, and habits as to the use of stimulants and drugs, from which a presumption as to the continuance or destruction of life would arise, are proper to be considered;[84] and the condition of health of a person when last seen or heard from is also an important subject of inquiry, for if the person is afflicted with some disease liable to immediately produce death or some specific malady which would necessarily undermine and destroy health, the presumption of an early dissolution would be greatly increased.[85]

76. Carroll *v.* Carroll, 60 N. Y. 121, 19 Am. Rep. 144 [*reversing* 2 Hun 609] (applying the rule to letters testamentary and proofs of a will); English *v.* Murray, 13 Tex. 366; Turner *v.* Sealock, 21 Tex. Civ. App. 594, 54 S. W. 358; Mutual Ben. L. Ins. Co. *v.* Tisdale, 91 U. S. 238, 23 L. ed. 314 [*reversing* 23 Fed. Cas. No. 14,059, and *distinguishing* Jeffers *v.* Radcliff, 10 N. H. 245]. See also French *v.* French, Dick. 268, 269, in which case the court held in terms against the theory that the probate of a will was evidence of the death of the testator, but "under all circumstances (the probate having been granted a long time before) admitted the probate to be read, as proof of his death."

77. English *v.* Murray, 13 Tex. 366.

78. Secrist *v.* Green, 3 Wall. (U. S.) 744, 18 L. ed. 153.

79. Postlewaite *v.* Wise, 17 W. Va. 1.

80. Norris *v.* Hall, 124 Mich. 170, 82 N. W. 832, holding that where the death of a party was shown by the recitals in three documents executed in 1846, the objection that there was no legal evidence of such death was not well taken, since such papers were ancient documents, and such recitals were proof of the death of the party, even against strangers.

81. Mutual L. Ins. Co. *v.* Schmidt, 6 Ohio Dec. (Reprint) 901, 8 Am. L. Rec. 629 [*affirmed* in 40 Ohio St. 112].

82. See, generally, Evidence.

83. For evidence sufficient to establish fact of death see the following cases: Woolsey *v.* Williams, 128 Cal. 552, 61 Pac. 670; Butrick *v.* Tilton, 155 Mass. 461, 29 N. E. 1088; Marden *v.* Boston, 155 Mass. 359, 29 N. E. 588; Sandberg *v.* State, 113 Wis. 578, 89 N. W. 504; Senscnderfer *v.* Pacific Mut. L. Ins. Co., 19 Fed. 68.

For evidence not sufficient to establish fact of death see Vogel's Succession, 16 La. Ann. 139, 79 Am. Dec. 571; Straub *v.* Grand Lodge A. O. U. W., 2 N. Y. App. Div. 138, 37 N. Y. Suppl. 750 [*affirmed* in 158 N. Y. 729, 53 N. E. 1132]; Matter of Tobin, 15 N. Y. St. 749; State *v.* Tculon, 41 Tex. 249; Schwarzhoff *v.* Necker, 1 Tex. Unrep. Cas. 325; Martin *v.* Union Mut. Ins. Co., 13 Wash. 275, 43 Pac. 53.

The certificate of a counsel of the death of an individual abroad is not sufficient proof that such person is dead. Morton *v.* Barrett, 19 Me. 109.

84. Reedy *v.* Millizen, 155 Ill. 636, 40 N. E. 1028.

85. Reedy *v.* Millizen, 155 Ill. 636, 40 N. E. 1028.

B. As to Survivorship — 1. Presumptions — a. Under the Civil Law. The civil law indulged in various presumptions as to the survivorship between persons who perished in the same disaster, based upon the age, sex, and physical strength of the individuals, and the assumption that the stronger would survive the weaker.[86] And in California and Louisiana such presumptions have been established by statute.[87]

b. Under the Common Law. At common law, however, where several persons perish in a common disaster, notwithstanding differences of age, sex, and physical strength, there is no presumption as to survivorship,[88] but it is a fact to be proved by the party asserting it.[89] It will not be presumed that one individual survived another,[90] or, it has been said, that they all died at the same moment,[91] although this latter proposition is controverted by several cases which hold that

86. See Smith *v.* Croom, 7 Fla. 81; Newell *v.* Nichols, 75 N. Y. 78, 31 Am. Rep. 424; Males *v.* Sovereign Camp W. of W., 30 Tex. Civ. App. 184, 70 S. W. 108.

By the Roman law if a father and son perished together in the same shipwreck or battle, and the son was under the age of puberty, it was presumed that he died first; but if above that age that he was the survivor, upon the principle that in the former case the elder is generally the more robust, and in the latter the younger. Cowman *v.* Rogers, 73 Md. 403, 21 Atl. 64, 10 L. R. A. 550.

The Code Napoleon had regard to the ages of fifteen and sixty; presuming that of those under the former age the eldest survived; and that of those above the latter age, the youngest survived. If the parties were between those ages, but of different sexes, the male was presumed to have survived; if they were of the same sex the presumption was in favor of the survivorship of the younger. Cowman *v.* Rogers, 73 Md. 403, 21 Atl. 64, 10 L. R. A. 550.

By the Mahometan law of India when relatives perish together it is to be presumed that they all died at the same moment, and such also was the rule of the ancient Danish law. Cowman *v.* Rogers, 73 Md. 403, 21 Atl. 64, 10 L. R. A. 550.

87. Hollister *v.* Cordero, 76 Cal. 649, 18 Pac. 855; Sanders *v.* Simeich, 65 Cal. 50, 2 Pac. 741; Cal. Code Civ. Proc. § 1963; Langles' Succession, 105 La. 39, 29 So. 739; La. Civ. Code, arts 936–939.

The murder of a husband and wife at the same time is "a calamity" within the meaning of the California statute. Hollister *v.* Cordero, 76 Cal. 649, 18 Pac. 855.

88. *Florida.*— Smith *v.* Croom, 7 Fla. 81.

Illinois.— Middeke *v.* Bulder, 198 Ill. 590, 64 N. E. 1002, 92 Am. St. Rep. 284 [*affirming* 98 Ill. App. 525].

Kansas.— Russell *v.* Hallett, 23 Kan. 276.

Missouri.— U. S. Casualty Co. *v.* Kaeer, 169 Mo. 301, 69 S. W. 370, 92 Am. St. Rep. 641.

New York.— Stinde *v.* Goodrich, 3 Redf. Surr. 87.

Texas.— Cook *v.* Caswell, 81 Tex. 678, 17 S. W. 385; Hilderbrandt *v.* Ames, 28 Tex. Civ. App. 377, 66 S. W. 128.

United States.— Young Women's Christian Home *v.* French, 187 U. S. 401, 23 S. Ct. 184, 47 L. ed. 233 [*reversing* 18 App. Cas. (D. C.) 9].

See 15 Cent. Dig. tit. "Death," § 7.

Survivorship between persons who have disappeared, but were not lost in a common disaster.— It has been held that where two persons have disappeared and have both been absent a sufficient time to raise a presumption of death, no presumption of survivorship arises from the fact that one was heard from after the disappearance of the other, where at such time the other had not been absent a sufficient time to raise a presumption of his death. Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443.

89. *Maine.*— Johnson *v.* Merithew, 80 Me. 111, 13 Atl. 132, 9 Am. St. Rep. 162.

Massachusetts.—Fuller *v.* Linzee, 135 Mass. 468.

Missouri.— U. S. Casualty Co. *v.* Kaeer, 169 Mo. 301, 69 S. W. 370, 92 Am. St. Rep. 641.

South Carolina.— See Pell *v.* Ball, 1 Cheves 99.

United States.— Robinson *v.* Gallier, 20 Fed. Cas. No. 11,951, 2 Woods 178.

See 15 Cent. Dig. tit. "Death," § 7.

90. *Florida.*— Smith *v.* Croom, 7 Fla. 81.

Maine.— Johnson *v.* Merithew, 80 Me. 111, 13 Atl. 132, 9 Am. St. Rep. 162.

Maryland.— Cowman *v.* Rogers, 73 Md. 403, 21 Atl. 64, 10 L. R. A. 550.

Missouri.— Supreme Council R. A. *v.* Kaeer, 96 Mo. App. 93, 69 S. W. 671.

New York.— Newell *v.* Nichols, 75 N. Y. 78, 31 Am. Rep. 424; Moehring *v.* Mitchell, 1 Barb. Ch. 264.

Texas.— Males *v.* Sovereign Camp W. of W., 30 Tex. Civ. App. 184, 70 S. W. 108; Hilderbrandt *v.* Ames, 27 Tex. Civ. App. 377, 66 S. W. 128.

United States.— See Robinson *v.* Gallier, 20 Fed. Cas. No. 11,951, 2 Woods 178.

England.— See *In re* Johnson, 78 L. T. Rep. N. S. 85.

See 15 Cent. Dig. tit. "Death," § 7.

91. *Maine.*— Johnson *v.* Merithew, 80 Me. 111, 13 Atl. 132, 9 Am. St. Rep. 162.

Maryland.— Cowman *v.* Rogers, 73 Md. 403, 21 Atl. 64, 10 L. R. A. 550.

New York.— Newell *v.* Nichols, 75 N. Y. 78, 31 Am. Rep. 424.

Texas.— Hilderbrandt *v.* Ames, 27 Tex. Civ. App. 377, 66 S. W. 128.

there is a presumption that all the persons died at the same moment.[92] However this may be, it is certain that where two or more persons have perished in a common disaster, and there is no evidence as to which died first, the courts will dispose of property rights as though death occurred at the same time,[93] and this being true it seems to be of little practical importance whether the courts arrive at this conclusion through the roundabout method of saying that the fact is incapable of proof, and hence the party upon whom the onus lies fails, and the property is disposed of as though both died together, not because of the fact that this is proved, or because there is any presumption to that effect, but merely because there is no evidence and no presumption to the contrary;[94] or adopt the simple and direct method of saying that there is a presumption that death occurred at the same time, and this, not having been overcome, must be acted upon by the court.[95]

2. Evidence[96] — a. In General. Where there is no evidence whatever as to which of two persons survived a common disaster, such general considerations as

United States.— Robinson *v.* Gallier, 20 Fed. Cas. No. 11,951, 2 Woods 178.

See 15 Cent. Dig. tit. "Death," § 7.

92. Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442; Balder *v.* Middeke, 92 Ill. App. 227; Taylor *v.* Diplock, 2 Phillim. 261; *In re* Selwyn, 3 Hagg. Eccl. 748. See also Coye *v.* Leach, 8 Metc. (Mass.) 371, 41 Am. Dec. 518.

93. *Illinois.*— Middeke *v.* Balder, 198 Ill. 590, 64 N. E. 1002, 92 Am. St. Rep. 284, 59 L. R. A. 653 [*affirming* 98 Ill. App. 525].

Kansas.— Russell *v.* Hallett, 23 Kan. 276.

New York.— Newell *v.* Nichols, 75 N. Y. 78, 31 Am. Rep. 424.

Rhode Island.— *In re* Wilbor, 20 R. I. 126, 37 Atl. 634, 78 Am. St. Rep. 842, 51 L. R. A. 863.

United States.— Young Women's Christian Home *v.* French, 187 U. S. 401, 23 S. Ct. 184, 47 L. ed. 233 [*reversing* 18 App. Cas. (D. C.) 9].

England.— Underwood *v.* Wing, 19 Beav. 459, 4 DeG. M. & G. 633, 3 Eq. Rep. 794, 1 Jur. N. S. 159, 24 L. J. Ch. 293, 2 Wkly. Rep. 641, 53 Eng. Ch. 496.

See 15 Cent. Dig. tit. "Death," § 7; and, generally, Descent and Distribution.

94. See Newell *v.* Nichols, 75 N. Y. 78, 31 Am. Rep. 424.

95. See Balder *v.* Middeke, 92 Ill. App. 227.

96. See, generally, Evidence.

Illustrative cases on the sufficiency of evidence as to survivorship.— A husband and his wife went into a certain timber between eleven and twelve o'clock A. M., the husband carrying a rifle, and shortly thereafter two reports were heard. Their bodies were found about six P. M., the wife shot through the body from behind, while the husband was in a squatting position, with his rifle across his knees, and the top of his head blown off. It was conceded that the husband had shot the wife, either accidentally or intentionally, and then committed suicide. The evening was rainy, and was nearly freezing. Two heirs of the wife and another witness testified that the body of the wife was warm at six o'clock, and that there were leaves and grass in her hands, as if she had struggled in dying. One witness for the heirs of the husband testified that he reached the bodies at eight P. M., and that they were both cold and stiff, and there were no signs of a struggle. It was held that the evidence was sufficient to show that the wife survived the husband, and his property descended to her (Broome *v.* Duncan, (Miss. 1901) 29 So. 394). Testator devised land to his son J for life, remainder to J's three infant children in fee. All the persons named were burned to death together. On the night of the fire, which was very cold, testator, if he followed his usual custom, slept in a room in the northwest part of the house; J and his wife and children sleeping in another room east of and divided by a hall from testator's room. Testator was eighty-two years old, and, in cold weather, a fire was kept up in an unsafe stove in his room, and a lamp burned there all night. There was a closet, with a curtain instead of a door, in his room, to which he often went in the night for medicine, lighting a candle kept there to enable him to see. His remains were found under the ruins at the closet. The only person who escaped from the house stated that the fire was under the greatest headway in testator's room, and a wind driving it eastward, in which direction partitions and doors would obstruct its progress. The only outcry heard by this witness was J's voice, and he saw no one at all. It was shown that death would result quicker from excessive heat than smoke. It was held that testator probably died before any of the others. Ehle's Estate, 73 Wis. 445, 41 N. W. 627. Upon a question of survivorship, it appeared that the testatrix and her two grandchildren, together with the father of the latter, perished in the disaster to the steamer Schiller. They were all in the pavilion on the deck after the steamer struck. The testatrix was washed out of the pavilion, but the evidence did not disclose whether she was carried out into the sea or to some other part of the deck. The children, with their father, were seen alive in the pavilion some ten or fifteen minutes after the testatrix was swept away. Her dead body was afterward recovered, but the remains of the chil-

age, health, etc., may be resorted to to aid conjecture;[97] but where there is any evidence whatever as to the survivorship between two persons who perished in a common disaster it must govern in the decision of the facts.[98]

b. Recital in Order of Probate Court. A recital in the order of a probate court, appointing an administrator, that the intestate is the "surviving wife" of her husband raises no presumption of survivorship of the wife, where both she and her husband perished in a common disaster.[99]

c. Opinion Evidence. In California, where the statute establishes certain presumptions as to the survivorship among persons who perish in the same calamity, opinion evidence is inadmissible on the question of survivorship.[1]

III. ACTIONS FOR CAUSING DEATH.

A. Right of Action — 1. At Common Law. At common law no action will lie for damages caused by the death of a human being by the wrongful or negligent act of another, in favor of the heirs, distributees, or personal representatives of the decedent, in conformance with the maxim *actio personalis moritur cum persona*.[2] In some jurisdictions, however, the doctrine has been enunciated that

dren were never found. It was held that the evidence of survivorship of the grandchildren was insufficient. *In re* Ridgway, 4 Redf. Surr. (N. Y.) 226. But see Stinde *v.* Ridgway, 55 How. Pr. (N. Y.) 301, in which it was held that the same evidence would sustain a finding that the testatrix died first.

97. Pell *v.* Ball, Cheves Eq. (S. C.) 99. See also Moehring *v.* Mitchell, 1 Barb. Ch. (N. Y.) 264, in which case the court held that where a husband, wife, and daughter perished at sea by the same disaster, and there was no evidence as to who was the survivor, there was no presumption of law that the daughter survived the mother, but expressed the opinion, although it did not decide, that it would be presumed that the husband survived his wife.

Where the calamity consists of a series of successive events separated from each other in point of time and character, and each likely to produce death upon the several victims according to the degree of exposure to it, the difference of age, sex, and physical strength becomes a matter of evidence and may be considered. Smith *v.* Croom, 7 Fla. 81.

An infant of tender years may be presumed to have been survived by a person of middle age and in the full vigor of life, where both perish in a shipwreck. Coye *v.* Leach, 8 Metc. (Mass.) 371, 41 Am. Dec. 518.

98. Pell *v.* Ball, Cheves Eq. (S. C.) 99, holding that where a husband and wife had perished in a shipwreck, the wife must be held to have survived where there was evidence that she was seen and was heard to call loudly for her husband immediately after the disaster and that he was not heard to answer, nor was he heard or seen at any time after the explosion which caused the shipwreck.

99. Sanders *v.* Simcich, 65 Cal. 50, 2 Pac. 741.

1. Hollister *v.* Cordero, 76 Cal. 649, 18 Pac. 855, in which the verdict of a coroner's jury was held not to be admissible on the question of survivorship of a husband and wife who were murdered at the same time, it being a mere matter of opinion.

2. *California.*— Kramer *v.* San Francisco Market St. R. Co., 25 Cal. 434.

Connecticut.— Goodsell *v.* Hartford, etc., R. Co., 33 Conn. 51; Connecticut Mut. L. Ins. Co. *v.* New York, etc., R. Co., 25 Conn. 265, 65 Am. Dec. 571.

Illinois.—Chicago, etc., R. Co. *v.* Schroeder, 18 Ill. App. 328.

Indiana.— Cincinnati, etc., R. Co. *v.* Chester, 57 Ind. 297.

Iowa.— Major *v.* Burlington, etc., R. Co., 115 Iowa 309, 88 N. W. 815.

Kansas.— Eureka *v.* Merrifield, 53 Kan. 794, 37 Pac. 113.

Kentucky.— Lewis *v.* Taylor Coal Co., 112 Ky. 845, 66 S. W. 1044, 23 Ky. L. Rep. 2218, 57 L. R. A. 447; O'Donoghue *v.* Akin, 2 Duv. 478; Eden *v.* Lexington, etc., R. Co., 14 B. Mon. 204.

Louisiana.— Van Amburg *v.* Vicksburg, etc., R. Co., 37 La. Ann. 650, 55 Am. Rep. 517; Hubgh *v.* New Orleans, etc., R. Co., 6 La. Ann. 495, 54 Am. Dec. 565.

Maine.— Bligh *v.* Biddeford, etc., R. Co., 94 Me. 499, 48 Atl. 112; Lyons *v.* Woodward, 49 Me. 29.

Massachusetts.— Palfrey *v.* Portland, etc., R. Co., 4 Allen 55; Hollenbeck *v.* Berkshire R. Co., 9 Cush. 478; Kearney *v.* Boston, etc., R. Corp., 9 Cush. 108; Carey *v.* Berkshire R. Co., 1 Cush. 475, 48 Am. Dec. 616.

Michigan.— Hyatt *v.* Adams, 16 Mich. 180.

Missouri.— McNamara *v.* Slavens, 76 Mo. 329.

New Jersey.—Myers *v.* Holborn, 58 N. J. L. 193, 33 Atl. 389, 55 Am. St. Rep. 606, 30 L. R. A. 345.

New York.— Sorensen *v.* Balaban, 11 N. Y. App. Div. 164, 42 N. Y. Suppl. 654; Safford *v.* Drew, 3 Duer 627.

Ohio.— Worley *v.* Cincinnati, etc., R. Co., 1 Handy 481, 12 Ohio Dec. (Reprint) 247; Lake Shore, etc., R. Co. *v.* Orvis, 12 Ohio Cir. Ct. 710.

where the death of a wife or child, caused by wrongful act, is not instantaneous, the husband or father may recover for the loss of services and for medical and other expenses up to the time of death, without the aid of any statute;[3] but this doctrine has never been carried to the extent of holding that recovery might be had for mental suffering of the father or husband, or the deceased, in such a case.[4]

2. Under Statutory and Constitutional Provisions — a. In General. The right of action to recover damages for death caused by wrongful act was first given in England by a statute known as Lord Campbell's Act;[5] and this statute has been, with various modifications, incorporated in the legislation, it is believed, of all the American states, and under these statutes and constitutional provisions, whenever the death of any person is caused by any wrongful act or neglect, the party who would have been liable if death had not ensued is liable to an action for damages,

Pennsylvania.— Moe *v.* Smiley, 23 Wkly. Notes Cas. 461.

South Carolina.— Edgar *v.* Castello, 14 S. C. 20, 37 Am. Rep. 714.

Texas.— Gulf, etc., R. Co. *v.* Beall, 91 Tex. 310, 42 S. W. 1054, 66 Am. St. Rep. 892, 41 L. R. A. 807.

Vermont.— Sherman *v.* Johnson, 58 Vt. 40, 2 Atl. 707.

United States.— Mobile L. Ins. Co. *v.* Brame, 95 U. S. 754, 24 L. ed. 580; The E. B. Ward, Jr., 16 Fed. 255, 4 Woods 145; Sullivan *v.* Union Pac. R. Co., 2 Fed. 447; Sullivan *v.* Union Pac. R. Co., 23 Fed. Cas. No. 13,599, 3 Dill. 334. See also Holmes *v.* Oregon, etc., R. Co., 5 Fed. 75, 6 Sawy. 262.

England.— Osborn *v.* Gillett, L. R. 8 Exch. 88, 42 L. J. Exch. 53, 28 L. T. Rep. N. S. 197, 21 Wkly. Rep. 409 (Bramwell, B., dissenting); Baker *v.* Bolton, 1 Campb. 493, 10 Rev. Rep. 734. In Higgins *v.* Butcher, Yelv. 89, 90, the court, by Tanfield, J., said: "If a man beats the servant of J. S. so that he dies of that battery, the master shall not have an action against the other for the battery, and loss of service because the servant dying of the extremity of the battery, it is now become an offence to the crown, being converted into felony, and that drowns the particular offence, and private wrong offered to the master before, and his action is thereby lost."

See 15 Cent. Dig. tit. "Death," § 10.

The reason which led the courts at common law to refuse damages to a member of a family for the death of the family head or the family support was because the injury which resulted from the death of the member of the state was regarded as the public injury, that is, the injury to the state itself; that the justice to be satisfied was the public justice. The E. B. Ward, Jr., 16 Fed. 255, 4 Woods 145.

Wrongful acts not amounting to felony.— It has, however, been held in Georgia that at common law an action can be maintained for damages resulting from the death of plaintiff's son through the wrongful acts of defendant, if such wrongful acts do not amount to a felony. Shields *v.* Yonge, 15 Ga. 349, 60 Am. Dec. 698.

Under the general maritime law the same doctrine prevails where death is the result of negligence. *In re* La Bourgogne, 117 Fed. 261.

In Hawaii recovery can be had at common law for death by wrongful act. The Schooner Robert Lewers Co. *v.* Kekauoha, 114 Fed. 849, 52 C. C. A. 483.

3. Mowry *v.* Chaney, 43 Iowa 609; Covington St. R. Co. *v.* Packer, 9 Bush (Ky.) 455, 15 Am. Rep. 725; Eden *v.* Lexington, etc., R. Co., 14 B. Mon. (Ky.) 204; Hyatt *v.* Adams, 16 Mich. 180. And see McCubbin *v.* Hastings, 27 La. Ann. 713, holding that recovery might also be had for funeral expenses.

In England it has been held that, independently of Lord Campbell's Act, the executrix of a passenger injured by negligence by a railway train, causing his subsequent death, may recover as for a breach of the contract of carriage for the damage to the estate occasioned by medical expenses, etc., and the loss of time incurred prior to the death. Bradshaw *v.* Lancashire, etc., R. Co., L. R. 10 C. P. 189, 44 L. J. C. P. 148, 31 L. T. Rep. N. S. 847, 23 Wkly. Rep. 310.

4. Covington St. R. Co. *v.* Packer, 9 Bush (Ky.) 455, 15 Am. Rep. 725; Hyatt *v.* Adams, 16 Mich. 180.

5. *Illinois.*— Holton *v.* Daly, 106 Ill. 131.

Missouri.— Stoeckman *v.* Terre Haute, etc., R. Co., 15 Mo. App. 503.

New York.— Whitford *v.* Panama R. Co., 23 N. Y. 465; Safford *v.* Drew, 3 Duer 627.

Oregon.— Perham *v.* Portland Gen. Electric Co., 33 Oreg. 451, 53 Pac. 14, 24, 72 Am. St. Rep. 730, 40 L. R. A. 799.

England.— Blake *v.* Midland R. Co., 18 Q. B. 93, 16 Jur. 562, 21 L. J. Q. B. 233, 83 E. C. L. 93; Leggott *v.* Great Northern R. Co., 1 Q. B. D. 599, 45 L. J. Q. B. 557, 35 L. T. Rep. N. S. 334, 24 Wkly. Rep. 784; Read *v.* Great Eastern R. Co., L. R. 3 Q. B. 555, 9 B. & S. 714, 37 L. J. Q. B. 278, 18 L. T. Rep. N. S. 82, 16 Wkly. Rep. 1040; Seward *v.* The Vera Cruz, 10 App. Cas. 59, 5 Aspin. 386, 49 J. P. 324, 54 L. J. P. 9, 52 L. T. Rep. N. S. 474, 33 Wkly. Rep. 477; Pym *v.* Great Northern R. Co., 2 B. & S. 759, 110 E. C. L. 759; Barnett *v.* Lucas, Ir. R. 6 C. L. 247.

See 15 Cent. Dig. tit. "Death," § 11.

notwithstanding the death of the party injured, even though the act be felonious.[6]

b. Constitutionality and Interpretation of Statutes. Where statutes giving a right of action for damages for death by wrongful act have been assailed on constitutional grounds, they have usually been upheld;[7] although particular statutes have been declared to be unconstitutional on the ground of their being class legislation, or for other objectionable provisions contained therein.[8] Statutes giving a right of action for damages for the death of a person caused by the wrongful act or default of another are generally held to be remedial and not penal in their nature, and therefore to be liberally interpreted.[9]

For Lord Campbell's Act see 9 & 10 Vict. c. 93.

6. *Alabama.*— Smith *v.* Louisville, etc., R. Co., 75 Ala. 449.

Illinois.— Beard *v.* Skeldon, 113 Ill. 584; Holton *v.* Daly, 106 Ill. 131.

Indiana.— Peru, etc., R. Co. *v.* Bradshaw, 6 Ind. 146.

Iowa.— Conners *v.* Burlington, etc., R. Co., 71 Iowa 490, 32 N. W. 465, 60 Am. Rep. 814.

Kentucky.— Louisville, etc., R. Co. *v.* Sanders, 86 Ky. 259, 5 S. W. 563, 9 Ky. L. Rep. 690; Conner *v.* Paul, 12 Bush 144.

Maryland.— State *v.* Boyce, 72 Md. 140, 19 Atl. 366, 20 Am. St. Rep. 458, 7 L. R. A. 272.

Massachusetts.— Kelley *v.* Boston, etc., R. Co., 135 Mass. 448.

Michigan.— Racho *v.* Detroit, 90 Mich. 92, 51 N. W. 360.

Missouri.— Stoeckman *v.* Terre Haute, etc., R. Co., 15 Mo. App. 503.

Nebraska.— Chicago, etc., R. Co. *v.* Young, 58 Nebr. 678, 79 N. W. 556.

New Hampshire.— Clark *v.* Manchester, 62 N. H. 577.

New York.—Doedt *v.* Wiswall, 15 How. Pr. 128.

Pennsylvania.— Conroy *v.* Pennsylvania R. Co., 1 Pittsb. 440.

Rhode Island.— Chase *v.* American Steamboat Co., 10 R. I. 79.

South Dakota.— Belding *v.* Black Hills, etc., R. Co., 3 S. D. 369, 53 N. W. 750.

Texas.— Houston, etc., Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98; Price *v.* Houston Direct Nav. Co., 46 Tex. 535.

United States.— Dennick *v.* New Jersey Cent. R. Co., 103 U. S. 11, 26 L. ed. 439; Hulbert *v.* Topeka, 34 Fed. 510; Gohen *v.* Texas Pac. R. Co., 10 Fed. Cas. No. 5,506, 2 Woods 346.

See 15 Cent. Dig. tit. "Death," § 11.

Proceedings by indictment.— In several jurisdictions by statute the proceeding against railroad companies and other common carriers causing death by negligence is by indictment, and a fine is imposed on conviction; but such fine is for the benefit of the widow, children, or heirs of the deceased, and the principles applicable in civil cases apply. Com. *v.* Boston, etc., R. Corp., 134 Mass. 211; Com. *v.* Boston, etc., R. Co., 121 Mass. 36; Com. *v.* Metropolitan R. Co., 107 Mass. 236; Carey *v.* Berkshire R. Co., 1 Cush. (Mass.) 475, 48 Am. Dec. 616; State *v.* Manchester, etc., R. Co., 52 N. H. 528. It has been held in Maine that the killing must be instantaneous to bring it within the statute providing that railroads by whose negligence the life of a person is lost shall forfeit a certain amount to the use of the heirs of the deceased, since if the person lives for a time the right of action accrues to him and survives to his personal representatives. State *v.* Grand Trunk R. Co., 61 Me. 114, 14 Am. Rep. 552; State *v.* Maine Cent. R. Co., 60 Me. 490. See, however, State *v.* Maine Cent. R. Co., 90 Me. 267, 38 Atl. 158.

7. *Alabama.*— Richmond, etc., R. Co. *v.* Freeman, 97 Ala. 289, 11 So. 800.

Georgia.— Clay *v.* Central R., etc., Co., 84 Ga. 345, 10 S. E. 967; Georgia R. Co. *v.* Pittman, 73 Ga. 325; Southwestern R. Co. *v.* Paulk, 24 Ga. 356.

Kentucky.— Owensboro, etc., R. Co. *v.* Barclay, 102 Ky. 16, 43 S. W. 177, 19 Ky. L. Rep. 997; Schoolcraft *v.* Louisville, etc., R. Co., 92 Ky. 233, 17 S. W. 567, 14 L. R. A. 579.

Michigan.— James *v.* Emmet Min. Co., 55 Mich. 335, 21 N. W. 361.

Missouri.— Carroll *v.* Missouri Pac. R. Co., 88 Mo. 239, 57 Am. Rep. 382.

See 15 Cent. Dig. tit. "Death," § 11; and, generally, CONSTITUTIONAL LAW.

8. Smith *v.* Louisville, etc., R. Co., 75 Ala. 449; South Alabama, etc., R. Co. *v.* Morris, 65 Ala. 193; Gordon *v.* Winchester Bldg., etc., Assoc., 12 Bush (Ky.) 110, 23 Am. Rep. 713; Chicago, etc., R. Co. *v.* Moss, 60 Miss. 641; Wilson *v.* Tootle, 55 Fed. 211; *In re* Railroad Tax Cases, 13 Fed. 722, 8 Sawy. 238.

9. *Connecticut.*—Lamphear *v.* Buckingham, 33 Conn. 237.

Missouri.— Stoeckman *v.* Terre Haute, etc., R. Co., 15 Mo. App. 503.

New Hampshire.—State *v.* Manchester, etc., R. Co., 52 N. H. 528.

New Jersey.— Haggerty *v.* Central R. Co., 31 N. J. L. 349.

New York.— Whitford *v.* Panama R. Co., 23 N. Y. 465; Beach *v.* Bay State Steamboat Co., 30 Barb. 433, 10 Abb. Pr. 71, 18 How. Pr. 335 [*reversing* 27 Barb. 248, 6 Abb. Pr. 415, 16 How. Pr. 1].

See 15 Cent. Dig. tit. "Death," § 11.

Proceedings by indictment.— Under the Maine statute, providing that an indictment of railroad corporations for the negligent killing of any person, and the forfeiture on conviction of a sum of not more than five thousand dollars, nor less than five hundred dollars, to the use of his widow, children, etc., it has been held that the same rules of evidence and the same principles of law should be applied as in analogous civil actions for

3. Conditions Precedent[10] — a. Action Must Have Been Maintainable by Deceased. Under Lord Campbell's Act, and statutes framed thereon, the personal representative of the deceased can only maintain an action where, had the deceased survived, he himself at common law could have maintained such action.[11]

b. Notice of Claim. In some jurisdictions the statute provides, as a condition precedent to a right of action for the death of a person by wrongful act, that notice shall be given of the time, place, and cause of the injury to the party sought to be charged therefor, by the administrator or heir of the deceased within a specified period.[12]

c. Criminal Prosecution. Again in some jurisdictions, by statute, where the injury amounts to a felony, the person injured must concurrently with or previous to his action for damages for death by wrongful act prosecute defendant therefor, or allege a good excuse for failure to so prosecute.[13]

4. What Law Governs — a. General Rule. Under the various statutes permitting a recovery for death by wrongful act, the question has frequently arisen in the American courts whether, in the case where the death of a human being

damages. State *v.* Canada Grand Trunk R. Co., 58 Me. 176, 4 Am. Rep. 258.

On the contrary in some courts such statutes have been held to be penal, and in derogation of the common law, and as such to be strictly construed. Smith *v.* Louisville, etc., R. Co., 75 Ala. 449; Kramer *v.* San Francisco Market St. R. Co., 25 Cal. 434; Donahue *v.* Drexler, 82 Ky. 157, 56 Am. Rep. 886; Lexington *v.* Lewis, 10 Bush (Ky.) 677; Jackson *v.* St. Louis, etc., R. Co., 87 Mo. 422, 56 Am. Rep. 460.

10. **Conditions precedent** generally see Actions, 1 Cyc. 692 *et seq.*

11. *Georgia.*— East Tennessee, etc., R. Co. *v.* Maloy, 77 Ga. 237, 2 S. E. 941.

Illinois.— Holton *v.* Daly, 106 Ill. 131; Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 553.

Indiana.— Evansville, etc., R. Co. *v.* Lowdermilk, 15 Ind. 120; Ohio, etc., R. Co. *v.* Tindall, 13 Ind. 366, 74 Am. Dec. 259.

Maine.— See State *v.* Maine Cent. R. Co., 60 Me. 490.

Mississippi.— Vicksburg, etc., R. Co. *v.* Phillips, 64 Miss. 693, 2 So. 537.

Missouri.— Spiva *v.* Osage Coal, etc., Co., 88 Mo. 68; Elliott *v.* St. Louis, etc., R. Co., 67 Mo. 272.

Nebraska.— Chicago, etc., R. Co. *v.* Zerncke, 59 Nebr. 689, 82 N. W. 26, 55 L. R. A. 610.

New York.—Sullivan *v.* Dunham, 161 N. Y. 290, 55 N. E. 923, 76 Am. St. Rep. 274, 47 L. R. A. 715. And *compare* Lynch *v.* Davis, 12 How. Pr. 323.

Ohio.— Murphy *v.* Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633.

Rhode Island.— Neilson *v.* Brown, 13 R. I. 651, 43 Am. Rep. 58; Bradbury *v.* Furlong, 13 R. I. 15, 43 Am. Rep. 1.

United States.— Scheffer *v.* Washington City Midland, etc., R. Co., 105 U. S. 249, 26 L. ed. 1070; Barron *v.* Illinois Cent. R. Co., 2 Fed. Cas. No. 1,053, 1 Biss. 453.

England.— Read *v.* Great Eastern R. Co., L. R. 3 Q. B. 555, 9 B. & S. 714, 37 L. J. Q. B. 278, 18 L. T. Rep. N. S. 82, 16 Wkly. Rep. 1040; Tucker *v.* Chaplin, 2 C. & K. 730, 61 E. C. L. 730.

See 15 Cent. Dig. tit. "Death," § 10 *et seq.*

12. Sachs *v.* Sioux City, 109 Iowa 224, 80 N. W. 336; Brick *v.* Bosworth, 162 Mass. 334, 39 N. E. 36; Beauregard *v.* Webb Granite, etc., Co., 160 Mass. 201, 35 N. E. 555 (in which case the notice was held to be sufficient); Dickerman *v.* Old Colony R. Co., (Mass. 1892) 31 N. E. 728; Jones *v.* Boston, etc., R. Co., 157 Mass. 51, 31 N. E. 727; Daly *v.* New Jersey Steel, etc., Co., 155 Mass. 1, 29 N. E. 507; Gustafsen *v.* Washburn, etc., Mfg. Co., 153 Mass. 468, 27 N. E. 179 (holding that under the Massachusetts statute, where a death occurs without conscious suffering, it is not necessary to appoint an administrator to give the required notice, but the widow of the deceased or her attorney may give it); Gmaehle *v.* Rosenberg, 83 N. Y. App. Div. 339, 82 N. Y. Suppl. 366 [*affirming* on rehearing 80 N. Y. App. Div. 541, 80 N. Y. Suppl. 705]; Carter *v.* Drysdale, 12 Q. B. D. 91, 53 L. J. Q. B. 557, 32 Wkly. Rep. 171. See French *v.* Mascoma Flannel Co., 66 N. H. 90, 20 Atl. 363. See also Mitchell *v.* Colorado Milling, etc., Co., 12 Colo. App. 277, 55 Pac. 736 (holding that the Employers' Liability Act providing for the recovery of damages sustained by aged servants and employees resulting from negligence, and declaring that no such action shall be maintained unless plaintiff shall have given notice of his intention to bring suit, etc., has no application to a suit by a mother for the negligent killing of her son, under the act of 1877, authorizing certain relatives of a deceased employee, whose death resulted from his employers' negligence, to recover therefor, and requiring no notice); Orth *v.* Belgrade, 87 Minn. 237, 91 N. W. 843 (holding that the Minnesota statute, requiring notice to be given to a municipality of injury caused by defects in its streets, as a condition precedent to an action for such injuries, does not apply to an action by the personal representative of a deceased person whose death was caused by such defects); Jewett *v.* Keene, 62 N. H. 701; Clark *v.* Manchester, 62 N. H. 577.

13. Western, etc., R. Co. *v.* Sawtell, 65 Ga. 235; Sawtell *v.* Western, etc., R. Co., 61 Ga.

has happened in one state under such circumstances as would give a civil action therefor under the statute of that state, such action can be maintained in the courts of another state; in other words, whether an extraterritorial force can be given to statutes of this nature. In some cases the courts have reached the conclusion that the remedy under such statute is confined to the courts of the state in which the injury took place.[14] However, the contrary doctrine has been laid down in many decisions, on the ground that the foreign statutes should on prin-

567. See also South Carolina R. Co. *v.* Nix, 68 Ga. 572 (holding, however, that unless the statutes of the state in which a homicide is committed require a prosecution as a condition precedent to recover for homicide in a civil case, such prosecution is unnecessary to confer jurisdiction on the courts of Georgia of an action for the homicide brought therein, regardless of what the Georgia statutes require); Wise *v.* Teerpenning, 2 Edm. Sel. Cas. (N. Y.) 112.

14. *Illinois.*— Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177.

Iowa.— Hyde *v.* Wabash, etc., R. Co., 61 Iowa 441, 16 N. W. 351, 47 Am. Rep. 820.

Kansas.— Matheson *v.* Kansas City, etc., R. Co., 61 Kan. 667, 60 Pac. 747 (holding that the Missouri statute, giving a right of recovery for death caused by wrongful act, is so far penal in its nature, and so dissimilar in its provisions to the Kansas statute authorizing recovery for death by wrongful act, that it is not enforceable in the courts of the latter state); Dale *v.* Atchison, etc., R. Co., 57 Kan. 601, 47 Pac. 521 (holding that the courts of Kansas will not enforce the statutes of another state imposing a penalty for wrongful death, and giving the right of action to persons other than those entitled to recover in a similar case arising in Kansas). See also McCarthy *v.* Chicago, etc., R. Co., 18 Kan. 46, 26 Am. Rep. 742.

Kentucky.— Taylor *v.* Pennsylvania Co., 78 Ky. 348, 39 Am. Rep. 244.

Maryland.— State *v.* Pittsburgh, etc., R. Co., 45 Md. 41.

Massachusetts.— Richardson *v.* New York Cent. R. Co., 98 Mass. 85.

Missouri.—Vawter *v.* Missouri Pac. R. Co., 84 Mo. 679, 54 Am. Rep. 105.

New York.— Whitford *v.* Panama R. Co., 23 N. Y. 465 [*affirming* 3 Bosw. 67]; Beach *v.* Bay State Steamboat Co., 30 Barb. 433, 10 Abb. Pr. 71, 18 How. Pr. 335 [*reversing* 27 Barb. 248, 6 Abb. Pr. 415, 16 How. Pr. 1]; Vandeventer *v.* New York, etc., R. Co., 27 Barb. 244; Vanderwerken *v.* New York, etc., R. Co., 6 Abb. Pr. 239.

Ohio.— Hover *v.* Pennsylvania Co., 25 Ohio St. 667; Woodard *v.* Michigan Southern, etc., R. Co., 10 Ohio St. 121; Campbell *v.* Rogers, 2 Handy 110, 12 Ohio Dec. (Reprint) 355.

Pennsylvania.— Knight *v.* Railroad Co., 13 Wkly. Notes Cas. 251.

Tennessee.—Nashville, etc., R. Co. *v.* Eakin, 6 Coldw. 582.

Texas.— Texas, etc., R. Co. *v.* Richards, 68 Tex. 375, 4 S. W. 627 (where the court refused to enforce a right of action for personal injuries which survived the death of the injured person by the statute of the state where the injury occurred, in the absence of a statute in Texas providing for such survivorship); De Ham *v.* Mexican Nat. R. Co. (Civ. App. 1893) 22 S. W. 249 (holding that since the laws of Mexico do not give a right of action for death caused by the wrongful act of another, no action can be maintained in Texas for the negligence of the railroad company in Mexico which resulted in the death of one of its employees, although the death occurred within the state); Belt *v.* Gulf, etc., R. Co., 4 Tex. Civ. App. 231, 22 S. W. 1062.

See 15 Cent. Dig. tit. "Death," § 12.

Some of the decisions state the doctrine thus: If the laws of the state or foreign country in which the wrongful acts are committed do not give a right of action for death, or in the absence of proof of the existence of a statute giving such right, no action can be maintained in another state, even where the death occurred within the state in which the action is sought to be brought.

Alabama.— Louisville, etc., R. Co. *v.* Williams, 113 Ala. 402, 21 So. 938; Kahl *v.* Memphis, etc., R. Co., 95 Ala. 337, 10 So. 661.

Georgia.— Selma, etc., R. Co. *v.* Lacy, 43 Ga. 461.

Kansas.—McCarthy *v.* Chicago, etc., R. Co., 18 Kan. 46, 26 Am. Rep. 742.

Kentucky— Taylor *v.* Pennsylvania Co., 78 Ky. 348, 39 Am. Rep. 244.

Maryland.— State *v.* Pittsburgh, etc., R. Co., 45 Md. 41.

Massachusetts.— Richardson *v.* New York Cent. R. Co., 98 Mass. 85.

New York.— Geoghegan *v.* Atlas Steamship Co., 3 Misc. 224, 22 N. Y. Suppl. 749.

Ohio.— Wabash R. Co. *v.* Fox, 64 Ohio St. 133, 59 N. E. 888, 83 Am. St. Rep. 739; Van Camp *v.* Aldrich, 5 Ohio Dec. (Reprint) 92, 2 Am. L. Rec. 454; Woodward *v.* Michigan Southern, etc., R. Co., 2 Ohio Dec. (Reprint) 32, 1 West. L. Month. 196; Ott *v.* Lake Shore, etc., R. Co., 18 Ohio Cir. Ct. 395, 10 Ohio Cir. Dec. 85.

Rhode Island.— O'Reilly *v.* New York, etc., R. Co., 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 5 L. R. A. 364, 6 L. R. A. 719.

Texas.— De Ham *v.* Mexican Nat. R. Co., 86 Tex. 68, 23 S. W. 381; St. Louis, etc., R. Co. *v.* McCormick, 71 Tex. 660, 9 S. W. 540, 1 L. R. A. 804; Willis *v.* Missouri Pac. R. Co., 61 Tex. 432, 48 Am. Rep. 301; De Ham *v.* Mexican Nat. R. Co., (Civ. App. 1893) 22 S. W. 249; Belt *v.* Gulf, etc., R. Co., 4 Tex. Civ. App. 231, 22 S. W. 1062.

Vermont.— Adams *v.* Fitchburg R. Co., 67 Vt. 76, 30 Atl. 687, 48 Am. St. Rep. 800; Needham *v.* Grand Trunk R. Co., 38 Vt. 294.

United States.— Marshall *v.* Wabash R.

ciples of comity be enforced, unless against the public policy of the laws of the forum, and such an action may be maintained where the statute of the sister state sued upon is of the same general character as the statute of the forum upon the same subject, and it is not necessary that the foreign statute should resemble the statute of the forum in all its details, it being sufficient that the policy of the legislatures of the two states upon the subject of the right of action for such an injury is the same.[15] Where the latter doctrine is adhered to, the *lex loci* will

Co., 46 Fed. 269 (holding that a federal court in another state will not enforce the Missouri statute, giving a right of action for wrongful death, on the ground that it is a penal statute, and such statutes can only be enforced within the sovereignty of their creation); The E. B. Ward Jr., 16 Fed. 255, 4 Woods 145.

See 15 Cent. Dig. tit. "Death," § 12.

Without proof of the existence of a similar statute in a sister state, an action for damages for death caused by negligence in another state cannot be maintained in the state of New York. Debevoise *v.* New York, etc., R. Co., 98 N. Y. 377, 50 Am. Rep. 683.

15. *Arkansas.*— St. Louis, etc., R. Co. *v.* Haist, (1903) 72 S. W. 893.

District of Columbia.—Weaver *v.* Baltimore, etc., R. Co., 21 D. C. 499.

Georgia.— Central R. Co. *v.* Swint, 73 Ga. 651; South Carolina R. Co. *v.* Nix, 68 Ga. 572.

Illinois.— Shedd *v.* Moran, 10 Ill. App. 618.

Indiana.— Cincinnati, etc., R. Co. *v.* McMullen, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67; Burns *v.* Grand Rapids, etc., R. Co., 113 Ind. 169, 15 N. E. 230. See also Fabel *v.* Cleveland, etc., R. Co., 30 Ind. App. 268, 65 N. E. 929.

Iowa.— Morris *v.* Chicago, etc., R. Co., 65 Iowa 727, 23 N. W. 143, 54 Am. Rep. 39.

Kentucky.—Louisville, etc., R. Co. *v.* Whitlow, 43 S. W. 711, 19 Ky. L. Rep. 1931, 41 L. R. A. 614 (where plaintiff's decedent was killed in Tennessee, where contributory negligence will not defeat the action, but goes in mitigation of damages only, and the action for damages for the injury was brought in Kentucky, where contributory negligence will defeat such an action, and it was held that the liability for damages was governed by the laws of Tennessee); Wintuska *v.* Louisville, etc., R. Co., 20 S. W. 819, 14 Ky. L. Rep. 579; Louisville, etc., R. Co. *v.* Shivell, 18 S. W. 944, 13 Ky. L. Rep. 902; Bruce *v.* Cincinnati R. Co., 7 Ky. L. Rep. 469.

Minnesota.— Nicholas *v.* Burlington, etc., R. Co., 78 Minn. 43, 80 N. W. 776.

Mississippi.—Chicago, etc., R. Co. *v.* Doyle, 60 Miss. 977, holding that where a person was killed by a collision on a railroad running through two states, the right of action was determined by the law of the state in which the collision occurred.

Missouri.— Riley *v.* Grand Island Receivers, 72 Mo. App. 280; Stoeckman *v.* Terre Haute, etc., R. Co., 15 Mo. App. 503.

New York.—Wooden *v.* Western New York, etc., R. Co., 126 N. Y. 10, 16, 26 N. E. 1050, 22 Am. St. Rep. 803, 13 L. R. A. 458 (where the court, by Finch, J., said: "We refer to the *lex fori* and measure it by and compare it with the *lex loci*, I think, for two reasons: one, that the party defendant may not be subjected to different and varying responsibilities, and the other, that we may know that we are not lending our tribunals to enforce a right which we do not recognize, and which is against our own public policy); Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491 [*reviewing, distinguishing*, and to some extent *overruling* a number of prior decisions of the court of appeals and of other courts of that state upon the same question]; Stallknecht *v.* Pennsylvania R. Co., 13 Hun 451 [*affirming* 53 How. Pr. 305] (holding that the right of action given by New Jersey statute for death by wrongful act could be enforced in the courts of New York by an administratrix appointed in the latter state); Boyle *v.* Southern R. Co., 36 Misc. 289, 73 N. Y. Suppl. 465; Cavanagh *v.* Ocean Steam Nav. Co., 13 N. Y. Suppl. 540, 19 N. Y. Civ. Proc. 391.

Ohio.— Wabash R. Co. *v.* Fox, 20 Ohio Cir. Ct. 440, 11 Ohio Cir. Dec. 148; Ott *v.* Lake Shore, etc., R. Co., 18 Ohio Cir. Ct. 395, 10 Ohio Cir. Dec. 85; Essenwine *v.* Pennsylvania Co., 11 Ohio Dec. (Reprint) 277, 25 Cinc. L. Bul. 396.

Pennsylvania.— Knight *v.* West Jersey R. Co., 108 Pa. St. 250, 56 Am. Rep. 200.

Tennessee.—Nashville, etc., R. Co. *v.* Sprayberry, 9 Heisk. 852, holding, however, that the declaration must aver the statute under which it is brought.

Virginia.— Nelson *v.* Chesapeake, etc., R. Co., 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583.

Wisconsin.— Eingartner *v.* Illinois Steel Co., 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503.

United States.— Stewart *v.* Baltimore, etc., R. Co., 168 U. S. 445, 18 S. Ct. 105, 42 L. ed. 537 [*reversing* 6 App. Cas. (D. C.) 56]; Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 12 S. Ct. 905, 36 L. ed. 829; Dennick *v.* New Jersey Cent. R. Co., 103 U. S. 11, 26 L. ed. 439; Mexican Nat. R. Co. *v.* Slater, 115 Fed. 593, 53 C. C. A. 239; Burrell *v.* Fleming, 109 Fed. 489, 47 C. C. A. 598 (holding that a cause of action founded on a statute of one state, conferring a right of action to recover damages for wrongful death, may be enforced in a court of the United States sitting in another state, when it is not inconsistent with the statutes or public policy of the state in which the action was brought); Boston, etc., R. Co. *v.* Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193; Erickson *v.* Pacific Coast Steamship Co., 96 Fed. 80; Van Doren *v.* Pennsylvania R. Co., 93 Fed. 260, 35 C. C. A.

control as to the right of action, while all matters pertaining merely to the remedy will be governed by the *lex fori*.[16]

b. Death on High Seas. Where the statute of a state causes a survival to the next of kin of the right of action for damages for death wrongfully caused, such statute can have no application to a case where the death was caused outside the jurisdiction of such state and on the high seas.[17] However, by the weight of modern authority, the state laws follow the domestic vessel upon the high seas until she comes within another jurisdiction, and therefore an action will lie, under a statute of that state, for a death caused by negligence on board a vessel whose home port is in that state, even though upon the high seas, without the jurisdiction of any other sovereignty;[18] and therefore if the laws of the place where such negligent killing occurred give a right of action therefor it may be enforced in the courts of that state by an administrator there appointed.[19]

5. Grounds of Action — a. Creation of New Cause of Action. In many jurisdictions, under statutes providing that whenever death shall be caused by wrongful act, such as would, if death had not ensued, have entitled the party injured to maintain an action, the persons who would have been liable had death not ensued shall be liable notwithstanding such death, and designating the beneficiaries, it is held that such action is not a survival of the former right of action, but that a new cause of action arises, since there is an element in it, in addition to that which constituted the cause of action in favor of the person injured; namely, death must ensue as a consequence of the injury, and also because only the damages which ensue from the death are recoverable;[20] and under these stat-

282; Law *v.* Alabama Western R. Co., 91 Fed. 817; Davidow *v.* Pennsylvania R. Co., 85 Fed. 943. See also Cowen *v.* Ray, 108 Fed. 320, 47 C. C. A. 352.

16. *Illinois.*— Chicago, etc., R. Co. *v.* Rouse, 78 Ill. App. 286; Hanna *v.* Grand Trunk R. Co., 41 Ill. App. 116; Shedd *v.* Moran, 10 Ill. App. 618.

Iowa.— Mooney *v.* Union Pac. R. Co., 60 Iowa 346, 14 N. W. 343.

Kansas.—Burlington, etc., R. Co. *v.* Thompson, 31 Kan. 180, 1 Pac. 622, 47 Am. Rep. 497.

Massachusetts.— Walsh *v.* New York, etc., R. Co., 160 Mass. 571, 36 N. E. 584, 39 Am. St. Rep. 514; Higgins *v.* Central New England, etc., R. Co., 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544.

Minnesota.— Herrick *v.* Minneapolis, etc., R. Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771.

Mississippi.— Chicago, etc., R. Co. *v.* Doyle, 60 Miss. 977.

New York.— Wooden *v.* Western New York, etc., R. Co., 126 N. Y. 10, 26 N. E. 1050, 22 Am. St. Rep. 803, 13 L. R. A. 458.

Wisconsin.— Eingartner *v.* Illinois Steel Co., 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503.

United States.— Northern Pac. R. Co. *v.* Babcock, 154 U. S. 190, 14 S. Ct. 978, 38 L. ed. 958.

See 15 Cent. Dig. tit. "Death," § 12.

17. Until the law-making or treaty-making power has authorized this right of action and affixed its conditions and limitations, courts cannot decree damages to one person for the death of another upon the high seas. Mahler *v.* Norwich, etc., Transp. Co., 35 N. Y. 352. See also Whitford *v.* Panama R. Co., 23 N. Y. 465; Welsh *v.* The North Cambria, 40 Fed. 655; The E. B. Ward Jr., 16 Fed. 255, 4 Woods 145.

18. McDonald *v.* Mallory, 77 N. Y. 546, 33 Am. Rep. 664; Lindstrom *v.* International Nav. Co., 117 Fed. 170.

Within three-mile limit.— The statute of New Jersey giving a right of action in case of death by negligence applies to, and gives a right of action in case of, death from negligence occurring on the seas within three miles from the New Jersey shore. Lennan *v.* Hamburg-American Steamship Co., 73 N. Y. App. Div. 357, 77 N. Y. Suppl. 60.

19. Stallknecht *v.* Pennsylvania R. Co., 13 Hun (N. Y.) 451.

20. *Alabama.*—Smith *v.* Louisville, etc., R. Co., 75 Ala. 449.

Connecticut.— See Andrews *v.* Hartford, etc., R. Co., 34 Conn. 57.

Illinois.— Holton *v.* Daly, 106 Ill. 131; Quincy Coal Co. *v.* Hood, 77 Ill. 68; Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 553.

Indiana.— Mallott *v.* Shimer, 153 Ind. 35, 54 N. E. 101, 74 Am. St. Rep. 278; Pittsburgh, etc., R. Co. *v.* Hosea, 152 Ind. 412, 53 N. E. 419; Burns *v.* Grand Rapids, etc., R. Co., 113 Ind. 169, 15 N. E. 230.

Kansas.— Martin *v.* Missouri Pac. R. Co., 58 Kan. 475, 49 Pac. 605; Eureka *v.* Merrifield, 53 Kan. 794, 37 Pac. 113; McCarthy *v.* Chicago, etc., R. Co., 18 Kan. 46, 26 Am. Rep. 742; Missouri Pac. R. Co. *v.* Bennett, 5 Kan. App. 231, 47 Pac. 183.

New York.— Whitford *v.* Panama R. Co., 23 N. Y. 465 (holding that actions for injuries resulting in death, given to the administrator, etc., by statute, are not based on a revivor of the deceased's cause of action, but are new causes of action resting on the statute); O'Reilly *v.* Utah, etc., Stage Co., 87 Hun 406, 34 N. Y. Suppl. 358.

utes, creating a new cause of action in favor of designated beneficiaries, the right of action thereunder is not affected by the fact that the deceased is instantaneously killed.[21] Often, however, the statutes, unlike Lord Campbell's Act and the statutes modeled upon it, do not create a new cause of action for the death, but are survival statutes under which the personal representatives of the deceased may bring an action to recover damages for the injury which caused the death, in cases where the party injured was entitled to bring such action, but died before

Oregon.—Perham *v.* Portland Gen. Electric Co., 33 Oreg. 451, 53 Pac. 14, 24, 72 Am. St. Rep. 730, 40 L. R. A. 799 (holding that since the right of action is based on the death of the injured person, and not on the injury that caused it, such right of action exists, although the decedent may have been accidentally killed); Carlson *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 450, 28 Pac. 497.

Pennsylvania.— Fink *v.* Garman, 40 Pa. St. 95.

Utah.— Mason *v.* Union Pac. R. Co., 7 Utah 77, 24 Pac. 796.

Wisconsin.— Brown *v.* Chicago, etc., R. Co., 102 Wis. 137, 140, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579 (where the court said: "The death loss act of the English statute (9 & 10 Vict. c. 93), commonly called 'Lord Campbell's Act,' and the various laws of a similar kind that have been modelled after it, gave a new cause of action, unknown to the common law, for the benefit of certain designated classes of surviving relatives. Such relatives do not take the cause of action for damages to the deceased by transfer to them by operation of law, or otherwise, but are enabled by statute to recover the pecuniary loss to themselves caused by the wrongful taking off of the decedent, the continuation of whose life would have been beneficial to them"); Topping *v.* St. Lawrence, 86 Wis. 526, 57 N. W. 365.

United States.— Northern Pac. R. Co. *v.* Adams, 116 Fed. 324, 54 C. C. A. 196; The Oregon, 73 Fed. 846; The City of Norwalk, 55 Fed. 98; Holland *v.* Brown, 35 Fed. 43, 13 Sawy. 284; Hulbert *v.* Topeka, 34 Fed. 510; Roach *v.* Imperial Min. Co., 7 Fed. 698, 7 Sawy. 224. See also Ladd *v.* Foster, 31 Fed. 827, 12 Sawy. 547; Lung Chung *v.* Northern Pac. R. Co., 19 Fed. 254, 10 Sawy. 17.

England.— Seward *v.* The Vera Cruz, 10 App. Cas. 59, 5 Aspin. 386, 49 J. P. 324, 54 L. J. P. 9, 52 L. T. Rep. N. S. 474, 33 Wkly. Rep. 477; Pym *v.* Great Northern R. Co., 4 B. & S. 396, 10 Jur. N. S. 199, 32 L. J. Q. B. 377, 8 L. T. Rep. N. S. 734, 11 Wkly. Rep. 922, 116 E. C. L. 396.

See 15 Cent. Dig. tit. "Death," § 15.

Two causes of action.— It has been held in Vermont, under the acts of Nov. 15, 1847, and of 1849, that where death occurs in consequence of a bodily injury, two causes of action may arise — one in favor of decedent for his loss and suffering resulting from the injury in his lifetime, and revived by the act of 1847, and the other founded on his death, or on the damages resulting from his death, to his widow and next of kin, under the act of 1849. Needham *v.* Grank Trunk R. Co., 38 Vt. 294.

21. *Connecticut.*— Broughel *v.* Southern New England Tel. Co., 73 Conn. 614, 48 Atl. 751, 84 Am. St. Rep. 176 [*affirming* 72 Conn. 617, 45 Atl. 435, 49 L. R. A. 406] (decided under a statute, providing that causes of action for injuries to the person of decedent, whether the same result in instantaneous death or otherwise, survive to his personal representative, and holding that under such statute a recovery can be had for mere loss of life alone); Murphy *v.* New York, etc., R. Co., 30 Conn. 184.

Indiana.— Malott *v.* Shimer, 153 Ind. 35, 54 N. E. 101, 74 Am. St. Rep. 278.

Louisiana.— Hamilton *v.* Morgan's Steamship Co., 42 La. Ann. 824, 8 So. 586.

Michigan.— See Dolson *v.* Lake Shore, etc., R. Co., 128 Mich. 444, 87 N. W. 629.

New York.— Brown *v.* Buffalo, etc., R. Co., 22 N. Y. 191.

Pennsylvania.— Fink *v.* Garman, 40 Pa. St. 95.

South Carolina.— Reed *v.* Northeastern R. Co., 37 S. C. 42, 14 S. E. 289 [*following* Price *v.* Richmond, etc., R. Co., 33 S. C. 556, 12 S. E. 413, 26 Am. St. Rep. 700].

Tennessee.— Haley *v.* Mobile, etc., R. Co., 7 Baxt. 239; Fowlkes *v.* Nashville, etc., R. Co., 5 Baxt. 663, 9 Heisk. 829; Nashville, etc., R. Co. *v.* Prince, 2 Heisk. 580 [*overruling* on this point Louisville, etc., R. Co. *v.* Burke, 6 Coldw. 45].

United States.— Missouri, etc., R. Co. *v.* Elliott, 102 Fed. 96, 42 C. C. A. 188; Sternenberg *v.* Mailhos, 99 Fed. 43, 39 C. C. A. 408 [*citing* Gulf, etc., R. Co. *v.* Compton, 75 Tex. 667, 13 S. W. 667, and *distinguishing* Winnt *v.* International, etc., R. Co., 74 Tex. 32, 11 S. W. 907, 5 L. R. A. 172]; Matz *v.* Chicago, etc., R. Co., 85 Fed. 180; Roach *v.* Imperial Min. Co., 7 Fed. 698, 7 Sawy. 224.

See 15 Cent. Dig. tit. "Death," § 18.

Where conscious suffering precedes death. — It was held in Massachusetts that where the decedent, an employee, while descending from a car which was traveling at about four miles an hour, fell and caught his feet in the car and was carried about one hundred and eighty feet and was then instantly killed, there could be no recovery under the Employers' Liability Act, allowing recovery by such persons where an employee was instantly killed, or died without conscious suffering, as the result of the employer's negligence, since defendant's death could not be said to be without conscious suffering. Martin *v.* Boston, etc., R. Co., 175 Mass. 502, 56 N. E. 719.

exercising such right.[22] And in several jurisdictions, under the peculiar wording of the statute, the personal representative can only recover such damages as the deceased suffered up to the time of his death, and hence no action can be maintained under such a statute where the death was instantaneous.[23]

b. Acts or Omissions For Which Recovery May Be Had — (i) *General Rule.* In most cases the question of the right to recover for the death of a person by wrongful act is merely a question of negligence, and is to be governed by the same principles and considerations as questions of negligence where the results are less serious.[24]

(ii) *Ordinary Neglect or Omission.* Where the statute gives a right of action for death caused by wrongful act, by reason of the negligence, unskilfulness, or default of defendant or his agent, recovery may be had for ordinary negligence or carelessness.[25]

22. *Arkansas.*— St. Louis, etc., R. Co. *v.* Dawson, 68 Ark. 1, 56 S. W. 46 (holding that the cause of action survived the personal representative of the decedent, if decedent lived after the act constituting the cause of action, whether conscious or not); Davis *v.* St. Louis, etc., R. Co., 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283.

Connecticut.— Budd *v.* Meriden Electric R. Co., 69 Conn. 272, 37 Atl. 683.

Iowa.— Sherman *v.* Western Stage Co., 24 Iowa 515. See Conners *v.* Burlington, etc., R. Co., 71 Iowa 490, 32 N. W. 465, 60 Am. Rep. 814.

Kansas.— See Atchison, etc., R. Co. v. Napole, 55 Kan. 401, 40 Pac. 669; Berry *v.* Kansas City, etc., R. Co., 52 Kan. 759, 34 Pac. 805, 39 Am. St. Rep. 371.

Massachusetts.— Maher *v.* Boston, etc., R. Co., 158 Mass. 36, 32 N. E. 950; Mulchahey *v.* Washburn Car-Wheel Co., 145 Mass. 281, 14 N. E. 106, 1 Am. St. Rep. 458; Riley *v.* Connecticut River R. Co., 135 Mass. 292; Corcoran *v.* Boston, etc., R. Co., 133 Mass. 507; Bancroft *v.* Boston, etc., R. Corp., 11 Allen 34; Kearney *v.* Boston, etc., R. Corp., 9 Cush. 108.

Michigan.— Jones *v.* McMillan, 129 Mich. 86, 88 N. W. 206; Dolson *v.* Lake Shore, etc., R. Co., 128 Mich. 444, 87 N. W. 629.

Mississippi.— Illinois Cent. R. Co. *v.* Pendergrass, 69 Miss. 425, 12 So. 954.

Missouri.— Gray *v.* McDonald, 104 Mo. 303, 16 S. W. 398.

South Dakota.—Belding *v.* Black Hills, etc., R. Co., 3 S. D. 369, 53 N. W. 750.

Tennessee.— Whaley *v.* Catlet, 103 Tenn. 347, 53 S. W. 131.

United States.— Lyon *v.* Boston, etc., R. Co., 107 Fed. 386.

See 15 Cent. Dig. tit. "Death," § 15 *et seq.*

23. Bligh *v.* Biddeford, etc., R. Co., 94 Me. 499, 48 Atl. 112; Bancroft *v.* Boston, etc., R. Corp., 11 Allen (Mass.) 34; Hollenbeck *v.* Berkshire R. Co., 9 Cush. (Mass.) 478 (holding, however, that if the deceased lived an appreciable time after the injury, the cause of action would survive to his personal representative, the survival of the action not depending on the intelligence, consciousness, or mental capacity of the deceased after the injury which resulted in his death); Kearney *v.* Boston, etc., R. Corp., 9 Cush. (Mass.) 108; Belding *v.* Black Hills, etc., R. Co., 3 S. D. 369, 53 N. W. 750; Louisville, etc., R. Co. *v.* Burke, 46 Tenn. 45.

24. Texas, etc., R. Co. *v.* Crowder, 70 Tex. 222, 7 S. W. 709. And see, generally, Negligence.

25. *Alabama.*—Shannon *v.* Jefferson County, 125 Ala. 384, 27 So. 977.

Indiana.— American Tin-Plate Co. *v.* Guy, 25 Ind. App. 588, 58 N. E. 738.

Iowa.— Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391.

Kentucky.— Schoolcraft *v.* Louisville, etc., R. Co., 92 Ky. 233, 17 S. W. 567, 13 Ky. L. Rep. 517, 14 L. R. A. 579 (holding, however, that in an action against a railroad company for death through its negligence of one not employed by it, the character of the negligence alleged must determine whether the action is under Gen. St. c. 57, § 3, which provides an action for the loss of life caused by wilful neglect of defendant, or under section 1, which provides an action for neglect or carelessness of such company); Louisville, etc., R. Co. *v.* Smith, 87 Ky. 501, 9 S. W. 493, 10 Ky. L. Rep. 514; Illinois Cent. R. Co. *v.* Josey, 110 Ky. 342, 61 S. W. 703, 22 Ky. L. Rep. 1795, 54 L. R. A. 78 (holding that under the Kentucky statutes gross negligence is not necessary to entitle an administrator to compensatory damages for the negligent killing of his intestate). See Harris *v.* Kentucky Timber, etc., Co., 43 S. W. 462, 45 S. W. 94, 19 Ky. L. Rep. 1731.

Minnesota.— McLean *v.* Burbank, 12 Minn. 530.

Mississippi.— Bussey *v.* Gulf, etc., R. Co., 79 Miss. 597, 31 So. 212.

Missouri.— Buddenberg *v.* Charles P. Chouteau Transp. Co., 108 Mo. 394, 18 S. W. 970.

New York.— Gibney *v.* State, 137 N. Y. 1, 33 N. E. 142, 33 Am. St. Rep. 690, 19 L. R. A. 365; Baker *v.* Bailey, 16 Barb. 54, holding that in such an action it is no defense that the act was not intentional.

Texas.— Hendrick *v.* Walton, 69 Tex. 192, 6 S. W. 749; McCue *v.* Klein, 60 Tex. 168, 48 Am. Rep. 260, where it was held that one who induced another, whose faculties were impaired by the use of intoxicants, to drink liquor on a wager to such an excess as to cause death, was liable in damages therefor. See also Showers *v.* Yeancy, 9 Pa. Co. Ct. 69.

(iii) *Wilful Neglect.* Under a statute giving a right of action for death by wrongful act, where the killing is wilful, wilful neglect of defendant or his agent must be shown in order to maintain the action.[26]

(iv) *Unlawful Homicide.* Under a statute giving designated persons a right of action for the unlawful, wilful homicide of a person, such action may be maintained where such homicide amounts to murder or only voluntary manslaughter.[27] Where, however, the homicide is either justifiable or excusable, no cause of action for damages will arise under such a statute.[28] Under a statute of this nature, defendant is liable in an action for damages, although he may also be liable to criminal prosecution.[29]

c. Proximate Cause. The wrongful act, neglect, or default must have been the proximate cause of death in order to give a right of action therefor, but such act, neglect, or default is the proximate cause of death within the rule if it inflicts a fatal injury, although the death that would have resulted therefrom is hastened

See Van Camp *v.* Aldrich, 5 Ohio Dec. (Reprint) 92, 4 Am. L. Rec. 454.

See 15 Cent. Dig. tit. "Death," § 16.

Passive neglect.— It has been held under the Rhode Island statute, giving a right of action where death ensues for an "injury inflicted by the wrongful act of another," that such action cannot be maintained against one charged only with passive neglect or a mere omission of duty. Myette *v.* Gross, 18 R. I. 729, 30 Atl. 602; Bradbury *v.* Furlong, 13 R. I. 15, 43 Am. Rep. 1. Under the Texas statute, providing that an action for death may be brought where the death is caused by the negligence or carelessness of the proprietor or owner of any railroad, or by the unfitness, negligence, or carelessness of his servants or agents, it was held that the recovery under this act was not limited to a death resulting from the railroad's operation of its road in its capacity as a carrier only, but extended to a death resulting from the negligence of a servant of the railroad company employed to nurse a smallpox camp in connection with a hospital maintained by the railroad as a part of the legal department. Missouri, etc., R. Co. *v.* Freeman, (Tex. Civ. App. 1903) 73 S. W. 542.

Unfitness of employee.—Under a Massachusetts statute, giving a right of action against a railway company for the death of a passenger if such death is caused through the unfitness of an employee, it has been held that the fact that the death of an aged passenger was caused by the conductor's negligence in starting the car too soon, while he was getting into the car, was not alone sufficient evidence of the employee's unfitness to justify a recovery under the statute. Gordon *v.* West End St. R. Co., 175 Mass. 181, 55 N. E. 990.

26. King *v.* Henkie, 80 Ala. 505, 60 Am. Rep. 119; Hackett *v.* Smelsley, 77 Ill. 109; Louisville, etc., R. Co. *v.* Brice, 84 Ky. 298, 1 S. W. 483, 8 Ky. L. Rep. 271; Reinder *v.* Black, etc., Coal Co., 13 S. W. 719, 12 Ky. L. Rep. 30; Rogers *v.* Hughes, 87 Ky. 185, 8 S. W. 16, 10 Ky. L. Rep. 68; Derby *v.* Kentucky Cent. R. Co., 4 S. W. 303, 9 Ky. L. Rep. 153; Campbell *v.* Houston, etc., R. Co., 2 Tex. Unrep. Cas. 473, holding that plaintiff who seeks exemplary damages in an action for wrongfully causing the death of his intestate must either charge the death to have resulted from the wilful commission of some act of defendant, or that it was induced by a wilful omission of duty on his part or from gross negligence or malice. See also Chiles *v.* Drake, 2 Metc. (Ky.) 146, 74 Am. Dec. 406.

Where killing was intentional.— It was held in Spring *v.* Glenn, 12 Busn (Ky.) 172, under a statute giving a right of action against one by whose "wilful neglect" another is killed, that such statute did not authorize a suit by a personal representative of one killed intentionally; that the element of negligence must enter into the act of killing. See also Winnegar *v.* Central Pass. R. Co., 85 Ky. 547, 4 S. W. 237, 9 Ky. L. Rep. 156 (holding that under the Kentucky statute, giving to an administrator the right of action for the death of his intestate, when caused by the neglect of servants or agents of a corporation, an action cannot be maintained against a railroad company for the death of a passenger caused by an employee wilfully assaulting him and throwing him off the car); Morgan *v.* Thompson, 82 Ky. 383, 6 Ky. L. Rep. 499.

Wilful neglect defined.— "Wilful neglect," within the meaning of Ky. Gen. St. c. 57, § 3, making persons or corporations liable in an action, by the widow or personal representative, for punitive damages for loss of life through their "wilful neglect," or that of their agents or servants, has been defined to be intentional neglect or recklessness evidencing an intent to injure. Louisville, etc., R. Co. *v.* Coniff, 27 S. W. 865, 16 Ky. L. Rep. 296.

27. McDonald *v.* Eagle, etc., Mfg. Co., 67 Ga. 761, 68 Ga. 839; Weekes *v.* Cottingham, 58 Ga. 559; McClurg *v.* Ingleheart, 33 S. W. 80, 17 Ky. L. Rep. 913; Vawter *v.* Hultz, 112 Mo. 633, 20 S. W. 689; Stephens *v.* Wallace, 10 Tex. Civ. App. 44, 30 S. W. 1099.

28. McDonald *v.* Eagle, etc., Mfg. Co., 68 Ga. 839; Western, etc., R. Co. *v.* Strong, 52 Ga. 461; Morgan *v.* Durfee, 69 Mo. 469, 33 Am. Rep. 508. See also Burnham *v.* Stone, 101 Cal. 164, 35 Pac. 627.

29. Kain *v.* Larkin, 56 Hun (N. Y.) 79, 9 N. Y. Suppl. 89.

or anticipated by some other cause,[30] such as an unskilful surgical operation or the like.

d. Loss or Injury to Beneficiary. Under statutes providing that the designated beneficiaries shall recover such damages for death by wrongful act as the jury

30. *Alabama.*— Thompson *v.* Louisville, etc., R. Co., 91 Ala. 496, 8 So. 406, 11 L. R. A. 146.

Arkansas.— Texas, etc., R. Co. *v.* Orr, 46 Ark. 182.

Georgia.—See also Southern R. Co. *v.* Webb, 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109.

Illinois.— Merrihew *v.* Chicago City R. Co., 92 Ill. App. 346; Chase *v.* Nelson, 39 Ill. App. 53.

Indiana.— Terre Haute, etc., R. Co. *v.* Buck, 96 Ind. 346, 49 Am. Rep. 168.

Massachusetts.— Daniels *v.* New York, etc., R. Co., 183 Mass. 393, 67 N. E. 424, 62 L. R. A. 751.

Michigan.— Beauchamp *v.* Saginaw Min. Co., 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30.

Missouri.— Jackson *v.* St. Louis, etc., R. Co., 87 Mo. 422, 56 Am. Rep. 460 (holding that an action will not lie where the injury did not cause but only hastened the death of the injured party); Nagel *v.* Missouri Pac. R. Co., 75 Mo. 653, 42 Am. Rep. 418.

New York.— Sullivan *v.* Tioga R. Co., 112 N. Y. 643, 20 N. E. 569, 8 Am. St. Rep. 793; Sauter *v.* New York Cent., etc., R. Co., 66 N. Y. 50, 23 Am. Rep. 18; Koch *v.* Zimmermann, 85 N. Y. App. Div. 370, 83 N. Y. Suppl. 339; McQuade *v.* Metropolitan St. R. Co., 84 N. Y. App. Div. 637, 82 N. Y. Suppl. 720; Hoey *v.* Metropolitan St. R. Co., 70 N. Y. App. Div. 60, 74 N. Y. Suppl. 1113 [*modifying* 36 Misc. 93, 72 N. Y. Suppl. 544]; Bruss *v.* Metropolitan St. R. Co., 66 N. Y. App. Div. 554, 73 N. Y. Suppl. 256 (holding that the evidence would sustain a finding that the injury was the proximate cause of death); Tait *v.* Buffalo R. Co., 55 N. Y. App. Div. 507, 67 N. Y. Suppl. 403; Turner *v.* Nassau Electric R. Co., 41 N. Y. App. Div. 213, 58 N. Y. Suppl. 490 (where, upon the evidence, it was held that defendant's negligence was the proximate cause of death); Caven *v.* Troy, 15 N. Y. App. Div. 163, 44 N. Y. Suppl. 244; Weber *v.* Third Ave. R. Co., 12 N. Y. App. Div. 512, 42 N. Y. Suppl. 789 (where the evidence was held not to show that the injury was the proximate cause of death); Ginna *v.* Second Ave. R. Co., 8 Hun 494; Sauter *v.* New York Cent., etc., R. Co., 6 Hun 446; Mitchell *v.* Cody, 6 Misc. 307, 26 N. Y. Suppl. 781.

Ohio.— Ronker *v.* St. John, 21 Ohio Cir. Ct. 39, 11 Ohio Cir. Dec. 434.

Pennsylvania.— McCafferty *v.* Pennsylvania R. Co., 193 Pa. St. 339, 44 Atl. 435, 74 Am. St. Rep. 690; Hoehle *v.* Allegheny Heating Co., 5 Pa. Super. Ct. 21.

Tennessee.— White *v.* Conly, 14 Lea 51, 52 Am. Rep. 154; Wagner *v.* Woolsey, 2 Heisk. 235.

Texas.— Brush Electric Light, etc., Co. *v.* Lefevre, (Civ. App. 1900) 55 S. W. 396.

United States.— Scheffer *v.* Washington City Midland, etc., R. Co., 105 U. S. 249, 252, 26 L. ed. 1070 (where a person was so injured in a railroad collision that he subsequently became deranged and eight months afterward committed suicide, and the court held that the proximate cause of his death was his own act, and that no action would lie against the railroad company for negligently causing his death. Miller, J., in delivering the opinion of the court, said: "The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease, and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that 'great first cause least understood' in which the train of all causation ends. . . . His insanity, as the cause of final destruction, was as little the natural or probable result of the negligence of the railway officials, as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him, and his death"); The Onoko, 100 Fed. 477.

See 15 Cent. Dig. tit. "Death," § 19.

Proximate cause defined.— In Seifter *v.* Brooklyn Heights R. Co., 169 N. Y. 254, 258, 62 N. E. 349, the court, by Parker, C. J., said: "It will be well to have in mind the rule upon that subject as it was last expressed by this court in Laidlaw *v.* Sage, 158 N. Y. 73, 52 N. E. 679, 688, 44 L. R. A. 216: 'A proximate cause is one in which is involved the idea of necessity. It is one the connection between which and the effect is plain and intelligible; it is one which can be used as a term by which a proposition can be demonstrated, that is, one which can be reasoned from conclusively. A remote cause is one which is inconclusive in reasoning, because from it no certain conclusion can be legitimately drawn. In other words, a remote cause is a cause the connection between which and the effect is uncertain, vague or indeterminate. . . . The proximate cause being given, the effect must follow.'"

Two or more concurrent causes.— To attribute death to two or more concurrent causes, each must be a prominent, efficient cause; for if one of the alleged causes operates slightly with another, which is a prominent, efficient cause, then the proximate cause of death should be traced to the latter. Ellyson *v.* International, etc., R. Co., (Tex. Civ. App. 1903) 75 S. W. 868.

The common-law presumption in criminal cases that an injury was not the proximate cause of the death, because it did not occur within a year and a day, does not apply to civil cases. Western, etc., R. Co. *v.* Bass, 104 Ga. 390, 30 S. E. 874; Purcell *v.* Lauer, 14 N. Y. App. Div. 33, 43 N. Y. Suppl. 988, 4 N. Y. Annot. Cas. 129]; Schlichting *v.* Wintgen, 25 Hun (N. Y.) 626; Louisville, etc.,

shall deem a fair and just compensation with reference to pecuniary injury resulting from the death to such beneficiaries, some pecuniary loss must have resulted to the beneficiaries named in the statute in order to entitle them to maintain the action,[31] although according to the better rule it need not be shown that such beneficiaries had a legal claim on the deceased for support.[32] Under some statutes, however, giving a right of action for death by wrongful act to persons who were dependent upon deceased for support, it has been held that there can be no recovery by such next of kin where no legal obligation rested upon decedent to support them.[33]

R. Co. *v.* Clarke, 152 U. S. 230, 14 S. Ct. 579, 38 L. ed. 422.

31. *Colorado.*— Denver, etc., R. Co. *v.* Wilson, 12 Colo. 20, 20 Pac. 340.

Georgia.— East Tennessee, etc., R. Co. *v.* Maloy, 77 Ga. 237, 2 S. E. 941; Bell *v.* Central R. Co., 73 Ga. 520 (holding that the parent's right to compensation for the killing of his child rests on loss of service); Bell *v.* Wooten, 53 Ga. 684; Shields *v.* Yonge, 15 Ga. 349, 60 Am. Dec. 698.

Illinois.— Chicago *v.* Scholten, 75 Ill. 468; Chicago, etc., R. Co. *v.* Swett, 45 Ill. 197, 92 Am. Dec. 206; Callaway *v.* Spurgeon, 63 Ill. App. 571; Bradley *v.* Sattler, 54 Ill. App. 504.

Indiana.— Wabash R. Co. *v.* Cregan, 23 Ind. App. 1, 54 N. E. 767.

Kentucky.— Lexington City R. Co. *v.* Kayse, 10 Ky. L. Rep. 321.

Massachusetts.— Welch *v.* New York, etc., R. Co., 182 Mass. 84, 64 N. E. 695; Houlihan *v.* Connecticut R. Co., 164 Mass. 555, 42 N. E. 108; Daly *v.* New Jersey Steel, etc., Co., 155 Mass. 1, 29 N. E. 507.

Missouri.— Hennesey *v.* Bavarian Brewing Co., 63 Mo. App. 111.

Pennsylvania.— Schnatz *v.* Philadelphia, etc., R. Co., 160 Pa. St. 602, 28 Atl. 952; Pennsylvania R. Co. *v.* Adams, 55 Pa. St. 490; Deni *v.* Pennsylvania R. Co., 19 Pa. Co. Ct. 7; Moe *v.* Smiley, 23 Wkly. Notes Cas. 461; Lehigh Iron Co. *v.* Rupp, 12 Wkly. Notes Cas. 47.

Texas.— St. Louis, etc., R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104; Missouri Pac. R. Co. *v.* Henry, 75 Tex. 220, 12 S. W. 828; Galveston, etc., R. Co. *v.* Polk, (Civ. App. 1901) 63 S. W. 343; Proctor *v.* San Antonio St. R. Co., 26 Tex. Civ. App. 148, 62 S. W. 938, 939; Texas, etc., R. Co. *v.* Brown, 14 Tex. Civ. App. 697, 39 S. W. 140; St. Louis Southwestern R. Co. *v.* Bishop, 14 Tex. Civ. App. 504, 37 S. W. 764; Ft. Worth, etc., R. Co. *v.* Floyd, (Civ. App. 1893) 21 S. W. 544.

United States.— Illinois Cent. R. Co. *v.* Barron, 5 Wall. 90, 18 L. ed. 591; *In re* California Nav., etc., Co., 110 Fed. 678.

See 15 Cent. Dig. tit. "Death," § 20 *et seq.*

32. *Illinois.*— Chicago *v.* Scholten, 75 Ill. 468; Chicago, etc., R. Co. *v.* Swett, 45 Ill. 197, 92 Am. Dec. 206.

Maine.— McKay *v.* New England Dredging Co., 92 Me. 454, 43 Atl. 29.

Massachusetts.— Daly *v.* New Jersey Steel, etc., Co., 155 Mass. 1, 29 N. E. 507.

New York.— Dickens *v.* New York Cent. R. Co., 28 Barb. 41; Keller *v.* New York Cent. R. Co., 17 How. Pr. 102; Palmer *v.* New York Cent., etc., R. Co., 5 N. Y. St. 436, 26 N. Y. Wkly. Dig. 26.

Pennsylvania.— Schnatz *v.* Philadelphia, etc., R. Co., 160 Pa. St. 602, 28 Atl. 952; Pennsylvania R. Co. *v.* Adams, 55 Pa. St. 499.

South Carolina.— Petrie *v.* Columbia, etc., R. Co., 29 S. C. 303, 7 S. E. 515.

Texas.— Houston, etc., R. Co. *v.* Cowser, 57 Tex. 293; Atchison, etc., R. Co. *v.* Van Belle, 26 Tex. Civ. App. 511, 64 S. W. 397; Gulf, etc., R. Co. *v.* Southwick, (Civ. App. 1895) 30 S. W. 592; San Antonio, etc., R. Co. *v.* Long, (Civ. App. 1894) 26 S. W. 114.

Vermont.— Boyden *v.* Fitchburg R. Co., 70 Vt. 125, 39 Atl. 771.

Wisconsin.— Tuteur *v.* Chicago, etc., R. Co., 77 Wis. 505, 46 N. W. 897.

United States.— Illinois Cent. R. Co. *v.* Barron, 5 Wall. 90, 18 L. ed. 591; Brennan *v.* Molly Gibson Consol. Min., etc., Co., 44 Fed. 795; Maryland *v.* Baltimore, etc., R. Co., 16 Fed. Cas. No. 9,219, 1 Hughes 337.

See 15 Cent. Dig. tit. "Death," § 20.

Under certain statutes fixing a fine or penalty upon corporations for the death of a person caused by their negligence, it has been held that it is not necessary to show a pecuniary loss in order to entitle the designated beneficiaries to recover a fine or penalty. Goodsell *v.* Hartford, etc., R. Co., 33 Conn. 51; Philpott *v.* Missouri Pac. R. Co., 85 Mo. 164; Oldfield *v.* New York, etc., R. Co., 14 N. Y. 310; Keller *v.* New York Cent. R. Co., 2 Abb. Dec. (N. Y.) 480, 24 How. Pr. (N. Y.) 172; Grotenkemper *v.* Harris, 25 Ohio St. 510.

33. Duvall *v.* Hunt, 34 Fla. 85, 15 So. 876 (where the adult sisters of deceased were strong in health, mentally and physically, and fully able to support and maintain themselves, and it was held that they could not recover for the death of their brother, although they were in fact supported by him); Atlanta, etc., Air-Line R. Co. *v.* Gravitt, 93 Ga. 369, 20 S. E. 550, 44 Am. St. Rep. 145, 26 L. R. A. 553 (where a boy eleven years old, whose labor was worth six dollars per month, and who resided with his parents, worked for his father on a farm and rendered services for his mother about the house, and it was held that the mother was dependent on him and could sue for his wrongful death, although she also depended upon her husband for support); Daniels *v.* Savannah, etc., R. Co., 86 Ga. 236, 12 S. E. 365; Clay *v.* Central R., etc., Co., 84 Ga. 345, 10 S. E. 967 (holding, however, that it is not necessary for a recovery by a mother for the death of

6. DEFENSES — a. Negligence of Fellow Servant. Where the injury resulting in death is due to some act or omission of a fellow servant of decedent, no action will lie against the master under a statute giving a right of action for wrongful death, and the fact that the injury resulting in death was caused by the negligence of a fellow servant is a good defense to such action,[34] unless the statute[35] gives such right by express provision, or by fair construction appears to allow it in such case.[36]

her child, that she should have been wholly dependent upon such child for support); Snell *v.* Smith, 78 Ga. 355; Scott *v.* Central R. Co., 77 Ga. 450.

34. *Alabama.*— Harris *v.* McNamara, 97 Ala. 181, 12 So. 103.

California.— Daves *v.* Southern Pac. R. Co., 98 Cal. 19, 32 Pac. 708, 35 Am. St. Rep. 133.

Georgia.— Hovis *v.* Richmond, etc., R. Co., 91 Ga. 36, 16 S. E. 211; McDonald *v.* Eagle, etc., Mfg. Co., 67 Ga. 761, 68 Ga. 839.

Illinois.— Ohio, etc., R. Co. *v.* Robb, 36 Ill. App. 627.

Kentucky.—Linck *v.* Louisville, etc., R. Co., 107 Ky. 370, 54 S. W. 184, 21 Ky. L. Rep. 1097; Casey *v.* Louisville, etc., R. Co., 84 Ky. 79; Cincinnati, etc., R. Co. *v.* Adams, 13 S. W. 428, 11 Ky. L. Rep. 833.

Maine.— State *v.* Maine Cent. R. Co., 60 Me. 490.

Massachusetts.— O'Keefe *v.* Brownell, 156 Mass. 131, 30 N. E. 479; Dacey *v.* Old Colony R. Co., 153 Mass. 112, 26 N. E. 437; Connors *v.* Holden, 152 Mass. 598, 26 N. E. 137; Peaslee *v.* Fitchburg R. Co., 152 Mass. 155, 25 N. E. 71; Daley *v.* Boston, etc., R. Co., 147 Mass. 101, 16 N. E. 690.

Michigan.— Enright *v.* Toledo, etc., R. Co., 93 Mich. 409, 53 N. W. 536.

Minnesota.— Collins *v.* St. Paul, etc., R. Co., 30 Minn. 31, 14 N. W. 60.

Missouri.— Relyea *v.* Kansas City, etc., R. Co., (1892) 19 S. W. 1116; Jackson *v.* Missouri Pac. R. Co., (1890) 14 S. W. 54; Proctor *v.* Hannibal, etc., R. Co., 64 Mo. 112; Higgins *v.* Hannibal, etc., R. Co., 36 Mo. 418. See also Sullivan *v.* Missouri Pac. R. Co., 97 Mo. 113, 10 S. W. 852.

New Mexico.—Lutz *v.* Atlantic, etc., R. Co., 6 N. M. 496, 30 Pac. 912, 16 L. R. A. 819.

New York.— Vick *v.* New York Cent., etc., R. Co., 95 N. Y. 267, 47 Am. Rep. 36; Slater *v.* Jewett, 85 N. Y. 61, 39 Am. Rep. 627; McCosker *v.* Long Island R. Co., 84 N. Y. 77; Sammon *v.* New York, etc., R. Co., 62 N. Y. 251; Tinney *v.* Boston, etc., R. Co., 62 Barb. 218; Sherman *v.* Rochester, etc., R. Co., 15 Barb. 574.

Texas.— Texas, etc., R. Co. *v.* Cumpston, 4 Tex. Civ. App. 25, 23 S. W. 47.

Virginia.—Norfolk, etc., R. Co. *v.* Donnelly, 88 Va. 853, 14 S. E. 692; Bibb *v.* Norfolk, etc., R. Co., 87 Va. 711, 14 S. E. 163.

West Virginia.— Beuhring *v.* Chesapeake, etc., R. Co., 37 W. Va. 502, 16 S. E. 435.

Wisconsin.— Petersen *v.* Sherry Lumber Co., 90 Wis. 83, 62 N. W. 948.

United States.— Baltimore, etc., R. Co. *v.* Andrews, 50 Fed. 728, 1 C. C. A. 636, 17 L. R. A. 190; Hardy *v.* Minneapolis, etc., R. Co., 36 Fed. 657; Naylor *v.* New York Cent., etc., R. Co., 33 Fed. 801; Howard *v.* Denver, etc., R. Co., 26 Fed. 837.

See 15 Cent. Dig. tit. "Death," § 24.

35. Death without conscious suffering.— In some jurisdictions, by express statutory provision, in case of an employee's death, without conscious suffering, caused by the negligence of a co-employee, an action can be maintained against the employer in the name of the widow or dependent next of kin, and of course under these statutes such defense is bad. Conley *v.* Portland Gaslight Co., 96 Me. 281, 52 Atl. 656; Sawyer *v.* Perry, 88 Me. 42, 33 Atl. 660 (differentiating the terms "immediate and instantaneous," as used in the Maine statute, permitting recovery for immediate death resulting from injuries received by wrongful act of another, and holding that the statute does not require the death to be instantaneous); Martin *v.* Boston, etc., R. Co., 175 Mass. 502, 56 N. E. 719 (holding, however, that in order to maintain an action under this statute, it is essential that death should have occurred without conscious suffering); Welch *v.* Grace, 167 Mass. 590, 46 N. E. 387; Clark *v.* New York, etc., R. Co., 160 Mass. 39, 35 N. E. 104 (holding, however, that the effect of this statute is not to give an action to the administrator free from the defense arising from the relation of fellow servants, in a case where death resulted without conscious suffering, where there is no widow nor dependent next of kin); Com. *v.* Eastern R. Co., 5 Gray (Mass.) 473.

36. Central R. Co. *v.* Roach, 70 Ga. 434; Philo *v.* Illinois Cent. R. Co., 33 Iowa 47 (holding that where an employee of a railroad company dies of injuries received in consequence of the negligence of a co-employee, the company will be regarded as the perpetrator, within the meaning of the Iowa act); McLeod *v.* Ginther, 80 Ky. 399 (holding that action for wrongful death will lie in favor of the widow of decedent, for the wilful neglect of the company or its employees resulting in his death, although he was an employee of the company). See also Donaldson *v.* Mississippi, etc., Co., 18 Iowa 280, 87 Am. Dec. 391; Magoffin *v.* Missouri Pac. R. Co., 102 Mo. 540, 15 S. W. 76, 22 Am. St. Rep. 798.

Gross negligence.—It has been held in Kentucky that the implied undertaking of employees in the same service to risk the contingencies which the ordinary skill and care of each, in his line of service, could not avert, does not exonerate the master from liability for death resulting to one of such fellow servants from the gross negligence of another.

b. Contributory Negligence — (I) *Of Deceased* — (A) *General Rule.* The principle is well settled that if the negligence of the deceased contributed proximately to the injury causing his death no action can be maintained under a statute giving a right of action for death by wrongful act, because he himself could not have brought such an action had the injury not proved fatal.[37] Under some statutes, however, it has been held that contributory negligence of the deceased is no defense to an action for death by wrongful act, although it may go in mitigation of damages.[38]

(B) *Where Act Is Wilful or Wanton.* However, it has been decided that the

Louisville, etc., R. Co. *v.* Filbern, 6 Bush 574, 99 Am. Dec. 690; Louisville, etc., R. Co. *v.* Robinson, 4 Bush 507; Louisville, etc., R. Co. *v.* Collins, 2 Duv. 114, 87 Am. Dec. 486.

Negligence of superior servant.— Under the Kentucky statute an action will lie for the death of a servant resulting from the ordinary negligence of a superior servant engaged in the same employment, although there could have been no recovery for the injury if it had not resulted in death. Cincinnati, etc., R. Co. *v.* Cook, 67 S. W. 383, 23 Ky. L. Rep. 2410.

37. *Alabama.*—McAdory *v.* Louisville, etc., R. Co., 109 Ala. 636, 19 So. 905; King *v.* Henkie, 80 Ala. 505, 60 Am. Rep. 119.

Arkansas.— Little Rock, etc., R. Co. *v.* Cavenesse, 48 Ark. 106, 2 S. W. 505.

Delaware.— Neal *v.* Wilmington, etc., Electric R. Co., 3 Pennew. 467, 53 Atl. 338.

Georgia.— Western, etc., R. Co. *v.* Herndon, 114 Ga. 168, 39 S. E. 911; Georgia R., etc., Co. *v.* Sawyer, 112 Ga. 346, 37 S. E. 380; Seats *v.* Georgia Midland, etc., R. Co., 86 Ga. 811, 13 S. E. 88; Berry *v.* Northwestern R. Co., 72 Ga. 137; Central R., etc., Co. *v.* Roach, 64 Ga. 635; Southwestern R. Co. *v.* Johnson, 60 Ga. 667.

Indiana.— Indiana, etc., R. Co. *v.* Greene, 106 Ind. 279, 6 N. E. 603, 55 Am. Rep. 736; Lofton *v.* Vogles, 17 Ind. 105.

Kentucky.— Clarke *v.* Louisville, etc., R. Co., 101 Ky. 34, 39 S. W. 840, 18 Ky. L. Rep. 1082, 36 L. R. A. 123; Passamaneck *v.* Louisville R. Co., 98 Ky. 195, 32 S. W. 620; Jacobs *v.* Louisville, etc., R. Co., 10 Bush 263.

Maine.— State *v.* Maine Cent. R. Co., 76 Me. 357, 49 Am. Rep. 622.

Maryland.— See also Baltimore, etc., R. Co. *v.* State, 75 Md. 152, 23 Atl. 310, 32 Am. St. Rep. 372.

Massachusetts.— Chandler *v.* New York, etc., R. Co., 159 Mass. 589, 35 N. E. 89, construing a Connecticut statute.

Michigan.— Saner *v.* Lake Shore, etc., R. Co., 108 Mich. 31, 65 N. W. 624.

Missouri.—Huelsenkamp *v.* Citizens' R. Co., 34 Mo. 45.

New Jersey.— Blaker *v.* New Jersey Midland R. Co., 30 N. J. Eq. 240.

New York.— Cordell *v.* New York Cent., etc., R. Co., 75 N. Y. 330; Van Schaick *v.* Hudson River R. Co., 43 N. Y. 527; Curran *v.* Warren Chemical, etc., Co., 36 N. Y. 153; Mackey *v.* New York Cent. R. Co., 27 Barb. 528; Galvin *v.* New York, 54 N. Y. Super. Ct. 295; Canning *v.* Buffalo, etc., R. Co., 50 N. Y. Suppl. 506.

North Dakota.— Cameron *v.* Great Northern R. Co., 8 N. D. 618, 80 N. W. 885.

United States.—Miles *v.* Receivers, 17 Fed. Cas. No. 9,544, 4 Hughes 172.

England.— Senior *v.* Ward, 1 E. & E. 385, 5 Jur. N. S. 172, 28 L. J. Q. B. 139, 7 Wkly. Rep. 261, 102 E. C. L. 385; Barton's Hill Coal Co. *v.* Reid, 4 Jur. N. S. 767, 3 Macq. H. L. 266, 6 Wkly. Rep. 664.

See 15 Cent. Dig. tit. "Death," § 25.

Refusal to permit amputation.— In Sullivan *v.* Tioga R. Co., 112 N. Y. 643, 20 N. E. 569, 8 Am. St. Rep. 793, it was held that the plaintiff's right to recover was not defeated by the fact that the intestate rejected the advice of his physician and refused to submit his injured leg to amputation, the physician testifying that such an operation would merely have improved the chances of recovery.

38. Williams *v.* South, etc., R. Co., 91 Ala. 635, 9 So. 77 (holding that a father may recover for the death of his minor son employed by a railroad company without his consent, although the son was guilty of contributory negligence); Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149 (holding that where the deceased and defendant were both guilty of negligence, the contributory negligence of the deceased is no defense to an action by his widow, but merely goes in mitigation of damages); Merrill *v.* Eastern R. Co., 139 Mass. 252, 29 N. E. 666; Com. *v.* Boston, etc., R. Corp., 134 Mass. 211; Boston, etc., R. Co. *v.* Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193 (holding that under the Massachusetts statute contributory negligence was no defense unless it was the true cause of the injury). See Corcoran *v.* Boston, etc., R. Co., 133 Mass. 507.

Contributory negligence indirect cause of death.— It has been held in Missouri that where the evidence showed that the deceased only remotely contributed to the accident, and that the agents and employees of defendant were the direct and immediate cause, and might have prevented it by the exercise of prudence and care, defendant was liable. Morrissey *v.* Wiggins Ferry Co., 43 Mo. 380, 97 Am. Dec. 402.

Failure to observe statutory precautions.— It has been held in Tennessee that in a statutory action to recover damages for death caused by the failure of a railroad company to observe the statutory precautions in running a train, plaintiff is not precluded from recovery by the contributory negligence of deceased, but the damages otherwise recoverable are only mitigated thereby. Artenberry *v.*

contributory negligence of the deceased is not a bar to a recovery for his death, caused by the wanton and wilful act of another.[39]

(II) *Of Beneficiary.* The rule is well recognized that where the injury causing the death of the deceased is due to the contributory negligence of a beneficiary under the statute, there can be no recovery by such beneficiary.[40] However, under statutes giving the right of action to the personal representative of the deceased, it has been held that contributory negligence on the part of the beneficiary is not a defense to an action by such personal representative.[41]

Southern R. Co., 103 Tenn. 266, 52 S. W. 878; Nashville, etc., R. Co. *v.* Smith, 6 Heisk. 174.

In death resulting from an affray, it was held that the fact that the deceased brought it on was no defense to an action for damages for his death. Darling *v.* Williams, 35 Ohio St. 58.

39. *Alabama.*— Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35; Louisville, etc., R. Co. *v.* Markee, 103 Ala. 160, 15 So. 511, 49 Am. St. Rep. 21.

Illinois.— Litchfield Coal Co. *v.* Taylor, 81 Ill. 590.

Kentucky.— Louisville, etc., R. Co. *v.* Brice, 84 Ky. 298, 1 S. W. 483, 8 Ky. L. Rep. 271; McLeod *v.* Ginther, 80 Ky. 399; Claxton *v.* Lexington, etc., R. Co., 13 Bush 636; Louisville, etc., R. Co. *v.* Filbern, 6 Bush 574, 99 Am. Dec. 690; Union Warehouse Co. *v.* Prewitt, 50 S. W. 964, 21 Ky. L. Rep. 67; Hollinsworth *v.* Warnock, 47 S. W. 770, 20 Ky. L. Rep. 883; Louisville, etc., R. Co. *v.* Coniff, 27 S. W. 865, 16 Ky. L. Rep. 296; Derby *v.* Kentucky Cent. R. Co. 4 S. W. 303, 9 Ky. L. Rep. 153.

Maryland.— See Tucker *v.* State, 89 Md. 471, 43 Atl. 778, 44 Atl. 1004.

Missouri.— Gray *v.* McDonald, 104 Mo. 303, 16 S. W. 398.

New York.— Kain *v.* Larkin, 56 Hun 79, 9 N. Y. Suppl. 89.

Ohio.— Schausten *v.* Toledo Consol. St. R. Co., 18 Ohio Cir. Ct. 691.

Texas.— Texas, etc., R. Co. *v.* Bell, (Civ. App. 1897) 39 S. W. 636.

Virginia.— Matthews *v.* Warner, 29 Gratt. 570, 26 Am. Rep. 396.

Canada.— Martel *v.* Ross, 16 Quebec Super. Ct. 118.

See 15 Cent. Dig. tit. "Death," § 25.

40. *Alabama.*— Alabama, etc., R. Co. *v.* Burgess, 116 Ala. 509, 22 So. 913; Alabama Great Southern R. Co. *v.* Dobbs, 101 Ala. 219, 12 So. 770.

Arkansas.— St. Louis, etc., R. Co. *v.* Dawson, 68 Ark. 1, 56 S. W. 46; St. Louis, etc., R. Co. *v.* Freeman, 36 Ark. 41.

Idaho.— Holt *v.* Spokane, etc., R. Co., 1 Ida. 443, 40 Pac. 56.

Illinois.— Pekin *v.* McMahon, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114, 27 L. R. A. 206; Baltimore, etc., R. Co. *v.* Pletz, 61 Ill. App. 161.

Indiana.— Evansville, etc., R. Co. *v.* Wolf, 59 Ind. 89; Jeffersonville, etc., R. Co. *v.* Bowen, 49 Ind. 154.

Missouri.— Wiese *v.* Remme, 140 Mo. 289, 41 S. W. 797.

Nebraska.— Tucker *v.* Draper, 62 Nebr. 66, 86 N. W. 917, 54 L. R. A. 321.

New York.— Foley *v.* New York Cent., etc., R. Co., 78 Hun 248, 28 N. Y. Suppl. 816.

Ohio.— Wolf *v.* Lake Erie, etc., R. Co., 55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812 (holding, however, that the contributory negligence of some of the beneficiaries will not defeat the action as to others who were not guilty of such negligence); Altemeier *v.* Cincinnati St. R. Co., 4 Ohio N. P. 224.

Tennessee.— Bamberger *v.* Citizens' St. R. Co., 95 Tenn. 18, 31 S. W. 163, 49 Am. St. Rep. 909, 28 L. R. A. 486.

Texas.— Missouri, etc., R. Co. *v.* Evans, 16 Tex. Civ. App. 68, 41 S. W. 80.

Vermont.— Ploof *v.* Burlington Traction Co., 70 Vt. 509, 41 Atl. 1017, 45 L. R. A. 108.

Compare Walters *v.* Chicago, etc., R. Co., 41 Iowa 71 (where the parents of an infant two years of age, being unable to give him their personal care, intrusted him to the supervision of a suitable person, and it was held that the negligence of the latter could not be imputed to the parents to defeat a recovery for negligence resulting in the death of the infant); Miller *v.* Meade Tp., 128 Mich. 98, 87 N. W. 131 (where a father having notice of a defect in a highway over which his son was driving in daylight, forgot to warn his son of its dangerous condition, and it was held that he was not guilty of such contributory negligence as to prevent a recovery by him for damages for the death of his son resulting from such defect).

See 15 Cent. Dig. tit. "Death," § 25.

But the contributory negligence of some of the beneficiaries will not defeat the action as to others not guilty of such negligence. Wolf *v.* Lake Erie, etc., R. Co., 55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812; Cleveland, etc., R. Co. *v.* Crawford, 24 Ohio St. 631, 15 Am. Rep. 633.

41. Wymore *v.* Mahaska County, 78 Iowa 396, 43 N. W. 264, 16 Am. St. Rep. 449, 6 L. R. A. 545; Lewin *v.* Missouri Valley R. Co., 52 N. Y. App. Div. 69, 65 N. Y. Suppl. 49 (holding that under the New York statute (Code Civ. Proc. § 1902), giving the administrator of decedent who has left surviving him or her a husband, wife, or next of kin, a right of action for the wrongful death, where a child of eighteen months was killed by its father negligently driving on defendant's track, the father was entitled to recover for the death of the child because of defendant's negligence in not sounding any warning, where his contributory negligence was not wilful and intentional, since the right is given by the express words of the statute);

c. Release or Accord and Satisfaction[42] — (I) *By Decedent* — (A) *General Rule.* Upon the question as to whether a release, executed by the deceased for the injury received by him, will continue a bar to an action by his representative or heirs for his death, there is considerable conflict of authority. However, the better rule is that where the party injured has compromised for the injury and accepted satisfaction previous to his death, there can be no further right of action, and consequently no suit under the statute, unless it be shown that such compromise or release was procured by fraud or duress.[43]

(B) *By Contract.* It has been held in some jurisdictions that the value of the interest of beneficiaries in the life of the decedent given by statute, and the amount they may recover for his death caused through negligence of another, cannot be affected by any contract made by him in his lifetime, nor will the acceptance of money in pursuance of such contract, nor the execution of a release of liability by one of such beneficiaries affect the administrator's right of action on behalf of the other beneficiaries.[44]

(II) *By Beneficiaries.* By decided weight of authority, a release to the person liable, by those entitled to the amount recoverable for death caused by wrongful act, is a bar to a subsequent action brought by the personal representative or the beneficiaries of the decedent.[45] However, where a release has been

Norfolk, etc., R. Co. *v.* Groseclose, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718. See Hoag *v.* New York Cent., etc., R. Co., 111 N. Y. 199, 18 N. E. 648 (where both husband and wife were killed in the same accident, and it was held that the contributory negligence of the husband could not be imputed to the wife so as to bar a recovery by her administrator for her death); McMahon *v.* New York, 33 N. Y. 642. And see Consolidated Traction Co. *v.* Hone, 60 N. J. L. 444, 38 Atl. 759 [*reversing* on another point 59 N. J. L. 275, 35 Atl. 899], where the court was equally divided upon the question whether contributory negligence on the part of the sole next of kin will defeat the action.

42. **Accord and satisfaction** generally see ACCORD AND SATISFACTION.

Release generally see RELEASE.

43. *Georgia.*— Southern Bell Tel., etc., Co. *v.* Cassin, 111 Ga. 575, 36 S. E. 881, 50 L. R. A. 694, decided by a divided court.

New York.— Dibble *v.* New York, etc., R. Co., 25 Barb. 183.

Ohio.— Solor Refining Co. *v.* Elliott, 15 Ohio Cir. Ct. 581, 8 Ohio Cir. Dec. 225.

Pennsylvania.— Hill *v.* Pennsylvania R. Co., 178 Pa. St. 223, 35 Atl. 997, 56 Am. St. Rep. 754, 35 L. R. A. 196; Fink *v.* Garman, 40 Pa. St. 95.

South Carolina — Price *v.* Richmond, etc., R. Co., 33 S. C. 556, 12 S. E. 413, 26 Am. St. Rep. 700.

Tennessee.—Brown *v.* Chattanooga Electric R. Co., 101 Tenn. 252, 47 S. W. 415, 70 Am. St. Rep. 666.

Texas.— Missouri, etc., R. Co. *v.* Brantley, 26 Tex. Civ. App. 11, 62 S. W. 94.

England.— Read *v.* Great Eastern R. Co., L. R. 3 Q. B. 555, 558, 9 B. & S. 714, 37 L. J. Q. B. 278, 18 L. T. Rep. N. S. 82, 16 Wkly. Rep. 1040.

See 15 Cent. Dig. tit. "Death," § 27.

Contra.— Donahue *v.* Drexler, 82 Ky. 157, 56 Am. Rep. 886, decided under a statute which was held by the court to be highly penal, passed to protect widows and orphans from the pecuniary distress resulting from the acts described in the statute, and to prevent the perpetration of such acts by awarding vindictive damages in addition to or regardless of the punishment which would be inflicted by the criminal law.

44. *Illinois.*—Illinois Cent. R. Co. *v.* Cozby, 69 Ill. App. 256 (holding that the husband cannot abridge by contract the right of his family to recover for his death); Maney *v.* Chicago, etc., R. Co., 49 Ill. App. 105 (holding that exemption cannot be secured by contract against liability for the consequences of gross negligence or wilful act).

Indiana.— Pittsburgh, etc., R. Co. *v.* Hosea, 152 Ind. 412, 53 N. E. 419.

Kansas.— Chicago, etc., R. Co. *v.* Martin, 59 Kan. 437, 53 Pac. 461.

Massachusetts.— See also Com. *v.* Vermont, etc., R. Co., 108 Mass. 7, 11 Am. Rep. 301.

Nebraska.— Chicago, etc., R. Co. *v.* Wymore, 40 Nebr. 645, 58 N. W. 1120. See also Oyster *v.* Burlington Relief Dept., (1902) 91 N. W. 699, 55 L. R. A. 291.

New Jersey.— McKeering *v.* Pennsylvania R. Co., 65 N. J. L. 57, 46 Atl. 715.

Ohio.— Baltimore, etc., R. Co. *v.* McCamey, 12 Ohio Cir. Ct. 543, 1 Ohio Cir. Dec. 631.

United States.—Adams *v.* Northern Pac. R. Co., 95 Fed. 938.

45. *Illinois.*— Mattoon Gas Light, etc., Co. *v.* Dolan, 105 Ill. App. 1.

Iowa.— Christe *v.* Chicago, etc., R. Co., 104 Iowa 707, 74 N. W. 697.

Minnesota.—Foot *v.* Great Northern R. Co., 81 Minn. 493, 84 N. W. 342, 83 Am. St. Rep. 395, 52 L. R. A. 354 (holding that such settlement may be affected either before or after action is brought); Sykora *v.* J. I. Case Threshing Mach. Co., 59 Minn. 130, 60 N. W. 1008.

Mississippi.— Natchez Cotton-Mills Co. *v.* Mullins, 67 Miss. 672, 7 So. 542.

New York.— Doyle *v.* New York, etc., R.

executed by one of the beneficiaries without the consent of the others, as for instance by the widow without the concurrence of the children or next of kin, it has been held that such release will not be a bar to an action by such other beneficiaries, or by the personal representative of the deceased in their behalf.[46]

d. Pendency of Other Actions.[47] Since the general rule is that an action for damages for an injury to the person of the plaintiff, in the absence of statute, abates by his death,[48] the pendency of such action cannot be pleaded in bar of an action, brought by his personal representative or beneficiaries designated under the statute, for his death resulting from such injury and caused by the wrongful act or omission of the defendant.[49] In some jurisdictions, however, it has been held that the right of action given by statute to an administrator to sue for his intestate's loss of life, for the benefit of the widow and children, is independent of his right to sue for damages suffered by the intestate during his lifetime from the injury which caused his death, and that both actions may proceed at the same time.[50]

Co., 66 N. Y. App. Div. 398, 72 N. Y. Suppl. 936; Stuebing *v.* Marshall, 10 Daly 406.

Ohio.— Cullison *v.* Baltimore, etc., R. Co., 7 Ohio S. & C. Pl. Dec. 269.

Tennessee.—Prater *v.* Tennessee Producers' Marble Co., 105 Tenn. 496, 58 S. W. 1068; Holder *v.* Nashville, etc., R. Co., 92 Tenn. 141, 20 S. W. 537, 36 Am. St. Rep. 77; Stephens *v.* Nashville, etc., R. Co., 10 Lea 448; Greenlee *v.* East Tennessee, etc., R. Co., 5 Lea 418 (holding that a release by the widow of deceased is binding on the children); Smalling *v.* Kreech, (Ch. App. 1897) 46 S. W. 1019. See, however, Knoxville, etc., R. Co. *v.* Acuff, 92 Tenn. 26, 20 S. W. 348, holding that where an action has been instituted by an administrator for the wrongful death of his intestate, the widow cannot compromise such suit without the consent of the administrator or children.

See 15 Cent. Dig. tit. "Death," § 27.

Accord and satisfaction.— In a suit by a widow for damages for causing the death of her husband, defendant having pleaded accord and satisfaction, produced a paper, signed by the parties, which, after reciting that defendant had bought certain articles of plaintiff, surrendered certain notes of deceased and paid her certain moneys, stated further that these are "in full demands of every name and nature whatsoever from one party to the other," and plaintiff testified that at the time of signing the paper she knew that she had a claim on account of the death of her husband and intended to bring suit upon it, but did not mention it then because she did not care to do so, it was held that a verdict was properly directed for defendant. Guldager *v.* Rockwell, 14 Colo. 459, 24 Pac. 556.

A release by an administrator, executed prior to his appointment, constitutes no defense to an action for death by wrongful act. Snedeker *v.* Snedeker, 47 N. Y. App. Div. 471, 63 N. Y. Suppl. 580 [*affirmed* in 164 N. Y. 58, 58 N. E. 4].

46. Pisano *v.* B. M. Shanley, etc., Co., 66 N. J. L. 1, 48 Atl. 618 (holding that a release executed by an administrator who was not appointed by the widow or next of kin, and was not made with their approbation, is a nullity); Toole *v.* Jones, 32 Pittsb. Leg. J. (Pa.) 387 (holding that a release given by a widow for her share only did not bar an action in the name of the children for their shares, where the declaration set forth a settlement by the widow for her own share, and the neglect or refusal on her part to bring suit on behalf of the children); Houston, etc., R. Co. *v.* Bradley, 45 Tex. 171. See also Oyster *v.* Burlington Relief Dept., (Nebr. 1902) 91 N. W. 699, 55 L. R. A. 291.

Where the statute directs the administrator to bring suit, it has been held that a release given by the beneficiaries is not a bar to an action by such administrator. South, etc., R. Co. *v.* Sullivan, 59 Ala. 272; Yelton *v.* Evansville, etc., R. Co., 134 Ind. 414, 33 N. E. 629, 21 L. R. A. 158.

47. **Another action pending** see ABATEMENT AND REVIVAL.

48. See, generally, ABATEMENT AND REVIVAL. But where a common-law action for mental and bodily suffering of deceased, caused by the act or neglect of defendant, survives by statute, the pendency of such action may be pleaded in bar to an action for death by wrongful act by his personal representative or beneficiaries designated in the statute. Conner *v.* Paul, 12 Bush (Ky.) 144. See also Henderson *v.* Kentucky Cent. R. Co., 86 Ky. 389, 5 S. W. 875, 9 Ky. L. Rep. 625, holding that an action brought by the administrator of the deceased for the benefit of the widow or next of kin is a bar to an action brought by the widow as the sole beneficiary for the same cause.

49. Indianapolis, etc., R. Co. *v.* Stout, 53 Ind. 143. See also Tennessee Coal, etc., Co. *v.* Herndon, 100 Ala. 451, 14 So. 287.

50. *Arkansas.*— Davis *v.* St. Louis, etc., R. Co., 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283.

Georgia.— See Augusta R. Co. *v.* Glover, 92 Ga. 132, 18 S. E. 406.

Massachusetts.— Bowes *v.* Boston, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365.

Michigan.— Hurst *v.* Detroit City R. Co., 84 Mich. 539, 48 N. W. 44, holding that a recovery in one action is no bar to recovery in the other action.

Mississippi.— Vicksburg, etc., R. Co. *v.* Phillips, 64 Miss. 693, 2 So. 537.

e. Former Recovery[51]—(i) *By or on Behalf of Decedent.* While the authorities are by no means unanimous upon the point,[52] the better doctrine seems to be that where one in his lifetime recovers damages for personal injuries caused by negligence, and death subsequently results therefrom, his personal representatives or beneficiaries designated under statute are barred from recovery under a statute giving them a right of action for death by wrongful act.[53] Likewise, where the plaintiff, in an action for personal injuries, dies from such injuries pending the action, and his administrator recovers judgment therein, such judgment is a bar to an action by the administrator or the beneficiaries for the death by wrongful act.[54]

(ii) *By One of Several Beneficiaries.* The prevailing rule is that, although a right of action for death by wrongful act may by statute be given to several different persons, or to the same persons in several different rights, there is but one cause of action, and there can be but one recovery for such death.[55]

f. Self-Defense. The rule applied in criminal cases as to the right to protect life may be invoked with equal force in a civil action for damages resulting from death, and homicide is justifiable when committed on a person in the lawful defense of himself or of his wife and children.[56]

Texas.— International, etc., R. Co. *v.* Kuehn, 70 Tex. 582, 8 S. W. 484.

Wisconsin.—Brown *v.* Chicago, etc., R. Co., 102 Wis. 137, 78 N. W. 735, 44 L. R. A. 579.

See 15 Cent. Dig. tit. "Death," § 28.

51. Former recovery generally see JUDGMENTS.

52. In several jurisdictions the rule is laid down that a judgment recovered for personal injuries suffered by a party is no bar to subsequent action under statute for death caused by such injuries. Clare *v.* New York, etc., R. Co., 172 Mass. 211, 51 N. E. 1083; Schlichting *v.* Wintgen, 25 Hun (N. Y.) 626; Hedrick *v.* Ilwaco R., etc., Co., 4 Wash. 400, 30 Pac. 714 (holding that a recovery by a father for the loss of a child's services prior to his majority, caused by an injury to such child, will not bar an action for the loss to the estate, accruing after he would have attained his majority, caused by the death of such child); Barley *v.* Chicago, etc., R. Co., 2 Fed. Cas. No. 997, 4 Biss. 430. See also Peake *v.* Baltimore, etc., R. Co., 26 Fed. 495.

53. Hecht *v.* Ohio, etc., R. Co., 132 Ind. 507, 32 N. E. 302 (holding that where decedent recovered damages for personal injuries, his administrators cannot maintain an action for his death resulting from the same injuries, although in the latter action the measure of damages would be different from those in the former, and would go exclusively to the widow and children); Littlewood *v.* New York, 89 N. Y. 24, 42 Am. Rep. 271.

54. Conner *v.* Paul, 12 Bush (Ky.) 144; Hansford *v.* Payne, 11 Bush (Ky.) 380; McGovern *v.* New York Cent., etc., R. Co., 67 N. Y. 417; Legg *v.* Briton, 64 Vt. 652, 24 Atl. 1016.

55. Hartigan *v.* Southern Pac. R. Co., 86 Cal. 142, 24 Pac. 851; Louisville, etc., R. Co. *v.* Sanders, 86 Ky. 259, 5 S. W. 563, 9 Ky. L. Rep. 690; Putnam *v.* Southern Pac. Co., 21 Oreg. 230, 27 Pac. 1033; Fritz *v.* Western Union Tel. Co., 25 Utah 263, 71 Pac. 209. See Illinois Cent. R. Co. *v.* Slater, 139 Ill. 190, 28 N. E. 830 [*affirming* 39 Ill. App. 69], holding that where two brothers were killed at the same time by the negligence of defendant, a recovery by his administrator of damages for the negligent killing of one of such brothers would not bar an action for the death of the other. *Contra,* Galveston, etc., R. Co. *v.* Kutac, 72 Tex. 643, 11 S. W. 127.

Posthumous child.— It has been held in California that where a child is unborn and its existence is unknown to defendant in an action by its mother for the wrongful death of her husband, the father of the child, at the time the judgment is rendered in favor of the widow or other heirs, such judgment is a bar to a subsequent action by such unborn child to recover for his father's wrongful death, notwithstanding the section of the code providing that an unborn child is deemed to be in existence so far as necessary for its interests in the event of its subsequent birth. Daubert *v.* Western Meat Co., 139 Cal. 480, 69 Pac. 297, 73 Pac. 244.

56. Locher *v.* Kluga, 97 Ill. App. 518; McClurg *v.* Ingleheart, 33 S. W. 80, 17 Ky. L. Rep. 913 (holding, however, that if defendant, with intent to assault or kill deceased, took the initiative in attack, which he never abandoned until he shot the deceased, the jury should not find for defendant on the ground of self-defense); Hollingsworth *v.* Warnock, 65 S. W. 163, 23 Ky. L. Rep. 1395 (holding, however, that the defenses of shooting in self-defense and of accidental shooting are inconsistent, and where both were pleaded by defendant, the court properly sustained a motion to require him to elect upon which he would rely); Vawter *v.* Hultz, 112 Mo. 633, 20 S. W. 689; White *v.* Maxey, 64 Mo. 552 (holding, however, that the plea of self-defense is unavailable in a case where the conflict ending in homicide was induced or begun by defendant); Besenecker *v.* Sale, 8 Mo. App. 211 (holding that the doctrine that he who seeks and originates an affray resulting in homicide cannot avail himself of the plea of self-defense is not applicable to a civil suit for damages brought

7. Abatement or Survival[57] — a. On Death of Plaintiff or Beneficiary. The better doctrine seems to be that where the beneficiary dies in whose name an action is pending for death by wrongful act, the action cannot be revived for the benefit of the surviving next of kin or for the estate of such beneficiary.[58] In some jurisdictions, however, by statutory provision, a right of action given to a designated beneficiary survives to his personal representatives or heirs.[59]

b. On Death of Defendant. The better rule seems to be that where a statute gives a right of action for death by wrongful act, such action abates upon the death of defendant therein.[60] In several cases, however, it has been held that an

by a representative of the deceased); Croft *v.* Smith, (Tex. Civ. App. 1899) 51 S. W. 1089.

Acquittal in criminal prosecution.—A judgment of acquittal in a criminal prosecution for killing a person is no bar to a civil action for his wrongful death, and is therefore properly struck from the answer as irrelevant. Cottingham *v.* Weeks, 54 Ga. 275; Gray *v.* McDonald, 104 Mo. 303, 16 S. W. 398.

Defense of servant.—It was held in Tucker *v.* State, 89 Md. 471, 43 Atl. 778, 44 Atl. 1004, 46 L. R. A. 481, that the fact that defendant shot a person engaged in a fight with defendant's servant was not a good defense to an action for damages for death by wrongful act, although defendant believed it to be necessary for the servant's protection, if in reality such belief was not justified by the facts.

57. Abatement and survival generally see Abatement and Revival.

58. *Georgia.*— Frazier *v.* Georgia R., etc., Co., 101 Ga. 77, 28 S. E. 662.

Louisiana.— Huberwald *v.* Orleans R. Co., 50 La. Ann. 477, 23 So. 474 (holding that a right of action for death by wrongful act does not survive the widow in favor of the adult children, and, although it survives to the minor children, upon their coming of age their right abates); Chivers *v.* Roger, 50 La. Ann. 57, 23 So. 100.

Maryland.— Harvey *v.* Baltimore, etc., R. Co., 70 Md. 319, 17 Atl. 88.

New York.— Hodges *v.* Webber, 65 N. Y. App. Div. 170, 72 N. Y. Suppl. 508. See, however, Mundt *v.* Glokner, 24 N. Y. App. Div. 110, 48 N. Y. Suppl. 940, 27 N. Y. Civ. Proc. 120, 5 N. Y. Annot. Cas. 121 [*reversing* 20 Misc. 63, 44 N. Y. Suppl. 430, 3 N. Y. Annot. Cas. 383].

Tennessee.—Louisville, etc., R. Co. *v.* Bean, 94 Tenn. 388, 29 S. W. 370; Loague *v.* Memphis, etc., R. Co., 91 Tenn. 458, 19 S. W. 430.

Wisconsin.— Schmidt *v.* Menasha Woodenware Co., 99 Wis. 300, 74 N. W. 797; Woodward *v.* Chicago, etc., R. Co., 23 Wis. 400.

United States.— Sanders *v.* Louisville, etc., R. Co., 111 Fed. 708, 49 C. C. A. 565, construing the Tennessee statute.

See 15 Cent. Dig. tit. "Death," § 33.

See also Cooper *v.* Shore Electric Co., 63 N. J. L. 558, 44 Atl. 633 (holding that in an action for causing death, on the death of the beneficiary, while the action does not abate, the personal injury would be limited in duration and extent to the lifetime of the beneficiary); Texas Loan Agency *v.* Fleming, 18 Tex. Civ. App. 668, 46 S. W. 63 (holding that under the Texas statute, if the sole plaintiff dies pending the suit, and he is the only party entitled to the damages recovered, the suit shall abate; otherwise not). But see Meekin *v.* Brooklyn Heights R. Co., 164 N. Y. 145, 58 N. E. 50, 31 N. Y. Civ. Proc. 239, 79 Am. St. Rep. 635, 51 L. R. A. 235 [*affirming* 51 N. Y. App. Div. 1, 64 N. Y. Suppl. 291], holding that an action by a father to recover damages for the death of his daughter survived his death, where she left surviving her other persons who, had he not survived her, would have been her next of kin.

59. Pennsylvania R. Co. *v.* Davis, 4 Ind. App. 51, 29 N. E. 425 (holding that an action by a father for an injury resulting in the death of his child survives by the terms of the statute, and that the common-law rule is abrogated thereby); Thomas *v.* Maysville Gas Co., 66 S. W. 398, 23 Ky. L. Rep. 1879; Tobin *v.* Missouri Pac. R. Co., (Mo. 1891) 18 S. W. 996; James *v.* Christy, 18 Mo. 162; Haggerty *v.* Pittston, 17 Pa. Super. Ct. 151. See also Davis *v.* Southwestern R. Co., 41 Ga. 223 (holding that where a widow dies pending suit by her for the homicide of her husband, the right of action for such homicide survives to the children, and in such last suit the measure of damages is the injury to the children, to be measured, as in the case of the widow, by a reasonable support for them); Senn *v.* Southern R. Co., 124 Mo. 621, 28 S. W. 66. See, however, Gibbs *v.* Hannibal, 82 Mo. 143, holding that under the Missouri statute, the only persons authorized to sue for damages for death by wrongful act are the husband or wife, or minor child, or the father and mother, or either of them where the other is dead, in case the deceased be an unmarried minor, and where all these beneficiaries perish in the same disaster, there is no person left to whom the action survives.

60. *Arkansas.*— Davis *v.* Nichols, 54 Ark. 358, 15 S. W. 880.

Indiana.— Hamilton *v.* Jones, 125 Ind. 176, 25 N. E. 192.

Minnesota.— Green *v.* Thompson, 26 Minn. 500, 5 N. W. 376.

New York.—Moriority *v.* Bartlett, 99 N. Y. 651, 1 N. E. 794; Hegerich *v.* Keddie, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25; Pessini *v.* Wilkins, 54 N. Y. Super. Ct. 146; Norton *v.* Wiswall, 14 How. Pr. 42.

Ohio.— Russell *v.* Sunbury, 37 Ohio St. 372, 41 Am. Rep. 523. *Contra*, Hudson *v.* Adin, 4 Ohio Dec. (Reprint) 211, 1 Clev. L. Rep. 122.

action for death by wrongful act survives against the personal representative of defendant when he dies pending the action.[61]

8. PARTIES[62] — a. Plaintiffs — (i) *IN GENERAL.* Since the right of action for death by wrongful act is purely statutory, such action must be brought by the person who is designated in the statute.[63] However, any one of the parties to whom the statute gives a right of action is entitled to maintain such action for the benefit of all the beneficiaries designated therein.[64]

(ii) *NECESSARY PARTIES.* Under some statutes, where only one right of action is given against the person or corporation whose wrongful act, neglect, or default causes the death of another, where one of the beneficiaries designated in the statute brings such action, all the other beneficiaries designated therein are necessary parties plaintiff.[65] In other cases, however, it has been held that where an action is brought by one of the beneficiaries designated in the statute, it is not necessary to join the other beneficiaries as parties plaintiff.[66]

(iii) *SPECIFIC PARTIES* — (A) *Personal Representative.* In well-nigh every jurisdiction, under statutes giving a right of action for death caused by wrongful act, the personal representative of the deceased is the proper party plaintiff.[67] In

Pennsylvania.— Moe *v.* Smiley, 125 Pa. St. 136, 17 Atl. 228, 3 L. R. A. 341; Weiss *v.* Hunsicker, 3 Pa. Dist. 445, 14 Pa. Co. Ct. 398.

Texas.— Johnson *v.* Farmer, 89 Tex. 610, 35 S. W. 1062.

61. Hegerick *v.* Keddie, 32 Hun (N. Y.) 141, 5 N. Y. Civ. Proc. 228; Yertore *v.* Wiswall, 16 How. Pr. (N. Y.) 8; Doedt *v.* Wiswall, 15 How. Pr. (N. Y.) 128 (holding that under the New York act the action is one founded on a contract, and therefore survives against defendant's executors); Collier *v.* Arrington, 61 N. C. 356; Hudson *v.* Adin, 4 Ohio Dec. (Reprint) 211, 1 Clev. L. Rep. 122.

62. Parties generally see PARTIES.

63. Louisville, etc., R. Co. *v.* Jones, (Fla. 1903) 34 So. 246; Cincinnati, etc., R. Co. *v.* Adams, 13 S. W. 428, 11 Ky. L. Rep. 833; Weidner *v.* Rankin, 26 Ohio St. 522; Drew *v.* Milwaukee, etc., R. Co., 7 Fed. Cas. No. 4,079. See Mobile L. Ins. Co. *v.* Brame, 95 U. S. 754, 24 L. ed. 580.

64. Texas, etc., R. Co. *v.* Berry, 67 Tex. 238, 5 S. W. 817. See also Hamilton *v.* Hannibal, etc., R. Co., 39 Kan. 56, 18 Pac. 57 (holding that under the Missouri statute, authorizing an action for damages for injuries to a person resulting in death, the right of action is in the husband or wife of the deceased for six months after the death, after which time the right vests absolutely in the surviving minor children, if there are any); McClure *v.* Alexander, 24 S. W. 619, 15 Ky. L. Rep. 732.

Improper joinder of parties.— It was held in Willis Coal, etc., Co. *v.* Grizzell, 198 Ill. 313, 65 N. E. 74 [*reversing* 100 Ill. App. 480], that judgment may not be awarded plaintiffs jointly in an action for wrongful death, one of them not being entitled to sue therefor.

65. East Line, etc., R. Co. *v.* Culberson, 68 Tex. 664, 5 S. W. 820; Dallas, etc., R. Co. *v.* Spicker, 61 Tex. 427, 48 Am. Rep. 297; Galveston, etc., R. Co. *v.* Le Gierse, 51 Tex. 189; Gulf, etc., R. Co. *v.* Hernandez, (Tex. Civ. App. 1898) 45 S. W. 197; Galveston, etc., R. Co. *v.* McCray, (Tex. Civ. App. 1897) 43 S. W. 275; Ft. Worth, etc., R. Co. *v.* Wilson, 3 Tex. Civ. App. 583, 24 S. W. 686 (holding, however, that a release by the parents of deceased of all claims against defendant by reason of their son's death was a good defense to defendant's motion for a new trial on the ground that the parents were necessary parties plaintiff); Whelan *v.* Rio Grande Western R. Co., 111 Fed. 326; St. Louis, etc., R. Co. *v.* Needham, 52 Fed. 371, 3 C. C. A. 129.

Parties who by compromise have deprived themselves of all interest in the action need not be joined therein. Houston, etc., R. Co. *v.* Bradley, 45 Tex. 171.

Parties not dependent on deceased.— It has been held under the Texas statute that a person who was not dependent on deceased was not a necessary party to an action by deceased's surviving wife and children who were dependent on him. Missouri Pac. R. Co. *v.* Henry, 75 Tex. 220, 12 S. W. 828; Texas Cent. R. Co. *v.* Frazier, (Tex. Civ. App. 1896) 34 S. W. 664; St. Louis, etc., R. Co. *v.* Taylor, 5 Tex. Civ. App. 668, 24 S. W. 975.

66. Deford *v.* State, 30 Md. 179 (holding that failure to join all the children in an action brought in the name of the state, for the use of the children of a deceased parent, who was killed by the neglect of another, was no defense to the action); Huntingdon, etc., R. Co. *v.* Decker, 84 Pa. St. 419; Collins *v.* East Tennessee, etc., R. Co., 9 Heisk. (Tenn.) 841; Merchants, etc., Oil Co. *v.* Burns, (Tex. Sup. 1903) 74 S. W. 758 [*reversing* (Tex. Civ. App. 1903) 72 S. W. 626]; San Antonio St. R. Co. *v.* Renken, 10 Tex. Civ. App. 543, 30 S. W. 829; Houston, etc., R. Co. *v.* Shaw, 2 Tex. Unrep. Cas. 553. See also Daly *v.* New Jersey Steel, etc., Co., 155 Mass. 1, 29 N. E. 507.

67. *Alabama.*— Columbus, etc., R. Co. *v.* Bradford, 86 Ala. 574, 6 So. 90; Stewart *v.* Louisville, etc., R. Co., 83 Ala. 493, 4 So. 373; South, etc., R. Co. *v.* Sullivan, 59 Ala. 272.

Arkansas.—Davis *v.* St. Louis, etc., R. Co.,

a majority of jurisdictions, by construction of statute, a foreign administrator of

53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283; Little Rock, etc., R. Co. *v.* Townsend, 41 Ark. 382.

California.—Kramer *v.* San Francisco Market St. R. Co., 25 Cal. 434.

District of Columbia.— Ferguson *v.* Washington, etc., R. Co., 6 App. Cas. 525.

Georgia.— Louisville, etc., R. Co. *v.* Chaffin, 84 Ga. 519, 11 S. E. 891.

Illinois.— Union R., etc., Co. *v.* Shacklet, 119 Ill. 232, 10 N. E. 896; Mattoon Gas Light, etc., Co. *v.* Dolan, 105 Ill. App. 1; Nixon *v.* Ludlam, 50 Ill. App. 273.

Indiana.— Lake Erie, etc., R. Co. *v.* Charman, (1903) 67 N. E. 923 (holding that the Indiana act, authorizing action by personal representatives to recover for the benefit of decedent's widow and children, does not require the appointment of a special administrator to bring suit, but authorizes suit by the general administrator of the estate); Toledo, etc., R. Co. *v.* Reeves, 8 Ind. App. 667, 35 N. E. 199.

Iowa.— Major *v.* Burlington, etc., R. Co., 115 Iowa 309, 88 N. W. 815; Lawrence *v.* Birney, 40 Iowa 377; Philo *v.* Illinois Cent. R. Co., 33 Iowa 47.

Kentucky.— Thomas *v.* Royster, 98 Ky. 206, 32 S. W. 613, 17 Ky. L. Rep. 783; Givens *v.* Kentucky Cent. R. Co., 89 Ky. 231, 12 S. W. 257, 11 Ky. L. Rep. 452; Bruce *v.* Cincinnati R. Co., 83 Ky. 174; Lexington, etc., Min. Co. *v.* Hoffman, 32 S. W. 611, 17 Ky. L. Rep. 775.

Minnesota.— Nash *v.* Tousley, 28 Minn. 5, 8 N. W. 875; Boutiller *v.* Milwaukee, etc., R. Co., 8 Minn. 97.

Mississippi.— Bussey *v.* Gulf, etc., R. Co., 79 Miss. 597, 31 So. 212; Illinois Cent. R. Co. *v.* Hunter, 70 Miss. 471, 12 So. 482.

New York.— Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48, 32 Am. Rep. 491; Quin *v.* Moore, 15 N. Y. 432; Ohnmacht *v.* Mt. Morris Electric Light Co., 66 N. Y. App. Div. 482, 73 N. Y. Suppl. 296; Murphy *v.* New York Cent., etc., R. Co., 31 Hun 358; Ryall *v.* Kennedy, 40 N. Y. Super. Ct. 347; Safford *v.* Drew, 3 Duer 627.

North Carolina.— Killian *v.* Southern R. Co., 128 N. C. 261, 38 S. E. 873; Howell *v.* Yansey County, 121 N. C. 362, 28 S. E. 362.

Ohio.— Wolf *v.* Lake Erie, etc., R. Co., 55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812 (holding, however, that the administrator is but the nominal party); Solor Refining Co. *v.* Elliott, 15 Ohio Cir. Ct. 581, 8 Ohio Cir. Dec. 225.

Oregon.— Schleiger *v.* Northern Terminal Co., (1903) 72 Pac. 324; Perham *v.* Portland General Electric Co., 33 Oreg. 451, 53 Pac. 14, 24, 72 Am. St. Rep. 730, 40 L. R. A. 799.

Rhode Island.— Lubramo *v.* Atlantic Mills, 19 R. I. 129, 32 Atl. 205, 34 L. R. A. 797.

South Carolina.— Brickman *v.* South Carolina R. Co., 8 S. C. 173.

Tennessee.— Chattanooga Electric R. Co. *v.* Johnson, 97 Tenn. 667, 37 S. W. 558, 34 L. R. A. 442; Webb *v.* East Tennessee, etc., R. Co., 88 Tenn. 119, 12 S. W. 428 (holding that the amendment to the statute giving the widow the right of action for the wrongful death of her husband did not take away the right of a personal representative to sue when deceased left a widow, and that if the widow waived her right to sue the right remained to the personal representative); Bream *v.* Brown, 5 Coldw. (Tenn.) 168.

Texas.— See Houston, etc., R. Co. *v.* Hook, 60 Tex. 403.

Washington.— Dahl *v.* Tibbals, 5 Wash. 259, 31 Pac. 868.

West Virginia.—Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32, 55 Am. Rep. 292.

Wisconsin.— McMillan *v.* Spider Lake Saw Mill, etc., Co., 115 Wis. 332, 91 N. W. 979, 95 Am. St. Rep. 947, 60 L. R. A. 589; Swan *v.* Norvell, 107 Wis. 625, 83 N. W. 934 (holding that a special administrator may maintain an action for the wrongful death of his decedent); Whiton *v.* Chicago, etc., R. Co., 21 Wis. 305.

United States.— Peers *v.* Nevada Power, etc., Co., 119 Fed. 400.

See 15 Cent. Dig. tit. "Death," § 38.

But see Books *v.* Danville, 1 Kulp (Pa.) 3.

Ancillary executor.—Under N. Y. Code Civ. Proc. § 1902, providing that "the executor or administrator of a decedent" may sue, it has been held that an ancillary executor comes within this provision of the statute. Lang *v.* Houston, etc., R. Co., 75 Hun 151, 27 N. Y. Suppl. 90.

Former rule in Georgia.— Under a former statute in Georgia providing that the widow, or if no widow, the child or children, might recover for the homicide of a husband or parent, it was held that the right to recover damages for such homicide was limited to the widow or children and did not extend to the personal representative. Miller *v.* Southwestern R. Co., 55 Ga. 143.

In the absence of father, mother, or guardian, an administrator of a child may bring an action for the death of the child by wrongful act, under the Indiana statute, although section 27 thereof provides that the action for the death of a child must be brought by the father, the mother, or the guardian. Pittsburgh, etc., R. Co. *v.* Vining, 27 Ind. 513, 92 Am. Dec. 269.

Letters of administration.— Where an indictment, under the Maine statute against a city for the loss of a life by defect in a highway, describes the deceased person as late of B, in the county of P, the right of his administrator to prosecute the indictment may be proved by letters of administration granted by probate court of another county. State *v.* Bangor, 30 Me. 341.

Suit for death of minor.— It has been held under an Indiana statute, giving parents the right of action for the negligent injury or killing of a child, that unless a minor has been emancipated by his parents, the father cannot, instead of suing as such for the death of the minor, sue as the minor's administrator, under section 284, giving the personal representative of one killed by the wrongful

a resident of another state may maintain an action for the death of his intestate by wrongful act in the state where such wrongful death occurred.[68]

(B) *Widow.* In some jurisdictions the statutes give the right of action for death by wrongful act primarily to the widow of the deceased.[69] Under some statutes, however, while the action is brought solely for the benefit of the widow, or the widow and next of kin, yet the widow cannot maintain such action in her own name; it must be brought in the name of the personal representative of the decedent for the widow's benefit.[70]

(C) *Heirs and Next of Kin.* Some of the statutes give a right of action to the heirs at law or next of kin of the deceased, for death by wrongful act, in

act of another the right to sue therefor. Berry *v.* Louisville, etc., R. Co., 128 Ind. 484, 28 N. E. 182; Mayhew *v.* Burns, 103 Ind. 328, 2 N. E. 793.

The words "personal representatives," as used in the Ohio statute relating to actions for wrongful death, mean executors and administrators, and an action under the statute may be brought by the executor of the person so deceased. Wittman *v.* Cincinnati, etc., R. Co., 10 Ohio S. & C. Pl. Dec. 563.

Where death is instantaneous.— Under the Mississippi code allowing the personal representative of deceased to sue for and recover damages for any trespass to the person or property of deceased in like manner as deceased might have done if living, it has been held that an action by the personal representative will not lie to recover for injuries resulting in instantaneous death. Illinois Cent. R. Co. *v.* Pendergrass, 69 Miss. 425, 12 So. 954.

68. *Illinois.*— Wabash, etc., R. Co. *v.* Shacklet, 105 Ill. 364, 44 Am. Rep. 791.

Indiana.— Memphis, etc., Packet Co. *v.* Pikey, 142 Ind. 304, 40 N. E. 527; Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48.

Kansas.— Kansas Pac. R. Co. *v.* Cutter, 16 Kan. 568.

New Jersey.— Pisano *v.* B. M., etc., Shanley Co., 66 N. J. L. 1, 48 Atl. 618 (holding, however, that letters granted an administrator in another jurisdiction cannot defeat the right of an administrator appointed in New Jersey to recover in an action for death within that statute); Lower *v.* Segal, 60 N. J. L. 99, 36 Atl. 777.

Pennsylvania.—Boulden *v.* Pennsylvania R. Co., 205 Pa. St. 264, 54 Atl. 906.

Utah.— Utah Sav., etc., Co. *v.* Diamond Coal, etc., Co., 26 Utah 299, 73 Pac. 524.

United States.— Florida Cent., etc., R. Co. *v.* Sullivan, 120 Fed. 799, 57 C. C. A. 167, 61 L. R. A. 410; Boston, etc., R. Co. *v.* Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193.

See 15 Cent. Dig. tit. "Death," § 39.

Contra.— Maysville St. R., etc., Co. *v.* Martin, 59 Fed. 91, 8 C. C. A. 21.

69. *Colorado.*—Hayes *v.* Williams, 17 Colo. 465, 30 Pac. 352. See also Hindry *v.* Holt, 24 Colo. 464, 51 Pac. 1002, 65 Am. St. Rep. 235, 39 L. R. A. 351.

Illinois.— Litchfield Coal Co. *v.* Taylor, 81 Ill. 590.

Indiana.— L. T. Dickason Coal Co. *v.* Ungerferth, 30 Ind. App. 546, 66 N. E. 759 (holding that the right of action given by the Indiana statute is personal to the widow and children of deceased employee so killed, and cannot be maintained by deceased's administrator); Boyd *v.* Brazil Block Coal Co., 25 Ind. App. 157, 57 N. E. 732.

Kansas.— Chicago, etc., R. Co. *v.* Mills, 57 Kan. 687, 47 Pac. 834.

Kentucky.— McClurg *v.* Iglehcart, 33 S. W. 80, 17 Ky. L. Rep. 913.

Missouri.— Poor *v.* Watson, 92 Mo. App. 89.

Ohio.— Merrell *v.* McMahon, 7 Ohio S. & C. Pl. Dec. 136, 5 Ohio N. P. 77.

Pennsylvania.— Gross *v.* Electric Traction Co., 180 Pa. St. 99, 36 Atl. 424 (holding that the Pennsylvania act of 1851, authorizing a widow to recover damages for death, applies to one who was married to deceased after he received the injuries causing his death); Snyder *v.* Philadelphia, etc., R. Co., 9 Pa. Dist. 3; Gross *v.* Electric Traction Co., 5 Pa. Dist. 294; South Easton *v.* Reinhart, 13 Wkly. Notes Cas. 389.

Rhode Island.— Goodwin *v.* Nicholson, 17 R. I. 478, 23 Atl. 12.

South Dakota— Belding *v.* Black Hills, etc., R. Co., 3 S. D. 369, 53 N. W. 750.

Tennessee.— Collins *v.* East Tennessee, etc., R. Co., 9 Heisk. 841.

Texas.— International, etc., R. Co. *v.* Sein, 11 Tex. Civ. App. 386, 33 S. W. 558.

United States.— Cole *v.* Mayne, 122 Fed. 836.

See 15 Cent. Dig. tit. "Death," § 42.

Effect of second marriage.— Where the statute gives the widow the right of action for the death of her husband by wrongful act, the fact that pending the suit the widow remarries does not preclude her right of action. Georgia R., etc., Co. *v.* Garr, 57 Ga. 277, 24 Am. Rep. 492; International, etc., R. Co. *v.* Kuehn, 70 Tex. 582, 8 S. W. 484.

70. *Georgia.*— Western, etc., R. Co. *v.* Strong, 52 Ga. 461.

Indiana.— Indianapolis, etc., R. Co. *v.* Davis, 10 Ind. 398; Madison, etc., R. Co. *v.* Bacon, 6 Ind. 205; Peru, etc., R. Co. *v.* Bradshaw, 6 Ind. 146.

Iowa.— Major *v.* Burlington, etc., R. Co., 115 Iowa 309, 88 N. W. 815.

Kansas.—Atchison *v.* Twine, 9 Kan. 350.

New Hampshire.— See Wyatt *v.* Williams, 43 N. H. 102.

North Carolina.—Howell *v.* Yancey County, 121 N. C. 362, 28 S. E. 362.

Pennsylvania.— Usher *v.* West Jersey R. Co., 126 Pa. St. 206, 17 Atl. 597, 12 Am. St.

case there are no personal representatives of such deceased,[71] while under other statutes such right of action is given to the widow, heir, or personal representative.[72]

(D) *Parents.* In construing statutes giving a right of action for death by wrongful act, many of the courts limit the right to bring such action to the persons expressly authorized in the statute, and hold that where the parents are not specifically designated in the statute, they cannot bring the action in their own names, even where the recovery is for their own benefit.[73] In other jurisdictions,

Rep. 863, 4 L. R. A. 261, construing a New Jersey statute.

United States.— Hagen *v.* Kean, 11 Fed. Cas. No. 5,899, 3 Dill. 124.

See 15 Cent. Dig. tit. "Death," § 42.

71. Webster *v.* Norwegian Min. Co., 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181; Atchison, etc., R. Co. *v.* Judah, (Kan. App. 1900) 62 Pac. 711 (holding that in order for a parent to recover as next of kin for the wrongful death of a minor child, a resident of the state, he must prove that no personal representative has been appointed); Western Union Tel. Co. *v.* McGill, 57 Fed. 699, 6 C. C. A. 521, 21 L. R. A. 818 (holding that the surviving husband of deceased is not included in "the next of kin," as used in the Kansas statute, providing that an action for death by wrongful act, when there is no personal representative or widow, may be brought by the next of kin. See also Hindry *v.* Holt, 24 Colo. 464, 51 Pac. 1002, 65 Am. St. Rep. 235, 39 L. R. A. 351.

72. *Indiana.*— Maule Coal Co. *v.* Partenheimer, 155 Ind. 100, 55 N. E. 751, 57 N. E. 710.

Kentucky.— Hackett *v.* Louisville, etc., R. Co., 95 Ky. 236, 24 S. W. 871, 15 Ky. L. Rep. 612; Jordan *v.* Cincinnati, etc., R. Co., 89 Ky. 40, 11 S. W. 1013, 11 Ky. L. Rep. 204; Pennsylvania Co. *v.* Malia, 49 S. W. 809, 20 Ky. L. Rep. 1623; Kentucky Cent. R. Co. *v.* McGinty, 14 S. W. 601, 12 Ky. L. Rep. 482; Louisville, etc., R. Co. *v.* Coppage, 13 S. W. 1086, 12 Ky. L. Rep. 200; Fitts *v.* Johnson, 11 Ky. L. Rep. 676; Hennings *v.* Louisville Leather Co., 12 S. W. 550, 11 Ky. L. Rep. 544; Carden *v.* Louisville, etc., R. Co., (1896) 37 S. W. 839.

New Jersey.— Fitzhenry *v.* Consolidated Traction Co., 63 N. J. L. 142, 42 Atl. 416; Haggerty *v.* Central R. Co., 31 N. J. L. 349.

Oregon.— Schleiger *v.* Northern Terminal Co., (1903) 72 Pac. 324.

Pennsylvania.— North Pennsylvania R. Co. *v.* Robinson, 44 Pa. St. 175.

Texas.— San Antonio St. R. Co. *v.* Renken, 15 Tex. Civ. App. 229, 38 S. W. 829.

Washington.— Nesbit *v.* Northern Pac. R. Co., 22 Wash. 698, 61 Pac. 141.

Wisconsin.— Brown *v.* Chicago, etc., R. Co., 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579.

United States.— Peterman *v.* Northern Pac. R. Co., 105 Fed. 335, holding that under the Washington statute, a mother who is the sole heir of an unmarried adult son may maintain an action for recovery of damages for his death by wrongful act in her own name.

See 15 Cent. Dig. tit. "Death," § 40. See also Holston *v.* Dayton Coal, etc., Co., 95 Tenn. 521, 32 S. W. 486, holding that the action can only be brought by the personal representative, save in the cases excepted expressly by statute, of the widow and children, and hence an action in the names of parents as such for the death of a minor child will not lie, although they be beneficially entitled to the recovery as next of kin. See, however, Romero *v.* Atchison, etc., R. Co., (N. M. 1903) 72 Pac. 37.

"Heirs" defined.— The word "heirs," under the California statute, allowing heirs to recover for the death of an adult by wrongful act, includes all those capable of inheritance from the deceased generally, uncontrolled by limitation of statutes relating to the distribution of community property, and hence includes minor children of deceased. Redfield *v.* Oakland Consol. St. R. Co., 110 Cal. 277, 42 Pac. 822. But see Henderson *v.* Kentucky Cent. R. Co., 86 Ky. 389, 5 S. W. 875, 9 Ky. L. Rep. 625, holding that the word "heir" as used in the Kentucky statute, providing that "the widow, heir, or personal representative" of one whose life is lost by the wilful neglect of another may sue the person causing the death and may recover punitive damages, means "child" and does not include parents or collateral representatives.

Guardians.— Under the Texas act of 1860, authorizing the heirs, representatives, or relations of deceased persons to sue for damages where the death is caused by negligence, it has been held that suit may be brought by the guardian of the minor children of the person killed, either in his name as guardian or in the names of the minor children by him as guardian. Houston, etc., R. Co. *v.* Bradley, 45 Tex. 171.

73. *Georgia.*— Frazier *v.* Georgia R., etc., Co., 96 Ga. 785, 22 S. E. 936.

Kansas.— Eureka *v.* Merrifield, 53 Kan. 794, 37 Pac. 113.

Kentucky.— Louisville, etc., R. Co. *v.* Coppage, 13 S. W. 1086, 12 Ky. L. Rep. 200.

Minnesota.— Scheffler *v.* Minneapolis, etc., R. Co., 32 Minn. 125, 19 N. W. 656.

Nebraska.— Wilson *v.* Bumstead, 12 Nebr. 1, 10 N. W. 411.

New York.— Ohnmacht *v.* Mt. Morris Electric Light Co., 66 N. Y. App. Div. 482, 73 N. Y. Suppl. 296.

North Carolina.— Killian *v.* Southern R. Co., 128 N. C. 261, 38 S. E. 873.

South Carolina.— Edgar *v.* Costello, 14 S. C. 20, 37 Am. Rep. 714.

Washington.— Nesbit *v.* Northern Pac. R. Co., 22 Wash. 698, 61 Pac. 141.

however, statutes specifically provide for the maintenance of an action by the parents for the death of their child caused by wrongful act,[74] some of the statutes being construed to give the right of action to the spouse having the custody of the child, where the parents have been divorced, or one has deserted the other.[75]

(E) *Aliens.*[76] The general rule seems to be that a right of action given by statute to certain designated persons, for death caused by wrongful act, may be brought by an alien who otherwise comes within the statutory designation.[77]

See 15 Cent. Dig. tit. "Death," § 43. See also Williams *v.* South Alabama, etc., R. Co., 91 Ala. 635, 9 So. 77; Thompson *v.* Chicago, etc., R. Co., 104 Fed. 845.

74. *Colorado.*— Pierce *v.* Conners, 20 Colo. 178, 183, 37 Pac. 721, 46 Am. St. Rep. 279.

Indiana.— Louisville, etc., R. Co. *v.* Goodykoontz, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371; Ft. Wayne, etc., R. Co. *v.* Beyerle, 110 Ind. 100, 11 N. E. 6; Ohio, etc., R. Co. *v.* Tindall, 13 Ind. 366, 74 Am. Dec. 259; Elwood Electric St. R. Co. *v.* Ross, 26 Ind. App. 258, 58 N. E. 535 (where it was held that the action of the parent did not amount to an emancipation of the child which would prevent his maintaining an action for its death by wrongful act); Boyd *v.* Brazil Block Coal Co., 25 Ind. App. 157, 57 N. E. 732, 50 N. E. 368. See Gann *v.* Worman, 69 Ind. 458; Citizens' St. R. Co. *v.* Cooper, 22 Ind. App. 459, 53 N. E. 1092, 72 Am. St. Rep. 319.

Iowa.— Lawrence *v.* Birney, 40 Iowa 377.

Massachusetts.— Mulhall *v.* Fallon, 176 Mass. 266, 57 N. E. 386, 79 Am. St. Rep. 309, 54 L. R. A. 934.

Mississippi.— Illinois Cent. R. Co. *v.* Hunter, 70 Miss. 471, 12 So. 482. See also Amos *v.* Mobile, etc., R. Co., 63 Miss. 509, holding that the Mississippi statute limits the right of action to cases in which the deceased "left a widow, or children, or both, or husband, or father," and that the mother has no right of action, and that the term "parent" in the statute refers to the father.

Missouri.— Lee *v.* Knapp, 155 Mo. 610, 56 S. W. 458; Hennessey *v.* Bavarian Brewing Co., 145 Mo. 104, 46 S. W. 966, 68 Am. St. Rep. 554, 41 L. R. A. 385 (holding that the remarriage of the mother does not impair her right to maintain action for the death of her child); Marshall *v.* Wabash R. Co., 120 Mo. 275, 25 S. W. 179 (holding that the Missouri statute does not require a joinder of the father and mother in an action for the death of their child, where the same is illegitimate); Croekett *v.* St. Louis Transfer Co., 52 Mo. 457 (holding that the joinder of father and mother as plaintiffs in an action for the death of a child was proper, even though they were divorced prior to the accrual of the cause of action); Buel *v.* St. Louis Transfer Co., 45 Mo. 562.

New Mexico.— Romero *v.* Atchison, etc., R. Co., (1903) 72 Pac. 37.

Pennsylvania.— Kerr *v.* Pennsylvania R. Co., 169 Pa. St. 95, 32 Atl. 96 (holding that where a husband deserts his wife and family and ceases to support them, the wife may sue to recover for the death of a minor child without joining him as a party); Pennsylvania R. Co. *v.* Zebe, 37 Pa. St. 420; Marshall *v.* Masselli, 30 Pittsb. Leg. J. N. S. 147.

Texas.— Texas, etc., R. Co. *v.* Hall, 83 Tex. 675, 19 S. W. 121. But *compare* Winnt *v.* International, etc., R. Co., 74 Tex. 32, 11 S. W. 907, 5 L. R. A. 172.

See 15 Cent. Dig. tit. "Death," § 43. See also Isaac *v.* Denver, etc., R. Co., 12 Daly (N. Y.) 340.

Where a stepfather assumed the relationship of a natural parent to a minor child of his wife by a former marriage, it was held, under the Missouri statute, that he and not the mother was the proper party to sue for loss of services sustained by the child's death, caused by another's negligence. Natchez, etc., R. Co. *v.* Cook, 63 Miss. 38; Hennesey *v.* Bavarian Brewing Co., 63 Mo. App. 111; Craft *v.* Northern Pac. R. Co., 25 Oreg. 275, 35 Pac. 250; Putman *v.* Southern Pac. R. Co., 21 Oreg. 230, 27 Pac. 1033, holding, however, that a parent could only recover for the death of a child where the death occurred before the child attained its majority.

Where wife is separated from husband.— It has been held in Georgia that the fact that a wife is living apart from her husband, being supported by the wages of their minor son, is no objection to the maintenance by her of an action against a railroad company to recover for the son's death, brought not only in her name, but in the name of the husband for her use. East Tennessee, etc., R. Co. *v.* Maloy, 77 Ga. 237, 6 S. E. 941.

75. *California.*— Delatour *v.* Mackey, 139 Cal. 621, 73 Pac. 454.

Georgia.— Amos *v.* Atlanta R. Co., 104 Ga. 809, 31 S. E. 42.

Louisiana.— Wilson *v.* Banner Lumber Co., 108 La. Ann. 590, 32 So. 460.

Oregon.— Schleiger *v.* Northern Terminal Co., (1903) 72 Pac. 324.

Washington.— Clark *v.* Northern Pac. R. Co., 29 Wash. 139, 69 Pac. 636.

See 15 Cent. Dig. tit. "Death," § 43.

76. Actions by aliens generally see ALIENS, 2 Cyc. 107.

77. *Arizona.*— Bonthron *v.* Phœnix Light, etc., Co., (1903) 71 Pac. 941, 61 L. R. A. 563.

Delaware.— Szymanski *v.* Blumenthal, 3 Pennew. 558, 52 Atl. 347.

Georgia.— Augusta R. Co. *v.* Glover, 92 Ga. 132, 18 S. E. 406.

Indiana.— Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48.

Massachusetts.— Mulhall *v.* Fallon, 176

(iv) *What Law Governs.* In some jurisdictions, by construction of the statute, foreign administrators and executors are permitted to prosecute actions for death by wrongful act wherever such actions might be prosecuted by a personal representative appointed in the jurisdiction.[78] The better rule, however, seems to be that the question of who may sue, being a matter of right and not of remedy merely, the question as to the proper party to bring an action in the courts of a state to recover for death occurring in another state depends solely on the statutes of the latter state, and must be prosecuted by the person or persons designated in such statutes.[79]

b. Defendants. Under statutes giving a right of action against any person, company, or corporation, their agents or servants, for the wrongful death of another, it is proper to join any two of such persons as parties defendant in an action for death.[80]

Mass. 266, 57 N. E. 386, 79 Am. St. Rep. 309, 54 L. R. A. 934.

Minnesota.— Renlund *v.* Commodore Min. Co., 89 Minn. 41, 93 N. W. 1057.

Missouri.— Philpott *v.* Missouri Pac. R. Co., 85 Mo. 164.

See 15 Cent. Dig. tit. "Death," § 35. See also Deni *v.* Pennsylvania R. Co., 6 Pa. Dist. 15. But see McMillen *v.* Spider Lake Saw Mill, etc., Co., 115 Wis. 332, 91 N. W. 971, 95 Am. St. Rep. 947, 60 L. R. A. 589.

78. Illinois Cent. R. Co. *v.* Crudup, 63 Miss. 291 (holding that since the Tennessee statute gives the right of action to the administrator of one wrongfully killed, an action accruing in that state may be maintained in Mississippi by an administrator appointed under the laws of either state); Missouri Pac. R. Co. *v.* Lewis, 24 Nebr. 848, 40 N. W. 401, 2 L. R. A. 67; Noonan *v.* Bradley, 9 Wall. (U. S.) 394, 19 L. ed. 757; Popp *v.* Cincinnati, etc., R. Co., 96 Fed. 465; Hodges *v.* Kimball, 91 Fed. 845, 34 C. C. A. 103; Duchesse D'Auxy *v.* Porter, 41 Fed. 68. See also Chandler *v.* New York, etc., R. Co., 159 Mass. 589, 35 N. E. 89; Higgins *v.* Central New England, etc., R. Co., 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544; Dennick *v.* New Jersey Cent. R. Co., 103 U. S. 11, 26 L. ed. 439; Wilson *v.* Tootle, 55 Fed. 211.

Domestic administrators.— In several jurisdictions it has been held that the statute of one state, authorizing actions by administrators for injuries causing the death of the intestate, cannot authorize an action in another state by an administrator therein appointed, although the accident happened in the state where the statute was in force. Richardson *v.* New York Cent. R. Co., 98 Mass. 85; Woodward *v.* Michigan Southern, etc., R. Co., 10 Ohio St. 121.

79. *Georgia.*— Selma, etc., R. Co. *v.* Lacey, 49 Ga. 106.

Kansas.— Limekiller *v.* Hannibal, etc., R. Co., 33 Kan. 83, 5 Pac. 401, 52 Am. Rep. 523.

Kentucky.— See Bruce *v.* Cincinnati R. Co., 83 Ky. 174.

Maryland.— Ash *v.* Baltimore, etc., R. Co., 72 Md. 144, 19 Atl. 643, 20 Am. St. Rep. 461.

Massachusetts.— Davis *v.* New York, etc., R. Co., 143 Mass. 301, 9 N. E. 815, 58 Am. Rep. 138.

Missouri.— McGinnis *v.* Missouri Car, etc., Co., 174 Mo. 225, 73 S. W. 586; Riley *v.* Grand Island Receivers, 72 Mo. App. 280. And see Oates *v.* Union Pac. R. Co., 104 Mo. 514, 16 S. W. 487, 24 Am. St. Rep. 384; Vawter *v.* Missouri Pac. R. Co., 84 Mo. 79, 54 Am. Rep. 105.

New Jersey.— Lower *v.* Segal, 60 N. J. L. 99, 36 Atl. 777, 59 N. J. L. 66, 34 Atl. 945.

New York.—Wooden *v.* Western New York, etc., R. Co., 126 N. Y. 10, 26 N. E. 1050, 22 Am. St. Rep. 803, 13 L. R. A. 458 [*affirming* 12 N. Y. Suppl. 908]; Hoes *v.* New York, etc., R. Co., 73 N. Y. App. Div. 363, 77 N. Y. Suppl. 117; Stone *v.* Groton Bridge, etc., Co., 77 Hun 99, 28 N. Y. Suppl. 446.

Ohio.— Essenwine *v.* Pennsylvania Co., 11 Ohio Dec. (Reprint) 277, 25 Cinc. L. Bul. 396.

Pennsylvania.— Usher *v.* West Jersey R. Co., 126 Pa. St. 206, 17 Atl. 597, 12 Am. St. Rep. 863, 5 Pa. Co. Ct. 109, 4 L. R. A. 261.

Tennessee.—Nashville, etc., R. Co. *v.* Sprayberry, 8 Baxt. 341, 31 Am. Rep. 705.

Texas.— See Willis *v.* Missouri Pac. R. Co., 61 Tex. 432, 48 Am. Rep. 301.

Utah.— Thorp *v.* Union Pac. Coal Co., 24 Utah 475, 68 Pac. 145.

United States.— Cincinnati, etc., R. Co. *v.* Thiebaud, 114 Fed. 918, 52 C. C. A. 538; Erickson *v.* Pacific Coast Steamship Co., 96 Fed. 80; Boston, etc., R. Co. *v.* McDuffey, 79 Fed. 934, 25 C. C. A. 247; Hulbert *v.* Topeka, 34 Fed. 510. See also Lyon *v.* Boston, etc., R. Co., 107 Fed. 386. But see Stewart *v.* Baltimore, etc., R. Co., 168 U. S. 445, 18 S. Ct. 105, 42 L. ed. 537.

80. Cincinnati, etc., R. Co. *v.* Cook, 67 S. W. 383, 23 Ky. L. Rep. 2410 (holding that under the Kentucky statute a corporation and its servant may be sued jointly for a death resulting from the negligence of the servant); Winston *v.* Illinois Cent. R. Co., 65 S. W. 13, 23 Ky. L. Rep. 1283, 55 L. R. A. 603; Comitez *v.* Parkerson, 50 Fed. 170 (holding that as all the persons in any way concerned with an unlawful killing by a mob are liable *in solido*, it was proper to join, as a party defendant with the individuals who participated in the killing, the city in which the act was committed, on the ground of its negligence in not preventing the killing).

9. BENEFICIARIES — a. In General. By a great weight of authority, where a statute gives a right of action for death by wrongful act, if no such persons or class of persons exist as are specified in the statute as the beneficiaries of the recovery the action cannot be maintained.[81] Thus it has been held that a statute giving the widow a right of action to recover for the death of her husband does not confer a like right on the husband for the death of the wife;[82] and it has

81. *California.*— Webster *v.* Norwegian Min. Co., 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181.

Colorado.— Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442, holding, however, that the existence of any of the beneficiaries named in the statute is sufficient to give the right of action.

Connecticut.— Andrews *v.* Hartford, etc., R. Co., 34 Conn. 57.

Illinois.— Willis Coal, etc., Co. *v.* Grizzell, 198 Ill. 313, 65 N. E. 74 [*reversing* 100 Ill. App. 480] (holding that under an Illinois statute, giving a right of action for the benefit of the widow of deceased, his lineal heirs, or adopted children, or any other person who was dependent upon him for support, brothers or sisters have no cause of action under such statute unless they were dependent on deceased); Chicago, etc., R. Co. *v.* Morris, 26 Ill. 400; Mattoon Gas Light Co. *v.* Dolan, 105 Ill. App. 1.

Kansas.— Martin *v.* Missouri Pac. R. Co., 58 Kan. 475, 49 Pac. 605.

Kentucky.—Kentucky Cent. R. Co. *v.* Wainwright, (1890) 13 S. W. 438; Koenig *v.* Covington, 12 S. W. 128, 11 Ky. L. Rep. 251; Fitts *v.* Johnson, 11 Ky. L. Rep. 676.

Massachusetts.— Com. *v.* Boston, etc., R. Co., 121 Mass. 36. See Dietrich *v.* Northampton, 138 Mass. 14, 52 Am. Rep. 422.

Nebraska.— Warren *v.* Englehart, 13 Nebr. 283, 13 N. W. 401.

New Jersey.—Haggerty *v.* New Jersey Cent. R. Co., 31 N. J. L. 349. See also Paulmier *v.* Erie R. Co., 34 N. J. L. 151.

New York.— Lucas *v.* New York Cent. R. Co., 21 Barb. 245. *Contra*, Quin *v.* Moore, 15 N. Y. 432; McMahon *v.* New York, 33 N. Y. 642.

Ohio.— Grotenkemper *v.* Harris, 25 Ohio St. 510 (holding that under an act giving a right of action for the exclusive benefit of the widow and next of kin, the next of kin who had no legal claim on the deceased for support might have an action maintained for their benefit under such statute); Halloran *v.* Cleveland, etc., R. Co., 4 Ohio Dec. (Reprint) 14, 1 Clev. L. Rep. 11. See also Muhl *v.* Michigan Southern R. Co., 10 Ohio St. 272.

Pennsylvania.— Pennsylvania R. Co. *v.* Adams, 55 Pa. St. 499, holding that the Pennsylvania act giving damages for injuries causing death in certain cases, and entitling "parents or children" of the deceased to recover, the words "parents" and "children" indicate the family relation in point of fact without regard to age, and the relation may continue though the child be over age. See also Books *v.* Danville, 1 Kulp 3.

South Dakota.— Lintz *v.* Holy Terror Min. Co., 13 S. D. 489, 83 N. W. 570.

Tennessee.— East Tennessee, etc., R. Co. *v.* Lilly, 90 Tenn. 563, 18 S. W. 243.

Wisconsin.— Hubbard *v.* Chicago, etc., R. Co., 104 Wis. 160, 80 N. W. 454, 76 Am. St. Rep. 855; Brown *v.* Chicago, etc., R. Co., 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579.

United States.— Thompson *v.* Chicago, etc., R. Co., 104 Fed. 845; Dueber *v.* Northern Pac. R. Co., 100 Fed. 424; Western Union Tel. Co. *v.* McGill, 57 Fed. 699, 6 C. C. A. 521, 21 L. R. A. 818; Serensen *v.* Northern Pac. R. Co., 45 Fed. 407.

See 15 Cent. Dig. tit. "Death," § 47.

Collateral kin.— It has been held in Illinois that to entitle an administrator to sue for the wrongful death of his intestate, it is not necessary that the deceased should have left a surviving wife and children entitled to be supported by him, or that his parents should have the legal right to his services by reason of his being a minor. Chicago, etc., R. Co. *v.* Swett, 45 Ill. 197, 92 Am. Dec. 206 [*citing* with approval Chicago, etc., R. Co. *v.* Shannon, 43 Ill. 338].

Next of kin.— It has been held under the Ohio statute, providing that right of action for wrongful death shall be for the benefit of a wife or husband, parents and child or children, or if there be neither of them then the next of kin, that the widow of a decedent is next of kin under the statute. Lima Electric Light, etc., Co. *v.* Deubler, 7 Ohio Cir. Ct. 185. See also Dunhene *v.* Ohio L. Ins., etc., Co., 1 Disn. (Ohio) 257, 12 Ohio Dec. (Reprint) 608 (holding that the phrase "next of kin" in the Ohio statute giving a right of action for wrongfully causing the death of another comprehends not only children, but those who are entitled to come in, in the order of inheritance); Chicago, etc., R. Co. *v.* Logue, 47 Ill. App. 292.

82. Georgia R., etc., Co. *v.* Wynn, 42 Ga. 331; Grosso *v.* Delaware, etc., R. Co., 50 N. J. L. 317, 13 Atl. 233; Green *v.* Hudson River R. Co., 2 Abb. Dec. (N. Y.) 277, 2 Keyes (N. Y.) 294. See also Schadewald *v.* Milwaukee, etc., R. Co., 55 Wis. 569, 13 N. W. 458, holding that under a statute providing that damages recovered for negligence causing death shall be paid to the husband or widow of deceased, or if no husband or widow survive, such damages shall be paid over to the lineal descendants of deceased, where deceased leaves a widow, the damages sustained by her alone are all that can be recovered. See, however, St. Louis Southwestern R. Co. *v.* Henson, 58 Fed. 531, 7 C. C. A. 349.

A wife by common-law marriage, and the issue of such marriage, may recover damages for the death of the husband as though

been held, under a statute giving a right of action to the next of kin of the deceased, that a husband is not next of kin to his wife, within the meaning of the statute.[83] In some jurisdictions the father has no cause of action for the death of his child in case the mother survives, or where he is not dependent or partially dependent upon such child for support.[84]

b. Children[85] — (i) *In General.* Under statutes giving a right of action for the benefit of the children of the deceased, it has been held that grandchildren are not included within the purview of the statute, and that no recovery can be had for their benefit;[86] although it has been held that posthumous children are included, and a recovery may be had for their benefit.[87] Where the statute gives a right of action for the benefit of the heir or heirs of the deceased, it has been held that the words "heir or heirs" mean child or children, and limits the right of action to lineal descendants of deceased.[88]

the marriage had been duly solemnized under license. Galveston, etc., R. Co. *v.* Cody, 20 Tex. Civ. App. 520, 50 S. W. 135.

83. Watson *v.* St. Paul City R. Co., 70 Minn. 514, 73 N. W. 400; Green *v.* Hudson River R. Co., 32 Barb. (N. Y.) 25; Western Union Tel. Co. *v.* McGill, 57 Fed. 699, 21 L. R. A. 818. See also Noble *v.* Seattle, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822, holding that the words "heirs or personal representatives," as used in the Washington statute, include only the widow and children. See, however, Chattanooga Electric R. Co. *v.* Johnson, 97 Tenn. 667, 37 S. W. 558, 34 L. R. A. 442.

The phrase "next of kin," as used in the Kansas statute, providing for recovery of damages for wrongfully causing a death, means those kin who inherit from the deceased under the statute of descents and distributions. Atchison, etc., R. Co. *v.* Ryan, 62 Kan. 682, 64 Pac. 603.

84. Georgia R., etc., Co. *v.* Spinks, 111 Ga. 571, 36 S. E. 855; Middle Georgia, etc., R. Co. *v.* Barnett, 104 Ga. 582, 30 S. E. 771; Smith *v.* Hatcher, 102 Ga. 158, 29 S. E. 162; Harris *v.* Kentucky Timber, etc., Co., 43 S. W. 462, 45 S. W. 94, 19 Ky. L. Rep. 1731; Doyle *v.* New York, etc., R. Co., 66 N. Y. App. Div. 398, 72 N. Y. Suppl. 936, holding that under the New York statute providing that damages recovered in an action causing death by negligence are for the benefit of decedent's husband or wife and next of kin, the right of action for an unmarried son's death belongs to the father, where the mother is dead and there are no heirs and next of kin. See also Augusta Southern R. Co. *v.* McDade, 104 Ga. 134, 31 S. E. 420 (holding that in order to warrant the recovery by a mother for the homicide of a child under the Georgia statute, it must appear that the child not only contributed to her support, but also that she was dependent upon the child for such support); Missouri, etc., R. Co. *v.* Freeman, (Tex. Civ. App. 1903) 73 S. W. 542 (holding that where a father was receiving no pecuniary benefits from decedent's earnings at the time of his death, and did not have any reasonable expectation of so doing in the future, a verdict in his favor was erroneous).

85. **Children defined** see 7 Cyc. 123.

86. Walker *v.* Vicksburg, etc., R. Co., 110 La. 718, 34 So. 749; Houston, etc., R. Co. *v.* Harris, (Tex. Civ. App. 1901) 64 S. W. 227; Dallas Rapid Transit R. Co. *v.* Elliott, 7 Tex. Civ. App. 216, 26 S. W. 455; The McCutcheon *v.* Receivers, 16 Fed. Cas. No. 8,742*a*, construing Missouri statute. See also Delisle *v.* Bourriague, 105 La. 77, 29 So. 731, 54 L. R. A. 420.

Adult children.— It has been held, under the Georgia statute giving a right of action to a widow, or, if no widow, to the child or children, for the homicide of the husband or parent, that the adult child of one who left no widow could not recover. Mott *v.* Central R. Co., 70 Ga. 680, 48 Am. Rep. 595. See, however, Galveston, etc., R. Co. *v.* Kutac, 72 Tex. 643, 11 S. W. 127, holding that the fact that one of the plaintiffs was more than twenty-one years of age at the time of his mother's death did not prevent him from recovering damages.

Stepchild.— It has been held in Georgia that a child has no right of action for the homicide of its stepfather. Marshall *v.* Macon Sash, etc., Co., 103 Ga. 725, 30 S. E. 571, 68 Am. St. Rep. 140, 41 L. R. A. 211.

87. Gorman *v.* Budlong, 23 R. I. 169, 49 Atl. 704; Texas, etc., R. Co. *v.* Robertson, 82 Tex. 657, 17 S. W. 1041, 27 Am. St. Rep. 929; Nelson *v.* Galveston, etc., R. Co., 78 Tex. 621, 14 S. W. 1021, 22 Am. St. Rep. 81, 11 L. R. A. 391; Galveston, etc., R. Co. *v.* Contreras, 31 Tex. Civ. App. 489, 72 S. W. 1051 (holding that in an action by a posthumous child for damages sustained by reason of the father's death, the fact that the mother and other children have recovered damages for such death is immaterial).

88. Hindry *v.* Holt, 24 Colo. 464, 51 Pac. 1002, 65 Am. St. Rep. 235, 39 L. R. A. 351; Brown *v.* Chicago, etc., R. Co., 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579. See also Wabash R. Co. *v.* Cregan, 23 Ind. App. 1, 54 N. E. 767, where, under a statute providing that the damages recovered must inure to the exclusive benefit of the widow and children, if any, or next of kin of deceased, and it appeared that the deceased was thirty-two years of age, and left as his sole heirs at law two elder brothers, to whose

(11) *Illegitimate Children.* It is a well-recognized rule of construction that *prima facie* the word "child" or "children," when used in a statute, means legitimate child or children, and that bastards are not within the meaning of the term, and therefore where parents are given a right of action for the death of a child such action cannot be maintained by a parent for the death of a bastard.[89]

c. Decedent's Estate. Where, however, the statute gives the personal representative of the deceased a right of action generally, or for the benefit of his estate, such action will lie where decedent left neither widow, children, nor next of kin.[90]

10. Persons Liable. The doctrine seems to be well-nigh universally recognized that where a statute gives a right of action for death by wrongful act, a person or corporation is liable for its torts, and those of agents or servants, resulting in the death of another.[91] In one jurisdiction, however, it is held that a

support defendant had not contributed, it was held that the administrator was not entitled to any damages whatever.

Married children.— Under the Texas statute, a daughter, although married, can recover for the death of her father, it not being provided by the statute that as a condition precedent to recovery deceased must have been bound to contribute to the support of the beneficiaries designated. Texas, etc., R. Co. *v.* Martin, 25 Tex. Civ. App. 204, 60 S. W. 803.

89. *Georgia.*—Robinson *v.* Georgia R., etc., Co., 117 Ga. 168, 43 S. E. 452, 60 L. R. A. 555.

Indiana.— McDonald *v.* Pittsburg, etc., R. Co., 144 Ind. 459, 43 N. E. 447, 55 Am. St. Rep. 185, 32 L. R. A. 309; Thornburg *v.* American Strawboard Co., 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334.

Pennsylvania.— Harkins *v.* Philadelphia, etc., R. Co., 15 Phila. 286.

United States.— Marshall *v.* Wabash R. Co., 46 Fed. 269.

Canada.— Gibson *v.* Midland R. Co., 2 Ont. 658.

Sec 15 Cent. Dig. tit. "Death." § 47. See also Dickinson *v.* North Eastern Co., 2 H. & C. 735, 33 L. J. Exch. 91, 9 L. T. Rep. N. S. 299, 12 Wkly. Rep. 52, holding that a bastard is not a child within section 2 of 9 & 10 Vict. c. 93, and therefore an action could not be maintained for his benefit under that statute.

Contra.— Security Title, etc., Co. *v.* West Chicago St. R. Co., 91 Ill. App. 332; Marshall *v.* Wabash R. Co., 120 Mo. 275, 25 S. W. 179.

Adopted children.— Under the New Jersey statute it has been held that the next of kin of a child adopted under that act are the next of kin by blood and not the adopting parents. Heidecamp *v.* Jersey City, etc., R. Co., (Err. & App. 1903) 55 Atl. 239.

Illegitimate sister.— It was held in Illinois Cent. R. Co. *v.* Johnson, 77 Miss. 727, 28 So. 753, 51 L. R. A. 837, that the act giving a sister or brother the right of action for the wrongful or negligent death of a sister or brother should be strictly construed as in derogation of the common law. It does not give a right of action to an illegitimate sister.

90. Lexington, etc., Min. Co. *v.* Huffman, 32 S. W. 611, 17 Ky. L. Rep. 775; Johnston *v.* Cleveland, etc., R. Co., 7 Ohio St. 336, 70 Am. Dec. 75; Perham *v.* Portland Gen. Electric Co., 33 Oreg. 451, 53 Pac. 14, 72 Am. St. Rep. 730, 40 L. R. A. 799. See also Wright *v.* Wood, 96 Ky. 56, 27 S. W. 979, 16 Ky. L. Rep. 337.

91. *Alabama.*— Savannah, etc., R. Co. *v.* Shearer, 58 Ala. 672.

Georgia.— Cottingham *v.* Weekes, 56 Ga. 201; Southwestern R. Co. *v.* Paulk, 24 Ga. 356.

Illinois.— Wisconsin Cent. R. Co. *v.* Ross, 43 Ill. App. 454.

Iowa.— Philo *v.* Illinois Cent. R. Co., 33 Iowa 47.

Louisiana.— Frank *v.* New Orleans, etc., R. Co., 20 La. Ann. 25.

New Hampshire.— State *v.* Gilmore, 24 N. H. 461, holding, however, that under the New Hampshire statute, making railroad companies subject to indictment for death by wrongful act, the indictment must be against the corporation and not against the stockholders.

New Jersey.— Murphy *v.* Mercer County, 57 N. J. L. 245, 31 Atl. 229.

New York.— Hughes *v.* Auburn, 21 N. Y. App. Div. 311, 47 N. Y. Suppl. 235; Baker *v.* Bailey, 16 Barb. 54.

Pennsylvania.— Pennsylvania *v.* McHugho, 35 Leg. Int. 62. See, however, Fleming *v.* Pennsylvania R. Co., 134 Pa. St. 477, 19 Atl. 740, holding that under the Pennsylvania act of 1868, the parents of a man employed by contractors to work on a railroad cannot recover against the railroad for his death, caused by the negligence of its servants.

Rhode Island.— McCaughey *v.* Tripp, 12 R. I. 449 (holding that an action would lie against a city for death by wrongful act of its officers and agents as against any other corporation); Chase *v.* American Steamboat Co., 10 R. I. 79.

United States.— American Sugar Refining Co. *v.* Tatum, 60 Fed. 514, 9 C. C. A. 121; American Sugar Refining Co. *v.* Johnson, 60 Fed. 503, 9 C. C. A. 110.

statute giving a right of action for death by wrongful act is confined to private corporations and does not extend to municipal corporations.[92]

B. Venue.[93] Under a majority of the statutes[94] the right of action for death

See 15 Cent. Dig. tit. "Death," § 49.

Action against steamboat.— It has been held under the Minnesota statute, providing that any person having a demand against a vessel for injuries done by it, instead of proceeding "against the master, owner, agent, or consignee," may institute suit against such vessel by name, and the statute giving a right of action for wrongful act causing death, such action may be maintained against the steamboat by name. Boutiller *v.* The Milwaukee, 8 Minn. 97.

Acts or omissions of agents.— It has been held under the Texas statute, giving cause of action for death when death is caused by the "wrongful act, negligence, unskillfulness, or default of another," a person is not liable for the acts or omissions of his agents or employees causing death, but death must result from his own immediate act. Cole *v.* Parker, 27 Tex. Civ. App. 563, 66 S. W. 135.

Express company.— It has been held under the Texas statute, giving an action for death caused by the negligence of the proprietor, owner, charterer, or hirer of any railroad or other vehicle for the conveyance of goods or passengers, no action will lie against an express company which under contract had a particular car or part of a car of a train exclusively controlled by a railroad. Lipscomb *v.* Houston, etc., R. Co., 95 Tex. 5, 64 S. W. 923, 93 Am. St. Rep. 804, 55 L. R. A. 869 [*modifying* (Tex. Civ. App. 1901) 62 S. W. 954].

Insane persons.— It has been held that an insane person or his estate is liable in compensatory damages for the death of another. McIntyre *v.* Sholty, 121 Ill. 660, 13 N. E. 239, 2 Am. St. Rep. 140; Jewell *v.* Colby, 66 N. H. 399, 24 Atl. 902.

Prisoner killed by mob.—It was held under the Indiana statute that the legal representative of a prisoner who was murdered by a mob might maintain an action on the bond of the sheriff, in whose custody the deceased was at the time, for a failure of the sheriff to perform his official duty in protecting his prisoner. Indiana *v.* Gobin, 94 Fed. 48.

Receiver of private corporation.— It has been held under the Texas statute that an action cannot be maintained against the receiver of a private corporation for death caused by the negligence of the agents or employees of such corporation. Parker *v.* Dupree, 28 Tex. Civ. App. 341, 67 S. W. 185.

The person aiding or abetting the wrongful act is under the Missouri statute equally liable in damages with the person who actually perpetrates it, where death ensues from such wrongful act. Gray *v.* McDonald, 104 Mo. 303, 16 S. W. 398 [*affirming* 28 Mo. App. 477].

Where killing was wilful or malicious.— Where plaintiff's intestate was shot and killed by an agent of defendant, while the latter two were endeavoring, under claim of right, to enter upon the premises of the deceased, if there was no evidence that the fatal shot was fired by the express direction or assent of defendant, it was held that defendant was not liable in an action for causing the death of the intestate. Fraser *v.* Freeman, 43 N. Y. 566, 3 Am. Rep. 740.

92. Fleming *v.* Texas Loan Agency, 87 Tex. 238, 27 S. W. 126, 27 L. R. A. 250; Hendrick *v.* Walton, 69 Tex. 192, 6 S. W. 749; Burns *v.* Merchants', etc., Oil Co., 26 Tex. Civ. App. 223, 63 S. W. 1061; Bammell *v.* Kirby, 19 Tex. Civ. App. 198, 47 S. W. 392; Searight *v.* Austin, (Tex. Civ. App. 1897) 42 S. W. 857; Lynch *v.* Southwestern Tel., etc., Co., (Tex. Civ. App. 1895) 32 S. W. 776; Ritz *v.* Austin, 1 Tex. Civ. App. 455, 20 S. W. 1029; Asher *v.* Cabell, 50 Fed. 818, 1 C. C. A. 693.

Death caused from neglect of sanitary precautions on the part of public authorities in the construction and maintenance of a sewer system has been held in New York not to come within the purview of the statute permitting actions for damages by reason of death caused by the wrongful act, neglect, or default of another, where such action is attempted to be brought against the city by the representatives of one who died from disease superindueed by such sanitary neglect. Hughes *v.* Auburn, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636 [*reversing* 21 N. Y. App. Div. 311, 47 N. Y. Suppl. 235].

Action against state of New York.— It was held in Bowen *v.* State, 108 N. Y. 166, 15 N. E. 56, that the fact that a special statute, giving the personal representatives a right of action for the death of the decedent by wrongful act, omits to include actions against the state does not affect the right of an administratrix to proceed before the board of claims to recover damages for the drowning of her husband in a canal, the state assuming, under Laws (1870), c. 321, the same measure of liability incurred by individuals and corporations engaged in similar enterprises.

Action against township.— It was held in Merkle *v.* Bennington Tp., 58 Mich. 156, 24 N. W. 776, 55 Am. Rep. 666, that the Michigan statute, giving a right of action for a fatal injury, although in derogation of the common law, is a remedial statute, and establishes a general rule which applies as well to townships as to other defendants, even though at the time of its adoption townships were not liable for such injuries, but became so afterward. See also Davis *v.* Rumney, 66 N. H. 331, 29 Atl. 542, to the same effect.

93. Venue generally see VENUE.

94. In several jurisdictions, however, the action may be brought either in the county in which the injury causing death was sustained or in the county where such death occurred. Castille *v.* Caffrey Cent. Refinery,

by wrongful act is transitory, and such action can be brought in any county in the state where defendant or any one of several defendants resides and can be served.[95]

C. Limitation of Actions[96] **— 1. General Rule.** Where the statute giving a right of action for death by wrongful act limits the time within which such action must be brought to a certain designated period, and contains no saving clause, an action sought to be brought after the expiration of such period is barred, and no excuse will be recognized for such delay.[97]

2. When Statute Begins to Run — a. General Rule. The better rule seems to be that the statute of limitations begins to run against the statutory right of action for death by wrongful act only from the time that such death occurs,[98]

etc., Co., 48 La. Ann. 322, 19 So. 332; White *v.* Rio Grande Western R. Co., 25 Utah 346, 71 Pac. 593.

95. Louisville, etc., R. Co. *v.* Cooley, 49 S. W. 339, 20 Ky. L. Rep. 1372; Drea *v.* Carrington, 32 Ohio St. 595; Austin *v.* Cameron, 83 Tex. 351, 18 S. W. 437.

96. Statutes of limitation generally see Limitations of Actions.

97. *Alabama.*— O'Kief *v.* Memphis, etc., R. Co., 99 Ala. 524, 12 So. 454.

Illinois.— St. Luke's Hospital *v.* Foster, 86 Ill. App. 282; Swift *v.* Foster, 55 Ill. App. 280.

Iowa.— Sherman *v.* Western Stage Co., 22 Iowa 556.

Maine.— See State *v.* Bangor, 30 Me. 341.

Minnesota.— Maylone *v.* St. Paul, 40 Minn. 406, 42 N. W. 88.

Missouri.— Barker *v.* Hannibal, etc., R. Co., 91 Mo. 86, 14 S. W. 280; Coover *v.* Moore, 31 Mo. 574.

New Jersey.— County *v.* Pacific Coast Borax Co., 68 N. J. L. 273, 53 Atl. 386, holding, however, that a plea that the action was not commenced within the limited time is not established by proof that the process was returnable or served after the limited time, or that after such expiration the return-day of the process had been altered by the sheriff before service.

New York.— Titman *v.* New York, 57 Hun 469, 10 N. Y. Suppl. 689.

North Carolina.— Taylor *v.* Cranberry Iron, etc., Co., 94 N. C. 525.

Ohio.— Pittsburg, etc., R. Co. *v.* Hine, 25 Ohio St. 629 (holding that under a statute providing that actions for death by wrongful act shall be commenced within two years after such death, the subsequent amendment and repeal of the section containing such proviso during the existence of the right of action, and the omission of the proviso from the section as amended, did not have the effect of extending the time within which the action might be brought); Alston *v.* Cleveland, etc., R. Co., 2 Ohio Cir. Ct. 45.

Virginia.—Birmingham *v.* Chesapeake, etc., R. Co., 98 Va. 548, 37 S. E. 17.

Wisconsin.— Staeffler *v.* Menasha Woodenware Co., 111 Wis. 483, 87 N. W. 480; George *v.* Chicago, etc., R. Co., 51 Wis. 603, 8 N. W. 374.

United States.— International Nav. Co. *v.* Lindstrom, 123 Fed. 475 [*reversing* 117 Fed. 170].

See 15 Cent. Dig. tit. "Death," § 52 *et seq.*

98. *Georgia.*—Western, etc., R. Co. *v.* Bass, 104 Ga. 390, 30 S. E. 874.

Illinois.— Lake Shore, etc., R. Co. *v.* Dylinski, 67 Ill. App. 114.

Indiana.— Hanna *v.* Jeffersonville R. Co., 32 Ind. 113.

Kansas.— Rodman *v.* Missouri Pac. R. Co., 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 704.

Kentucky.— Carden *v.* Louisville, etc., R. Co., 101 Ky. 113, 39 S. W. 1027, 19 Ky. L. Rep. 132; Van Vactor *v.* Louisville, etc., R. Co., 66 S. W. 4, 23 Ky. L. Rep. 1743; Chesapeake, etc., R. Co. *v.* Kelley, 48 S. W. 993, 20 Ky. L. Rep. 1238.

Louisiana.— Goodwin *v.* Bodcaw Lumber Co., 109 La. 1050, 34 So. 74.

Minnesota.— St. Paul Trust Co. *v.* Sargent, 44 Minn. 449, 47 N. W. 51; Rugland *v.* Anderson, 30 Minn. 386, 15 N. W. 676.

Missouri.— Kennedy *v.* Burrier, 36 Mo. 128.

New Hampshire.— State *v.* Nashua, etc., R. Co., 58 N. H. 182.

New York.— Bonnell *v.* Jewett, 24 Hun 524; Dailey *v.* New York, etc., R. Co., 26 Misc. 539, 57 N. Y. Suppl. 485.

North Carolina.— Best *v.* Kinston, 106 N. C. 205, 10 S. E. 997.

Ohio.— Solor Refining Co. *v.* Elliott, 15 Ohio Cir. Ct. 581, 8 Ohio Cir. Dec. 225, holding that the right of the administrator to bring an action for the death of his intestate is not barred until four years after the death, unless at the time of the death the intestate's right of action for his injuries was barred. And see Alston *v.* Cleveland, etc., R. Co., 1 Ohio Cir. Dec. 353.

Pennsylvania.— Marsh *v.* Western New York, etc., R. Co., 204 Pa. St. 229, 53 Atl. 1001 (holding likewise that such cause of action cannot be assigned by the widow, to a child, before verdict, so as to enable the action to be brought or maintained in the name of the widow for the use of the child); Huntingdon, etc., R., etc., Co. *v.* Decker, 84 Pa. St. 419.

Tennessee.— Whaley *v.* Catlett, 103 Tenn. 347, 53 S. W. 131.

Washington.— Robinson *v.* Baltimore, etc., Min., etc., Co., 26 Wash. 484, 67 Pac. 274.

West Virginia.—Hoover *v.* Chesapeake, etc., R. Co., 46 W. Va. 268, 33 S. E. 224.

United States.— Stern *v.* La Compagnie Generale Transatlantique, 110 Fed. 996; Nestelle *v.* Northern Pac. R. Co., 56 Fed. 261.

although that event may take place long after the time of the infliction of the injury causing such death. This rule has been applied, under statutes creating no saving clause for the benefit of parties under disability, to the case of infants, and they are barred from their right of action unless the same is brought within the prescribed statutory period.[99]

b. Modification of Rule. In some jurisdictions, however, it has been held that the statute of limitations does not begin to run against a cause of action for death by wrongful act until after an executor has qualified or an administrator has been appointed.[1]

3. What Law Governs. In an action for death by wrongful act occurring in another state the statute of limitations of the forum governs, unless the statute giving the right of action in such other state itself prescribes a limitation, in which case such limitation will govern, as the period during which the action must be brought relates to and qualifies the right itself instead of affecting the remedy.[2]

D. Pleading[3] **— 1. Declaration, Complaint, or Petition — a. Necessary Allegations** — (I) *In General.* In statutory actions for damages for death by wrongful act, the plaintiff must bring himself strictly within the statutory requirements necessary to confer the right, and this must appear by proper allegations in the declaration or complaint.[4]

(II) *Compliance With Conditions Precedent.* Where conditions are imposed as a prerequisite to the maintenance of the action, it is necessary that

See 15 Cent. Dig. tit. "Death," § 52 *et seq.* But see Ewell *v.* Chicago, etc., R. Co., 29 Fed. 57.

Special limitations.— It has been held in Minnesota that the special statute, limiting the time for commencing actions against the city of St. Paul for injuries caused by its negligence, is not applicable to statutory actions by the personal representative of a deceased person for negligence causing his death. Maylone *v.* St. Paul, 40 Minn. 406, 42 N. W. 88.

99. *Indiana.*— Elliott *v.* Brazil Block Coal Co., 25 Ind. App. 592, 58 N. E. 736.

Kentucky.— Van Vactor *v.* Louisville, etc., R. Co., 66 S. W. 4, 23 Ky. L. Rep. 1743. See, however, Louisville, etc., R. Co. *v.* Sanders, 86 Ky. 259, 5 S. W. 563, 9 Ky. L. Rep. 690.

Mississippi.— Foster *v.* Yazoo, etc., R. Co., 72 Miss. 886, 18 So. 380.

Missouri.— Rutter *v.* Missouri Pac. R. Co., 81 Mo. 169.

Pennsylvania.— Lanning *v.* Penn Electric Light Co., 31 Wkly. Notes Cas. 251.

See 15 Cent. Dig. tit. "Death," § 52 *et seq.*

Contra.— Nelson *v.* Galveston, etc., R. Co., 78 Tex. 621, 14 S. W. 1021, 22 Am. St. Rep. 81, 11 L. R. A. 391, holding that in an action for death by wrongful act, the fact that at the time of the death one of the parties entitled to sue was under no disability, does not set the statute of limitations in motion as against a posthumous child of the person injured.

1. Andrews *v.* Hartford, etc., R. Co., 34 Conn. 57; Louisville, etc., R. Co. *v.* Sanders, 86 Ky. 259, 5 S. W. 563, 9 Ky. L. Rep. 690; Barnes *v.* Brooklyn, 22 N. Y. App. Div. 520, 48 N. Y. Suppl. 36; Nashville, etc., R. Co. *v.* Foster, 10 Lea (Tenn.) 351; Flatley *v.* Memphis, etc., R. Co., 9 Heisk. (Tenn.) 230. See also McBride *v.* Burlington, etc., R. Co., 97 Iowa 91, 66 N. W. 73, 59 Am. St. Rep. 395; Sherman *v.* Western Stage Co., 24 Iowa 515; Fleming *v.* Ernst, 2 Bush (Ky.) 128.

2. *District of Columbia.*—Weaver *v.* Baltimore, etc., R. Co., 21 D. C. 499.

Georgia.— Selma, etc., R. Co. *v.* Lacey, 49 Ga. 106.

Kansas.— Hamilton *v.* Hannibal, etc., R. Co., 39 Kan. 56, 18 Pac. 57.

New York.— Dailey *v.* New York, etc., R. Co., 26 Misc. 539, 57 N. Y. Suppl. 485; Cavanagh *v.* Ocean Steam Nav. Co., 13 N. Y. Suppl. 540, 19 N. Y. Civ. Proc. 391.

United States.— The Harrisburg, 119 U. S. 199, 7 S. Ct. 140, 30 L. ed. 358; Stern *v.* La Compagnie Generale Transatlantique, 110 Fed. 996; Theroux *v.* Northern Pac. R. Co., 64 Fed. 84, 12 C. C. A. 52; Munos *v.* Southern Pac. Co., 51 Fed. 188, 2 C. C. A. 163; Boyd *v.* Clark, 8 Fed. 849.

See 15 Cent. Dig. tit. "Death," § 52 *et seq.*

3. Pleading generally see Pleading.

4. *Alabama.*— Lovell *v.* De Bardelaben Coal, etc., Co., 90 Ala. 13, 7 So. 756.

Georgia.— Smith *v.* East, etc., R. Co., 84 Ga. 183, 10 S. E. 602; East Tennessee, etc., R. Co. *v.* Maloy, 77 Ga. 237, 2 S. E. 941; Daly *v.* Stoddard, 66 Ga. 145; Chick *v.* Southwestern R. Co., 57 Ga. 357.

Indiana.— Ft. Wayne, etc., R. Co. *v.* Beyerle, 110 Ind. 100, 11 N. E. 61.

Maine.— Carrigan *v.* Stillwell, 97 Me. 247, 54 Atl. 389, 61 L. R. A. 163.

Missouri.— Baird *v.* Citizens' R. Co., 146 Mo. 265, 48 S. W. 78; Barker *v.* Hannibal, etc., R. Co., 91 Mo. 86, 14 S. W. 280.

See 15 Cent. Dig. tit. "Death," § 60 *et seq.*

For form of petition held to be sufficient in an action for death by wrongful act see Helm *v.* O'Rourke, 46 La. Ann. 178, 15 So. 400.

the plaintiff should allege in his declaration or complaint a compliance with such conditions, or otherwise it will be bad on demurrer.[5]

(III) *Act or Omission Causing Death.* The declaration, complaint, or petition must allege a wrongful act, neglect, or default of defendant causing the death of the deceased, under such circumstances as would entitle him to maintain an action if death had not ensued.[6]

(IV) *Existence of Beneficiaries*—(A) *General Rule.* Under Lord Campbell's Act and statutes founded thereon the personal representative of deceased is authorized to bring an action for death by wrongful act, in his own name, for the benefit of the widow and children, or next of kin, and in such

5. Allen *v.* Atlanta St. R. Co., 54 Ga. 503 (where it was held that a failure to allege in the declaration that the plaintiff had prosecuted the agent of the company on the criminal side of the court, or to set forth a good excuse for its failure to do so, was fatal); Berry *v.* Louisville, etc., R. Co., 128 Ind. 484, 28 N. E. 182; Dulaney *v.* Missouri Pac. R. Co., 21 Mo. App. 597 (holding that in an action under the Missouri statute, by a father and mother to recover for injuries to a minor son causing his death, petition must allege that he was unmarried, as the statute gives a right of action "if deceased be a minor and unmarried"). See also Chicago, etc., R. Co. *v.* Morris, 26 Ill. 400; Brown *v.* Harmon, 21 Barb. (N. Y.) 508.

Death of one not employee.— Under a statute giving a right of action for death by wrongful act, of a person not an employee of defendant, it has been held that the fact that the petition fails to allege that the deceased was not an employee of defendant does not render the petition defective, as the question as to whether or not deceased was an employee of defendant could be developed by the proof so as to control the right of recovery. Louisville, etc., R. Co. *v.* Smith, 87 Ky. 501, 9 S. W. 493, 10 Ky. L. Rep. 514.

6. Such allegation, while it need not be in the exact language of the statute, should be in language clearly importing the degree of negligence indicated by the statute.

Alabama.— Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35; Buckalew *v.* Tennessee Coal, etc., Co., 112 Ala. 146, 20 So. 606; Alabama, etc., R. Co. *v.* Waller, 48 Ala. 459.

Colorado.— Pierce *v.* Conners, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279.

Illinois.— Holton *v.* Daly, 106 Ill. 131.

Indiana.— Indianapolis Commercial Club *v.* Hilliker, 20 Ind. App. 239, 50 N. E. 578; Chicago, etc., R. Co. *v.* Beatty, 13 Ind. App. 604, 40 N. E. 753, 42 N. E. 284.

Kentucky.— East Tennessee Telephone Co. *v.* Simms, 99 Ky. 404, 36 S. W. 171, 38 S. W. 131, 18 Ky. L. Rep. 761; Coleman *v.* Kentucky Cent. R. Co., 33 S. W. 945, 17 Ky. L. Rep. 1145; Hansford *v.* Payne, 11 Bush 380; Lexington *v.* Lewis, 10 Bush 677; Louisville, etc., R. Co. *v.* Case, 9 Bush 728.

Louisiana.—Helm *v.* O'Rourke, 46 La. Ann. 178, 15 So. 400.

Maryland.— Philadelphia, etc., R. Co. *v.* State, 58 Md. 372.

Massachusetts.— Gay *v.* Essex Electric St. R. Co., 159 Mass. 242, 34 N. E. 258.

Michigan.— Storrs *v.* Grand Rapids, 110 Mich. 483, 68 N. W. 258.

Missouri.— Lee *v.* Knapp, 155 Mo. 610, 56 S. W. 458; Le May *v.* Missouri Pac. R. Co., 105 Mo. 361, 16 S. W. 1049.

New York.— Pizzi *v.* Reid, 72 N. Y. App. Div. 162, 76 N. Y. Suppl. 306.

Ohio.— Lima Electric Light, etc., Co. *v.* Deubler, 7 Ohio Cir. Ct. 185.

Tennessee.— Chattanooga Cotton Oil Co. *v.* Shamblin, 101 Tenn. 263, 47 S. W. 496.

Texas.— Missouri Pac. R. Co. *v.* Lee, 70 Tex. 496, 7 S. W. 857.

Virginia.— See Baltimore, etc., R. Co. *v.* Whittington, 30 Gratt. (Va.) 805.

United States.— See Cleveland, etc., R. Co. *v.* Tartt, 64 Fed. 823, 12 C. C. A. 618.

See 15 Cent. Dig. tit. "Death," § 61.

Defect in machinery.— In an action for death caused by defect in machinery, where the nature of the defect is peculiarly within defendant's knowledge, the declaration is sufficient where it points out its general character. Willey *v.* Boston Electric Light Co., 168 Mass. 40, 46 N. E. 395, 37 L. R. A. 723.

Gross negligence.— In an action under the Massachusetts statute, making a company liable for death occasioned by the "gross negligence" of its servants, it was held that a complaint was fatally defective if it failed to allege that the negligence of defendant's servants which caused the death was "gross." Hicks *v.* New York, etc., R. Co., 164 Mass. 424, 41 N. E. 721, 49 Am. St. Rep. 471.

Negativing self-defense.— Under a Kentucky statute, which provides "that the widow and minor child or children . . . of a person killed by the careless or wanton or malicious use of fire-arms, or other deadly weapons, not in self-defense, may have an action against the person or persons who committed the killing, . . . for reparation of the injury, and in such action the jury may give vindictive damages," the declaration need not allege that the killing was not in self-defense. Becker *v.* Crow, 7 Bush (Ky.) 198, 201.

Surplusage.— In an action under the Kentucky statute, giving compensatory damages only to personal representatives for death caused by negligence, it was held that an allegation in a complaint of wilful negligence might be disregarded as surplusage. Morris *v.* Louisville, etc., R. Co., 12 S. W. 940, 11 Ky. L. Rep. 698.

action it is necessary that the declaration or complaint shall aver that there are persons in existence answering such description and entitled to the damages.[7] Where the statute gives a right of action in favor of a designated class of beneficiaries, provided there are none of a certain other designated class of beneficiaries in existence, the failure to aver in the declaration or complaint the non-existence of any of such latter class is fatal on demurrer.[8]

(B) *Names of Beneficiaries.* Under some statutes it has been held that it is not only necessary to allege the existence of the beneficiaries designated in the statute, but also to give the names of all such beneficiaries entitled to share in the recovery.[9]

7. *California.*— Kerrigan *v.* Market St. R. Co., 138 Cal. 506, 71 Pac. 621; Webster *v.* Norwegian Min. Co., 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181; Knott *v.* McGilvray, 124 Cal. 128, 56 Pac. 789.

Illinois.— Foster *v.* St. Luke's Hospital, 191 Ill. 94, 60 N. E. 803; Holton *v.* Daly, 106 Ill. 131; Chicago, etc., R. Co. *v.* Morris, 26 Ill. 400; Chicago Terminal Transfer R. Co. *v.* Helbreg, 99 Ill. App. 563; Foley *v.* Suburban R. Co., 98 Ill. App. 108; Assumption *v.* Campbell, 95 Ill. App. 521; St. Luke's Hospital *v.* Foster, 86 Ill. App. 282; West Chicago St. R. Co. *v.* Mabie, 77 Ill. App. 176.

Indiana.— Stewart *v.* Terre Haute, etc., R. Co., 103 Ind. 44, 2 N. E. 208; Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48; Indianapolis Commercial Club *v.* Hilliker, 20 Ind. App. 239, 50 N. E. 578; State *v.* Walford, 11 Ind. App. 392, 39 N. E. 162.

Kansas.— Missouri Pac. R. Co. *v.* Barber, 44 Kan. 612, 24 Pac. 969.

Maine.— State *v.* Canada Grand Trunk R. Co., 60 Me. 145.

Michigan.— Walker *v.* Lake Shore, etc., R. Co., 104 Mich. 606, 62 N. W. 1032.

Minnesota.— Schwarz *v.* Judd, 28 Minn. 371, 10 N. W. 208.

Missouri.— McIntosh *v.* Missouri Pac. R. Co., 103 Mo. 131, 15 S. W. 80.

Nebraska.— Chicago, etc., R. Co. *v.* Bond, 58 Nebr. 385, 78 N. W. 710; Chicago, etc., R. Co. *v.* Van Buskirk, 58 Nebr. 252, 78 N. W. 514; Chicago, etc., R. Co. *v.* Oyster, 58 Nebr. 1, 78 N. W. 359; Burlington, etc., R. Co. *v.* Crockett, 17 Nebr. 570, 24 N. W. 219; Warren *v.* Englehart, 13 Nebr. 283, 13 N. W. 401.

New York.— Green *v.* Hudson River R. Co., 31 Barb. 260, 16 How. Pr. 263; Lucas *v.* New York Cent. R. Co., 21 Barb. 245; Safford *v.* Drew, 3 Duer 627; Boyle *v.* Southern R. Co., 36 Misc. 289, 73 N. Y. Suppl. 465; Pizzi *v.* Reid, 36 Misc. 123, 72 N. Y. Suppl. 1053.

Ohio.— Hartzell *v.* Shannon, 6 Ohio Dec. (Reprint) 1093, 10 Am. L. Rec. 444; Halloran *v.* Cleveland, etc., R. Co., 4 Ohio Dec. (Reprint) 14; Hall *v.* Crain, 2 Ohio Dec. (Reprint) 396, 3 West. L. Month. 593; Dunhene *v.* Ohio L. Ins., etc., Co., 1 Disn. 257, 12 Ohio Dec. (Reprint) 608.

South Carolina.— Lilly *v.* Charlotte, etc., R. Co., 32 S. C. 142, 10 S. E. 932; Conlin *v.* Charleston, 15 Rich. 201.

Tennessee.— Louisville, etc., R. Co. *v.* Pitt, 91 Tenn. 86, 18 S. W. 118.

Texas.— Gulf, etc., R. Co. *v.* Younger, 10 Tex. Civ. App. 141, 29 S. W. 948.

Vermont.— Geroux *v.* Graves, 62 Vt. 280, 19 Atl. 987. See Westcott *v.* Central Vermont R. Co., 61 Vt. 438, 17 Atl. 745.

West Virginia.— Baltimore, etc., R. Co. *v.* Gettle, 3 W. Va. 376.

United States.— Peers *v.* Nevada Power, etc., Co., 119 Fed. 400; Davidow *v.* Pennsylvania R. Co., 85 Fed. 943; Serensen *v.* Northern Pac. R. Co., 45 Fed. 407; Roach *v.* Imperial Min. Co., 7 Fed. 698, 7 Sawy. 224.

See 15 Cent. Dig. tit. "Death," § 64 *et seq.* See also Baker *v.* Louisville, etc., R. Co., 17 S. W. 191, 13 Ky. L. Rep. 465; Hamilton *v.* Bordentown Electric Light, etc., Co., 68 N. J. L. 85, 52 Atl. 290, holding that an allegation from which it can be inferred that a suit for wrongful death is for the benefit of next of kin is sufficient, without a direct averment to that effect.

8. St. Louis, etc., R. Co. *v.* Yocum, 34 Ark. 493; Louisville, etc., R. Co. *v.* Lohges, 6 Ind. App. 288, 33 N. E. 449; McIntosh *v.* Missouri Pac. R. Co., 103 Mo. 131, 15 S. W. 80; Sparks *v.* Kansas City, etc., R. Co., 31 Mo. App. 111; David *v.* Waters, 11 Oreg. 448, 5 Pac. 748, holding, however, that if a mother, in an action for death by wrongful act, avers that she is "next of kin" of her deceased son, this supplies after verdict want of an averment that the father is dead. See also Barker *v.* Hannibal, etc., R. Co., 91 Mo. 86, 14 S. W. 280.

9. *Indiana.*— Indianapolis, etc., R. Co. *v.* Keely, 23 Ind. 133. See also Clore *v.* McIntire, 120 Ind. 262, 22 N. E. 128.

Nebraska.— Chicago, etc., R. Co. *v.* Bond, 58 Nebr. 385, 78 N. W. 710; Chicago, etc., R. Co. *v.* Oyster, 58 Nebr. 1, 78 N. W. 359, holding, however, that where the names of the surviving minor children of decedent who were dependent on him for support are averred in the petition, the omission to allege whether or not he left a widow will not render the petition bad on demurrer.

Ohio.— Hartzell *v.* Shannon, 8 Ohio Dec. (Reprint) 265, 6 Cinc. L. Bul. 756.

South Carolina.— Nohrden *v.* Northeastern R. Co., 54 S. C. 492, 32 S. E. 524.

Texas.— Houston, etc., R. Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98.

United States.— See Davidow *v.* Pennsylvania R. Co., 85 Fed. 943.

See 15 Cent. Dig. tit. "Death," § 64 *et seq.*

Contra.— McGlone *v.* New Jersey R., etc., Co., 37 N. J. L. 304; Keller *v.* New York Cent. R. Co., 24 How. Pr. (N. Y.) 172.

(c) *Where Action Is For Benefit of Estate.* Under statutes giving the right of action for death by wrongful act for the benefit of the estate of the deceased or of his heirs, without reference to the existence of widow and children or next of kin, an allegation of the existence of such persons is unnecessary.[10]

(v) *Character in Which Plaintiff Sues.* Some of the statutes require the declaration or complaint to contain an allegation as to whether the plaintiff brings the action in a representative capacity or is the real party to the issue.[11]

(vi) *Damages*—(a) *General Rule.* Under statutes providing in terms for the recovery of damages for pecuniary injury, and under statutes where the word "pecuniary" is not used but the construction given is the same, restricting the damages to such injury, the rule is laid down that it is necessary to allege in the declaration or complaint pecuniary loss to the beneficiaries for whom recovery is sought.[12]

10. *Alabama.*— Columbus, etc., R. Co. *v.* Bradford, 86 Ala. 574, 6 So. 90.

California.— O'Callaghan *v.* Bode, 84 Cal. 489, 24 Pac. 269.

Connecticut.— Budd *v.* Meriden Electric R. Co., 69 Conn. 272, 37 Atl. 683.

Idaho.— Palmer *v.* Utah, etc., R. Co., 2 Ida. (Hasb.) 290, 13 Pac. 425.

Kentucky.— East Tennessee Telephone Co. *v.* Simms, 99 Ky. 404, 36 S. W. 171, 38 S. W. 131, 18 Ky. L. Rep. 761.

Virginia.— Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. 394; Matthews *v.* Warner, 29 Gratt. 570, 26 Am. Rep. 396; Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431, 26 Am. Rep. 384.

West Virginia.— Searle *v.* Kanawha, etc., R. Co., 32 W. Va. 270, 9 S. E. 248.

Wisconsin.— Wiltse *v.* Tilden, 77 Wis. 152, 46 N. W. 234. See Topping *v.* St. Lawrence, 88 Wis. 526, 57 N. W. 365.

United States.— Howard *v.* Delaware, etc., Canal Co., 40 Fed. 195, 6 L. R. A. 75; Harper *v.* Norfolk, etc., R. Co., 36 Fed. 102; Roach *v.* Imperial Min. Co., 7 Fed. 698, 7 Sawy. 224, construing the Nevada statute. See also Brennan *v.* Molly Gibson Consol. Min., etc., Co., 44 Fed. 795.

See 15 Cent. Dig. tit. "Death," § 64 *et seq.*

11. Louisville, etc., R. Co. *v.* Trammell, 93 Ala. 350, 9 So. 870; Atchison *v.* Twine, 9 Kan. 350; Hardin County *v.* Coffman, 18 Ohio Cir. Ct. 254, 10 Ohio Cir. Dec. 91. See also Lower *v.* Segal, 60 N. J. L. 99, 36 Atl. 777; Gurney *v.* Grand Trunk R. Co., 59 Hun (N. Y.) 625, 13 N. Y. Suppl. 645.

Where no personal representative has been appointed.— Under a statute giving the right of action to the next of kin where no personal representative has been appointed, it has been held that in order for one of such next of kin to recover it is necessary to allege and prove that no personal representative has been appointed. Atchison Water Co. *v.* Price, (Kan. App. 1900) 59 Pac. 677.

12. *District of Columbia.*— District of Columbia *v.* Wilcox, 4 App. Cas. 90.

Michigan.— Rouse *v.* Detroit Electric R. Co., (1901) 87 N. W. 68; Charlebois *v.* Gogebic, etc., R. Co., 91 Mich. 59, 51 N. W. 812; Hurst *v.* Detroit City R. Co., 84 Mich. 539, 48 N. W. 44.

Nebraska.— Union Pac. R. Co. *v.* Roeser, (1903) 95 N. W. 68; Tucker *v.* Draper, 62 Nebr. 66, 86 N. W. 917, 54 L. R. A. 321 (holding, however, that as against a general demurrer, it is sufficient to allege that "by reason of the death of the intestate and the loss of the service and society and fellowship of the said intestate the plaintiff has been damaged," etc.); Omaha, etc., R. Co. *v.* Crow, 54 Nebr. 747, 74 N. W. 1066, 69 Am. St. Rep. 741 (holding that a petition alleging that deceased left a widow and next of kin, describing them, on whom the law confers the right to be supported by the person killed, sufficiently avers pecuniary loss, and in that respect states a cause of action); Friend *v.* Burleigh, 53 Nebr. 674, 74 N. W. 50; Orgall *v.* Chicago, etc., R. Co., 46 Nebr. 4, 64 N. W. 450. See also Kearney Electric Co. *v.* Laughlin, 45 Nebr. 390, 63 N. W. 941.

Texas.— Winnt *v.* International, etc., R. Co., 74 Tex. 32, 11 S. W. 907, 5 L. R. A. 172. See also San Antonio, etc., R. Co. *v.* Long, 87 Tex. 148, 27 S. W. 113, 47 Am. St. Rep. 87, 24 L. R. A. 637.

Wisconsin.— McKeigue *v.* Janesville, 68 Wis. 50, 31 N. W. 298; George *v.* Chicago, etc., R. Co., 51 Wis. 603, 8 N. W. 374; Regan *v.* Chicago, etc., R. Co., 51 Wis. 599, 8 N. W. 292; Kelley *v.* Chicago, etc., R. Co., 50 Wis. 381, 7 N. W. 291.

United States.— Thompson *v.* Chicago, etc., R. Co., 104 Fed. 845.

See 15 Cent. Dig. tit. "Death," § 64 *et seq.*

Injury to business of decedent.— It has been held in Ohio that in an action for damages for death by wrongful act, in the absence of any special averment, no recovery can be had for any injury to the business of decedent, and recovery can only be had for the general value of the life of the individual, growing out of the situation of those who are dependent on him. McClardy *v.* Chandler, 3 Ohio Dec. (Reprint) 1, 2 Wkly. L. Gaz. 1.

Medical and funeral expenses.—It has been held in Minnesota that in an action for death by wrongful act, in order to recover for the support of deceased and funeral expenses, under the Minnesota statute (Gen. St. (1878) c. 77, § 2, as amended by Laws (1891), c. 123), the amount thereof must be alleged in the complaint. Sykora *v.* J. I. Case Threshing-Mach. Co., 59 Minn. 130, 60 N. W. 1008.

Special damages.— It has been held in

(B) *Application of Rule.* In some jurisdictions the rule is laid down that it is necessary to aver in the declaration or complaint a loss of means of support where, from the relation of the survivors of the deceased to him, the law would not presume that from his death such survivors had been deprived of their means of support.[13] And under some statutes, where the only right of action given a parent for the negligent killing of a minor child is for the loss of services of such child, it has been held that a declaration which fails to allege such loss of services is fatally defective.[14]

(C) *Modification of Rule.* Under statutes giving the damages recovered to the next of kin of the deceased, it has been held that it is not necessary that the declaration or complaint should contain a special allegation showing the manner in which the next of kin had sustained pecuniary loss,[15] the intention of the statute clearly being not to limit the damages to those persons who sustained loss.

(VII) *Negativing Contributory Negligence.* In a majority of jurisdictions an allegation as to the absence of contributory negligence on the part of the

Texas that while, in an action for death of plaintiff's wife, damages for loss of her services generally may be recovered as general damages, yet where her services are not such as are usually performed by a wife, or are of peculiar value to him in his trade or profession, they should be pleaded and proved. Gulf, etc., R. Co. *v.* Younger, (Civ. App. 1897) 40 S. W. 423.

Where both actual and exemplary damages for causing death are sought, the allegation should be in the nature of two distinct counts on different causes of action (Galveston, etc., R. Co. *v.* Le Gierse, 51 Tex. 189); and where a party claims exemplary damages, he must set up, by proper averments in his petition, the facts which if true entitle him to such damages (Campbell *v.* Houston, etc., R. Co., 2 Tex. Unrep. Cas. 473).

13. Loss of support.— Union Pac. R. Co. *v.* Roeser, (Nebr. 1903) 95 N. W. 68 (holding that in an action for wrongful death a petition is not demurrable because it alleges a contract to support the next of kin, made by deceased in his lifetime, without alleging that the estate of deceased was insufficient for that purpose); Chicago, etc., R. Co. *v.* Young, 58 Nebr. 678, 79 N. W. 556; Chicago, etc., R. Co. *v.* Bond, 58 Nebr. 385, 78 N. W. 710; Chicago, etc., R. Co. *v.* Van Buskirk, 58 Nebr. 252, 78 N. W. 514; Friend *v.* Burleigh, 53 Nebr. 674, 74 N. W. 50.

14. Loss of services.— *Georgia.*— Perry *v.* Georgia R., etc., Co., 85 Ga. 193, 11 S. E. 605. But see Augusta R. Co. *v.* Glover, 92 Ga. 132, 18 S. E. 406.

Indiana.—Pennsylvania Co. *v.* Lilly, 73 Ind. 252. See also Elwood Electric St. R. Co. *v.* Ross, 26 Ind. App. 258, 58 N. E. 535.

Missouri.— Hennesey *v.* Bavarian Brewing Co., 63 Mo. App. 111.

New York.— See Lucas *v.* New York Cent. R. Co., 21 Barb. (N. Y.) 245.

Texas.— Austin Rapid Transit R. Co. *v.* Cullen, (Tex. Civ. App. 1895) 29 S. W. 25.

Wisconsin.— Luessen *v.* Oshkosh Electric Light, etc., Co., 109 Wis. 94, 85 N. W. 124.

Contra, Morgan *v.* Southern Pac. Co., 95 Cal. 510, 30 Pac. 603, 29 Am. St. Rep. 143, 17 L. R. A. 71.

15. *Colorado.*— Orman *v.* Mannix, 17 Colo. 564, 30 Pac. 1037, 31 Am. St. Rep. 340, 17 L. R. A. 602.

Indiana.— Chicago, etc., R. Co. *v.* Thomas, 155 Ind. 634, 58 N. E. 1040; Korrady *v.* Lake Shore, etc., R. Co., 131 Ind. 261, 29 N. E. 1069; Louisville, etc., R. Co. *v.* Buck, 116 Ind. 566, 19 N. E. 453, 9 Am. St. Rep. 883, 2 L. R. A. 520; Salem Bedford Stone Co. *v.* Hobbs, 11 Ind. App. 27, 38 N. E. 538.

Kansas.— Erb *v.* Morasch, 8 Kan. App. 61, 54 Pac. 323.

Minnesota.— Johnson *v.* St. Paul, etc., R. Co., 31 Minn. 283, 17 N. W. 622; Barnum *v.* Chicago, etc., R. Co., 30 Minn. 461, 16 N. W. 364.

Missouri.— Ellingson *v.* Chicago, etc., R. Co., 60 Mo. App. 679.

New York.— Pizzi *v.* Reid, 72 N. Y. App. Div. 162, 76 N. Y. Suppl. 306; Hooghkirk *v.* Delaware, etc., Canal Co., 11 Abb. N. Cas. 72; Yertore *v.* Wiswall, 16 How. Pr. 8. See also Kennedy *v.* New York Cent. R. Co., 49 Hun 535, 2 N. Y. Suppl. 512, 15 Civ. Proc. 347.

North Dakota.— See Haug *v.* Great Northern R. Co., 8 N. D. 23, 77 N. W. 97, 73 Am. St. Rep. 727, 42 L. R. A. 664.

Ohio.— Johnston *v.* Cleveland, etc., R. Co., 7 Ohio St. 336, 70 Am. Dec. 75.

Vermont.— Westcott *v.* Central Vermont R. Co., 61 Vt. 438, 17 Atl. 745.

Virginia.— Norfolk, etc., R. Co. *v.* Stevens, 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367.

Washington.— Atrops *v.* Costello, 8 Wash. 149, 35 Pac. 620.

United States.— Peden *v.* American Bridge Co., 120 Fed. 523, 56 C. C. A. 646; Peers *v.* Nevada Power, etc., Co., 119 Fed. 400; Sorensen *v.* Northern Pac. R. Co., 45 Fed. 407; Roach *v.* Imperial Min. Co., 7 Fed. 698, 7 Sawy. 224; Barron *v.* Illinois Cent. R. Co., 2 Fed. Cas. No. 1,052, 1 Biss. 412.

England.—Chapman *v.* Rothwell, E. B. & E. 168, 4 Jur. N. S. 1180, 27 L. J. Q. B. 315, 96 E. C. L. 168.

See 15 Cent. Dig. tit. "Death," § 69.

Expenses resulting from wrongful death.— It has been held in New York that in an action to recover for expenses resulting from

deceased is unnecessary.[16] In several jurisdictions, however, where allegations of absence of contributory negligence are held to be essential in all actions for personal injuries, the absence of such allegations will render the declaration or complaint demurrable.[17]

(VIII) *Statute Creating Right of Action.* The general rule is that it is not necessary, in the declaration, complaint, or petition, to set forth or refer to the statute of the forum under which the action is brought, where facts sufficient are pleaded to bring the case within the statute.[18] Where, however, the action is based upon a foreign statute, the existence of such statute and its similarity to the statute of the forum must be alleged and proved.[19]

(IX) *Compliance With Statute as to Limitation of Action.* The better rule seems to be that it is not necessary for the plaintiff to allege in the declara-

wrongful death, an omission to state that they were necessary and reasonable will not vitiate the complaint on demurrer. Roeder *v.* Ormsby, 22 How. Pr. (N. Y.) 270.

16. *Alabama.*— Columbus, etc., R. Co. *v.* Bradford, 86 Ala. 574, 6 So. 90.

Kentucky.— Lexington, etc., Min. Co. *v.* Stephens, 47 S. W. 321, 20 Ky. L. Rep. 696.

Mississippi.—Hickman *v.* Kansas City, etc., R. Co., 66 Miss. 154, 5 So. 225.

Missouri.— O'Conner *v.* Missouri Pac. R. Co., 94 Mo. 150, 7 S. W. 106, 4 Am. St. Rep. 364; Petty *v.* Hannibal, etc., R. Co., 88 Mo. 306; Lloyd *v.* Hannibal, etc., R. Co., 53 Mo. 509; Thompson *v.* North Missouri R. Co., 51 Mo. 190, 11 Am. Rep. 443.

New York.— Hackford *v.* New York Cent., etc., R. Co., 53 N. Y. 654 [*affirming* 6 Lans. 381]; Melhado *v.* Poughkeepsie Transp. Co., 27 Hun 99.

Virginia.— Baltimore, etc., R. Co. *v.* Whittington, 30 Gratt. 805.

West Virginia.— Unfried *v.* Baltimore, etc., R. Co., 34 W. Va. 260, 12 S. E. 512; Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 14. See also Hawker *v.* Baltimore, etc., R. Co., 15 W. Va. 628, 36 Am. Rep. 825.

United States.— Washington, etc., R. Co. *v.* Gladmon, 15 Wall. 401, 21 L. ed. 114.

See 15 Cent. Dig. tit. "Death," § 62. See also Robinson *v.* Western Pac. R. Co., 48 Cal. 409; Texas, etc., R. Co. *v.* Murphy, 46 Tex. 356, 26 Am. Rep. 272.

17. Kauffman *v.* Cleveland, etc., R. Co., 144 Ind. 456, 43 N. E. 446; Pittsburg, etc., R. Co. *v.* Burton, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594; Indiana, etc., R. Co. *v.* Greene, 106 Ind. 279, 6 N. E. 603, 55 Am. Rep. 736; Cincinnati, etc., R. Co. *v.* Eaton, 53 Ind. 307; Higgins *v.* Jeffersonville, etc., R. Co., 52 Ind. 110; Hildebrand *v.* Toledo, etc., R. Co., 47 Ind. 399; Pennsylvania Co. *v.* Davis, 4 Ind. App. 51, 29 N. E. 425; Patterson *v.* Burlington, etc., R. Co., 38 Iowa 279; State *v.* Baltimore, etc., R. Co., 24 Md. 84, 87 Am. Dec. 600. But where the declaration or complaint contains an allegation that the injury was committed wilfully and purposely, an allegation that the deceased was guilty of no contributory negligence is unnecessary. Cincinnati, etc., R. Co. *v.* Eaton, 53 Ind. 307; Terre Haute, etc., R. Co. *v.* Graham, 46 Ind. 239.

Action by administrator.— It was held in Indiana Mfg. Co. *v.* Millican, 87 Ind. 87, that an administrator, in an action for the death of his intestate, need not aver absence of contributory negligence on his own part. See also Pittsburg, etc., R. Co. *v.* Burton, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594.

Negligence of parent.— It has been held in Indiana that in an action by a father for the death of a minor child, occurring while in his company, it must be alleged that both the deceased and the plaintiff were without fault, and that such allegation in regard to the deceased is insufficient. Sullivan *v.* Toledo, etc., R. Co., 58 Ind. 26. See also Pittsburg, etc., R. Co. *v.* Vining, 27 Ind. 513, 92 Am. Dec. 269, holding, that where a child for whose death the action was brought was very young, it was sufficient to allege in the complaint that the injury occurred without the fault of the parents, without alleging the absence of contributory negligence on the part of the child.

18. White *v.* Maxcy, 64 Mo. 552; Kennayde *v.* Pacific R. Co., 45 Mo. 255; Brown *v.* Harmon, 21 Barb. (N. Y.) 508; Morrisey *v.* Hughes, 65 Vt. 553, 27 Atl. 205; Westcott *v.* Central Vermont R. Co., 61 Vt. 438, 17 Atl. 745. See Senn *v.* Southern R. Co., 135 Mo. 512, 36 S. W. 367. See also Earhart *v.* New Orleans, etc., R. Co., 17 La. Ann. 243.

19. *Alabama.*— Kahl *v.* Memphis, etc., R. Co., 95 Ala. 337, 10 So. 661.

Georgia.— Selma, etc., R. Co. *v.* Lacy, 43 Ga. 461.

Indiana.—Jackson *v.* Pittsburg, etc., R. Co., 140 Ind. 241, 39 N. E. 663, 49 Am. St. Rep. 192.

Iowa.— Hyde *v.* Wabash, etc., R. Co., 61 Iowa 441, 16 N. W. 351, 47 Am. Rep. 820.

New York.—Gurney *v.* Grand Trunk R. Co., 59 Hun 625, 13 N. Y. Suppl. 645 (holding that it is unnecessary to allege that if death had not ensued the intestate could himself have maintained an action under the law of the foreign country where the death occurred); Beach *v.* Bay State Co., 27 Barb. 248; Fagan *v.* Strong, 7 N. Y. Suppl. 919, 17 N. Y. Civ. Proc. 438.

Tennessee.— Hobbs *v.* Memphis, etc., R. Co., 9 Heisk. 873; Nashville, etc., R. Co. *v.* Sprayberry, 9 Heisk. 852; Nashville, etc., R. Co. *v.* Eakin, 6 Coldw. 582.

Vermont.— See Hill *v.* New Haven, 37 Vt. 501, 88 Am. Dec. 613.

tion or complaint that the action was brought within the time prescribed by the statute of limitations.[20]

b. Amendment — (i) *In General.* Where the declaration or complaint states a good cause of action,[21] it is proper for the court to allow an amendment thereto in order that the pleadings may conform to the evidence, or to cure a formal defect;[22] but it is error to permit an amendment which sets up a new cause of action, or, where two causes of action are given, to allow a declaration or complaint, drawn under one statute, to be amended so as to bring it within the provisions of another statute.[23]

(ii) *Bringing in New Parties.* The declaration or complaint may be amended in order to add a new party plaintiff, where such amendment sets up no new matter or claim.[24]

2. Indictment. Under statutes imposing a fine or forfeiture upon a corporation for wrongfully causing death, and authorizing recovery therefor by indictment for the benefit of designated beneficiaries, the indictment should contain an allegation that there are in existence persons answering to such statutory designa-

20. Chiles *v.* Drake, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; Brothers *v.* Rutland R. Co., 71 Vt. 48, 42 Atl. 980, holding that it is sufficient *prima facie* if it appears by the writ that the action was commenced within the period prescribed by the statute, without a specific allegation to that effect. See also Hill *v.* New Haven, 37 Vt. 501, 88 Am. Dec. 613, holding that where the declaration alleged the day upon which the death occurred, which was actually within the statutory limit, this was sufficient, after verdict, although there was no specific allegation that the death occurred within such period. But see *contra*, Hamilton *v.* Hannibal, etc., R. Co., 39 Kan. 56, 18 Pac. 57; Eureka *v.* Merrifield, 9 Kan. App. 579, 58 Pac. 243.

21. **Where pleadings show no cause of action they cannot be amended.** Smith *v.* East, etc., R. Co., 84 Ga. 183, 10 S. E. 602; Bell *v.* Central R. Co., 73 Ga. 520; Selma, etc., R. Co. *v.* Lacey, 49 Ga. 106; Hurst *v.* Detroit City R. Co., 84 Mich. 539, 48 N. W. 44; Lilly *v.* Charlotte, etc., R. Co., 32 S. C. 142, 10 S. E. 932. See also Hulbert *v.* Topeka, 34 Fed. 510.

22. *Arkansas.*—Texarkana Gas, etc., Light Co. *v.* Orr, 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30.

Georgia.— Van Pelt *v.* Chattanooga, etc., R. Co., 89 Ga. 706, 15 S. E. 622; Ellison *v.* Georgia R. Co., 87 Ga. 691, 13 S. E. 809; Harris *v.* Central R. Co., 78 Ga. 525, 3 S. E. 355; Weekes *v.* Cottingham, 58 Ga. 559.

Illinois.— Chicago Terminal Transfer Co. *v.* Helbreg, 99 Ill. App. 563; Haynie *v.* Chicago, etc., R. Co., 9 Ill. App. 105.

Kansas.— Atchison *v.* Twine, 9 Kan. 350.

Kentucky.— Louisville, etc., R. Co. *v.* Pointer, 69 S. W. 1108, 24 Ky. L. Rep. 772; Louisville, etc., R. Co. *v.* Berg, 32 S. W. 616, 17 Ky. L. Rep. 1105.

Massachusetts.— Daley *v.* Boston, etc., R. Co., 147 Mass. 101, 16 N. E. 690.

Missouri.— Weber *v.* Hannibal, 83 Mo. 262.

Nebraska.— Chicago, etc., R. Co. *v.* Young, (1903) 93 N. W. 922.

South Carolina.— Reed *v.* Northeastern R. Co., 37 S. C. 42, 16 S. E. 289.

Texas.— See International, etc., R. Co. *v.* Boykin, (Civ. App. 1903) 74 S. W. 93.

See 15 Cent. Dig. tit. "Death," § 60 *et seq.*

23. Hackett *v.* Louisville, etc., R. Co., 95 Ky. 236, 24 S. W. 871, 15 Ky. L. Rep. 612; Sawyer *v.* Perry, 88 Me. 42, 33 Atl. 660; Hurst *v.* Detroit City R. Co., 84 Mich. 539, 48 N. W. 44; Lilly *v.* Charlotte, etc., R. Co., 32 S. C. 142, 10 S. E. 932; All *v.* Barnwell County, 29 S. C. 161, 7 S. E. 58.

24. *Georgia.*— Van Pelt *v.* Chattanooga, etc., R. Co., 89 Ga. 706, 15 S. E. 622.

Kansas.— Atchison *v.* Twine, 9 Kan. 350.

Missouri.— Buel *v.* St. Louis Transfer Co., 45 Mo. 562, where plaintiff was allowed to amend his complaint so as to make a party who was originally a defendant a party co-plaintiff. See also Weber *v.* Hannibal, 83 Mo. 262.

Pennsylvania.— Patton *v.* Pittsburgh, etc., R. Co., 96 Pa. St. 169.

Tennessee.— See Flatley *v.* Memphis, etc., R. Co., 9 Heisk. 230.

Texas.— East Line, etc., R. Co. *v.* Culberson, 72 Tex. 375, 10 S. W. 706, 13 Am. St. Rep. 805, 3 L. R. A. 567; International, etc., R. Co. *v.* Boykin, (Civ. App. 1903) 74 S. W. 93.

Utah.— Pugmire *v.* Diamond Coal, etc., Co., 26 Utah 115, 72 Pac. 385.

See 15 Cent. Dig. tit. "Death," § 60 *et seq.*

Action barred by statute of limitations.— Where an action has been improperly commenced by a father, as such, to recover for the wrongful death of his son, and a demurrer has been filed, an amendment substituting the personal representative of the deceased as plaintiff will not be allowed, where the statutory period in which the new action by the representative could be brought has expired. Fitzhenry *v.* Consolidated Traction Co., 63 N. J. L. 142, 42 Atl. 416.

Nominal interest in cause of action.— It has been held in Texas that where an attorney performs services for a widow in the prosecution of an action for the wrongful death of her husband, the claim of such attorney for compensation is not such an interest in the cause of action as would en-

tion.[25] Likewise the indictment should allege the negligence of defendant for which the fine or forfeiture is imposed by the statute,[26] and where the statute imposes a fine or penalty for gross negligence, it is insufficient to allege facts which would merely indicate ordinary negligence on the part of defendant or his agents.[27] It is not necessary, however, for the indictment to allege that the deceased was in the exercise of ordinary care, where it sets out the particular acts of negligence causing the death.[28]

3. Bill of Particulars. In some jurisdictions, by statutory provision, a bill of particulars must be furnished when demanded by defendant.[29]

4. Plea or Answer.[30] Pleading the general issue puts in issue the fact of there being a widow or next of kin surviving, as well as the commission of the act complained of.[31] Where the complaint is in the name of the plaintiff as administrator, defendant, by pleading the general issue, admits the capacity in which the plaintiff sues.[32] The question of the due commencement of an action, under a statute giving the right of action for death by wrongful act, is properly raised by a plea in bar.[33] By demurring and omitting to deny the facts defendant admits the existence of sufficient negligence to give a right to recover under the statute.[34]

title him to intervene in a suit by amendment of the petition. Southern Pac. Co. *v.* Winton, 27 Tex. Civ. App. 503, 66 S. W. 477.

25. State *v.* Canada Grand Trunk R. Co., 60 Me. 145 (holding that an allegation in the indictment to the effect that the names of the beneficiaries of the deceased are to the jurors unknown is insufficient); Com. *v.* Eastern R. Co., 5 Gray (Mass.) 473 (holding that an averment that defendant is liable to the fine "to the use of J. S., who has been duly appointed administrator of said deceased, and the heirs at law of said deceased" is insufficient); Com. *v.* Boston, etc., R. Corp., 11 Cush. (Mass.) 512 (holding that where the indictment alleges that there are heirs at law of the deceased living, and further adds that the names of such heirs at law are unknown to the jurors, the allegation is sufficient); State *v.* Gilmore, 24 N. H. 461. See also Com. *v.* East Boston Ferry Co., 13 Allen (Mass.) 589; Com. *v.* Sanford, 12 Gray (Mass.) 174, holding that the indictment must allege that the administration was taken out in the commonwealth.

26. Com. *v.* Fitchburg R. Co., 120 Mass. 372; State *v.* Manchester, etc., R. Co., 52 N. H. 528. See also State *v.* Bangor, 30 Me. 341; Com. *v.* Boston, etc., R. Corp., 11 Cush. (Mass.) 512.

27. Com. *v.* Boston, etc., R. Co., 133 Mass. 383 (where the statute imposed a penalty on a railroad company, if by reason of its negligence or the unfitness or gross negligence of its servants the life of any person on a highway was lost, and it was held that the indictment was insufficient where it merely showed negligence on the part of those operating a train in failing to give proper signals and in failing to reduce its speed while approaching an intersecting highway); Com. *v.* Fitchburg R. Co., 120 Mass. 372.

28. Com. *v.* Fitchburg R. Co., 10 Allen (Mass.) 189; State *v.* Manchester, etc., R. Co., 52 N. H. 528.

29. Rosney *v.* Erie R. Co., 124 Fed. 90.

In the absence of such statutory provision, however, a bill of particulars cannot be required. Murphy *v.* Kipp, 1 Duer (N. Y.) 659. And see, generally, Pleading.

30. For form of answer see Madison, etc., R. Co. *v.* Bacon, 6 Ind. 205.

31. Conant *v.* Griffin, 48 Ill. 410.

32. Louisville, etc., R. Co. *v.* Trammell, 93 Ala. 350, 9 So. 870; Hughes *v.* Richter, 161 Ill. 409, 43 N. E. 1066 [*affirming* 60 Ill. App. 616]; Chicago, etc., R. Co. *v.* Smith, 77 Ill. App. 492; Burlington, etc., R. Co. *v.* Crockett, 17 Nebr. 570, 24 N. W. 219 (holding that where an administratrix had authority, when the action was commenced, to bring such action, a subsequent revocation of the authority must be specially pleaded, and is not put in issue by a denial of her authority "to sue and recover in and maintain this action").

The fact of the appointment of an administrator may be challenged by defendant in a plea *ne unques* administrator. Denver, etc., R. Co. *v.* Woodward, 4 Colo. 1.

Unverified denial.— It was held in Kansas, in an action by a widow to recover for the death of her husband, who was a resident of the state, that an allegation that no personal representative of the estate had been appointed was put in issue by the unverified denial, and without proof of such fact a demurrer to the evidence was rightfully sustained; the court holding that such right to sue not being "an appointment" or "an authority" within Kan. Code Civ. Proc. § 108, providing that an allegation of any appointment or authority, duly verified, shall be taken as true, unless the denial of the same be verified by the affidavit of the adverse party. Vaughn *v.* Kansas City Northwestern R. Co., 65 Kan. 685, 70 Pac. 602.

33. County *v.* Pacific Coast Borax Co., 67 N. J. L. 48, 50 Atl. 906.

34. Hence in an action for death by wrongful act, where, after a demurrer has been interposed and overruled, the court on a hearing on the merits finds as a fact that defendants are not guilty of negligence, plaintiff is nevertheless entitled to recover the minimum

5. Issues, Proof, and Variance. The rule is elementary that whatever it is indispensable to allege in order to entitle a party to recover must be proved upon the trial unless admitted by defendant, and it must be proved substantially as alleged.[35] Any material variance between the declaration or complaint and the proof will be fatal to the action;[36] but where the variance between the allegations and the proof is immaterial it will be disregarded.[37] An issue should not be submitted to the jury unless there is some evidence to support it.[38]

E. Evidence[39] — 1. Presumptions and Burden of Proof — a. Presumptions — (I) *As to Family Relationship.* In an action by a parent for the death of a child by wrongful act, where the child is under age the law presumes the family relation to exist, and that stands for proof until the contrary appears; but where the deceased child is over age, the family relation must be shown to exist in point of fact, and is to be proved by evidence like any other fact.[40]

(II) *As to Pecuniary Loss.* The general rule is that where the relation of husband and wife or parent and child exists, provided the child is shown to be a minor, the law presumes a pecuniary loss to the survivor from the fact of death, and it is not necessary to submit proof as to such loss.[41] However, under some statutes there must be some proof of pecuniary loss to the beneficiary conforming to such allegation in the declaration or complaint, in order to justify recovery of even nominal damages.[42]

sum fixed by the statute. Lamphear *v.* Buckingham, 33 Conn. 237.

35. Weekes *v.* Cottingham, 58 Ga. 559; Quincy Coal Co. *v.* Hood, 77 Ill. 68.

Under a general allegation of negligence plaintiff may prove any particular act or omission on the part of defendant tending to establish such negligence. St. Louis, etc., R. Co. *v.* Taylor, 5 Tex. Civ. App. 668, 24 S. W. 975.

Where definite acts of negligence have been alleged in the declaration or complaint, the proof must be confined to the acts alleged or to other acts or omissions closely connected therewith. Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145; Flanagan *v.* Wilmington, 4 Houst. (Del.) 548 (holding that proof merely of non-feasance, under a declaration containing but one count, and this for misfeasance, was ground for nonsuit); Georgia R., etc., Co. *v.* Oaks, 52 Ga. 410; Long *v.* Doxey, 50 Ind. 385.

36. Flanagan *v.* Wilmington, 4 Houst. (Del.) 548; Quincy Coal Co. *v.* Hood, 77 Ill. 68; Com. *v.* Fitchburg R. Co., 126 Mass. 472.

37. O'Callaghan *v.* Bode, 84 Cal. 489, 24 Pac. 269 (where a variance between the allegation of the petition and the proof as to the sex of the minor children, brothers and sisters of the deceased, was held to be immaterial); Gay *v.* Winter, 34 Cal. 153 (where the allegation of the complaint was that defendants owned as tenants in common the entire block in front of which the accident occurred, and the proof showed that they owned such property in distinct parcels in severalty); Litchfield Coal Co. *v.* Taylor, 81 Ill. 590. See also Claxton *v.* Lexington, etc., R. Co., 13 Bush (Ky.) 636, holding that an allegation of wilful negligence, in the complaint for the negligent killing, includes all inferior degrees of negligence, and although plaintiff fails to establish a case warranting exemplary damages under the statute, yet if he proves culpable negligence he is entitled to compensatory damages.

38. Ellerbe *v.* Carolina Cent. R. Co., 118 N. C. 1024, 24 S. E. 808, holding that in an action for damages for death by wrongful act, where negligence is alleged and contributory negligence is pleaded as a defense, issues as to neglect, contributory negligence, and amount of damages are sufficient.

39. Evidence generally see Evidence.

40. Pennsylvania R. Co. *v.* Adams, 55 Pa. St. 499; Deni *v.* Pennsylvania R. Co., 6 Pa. Dist. 15, 19 Pa. Co. Ct. 7. See also West Chicago St. R. Co. *v.* Whittaker, 72 Ill. App. 48, holding that where the declaration alleged that the deceased was eight years of age at the time of his death, and no proof of his age was made on the trial, but some of the witnesses referred to him as "a little boy," and others as "a child," exact proof of the age of deceased was not essential to a recovery.

41. *Illinois.*— Chicago *v.* Hesing, 83 Ill. 204, 25 Am. Rep. 378; Rockford, etc., R. Co. *v.* Delaney, 82 Ill. 198, 25 Am. Rep. 308; Chicago *v.* Scholten, 75 Ill. 468; McKechney *v.* Redmond, 94 Ill. App. 470; Joliet *v.* Weston, 22 Ill. App. 225.

New York.— Kelly *v.* Twenty-third St. R. Co., 14 Daly 418, 14 N. Y. St. 699.

Ohio.— Dunhene *v.* Ohio L. Ins., etc., Co., 1 Disn. 257, 12 Ohio Dec. (Reprint) 608.

Pennsylvania.— Delaware, etc., R. Co. *v.* Jones, 128 Pa. St. 308, 18 Atl. 330.

South Carolina.— Mason *v.* Southern R. Co., 58 S. C. 70, 36 S. E. 440, 79 Am. St. Rep. 826, 53 L. R. A. 913.

Washington.— Atrops *v.* Costello, 8 Wash. 149, 35 Pac. 620.

See 15 Cent. Dig. tit. "Death," § 75.

42. Hurst *v.* Detroit City R. Co., 84 Mich. 539, 48 N. W. 44; Van Brunt *v.* Cincinnati R. Co., 78 Mich. 530, 44 N. W. 321; Cooper *v.* Lake Shore, etc., R. Co., 66 Mich. 261, 33

b. Burden of Proof — (I) *Of Defendant's Negligence.* The burden is upon the plaintiff in the first instance to prove that decedent's death was caused by the wrongful act or omission of defendant or his agents or servants.[43] Likewise where the contributory neglect of deceased is established the burden of proof is upon plaintiff to show that the injury could have been avoided by ordinary care on the part of defendant, and that it was due to the wilful or reckless neglect of defendant.[44]

(II) *Of Decedent's Contributory Negligence.* Where plaintiff by proper proof makes out a *prima facie* case of negligence, and does not disclose contributory negligence on the part of the deceased, the better rule seems to be that it is a presumption of law that the deceased, killed by the negligence of defendant, exercised due care, and was not guilty of contributory negligence, and the burden is upon defendant to show such negligence on the part of the deceased.[45] In some jurisdictions, however, the rule is that the burden of proof is upon plaintiff to show that deceased was using ordinary care when he was killed by the alleged negligence of defendant.[46]

N. W. 306, 11 Am. St. Rep. 482; International, etc., R. Co. *v.* Knight, (Tex. Civ. App. 1899) 52 S. W. 640.

Adult children.— It has been held in Texas that adult children cannot recover damages for their father's wrongful death, unless actual damages are shown to have resulted therefrom, and such damages will not be presumed. International, etc., R. Co. *v.* De Bajligethy, 9 Tex. Civ. App. 108, 28 S. W. 829.

Where no legal obligation rested on deceased to contribute to the support of plaintiff, it has been held in Illinois that damages must be affirmatively proved in an action for death and will not be presumed. Armour *v.* Czischaki, 59 Ill. App. 17.

43. *Arkansas.*— St. Louis, etc., R. Co. *v.* Townsend, 69 Ark. 380, 63 S. W. 994.

Illinois.— Chase *v.* Nelson, 39 Ill. App. 53.

Maine.— State *v.* Maine Cent. R. Co., 77 Me. 538, 1 Atl. 673.

Maryland.— Tucker *v.* State, 89 Md. 471, 43 Atl. 778, 44 Atl. 1004, 46 L. R. A. 181.

Missouri.— Nichols *v.* Winfrey, 79 Mo. 544 (holding that the burden of proving the killing wrongful is on plaintiff, and specially pleading self-defense does not shift the burden); Schultz *v.* Pacific R. Co., 36 Mo. 13.

Ohio.— Schausten *v.* Toledo Consol. St. R. Co., 18 Ohio Cir. Ct. 691.

Pennsylvania.—Pennsylvania Telephone Co. *v.* Varnau, (1888) 15 Atl. 624.

Texas.— San Antonio, etc., R. Co. *v.* Bennett, 76 Tex. 151, 13 S. W. 319; International, etc., R. Co. *v.* Knight, (Civ. App. 1899) 52 S. W. 640.

See 15 Cent. Dig. tit. "Death," § 78.

44. Lee *v.* De Bardeleben Coal, etc., Co., 102 Ala. 628, 15 So. 270; St. Louis, etc., R. Co. *v.* Townsend, 69 Ark. 380, 63 S. W. 994; St. Louis, etc., R. Co. *v.* Jordan, 65 Ark. 429, 47 S. W. 115; St. Louis, etc., R. Co. *v.* Freeman, 36 Ark. 41; Texas, etc., R. Co. *v.* Hare, 4 Tex. Civ. App. 18, 23 S. W. 42.

45. *California.*— Schneider *v.* Market St. R. Co., 134 Cal. 482, 66 Pac. 734, holding that in an action for death by wrongful act, contributory negligence is a matter of defense to be proved affirmatively by defendant. See also Brooks *v.* Haslam, 65 Cal. 421, 4 Pac. 399.

Iowa.— Dalton *v.* Chicago, etc., R. Co., 104 Iowa 26, 73 N. W. 349.

Kentucky.— Judd *v.* Chesapeake, etc., R. Co., (1897) 38 S. W. 880.

Maryland.— Tucker *v.* State, 89 Md. 471, 43 Atl. 778, 44 Atl. 1004, 46 L. R. A. 181. But see State *v.* Baltimore, etc., R. Co., 24 Md. 84, 87 Am. Dec. 600.

Massachusetts.— McKimble *v.* Boston, etc., R. Co., 141 Mass. 463, 5 N. E. 804; McKimble *v.* Boston, etc., R. Co., 139 Mass. 542, 2 N. E. 97; Merrill *v.* Eastern R. Co., 139 Mass. 252, 29 N. E. 666. See Massachusetts cases cited *infra*, note 46.

Minnesota.— Deisen *v.* Chicago, etc., R. Co., 43 Minn. 454, 45 N. W. 864.

North Carolina.— Cogdell *v.* Wilmington, etc., R. Co., 132 N. C. 852, 44 S. E. 618 [*reversing* 130 N. C. 313, 41 S. E. 541].

Texas.— Gulf, etc., R. Co. *v.* Finley, 11 Tex. Civ. App. 64, 32 S. W. 51.

See 15 Cent. Dig. tit. "Death," § 78; and, generally, Negligence.

46. *Connecticut.*—Ryan *v.* Bristol, 63 Conn. 26, 27 Atl. 309.

Illinois.— Illinois Cent. R. Co. *v.* Cozby, 174 Ill. 109, 50 N. E. 1011 [*affirming* 69 Ill. App. 256]; Illinois Cent. R. Co. *v.* Nowicki, 148 Ill. 29, 35 N. E. 358; Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 226; Chicago North Shore R. Co. *v.* Green, 93 Ill. App. 105; Chicago, etc., R. Co. *v.* Gunderson, 74 Ill. App. 356. See, however, Chicago, etc., R. Co. *v.* Huston, 196 Ill. 480, 63 N. E. 1028 [*affirming* 95 Ill. App. 350] (holding that it is not incumbent on an administrator suing for the death of his intestate to establish ordinary care on the part of such intestate by direct and positive testimony; that such care may be inferred from all the circumstances shown to exist immediately prior to and at the time of the inquiry, and in determining the question the jury may properly take into consideration the instinct prompting to the preservation of life and the avoidance of danger); Chicago, etc., R. Co. *v.* Keely, 103 Ill. App. 205 (holding that where there were no eyewitnesses to the accident, the fact that de-

2. ADMISSIBILITY — a. In General. Where the object of a statute is to give only such pecuniary damages as the designated beneficiaries have suffered by the loss of the person killed, it is usual to permit the evidence to take a wide range[47] in order to give the jury the fullest insight into the circumstances of such beneficiaries to determine to what extent they are injured by the loss.

b. Cause of Death. The general rule is that the question as to the cause of death is one of evidence, which is admissible under the general issue in an action for death by wrongful act.[48] The result of a *post-mortem* examination of deceased is competent evidence to prove the cause of such death,[49] although it

ceased exercises ordinary care for his own safety at the time of the injury may be shown by circumstantial evidence, or proof of facts and circumstances from which that fact may be reasonably inferred, including the natural instinct of self-preservation); Illinois Cent. R. Co. *v.* Cozby, 69 Ill. App. 256.

Maine.— State *v.* Maine Cent. R. Co., 77 Me. 538, 1 Atl. 673.

Massachusetts.— Walsh *v.* Boston, etc., R. Co., 171 Mass. 52, 50 N. E. 453; Corcoran *v.* Boston, etc., R. Co., 133 Mass. 507, decided under a Massachusetts statute known as Employers' Liability Act, under which there could be no recovery where the employee was guilty of contributory negligence or death was instantaneous. See Massachusetts cases cited *supra*, note 45.

New York.— Wiwirowski *v.* Lake Shore, etc., R. Co., 124 N. Y. 420, 26 N. E. 1023; Tolman *v.* Syracuse, etc., R. Co., 98 N. Y. 198, 50 Am. Rep. 649; Cordell *v.* New York Cent., etc., R. Co., 75 N. Y. 330; Fejdowski *v.* Delaware, etc., Canal Co., 12 N. Y. App. Div. 589, 43 N. Y. Suppl. 84, holding, however, that freedom of deceedent from contributory negligence may be shown by constitutional evidence. See also Kane *v.* Whitaker, 33 N. Y. App. Div. 416, 54 N. Y. Suppl. 85, holding that plaintiff should produce evidence from which the inference of freedom from contributory negligence can be drawn. And *compare* Boyle *v.* Degnon-McLean Constr. Co., 47 N. Y. App. Div. 311, 61 N. Y. Suppl. 1043.

Pennsylvania.— Pennsylvania Telephone Co. *v.* Barnau, (1888) 15 Atl. 624.

Wisconsin.— Sorenson *v.* Menasha Paper, etc., Co., 56 Wis. 338, 14 N. W. 446.

See 15 Cent. Dig. tit. "Death," § 78.

Proceedings by indictment.— Under statutes providing for proceedings by indictment for death by wrongful act, the rule is laid down that the party prosecuting must show due care on the part of the deceased at the time of the accident; or in other words, that the want of due care did not contribute to produce the injury complained of. State *v.* Maine Cent. R. Co., 76 Me. 357, 49 Am. Rep. 622.

47. Staal *v.* Grand Rapids, etc., R. Co., 57 Mich. 239, 23 N. W. 795; Opsahl *v.* Judd, 30 Minn. 126, 14 N. W. 575; Chilton *v.* Union Pac. R. Co., 8 Utah 47, 29 Pac. 963; Pool *v.* Southern Pac. Co., 7 Utah 303, 26 Pac. 654. And see McKeigue *v.* Janesville, 68 Wis. 50, 31 N. W. 298, holding that evidence that some of the younger children of plaintiff's intestate were in poor health was competent as tending to show that her death was a pecuniary loss to them especially; also evidence tending to show that the children had no means of support of their own was admissible.

Children of deceased.— It has been held in Utah that it is proper to admit testimony as to the names and ages of the children of the deceased. English *v.* Southern Pac. Co., 13 Utah 407, 45 Pac. 47, 57 Am. St. Rep. 772, 35 L. R. A. 155.

Evidence of father's physical disability to labor is admissible in behalf of the mother to show her partial dependence on a minor son, for whose homicide the action was brought. Augusta R. Co. *v.* Glover, 92 Ga. 132, 18 S. E. 406.

48. Wetherell *v.* Chicago City R. Co., 104 Ill. App. 357; Valley R. Co. *v.* Roos, 9 Ohio Cir. Ct. 201.

General habits of deceased.— In establishing the cause of death, the rule has been laid down that evidence of the general habits of the deceased, with reference to his being careful or careless, is admissible only where no witness saw the deceased when he was killed, and as a matter of necessity in the absence of better proof. Toledo, etc., R. Co. *v.* Bailey, 145 Ill. 159, 33 N. E. 1089; Chicago, etc., R. Co. *v.* Clark, 108 Ill. 113; Chicago, etc., R. Co. *v.* Gunderson, 65 Ill. App. 638; Gardner *v.* Chicago, etc., R. Co., 17 Ill. App. 262.

49. McClellan *v.* Ft. Wayne, etc., R. Co., 105 Mich. 101, 62 N. W. 1025; Erickson *v.* Smith, 2 Abb. Dec. (N. Y.) 64, 38 How. Pr. (N. Y.) 454 (holding that a medical witness who had examined the body and testified that death was caused by drowning might properly testify as to the indications where the person had been suffocated first and afterward had fallen into the water, even where there had been no evidence introduced tending to show that such was the fact); Looram *v.* Third Ave. R. Co., 57 N. Y. Super. Ct. 165, 6 N. Y. Suppl. 504 (holding that where the physician testified that the immediate cause of death was peritonitis, the question as to what had caused the peritonitis was proper, and not objectionable as being too general, and not placing cause of death with sufficient certainty); Stahler *v.* Philadelphia, etc., R. Co., 16 Montg. Co. Rep. 198.

Expert testimony.— It has been held in South Carolina that it is not error to permit a physician to give his opinion, founded on the testimony of others, that deceased was dead before the accident occurred. State *v.*

has been held that the verdict of a coroner's jury which investigated such death was inadmissible to show the cause of death.[50]

c. Condition of Body. There being no controversy as to the fact or manner of death, it has been held that evidence as to the condition of the body of the deceased, when found after the accident, is inadmissible;[51] but where defendant has by general denial put in issue every fact, it is not error to admit evidence as to the appearance and condition of the body of the deceased tending to throw light upon the cause of the accident.[52]

d. Declarations of Deceased — (i) *General Rule.* By the great weight of authority the declarations of a person fatally injured by acts or omissions of another, as to the facts or circumstances attending the injury, are not admissible in evidence against defendant in a civil suit brought to recover damages for death by wrongful act.[53] However, such declarations have been held to be admissible

Clark, 15 S. C. 403. See also Ft. Worth, etc., R. Co. *v.* Hyatt, 12 Tex. Civ. App. 435, 34 S. W. 677, holding that the testimony of a mother that the child's death was caused by a cold contracted by exposure to cold in defendant's railway coach was competent as tending to establish the cause of such death, where it was shown that such witness was forty-six years old and the mother of eleven children.

50. Memphis, etc., R. Co. *v.* Womack, 84 Ala. 149, 4 So. 618; Central R. Co. *v.* Moore, 61 Ga. 151. See also Croft *v.* Smith, (Tex. Civ. App. 1899) 51 S. W. 1089, holding that evidence in regard to any action which may have been taken before the grand jury in connection with criminal proceedings is inadmissible.

Testimony of deceased witness given upon a coroner's inquest, held upon body of plaintiff's intestate, is inadmissible in an action to recover damages for his death, the inquest being in no sense an action or judicial proceeding between the parties. Cook *v.* New York Cent. R. Co., 5 Lans. (N. Y.) 401.

The record of conviction of murder has been held to be admissible as evidence of the fact that the person convicted was implicated in a certain murder. Harris *v.* More, (Cal. 1884) 5 Pac. 159.

51. Buckalew *v.* Tennessee Coal, etc., Co., 112 Ala. 146, 20 So. 606.

52. Gulf, etc., R. Co. *v.* Johnson, 10 Tex. Civ. App. 254, 31 S. W. 255; St. Louis, etc., R. Co. *v.* Hicks, 79 Fed. 262, 24 C. C. A. 563, holding that evidence as to the nature of the injuries of the deceased was admissible where the court specifically charges the jury that nothing can be allowed for the pain and suffering of deceased, nor for the grief or distress of any one. See also Leahy *v.* Southern Pac. R. Co., 65 Cal. 150, 3 Pac. 622; Houston City St. R. Co. *v.* Sciacca, 80 Tex. 350, 16 S. W. 31.

53. *Connecticut.*— Daily *v.* New York, etc., R. Co., 32 Conn. 356, 87 Am. Dec. 176.

Georgia.— Fink *v.* Ash, 99 Ga. 106, 24 S. E. 976; Poole *v.* East Tennessee, etc., R. Co., 92 Ga. 337, 17 S. E. 267; East Tennessee, etc., R. Co. *v.* Maloy, 77 Ga. 237, 2 S. E. 941.

Illinois.— Chicago West Div. R. Co. *v.* Becker, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144 [*reversing* 30 Ill. App. 200]; Marshall *v.* Chicago, etc., R. Co., 48 Ill. 475, 95 Am. Dec. 561; Chicago, etc., R. Co. *v.* Howard, 6 Ill. App. 569.

Indiana.— Ohio, etc., R. Co. *v.* Hammersley, 28 Ind. 371; Louisville, etc., R. Co. *v.* Berry, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646, 2 Ind. App. 427, 28 N. E. 714.

Iowa.— Armil *v.* Chicago, etc., R. Co., 70 Iowa 130, 30 N. W. 42.

New York.— Waldele *v.* New York Cent., etc., R. Co., 95 N. Y. 274, 47 Am. Rep. 41 [*reversing* 29 Hun 35].

Ohio.— Cosgrove *v.* Schafer, 9 Ohio Dec. (Reprint) 550, 15 Cinc. L. Bul. 8; Atkinson *v.* Bond Hill, 2 Ohio S. & C. Pl. Dec. 48, 1 Ohio N. P. 166.

Oregon.— Johnston *v.* Oregon, etc., R. Co., 23 Oreg. 94, 31 Pac. 283.

Pennsylvania.— Friedman *v.* Railroad Co., 7 Phila. 203. *Contra,* Hughes *v.* Delaware, etc., Canal Co., 176 Pa. St. 254, 35 Atl. 190.

Tennessee.— Lousiville, etc., R. Co. *v.* Stacker, 86 Tenn. 343, 6 S. W. 737, 6 Am. St. Rep. 840.

Wisconsin.— Fitzgerald *v.* Weston, 52 Wis. 354, 9 N. W. 13.

See 15 Cent. Dig. tit. "Death," § 81.

Declaration as to character of sufferings.— It was held in Gray *v.* McLaughlin, 26 Iowa 279, that in an action for damages for injuries received by plaintiff's intestate, her declarations as to the nature and character of her sufferings, made while in that condition, were admissible. See also McKeigue *v.* Janesville, 68 Wis. 50, 31 N. W. 298, holding that on the question of damages testimony as to expressions of pain uttered by deceased at the time she claimed to be injured and from that time to her death, and indicating the place where such pains were located, was admissible. See, however, Lange *v.* Schoettler, 115 Cal. 388, 47 Pac. 139, holding that declarations of deceased as to his sufferings are admissible to show the extent of his injuries.

Declaration not affecting cause of death.— It was held in Disbrow *v.* Ulster Tp., (Pa. 1887) 8 Atl. 912, that in order to prove the value of decedent's life to his family, defendant might introduce in evidence declarations of deceased that he was tired of life, that his life had been a failure, and that his family was a failure.

in certain cases in actions of this character on the ground that they constituted a part of the *res gestæ*.[54]

(II) *Against Interest.* The rule seems to be well settled that self-disserving declarations of the deceased, made after the injury,[55] are admissible on behalf of defendant to show that the injury was not the cause of death,[56] or that the injury was caused by contributory negligence on the part of the deceased,[57] the reason being that the beneficiary is to be considered in privity with the deceased, in so far as his right to complain of the death is concerned.

e. Whether Death Was Instantaneous. It is within the discretion of the court to allow a medical expert to testify as to whether in his opinion deceased had a period of conscious suffering before death.[58]

f. Life Expectancy — (I) *In General.* Since the reasonable probability of the continuance of the life of the deceased is a factor in estimating the damages sustained by his death, evidence is admissible tending to show the probable duration of decedent's life, without being specially pleaded.[59] Likewise evidence is

54. *Georgia.*— Augusta Factory *v.* Barnes, 72 Ga. 217, 53 Am. Rep. 838.

Indiana.— Louisville, etc., R. Co. *v.* Buck, 116 Ind. 566, 19 N. E. 453, 9 Am. St. Rep. 883, 2 L. R. A. 520.

Iowa.— Fish *v.* Illinois Cent. R. Co., 96 Iowa 702, 65 N. W. 995.

Missouri.— Entwhistle *v.* Feighner, 60 Mo. 214.

Pennsylvania.— Stein *v.* Railway Co., 10 Phila. 440.

Texas.— Texas, etc., R. Co. *v.* Hall, 83 Tex. 675, 19 S. W. 121; Galveston *v.* Barbour, 62 Tex. 172, 50 Am. Rep. 519.

See 15 Cent. Dig. tit. "Death," § 81. See also Memphis, etc., R. Co. *v.* Martin, 117 Ala. 367, 23 So. 231, where evidence was admitted of an alleged statute made by the deceased after her injury, and it was held to be competent to show in rebuttal that deceased never recovered consciousness.

55. **Made before injury.**— Where the death of plaintiff's intestate was caused by a displaced switch, and it appeared that a few days before the accident defendant had inserted the switch in lieu of a patent switch, it was held proper on the question of negligence to admit against plaintiff declarations of his intestate, made before such removal, to the effect that the patent switch was unsafe, and that he wanted it taken out and one inserted similar to the one which caused the injury. Piper *v.* New York Cent., etc., R. Co., 1 Thomps. & C. (N. Y.) 290.

56. Bond Hill *v.* Atkinson, 16 Ohio Cir. Ct. 470, 9 Ohio Cir. Dec. 185.

Declarations of defendant.— In an action for wrongful death, caused by defendant driving over a boy riding a bicycle, defendant's declarations on being arrested therefor, in which he swore at the bicycle, and said it was no good, were admissible as tending to show his hostility to bicycles, and as increasing the possibility that he was indifferent to the rider's rights. Quinn *v.* Pietro, 38 N. Y. App. Div. 484, 56 N. Y. Suppl. 419.

57. Georgia R., etc., Co. *v.* Fitzgerald, 108 Ga. 507, 34 S. E. 316, 49 L. R. A. 175; Camden, etc., R. Co. *v.* Williams, 61 N. J. L. 646, 40 Atl. 634 (holding, however, that such declarations are not conclusive against the plaintiff); Helman *v.* Pittsburg, etc., R. Co., 58 Ohio St. 400, 50 N. E. 986, 41 L. R. A. 860; Hughes *v.* Delaware, etc., Canal Co., 176 Pa. St. 254, 35 Atl. 190; Stein *v.* Railway Co., 10 Phila. (Pa.) 440, holding that in an action for the death of his son the father claims in privity with his son, and the declaration of the son immediately after the happening of the accident that he had jumped from the car was admissible, first, as an admission against interest, and second, as a part of the *res gestæ*. See also Hollingsworth *v.* Warnock, 65 S. W. 163, 23 Ky. L. Rep. 1395.

The declarations of a minor child are not admissible against the father in a suit by the latter to recover for the loss of services of the child resulting from an injury causing his death. Louisville, etc., R. Co. *v.* Berry, 2 Ind. App. 427, 28 N. E. 714, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646. Nor are they admissible in an action by a parent for the death of a child where the injury causing death was received by the minor while employed by defendant without the consent and against the will of the parent. Pennsylvania Co. *v.* Long, 94 Ind. 250.

58. Finnegan *v.* Fall River Glass Works Co., 159 Mass. 311, 34 N. E. 523.

59. *Alabama.*— Columbus, etc., R. Co. *v.* Bridges, 86 Ala. 448, 5 So. 864, 11 Am. St. Rep. 58.

Delaware.— Wilcox *v.* Wilmington City R. Co., 2 Pennew. 157, 44 Atl. 686.

Georgia.— Chattanooga, etc., R. Co. *v.* Clowdis, 90 Ga. 258, 17 S. E. 88 (holding that it is not error to permit witness to testify in regard to the longevity of decedent's father and mother); Savannah, etc., R. Co. *v.* Stewart, 71 Ga. 427.

Iowa.— Wheelan *v.* Chicago, etc., R. Co., 85 Iowa 167, 52 N. W. 119, holding, however, that where the deceased was a minor at the time of the accident, evidence of his expectancy of life should have been based upon his age at the time of his decease, and not at the assumed age of twenty-one.

Kansas.— Coffeyville Min., etc., Co. *v.* Carter, 65 Kan. 565, 70 Pac. 635.

properly admissible showing the ages and expectancy of life of the beneficiaries of the deceased, as a proper element to be taken into consideration in fixing the damages.[60]

(II) *Mortality Tables.* In recognition of the above rule of evidence, tables known as mortality or experience tables, which are accepted as standards on the subjects of which they treat, are admissible in evidence to show the expectancy of life of the deceased.[61] It has, however, been held error to admit testimony as to the present value of the gross amount the decedent would have earned had he lived the time specified in the mortality tables, since it excludes

Kentucky.— Southern R. Co. *v.* Evans, 63 S. W. 445, 23 Ky. L. Rep. 568.

Montana.— Soyer *v.* Great Falls Water Co., 15 Mont. 1, 37 Pac. 838.

Nebraska.— Missouri Pac. R. Co. *v.* Baier, 37 Nebr. 235, 55 N. W. 913.

Texas.— International, etc., R. Co. *v.* Knight, 91 Tex. 660, 45 S. W. 556 [*reversing* (Civ. App. 1898) 45 S. W. 167].

Wisconsin.— Tuteur *v.* Chicago, etc., R. Co., 77 Wis. 505, 46 N. W. 897.

United States.— Hall *v.* Galveston, etc., R. Co., 39 Fed. 18.

See 15 Cent. Dig. tit. "Death," § 84. But see Hinsdale *v.* New York, etc., R. Co., 81 N. Y. App. Div. 617, 81 N. Y. Suppl. 356, holding that on an assessment of damages for negligent death, evidence of the length of life of deceased's father was inadmissible.

60. *California.*— Redfield *v.* Oakland Consol. St. R. Co., (1896) 42 Pac. 1063.

Florida.— Duval *v.* Hunt, 34 Fla. 85, 15 So. 876.

Maryland.— Baltimore, etc., R. Co. *v.* State, 33 Md. 542.

Texas.— Galveston, etc., R. Co. *v.* Davis, 4 Tex. Civ. App. 468, 23 S. W. 301. See, however, Gulf, etc., R. Co. *v.* Compton, 75 Tex. 667, 13 S. W. 667.

United States.— The Dauntless, 121 Fed. 420.

See 15 Cent. Dig. tit. "Death," § 90.

61. *Colorado.*— Denver, etc., R. Co. *v.* Woodward, 4 Colo. 1; Kansas Pac. R. Co. *v.* Lundin, 3 Colo. 94.

Georgia.— Georgia R. Co. *v.* Pittman, 73 Ga. 325; David *v.* Southwestern R. Co., 41 Ga. 223.

Illinois.—Joliet *v.* Blower, 49 Ill. App. 464.

Iowa.— Coates *v.* Burlington, etc., R. Co., 62 Iowa 486, 17 N. W. 760; Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391.

Kentucky.— Louisville, etc., R. Co. *v.* Mahony, 7 Bush 235.

Michigan.— Jones *v.* McMillan, 129 Mich. 86, 88 N. W. 206; Nelson *v.* Lake Shore, etc., R. Co., 104 Mich. 582, 62 N. W. 993; Hunn *v.* Michigan Cent. R. Co., 78 Mich. 513, 44 N. W. 502, 7 L. R. A. 500.

Minnesota.— Scheffler *v.* Minneapolis, etc., R. Co., 32 Minn. 518, 21 N. W. 711.

Missouri.—Haines *v.* Pearson, 100 Mo. App. 551, 75 S. W. 194.

Texas.— San Antonio, etc., R. Co. *v.* Bennett, 76 Tex. 151, 13 S. W. 319 (holding that it is proper to allow a witness to testify from mortality tables the number of years that deceased would probably have lived); Galveston, etc., R. Co. *v.* Burnett, (Tex. Civ. App. 1897) 42 S. W. 314; Gulf, etc., R. Co. *v.* Johnson, 10 Tex. Civ. App. 254, 31 S. W. 255.

Virginia.— Norfolk, etc., R. Co. *v.* Phillips, 100 Va. 362, 41 S. E. 726.

England.— Rowley *v.* London, etc., R. Co., L. R. 8 Exch. 221, 42 L. J. Exch. 153, 29 L. T. Rep. N. S. 180, 21 Wkly. Rep. 869.

See 15 Cent. Dig. tit. "Death," § 84; and, generally, Damages.

Annuity tables are admissible for the purpose of determining the probable duration of deceased's life. Hall *v.* Jermain, 14 N. Y. Suppl. 5.

The Carlisle tables of mortality may be considered as data on which to act in determining damages, although they are not conclusive. Central R. Co. *v.* Crosby, 74 Ga. 737, 58 Am. Rep. 463; Walters *v.* Chicago, etc., R. Co., 41 Iowa 71; King *v.* Bell, 13 Nebr. 409, 14 N. W. 141; Roose *v.* Perkins, 9 Nebr. 304, 2 N. W. 715, 31 Am. Rep. 409; Sweet *v.* Providence, etc., R. Co., 20 R. I. 785, 40 Atl. 237.

The Northampton tables are competent evidence to show the probable duration of the life of the deceased. Georgia R., etc., Co. *v.* Oaks, 52 Ga. 410; Sauter *v.* New York, etc., R. Co., 66 N. Y. 50 [*affirming* 6 Hun 446].

Such tables have been held to be properly admissible, even where they do not take into consideration the vocations of men. Gulf, etc., R. Co. *v.* Johnson, 10 Tex. Civ. App. 254, 31 S. W. 255.

Table not recognized as standard.— It is error to admit in evidence a table of life expectation not shown to be accurate or of established repute upon the subject. Galveston, etc., R. Co. *v.* Arispe, 81 Tex. 517, 523, 17 S. W. 47, where a book was admitted in evidence entitled "A Million of Facts; Conkling's Handy Manual of Useful Information and Atlas of the World; All for Twenty-five Cents."

Where the table gave no expectancy of life for any age under ten years, it was held error to admit such table in evidence where the deceased was only five years of age. Rajnowski *v.* Detroit, etc., R. Co., 74 Mich. 20, 41 N. W. 847.

Expectancy of life of beneficiary.— In several jurisdictions mortality or annuity tables have been held to be admissible to determine the probable duration of the life of plaintiff or beneficiary. Hall *v.* Jermain, 14 N. Y. Suppl. 5; Galveston, etc., R. Co. *v.* Leonard, (Tex. Civ. App. 1894) 29 S. W. 955.

from consideration the contingencies of the loss of employment or earning capacity by sickness or otherwise, and does not accurately represent the pecuniary loss to the beneficiaries.[62]

g. Health and Physical Condition of Deceased. Under statutes limiting damages for death by wrongful act to the pecuniary loss sustained by the beneficiaries, the rule is well recognized that evidence is admissible as to the previous health and physical condition of the deceased.[63]

h. Character, Habits, and Domestic Relations of Deceased. In an action for death by wrongful act, evidence is usually admissible as to whether deceased was careful and competent,[64] and also in regard to his reputation for industry and sobriety,[65] his attitude toward his family in respect to provision for their support

62. Mix *v.* Hamburg-American Steamship Co., 85 N. Y. App. Div. 475, 83 N. Y. Suppl. 322; Fajardo *v.* New York Cent., etc., R. Co., 84 N. Y. App. Div. 354, 82 N. Y. Suppl. 912; Hinsdale *v.* New York, etc., R. Co., 81 N. Y. App. Div. 617, 81 N. Y. Suppl. 356. See also Louisiana Extension R. Co. *v.* Carstens, 19 Tex. Civ. App. 190, 47 S. W. 36.

63. *Alabama.*— Richmond, etc., R. Co. *v.* Hammond, 93 Ala. 181, 9 So. 577. See, however, Birmingham Electric R. Co. *v.* Clay, 108 Ala. 233, 19 So. 309, decided under a statute giving punitive and not compensatory damages.

Connecticut.— Broughel *v.* Southern New England Tel. Co., 73 Conn. 614, 48 Atl. 751, 84 Am. St. Rep. 176.

Delaware.— Wilcox *v.* Wilmington City R. Co., 2 Pennew. 157, 44 Atl. 686.

District of Columbia.— Mackey *v.* Baltimore, etc., R. Co., 19 D. C. 282.

Florida.— Duval *v.* Hunt, 34 Fla. 85, 15 So. 876.

Georgia.— Central R. Co. *v.* Rouse, 77 Ga. 393, 3 S. E. 307; Central R. Co. *v.* Thompson, 76 Ga. 770; Central R., etc., Co. *v.* Roach, 64 Ga. 635.

Indiana.— Ohio, etc., R. Co. *v.* Voight, 122 Ind. 288, 23 N. E. 774; Elwood *v.* Addison, 26 Ind. App. 28, 59 N. E. 47.

Iowa.— Lowe *v.* Chicago, etc., R. Co., 89 Iowa 420, 56 N. W. 519; Van Gent *v.* Chicago, etc., R. Co., 80 Iowa 526, 45 N. W. 913.

Kansas.— Missouri Pac. R. Co. *v.* Moffatt, 60 Kan. 113, 55 Pac. 837, 72 Am. St. Rep. 343.

Kentucky.— Louisville, etc., R. Co. *v.* Will, 66 S. W. 628, 23 Ky. L. Rep. 1961.

Minnesota.— Clapp *v.* Minneapolis, etc., R. Co., 36 Minn. 6, 29 N. W. 340, 1 Am. St. Rep. 629.

New Jersey.— Telfer *v.* Northern R. Co., 30 N. J. L. 188.

New York.— Slaven *v.* Germain, 64 Hun 506, 19 N. Y. Suppl. 492.

North Carolina.— Blackwell *v.* Lynchburg, etc., R. Co., 111 N. C. 151, 16 S. E. 12, 32 Am. St. Rep. 786, 17 L. R. A. 729.

Pennsylvania.— Bourke *v.* Railroad Co., 1 Lack. Leg. Rec. 108.

Texas.— Galveston, etc., R. Co. *v.* Gormley, (Civ. App. 1894) 27 S. W. 1051.

Virginia.— Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431, 26 Am. Rep. 384.

United States.— Sorensen *v.* Northern Pac. R. Co., 45 Fed. 407; Hall *v.* Galveston, etc., R. Co., 39 Fed. 18; Hogue *v.* Chicago, etc., R. Co., 32 Fed. 365.

See 15 Cent. Dig. tit. "Death," § 85.

Photograph of deceased.— It has been held in Texas that in an action for the death of a child, his photograph, although taken two years before he died, is admissible as tending to show the probabilities of future physical development had he lived. Taylor, etc., R. Co. *v.* Warner, 88 Tex. 642, 32 S. W. 868.

64. Chicago, etc., R. Co. *v.* Downey, 85 Ill. App. 175; Callaway *v.* Spurgeon, 63 Ill. App. 571; Pittsburgh, etc., R. Co. *v.* Parish, 28 Ind. App. 189, 62 N. E. 514; Missouri Pac. R. Co. *v.* Moffatt, 60 Kan. 113, 55 Pac. 837, 72 Am. St. Rep. 350.

65. *Alabama.*— Richmond, etc., R. Co. *v.* Hammond, 93 Ala. 181, 9 So. 577.

Delaware.— Wilcox *v.* Wilmington City R. Co., 2 Pennew. 157, 44 Atl. 686.

Illinois.— Flynn *v.* Fogarty, 106 Ill. 263; Chicago, etc., R. Co. *v.* Travis, 44 Ill. App. 466.

Indiana.— Ohio, etc., R. Co. *v.* Voight, 122 Ind. 288, 23 N. E. 774.

Iowa.— Wheelan *v.* Chicago, etc., R. Co., 85 Iowa 167, 52 N. W. 119.

Kentucky.— Louisville, etc., R. Co. *v.* Graham, 98 Ky. 688, 34 S. W. 229, 17 Ky. L. Rep. 1229.

Minnesota.— Opsahl *v.* Judd, 30 Minn. 126, 14 N. W. 575; Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 9 N. W. 575.

Missouri.— Nichols *v.* Winfrey, 90 Mo. 403, 2 S. W. 305.

Nebraska.— Missouri Pac. R. Co. *v.* Baier, 37 Nebr. 235, 55 N. W. 913.

New York.— Sternfels *v.* Metropolitan St. R. Co., 174 N. Y. 512, 66 N. E. 1117 [*affirming* 73 N. Y. App. Div. 494, 77 N. Y. Suppl. 309]; Mellwaine *v.* Metropolitan St. R. Co., 74 N. Y. App. Div. 496, 77 N. Y. Suppl. 426; Frank *v.* Otis, 15 N. Y. St. 681.

Tennessee.—Nashville, etc., R. Co. *v.* Prince, 2 Heisk. 580.

Utah.— Wells *v.* Denver, etc., R. Co., 7 Utah 482, 27 Pac. 688.

United States.— Hall *v.* Galveston, etc., R. Co., 39 Fed. 18.

See 15 Cent. Dig. tit. "Death," § 86.

Contra.— Taylor *v.* Western Pac. R. Co., 45 Cal. 323, holding that in an action by children for the wrongful death of their father, the business, education, and habits of sobriety and economy of deceased cannot be considered. And see Lipscomb *v.* Houston,

and kindly treatment,[66] and where deceased was a minor, as to his ability and willingness to render services or aid in the support of his family.[67]

i. Income or Earning Capacity of Deceased. In an action for death by wrongful act, evidence is admissible as to the net income or earning capacity of the deceased at the time of his death, and that some of the beneficiaries designated by statute were dependent upon him for support.[68] However, it has been held

etc., R. Co., 95 Tex. 5, 64 S. W. 923, 93 Am. St. Rep. 804, 55 L. R. A. 869 [*modifying* (Tex. Civ. App. 1901) 62 S. W. 954], holding that evidence that decedent was a church-member and did not use profane language was too remote on the question of damages.

Habitual drunkenness is admissible in mitigation of damages in an action for death by wrongful act under the Indiana statute. Wright *v.* Crawfordsville, 142 Ind. 636, 42 N. E. 227.

66. *Alabama.*— Bromley *v.* Birmingham Mineral R. Co., 95 Ala. 397, 11 So. 341.

California.— Cook *v.* Clay St. Hill R. Co., 60 Cal. 604.

Illinois.— Anthony Ittner Brick Co. *v.* Ashby, 198 Ill. 562, 64 N. E. 1109; Chicago, etc., R. Co. *v.* Travis, 44 Ill. App. 466.

Indiana.— Lake Erie, etc., R. Co. *v.* Mugg, 132 Ind. 168, 31 N. E. 564; Hudson *v.* Houser, 123 Ind. 309, 24 N. E. 243.

Kansas.— Union Pac. R. Co. *v.* Sternberger, 8 Kan. App. 131, 54 Pac. 1101.

Texas.— San Antonio, etc., R. Co. *v.* Long, 87 Tex. 148, 27 S. W. 113, 47 Am. St. Rep. 87, 24 L. R. A. 637; Standlee *v.* St. Louis Southwestern R. Co., 25 Tex. Civ. App. 340, 60 S. W. 781 (holding that it was not error to admit evidence of the habits of deceased tending to show that he was a worthless person whose services were of little or no value to his family, such evidence being relevant on the question of pecuniary loss); Galveston, etc., R. Co. *v.* Bonnet, (Civ. App. 1896) 38 S. W. 813; Galveston, etc., R. Co. *v.* Harris, (Civ. App. 1896) 36 S. W. 776 (holding that evidence that deceased expended his earnings upon a certain woman of ill fame was admissible for the purpose of contradicting testimony of the deceased's mother that her son expended most of his wages in support of herself and his children); Missouri Pac. R. Co. *v.* Bond, 2 Tex. Civ. App. 104, 20 S. W. 930.

Utah.— Chilton *v.* Union Pac. R. Co., 8 Utah 47, 29 Pac. 963.

Virginia.— Simmons *v.* McConnell, 86 Va. 494, 10 S. E. 838.

See 15 Cent Dig. tit. "Death," § 86 *et seq.* See also Mollie Gibson Consol. Min., etc., Co. *v.* Sharp, 5 Colo. App. 321, 38 Pac. 850; Baltimore, etc., R. Co. *v.* State, 81 Md. 371, 32 Atl. 201 (holding that under the Maryland statute evidence as to whether deceased saved anything out of his earnings is inadmissible); Brown *v.* Southern R. Co., 65 S. C. 260, 43 S. E. 794 (holding that evidence of declarations of deceased that his children were trying to get his property from him are incompetent in mitigation of damages). But see Quinn *v.* Power, 29 Hun (N. Y.) 183, holding that in an action by a father for the negligent killing of his son, letters written by such son tending to show affection and good intentions toward his father and family were inadmissible in evidence.

Deduction of personal expenses of deceased. — It has been held in Georgia, in an action for death of plaintiff's husband, that an inquiry as to personal expenses of deceased, to be deducted from the amount of recovery, was not limited to his food and clothing, but his habits, station in life, and means and manner of living might be shown for the consideration of the jury. Augusta, etc., R. Co. *v.* Killian, 79 Ga. 234, 4 S. E. 165.

67. *Illinois.*—Callaway *v.* Spurgeon, 63 Ill. App. 571.

Massachusetts.— Boyle *v.* Columbian Fire Proofing Co., 182 Mass. 93, 64 N. E. 726.

Michigan.— Snyder *v.* Lake Shore, etc., R. Co., (1902) 91 N. W. 643.

Texas.— Missouri, etc., R. Co. *v.* Gilmore, (Civ. App. 1899) 53 S. W. 61; International, etc., R. Co. *v.* Knight, (Civ. App. 1898) 45 S. W. 167; Ft. Worth, etc., R. Co. *v.* Hyatt, 12 Tex. Civ. App. 435, 34 S. W. 677.

Wisconsin.— Potter *v.* Chicago, etc., R. Co., 22 Wis. 615.

See 15 Cent. Dig. tit. "Death," § 86 *et seq.*

68. *Alabama.*— Louisville, etc., R. Co. *v.* Jones, 130 Ala. 456, 30 So. 586; Bessemer Land, etc., Co. *v.* Campbell, 121 Ala. 50, 25 So. 793, 77 Am. St. Rep. 17; Richmond, etc., R. Co. *v.* Hammond, 93 Ala. 181, 9 So. 577. See, however, Savannah, etc., R. Co. *v.* Shearer, 58 Ala. 672.

Florida.— Louisville, etc., R. Co. *v.* Jones, (1903) 34 So. 246.

Georgia.— Georgia Cent. R. Co. *v.* Perkerson, 112 Ga. 923, 38 S. E. 365, 53 L. R. A. 210; Western, etc., R. Co. *v.* Moore, 94 Ga. 457, 20 S. E. 640; Central R. Co. *v.* Rouse, 77 Ga. 393, 3 S. E. 307; Central R., etc., Co. *v.* Roach, 64 Ga. 635.

Illinois.—Pittsburg, etc., R. Co. *v.* Kinnare, 203 Ill. 388, 67 N. E. 826 [*affirming* 105 Ill. App. 566]; St. Louis, etc., R. Co. *v.* Dorsey, 189 Ill. 251, 59 N. E. 593; Chicago, etc., R. Co. *v.* Pearson, 82 Ill. App. 605; Heyer *v.* Salsbury, 7 Ill. App. 93. See, however, St. Louis, etc., R. Co. *v.* Rawley, 90 Ill. App. 653.

Iowa.— Pearl *v.* Omaha, etc., R. Co., 115 Iowa 535, 88 N. W. 1078; Spaulding *v.* Chicago, etc., R. Co., 98 Iowa 205, 67 N. W. 227; Fish *v.* Illinois Cent. R. Co., 96 Iowa 702, 65 N. W. 995 (holding that evidence that decedent is dependent upon his earnings is admissible to show an inducement to industry on his part. This case distinguishes Beenis *v.* Chicago, etc., R. Co., 58 Iowa 150, 12 N. W. 222, but apparently makes a distinction without a difference); McKelvy *v.* Burlington, etc., R. Co., (1894) 58 N. W. 1068 (holding

that where deceased was engaged in one occupation, it was error to admit testi-

that it is proper for the wife of the deceased to testify concerning the amount of property he had at the time of his death, and the proportion thereof accumulated since his marriage); Lowe *v.* Chicago, etc., R. Co., 89 Iowa 420, 56 N. W. 519; Wheelan *v.* Chicago, etc., R. Co., 85 Iowa 167, 52 N. W. 119. See also Van Gent *v.* Chicago, etc., R. Co., 80 Iowa 526, 45 N. W. 913.

Kansas.— Coffeyville Min., etc., Co. *v.* Carter, 65 Kan. 565, 70 Pac. 635.

Kentucky.— Louisville, etc., R. Co. *v.* Graham, 98 Ky. 688, 34 S. W. 229, 17 Ky. L. Rep. 1229; Cincinnati, etc., R. Co. *v.* Sampson, 97 Ky. 65, 30 S. W. 12, 16 Ky. L. Rep. 819 (holding that an instruction that the criterion of damages was "the power of the decedent to earn money had he lived, not exceeding the amount claimed," was proper); Louisville, etc., R. Co. *v.* Case, 9 Bush 728; Louisville R. Co. *v.* Will, 66 S. W. 628, 23 Ky. L. Rep. 1961; Southern R. Co. *v.* Evans, 63 S. W. 445, 23 Ky. L. Rep. 568.

Maine.— Oakes *v.* Maine Cent. R. Co., 95 Me. 103, 49 Atl. 418.

Massachusetts.— Boyle *v.* Columbian Fire Proofing Co., 182 Mass. 93, 64 N. E. 726; Welch *v.* New York, etc., R. Co., 182 Mass. 84, 64 N. E. 695; Mulhall *v.* Fallon, 176 Mass. 266, 57 N. E. 386, 79 Am. St. Rep. 309, 54 L. R. A. 934.

Michigan.— Storrs *v.* Grand Rapids, 110 Mich. 483, 68 N. W. 258.

Minnesota.— Clapp *v.* Minneapolis, etc., R. Co., 36 Minn. 6, 29 N. W. 340, 1 Am. St. Rep. 629; Opsahl *v.* Judd, 30 Minn. 126, 14 N. W. 575; Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 9 N. W. 575.

New York.— McIntyre *v.* New York Cent. R. Co., 37 N. Y. 287; Tilley *v.* Hudson River R. Co., 29 N. Y. 252, 86 Am. Dec. 297 (holding that evidence in relation to the capacity of the deceased mother to transact business and make money was proper, as aiding the jury in arriving at a correct result in regard to the pecuniary benefit which she was to her children, and her capacity to bestow such training and education as would be pecuniarily serviceable to the children in after life); Fajardo *v.* New York Cent., etc., R. Co., 84 N. Y. App. Div. 354, 82 N. Y. Suppl. 912 (holding that while it is proper to admit evidence of the wages earned by the deceased at the time of his death, it was improper to allow evidence as to the amount of wages decedent would now be receiving but for his death, where it appears that this expectation was based upon the hypothesis that the business of the firm would continue to be prosperous, and that its prosperity was dependent upon conditions of peace or war prevailing in the South American republics, in which the firm did business); Geary *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 441, 77 N. Y. Suppl. 54; Seifter *v.* Brooklyn Heights R. Co., 55 N. Y. App. Div. 10, 66 N. Y. Suppl. 1107; Meyer *v.* Hart, 23 N. Y. App. Div. 131, 48 N. Y. Suppl. 904.

North Carolina.— Burns *v.* Ashboro, etc., R. Co., 125 N. C. 304, 34 S. E. 495.

Pennsylvania.— Pennsylvania R. Co. *v.* Adams, 55 Pa. St. 499; Bourke *v.* Railroad Co., 1 Lack. Leg. Rec. 108.

Texas.— St. Louis, etc., R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104; Dallas, etc., R. Co. *v.* Spicker, 61 Tex. 427, 48 Am. Rep. 297; Brush Electric Light, etc., Co. *v.* Lefevre, (Civ. App. 1900) 55 S. W. 396; Galveston, etc., R. Co. *v.* Gormley, (Civ. App. 1896) 35 S. W. 488; Galveston, etc., R. Co. *v.* Leonard, (Civ. App. 1894) 29 S. W. 955; International, etc., R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58. See, however, International, etc., R. Co. *v.* Ormond, 64 Tex. 485.

Utah.— Pool *v.* Southern Pac. Co., 7 Utah 303, 26 Pac. 654. See also Fritz *v.* Western Union Tel. Co., 25 Utah 263, 71 Pac. 209.

Virginia.— Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431, 26 Am. Rep. 384.

Wisconsin.— Wiltse *v.* Tilden, 77 Wis. 152, 46 N. W. 234.

United States.— Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 L. ed. 624; Louisville, etc., R. Co. *v.* Clarke, 152 U. S. 230, 14 S. Ct. 579, 38 L. ed. 422; Serensen *v.* Northern Pac. R. Co., 45 Fed. 407; Hall *v.* Galveston, etc., R. Co., 39 Fed. 18; Hogue *v.* Chicago, etc., R. Co., 32 Fed. 365; Morris *v.* Chicago, etc., R. Co., 26 Fed. 22.

See 15 Cent. Dig. tit. "Death," § 88. See also Hamman *v.* Central Coal, etc., Co., 156 Mo. 232, 56 S. W. 1091 (holding that evidence as to what deceased earned the year before he was killed is inadmissible, the proper inquiry being what he was earning at the time of his death); Burns *v.* Ashboro, etc., R. Co., 125 N. C. 304, 34 S. E. 495. But see Wilcox *v.* Wilmington City R. Co., 2 Pennew. (Del.) 157, 44 Atl. 686.

A husband, in an action for recovery for the death of his wife, cannot state to the jury the value per annum of her services to himself and their children, since that question is for the jury to determine from all the evidence. Chicago, etc., R. Co. *v.* Roberts, 35 Ill. App. 137.

Evidence in rebuttal.— It was held in Texas, in an action for death by wrongful act, that testimony that deceased proposed to work for witness for a certain sum was admissible to rebut plaintiff's evidence that the earnings of deceased were greater than said sum. Galveston, etc., R. Co. *v.* Harris, (Tex. Civ. App. 1896) 36 S. W. 776.

Where act is punitive in nature.— It has been held in Alabama that in an action under Code (1896), § 27, evidence of the age, physical and mental condition, earning capacity and occupation of deceased, and amount contributed by him to the support of those dependent on him, was properly rejected as irrelevant, since the act is not compensatory, but punitive in its nature. Louisville, etc., R. Co. *v.* Tegner, 125 Ala. 593, 28 So. 510. See also Buckalew *v.* Tennessee Coal, etc., R.

mony as to the amount he could have earned in other occupations.[69] It has likewise been held to be error to admit evidence as to the profits derived by deceased from a partnership, the damages suffered being too speculative in character.[70]

j. Property Accumulated by Deceased. And the better rule is that evidence is likewise admissible as to the amount of property which decedent had accumulated, as bearing on the question of damages, and as tending to show the reasonable expectation of pecuniary benefit which would have accrued to the beneficiaries from the continuance of his life.[71]

Co., 112 Ala. 146, 20 So. 606, to the same effect.

69. *Georgia.*— Atlantic, etc., R. Co. *v.* Newton, 85 Ga. 517, 11 S. E. 776. See Christian *v.* Columbus, etc., R. Co., 90 Ga. 124, 15 S. E. 701.

Iowa.— Brown *v.* Chicago, etc., R. Co., 64 Iowa 652, 21 N. W. 193.

New York.— Geary *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 441, 77 N. Y. Suppl. 54.

Pennsylvania.— Mansfield Coal, etc., Co. *v.* McEnery, 91 Pa. St. 185, 36 Am. Rep. 662.

Texas.— Bonnet *v.* Galveston, etc., R. Co., 89 Tex. 72, 33 S. W. 334.

See 15 Cent. Dig. tit. "Death," § 88. See also Burns *v.* Ashboro, etc., R. Co., 125 N. C. 304, 34 S. E. 495, holding that where evidence had been introduced showing that deceased had occupied a more remunerative position than that which he filled at the time of his death, it is competent for defendant to show by cross-examination or direct proof that he was not competent to fill a better position than the one he occupied at the time of his death.

Decedent in line of promotion.— It was held in Galveston, etc., R. Co. *v.* Ford, (Tex. Civ. App. 1898) 46 S. W. 77, that in an action for the death of a locomotive fireman, it might be shown that deceased was in the line of promotion to engineer, and that engineers received a certain fixed amount of wages.

70. Dalton *v.* Chicago, etc., R. Co., 104 Iowa 26, 73 N. W. 349; McCracken *v.* Consolidated Traction Co., 201 Pa. St. 384, 50 Atl. 832. See also Chicago, etc., R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708 [*affirming* 74 Ill. App. 356], holding that in an action for damages for the death of decedent, who was a shoemaker, evidence as to the condition of the shoemaking business was not admissible.

Profits from temporary business or employment.— It was held in Read *v.* Brooklyn Heights R. Co., 32 N. Y. App. Div. 503, 53 N. Y. Suppl. 209, that evidence of profits of deceased from a temporary partnership, engaged in doing work under public contract secured by competitive bidding, involving the use of capital, where his part in the operations was not shown, was incompetent, being too speculative.

71. *Alabama.*— Louisville, etc., R. Co. *v.* York, 128 Ala. 305, 30 So. 676; Bessemer Land, etc., Co. *v.* Campbell, 121 Ala. 50, 25 So. 793, 77 Am. St. Rep. 17 (holding that it is error to limit a recovery to the amount deceased contributed to the support of his dependent next of kin, where he had saved a part of his wages after paying the living expenses of himself and those dependent on him); McAdory *v.* Louisville, etc., R. Co., 94 Ala. 272, 10 So. 507.

Colorado.— Hayes *v.* Williams, 17 Colo. 465, 30 Pac. 352; Denver, etc., R. Co. *v.* Woodward, 4 Colo. 1; Kansas Pac. R. Co. *v.* Lundin, 3 Colo. 94.

Indiana.—Louisville, etc., R. Co. *v.* Wright, 134 Ind. 509, 34 N. E. 314.

Iowa.— Spaulding *v.* Chicago, etc., R. Co., 98 Iowa 205, 67 N. W. 227; Walters *v.* Chicago, etc., R. Co., 41 Iowa 71; Lawrence *v.* Birney, 40 Iowa 377, holding, however, that recovery is limited to the probable earnings of deceased after he had attained his majority.

Kansas.— Kansas Pac. R. Co. *v.* Cutter, 19 Kan. 83.

Kentucky.—Louisville, etc., R. Co. *v.* Berry, 96 Ky. 604, 29 S. W. 449, 16 Ky. L. Rep. 722; Louisville, etc., R. Co. *v.* Mahony, 7 Bush 235.

Minnesota.— Phelps *v.* Winona, etc., R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867; Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 9 N. W. 575.

Nebraska.— Chicago, etc., R. Co. *v.* Holmes, (1903) 94 N. W. 1007. *Contra,* Chicago, etc., R. Co. *v.* Hambel, (1902) 89 N. W. 643.

New York.— Koosorowska *v.* Glasser, 8 N. Y. Suppl. 197 (holding that it is not reversible error for the trial judge to permit plaintiff to show that her intestate left no property); Frank *v.* Otis, 15 N. Y. St. 681. See, however, Tilley *v.* Hudson River R. Co., 24 N. Y. 471.

Oregon.— Carlson *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 450, 28 Pac. 497.

Pennsylvania.— Catawissa R. Co. *v.* Armstrong, 52 Pa. St. 282; Pennsylvania R. Co. *v.* McCloskey, 23 Pa. St. 526. See Wiest *v.* Electric Traction Co., 200 Pa. St. 148, 49 Atl. 891, 58 L. R. A. 666.

Wisconsin.— Tuteur *v.* Chicago, etc., R. Co., 77 Wis. 505, 46 N. W. 897; Castello *v.* Landwehr, 28 Wis. 522.

United States.— Hall *v.* Galveston, etc., R. Co., 39 Fed. 18.

See 15 Cent. Dig. tit. "Death," § 88 *et seq.*

Contra.— Hunn *v.* Michigan Cent. R. Co., 78 Mich. 513, 44 N. W. 502, 7 L. R. A. 500.

Possibilities of promotion.— It has been held in Colorado that in an action for injuries causing death, it is error to permit

k. Value of Services Where Deceased Was a Minor. Likewise, in an action by parents to recover for the wrongful death of a minor child, evidence of the value of such child's services or of his capacity to render service is admissible for the purpose of enhancing the damages, although the recovery is not necessarily limited to the value of such services.[72]

l. Number and Condition of Persons Dependent on Deceased. Where the statute allows compensatory damages, the general rule seems to be that evidence is admissible to show the number and ages of the children of deceased and others immediately dependent upon him.[73]

m. Pecuniary and Physical Condition of Beneficiaries. There is considerable conflict of authority as to whether evidence as to the pecuniary and physical condition of the beneficiaries of the deceased is admissible in evidence. One line of

evidence to be given respecting the possibilities of promotion of plaintiff's decedent. Colorado Coal, etc., Co. *v.* Lamb, 6 Colo. App. 255, 40 Pac. 251; Lake Erie, etc., R. Co. *v.* Mugg, 132 Ind. 168, 31 N. E. 564. See, however, Gulf, etc., R. Co. *v.* John, 9 Tex. Civ. App. 342, 29 S. W. 558.

72. *Colorado.*— Pierce *v.* Conners, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279.

Georgia.— Augusta R. Co. *v.* Glover, 92 Ga. 132, 18 S. E. 406.

Illinois.— Chicago *v.* Scholten, 75 Ill. 468.

New York.— O'Mara *v.* Hudson River R. Co., 38 N. Y. 445, 98 Am. Dec. 61; Kimmer *v.* Weber, 81 Hun 599, 30 N. Y. Suppl. 1103.

Pennsylvania.—Pennsylvania R. Co. *v.* Bantom, 54 Pa. St. 495.

Texas.— Galveston, etc., R. Co. *v.* Davis, 22 Tex. Civ. App. 335, 54 S. W. 909; International, etc., R. Co. *v.* Knight, (Civ. App. 1899) 52 S. W. 640.

Washington.— Atrops *v.* Costello, 8 Wash. 149, 35 Pac. 620.

See 15 Cent. Dig. tit. "Death," § 88.

Adult son.— It was held in Bonnet *v.* Galveston, etc., R. Co., 89 Tex. 72, 33 S. W. 334, that in an action by a father to recover damages for the death of his adult son, evidence that during his minority the son paid all his earnings to his father is incompetent.

Speculative opinion.— In an action for the death of a minor, where plaintiff's counsel asked witness, "What would the services of the deceased have been worth when he reached twenty-one years of age, if he had lived?" it was held that objection to such question was properly sustained, since the answer thereto would be purely speculative opinion based upon contingencies too remote and uncertain to furnish a basis for the measurement of damages. Nave *v.* Alabama Great Southern R. Co., 96 Ala. 264, 11 So. 391.

73. *Alabama.*— Louisville, etc., R. Co. *v.* Banks, 132 Ala. 471, 31 So. 573; Alabama Mineral R. Co. *v.* Jones, 114 Ala. 519, 21 So. 507, 62 Am. St. Rep. 121.

Illinois.— St. Louis, etc., R. Co. *v.* Rawley, 90 Ill. App. 653; Beard *v.* Skeldon, 13 Ill. App. 54. But see Illinois Cent. R. Co. *v.* Ashline, 56 Ill. App. 475.

Indiana.— Hunt *v.* Conner, 26 Ind. App. 41, 59 N. E. 50.

Iowa.— Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391, holding this to be the rule, at least where the jury have been instructed not to allow anything for pain and suffering of deceased, or grief of his family, or loss of his society. See, however, Beems *v.* Chicago, etc., R. Co., 58 Iowa 150, 12 N. W. 223, holding, by a divided court, that evidence of the number of intestate's family was admissible to show the value of his life to his estate.

Kansas.— Coffeyville Min., etc., Co. *v.* Carter, 65 Kan. 565, 70 Pac. 635.

Kentucky.— Louisville, etc., R. Co. *v.* Mahony, 7 Bush 235. See also Louisville, etc., R. Co. *v.* Taaffe, 106 Ky. 535, 50 S. W. 850, 21 Ky. L. Rep. 64, holding that it was a harmless error to admit testimony as to the family left by decedent, since the widow and children had the right to be present at the trial. *Contra*, Southern R. Co. *v.* Evans, 63 S. W. 445, 23 Ky. L. Rep. 568.

Michigan.— Breckenfelder *v.* Lake Shore, etc., R. Co., 79 Mich. 560, 44 N. W. 957.

Missouri.— Fisher *v.* Central Lead Co., 156 Mo. 479, 56 S. W. 1107; O'Mellia *v.* Kansas City, etc., R. Co., 115 Mo. 205, 21 S. W. 503; Schlereth *v.* Missouri Pac. R. Co., 115 Mo. 87, 21 S. W. 1110; Soeder *v.* St. Louis, etc., R. Co., 100 Mo. 673, 13 S. W. 714, 18 Am. St. Rep. 724; Tetherow *v.* St. Joseph, etc., R. Co., 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617.

Tennessee.— Freeman *v.* Illinois Cent. R. Co., 107 Tenn. 340, 64 S. W. 1; Illinois Cent. R. Co. *v.* Davis, 104 Tenn. 442, 58 S. W. 296.

Texas.— Galveston, etc., R. Co. *v.* Contreras, (Civ. App. 1903) 72 S. W. 1051.

Utah.— Chilton *v.* Union Pac. R. Co., 8 Utah 47, 29 Pac. 963; Pool *v.* Southern Pac. R. Co., 7 Utah 303, 26 Pac. 654.

Virginia.— Baltimore, etc., R. Co. *v.* Sherman, 30 Gratt. 602.

Wisconsin.— Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565.

United States.— Felton *v.* Spiro, 78 Fed. 576, 24 C. C. A. 321 [*reversing* 73 Fed. 91]; Atchison, etc., R. Co. *v.* Wilson, 48 Fed. 57, 1 C. C. A. 25.

See 15 Cent. Dig. tit. "Death," § 87. See, however, Klepsch *v.* Donald, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936, holding that under the meager allegations of the complaint it was error to permit plaintiff to testify as to the number of her children.

authorities,[74] while holding that it is entirely proper to show the amount of earnings of deceased, and that the beneficiaries were dependent upon him for support, yet maintain that it is wholly immaterial whether such beneficiaries had or had not other pecuniary resources after his death, or what was their physical condition, and that such evidence is not competent for the purpose of enhancing or reducing the damages. And another line of authorities have established the rule that not only is it proper to show the earning capacity of the deceased, and that the beneficiaries were dependent upon him, but also that evidence is admissible as to the present pecuniary and physical condition of such beneficiaries for the purpose of fixing the measure of damages.[75]

74. *California.*— Green *v.* Southern Pac. Co., 122 Cal. 563, 55 Pac. 577; Mahoney *v.* San Francisco, etc., R. Co., 110 Cal. 471, 42 Pac. 968.

Georgia.— Central R. Co. *v.* Moore, 61 Ga. 151.

Idaho.— Holt *v.* Spokane, etc., R. Co., 4 Ida. 443, 35 Pac. 39.

Illinois.— Pittsburg, etc., R. Co. *v.* Kinnare, 203 Ill. 388, 67 N. E. 826 [*affirming* 105 Ill. App. 566]; St. Louis, etc., R. Co. *v.* Dorsey, 189 Ill. 251, 59 N. E. 593; Chicago, etc., R. Co. *v.* Woolridge, 174 Ill. 330, 51 N. E. 701 [*reversing* 72 Ill. App. 551]; Swift *v.* Foster, 163 Ill. 50, 44 N. E. 837; Pennsylvania Co. *v.* Keane, 143 Ill. 172, 32 N. E. 260; Chicago, etc., R. Co. *v.* Moranda, 93 Ill. 302, 34 Am. Rep. 168; Illinois Cent. R. Co. *v.* Baches, 55 Ill. 379; Illinois Cent. R. Co. *v.* Bandy, 88 Ill. App. 629; John Morris Co. *v.* Burgess, 44 Ill. App. 27; Pennsylvania Co. *v.* Keane, 41 Ill. App. 317; Illinois Cent. R. Co. *v.* Slater, 28 Ill. App. 73; Beard *v.* Skeldon, 13 Ill. App. 54; Chicago *v.* McCulloch, 10 Ill. App. 459; Chicago, etc., R. Co. *v.* Henry, 7 Ill. App. 322; Heyer *v.* Salsbury, 7 Ill. App. 93. See Chicago, etc., R. Co. *v.* May, 108 Ill. 288, holding that in an action by the widow to recover for the death of her husband through defendant's negligence, evidence of plaintiff's prior dependence on deceased for support is admissible, if not indispensable.

Indiana.— Indianapolis, etc., R. Co. *v.* Pitzer, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387.

Iowa.— Benton *v.* Chicago, etc., R. Co., 55 Iowa 496, 8 N. W. 330.

Kentucky.— Southern R. Co. *v.* Evans, 63 S. W. 445, 23 Ky. L. Rep. 568.

Michigan.— Chicago, etc., R. Co. *v.* Bayfield, 37 Mich. 205.

Missouri.— Weller *v.* Chicago, etc., R. Co., 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532.

West Virginia.— See Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32, 55 Am. Rep. 292.

See 15 Cent. Dig. tit. "Death," § 91.

Proceeds of insurance.— In jurisdictions where this doctrine is laid down, it has been held that evidence that the beneficiaries received the proceeds of an insurance policy upon the life of the deceased is inadmissible in mitigation of damages. Coulter *v.* Pine Tp., 164 Pa. St. 543, 30 Atl. 490; Lipscomb *v.* Houston, etc., R. Co., 95 Tex. 5, 64 S. W. 923, 93 Am. St. Rep. 804, 55 L. R. A. 869; Galveston, etc., R. Co. *v.* Cody, 20 Tex. Civ. App. 520, 50 S. W. 135.

75. *Alabama.*— Louisville, etc., R. Co. *v.* Jones, 130 Ala. 456, 30 So. 586.

Arkansas.— Little Rock, etc., R. Co. *v.* Leverett, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230.

Florida.— Louisville, etc., R. Co. *v.* Jones, (1903) 34 So. 246.

Massachusetts.— Boyle *v.* Columbian Fire Proofing Co., 182 Mass. 93, 64 N. E. 726.

Michigan.— Cooper *v.* Lake Shore, etc., R. Co., 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482.

Mississippi.— Illinois Cent. R. Co. *v.* Crudup, 63 Miss. 291.

Missouri.— Haehl *v.* Wabash R. Co., 119 Mo. 325, 24 S. W. 737; Winters *v.* Hannibal, etc., R. Co., 39 Mo. 468. See also Overhote *v.* Vieths, 93 Mo. 422, 6 S. W. 74, 3 Am. St. Rep. 557, holding, however, that, after plaintiff had been permitted to testify as to her general condition, and that she and her daughter were compelled to do the household work, a direct question as to her financial condition was properly excluded, since the evidence already admitted showed her financial condition as fully as was proper.

New York.— Fowler *v.* Buffalo Furnace Co., 41 N. Y. App. Div. 84, 58 N. Y. Suppl. 223; Pressman *v.* Mooney, 5 N. Y. App. Div. 121, 39 N. Y. Suppl. 44. See also Lipp *v.* Otis, 161 N. Y. 559, 56 N. E. 79, holding, however, that in an action by the father for the death of a child, he being the sole next of kin under the code (Code Civ. Proc. §§ 1870, 2732, subd. 7), it was improper to admit evidence as to the property of the brothers and sisters of deceased, who were not next of kin. See, however, Terhune *v.* Joseph W. Cody Contracting Co., 72 N. Y. App. Div. 1, 76 N. Y. Suppl. 255, where the court said *obiter* that evidence of wages which plaintiff earns is not admissible in an action for the death of his child.

Ohio.— Cincinnati St. R. Co. *v.* Altemeier, 60 Ohio St. 10, 53 N. E. 300 [*criticized* in Lake Shore, etc., R. Co. *v.* Reynolds, 21 Ohio Cir. Ct. 402, 11 Ohio Cir. Dec. 701, holding that such evidence is inadmissible, but its admission was harmless error in this particular case].

Texas.— Gulf, etc., R. Co. *v.* Younger, 90 Tex. 387, 38 S. W. 1121; International, etc., R. Co. *v.* Kindred, 57 Tex. 491; St. Louis Southwestern R. Co. *v.* Bowles, (Civ. App.

n. Pecuniary Condition of Defendant. The general rule is that where the pecuniary loss to the designated beneficiaries is made the sole measure of damages, evidence as to the pecuniary condition of defendant is inadmissible,[76] since the amount of defendant's property cannot in any manner increase or diminish the pecuniary loss or change the measure of damages.

o. Defendant's Fear of Bodily Harm. In a civil action to recover damages for homicide, the rule seems to be well settled that evidence is not admissible as to apprehension on the part of defendant that he was in danger of bodily harm from the deceased.[77]

3. Weight and Sufficiency — a. As to Cause of Death. In an action for death by wrongful act, the same evidence as to the cause of the injury is required as though the action were brought by the deceased for injuries which he survived, and the evidence to justify the court in submitting to the jury the question as to whether or not death was caused by the injury complained of should show the connection between the two with reasonable certainty, and not leave it to vague speculation or conjecture.[78]

1903) 72 S. W. 451; Texas Midland R. Co. *v.* Crowder, (Civ. App. 1901) 64 S. W. 90; Houston, etc., R. Co. *v.* White, 23 Tex. Civ. App. 280, 56 S. W. 204; Galveston, etc., R. Co. *v.* Davis, 22 Tex. Civ. App. 335, 54 S. W. 909; International, etc., R. Co. *v.* Knight, (Civ. App. 1899) 52 S. W. 640; Galveston, etc., R. Co. *v.* Cody, 20 Tex. Civ. App. 520, 50 S. W. 135; Galveston, etc., R. Co. *v.* Bonnet, (Civ. App. 1896) 38 S. W. 813; Sills *v.* Ft. Worth, etc., R. Co., (Civ. App. 1894) 28 S. W. 908; Galveston, etc., R. Co. *v.* Davis, 4 Tex. Civ. App. 468, 23 S. W. 301. The apparent difference between these cases and the line of Texas cases holding the contrary doctrine seems to be reconcilable upon the theory that while such evidence is admissible for the purpose of showing the ability and probable willingness of decedent to support plaintiff, yet it is not admissible for the purpose of enhancing damages. *Contra*, Texas, etc., R. Co. *v.* Harrington, 62 Tex. 597.

Wisconsin.— Thompson *v.* Johnston Bros. Co., 86 Wis. 576, 57 N. W. 298; Wiltse *v.* Tilden, 77 Wis. 152, 46 N. W. 234 (holding that in an action by a mother for the death of her son, evidence is admissible to show that plaintiff was divorced from her husband and dependent upon the son); McKeigue *v.* Janesville, 68 Wis. 50, 31 N. W. 298; Annas *v.* Milwaukee, etc., R. Co., 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848; Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565; Johnson *v.* Chicago, etc., R. Co., 64 Wis. 425, 25 N. W. 223 (holding that in an action by a mother for the wrongful death of her son, evidence is admissible to show that plaintiff was divorced from her husband and dependent upon the son); Ewen *v.* Chicago, etc., R. Co., 38 Wis. 613.

See 15 Cent. Dig. tit. "Death," § 91.

76. Conant *v.* Griffin, 48 Ill. 410; Chicago, etc., R. Co. *v.* Bayfield, 37 Mich. 205; Morgan *v.* Durfee, 69 Mo. 469, 33 Am. Rep. 508.

General reputation of defendant.— It has been held in Missouri that in an action for killing plaintiff's husband, evidence offered by defendant to prove his general reputation as an honorable, peaceable, and law-abiding citizen is inadmissible. Vawter *v.* Hultz, 112 Mo. 633, 20 S. W. 689.

Under statutes, however, allowing exemplary or punitive damages for death by wrongful act, it has been held that evidence is admissible to show pecuniary condition of defendant. Louisville, etc., R. Co. *v.* Mahony, 7 Bush (Ky.) 235; Morgan *v.* Durfee, 69 Mo. 469, 33 Am. Rep. 508.

77. Vawter *v.* Hultz, 112 Mo. 633, 20 S. W. 689; Nichols *v.* Winfrey, 79 Mo. 544; White *v.* Maxey, 64 Mo. 552. See also Hollingsworth *v.* Warnock, 65 S. W. 163, 23 Ky. L. Rep. 1395, holding that evidence of threats by deceased to the effect that he would kill somebody before morning, which were never communicated to defendant, were too general to be admissible for any purpose.

78. *Georgia.*— James *v.* Florida, etc., R. Co., 115 Ga. 313, 41 S. E. 585.

Illinois.— Newell *v.* Rahn, 64 Ill. App. 249.

Indiana.— Kauffman *v.* Cleveland, etc., R. Co., 144 Ind. 456, 43 N. E. 446.

Louisiana.— Martinez *v.* Bernard, 106 La. 368, 30 So. 901, 87 Am. St. Rep. 306, 55 L. R. A. 671 (where a slight wound by a dog, greatly aggravated by imprudent treatment, was held not to give rise to liability for damages, where both the attending physicians placed the death to another cause than the dog bite); Randall *v.* New Orleans, etc., R. Co., 45 La. Ann. 778, 13 So. 166.

Minnesota.— Briggs *v.* Minneapolis St. R. Co., 52 Minn. 36, 53 N. W. 1019.

Missouri.— Elliott *v.* St. Louis, etc., R. Co., 67 Mo. 272.

New York.— Koch *v.* Zimmerman, 85 N. Y. App. Div. 370, 83 N. Y. Suppl. 339.

Rhode Island.— Lee *v.* Reliance Mills Co., 21 R. I. 549, 45 Atl. 554.

United States.— Bunt *v.* Sierra Butte Gold Min. Co., 138 U. S. 483, 11 S. Ct. 464, 34 L. ed. 1031 [*affirming* 24 Fed. 847, 11 Sawy. 178], holding that the fact that the only witnesses in an action for wrongful death were defendant's employees did not warrant submission of the case to the jury to determine the weight of the testimony, where the only evidence showed negligence on the

b. As to Damages.[79] The general rule is that in order to authorize a recovery of damages for death by wrongful act, the evidence must show the extent and amount thereof or furnish facts and data as a basis from which the jury may approximate the proper amount with reasonable certainty.[80] However, where a foundation for the recovery of damages has been laid by the introduction of evidence tending to show the earning capacity of the deceased,[81] or the existence of persons who were dependent upon him for support,[82] it is not necessary to show

part of the deceased. See also McQuade *v.* Metropolitan St. R. Co., 84 N. Y. App. Div. 637, 82 N. Y. Suppl. 720 (where the evidence was held insufficient to show that the injury received by the decedent was the proximate cause of his death); Galveston, etc., R. Co. *v.* Hanway, (Tex. Civ. App. 1900) 57 S. W. 695.

See 15 Cent. Dig. tit. "Death," § 94; and, generally, DAMAGES.

79. See *infra*, III, E; and, generally, DAMAGES, *ante*, p. 191 *et seq.*

80. *Alabama.*— Louisville, etc., R. Co. *v.* Orr, 91 Ala. 548, 8 So. 360.

Connecticut.—Hesse *v.* Meriden, etc., Tramway Co., 75 Conn. 571, 54 Atl. 299.

Massachusetts.— Hodnett *v.* Boston, etc., R. Co., 156 Mass. 86, 30 N. E. 224.

Michigan.— Hurst *v.* Detroit City R. Co., 84 Mich. 539, 48 N. W. 44; Van Brunt *v.* Cincinnati, etc., R. Co., 78 Mich. 530, 44 N. W. 321.

Pennsylvania.— McHugh *v.* Schlosser, 159 Pa. St. 480, 28 Atl. 291, 39 Am. St. Rep. 699, 23 L. R. A. 574.

Texas.— Houston, etc., R. Co. *v.* Cowser, 57 Tex. 293.

Wisconsin.— Decker *v.* McSorley, 111 Wis. 91, 86 N. W. 554.

See 15 Cent. Dig. tit. "Death," § 96. See also Louisville, etc., R. Co. *v.* Graham, 98 Ky. 688, 34 S. W. 229, 17 Ky. L. Rep. 1229 (holding that in an action under the Kentucky statute, providing that an action may be maintained by the personal representative of an employee killed by the negligence of a person in the service of the same master, who has charge of any signal, engine, or car, as if deceased were a stranger, it is not necessary to show either gross or wilful negligence in order to sustain a recovery); Clark *v.* Manchester, 64 N. H. 471, 13 Atl. 867 (where it was held that under a statute giving damages where the deceased suffered physical or mental pain, the fact of death by drowning in stagnant, muddy, and slimy water was sufficient, without other evidence, to sustain a finding by the jury that the deceased suffered pain); Lucas *v.* New York Cent. R. Co., 21 Barb. (N. Y.) 245 (where it was held that the evidence failed to show that plaintiff was dependent on deceased for support, and that no damages were proven). But see North Chicago St. R. Co. *v.* Wrixon, 51 Ill. App. 307, holding that in an action under a statute for wrongful death, the jury may give damages without evidence as to pecuniary loss sustained.

Limitation of rule.— In an action by a parent for the death of a minor child, the rule has been laid down that substantial damages may be recovered, although there is no proof of special pecuniary damages, but only proof of the death, the age, and the relationship of the deceased, since it is within the province of the jury to estimate pecuniary loss, the damage in such case not being readily susceptible of specific proof.

Arkansas.— Little Rock, etc., R. Co. *v.* Barker, 39 Ark. 491.

Illinois.— Chicago *v.* Hesing, 83 Ill. 204, 25 Am. Rep. 378.

Maryland.—Baltimore, etc., R. Co. *v.* State, 24 Md. 271.

New York.— Gorham *v.* New York Cent., etc., R. Co., 23 Hun 449.

Pennsylvania.—See Coakley *v.* North Pennsylvania R. Co., 5 Pa. L. J. Rep. 444.

Canada.— Ricketts *v.* Markdale, 31 Ont. 610; Rombough *v.* Balch, 27 Ont. App. 32.

See 15 Cent. Dig. tit. "Death," § 96.

Recovery for pain and suffering.— Where the statute allows damages for pain and suffering, in order to sustain the right of recovery therefor and to establish the fact that pain and suffering were endured by the decedent, it must affirmatively appear that death was not instantaneous, and that decedent was conscious after the accident. Sweetland *v.* Chicago, etc., R. Co., 117 Mich. 329, 75 N. W. 1066, 43 L. R. A. 568.

81. *Illinois.*— Baltimore, etc., R. Co. *v.* Then, 159 Ill. 535, 42 N. E. 971.

Iowa.— Beems *v.* Chicago, etc., R. Co., 67 Iowa 435, 25 N. W. 693.

Kentucky.— See Chesapeake, etc., R. Co. *v.* Dupee, 67 S. W. 15, 23 Ky. L. Rep. 2349.

Minnesota.— Robel *v.* Chicago, etc., R. Co., 35 Minn. 84, 27 N. W. 305, where the evidence was held to be sufficient to sustain a recovery of substantial damages.

Missouri.—Murdock *v.* Brown, 16 Mo. App. 549.

Texas.—San Antonio Traction Co. *v.* White, 94 Tex. 468, 61 S. W. 706 [*reversing* (Civ. App. 1900) 60 S. W. 323].

United States.— Southern Pac. Co. *v.* Lafferty, 57 Fed. 536, 6 C. C. A. 474, where the evidence was held to be sufficient to prove pecuniary damage.

See 15 Cent. Dig. tit. "Death," § 96.

82. *Alabama.*— Alabama Mineral R. Co. *v.* Jones, 121 Ala. 113, 25 So. 814.

Arkansas.— Fordyce *v.* McCants, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296.

Illinois.— Ohio, etc., R. Co. *v.* Wangelin, 152 Ill. 138, 38 N. E. 760 [*affirming* 43 Ill. App. 324]; Salem *v.* Harvey, 129 Ill. 344, 21 N. E. 1076 [*affirming* 29 Ill. App. 483];

the precise money value of the life of the deceased, or the exact amount of damages suffered by the beneficiaries in order to sustain a recovery of substantial damages. Likewise, while affirmative proof of the probable duration of life, such as the introduction of standard mortality tables, is admissible,[83] yet such evidence is not absolutely essential.[84]

F. Damages[85] — **1. Nature of — a. Nominal Damages.**[86] Where the statute expressly gives the right of action for death by wrongful act, the general rule in the United States is that at least nominal damages may be recovered.[87] And under statutes giving a right of action for the benefit of the widow and next of kin, where it is shown that such beneficiaries are in existence, the rule is that nominal damages may be recovered, although no actual or substantial loss to them be shown.[88]

Armour *v.* Czischki, 59 Ill. App. 17; Illinois, etc., R. Co. *v.* Whalen, 19 Ill. App. 116.

Massachusetts.— Boyle *v.* Columbian Fire Proofing Co., 182 Mass. 93, 46 N. E. 726.

Pennsylvania.— Schnatz *v.* Philadelphia, etc., R. Co., 160 Pa. St. 602, 28 Atl. 952; Pennsylvania R. Co. *v.* Keller, 67 Pa. St. 300.

Texas.— Galveston, etc., R. Co. *v.* Ford, 22 Tex. Civ. App. 131, 54 S. W. 37.

West Virginia.— Baltimore, etc., R. Co. *v.* Gettle, 3 W. Va. 376.

United States.— Southern Pac. Co. *v.* Lafferty, 57 Fed. 536, 6 C. C. A. 474, where the evidence was held to be sufficient to prove pecuniary damage.

See 15 Cent. Dig. tit. "Death," § 96. See also Lockwood *v.* New York, etc., R. Co., 98 N. Y. 523 (holding that the facts that children of one killed by negligence are of full age, and not living with their parent, and are supporting themselves, do not alone show that they have suffered no pecuniary damage from such parent's death); Kelly *v.* Twenty-third St. R. Co., 14 Daly (N. Y.) 418, 14 N. Y. St. 699 (holding that it is not necessary to show that the collateral kin, who alone would be benefited by a recovery, have been supported by the deceased, or probably would have been had he lived).

Question for jury.—In an action by parents to recover damages for the death of their son, who was twenty-eight years of age at the time of the accident, and had been away from home at frequent intervals since his majority, and in business on his own account, but at the time of his death was engaged in business with his father, for which he received no compensation, it was held that it was for the jury to decide whether there was a reasonable expectation of pecuniary advantage accruing to plaintiffs, which was destroyed by the loss of the son. North Pennsylvania R. Co. *v.* Kirk, 90 Pa. St. 15.

83. See *supra*, III, D, 2, f, (II).

84. Where there is sufficient evidence as to the age, health, physical condition, and habits of the deceased, the jury may form a reasonable estimate as to the value of his life, without resorting to such documentary evidence. Boswell *v.* Barnhart, 96 Ga. 521, 23 S. E. 414; Atchison, etc., R. Co. *v.* Hughes, 55 Kan. 491, 40 Pac. 919; Grogan *v.* Broadway Foundry Co., 87 Mo. 321.

85. Damages generally see DAMAGES, *ante*, p. 1 *et seq.*

86. Nominal damages generally see DAMAGES, *ante*, p. 14 *et seq.*

87. *Alabama.*— Alabama Mineral R. Co. *v.* Jones, 121 Ala. 113, 25 So. 814.

Arkansas.— Fordyce *v.* McCants, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296.

Massachusetts.— Mulchahey *v.* Washburn Car-Wheel Co., 145 Mass. 281, 14 N. E. 106, 1 Am. St. Rep. 458; Tully *v.* Fitchburg R. Co., 134 Mass. 499, holding, however, that where the deceased remained in a perfectly unconscious condition till his death, from the time of his injuries, and there was no expense incurred between the time of the injuries and the death, that only nominal damages could be recovered.

New York.— Quin *v.* Moore, 15 N. Y. 432; Lehman *v.* Brooklyn, 29 Barb. 234; Mitchell *v.* New York Cent., etc., R. Co., 5 Thomps. & C. 122.

Ohio.— Hall *v.* Crain, 2 Ohio Dec. (Reprint) 453, 3 West. L. Month. 137.

Contra, Hurst *v.* Detroit City R., 84 Mich. 539, 48 N. W. 44.

See 15 Cent. Dig. tit. "Death," § 97.

Collateral kin.— Under Cal. Code Civ. Proc. § 377, giving a right of action for wrongful death to the heirs and personal representatives of the decedent to recover such damages as under all the circumstances of the case may be just, where the only heirs of the deceased are collateral relatives, nominal damages at least are recoverable without proof of actual or probable pecuniary loss *In re* California Nav., etc., Co., 110 Fed. 670.

Mere speculative or conjectural possibilities of benefits to the parties complaining are not a proper basis for an estimate of damages resulting from the death, and in such case only nominal damages should be given. Burk *v.* Arcata, etc., River R. Co., 125 Cal. 364, 57 Pac. 1065, 73 Am. St. Rep. 52.

88. *California.*—Burk *v.* Arcata, etc., River R. Co., 125 Cal. 364, 57 Pac. 1065, 73 Am. St. Rep. 52.

Illinois.— North Chicago St. R. Co. *v.* Brodie, 156 Ill. 317, 40 N. E. 942 [*distinguishing* Ohio, etc., R. Co. *v.* Wangelin, 152 Ill. 138, 38 N. E. 760]; Rockford, etc., R. Co. *v.* Delaney, 82 Ill. 198, 25 Am. Rep. 308; Quincy Coal Co. *v.* Hood, 77 Ill. 68; Chicago *v.* Scholten, 75 Ill. 468; Chicago, etc., R. Co. *v.* Swett,

b. Compensatory Damages.[89] The amount of damages recoverable should be a just compensation with reference to the pecuniary injury resulting to the beneficiaries from such death.[90]

c. Exemplary Damages.[91] The rule is well established that under statutes giving a right of action for death by wrongful act, exemplary or punitive damages cannot be recovered unless expressly provided for in the statute giving the right of action.[92] Many statutes, however, provide that where death is caused by the

45 Ill. 197, 92 Am. Dec. 206; Chicago, etc., R. Co. *v.* Shannon, 43 Ill. 338.

Kansas.— Cherokee, etc., Coal, etc., Co. *v.* Limb, 47 Kan. 469, 28 Pac. 181; Atchison, etc., R. Co. *v.* Weber, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543.

Nebraska.— Anderson *v.* Chicago, etc., R. Co., 35 Nebr. 95, 52 N. W. 840.

Ohio.— Hall *v.* Crain, 2 Ohio Dec. (Reprint) 453, 3 West. L. Month. 137.

United States.— Howard *v.* Delaware, etc., Canal Co., 40 Fed. 195, 6 L. R. A. 75. See also *In re* California Nav., etc., Co., 110 Fed. 670, holding, however, that nominal damages for personal torts are never awarded by courts of admiralty.

See 15 Cent. Dig. tit. "Death," § 97.

Contra.— Lazelle *v.* Newfane, 70 Vt. 440, 41 Atl. 511.

89. **Compensatory damages** generally see DAMAGES, *ante*, p. 22 *et seq.*

90. *Alabama.*— Louisville, etc., R. Co. *v.* Trammell, 93 Ala. 350, 9 So. 870. See also Louisville, etc., R. Co. *v.* Morgan, 114 Ala. 449, 22 So. 20.

Arkansas.— Fordyce *v.* McCants, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296.

California.— Hillebrand *v.* Standard Biscuit Co., 139 Cal. 233, 73 Pac. 163; Morgan *v.* Southern Pac. Co., 95 Cal. 510, 30 Pac. 603, 29 Am. St. Rep. 143, 17 L. R. A. 71.

Colorado.— Pierce *v.* Conners, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279; Denver, etc., R. Co. *v.* Woodward, 4 Colo. 162; Kansas Pac. R. Co. *v.* Lundin, 3 Colo. 94; Mitchell *v.* Colorado Milling, etc., Co., 12 Colo. App. 277, 55 Pac. 736.

Illinois.— North Chicago St. R. Co. *v.* Brodie, 156 Ill. 317, 40 N. E. 942 [*distinguishing* Ohio, etc., R. Co. *v.* Wangelin, 152 Ill. 138, 38 N. E. 760]; Chicago *v.* Scholten, 75 Ill. 468; Chicago, etc., R. Co. *v.* Swett, 45 Ill. 197, 92 Am. Dec. 206; Chicago, etc., R. Co. *v.* Shannon, 43 Ill. 338.

Indiana.— Diebold *v.* Sharp, 19 Ind. App. 474, 49 N. E. 837.

Iowa.— Eginoire *v.* Union County, 112 Iowa 558, 84 N. W. 758.

Kansas.— Cherokee, etc., Coal, etc., Co. *v.* Limb, 47 Kan. 469, 28 Pac. 181; Union Pac. R. Co. *v.* Dunden, 37 Kan. 1, 14 Pac. 501.

Kentucky.— Louisville, etc., R. Co. *v.* Graham, 98 Ky. 688, 34 S. W. 229, 17 Ky. L. Rep. 1229.

Missouri.— Haehl *v.* Wabash R. Co., 119 Mo. 325, 24 S. W. 737; Stoher *v.* St. Louis, etc., R. Co., 91 Mo. 509, 4 S. W. 389.

Nebraska.— Anderson *v.* Chicago, etc., R. Co., 35 Nebr. 95, 52 N. W. 840.

New Hampshire.— Corliss *v.* Worcester, etc., R. Co., 63 N. H. 404.

New York.— Prendergast *v.* New York Cent., etc., R. Co., 58 N. Y. 652; Ihl *v.* Forty-Second St., etc., Ferry R. Co., 47 N. Y. 317, 7 Am. Rep. 450; Dickens *v.* New York Cent. R. Co., 1 Abb. Dec. 504, 1 Keyes 23; Scinrba *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 170, 76 N. Y. Suppl. 772; Wise *v.* Teerpenning, 2 Edm. Sel. Cas. 112. See also Staal *v.* Grand St., etc., R. Co., 107 N. Y. 625, 13 N. E. 624.

Ohio.— Davis *v.* Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548.

United States.— Howard *v.* Delaware, etc., Canal Co., 40 Fed. 195, 6 L. R. A. 75; Hogue *v.* Chicago, etc., R. Co., 32 Fed. 365; Ladd *v.* Foster, 31 Fed. 827, 12 Sawy. 547.

See 15 Cent. Dig. tit. "Death," § 103 *et seq.* See also Coulter *v.* Pine Tp., 164 Pa. St. 543, 30 Atl. 490, holding that the amount paid on an insurance policy cannot be regarded as the pecuniary value of the life.

Collateral relatives.— It has been held, under the California statute, that where the only heirs of the deceased are collateral relatives, only nominal damages are recoverable without proof of actual or probable pecuniary loss. *In re* California Nav., etc., Co., 110 Fed. 670.

91. **Exemplary damages** generally see DAMAGES, *ante*, p. 105 *et seq.*

92. *Alabama.*— Louisville, etc., R. Co. *v.* Orr, 91 Ala. 548, 8 So. 360; Thompson *v.* Louisville, etc., R. Co., 91 Ala. 496, 8 So. 406, 11 L. R. A. 146.

California.— Lange *v.* Schoettler, 115 Cal. 388, 47 Pac. 139; Morgan *v.* Southern Pac. Co., 95 Cal. 510, 30 Pac. 603, 29 Am. St. Rep. 143, 17 L. R. A. 71.

Colorado.— Murphy *v.* Hobbs, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366; Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442.

Illinois.— Conant *v.* Griffin, 48 Ill. 410.

Indiana.— Stewart *v.* Maddox, 63 Ind. 51.

Louisiana.— Hamilton *v.* Morgan's Louisiana, etc., Steamship Co., 42 La. Ann. 824, 8 So. 586.

Maine.— Oakes *v.* Maine Cent. R. Co., 95 Me. 103, 49 Atl. 418.

Michigan.— Hyatt *v.* Adams, 16 Mich. 180.

Mississippi.— Illinois Cent. R. Co. *v.* Crudup, 63 Miss. 291.

New Hampshire.— Fay *v.* Parker, 53 N. H. 342, 16 Am. Rep. 270.

North Carolina.— Gray *v.* Little, 127 N. C. 304, 37 S. E. 270; Collier *v.* Arrington, 61 N. C. 356.

Oregon.— Perham *v.* Portland Gen. Electric Co., 33 Oreg. 451, 53 Pac. 14, 24, 72 Am. St. Rep. 730, 40 L. R. A. 799.

wilful act or gross negligence of defendant, exemplary as well as compensatory damages may be recovered.[93]

d. Mitigation of Damages[94] — (i) *Inheritance From Deceased.* The rule seems to be well recognized that it cannot be shown in mitigation of damages that plaintiff or beneficiary acquired property by descent from deceased,[95] or received a sum of money for insurance upon his life.[96]

Pennsylvania.— Pennsylvania R. Co. *v.* Henderson, 51 Pa. St. 315; Pennsylvania R. Co. *v.* Vandever, 36 Pa. St. 298.

South Carolina.— Nohrden *v.* Northeastern R. Co., 54 S. C. 492, 32 S. E. 524; Garrick *v.* Florida Cent., etc., R. Co., 53 S. C. 448, 31 S. E. 334, 69 Am. St. Rep. 874.

Washington.— Walker *v.* McNeill, 17 Wash. 582, 50 Pac. 518; Spokane Trunk, etc., Co. *v.* Hoefer, 2 Wash. 45, 25 Pac. 1072, 26 Am. St. Rep. 842, 11 L. R. A. 689.

Wisconsin.— Potter *v.* Chicago, etc., R. Co., 21 Wis. 372, 94 Am. Dec. 548.

United States.— Holmes *v.* Oregon, etc., R. Co., 5 Fed. 523, 6 Sawy. 276; Hollyday *v.* The David Reeves, 12 Fed. Cas. No. 6,625, 5 Hughes 89.

England.— Smith *v.* London, etc., R. Co., 2 E. & B. 69, 17 Jur. 1071, 75 E. C. L. 69.

See 15 Cent. Dig. tit. "Death," § 98.

93. *Colorado.*— Kansas Pac. R. Co. *v.* Miller, 2 Colo. 242.

Kentucky.—Louisville, etc., R. Co. *v.* Ward, 44 S. W. 1112, 19 Ky. L. Rep. 1900. And see Louisville, etc., R. Co. *v.* Kelly, 100 Ky. 421, 38 S. W. 852, 40 S. W. 452, 19 Ky. L. Rep. 69; Cincinnati, etc., R. Co. *v.* Privitt, 92 Ky. 223, 17 S. W. 484, 13 Ky. L. Rep. 474; Louisville, etc., R. Co. *v.* Merriwether, (1890) 12 S. W. 935; Jordan *v.* Cincinnati, etc., R. Co., 89 Ky. 40, 11 S. W. 1013, 11 Ky. L. Rep. 204; Henderson *v.* Kentucky Cent. R. Co., 86 Ky. 389, 5 S. W. 875, 9 Ky. L. Rep. 625; Bowler *v.* Lane, 3 Mete. 311; Chiles *v.* Drake, 2 Mete. 146, 74 Am. Dec. 406; Clark *v.* Louisville, etc., R. Co., 39 S. W. 840, 18 Ky. L. Rep. 1082, 36 L. R. A. 123; Baker *v.* Louisville, etc., R. Co., 17 S. W. 191, 12 Ky. L. Rep. 465.

Louisiana.— Hamilton *v.* Morgan's Louisiana, etc., Steamship Co., 42 La. Ann. 824, 8 So. 586; McFee *v.* Vicksburg, etc., R. Co., 42 La. Ann. 790, 7 So. 720.

Missouri.— Haehl *v.* Wabash R. Co., 119 Mo. 325, 24 S. W. 737; Gray *v.* McDonald, 104 Mo. 303, 16 S. W. 398; Morgan *v.* Durfee, 69 Mo. 469, 33 Am. Rep. 508; Gilfillan *v.* McCrillis, 84 Mo. App. 576.

New Mexico.— See Cerrillos Coal R. Co. *v.* Deserant, 9 N. M. 49, 49 Pac. 807.

Tennessee.— Haley *v.* Mobile, etc., R. Co., 7 Baxt. 239.

Texas.— Houston, etc., R. Co. *v.* Baker, 57 Tex. 419.

United States.— Peers *v.* Nevada Power, etc., Co., 119 Fed. 400; Morgan *v.* Barnhill, 118 Fed. 24, 55 C. C. A. 1.

See 15 Cent. Dig. tit. "Death," § 98.

Rule in Alabama.— The Alabama courts, in construing their statute, have laid down the rule that punitive damages are recoverable under the statute for any degree of negligence, or, speaking more accurately, for negligence as well as for wantonness and wilfulness. Louisville, etc., R. Co. *v.* Lansford, 102 Fed. 62, 42 C. C. A. 160; Kansas City, etc., R. Co. *v.* Sanders, 98 Ala. 293, 13 So. 57; Richmond, etc., R. Co. *v.* Freeman, 97 Ala. 289, 11 So. 800. See also South, etc., R. Co. *v.* Sullivan, 59 Ala. 272; Savannah, etc., R. Co. *v.* Schearer, 58 Ala. 672.

94. Mitigation of damages generally see Damages, *ante*, p. 66 *et seq.*

95. *Arkansas.*— St. Louis, etc., R. Co. *v.* Maddry, 57 Ark. 306, 21 S. W. 472.

Georgia.— Boswell *v.* Barnhart, 96 Ga. 521, 23 S. E. 414.

New York.— Terry *v.* Jewett, 78 N. Y. 338.

Pennsylvania.— Stahler *v.* Philadelphia, etc., R. Co., 199 Pa. St. 383, 49 Atl. 273, 85 Am. St. Rep. 791.

Vermont.— See Harding *v.* Townshend, 43 Vt. 536, 5 Am. Rep. 304.

United States.— Clune *v.* Ristine, 94 Fed. 745, 36 C. C. A. 450.

Contra, San Antonio, etc., R. Co. *v.* Long, 87 Tex. 148, 27 S. W. 113, 47 Am. St. Rep. 87, 24 L. R. A. 637 [*reversing* (Civ. App. 1894) 26 S. W. 114].

See 15 Cent. Dig. tit. "Death." § 100.

Pension.— It has been held in New York that in assessing damages for the death of one employed in the city fire department the jury should not consider the pension his widow is receiving from the city in mitigation of damages. Demarest *v.* Little, 47 N. J. L. 28; Geary *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 441, 77 N. Y. Suppl. 54.

96. *Georgia.*— Western, etc., R. Co. *v.* Meigs, 74 Ga. 857.

Indiana.— Sherlock *v.* Alling, 44 Ind. 184.

Iowa.— Spaulding *v.* Chicago, etc., R. Co., 98 Iowa 205, 67 N. W. 227.

Missouri.— Carroll *v.* Missouri Pac. R. Co, 88 Mo. 239, 57 Am. Rep. 382.

New York.— Kellogg *v.* New York Cent., etc., R. Co., 79 N. Y. 72; Althorf *v.* Wolfe, 22 N. Y. 355.

Pennsylvania.— Coulter *v.* Pine Tp., 164 Pa. St. 543, 30 Atl. 490; North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15.

Texas.— Lipseomb *v.* Houston, etc., R. Co., 95 Tex. 5, 64 S. W. 923, 93 Am. St. Rep. 804, 55 L. R. A. 869; Houston, etc., R. Co. *v.* Weaver, (Civ. App. 1897) 41 S. W. 846; Tyler Southeastern R. Co. *v.* Rasberry, 13 Tex. Civ. App. 185, 34 S. W. 794.

Virginia.— Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431, 26 Am. Rep. 384.

See 15 Cent. Dig. tit. "Death," § 101.

Death benefits.— Nor will the fact that the mother of the deceased would receive from the relief department of the road, of which the deceased was a member, certain death

(II) *Subsequent Marriage of Spouse.* In an action by a husband for the death of his wife, or by a widow for the death of her husband, the subsequent marriage of the survivor is not to be considered in mitigation of the damages sought to be recovered;[97] nor the fact that the husband and wife were living in a state of separation at the time of the death of the spouse.[98]

(III) *Emancipation of Minor.* It has been held that in an action to recover damages for the death of a minor, the fact that the parents had released to such minor his time and services during his minority may be considered in mitigation of damages.[99]

(IV) *Medical and Funeral Expenses Defrayed by Defendant.* The fact that defendant paid the expenses of the support of the decedent from the time of his injury to the time of his death, and the funeral expenses, is not to be considered in mitigation of the damages.[1]

(V) *Pendency of Other Actions.* Nor is the fact that there are other actions pending to recover for the death of other persons caused by the accident resulting in the death sued for a proper ground for the mitigation of damages.[2]

(VI) *Contributory Negligence.* Where contributory negligence is not a defense to an action for death by wrongful act, as is the case in some jurisdictions,[3] such contributory negligence may it seems be considered in mitigation of damages sought to be recovered.[4]

e. Interest[5] — (I) *In General.* In the absence of statute[6] the general rule is that in an action for death by wrongful act interest will not be allowed on the amount of damages recovered prior to the judgment.[7]

(II) *What Law Governs.* The right to recover interest in an action for wrongful death, where the cause of action arises under the laws of a foreign state, rests exclusively on the laws of such foreign jurisdiction.[8]

2. Measure of[9] **— a. In General.** In the very nature of things an exact and

benefits be considered. Boulden *v.* Pennsylvania R. Co., 205 Pa. St. 264, 54 Atl. 906.

97. *Georgia.*— Georgia R., etc., Co. *v.* Garr, 57 Ga. 377, 24 Am. Rep. 492.

Illinois.— O. S. Richardson Fueling Co. *v.* Peters, 82 Ill. App. 508.

Indiana.— Consolidated Stone Co. *v.* Morgan, 160 Ind. 241, 66 N. E. 696.

Ohio.— Davis *v.* Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548.

Pennsylvania.—Philpott *v.* Pennsylvania R. Co., 175 Pa. St. 570, 34 Atl. 856.

Texas.— Gulf, etc., R. Co. *v.* Younger, 90 Tex. 387, 38 S. W. 1121; International, etc., R. Co. *v.* Kuehn, 70 Tex. 582, 8 S. W. 484.

See 15 Cent. Dig. tit. "Death," § 99.

98. Georgia Cent. R. Co. *v.* Bond, 111 Ga. 13, 36 S. E. 299; Boswell *v.* Barnhart, 96 Ga. 521, 23 S. E. 414, where the husband was confined in the chain-gang at the time of his death.

99. St. Joseph, etc., R. Co. *v.* Wheeler, 35 Kan. 185, 10 Pac. 461.

1. Murray *v.* Usher, 117 N. Y. 542, 23 N. E. 564 [*affirming* 46 Hun 404]; Linden *v.* Anchor Min. Co., 20 Utah 134, 58 Pac. 355.

2. Kansas City, etc., R. Co. *v.* Sanders, 98 Ala. 293, 13 So. 57.

3. See *supra*, III, A, 7, b.

4. Louisville, etc., R. Co. *v.* Howard, 90 Tenn. 144, 19 S. W. 116; Louisville, etc., R. Co. *v.* Conner, 61 Tenn. 382.

5. Interest as damages see, generally, DAMAGES, *ante*, p. 83 *et seq.*

6. In some jurisdictions, however, by statutory enactment, damages awarded for death by wrongful act draw interest from the time of the death, and such interest is added to the verdict and inserted in the entry of the judgment. Salter *v.* Utica, etc., R. Co., 86 N. Y. 401 (holding, however, that the right to interest in such actions is governed by the statute regulating it in force at the time that the verdict was rendered); Frounfelker *v.* Delaware, etc., R. Co., 73 N. Y. App. Div. 350, 76 N. Y. Suppl. 745; Kiefer *v.* Grand Trunk R. Co., 12 N. Y. App. Div. 28, 42 N. Y. Suppl. 171, 26 N. Y. Civ. Proc. 147; Cornwall *v.* Mills, 44 N. Y. Super. Ct. 45.

In other jurisdictions, by force of statute, or in accordance with established rules of practice, the question as to whether interest should be added to the damages is one for the jury. Central R. Co. *v.* Sears, 66 Ga. 499; Frounfelker *v.* Delaware, etc., R. Co., 73 N. Y. App. Div. 350, 76 N. Y. Suppl. 745.

7. Cook *v.* New York Cent., etc., R. Co., 10 Hun (N. Y.) 426.

8. Kiefer *v.* Grand Trunk R. Co., 153 N. Y. 688, 48 N. E. 1105 [*affirming* 12 N. Y. App. Div. 28, 42 N. Y. Suppl. 171, 26 N. Y. Civ. Proc. 147] (holding that where the accident occurred in Canada, the laws of which make no provision for interest on judgments in such cases, interest will not be allowed under the New York code (Code Civ. Proc. § 1904), providing that the clerk must add to the judgment interest from decedent's death); Frounfelker *v.* Delaware, etc., R. Co., 73 N. Y. App. Div. 350, 73 N. Y. Suppl. 745.

9. Measure of damages generally see DAMAGES, *ante*, p. 136 *et seq.*

uniform rule for measuring the value of the life of the deceased to the designated beneficiaries is impossible. The elements which go to make up the value are personal to each case.[10]

b. Recovery For Benefit of Estate. Under some statutes the recovery is measured by the amount which would probably have been saved to decedent's estate if he had lived, taking into consideration his occupation, age, health, and habits as to industry, sobriety, and economy, the amount of his property, and the probable duration of his life.[11] However, no arbitrary rule can be laid down in regard to damages, since the elements which enter into the question of the value of a life to the estate of the deceased are so various that the matters must be left under proper instructions from the court to the sound discretion of the jury.[12]

10. All that can well be done is to allow the jury to take into consideration all the matters which go to make the life taken away of pecuniary value to the survivors, and limited by the amount named in the statute, where there is a statutory limitation, and award compensation therefor; and the damages awarded must depend very much on the good sense and sound judgment of the jury upon all the facts and circumstances of the particular case. Louisville, etc., R. Co. *v.* Orr, 91 Ala. 548, 553, 8 So. 360 [*quoted* with approval in James *v.* Richmond, etc., R. Co., 92 Ala. 231, 9 So. 335], where the court said: "The jury have no arbitrary discretion to give as damages what they may see proper, without reference to a proper basis from which to estimate them. That the jury may have proper data from which a pecuniary compensation may be fixed, it is proper to admit evidence of the age, probable duration of life, habits of industry, means, business, earnings, health, skill of the deceased, and reasonable future expectations; and perhaps there are other facts which would exert a just influence in determining the pecuniary damage sustained." Treffert *v.* Ohio, etc., R. Co., 36 Ill. App. 93; Union Pac. R. Co. *v.* Dunden, 37 Kan. 1, 14 Pac. 501; Kansas Pac. R. Co. *v.* Cutter, 19 Kan. 91; Illinois Cent. R. Co. *v.* Barron, 5 Wall. (U. S.) 90, 18 L. ed. 591. And see *infra*, III, F, 2, b *et seq.*

Where a deceased son kept the premiums paid on a life-insurance policy of the father, inuring to the benefit of the mother, such fact should be taken into consideration by the jury in estimating the damages. Chicago, etc., R. Co. *v.* Shannon, 43 Ill. 338.

11. *Alabama.*— Louisville, etc., R. Co. *v.* Jones, 130 Ala. 456, 30 So. 586; Tutwiler Coal, etc., Co. *v.* Enslen, 129 Ala. 336, 30 So. 600; Alabama Mineral R. Co. *v.* Jones, 114 Ala. 519, 21 So. 507, 62 Am. St. Rep. 121; James *v.* Richmond, etc., R. Co., 92 Ala. 231, 9 So. 335; Louisville, etc., R. Co. *v.* Orr, 91 Ala. 548, 8 So. 360.

Delaware.—Neal *v.* Wilmington, etc., R. Co., 3 Pennew. 467, 53 Atl. 338; Tully *v.* Philadelphia, etc., R. Co., 3 Pennew. 455, 50 Atl. 95; Croker *v.* Pusey, etc., Co., 3 Pennew. 1, 50 Atl. 61; Maxwell *v.* Wilmington City R. Co., 1 Marv. 199, 40 Atl. 945.

Indiana.— Lake Erie, etc., R. Co. *v.* Mugg, 132 Ind. 168, 31 N. E. 564.

Iowa.—Hively *v.* Webster County, 117 Iowa 672, 91 N. W. 1041; Lowe *v.* Chicago, etc., R. Co., 89 Iowa 420, 56 N. W. 519; Wheelan *v.* Chicago, etc., R. Co., 85 Iowa 167, 52 N. W. 119; Lawrence *v.* Birney, 40 Iowa 377; Rose *v.* Des Moines Valley R. Co., 39 Iowa 246; Walters *v.* Chicago, etc., R. Co., 36 Iowa 458, 41 Iowa 71; Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391.

Kansas.— Kansas Pac. R. Co. *v.* Cutter, 19 Kan. 83.

Kentucky.— Louisville, etc., R. Co. *v.* Creighton, 106 Ky. 42, 50 S. W. 227, 20 Ky. L. Rep. 1691; Louisville, etc., R. Co. *v.* Clark, 105 Ky. 571, 49 S. W. 323, 20 Ky. L. Rep. 1375; Louisville, etc., R. Co. *v.* Eakins, 103 Ky. 465, 45 S. W. 529, 20 Ky. L. Rep. 933; Louisville, etc., R. Co. *v.* Kelly, 100 Ky. 421, 38 S. W. 852, 40 S. W. 452, 19 Ky. L. Rep. 69; Chesapeake, etc., R. Co. *v.* Lang, 100 Ky. 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271, 19 Ky. L. Rep. 65; Louisville, etc., R. Co. *v.* Berry, 96 Ky. 604, 29 S. W. 449, 16 Ky. L. Rep. 722; Southern R. Co. *v.* Evans, 63 S. W. 445, 23 Ky. L. Rep. 568; Southern R. Co. *v.* Barr, 55 S. W. 900, 21 Ky. L. Rep. 1615; Louisville, etc., R. Co. *v.* Shumaker, 53 S. W. 12, 21 Ky. L. Rep. 803 [rehearing *denied* in 108 Ky. 263, 56 S. W. 155, 21 Ky. L. Rep. 1701]; Louisville, etc., R. Co. *v.* Taaffe, 50 S. W. 850, 21 Ky. L. Rep. 64; Louisville, etc., R. Co. *v.* Milet, 46 S. W. 498, 20 Ky. L. Rep. 532; Louisville, etc., R. Co. *v.* Ward, 44 S. W. 1112, 19 Ky. L. Rep. 1900 (holding that the measure of damages for personal injuries resulting in death is not the value of decedent's power to labor, but the value of his power to earn money); Louisville, etc., R. Co. *v.* Morris, 20 S. W. 539, 14 Ky. L. Rep. 466.

Louisiana.— Vredenburg *v.* Behan, 33 La. Ann. 627.

Michigan.— Kyes *v.* Valley Telephone Co., (1903) 93 N. W. 623.

Oregon.— Carlson *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 450, 28 Pac. 497.

Pennsylvania.— Catawissa R. Co. *v.* Armstrong, 52 Pa. St. 282; Pennsylvania R. Co. *v.* McCloskey, 23 Pa. St. 526.

Tennessee.— Fowlkes *v.* N. & D. R. Co., 5 Baxt. 663; Louisville, etc., R. Co. *v.* Burke, 6 Coldw. 45.

United States.— Linss *v.* Chesapeake, etc., R. Co., 91 Fed. 964; Kelley *v.* Iowa Cent. R. Co., 48 Fed. 663; Ladd *v.* Foster, 31 Fed. 827, 12 Sawy. 547; Holmes *v.* Oregon, etc., R. Co., 5 Fed. 523, 6 Sawy. 276.

See 15 Cent. Dig. tit. "Death," § 103 *et seq.*

12. Chicago, etc., R. Co. *v.* Shannon, 43 Ill. 338 (holding that it is the province of the

c. Recovery For Designated Beneficiaries. In actions brought under Lord Campbell's Act and statutes modeled thereon, the reasonable expectation of pecuniary advantage by the designated beneficiaries should be taken into account by the jury,[13] and damages given only in respect of that expectation being disappointed, and the probable pecuniary loss thereby occasioned. This reasonable

jury to pass upon the issues of fact, and interference will only be had to prevent a plain perversion of justice); Waechter *v.* Second Ave. Traction Co., 198 Pa. St. 129, 47 Atl. 966; Pennsylvania R. Co. *v.* Ogier, 35 Pa. St. 60, 78 Am. Dec. 322; Pennsylvania R. Co. *v.* McCloskey, 23 Pa. St. 526; Kelley *v.* Iowa Cent. R. Co., 48 Fed. 663. See also St. Louis, etc., R. Co. *v.* Needham, 52 Fed. 371, 3 C. C. A. 129.

13. *Arkansas.*— St. Louis, etc., R. Co. *v.* Sweet, 60 Ark. 550, 31 S. W. 571.

California.— Hillebrand *v.* Standard Biscuit Co., 139 Cal. 233, 73 Pac. 163; Morgan *v.* Southern Pac. Co., 95 Cal. 510, 30 Pac. 603, 29 Am. St. Rep. 143, 17 L. R. A. 71; Munro *v.* Pacific Coast Dredging, etc., Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; Nehrbas *v.* Central Pac. R. Co., 62 Cal. 320 (holding that in an action by a parent for the death of his child, the jury is not limited to the actual pecuniary injury sustained by plaintiff by reason of the loss of the services of such child); Taylor *v.* Western Pac. R. Co., 45 Cal. 323.

Colorado.— Denver, etc., R. Co. *v.* Spencer, 25 Colo. 9, 52 Pac. 211; Hayes *v.* Williams, 17 Colo. 465, 30 Pac. 352; Moffatt *v.* Tenney, 17 Colo. 189, 30 Pac. 348; Denver, etc., R. Co. *v.* Woodward, 4 Colo. 1; Kansas Pac. R. Co. *v.* Lundin, 3 Colo. 94.

Delaware.— Williams *v.* Walton, etc., Co., 9 Houst. 322, 32 Atl. 726.

Georgia.— David *v.* Southwestern R. Co., 41 Ga. 223; Macon, etc., R. Co. *v.* Johnson, 38 Ga. 409.

Illinois.— Economy Light, etc., Co. *v.* Stephen, 187 Ill. 137, 58 N. E. 359; Cleveland, etc., R. Co. *v.* Baddeley, 150 Ill. 328, 36 N. E. 965; Holton *v.* Daly, 106 Ill. 131; Chicago *v.* Scholten, 75 Ill. 468; Illinois Cent. R. Co. *v.* Baches, 55 Ill. 379; Conant *v.* Griffin, 48 Ill. 410; Wetherell *v.* Chicago City R. Co., 104 Ill. App. 357; McNulta *v.* Jenkins, 91 Ill. App. 309; Armour *v.* Czischki, 59 Ill. App. 17; Lake Shore, etc., R. Co. *v.* Ouska, 51 Ill. App. 334; Maney *v.* Chicago, etc., R. Co., 49 Ill. App. 105; Chicago Consol. Bottling Co. *v.* Tietz, 37 Ill. App. 599; Chicago, etc., R. Co. *v.* Ashling, 34 Ill. App. 99; Lake Shore, etc., R. Co. *v.* Sunderland, 2 Ill. App. 307.

Iowa.— Rafferty *v.* Buckman, 46 Iowa 195.

Kansas.— Kansas Pac. R. Co. *v.* Cutter, 19 Kan. 83.

Maryland.— Western Maryland R. Co. *v.* State, 95 Md. 637, 53 Atl. 969; Baltimore, etc., R. Co. *v.* State, 41 Md. 268; Baltimore, etc., R. Co. *v.* State, 24 Md. 271.

Michigan.— Van Brunt *v.* Cincinnati, etc., R. Co., 78 Mich. 530, 44 N. W. 321; Nynning *v.* Detroit, etc., R. Co., 59 Mich. 257, 26 N. W. 514.

Minnesota.— Gunderson *v.* Northwestern Elevator Co., 47 Minn. 161, 49 N. W. 694; Hutchins *v.* St. Paul, etc., R. Co., 44 Minn. 5, 46 N. W. 79.

Missouri.— Haehl *v.* Wabash R. Co., 119 Mo. 325, 24 S. W. 737; Schaub *v.* Hannibal, etc., R. Co., 106 Mo. 74, 16 S. W. 924; Porter *v.* Hannibal, etc., R. Co., 71 Mo. 66, 36 Am. Rep. 454; Goss *v.* Missouri Pac. R. Co., 50 Mo. App. 614.

Nebraska.— Anderson *v.* Chicago, etc., R. Co., 35 Nebr. 95, 52 N. W. 840.

New Jersey.— May *v.* West Jersey, etc., R. Co., 62 N. J. L. 63, 42 Atl. 163; Telfer *v.* Northern R. Co., 30 N. J. L. 188.

New York.— Sternfels *v.* Metropolitan St. R. Co., 174 N. Y. 512, 66 N. E. 1117 [*affirming* 73 N. Y. App. Div. 494, 77 N. Y. Suppl. 309] (holding likewise that there was no error in refusing to charge that the jury must consider the possibility of deceased's becoming poor and the children being compelled to support him in his old age); Oldfield *v.* New York, etc., R. Co., 14 N. Y. 310; Sciurba *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 170, 76 N. Y. Suppl. 772; Lustig *v.* New York, etc., R. Co., 65 Hun 547, 20 N. Y. Suppl. 477; Mitchell *v.* New York Cent., etc., R. Co., 2 Hun 535; McIntyre *v.* New York Cent. R. Co., 47 Barb. 515; Lehman *v.* Brooklyn, 29 Barb. 234; Thomas *v.* Utica, etc., R. Co., 6 N. Y. Civ. Proc. 353; Tilley *v.* Hudson River R. Co., 23 How. Pr. 363; Wise *v.* Teerpenning, 2 Edm. Sel. Cas. 112; Palmer *v.* New York, etc., R. Co., 26 N. Y. Wkly. Dig. 26.

North Carolina.— Benton *v.* North Carolina R. Co., 122 N. C. 1007, 30 S. E. 333; Bradley *v.* Ohio River R., etc., Co., 122 N. C. 972, 30 S. E. 8; Coley *v.* Statesville, 121 N. C. 321, 28 S. E. 482; Burton *v.* Wilmington, etc., R. Co., 82 N. C. 504; Kelser *v.* Smith, 66 N. C. 154.

Ohio.— Steel *v.* Kurtz, 28 Ohio St. 191; Grotenkemper *v.* Harris, 25 Ohio St. 510; McClardy *v.* Chandler, 3 Ohio Dec. (Reprint) 1, 1 Wkly. L. Gaz. 1; Hall *v.* Crain, 2 Ohio Dec. (Reprint) 453, 3 West. L. Month. 137.

Pennsylvania.— Huntingdon, etc., R., etc., Co. *v.* Decker, 84 Pa. St. 419; Caldwell *v.* Brown, 53 Pa. St. 453; Disbrow *v.* Ulster Tp., (1887) 8 Atl. 912; North Pennsylvania R. Co. *v.* Robinson, 44 Pa. St. 175; Pennsylvania R. Co. *v.* Vandever, 36 Pa. St. 298.

Texas.— Galveston, etc., R. Co. *v.* Worthy, 87 Tex. 459, 29 S. W. 376; McGown *v.* International, etc., R. Co., 85 Tex. 289, 20 S. W. 80; March *v.* Walker, 48 Tex. 372; Houston, etc., R. Co. *v.* Johnson, (Civ. App. 1901) 66 S. W. 72; San Antonio R. Co. *v.* Waller, (Civ. App. 1901) 65 S. W. 210; International Light, etc., Co. *v.* Maxwell, (Civ. App. 1901) 65 S. W. 78; Galveston, etc., R. Co. *v.* Johnson, 24 Tex. Civ. App. 180, 58 S. W. 622;

expectation of pecuniary advantage includes the probable or prospective earnings or accumulations of the deceased, and the deprivation of the beneficiaries of what they might have reasonably expected from this source is an element to be taken into consideration by the jury in computing damages.[14]

d. Specific Elements of Compensation — (i) *Loss of Support.* In an action by a wife for the wrongful death of her husband, or by a child for the death of a parent, the jury in estimating the damages may consider what would be a reasonable support for the wife or child, according to the circumstances in life of the husband or parent as they existed at the death, and as they may be reasonably

Galveston, etc., R. Co. *v.* Hughes, 22 Tex. Civ. App. 134, 54 S. W. 264; Gulf, etc., R. Co. *v.* Southwick, (Civ. App. 1895) 30 S. W. 592.

Vermont.— Needham *v.* Grand Trunk R. Co., 38 Vt. 294.

Washington.— See also Klepsch *v.* Donald, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936.

Wisconsin.— Liermann *v.* Chicago, etc., R. Co., 82 Wis. 286, 52 N. W. 91, 33 Am. St. Rep. 37; Abbott *v.* McCadden, 81 Wis. 563, 51 N. W. 1079, 29 Am. St. Rep. 910; Tuteur *v.* Chicago, etc., R. Co., 77 Wis. 505, 46 N. W. 897; Potter *v.* Chicago, etc., R. Co., 21 Wis. 372, 94 Am. Dec. 548.

United States.— Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 L. ed. 624; Brady *v.* Chicago, 3 Fed. Cas. No. 1,796, 4 Biss. 448; Gohen *v.* Texas Pac. R. Co., 10 Fed. Cas. No. 5,506, 2 Woods 346; Hollyday *v.* The David Reeves, 12 Fed. Cas. No. 6,625, 5 Hughes 89.

England.— Blake *v.* Midland R. Co., 18 Q. B. 93, 16 Jur. 562, 21 L. J. Q. B. 233, 83 E. C. L. 93; Pym *v.* Great Northern R. Co., 4 B. & S. 396, 10 Jur. N. S. 199, 32 L. J. Q. B. 377, 8 L. T. Rep. N. S. 734, 11 Wkly. Rep. 922, 116 E. C. L. 396; Dalton *v.* South Eastern R. Co., 4 C. B. N. S. 295, 4 Jur. N. S. 711, 27 L. J. C. P. 227, 6 Wkly. Rep. 574, 93 E. C. L. 296; Franklin *v.* South Eastern R. Co., 3 H. & N. 211, 4 Jur. N. S. 565, 6 Wkly. Rep. 573; Sykes *v.* North Eastern R. Co., 44 L. J. C. P. 191, 32 L. T. Rep. N. S. 199, 23 Wkly. Rep. 473.

Canada.— McDonald *v.* Rex, 7 Can. Exch. 216.

See 15 Cent. Dig. tit. "Death," § 112.

14. *Alabama.*— Louisville, etc., R. Co. *v.* Jones, 130 Ala. 456, 30 So. 586; McAdory *v.* Louisville, etc., R. Co., 94 Ala. 372, 10 So. 507.

California.— Redfield *v.* Oakland Consol. St. R. Co., 110 Cal. 277, 42 Pac. 822; McKeever *v.* Market St. R. Co., 59 Cal. 294.

Colorado.— Denver, etc., R. Co. *v.* Spencer, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121; Hayes *v.* Williams, 17 Colo. 465, 30 Pac. 352; Denver, etc., R. Co. *v.* Woodward, 4 Colo. 1; Kansas Pac. R. Co. *v.* Lundin, 3 Colo. 94.

Delaware.— Cox *v.* Wilmington City R. Co., (1902) 53 Atl. 569; Williams *v.* Walton, etc., Co., 9 Houst. 322, 32 Atl. 726.

Florida.— Duval *v.* Hunt, 34 Fla. 85, 15 So. 876.

Georgia.— Savannah, etc., R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183.

Illinois.—O'Fallon Coal, etc., Co. *v.* Laquet, 198 Ill. 125, 64 N. E. 767 [*affirming* 89 Ill. App. 13]; Cleveland, etc., R. Co. *v.* Keenan, 190 Ill. 217, 60 N. E. 107; Illinois Cent. R. Co. *v.* Gilbert, 51 Ill. App. 404; McLean County Coal Co. *v.* McVey, 38 Ill. App. 158.

Indiana.— Lake Erie, etc., R. Co. *v.* Mugg, 132 Ind. 168, 31 N. E. 564; Chicago, etc., R. Co. *v.* Branyan, 10 Ind. App. 570, 37 N. E. 190.

Kansas.— Kansas Pac. R. Co. *v.* Cutter, 19 Kan. 83.

Kentucky.— Louisville, etc., R. Co. *v.* Tucker, 65 S. W. 453, 23 Ky. L. Rep. 1929; Southern R. Co. *v.* Evans, 63 S. W. 445, 23 Ky. L. Rep. 568.

Maryland.— Western Maryland R. Co. *v.* State, 95 Md. 637, 53 Atl. 969; Baltimore, etc., R. Co. *v.* State, 60 Md. 449; Baltimore, etc., R. Co. *v.* Woodward, 41 Md. 268; Baltimore, etc., R. Co. *v.* State, 33 Md. 542.

Michigan.— Richmond *v.* Chicago, etc., R. Co., 87 Mich. 374, 49 N. W. 621.

Montana.— Soyer *v.* Great Falls Water Co., 15 Mont. 1, 37 Pac. 838.

New Jersey.— Hackney *v.* Delaware, etc., Tel., etc., Co., (Err. & App. 1903) 55 Atl. 252; Graham *v.* Consolidated Traction Co., 64 N. J. L. 10, 44 Atl. 964.

New Mexico.— Cerrillos Coal R. Co. *v.* Deserant, 9 N. M. 49, 49 Pac. 807.

New York.— Countryman *v.* Fonda, etc., R. Co., 166 N. Y. 201, 59 N. E. 822, 82 Am. St. Rep. 640; Oldfield *v.* New York, etc., R. Co., 14 N. Y. 310; Beecher *v.* Long Island R. Co., 53 N. Y. App. Div. 324, 65 N. Y. Suppl. 642; Johnson *v.* Long Island R. Co., 80 Hun 306, 30 N. Y. Suppl. 318; Thomas *v.* Utica, etc., R. Co., 6 N. Y. Civ. Proc. 353.

North Carolina.— McLamb *v.* Wilmington, etc., R. Co., 122 N. C. 862, 29 S. E. 894; Burton *v.* Wilmington, etc., R. Co., 82 N. C. 504; Kresler *v.* Smith, 66 N. C. 154.

Ohio.— Hall *v.* Crane, 2 Ohio Dec. (Reprint) 453, 3 West. L. Month. 137.

Oregon.— Carlson *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 450, 28 Pac. 497.

Pennsylvania.—Pennsylvania Telephone Co. *v.* Varnau, (1888) 15 Atl. 624; Boyd *v.* Hutchinson, 18 Phila. 283.

Tennessee.— Collins *v.* East Tennessee, etc., R. Co., 9 Heisk. 841.

Texas.— San Antonio, etc., R. Co. *v.* Long, 87 Tex. 148, 21 S. W. 113, 47 Am. St. Rep. 87, 24 L. R. A. 637; Missouri Pac. R. Co. *v.* Lee, 70 Tex. 496, 7 S. W. 857; St. Louis Southwestern R. Co. *v.* Bowles, (Civ. App. 1903) 72 S. W. 451; Missouri, etc., R. Co. *v.*

supposed to exist in the future, in view of the character, habits, occupation, and prospects in life of the deceased.[15]

(II) *Loss of Services* — (A) *In Action by Parent.* Under some statutes the rule is laid down that the measure of damages, in an action by a parent for the wrongful death of a minor, is the value of the child's services from the time of his death until he would have reached his majority, taken in connection with his prospects in life, less the cost of his support during such time, including education and medical attendance.[16] In some jurisdictions, however, the rule is laid down

Hines, (Civ. App. 1897) 40 S. W. 152; International, etc., R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58.

Vermont.— Boyden *v.* Fitchburg R. Co., 70 Vt. 125, 39 Atl. 771.

Virginia.— Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. 394.

West Virginia.— Searle *v.* Kanawha, etc., R. Co., 32 W. Va. 370, 9 S. E. 248.

Wisconsin.— Bauer *v.* Richter, 103 Wis. 412, 79 N. W. 404; Rudiger *v.* Chicago, etc., R. Co., 101 Wis. 292, 77 N. W. 169; Tuteur *v.* Chicago, etc., R. Co., 77 Wis. 505, 46 N. W. 897; Castello *v.* Landwehr, 28 Wis. 522; Potter *v.* Chicago, etc., R. Co., 21 Wis. 372, 94 Am. Dec. 548.

United States.— Florida Cent., etc., R. Co. *v.* Sullivan, 120 Fed. 799, 57 C. C. A. 167, 61 L. R. A. 410; *In re* California Nav., etc., Co., 110 Fed. 670; Collins *v.* Davidson, 19 Fed. 83.

See 15 Cent. Dig. tit. "Death," § 112.

15. *Alabama.*— Louisville, etc., R. Co. *v.* Brown, 121 Ala. 221, 25 So. 609.

Florida.— Florida, etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149.

Georgia.— Central R., etc., Co. *v.* Rouse, 80 Ga. 442, 5 S. E. 627; Atlanta, etc., R. Co. *v.* Venable, 67 Ga. 697; David *v.* Southwestern R. Co., 41 Ga. 223; Macon, etc., R. Co. *v.* Johnson, 38 Ga. 409.

Illinois.— Pennsylvania Co. *v.* Keane, 143 Ill. 172, 32 N. E. 260 [*affirming* 41 Ill. App. 317, and *following* Chicago, etc., R. Co. *v.* May, 108 Ill. 288] (holding that in an action by a widow, as administratrix of her husband, for negligently causing his death, it was proper to allow her to testify that the deceased was at the time of his death her sole support); Chicago *v.* Powers, 42 Ill. 169, 89 Am. Dec. 418; Chicago, etc., R. Co. *v.* Kelly, 80 Ill. App. 675. See also Ohio, etc., R. Co. *v.* Simms, 43 Ill. App. 260.

Indiana.— Lake Erie, etc., R. Co. *v.* Mugg, 132 Ind. 168, 31 N. E. 564.

Iowa.— Rafferty *v.* Buckman, 46 Iowa 195.

Maryland.— Baltimore, etc., R. Co. *v.* State, 24 Md. 271.

Missouri.— McPherson *v.* St. Louis, etc., R. Co., 97 Mo. 253, 10 S. W. 846 (holding that in an action for death brought by deceased's minor children, the measure of damages is a fair and reasonable compensation to them for the loss of their father's services as a means of support during their minority); Bowerman *v.* Lackawanna Min. Co., 98 Mo. App. 308, 71 S. W. 1062.

New York.— Althof *v.* Wolf, 2 Hilt. 344.

Pennsylvania.— Pennsylvania R. Co. *v.* Adams, 55 Pa. St. 499; Pennsylvania R. Co. *v.* Henderson, 51 Pa. St. 315.

Texas.— Galveston, etc., R. Co. *v.* Puente, 30 Tex. Civ. App. 246, 70 S. W. 362, holding that in an action by a child for the wrongful death of his father, the damages to be awarded are not limited to such damages as accrue during the child's minority. See also International, etc., R. Co. *v.* Culpepper, 19 Tex. Civ. App. 182, 46 S. W. 922.

Canada.— Durand *v.* Asbestos, etc., Co., 19 Quebec Super. Ct. 39.

See 15 Cent. Dig. tit. "Death," § 117.

Loss of a pension or annuity, dependent on the continuance of decedent's life, may be recovered as part of the damages. Ewen *v.* Chicago, etc., R. Co., 38 Wis. 613; Rowley *v.* London, etc., R. Co., L. R. 8 Exch. 221, 42 L. J. Exch. 153, 29 L. T. Rep. N. S. 180, 21 Wkly. Rep. 869.

16. *Arkansas.*— St. Louis, etc., R. Co. *v.* Davis, 55 Ark. 462, 18 S. W. 628 (holding that in an action by a father to recover for the death of a minor son, his right to recover was not limited to the value of decedent's services during minority); St. Louis, etc., R. Co. *v.* Freeman, 36 Ark. 41; Little Rock, etc., R. Co. *v.* Barker, 33 Ark. 350, 34 Am. Rep. 44.

District of Columbia.— Bunyea *v.* Metropolitan R. Co., 19 D. C. 76.

Georgia.— Augusta Factory *v.* Davis, 87 Ga. 648, 13 S. E. 577.

Illinois.— Chicago, etc., R. Co. *v.* Beaver, 199 Ill. 34, 65 N. E. 144 [*affirming* 96 Ill. App. 558]; Illinois Cent. R. Co. *v.* Slater, 129 Ill. 91, 21 N. E. 575, 16 Am. St. Rep. 242, 6 L. R. A. 418; Rockford, etc., R. Co. *v.* Delaney, 82 Ill. 198, 25 Am. Rep. 308; West Chicago St. R. Co. *v.* Dooley, 76 Ill. App. 424; Callaway *v.* Spurgeon, 63 Ill. App. 571; Bradley *v.* Sattler, 54 Ill. App. 504. See, however, Rockford, etc., R. Co. *v.* Delaney, 82 Ill. 198, 25 Am. Rep. 308, holding that in such an action the jury should consider the value of deceased's services from the time of his death until he would have attained his majority, deducting the expense of feeding and clothing him during that time.

Indiana.— Louisville, etc., R. Co. *v.* Rush, 127 Ind. 545, 26 N. E. 1010; Pennsylvania Co. *v.* Lilly, 73 Ind. 252; Ohio, etc., R. Co. *v.* Tindall, 13 Ind. 366, 74 Am. Dec. 259; Elwood *v.* Addison, 26 Ind. App. 28, 59 N. E. 47.

Iowa.— Hopkinson *v.* Knapp, etc., Co., 92 Iowa 328, 60 N. W. 653; Benton *v.* Chicago, etc., R. Co., 55 Iowa 496, 8 N. W. 330.

Kansas.— Atchison, etc., R. Co. *v.* Cross, 58 Kan. 424, 49 Pac. 599.

that in estimating the damages of parents for the death of their child, only the pecuniary value of the minor's services during his minority should be estimated, and that any benefit which might have accrued to them after such child attained his majority is too vague and speculative to be taken into consideration.[17]

(B) *In Action by Husband.* In an action by a husband for the death of his wife an element to be considered in estimating the proper measure of damages is the excess in pecuniary value of the wife's services over the cost of suitably maintaining her.[18]

Nebraska.— Draper *v.* Tucker, (1903) 95 N. W. 1026.

New York.— Birkett *v.* Knickerbocker Ice Co., 110 N. Y. 504, 18 N. E. 108; McGovern *v.* New York Cent., etc., R. Co., 67 N. Y. 417; Connaughton *v.* Sun Printing, etc., Assoc., 72 N. Y. App. Div. 316, 76 N. Y. Suppl. 755; Ford *v.* Monroe, 20 Wend. 210.

Texas.—San Antonio Traction Co. *v.* White, 94 Tex. 468, 61 S. W. 706; Gulf, etc., R. Co. *v.* Compton, 75 Tex. 667, 13 S. W. 667; Freeman *v.* Carter, 28 Tex. Civ. App. 571, 67 S. W. 527; Texas, etc., R. Co. *v.* Harby, 28 Tex. Civ. App. 24, 67 S. W. 541 (holding that an instruction that the measure of damages is the present pecuniary value of the services the child would have rendered to the parents is not erroneous in not being limited to the services which the child would have performed during its minority); Cole *v.* Parker, 27 Tex. Civ. App. 563, 66 S. W. 135; San Antonio St. R. Co. *v.* Mechler, (Civ. App. 1894) 29 S. W. 202; Galveston, etc., R. Co. *v.* Davis, 4 Tex. Civ. App. 468, 23 S. W. 301.

Utah.— Beaman *v.* Martha Washington Min. Co., 23 Utah 139, 63 Pac. 631.

Wisconsin.— Johnson *v.* Chicago, etc., R. Co., 64 Wis. 425, 25 N. W. 223, holding that the jury may take into account the reasonable expectation of pecuniary benefit, even after the deceased had attained his majority. See also Luessen *v.* Oshkosh Electric Light, etc., Co., 109 Wis. 94, 85 N. W. 124. But see Potter *v.* Chicago, etc., R. Co., 21 Wis. 372, 94 Am. Dec. 548.

United States.— Texas, etc., R. Co. *v.* Wilder, 92 Fed. 953, 35 C. C. A. 105 (holding that it is proper for the jury in assessing damages to consider what reasonable expectations the parents had of pecuniary benefit to be received from their son after he had reached his majority, as the statute does not confine the damages to the loss of benefits to which the parents had a legal right); Barley *v.* Chicago, etc., R. Co., 2 Fed. Cas. No. 997, 4 Biss. 430; Sullivan *v.* Union Pac. R. Co., 23 Fed. Cas. No. 13,599, 3 Dill. 334.

See 15 Cent. Dig. tit. "Death," § 115. See also Zimmerman *v.* Denver Consol. Tramway Co., (Colo. App. 1903) 72 Pac. 607; Hall *v.* Crain, 2 Ohio Dec. (Reprint) 453, 3 West. L. Month. 137, holding that in determining the damages for death by wrongful act, the loss of the services of the deceased to relatives not next of kin cannot be considered.

Cost of maintaining.—It was held in Texas, etc., R. Co. *v.* Yarbrough, (Tex. Civ. App. 1903) 73 S. W. 844, that an instruction as to the damages recoverable for the negligent death of plaintiff's minor son, which failed to state that the cost of the boy's "keep" should be deducted in estimating the value of his services, was not misleading, as any jury would presumably so understand.

In **Alabama** the rule has been laid down that damages for the loss of earnings prior to the time when the minor would have attained his majority cannot be allowed, because his father would be entitled to his earnings until he became of age. Tutwiler Coal, etc., Co. *v.* Enslen, 129 Ala. 336, 30 So. 600; Alabama Connellsville Coal, etc., Co. *v.* Pitts, 98 Ala. 285, 13 So. 135; Linss *v.* Chesapeake, etc., R. Co., 91 Fed. 964; Morris *v.* Chicago, etc., R. Co., 26 Fed. 22.

In **Kentucky** the rule has been laid down that in an action by a parent for the death of a child, recovery can only be had by way of damages for the expenses incurred for medical attendance, care, and nursing, and for the loss of service from the date of injury to the time of the child's death. Covington St. R. Co. *v.* Packer, 9 Bush 455, 15 Am. Rep. 725; Eden *v.* Lexington, etc., R. Co., 14 B. Mon. 204.

17. *Maryland.*— Washington County Agricultural, etc., Assoc. *v.* State, 71 Md. 86, 18 Atl. 37, 17 Am. St. Rep. 507; State *v.* Baltimore, etc., R. Co., 24 Md. 84, 87 Am. Dec. 600.

Michigan.— Snyder *v.* Lake Shore, etc., R. Co., (1902) 91 N. W. 643; Cooper *v.* Lake Shore, etc., R. Co., 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482.

Missouri.— Leahy *v.* Davis, 121 Mo. 227, 25 S. W. 941; Pains *v.* St. Louis, etc., R. Co., 71 Mo. 164, 36 Am. Rep. 459; Stumbo *v.* Duluth Zinc Co., 100 Mo. App. 635, 75 S. W. 185.

New Jersey.— May *v.* West Jersey, etc., R. Co., 62 N. J. L. 67, 42 Atl. 165.

Pennsylvania.— Caldwell *v.* Brown, 53 Pa. St. 453; Pennsylvania R. Co. *v.* Zebe, 33 Pa. St. 318; Birmingham *v.* Dorer, 3 Brewst. 69; Lehigh Iron Co. *v.* Rupp, 12 Wkly. Notes Cas. 47; Coakley *v.* North Pennsylvania R. Co., 5 Pa. L. J. Rep. 444.

See 15 Cent. Dig. tit. "Death," § 115.

18. Nelson *v.* Lake Shore, etc., R. Co., 104 Mich. 582, 62 N. W. 993; Cregin *v.* Brooklyn Crosstown R. Co., 19 Hun (N. Y.) 341; Pennsylvania R. Co. *v.* Goodman, 62 Pa. St. 329; Gulf, etc., R. Co. *v.* Southwick, (Tex. Civ. App. 1895) 30 S. W. 592. See also Tilley *v.* Hudson River R. Co., 24 N. Y. 471. But see Dickens *v.* New York Cent. R. Co., 23 N. Y. 158, holding that a husband suing as an administrator cannot give in evidence the money value of his wife's services to him.

(III) *Loss of Society.* By the great weight of authority, in an action by parents for the wrongful death of their child,[19] by a husband or wife for the death of his or her spouse,[20] or by next of kin for the wrongful death of the decedent,[21] damages cannot be recovered for the loss of the society of the deceased.

(IV) *Loss of Prospective Intellectual and Moral Culture.* The rule seems to be well recognized that in an action for the wrongful death of a parent, the loss to the minor children of instruction, and physical, intellectual, and moral training by such parent, is a proper element to be considered in estimating the damages for the death, where it is shown that the deceased was of industrious habits, good character, and a dutiful parent.[22] In some jurisdictions,

The ordinary services of a wife in a household are not a pecuniary benefit to the children or the next of kin, so as to be an element of damages for her death, recoverable by them. May *v.* West Jersey, etc., R. Co., 62 N. J. L. 67, 42 Atl. 165.

19. *Arkansas.*— Little Rock, etc., R. Co. *v.* Barker, 33 Ark. 350, 34 Am. Rep. 44.

California.— Wales *v.* Pacific Electric Motor Co., 130 Cal. 521, 62 Pac. 932, 1120; Harrison *v.* Sutter St. R. Co., 116 Cal. 156, 47 Pac. 1019; Pepper *v.* Southern Pac. Co., 105 Cal. 389, 38 Pac. 947.

Idaho.— Holt *v.* Spokane, etc., R. Co., 3 Ida. 703, 35 Pac. 39.

Mississippi.— Mobile, etc.. R. Co. *v.* Watly, 69 Miss. 145, 13 So. 825.

Missouri.— Kuight *v.* Sadtler Lead, etc., Co., 75 Mo. App. 541.

Pennsylvania.— Caldwell *v.* Brown, 53 Pa. St. 453; Coakley *v.* North Pennsylvania R. Co., 5 Pa. L. J. Rep. 444.

Texas.— Taylor, etc., R. Co. *v.* Warner, 84 Tex. 122, 19 S. W. 449, 20 S. W. 823.

Wisconsin.— Potter *v.* Chicago, etc., R. Co., 21 Wis. 372, 94 Am. Dec. 548.

See 15 Cent. Dig. tit. "Death," § 116. See, however, Howard County *v.* Legg, 93 Ind. 523, 47 Am. Rep. 390, holding that damages for the negligent killing of a parent should include the child's loss of the parent's care and training.

Contra.— Corbett *v.* Oregon Short Line R. Co., 25 Utah 449, 71 Pac. 1065 (holding that in an action by a parent for the negligent death of a child, it was proper to authorize a recovery for the loss of the services of the child, and its society and comfort, the court expressly excluding any recovery for the sorrow, grief, or anguish of the parent, or for the pain and suffering of the child); Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. (Va.) 394.

20. *California.*— Munro *v.* Pacific Coast Dredging, etc., Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; Beeson *v.* Green Mountain Gold Min. Co., 57 Cal. 20. See Green *v.* Southern California R. Co., (1901) 67 Pac. 4.

Indiana.— Howard County *v.* Legg, 93 Ind. 523, 47 Am. Rep. 390.

Iowa.— Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391.

Missouri.— Schaub *v.* Hannibal, etc., R. Co., 106 Mo. 74, 16 S. W. 924.

New York.— Green *v.* Hudson River R. Co., 32 Barb. 25.

Tennessee.— Illinois Cent. R. Co. *v.* Bentz, 108 Tenn. 670, 69 S. W. 317, 58 L. R. A. 690.

Texas.— Galveston, etc., R. Co. *v.* Worthy, 87 Tex. 459, 29 S. W. 376; McGown *v.* International, etc., R. Co., 85 Tex. 289, 20 S. W. 80; Gulf, etc., R. Co. *v.* Finley, 11 Tex. Civ. App. 64, 32 S. W. 51.

United States.— Atchison, etc., R. Co. *v.* Wilson, 48 Fed. 57, 1 C. C. A. 25; Brady *v.* Chicago, 3 Fed. Cas. No. 1,796, 4 Biss. 448.

See 15 Cent. Dig. tit. "Death," § 116.

Contra.— Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149 (holding that the jury may consider the loss of the comfort, protection, and society of the husband, as shown by the evidence in relation to his character, habits, and conduct as a husband, and the marital relations between the parties at the time of and prior to his death); Pennsylvania R. Co. *v.* Goodman, 62 Pa. St. 329; Wells *v.* Denver, etc., R. Co., 7 Utah 482, 27 Pac. 688.

21. Sternfels *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 494, 77 N. Y. Suppl. 309; Lazelle *v.* Newfane, 70 Vt. 440, 41 Atl. 511; Northern Pac. R. Co. *v.* Freeman, 83 Fed. 82, 27 C. C. A. 457; Filiatrault *v.* Canadian Pac. R. Co., 18 Quebec 491.

22. *Arkansas.*— St. Louis, etc., R. Co. *v.* Haist, (1903) 72 S. W. 893; St. Louis, etc., R. Co. *v.* Sweet, 60 Ark. 550, 31 S. W. 571; St. Louis, etc., R. Co. *v.* Maddray, 57 Ark. 306, 21 S. W. 472.

Colorado.— Kansas Pac. R. Co *v.* Miller, 2 Colo. 442.

Michigan.— Walker *v.* Lake Shore, etc., R. Co., 111 Mich. 518, 69 N. W. 1114, holding, however, that it is error to allow the jury to consider damages sustained by decedent's children from the loss of culture and moral and physical training received from the father, of the value of which there was no evidence.

Minnesota.— Gunderson *v.* Northwestern Elevator Co., 47 Minn. 161, 49 N. W. 694.

Missouri.— Stoher *v.* St. Louis, etc., R. Co., 91 Mo. 509, 4 S. W. 389; Goss *v.* Missouri Pac. R. Co., 50 Mo. App. 614.

New York.— Sternfels *v.* Metropolitan St. R. Co., 174 N. Y. 512, 66 N. E. 1117; McIntyre *v.* New York Cent. R. Co., 37 N. Y. 287; Tilley *v.* Hudson River R. Co., 29 N. Y. 252, 86 Am. Dec. 297, 24 N. Y. 471, 23 How. Pr. 363.

Texas.— Galveston, etc., R. Co. *v.* Davis, 27 Tex. Civ. App. 279, 65 S. W. 217. See also Chicago, etc., R. Co. *v.* Porterfield, 19 Tex. Civ. App. 225, 46 S. W. 919. *Contra*, Gulf,

however, it has been held that in the absence of evidence that the deceased was fitted by nature, education, or disposition to furnish his children with instruction, or moral, physical, or intellectual training, such elements should not be considered by the jury in computing damages.[23]

(v) *Physical Suffering of Deceased.* Under some statutes the right of action is given for the injury to and death of decedent, and it has been held under such statutes that recovery can be had for the physical pain and suffering of deceedent.[24] However, under the statutes giving a right of action for wrongful death for the benefit of the widow and next of kin or other designated beneficiaries, the measure of damages is the pecuniary loss of such beneficiaries, and the suffering and injury of the deceased cannot be considered.[25]

etc., R. Co. *v.* Finley, 11 Tex. Civ. App. 64, 32 S. W. 51.

Vermont.— Hoadley *v.* International Paper Co., 72 Vt. 79, 47 Atl. 169.

Virginia.— Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431, 26 Am. Rep. 384.

West Virginia.— Searle *v.* Kanawha, etc., R. Co., 32 W. Va. 370, 9 S. E. 248.

Wisconsin.— Castello *v.* Landwehr, 28 Wis. 522.

United States.— Northern Pac. R. Co. *v.* Freeman, 83 Fed. 82, 27 C. C. A. 457.

See 15 Cent. Dig. tit. "Death," § 119. See also Demarest *v.* Little, 47 N. J. L. 28, in which case the children were adults and established in business.

23. St. Louis, etc., R. Co. *v.* Townsend, 69 Ark. 380, 63 S. W. 994; Chicago, etc., R. Co. *v.* Austin, 69 Ill. 426; Illinois Cent. R. Co. *v.* Weldon, 52 Ill. 290; Peoria, etc., R. Co. *v.* O'Brien, 18 Ill. App. 28. See May *v.* West Jersey, etc., R. Co., 62 N. J. L. 63, 42 Atl. 163, holding that in an action by an administrator to recover damages for the wrongful death of an intestate, for the benefit of his children as next of kin, the advice of the deceased to the next of kin, in order to be an element of damage, must be shown to relate to pecuniary affairs of next of kin, and that it would result in a pecuniary benefit to them.

24. *Arkansas.*— St. Louis, etc., R. Co. *v.* Dawson, 68 Ark. 1, 56 S. W. 46; St. Louis, etc., R. Co. *v.* McCain, 67 Ark. 377, 55 S. W. 165.

Florida.— Florida Cent., etc, R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149.

Kentucky.— Louisville, etc., R. Co. *v.* Coniff, 90 Ky. 560, 14 S. W. 543, 12 Ky. L. Rep. 545; Louisville, etc., R. Co. *v.* Sanders, 44 S. W. 644, 19 Ky. L. Rep. 1941; Louisville, etc., R. Co. *v.* Smith, 9 Ky. L. Rep. 404.

Michigan.— Sweetland *v.* Chicago, etc., R. Co., 117 Mich. 329, 75 N. W. 1066, 43 L. R. A. 568.

Mississippi.— Illinois Cent. R. Co. *v.* Harris, (1901) 29 So. 760.

New Hampshire.— Corliss *v.* Western, etc., R. Co., 63 N. H. 404; Jewett *v.* Keene, 62 N. H. 701; Clark *v.* Manchester, 62 N. H. 577.

Tennessee.— Davidson-Benedict Co. *v.* Severson, 109 Tenn. 572, 12 S. W. 967; Illinois Cent. R. Co. *v.* Davis, 104 Tenn. 442, 58 S. W. 296; Louisville, etc., R. Co. *v.* Conley, 10 Lea 531; East Tennessee, etc., R. Co. *v.* Toppins, 10 Lea 58.

See 15 Cent. Dig. tit. "Death," § 106. See also Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462 (holding that where plaintiff dies after bringing an action for injuries sustained by him, and his administrator is substituted, he may as such recover the amount due his decedent at the time suit was brought, including compensation for his bodily pain and suffering); Needham *v.* Grand Trunk R. Co., 38 Vt. 294.

In an action for malpractice, where the patient died, it has been held that damages can only include such loss, expense, and suffering as was due to defendant's default, in excess of what they would have been had the case been properly treated. Ramsdell *v.* Grady, 97 Me. 319, 54 Atl. 763.

25. *Alabama.*— James *v.* Richmond, etc., R. Co., 92 Ala. 231, 9 So. 335.

Illinois.— Holton *v.* Daly, 106 Ill. 131; West Chicago St. R. Co. *v.* Foster, 74 Ill. App. 414; Maney *v.* Chicago, etc., R. Co., 49 Ill. App. 105.

Iowa.— Dwyer *v.* Chicago, etc., R. Co., 84 Iowa 479, 51 N. W. 244, 35 Am. St. Rep. 322; Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391.

Kentucky.— Louisville, etc., R. Co. *v.* Graham, 98 Ky. 688, 34 S. W. 229, 17 Ky. L. Rep. 1229, construing Alabama statute.

Maine.— Oakes *v.* Maine Cent. R. Co., 95 Me. 103, 49 Atl. 418.

Massachusetts.—Kennedy *v.* Standard Sugar Refinery, 125 Mass. 90, 28 Am. Rep. 214.

Missouri.— Goss *v.* Missouri Pac. R. Co., 50 Mo. App. 614.

New Mexico.— Cerrillos Coal R. Co. *v.* Deserant, 9 N. M. 49, 49 Pac. 807.

New York.— Etherington *v.* Prospect Park, etc., R. Co., 88 N. Y. 641 [*affirming* 24 Hun 235]; Whitford *v.* Panama R. Co., 23 N. Y. 465; Quin *v.* Moore, 15 N. Y. 432; Oldfield *v.* New York, etc., R. Co., 14 N. Y. 310; Lehman *v.* Brooklyn, 29 Barb. 234; Dorman *v.* Brooklyn Broadway R. Co., 1 N. Y. Suppl. 334.

Ohio.— Hall *v.* Crain, 2 Ohio Dec. (Reprint) 453, 3 West. L. Month. 137.

Oregon.— Carlson *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 450, 28 Pac. 497.

Pennsylvania.— Pennsylvania R. Co. *v.* Goodman, 62 Pa. St. 329.

Texas.— Galveston, etc., R. Co. *v.* Matula,

(VI) *Mental Suffering of Beneficiaries.* The jury is not authorized to take into consideration the mental suffering of the beneficiaries designated by the statute, and award solatium for the bereavement and grief occasioned by the death,[26] but must give compensation for pecuniary loss only; such injuries to

79 Tex. 577, 15 S. W. 573; Southern Cotton Press, etc., Co. *v.* Bradley, 52 Tex. 587.

Utah.— Corbett *v.* Oregon Short Line R. Co., 25 Utah 449, 71 Pac. 1065.

United States.— The Corsair, 145 U. S. 335, 12 S. Ct. 949, 36 L. ed. 727; St. Louis, etc., R. Co. *v.* Hicks, 79 Fed. 262, 24 C. C. A. 563; Cheatham *v.* Red River Line, 56 Fed. 248 (holding that in an action for negligence resulting in a man's drowning, his sufferings, after he fell into the water and before he drowned, could not be taken into account, since they were substantially contemporaneous with his death); Kelley *v.* Iowa Cent. R. Co., 48 Fed. 663; Barron *v.* Illinois Cent. R. Co., 2 Fed. Cas. No. 1,052, 1 Biss. 412; Hollyday *v.* The David Reeves, 12 Fed. Cas. No. 6,625, 5 Hughes 89.

See 15 Cent. Dig. tit. "Death," § 82.

26. *Alabama.*— Alabama Great Southern R. Co. *v.* Burgess, 116 Ala. 509, 22 So. 913; James *v.* Richmond, etc., R. Co., 92 Ala. 231, 9 So. 335; Savannah, etc., R. Co. *v.* Shearer, 58 Ala. 672.

California.— Munro *v.* Pacific Coast Dredging, etc., Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; McKeever *v.* Market St. R. Co., 59 Cal. 294. See also Beeson *v.* Green Mountain Gold Min. Co., 57 Cal. 20, where it was held by a divided court that in an action by a wife for her husband's death damages may be allowed for loss of the husband's society, and evidence of affectionate relations between the married pair is admissible. *Contra*, Cleary *v.* City R. Co., 76 Cal. 240, 18 Pac. 269.

District of Columbia.— Bunyea *v.* Metropolitan R. Co., 19 D. C. 76.

Florida.— Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149.

Illinois.— Chicago, etc., R. Co. *v.* Rains, 203 Ill. 417, 67 N. E. 840; Wabash R. Co. *v.* Smith, 162 Ill. 583, 44 N. E. 856; Chicago, etc., R. Co. *v.* Kneirim, 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259; Chicago, etc., R. Co. *v.* Harwood, 80 Ill. 88; Chicago, etc., R. Co. *v.* Becker, 76 Ill. 25; Illinois Cent. R. Co. *v.* Baches, 55 Ill. 379; Chicago, etc., R. Co. *v.* Swett, 45 Ill. 197, 92 Am. Dec. 206; Chicago, etc., R. Co. *v.* Shannon, 43 Ill. 338; Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 553; Chicago, etc., R. Co. *v.* Ptacek, 62 Ill. App. 375; North Chicago St. R. Co. *v.* Wrixon, 51 Ill. App. 307; Chicago Consol. Bottling Co. *v.* Tietz, 37 Ill. App. 599; Chicago City R. Co. *v.* Gillam, 27 Ill. App. 386.

Indiana.— Ohio, etc., R. Co. *v.* Tindall, 13 Ind. 366, 74 Am. Dec. 259.

Iowa.— Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391.

Kansas.— Kansas Pac. R. Co. *v.* Cutter, 19 Kan. 83.

Kentucky.— Louisville, etc., R. Co. *v.* Graham, 98 Ky. 688, 34 S. W. 229, 17 Ky. L. Rep. 1229; Covington St. R. Co. *v.* Packer, 9 Bush 455, 15 Am. Rep. 725.

Louisiana.— McCubbin *v.* Hastings, 27 La. Ann. 713.

Maine.— Oakes *v.* Maine Cent. R. Co., 95 Me. 103, 49 Atl. 418.

Maryland.— State *v.* Baltimore, etc., R. Co., 24 Md. 84, 87 Am. Dec. 600.

Michigan.— See Hyatt *v.* Adams, 16 Mich. 180.

Missouri.— Barth *v.* Kansas City El. R. Co., 142 Mo. 535, 44 S. W. 778; Schaub *v.* Hannibal, etc., R. Co., 106 Mo. 74, 16 S. W. 924; Goss *v.* Missouri Pac. R. Co., 50 Mo. App. 614; Schultz *v.* Moon, 33 Mo. App. 329.

New Jersey.— Telfer *v.* Northern R. Co., 30 N. J. L. 188.

New Mexico.— Cerrillos Coal R. Co. *v.* Deserant, 9 N. M. 49, 49 Pac. 807.

New York.— Sternfels *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 494, 77 N. Y. Suppl. 309; Feliee *v.* New York Cent., etc., R. Co., 14 N. Y. App. Div. 345, 43 N. Y. Suppl. 922; McIntyre *v.* New York Cent. R. Co., 47 Barb. 515; Green *v.* Hudson River R. Co., 32 Barb. 25; Lehman *v.* Brooklyn, 29 Barb. 234; Dorman *v.* Broadway R. Co., 1 N. Y. Suppl. 334. See also Ford *v.* Monroe, 20 Wend. 210, holding that in an action for the death of a child the expense of the sickness of the mother caused by her grief is a proper element of damages.

Ohio.— Steel *v.* Kurtz, 28 Ohio St. 191; Lake Shore, etc., R. Co. *v.* Ehlert, 19 Ohio Cir. Ct. 177, 10 Ohio Cir. Dec. 443; Hall *v.* Crain, 2 Ohio Dec. (Reprint) 453, 3 West. L. Month. 137.

Oregon.— Carlson *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 450, 28 Pac. 497.

Pennsylvania.— Pennsylvania Telephone Co. *v.* Varnau, (1888) 15 Atl. 624; Mansfield Coal, etc., Co. *v.* McEnery, 91 Pa. St. 185, 36 Am. Rep. 662; Huntingdon, etc., R., etc., Co. *v.* Decker, 84 Pa. St. 419; Pennsylvania R. Co. *v.* Goodman, 62 Pa. St. 329; Pennsylvania R. Co. *v.* Butler, 57 Pa. St. 335; Caldwell *v.* Brown, 53 Pa. St. 453; Pennsylvania R. Co. *v.* Vandever, 36 Pa. St. 298; Coakley *v.* North Pennsylvania R. Co., 5 Pa. L. J. Rep. 444.

Tennessee.— Railroad Co. *v.* Wyrick, 99 Tenn. 500, 42 S. W. 434; Knoxville, etc., R. Co. *v.* Wyrick, 99 Tenn. 500, 42 S. W. 434; Nashville, etc., R. Co. *v.* Stevens, 9 Heisk. 12.

Texas.— McGown *v.* International, etc., R. Co., 85 Tex. 289, 20 S. W. 80; Houston City St. R. Co. *v.* Sciacca, 80 Tex. 350, 16 S. W. 31; March *v.* Walker, 48 Tex. 372; International, etc., R. Co. *v.* Boykin, (Civ. App. 1903) 74 S. W. 93; Houston, etc., R. Co. *v.*

the sentiments or affections, which have been frequently denominated sentimental damages, not being susceptible of pecuniary measurement.

(VII) *Medical and Funeral Expenses.* Under statutes giving a right of action for death by wrongful act for the benefit of the widow and next of kin, the general rule seems to be that medical and funeral expenses of the deceased cannot be recovered as items of damages;[27] at least where the amount due for such services or the value thereof is not shown.[28] In other jurisdictions, however, it has been held that recovery can be had for funeral expenses and other expenses incurred by reason of the injury between the time of the injury and the death.[29]

Loeffler, (Civ. App. 1899) 51 S. W. 536; Storrie *v.* Marshall, (Civ. App. 1894) 27 S. W. 224.

Utah.— Corbett *v.* Oregon Short Line R. Co., 25 Utah 449, 71 Pac. 1065; Wells *v.* Denver, etc., R. Co., 7 Utah 482, 27 Pac. 688; Webb *v.* Denver, etc., R. Co., 7 Utah 17, 24 Pac. 616.

Vermont.— Lazelle *v.* Newfane, 70 Vt. 440, 41 Atl. 511.

Virginia.— See Norfolk, etc., R. Co. *v.* Stevens, 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367.

Washington.—Walker *v.* McNeill, 17 Wash. 582, 50 Pac. 518.

Wisconsin.— Potter *v.* Chicago, etc., R. Co., 21 Wis. 372, 94 Am. Dec. 548.

United States.— *In re* California Nav., etc., Co., 110 Fed. 670; St. Louis, etc., R. Co. *v.* Hicks, 79 Fed. 262, 24 C. C. A. 563; Kelley *v.* Iowa Cent. R. Co., 48 Fed. 663; Morris *v.* Chicago, etc., R. Co., 26 Fed. 22; Holmes *v.* Oregon, etc., R. Co., 5 Fed. 523, 6 Sawy. 276; Barley *v.* Chicago, etc., R. Co., 2 Fed. Cas. No. 997, 4 Biss. 430; Barron *v.* Illinois Cent. R. Co., 2 Fed. Cas. No. 1,052, 1 Biss. 412; Brady *v.* Chicago, 3 Fed. Cas. No. 1,796, 4 Biss. 448; Hollyday *v.* The David Reeves, 12 Fed. Cas. No. 6,625, 5 Hughes 89.

England.— Blake *v.* Midland R. Co., 18 Q. B. 93, 16 Jur. 562, 21 L. J. Q. B. 233, 83 E. C. L. 93.

Canada.— McDonald *v.* Rex, 7 Can. Exch. 216; Filiatrault *v.* Canadian Pac. R. Co., 18 Quebec Super. Ct. 491.

See 15 Cent. Dig. tit. "Death," § 118.

Contra.— Brown *v.* Southern R. Co., 65 S. C. 260, 43 S. E. 794, holding that an instruction that the jury should give damages to the heirs for the loss resulting from grief or mental suffering is not erroneous.

By the Scotch law solatium for bereavement is allowed. Paterson *v.* Wallace, 1 Macq. H. L. 748.

Mitigating or aggravating circumstances.— It has been held under a Missouri statute permitting the jury to consider mitigating or aggravating circumstances, that parents may recover for the mental suffering caused by the death of their child. Owen *v.* Brockschmidt, 54 Mo. 285.

Where exemplary damages are allowed.— Under statutes allowing recovery of punitive or exemplary damages, it has been held that the jury may take into consideration the sorrow, suffering, and mental anguish caused to the beneficiaries by the wrongful death. Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. (Va.) 394; Matthews *v.* Warner, 29 Gratt. (Va.) 570, 26 Am. Rep. 396.

27. *Arkansas.*— St. Louis, etc., R. Co. *v.* Sweet, 57 Ark. 287, 21 S. W. 587. But see Little Rock, etc., R. Co. *v.* Barker, 33 Ark. 350, 34 Am. Rep. 44.

Delaware.— Wilcox *v.* Wilmington City R. Co., 2 Pennew. 157, 44 Atl. 686.

District of Columbia.— Bunyea *v.* Metropolitan R. Co., 19 D. C. 76.

Illinois.— Holton *v.* Daly, 106 Ill. 131.

New Jersey.— Consolidated Traction Co. *v.* Hone, 60 N. J. L. 444, 38 Atl. 759.

Vermont.— Trow *v.* Thomas, 70 Vt. 580, 41 Atl. 652 [*following* Sherman *v.* Johnson, 58 Vt. 40, 2 Atl. 707].

United States.— Holland *v.* Brown, 35 Fed. 43, 13 Sawy. 284.

England.— Dalton *v.* Southeastern R. Co., 4 C. B. N. S. 296, 4 Jur. N. S. 711, 27 L. J. C. P. 227, 6 Wkly. Rep. 574, 93 E. C. L. 296; Boulter *v.* Webster, 11 L. T. Rep. N. S. 598, 13 Wkly. Rep. 298, holding that a father, suing as administrator for the death of his minor child, could not recover medical and funeral expenses.

Canada.— McDonald *v.* Rex, 7 Can. Exch. 216; Filiatrault *v.* Canadian Pac. R. Co., 18 Quebec Super. Ct. 491.

See 15 Cent. Dig. tit. "Death," § 110.

28. *Arkansas.*— St. Louis, etc., R. Co. *v.* Sweet, 63 Ark. 563, 40 S. W. 463.

Florida.— Duval *v.* Hunt, 34 Fla. 85, 15 So. 876.

Maryland.— Baltimore, etc., R. Co. *v.* State, 33 Md. 542.

Minnesota.— Sieber *v.* Great Northern R. Co., 76 Minn. 269, 79 N. W. 95.

Mississippi.— See Illinois Cent. R. Co. *v.* Crudup, 63 Miss. 291.

Texas.— International, etc., R. Co. *v.* Boykin, (Civ. App. 1903) 74 S. W. 93; Galveston, etc., R. Co. *v.* Davis, 4 Tex. Civ. App. 468, 23 S. W. 301.

See 15 Cent. Dig. tit. "Death," § 110.

29. *Georgia.*— Southern R. Co. *v.* Covenia, 100 Ga. 46, 29 S. E. 219, 62 Am. St. Rep. 312, 40 L. R. A. 253 (holding that the father of a child under two years of age which was tortiously killed is entitled to recover the expenses necessarily and reasonably incurred in the burial of the child, including compensation for the loss of such time as was needed for this purpose); Augusta Factory *v.* Davis, 87 Ga. 648, 13 S. E. 577 (action by father).

Indiana.— Ohio, etc., R. Co. *v.* Tindall, 13 Ind. 366, 74 Am. Dec. 259, action by father.

3. Amount of Recovery — a. Discretion of Jury — (i) *General Rule.* While the general rule is that the recovery must be confined to strictly pecuniary damages, the jury are not bound by any fixed and precise rules in estimating the amount of damages, save by the statutory limit, where such limit exists, but may give compensation for all injuries, proceeding from whatever source, and their discretion in fixing the amount of damages should not be interfered with by the court, unless it has been palpably abused.[30] The rule has sometimes been thus

Iowa.— Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462.

Louisiana.— McCubbin *v.* Hastings, 27 La. Ann. 713, action by husband. See also Le Blanc *v.* Sweet, 107 La. 355, 31 So. 766, 90 Am. St. Rep. 303.

Mississippi.— Natchez, etc., R. Co. *v.* Cook, 63 Miss. 38.

Missouri.— Rains *v.* St. Louis, etc., R. Co., 71 Mo. 164, 36 Am. Rep. 459; Owen *v.* Brockschmidt, 54 Mo. 285.

New Hampshire.— Corliss *v.* Worcester, etc., R. Co., 63 N. H. 404.

New York.— Murphy *v.* New York Cent., etc., R. Co., 88 N. Y. 445 (so holding in case any one of those for whose benefit the action was brought is legally bound to pay the funeral expenses, and this, although all are not so bound); Pack *v.* New York, 3 N. Y. 489 (decided under a statute which was construed to allow the recovery of nothing beyond all medical and funeral expenses, in an action by a father for the death of his child); Roeder *v.* Ormsby, 22 How. Pr. 270.

Pennsylvania.— Cleveland, etc., R. Co. *v.* Rowan, 66 Pa. St. 393; Pennsylvania R. Co. *v.* Zebe, 33 Pa. St. 318; Lehigh Iron Co. *v.* Rupp, 12 Wkly. Notes Cas. 47.

South Carolina.— Petric *v.* Columbia, etc., R. Co., 29 S. C. 303, 7 S. E. 515.

Texas.— International, etc., R. Co. *v.* Boykin, (Civ. App. 1903) 74 S. W. 93 (holding that in an action for the death of plaintiff's wife from injuries sustained by reason of defendant's negligence, her husband was entitled to recover the cost of medical expenses necessarily incurred by reason of such injuries); Gulf, etc., R. Co. *v.* Southwick, (Civ. App. 1895) 30 S. W. 592.

United States.— Hollyday *v.* The David Reeves, 12 Fed. Cas. No. 6,625, 5 Hughes 89.

See 15 Cent. Dig. tit. "Death," § 110.

30. *Arkansas.*— St. Louis, etc., R. Co. *v.* McCain, 67 Ark. 377, 55 S. W. 165; St. Louis, etc., R. Co. *v.* Sweet, 60 Ark. 550, 31 S. W. 571; Fordyce *v.* McCants, 55 Ark. 384, 18 S. W. 371; Little Rock, etc., R. Co. *v.* Voss, (1892) 18 S. W. 172.

California.— Redfield *v.* Oakland Consol. St. R. Co., 110 Cal. 277, 42 Pac. 822; O'Callaghan *v.* Bode, 84 Cal. 489, 24 Pac. 269; Cook *v.* Clay St. Hill R. Co., 60 Cal. 604; Myers *v.* San Francisco, 42 Cal. 215.

Georgia.— Georgia R. Co. *v.* Pittman, 73 Ga. 325.

Illinois.— Economy Light, etc., Co. *v.* Stephen, 187 Ill. 137, 58 N. E. 359 [*affirming* 87 Ill. App. 220]; Chicago Edison Co. *v.* Moren, 185 Ill. 571, 57 N. E. 773 [*affirming* 86 Ill. App. 152]; Chicago *v.* Scholten, 75 Ill. 468; Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 553; Terre Haute, etc., R. Co. *v.* Williams, 69 Ill. App. 392; Leiter *v.* Kinnare, 68 Ill. App. 558; Chicago, etc., R. Co. *v.* Ptacek, 62 Ill. App. 375; Baltimore, etc., R. Co. *v.* Then, 59 Ill. App. 561; North Chicago St. R. Co. *v.* Brodie, 57 Ill. App. 564; Baltimore, etc., R. Co. *v.* Stanley, 54 Ill. App. 215; St. Louis, etc., R. Co. *v.* Bauer, 53 Ill. App. 525; Ohio, etc., R. Co. *v.* Wangelin, 43 Ill. App. 324; Treffert *v.* Ohio, etc., R. Co., 36 Ill. App. 93.

Indiana.— Pittsburgh, etc., R. Co. *v.* Burton, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594; Delphi *v.* Lowery, 74 Ind. 520, 39 Am. Rep. 98; Citizens' St. R. Co. *v.* Lowe, 12 Ind. App. 47, 39 N. E. 165.

Kansas.— St. Louis, etc., R. Co. *v.* French, 56 Kan. 584, 44 Pac. 12; Union Pac. R. Co. *v.* Dunden, 37 Kan. 1, 14 Pac. 501; Kansas Pac. R. Co. *v.* Cutter, 19 Kan. 83.

Kentucky.—Louisville, etc., R. Co. *v.* Scott, 108 Ky. 392, 56 S. W. 674, 22 Ky. L. Rep. 30, 50 L. R. A. 381; Chesapeake, etc., R. Co. *v.* Judd, 106 Ky. 364, 50 S. W. 539, 20 Ky. L. Rep. 1978; Louisville, etc., R. Co. *v.* Graham, 98 Ky. 688, 34 S. W. 229, 17 Ky. L. Rep. 1229; Union Warehouse Co. *v.* Prewitt, 50 S. W. 964, 21 Ky. L. Rep. 67.

Maine.— Hobbs *v.* Eastern R. Co., 66 Me. 572.

Minnesota.— Gray *v.* St. Paul City R. Co., 87 Minn. 280, 91 N. W. 1106; Sieber *v.* Great Northern R. Co., 76 Minn. 269, 79 N. W. 95; Bolinger *v.* St. Paul, etc., R. Co., 36 Minn. 418, 31 N. W. 856, 1 Am. St. Rep. 680.

Mississippi.— Vicksburg *v.* McLain, 67 Miss. 4, 6 So. 774.

Missouri.— Tetherow *v.* St. Joseph, etc., R. Co., 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617.

Nebraska.— Chicago, etc., R. Co. *v.* Young, (1903) 93 N. W. 922; Johnson *v.* Missouri Pac. R. Co., 18 Nebr. 690, 26 N. W. 347.

New Jersey.—Garbaccio *v.* Jersey City, etc., R. Co., (Sup. 1902) 53 Atl. 707; Williams *v.* Camden, etc., R. Co., (Sup. 1897) 37 Atl. 1107.

New York.— Houghkirk *v.* Delaware, etc., Canal Co., 92 N. Y. 219, 44 Am. Rep. 370; O'Mara *v.* Hudson River R. Co., 38 N. Y. 445, 98 Am. Dec. 61; Scarpati *v.* Metropolitan St. R. Co., 69 N. Y. App. Div. 609, 74 N. Y. Suppl. 499; Racine *v.* Erie R. Co., 69 N. Y. App. Div. 437, 74 N. Y. Suppl. 977; Reilly *v.* Brooklyn Heights R. Co., 65 N. Y. App. Div. 453, 72 N. Y. Suppl. 1080; Beecher *v.* Long Island R. Co., 53 N. Y. App. Div. 324, 65 N. Y. Suppl. 642; Wallace *v.* Third Ave. R. Co., 36 N. Y. App. Div. 57, 55 N. Y. Suppl.

stated: to justify interference by the court with the verdict of the jury, it must appear that some rule of law has been violated, or else that the verdict is so excessive or grossly inadequate as to indicate partiality, passion, or prejudice in the minds of the jurors.[31] This rule has likewise been applied in actions for the

132; Kane *v.* Mitchell Transp. Co., 90 Hun 65, 35 N. Y. Suppl. 581; Johnson *v.* Long Island R. Co., 80 Hun 306, 30 N. Y. Suppl. 318; Bowles *v.* Rome, etc., R. Co., 46 Hun 324; Erwin *v.* Neversink Steamboat Co., 23 Hun 573; Kelly *v.* Twenty-third St. R. Co., 14 Daly 418; Conklin *v.* Tice, 1 N. Y. Suppl. 803.

Pennsylvania.— Pennsylvania R. Co. *v.* Bantom, 54 Pa. St. 495.

Tennessee.— Illinois Cent. R. Co. *v.* Spence, 93 Tenn. 173, 23 S. W. 211, 42 Am. St. Rep. 907.

Texas.— Texas, etc., R. Co. *v.* Geiger, 79 Tex. 13, 15 S. W. 214; St. Louis, etc., R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104; Paschal *v.* Owen, 77 Tex. 583, 14 S. W. 203; Missouri Pac. R. Co. *v.* Henry, 75 Tex. 220, 12 S. W. 828; Missouri Pac. R. Co. *v.* Lehmberg, 75 Tex. 61, 12 S. W. 838; Texas, etc., R. Co. *v.* Lester, 75 Tex. 56, 12 S. W. 955; Brunswig *v.* White, 70 Tex. 504, 8 S. W. 85; International, etc., R. Co. *v.* Ormond, 64 Tex. 485; Missouri, etc., R. Co. *v.* Ferris, 23 Tex. Civ. App. 215, 55 S. W. 1119; Gulf, etc., R. Co. *v.* Delaney, 22 Tex. Civ. App. 427, 55 S. W. 538; Missouri, etc., R. Co. *v.* Gilmore, (Civ. App. 1899) 53 S. W. 61; International, etc., R. Co. *v.* Knight, (Civ. App. 1899) 52 S. W. 640; Texas, etc., R. Co. *v.* Spence, (Civ. App. 1899) 52 S. W. 562; Ft. Worth, etc., R. Co. *v.* Kime, (Civ. App. 1899) 51 S. W. 558; Houston, etc., R. Co. *v.* Loeffler, (Civ. App. 1899) 51 S. W. 536; Gulf, etc., R. Co. *v.* Royall, (Civ. App. 1898) 43 S. W. 815; San Antonio St. R. Co. *v.* Renken, (Civ. App. 1897) 38 S. W. 820; Gulf, etc., R. Co. *v.* Duvall, 12 Tex. Civ. App. 348, 35 S. W. 699; Tyler Southeastern R. Co. *v.* McMahon, (Civ. App. 1896) 34 S. W. 796; Gulf, etc., R. Co. *v.* Johnson, 10 Tex. Civ. App. 254, 31 S. W. 255; International, etc., R. Co. *v.* McNeel, (Civ. App. 1895) 29 S. W. 1133; Austin Rapid Transit R. Co. *v.* Cullen, (Civ. App. 1895) 29 S. W. 256.

Virginia.— Norfolk, etc., R. Co. *v.* De Board, 91 Va. 700, 22 S. E. 514, 29 L. R. A. 825.

Washington.— Vowell *v.* Issaquah Coal Co., 31 Wash. 103, 71 Pac. 725.

Wisconsin.— Annas *v.* Milwaukee, etc., R. Co., 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848; Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565; Ewen *v.* Northwestern R. Co., 38 Wis. 613.

United States.— The O. L. Hallenbeck, 119 Fed. 468; Nickerson *v.* Bigelow, 62 Fed. 900; *In re* Humboldt Lumber Manufacturers' Assoc., 60 Fed. 428.

See 15 Cent. Dig. tit. "Death," § 120 *et seq.*

31. *Alabama.*— McGhee *v.* Willis, 134 Ala. 281, 32 So. 301.

Arkansas.— St. Louis, etc., R. Co. *v.* Mahoney, (1900) 55 S. W. 840; St. Louis, etc., R. Co. *v.* Robbins, 57 Ark. 377, 21 S. W. 886; St. Louis, etc., R. Co. *v.* Maddry, 57 Ark. 306, 21 S. W. 472; St. Louis, etc., R. Co. *v.* Davis, 55 Ark. 462, 18 S. W. 628.

Connecticut.— Hesse *v.* Meriden, etc., Tramway Co., 75 Conn. 571, 54 Atl. 299; Nelson *v.* Branford Lighting, etc., Co., 75 Conn. 548, 54 Atl. 303.

Georgia.— Georgia, etc., R. Co. *v.* Mathews, 116 Ga. 424, 42 S. E. 771; Western, etc., R. Co. *v.* Hyer, 113 Ga. 776, 39 S. E. 447; Central R. Co. *v.* Crosby, 74 Ga. 737, 58 Am. Rep. 463.

Illinois.— Chicago, etc., R. Co. *v.* Bonifield, 104 Ill. 223; Cicero, etc., R. Co. *v.* Boyd, 95 Ill. App. 510; O'Fallon Coal Co. *v.* Laquet, 89 Ill. App. 13; Chicago, etc., R. Co. *v.* Des Lauriers, 40 Ill. App. 654; Chicago, etc., R. Co. *v.* Kelly, 28 Ill. App. 655; Chicago, etc., R. Co. *v.* Adler, 28 Ill. App. 102; Chicago, etc., R. Co. *v.* Blank, 24 Ill. App. 438; Chicago *v.* Kimball, 18 Ill. App. 240; Wabash, etc., R. Co. *v.* Shevers, 18 Ill. App. 52.

Indiana.— Malott *v.* Shimer, 153 Ind. 35, 54 N. E. 101, 74 Am. St. Rep. 313; Wabash *v.* Carver, 129 Ind. 552, 29 N. E. 25, 13 L. R. A. 851; Howard County *v.* Legg, 110 Ind. 479, 11 N. E. 612; Jeffersonville, etc., R. Co. *v.* Riley, 39 Ind. 568; Ohio, etc., R. Co. *v.* Hill, 7 Ind. App. 255, 34 N. E. 646.

Iowa.— Bell *v.* Clarion, 120 Iowa 332, 94 N. W. 907; Haas *v.* Chicago, etc., R. Co., 90 Iowa 259, 57 N. W. 894; Moore *v.* Keokuk, etc., R. Co., 89 Iowa 223, 56 N. W. 430; McDermott *v.* Iowa Falls, etc., R. Co., (1891) 47 N. W. 1037; Walter *v.* C. D. & M. R. Co., 39 Iowa 33.

Kansas.— Atchison, etc., R. Co. *v.* Hughes, 55 Kan. 491, 46 Pac. 919.

Kentucky.— Louisville, etc., R. Co. *v.* Brooks, 83 Ky. 129, 4 Am. St. Rep. 135; Chesapeake, etc., R. Co. *v.* Dupee, 67 S. W. 15, 23 Ky. L. Rep. 2349; Louisville, etc., R. Co. *v.* Shivell, 18 S. W. 944, 13 Ky. L. Rep. 902.

Maine.— Hobbs *v.* Eastern R. Co., 66 Me. 572.

Missouri.— Geismann *v.* Missouri-Edison Electric Co., 173 Mo. 654, 73 S. W. 654; Lee *v.* Knapp, 155 Mo. 610, 56 S. W. 458.

New York.— Sternfels *v.* Metropolitan St. R. Co., 174 N. Y. 512, 66 N. E. 1117; Woodworth *v.* New York Cent., etc., R. Co., 170 N. Y. 589, 63 N. E. 1123; Buckley *v.* New York, etc., R. Co., 73 N. Y. App. Div. 587, 77 N. Y. Suppl. 128; Sternfels *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 494, 77 N. Y. Suppl. 309; Ericius *v.* Brooklyn Heights R. Co., 63 N. Y. App. Div. 353, 71 N. Y. Suppl. 596; Johnson *v.* Rochester R. Co., 61 N. Y. App. Div. 12, 70 N. Y. Suppl. 113; Douglass *v.* Northern Cent. R. Co., 59 N. Y. App. Div. 470, 69 N. Y. Suppl. 370; Woodworth *v.* New York Cent., etc., R. Co.,

death of minor children, where there was nothing to show passion, prejudice, or ignorance on the part of the jury.[32] Again in cases where the evidence showed gross negligence on the part of defendant, the courts have refused to disturb an award of damages which would ordinarily be regarded as excessive.[33]

55 N. Y. App. Div. 23, 66 N. Y. Suppl. 1072; Fitzgerald *v.* New York Cent., etc., R. Co., 37 N. Y. App. Div. 127, 58 N. Y. Suppl. 1124; Feliee *v.* New York Cent., etc., R. Co., 14 N. Y. App. Div. 345, 43 N. Y. Suppl. 922; Purcell *v.* Lauer, 14 N. Y. App. Div. 33, 43 N. Y. Suppl. 988, 4 N. Y. Annot. Cas. 129; Medinger *v.* Brooklyn Heights R. Co., 6 N. Y. App. Div. 42, 39 N. Y. Suppl. 613; Walls *v.* Rochester R. Co., 92 Hun 581, 36 N. Y. Suppl. 1102; Lyons *v.* Second Ave. R. Co., 89 Hun 374, 35 N. Y. Suppl. 372, 2 N. Y. Annot. Cas. 402.

Ohio.— Lake Shore, etc., R. Co. *v.* Schultz, 19 Ohio Cir. Ct. 639; Toledo St. R. Co. *v.* Mammet, 13 Ohio Cir. Ct. 591.

Tennessee.— Rosenbaum *v.* Shoffner, 98 Tenn. 624, 40 S. W. 1086; Tennessee Coal, etc., Co. *v.* Roddy, 85 Tenn. 400, 5 S. W. 286.

Texas.— Texas, etc., R. Co. *v.* Robertson, 82 Tex. 657, 17 S. W. 1041, 27 Am. St. Rep. 929; East Line, etc., R. Co. *v.* Smith, 65 Tex. 167; International, etc., R. Co. *v.* Ormond, 64 Tex. 485; Texas Loan Agency *v.* Fleming, 18 Tex. Civ. App. 668, 46 S. W. 63; San Antonio, etc., R. Co. *v.* Harding, 11 Tex. Civ. App. 497, 33 S. W. 373.

West Virginia.— Turner *v.* Norfolk, etc., R. Co., 40 W. Va. 675, 22 S. E. 83.

Wisconsin.— Wiltse *v.* Tilden, 77 Wis. 152, 46 N. W. 234.

United States.— Chicago, etc., R. Co. *v.* Whitton, 13 Wall. 270, 20 L. ed. 571 [*affirming* 29 Fed. Cas. No. 17,597, 2 Biss. 282]; Voelker *v.* Chicago, etc., R. Co., 116 Fed. 867; Humboldt Lumber Manufacturers' Assoc. *v.* Christopherson, 73 Fed. 239, 19 C. C. A. 481, 46 L. R. A. 264 [*affirming* 60 Fed. 428]; Harkins *v.* Pullman Palace Car Co., 52 Fed. 724.

See 15 Cent. Dig. tit. "Death," § 120 *et seq.*

32. Death of minor child.— In the following cases it was held that the verdict was not sufficiently excessive to warrant a reversal:

Arkansas.— Little Rock, etc., R. Co. *v.* Barker, 39 Ark. 491.

California.— Nehrbas *v.* Central Pac. R. Co., 62 Cal. 320; Myers *v.* San Francisco, 42 Cal. 215.

Idaho.— York *v.* Pacific, etc., R. Co., 69 Pac. 1042.

Illinois.— Joliet *v.* Weston, 123 Ill. 641, 14 N. E. 665 [*affirming* 22 Ill. App. 225]; Chicago, etc., R. Co. *v.* Becker, 84 Ill. 483; Chicago *v.* Hesing, 83 Ill. 204, 35 Am. Rep. 378; Baltimore, etc., R. Co. *v.* Then, 59 Ill. App. 561; Chicago, etc., R. Co. *v.* Des Lauriers, 40 Ill. App. 654; Chicago, etc., R. Co. *v.* Wilson, 35 Ill. App. 346; Illinois Cent. R. Co. *v.* Slater, 28 Ill. App. 73; Consolidated Ice Mach. Co. *v.* Kiefer, 26 Ill. App. 466.

Indiana.— Chicago, etc., R. Co. *v.* Branyan, 10 Ind. App. 570, 37 N. E. 190.

Iowa.— Eginoire *v.* Union County, 112 Iowa 558, 84 N. W. 758.

Kansas.— Union Pac. R. Co. *v.* Dunden, 37 Kan. 1, 14 Pac. 501.

Michigan.— Cooper *v.* Lake Shore, etc., R. Co., 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482.

Minnesota.— Strutzel *v.* St. Paul City R. Co., 47 Minn. 543, 50 N. W. 690.

Missouri.— Franke *v.* St. Louis, 110 Mo. 516, 19 S. W. 938; Stumbo *v.* Duluth Zinc Co., 100 Mo. App. 635, 75 S. W. 185.

Nebraska.— Omaha *v.* Bowman, 63 Nebr. 333, 88 N. W. 521; Omaha *v.* Richards, 49 Nebr. 244, 68 N. W. 528; Post *v.* Olmsted, 47 Nebr. 893, 66 N. W. 828.

New York.— Morris *v.* Metropolitan St. R. Co., 170 N. Y. 592, 63 N. E. 1119; Twist *v.* Rochester, 165 N. Y. 619, 59 N. E. 1131 [*affirming* 37 N. Y. App. Div. 307, 55 N. Y. Suppl. 850]; Quinn *v.* Pietro, 38 N. Y. App. Div. 484, 56 N. Y. Suppl. 419; Heinz *v.* Brooklyn Heights R. Co., 91 Hun 640, 36 N. Y. Suppl. 675; Ahern *v.* Steele, 48 Hun 517, 1 N. Y. Suppl. 259 [*reversed* in 115 N. Y. 203, 22 N. E. 193, 12 Am. St. Rep. 778, 5 L. R. A. 449]; Pineo *v.* New York Cent., etc., R. Co., 34 Hun 80; Houghkirk *v.* Delaware, etc., Canal Co., 28 Hun 407 [*affirming* 11 Abb. N. Cas. 72, 63 How. Pr. 328]; Oldfield *v.* New York, etc., R. Co., 3 E. D. Smith 103; Huerzeler *v.* Central Cross Town R. Co., 1 Misc. 136, 20 N. Y. Suppl. 676.

Ohio.— Ashtabula Rapid Transit Co. *v.* Dagenbach, 11 Ohio Cir. Dec. 307.

Pennsylvania.— Hoon *v.* Beaver Valley Traction Co., 204 Pa. St. 369, 54 Atl. 270.

Tennessee.— Southern Queen Mfg. Co. *v.* Morris, 105 Tenn. 654, 58 S. W. 651.

Texas.— Taylor, etc., R. Co. *v.* Warner, (Civ. App. 1900) 60 S. W. 442; Citizens' R. Co. *v.* Washington, 24 Tex. Civ. App. 422, 58 S. W. 1042; Taylor, etc., R. Co. *v.* Warner, (Civ. App. 1895) 31 S. W. 66; Austin Rapid Transit R. Co. *v.* Cullen, (Civ. App. 1895) 29 S. W. 256; San Antonio St. R. Co. *v.* Watzlavzick, (Civ. App. 1894) 28 S. W. 115.

Wisconsin.— Schrier *v.* Milwaukee, etc., R. Co., 65 Wis. 457, 27 N. W. 167; Johnson *v.* Chicago, etc., R. Co., 64 Wis. 425, 25 N. W. 223; Hoppe *v.* Chicago, etc., R. Co., 61 Wis. 357, 21 N. W. 227.

United States.— The Oceanic, 61 Fed. 338; Ross *v.* Texas, etc., R. Co., 44 Fed. 44.

See 15 Cent. Dig. tit. "Death," § 128.

33. Gross negligence.— In the following cases the verdict was held not to be excessive: Chicago, etc., R. Co. *v.* Bonifield, 104 Ill. 223; Chicago, etc., R. Co. *v.* Garvy, 58 Ill. 83; Louisville, etc., R. Co. *v.* Brooks, 83 Ky. 129, 4 Am. St. Rep. 135; Chiles *v.*

(II) *Limitations of Rule*—(A) *Where Damages Are Excessive.* However, the discretion of the jury in awarding damages is under the control of the court, and damages out of all proportion to the actual earnings of the deceased or to any reasonable expectation of pecuniary benefit from him will not be allowed;[34] and where the circumstances of the case or the evidence produced indicate that the verdict was the result of bias, prejudice, or gross overestimate the courts have not hesitated to set such verdict aside.[35] The courts have shown less hesitation in

Drake, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; Chesapeake, etc., R. Co. *v.* Hendricks, 88 Tenn. 710, 13 S. W. 696, 14 S. W. 488.

34. *Alabama.*— McAdory *v.* Louisville, etc., R. Co., 94 Ala. 272, 10 So. 507.

California.— Fox *v.* Oakland Consol. St. R. Co., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216.

Colorado.— Denver, etc., R. Co. *v.* Spencer, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121.

Georgia.— Atlantic, etc., R. Co. *v.* Newton, 85 Ga. 517, 11 S. E. 776.

Illinois.— West Chicago St. R. Co. *v.* Mabie, 77 Ill. App. 176; Leiter *v.* Kinnare, 68 Ill. App. 558; Chicago, etc., R. Co. *v.* Gunderson, 65 Ill. App. 638; Baltimore, etc., R. Co. *v.* Stanley, 54 Ill. App. 215; Chicago City R. Co. *v.* Gillam, 27 Ill. App. 386; Andrews *v.* Boedecker, 17 Ill. App. 213.

Iowa.— Rose *v.* Des Moines Valley R. Co., 39 Iowa 246; Sherman *v.* Western Stage Co., 24 Iowa 515.

Kansas.— Atchison, etc., R. Co. *v.* Ryan, 62 Kan. 682, 64 Pac. 603; Atchison, etc., R. Co. *v.* Brown, 26 Kan. 443; St. Louis, etc., R. Co. *v.* Blinn, 10 Kan. App. 468, 62 Pac. 427.

Louisiana.— Cline *v.* Crescent City R. Co., 42 La. Ann. 35, 7 So. 66.

Maine.— Conley *v.* Maine Cent. R. Co., 95 Me. 149, 49 Atl. 668; McKay *v.* New England Dredging Co., 92 Me. 454, 43 Atl. 29; Welch *v.* Maine Cent. R. Co., 86 Me. 552, 30 Atl. 116, 25 L. R. A. 658.

Michigan.— Nelson *v.* Lake Shore, etc., R. Co., 104 Mich. 582, 62 N. W. 993; Chicago, etc., R. Co. *v.* Bayfield, 37 Mich. 205.

New Jersey.— Grieve *v.* North Jersey St. R. Co., 65 N. J. L. 409, 47 Atl. 427.

New York.— Stevens *v.* Union R. Co., 75 N. Y. App. Div. 602, 78 N. Y. Suppl. 624; Dinnihan *v.* Lake Ontario Beach Imp. Co., 8 N. Y. App. Div. 509, 40 N. Y. Suppl. 764; Klemm *v.* New York Cent., etc., R. Co., 78 Hun 277, 28 N. Y. Suppl. 861; Bierbauer *v.* New York Cent., etc., R. Co., 15 Hun 559; McIntyre *v.* New York Cent. R. Co., 47 Barb. 515.

Rhode Island.— Flaherty *v.* New York, etc., R. Co., (1896) 35 Atl. 308.

Tennessee.— Louisville, etc., R. Co. *v.* Stacker, 86 Tenn. 343, 6 S. W. 737, 6 Am. St. Rep. 840; Chesapeake, etc., R. Co. *v.* Higgins, 85 Tenn. 620, 4 S. W. 47.

Texas.— Southern Pac. Co. *v.* Winton, 27 Tex. Civ. App. 503, 66 S. W. 477; San Antonio, etc., R. Co. *v.* Waller, 27 Tex. Civ. App. 44, 65 S. W. 210; Atchison, etc., R. Co. *v.* Van Belle, 26 Tex. Civ. App. 511, 64 S. W. 397; San Antonio, etc., R. Co. *v.* Engelhorn, 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68; Gulf, etc., R. Co. *v.* Johnson, 1 Tex. Civ. App. 103, 20 S. W. 1123.

Utah.— English *v.* Southern Pac. Co., 13 Utah 407, 45 Pac. 47, 57 Am. St. Rep. 772, 35 L. R. A. 155.

Washington.—Walker *v.* McNeill, 17 Wash. 582, 50 Pac. 518; Klepsch *v.* Donald, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936.

Wisconsin.— Innes *v.* Milwaukee, 103 Wis. 582, 79 N. W. 783; Rudiger *v.* Chicago, etc., R. Co., 101 Wis. 292, 77 N. W. 169; Potter *v.* Chicago, etc., R. Co., 22 Wis. 615.

United States.—Lindstrom *v.* International Nav. Co., 117 Fed. 170; The Robert Graham Dun, 70 Fed. 270, 17 C. C. A. 90.

Canada.—Hutton *v.* Windsor, 34 U. C. Q. B. 487.

See 15 Cent. Dig. tit. "Death," § 125 *et seq.*

35. *Arkansas.*— St. Louis, etc., R. Co. *v.* Dawson, 68 Ark. 1, 56 S. W. 46; Little Rock, etc., R. Co. *v.* Barker, 33 Ark. 350, 34 Am. Rep. 44.

California.— Harrison *v.* Sutter St. R. Co., 116 Cal. 156, 47 Pac. 1019; Morgan *v.* Southern Pac. Co., 95 Cal. 510, 30 Pac. 603, 29 Am. St. Rep. 143, 17 L. R. A. 71.

Illinois.— North Chicago St. R. Co. *v.* Wrixon, 51 Ill. App. 307; Chicago, etc., R. Co. *v.* Adamick, 33 Ill. App. 412.

Indiana.— Pennsylvania Co. *v.* Lilly, 73 Ind. 252; Indianapolis Commercial Club *v.* Hilliker, 20 Ind. App. 239, 50 N. E. 578.

Kentucky.— Louisville, etc., R. Co. *v.* Creighton, 106 Ky. 42, 50 S. W. 227, 20 Ky. L. Rep. 1898.

Louisiana.— Hamilton *v.* Morgan's Louisiana, etc., Steamship Co., 42 La. Ann. 824, 8 So. 586.

Maine.— Ramsdell *v.* Grady, 97 Me. 319, 54 Atl. 763; Ward *v.* Maine Cent. R. Co., 96 Me. 136, 51 Atl. 947.

Mississippi.— Cumberland Telephone, etc., Co. *v.* Pitchford, (1901) 30 So. 41; Vicksburg *v.* McLain, 67 Miss. 4, 6 So. 774.

Missouri.— Parsons *v.* Missouri Pac. R. Co., 94 Mo. 286, 6 S. W. 464; Hickman *v.* Missouri Pac. R. Co., 22 Mo. App. 344.

New Jersey.— Frank *v.* Pennsylvania R. Co., (Sup. 1903) 55 Atl. 691; Geiger *v.* Worthen, etc., Co., 66 N. J. L. 576, 49 Atl. 918; Graham *v.* Consolidated Traction Co., 62 N. J. L. 90, 40 Atl. 773; Jackson *v.* Consolidated Traction Co., 59 N. J. L. 25, 35 Atl. 754.

New York.— Honghkirk *v.* Delaware, etc., Canal Co., 92 N. Y. 219, 44 Am. Rep. 370; Lane *v.* Brooklyn Heights R. Co., 85 N. Y. App. Div. 85, 82 N. Y. Suppl. 1057; Stillings *v.* Metropolitan St. R. Co., 84 N. Y. App.

setting aside the verdict where the action is brought for the benefit of next of kin not dependent upon the deceased, than where the action is for the benefit of the widow or children, and where the amount awarded is clearly in excess of the expectation of pecuniary benefit to be derived from deceased by such next of kin the judgment will be reversed.[36]

(B) *Where Damages Are Palpably Inadequate.* Likewise in the absence of statutory prohibition[37] the court may set aside the verdict where the amount of damages awarded is grossly and palpably inadequate.[38]

Div. 201, 82 N. Y. Suppl. 726; Smith *v.* Lehigh Valley R. Co., 61 N. Y. App. Div. 46, 69 N. Y. Suppl. 1112; Schaffer *v.* Baker Transfer Co., 29 N. Y. App. Div. 459, 51 N. Y. Suppl. 1092; Cooper *v.* New York, etc., R. Co., 25 N. Y. App. Div. 383, 49 N. Y. Suppl. 481; Taylor *v.* Long Island R. Co., 16 N. Y. App. Div. 1, 44 N. Y. Suppl. 820; Schmitt *v.* Metropolitan L. Ins. Co., 13 N. Y. App. Div. 120, 43 N. Y. Suppl. 318; Seeley *v.* New York Cent., etc., R. Co., 8 N. Y. App. Div. 402, 40 N. Y. Suppl. 866; Lehman *v.* Brooklyn, 29 Barb. 234.

Ohio.— Erie R. Co. *v.* McCormick, 24 Ohio Cir. Ct. 86.

Texas.— Trinity Valley R. Co. *v.* Stewart, (Civ. App. 1901) 62 S. W. 1085; International, etc., R. Co. *v.* Jones, (Civ. App. 1901) 60 S. W. 978; Galveston, etc., R. Co. *v.* Johnson, 24 Tex. Civ. App. 180, 58 S. W. 622; Galveston, etc., R. Co. *v.* Miller, (Civ. App. 1900) 57 S. W. 702.

Utah.— Riley *v.* Salt Lake Rapid Transit Co., 10 Utah 428, 37 Pac. 681.

See 15 Cent. Dig. tit. "Death," § 125 *et seq.*

Remittitur by trial court.— The rule has been laid down in several jurisdictions, however, that the trial court has no authority to direct a remittitur of part of the verdict, but should set such verdict aside where it is clearly excessive or is not supported by the evidence. St. Louis, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1896) 37 S. W. 992. See also Missouri, etc., R. Co. *v.* Perry, 8 Tex. Civ. App. 78, 27 S. W. 496; and, generally, DAMAGES.

36. *Arkansas.*— St. Louis, etc., R. Co. *v.* Robbins, 57 Ark. 377, 21 S. W. 886.

Illinois.— Chicago Terminal Transfer R. Co. *v.* Helbreg, 99 Ill. App. 563; Chicago, etc., R. Co. *v.* Downey, 96 Ill. App. 398; East St. Louis Electric St. R. Co. *v.* Burns, 77 Ill. App. 529.

Iowa.—Hively *v.* Webster County, 117 Iowa 672, 91 N. W. 1041; Rose *v.* Des Moines Valley R. Co., 39 Iowa 246.

Kansas.— Atchison, etc., R. Co. *v.* Brown, 26 Kan. 443.

Kentucky.— Board Internal Imp. *v.* Moore, 66 S. W. 417, 23 Ky. L. Rep. 1885.

Louisiana.— Rice *v.* Crescent City R. Co., 51 La. Ann. 108, 24 So. 791.

Michigan.— Chicago, etc., R. Co. *v.* Bayfield, 37 Mich. 205.

New Jersey.— Rafferty *v.* Erie R. Co., 66 N. J. L. 444, 49 Atl. 456; Rowe *v.* New York, etc., Tel. Co., 66 N. J. L. 19, 48 Atl. 523; Graham *v.* Consolidated Traction Co., 64 N. J. L. 10, 44 Atl. 964; May *v.* West Jersey, etc., R. Co., 62 N. J. L. 67, 42 Atl. 165; Paulmier *v.* Erie R. Co., 34 N. J. L. 151.

New York.— Wells *v.* New York Cent., etc., R. Co., 78 N. Y. App. Div. 1, 78 N. Y. Suppl. 991; Connaughton *v.* Sun Printing, etc., Assoc., 73 N. Y. App. Div. 316, 76 N. Y. Suppl. 755; Kellogg *v.* Albany, etc., R., etc., Co., 72 N. Y. App. Div. 321, 76 N. Y. Suppl. 85, 11 N. Y. Annot. Cas. 50; O'Connor *v.* Union R. Co., 67 N. Y. App. Div. 99, 73 N. Y. Suppl. 606; Carpenter *v.* Buffalo, etc., R. Co., 38 Hun 116; Bierbauer *v.* New York Cent., etc., Co., 15 Hun 559; McDonald *v.* Metropolitan St. R. Co., 36 Misc. 703, 74 N. Y. Suppl. 367.

Ohio.— Bond Hill *v.* Atkinson, 16 Ohio Cir. Ct. 470, 9 Ohio Cir. Dec. 185.

United States.— Serensen *v.* Northern Pac. R. Co., 45 Fed. 407.

See 15 Cent. Dig. tit. "Death," § 125 *et seq.* See also Mexican Nat. R. Co. *v.* Finch, 8 Tex. Civ. App. 409, 27 S. W. 1028.

37. In several jurisdictions statutes have been enacted prohibiting the granting of a new trial on account of the smallness of the damages, in actions for injuries to the person, and actions for death by wrongful act have been held to be within the purview of such statutes. Gann *v.* Worman, 69 Ind. 458; Kinser *v.* Soap Creek Coal Co., 85 Iowa 26, 51 N. W. 1151; Gentile *v.* Cincinnati St. R. Co., 6 Ohio S. & C. Pl. Dec. 111, 4 Ohio N. P. 9.

38. The verdict was set aside in the following cases:

Alabama.— James *v.* Richmond, etc., R. Co., 92 Ala. 231, 9 So. 335.

California.— Wolford *v.* Lyon Gravel Gold Min. Co., 63 Cal. 483 (where under the evidence the appellate court said that the verdict in the case was trifling with the form of the law); Mariani *v.* Dougherty, 46 Cal. 26.

Connecticut.— Broughel *v.* Southern New England Tel. Co., 72 Conn. 617, 45 Atl. 435, 49 L. R. A. 404.

Nebraska.— Draper *v.* Tucker, (1903) 95 N. W. 1026.

New York.— Morris *v.* Metropolitan St. R. Co., 51 N. Y. App. Div. 512, 64 N. Y. Suppl. 878, 30 N. Y. Civ. Proc. 371; Connor *v.* New York, 28 N. Y. App. Div. 186, 50 N. Y. Suppl. 972; Meyer *v.* Hart, 23 N. Y. App. Div. 131, 48 N. Y. Suppl. 904; Willsen *v.* Metropolitan St. R. Co., 74 N. Y. Suppl. 774.

Texas.— Burns *v.* Merchants', etc., Oil Co., 26 Tex. Civ. App. 223, 63 S. W. 1061.

See 15 Cent. Dig. tit. "Death," § 124.

The amount of damages awarded was not sufficiently inadequate to warrant the ver-

b. Statutory Limitations. Many of the statutes giving a right of action for death by wrongful act fix the maximum limit of recovery,[39] five thousand dollars being a common limitation.[40] In some jurisdictions, however, by constitutional provision, the limitation of the amount to be recovered for injuries resulting in death by any legislative act is specifically forbidden.[41]

c. What Law Governs. The better rule seems to be that in an action for death by wrongful act, where the death occurred out of the state in which the action is pending, the amount of the recovery is governed by the *lex loci* and not by the *lex fori*.[42]

4. Apportionment and Distribution of Award — a. Right to Proceeds — (i) *Character of Fund.* Under statutes authorizing actions for death by wrongful

dict being set aside in the following cases: Snyder *v.* Lake Shore, etc., R. Co., (Mich. 1902) 91 N. W. 643; Leahey *v.* Davis, 121 Mo. 227, 29 S. W. 941; Overholt *v.* Vieths, 93 Mo. 422, 6 S. W. 74, 3 Am. St. Rep. 557 (where it was held that decedent's death, being caused by his own negligence, plaintiff should not complain of the verdict in his favor as inadequate); Gubbitosi *v.* Rothschild, 75 N. Y. App. Div. 477, 78 N. Y. Suppl. 286 [*reversing* 37 Misc. 99, 74 N. Y. Suppl. 775]; Swanton *v.* King, 72 N. Y. App. Div. 578, 76 N. Y. Suppl. 528; Terhune *v.* Joseph W. Cody Contracting Co., 72 N. Y. App. Div. 1, 76 N. Y. Suppl. 255; Reger *v.* Rochester R. Co., 2 N. Y. App. Div. 5, 37 N. Y. Suppl. 520; Silberstein *v.* Wm. Wicke Co., 22 N. Y. Suppl. 170, 171, 29 Abb. N. Cas. (N. Y.) 291; Schnable *v.* Providence Public Market, 24 R. I. 477, 53 Atl. 634.

39. Pittsburgh, etc., R. Co. *v.* Burton, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594 (holding that the Indiana act of March 29, 1879, limiting the recovery in certain cases of negligent death to five thousand dollars was repealed as to the amount of damages for the death, by the act of April 8, 1881, giving an action for death by wrongful act with recovery up to ten thousand dollars); Riley *v.* Grand Island Receivers, 72 Mo. App. 280 (construing the Kansas statute); Webb *v.* Denver, etc., R. Co., 7 Utah 17, 24 Pac. 616.

40. *Colorado.*—Denver, etc., R. Co. *v.* Spencer, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121; Denver, etc., R. Co. *v.* Spencer, 25 Colo. 9, 52 Pac. 211.

Connecticut.— Nelson *v.* Branford Lighting, etc., Co., 75 Conn. 548, 54 Atl. 303; Lamphear *v.* Buckingham, 33 Conn. 237.

Illinois.— Chicago, etc., R. Co. *v.* Adamick, 33 Ill. App. 412.

Missouri.— Becke *v.* Missouri Pac. R. Co., 102 Mo. 544, 13 S. W. 1053, 9 L. R. A. 157; Tetherow *v.* St. Joseph, etc., R. Co., 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617; Flynn *v.* Kansas City, etc., R. Co., 78 Mo. 195, 47 Am. Rep. 99; Holmes *v.* Hannibal, etc., R. Co., 69 Mo. 536; Mangan *v.* Foley, 33 Mo. App. 250.

Ohio.— Steel *v.* Kurtz, 28 Ohio St. 191.

Wisconsin.— Ewen *v.* Chicago, etc., R. Co., 38 Wis. 613.

See 15 Cent. Dig. tit. "Death," § 122. And see The Oceanic, 61 Fed. 338, 363, where the court said: "There are, however, considerations involved in determining the value of a life not embraced within the rules of the annuity tables. Morgan *v.* Southern Pac. Co., 95 Cal. 501, 30 Pac. 601; Cheatham *v.* Red River Line, 56 Fed. 248; *In re* Humboldt Lumber Manufacturers' Assoc., 60 Fed. 428. In 14 states, these considerations have found expression in statutes limiting the amount that may be recovered for the death of a person to $5,000, and in two states and one territory the law limits the amount to $10,000."

41. Phalen *v.* Rochester R. Co., 31 N. Y. App. Div. 448, 52 N. Y. Suppl. 836; Weber *v.* Third Ave. R. Co., 12 N. Y. App. Div. 512, 42 N. Y. Suppl. 789 (holding that N. Y. Const. (1895) art. 1, § 18, removing the limitation on the amount recoverable in actions for death, applies to an action under N. Y. Code Civ. Proc. § 1902, for death occurring after although the injury causing the death was inflicted before the provision went into effect); Medinger *v.* Brooklyn Heights R. Co., 6 N. Y. App. Div. 42, 39 N. Y. Suppl. 613; Smith *v.* Metropolitan St. R. Co., 15 Misc. (N. Y.) 158, 35 N. Y. Suppl. 1062; Lewis *v.* Hollahan, 103 Pa. St. 425 [*criticizing* Pennsylvania R. Co. *v.* Langdon, 92 Pa. St. 21, 37 Am. Rep. 651] (holding that Pa. Const. (1874) art. 3, § 1, providing that no act of the general assembly shall limit the amount of the liability of railroad companies for death caused through their negligence, is not restricted to future legislation alone, and hence repeals the act of April 4, 1868, limiting the liability of railroad companies to five thousand dollars in case of death caused by negligence); Pennsylvania R. Co. *v.* Bowers, 23 Wkly. Notes Cas. (Pa.) 257; Fleming *v.* Pennsylvania R. Co., 21 Wkly. Notes Cas. (Pa.) 526; Mathews *v.* Pennsylvania R. Co., 20 Wkly. Notes Cas. (Pa.) 575; Conway *v.* Philadelphia, etc., R. Co., 17 Phila. (Pa.) 71. See also Northern Pac. R. Co. *v.* Ellison, 3 Wash. 225, 28 Pac. 333, 29 Pac. 263; Gractz *v.* McKenzie, 3 Wash. 194, 28 Pac. 331.

42. Hanna *v.* Grand Trunk R. Co., 41 Ill. App. 116; Northern Pac. R. Co. *v.* Babcock, 154 U. S. 190, 14 S. Ct. 978, 38 L. ed. 958. *Contra,* Wooden *v.* Western New York, etc., R. Co., 126 N. Y. 10, 26 N. E. 1050, 22 Am. St. Rep. 803, 13 L. R. A. 458 [*affirming* 12 N. Y. Suppl. 908], decided on the ground that a domestic corporation has the right to be protected by remedial limitations of its jurisdiction.

act to be brought by the personal representative of the deceased,[43] the personal representative occupies the place of trustee, for a special purpose, of such fund as he may obtain by the suit, holding it, when recovered, solely for the use of those who are entitled under the statute, free from the claims of creditors and legatees, and subject only to such charges and expenses, inclusive of counsel fees and his own commissions, as may have been reasonably incurred in presenting and securing the claim.[44]

(II) *Apportionment Fixed by Statute.* In many jurisdictions the statutes provide that the damages recovered in an action for death by wrongful act, where the right of action is given to the widow, children, or next of kin of the deceased, shall be distributed to the widow and children in the proportions in which they would be entitled to take the personal property of the deceased under the intestate laws.[45]

43. **Considered as assets of estate.**— And even under statutes providing that damages recovered by the personal representative for death by wrongful act shall become assets of the estate, it is expressly provided that the amount recovered shall not be subject to the payment of the decedent's debts, and shall be distributed as other personalty. Griswold *v.* Griswold, 111 Ala. 572, 20 So. 437; South, etc., R. Co. *v.* Sullivan, 59 Ala. 272.

44. *Indiana.*— Jeffersonville R. Co. *v.* Swayne, 26 Ind. 477.

Kentucky.— O'Malley *v.* McLean, 67 S. W. 11, 23 Ky. L. Rep. 2258; Caruthers *v.* Neal, 14 S. W. 599, 12 Ky. L. Rep. 567. See Givens *v.* Kentucky Cent. R. Co., 89 Ky. 231, 12 S. W. 257, 11 Ky. L. Rep. 452.

Minnesota.— State *v.* Dakota County Probate Ct., 51 Minn. 241, 53 N. W. 463.

New York.— Lee *v.* Van Voorhis, 78 Hun 575, 29 N. Y. Suppl. 571.

North Carolina.— Baker *v.* Raleigh, etc., R. Co., 91 N. C. 308.

Ohio.— Steel *v.* Kurtz, 28 Ohio St. 191; Hall *v.* Crain, 2 Ohio Dec. (Reprint) 396, 2 West. L. Month. 593. See also Wolf *v.* Lake Erie, etc., R. Co., 55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812.

United States.— Dennick *v.* New Jersey Cent. R. Co., 103 U. S. 11, 26 L. ed. 439; St. Louis, etc., R. Co. *v.* Needham, 52 Fed. 371, 3 C. C. A. 129.

See 15 Cent. Dig. tit. "Death," § 132 *et seq.* See also Cassady *v.* Grimmelman, 108 Iowa 695, 698, 77 N. W. 1067, holding that under the Iowa statute the damages recovered are to be disposed of as personal property belonging to the estate of the decedent, "except that if the deceased leaves a husband, wife, child or parent, it shall not be liable for the payment of debts."

Remittitur of part of recovery.—It has been held under the Arizona statute, providing that an action for wrongful death may be brought by one of the beneficiaries therein designated for the benefit of all and that the recovery shall be divided among the persons entitled thereto, that the party suing is not authorized to remit damages allotted to some of the persons entitled.

45. *Alabama.*— Griswold *v.* Griswold, 111 Ala. 572, 20 So. 437.

Indiana.— Duzan *v.* Myers, 30 Ind. App. 227, 65 N. E. 1046.

Missouri.— Senn *v.* Southern R. Co., 124 Mo. 621, 28 S. W. 66 (holding that, under the Missouri statute, providing that recovery may be had by the father and mother jointly if deceased was a minor and unmarried, where there is only one surviving parent at the date of the judgment such surviving parent is entitled to the full amount thereof); Riley *v.* Grand Island Receivers, 72 Mo. App. 280 (construing the Kansas statute).

New Jersey.— Paulmier *v.* Erie R. Co., 34 N. J. L. 151.

New York.— Snedeker *v.* Snedeker, 164 N. Y. 58, 58 N. E. 4 [*affirming* 47 N. Y. App. Div. 471, 63 N. Y. Suppl. 580].

Ohio.— Hall *v.* Crain, 2 Ohio Dec. (Reprint) 453, 3 West. L. Month. 137.

Pennsylvania.— Allison *v.* Powers, 179 Pa. St. 531, 36 Atl. 333; North Pennsylvania R. Co. *v.* Robinson, 44 Pa. St. 175.

Texas.— International, etc., R. Co. *v.* Sein, 11 Tex. Civ. App. 386, 33 S. W. 558.

United States.— Felton *v.* Spiro, 78 Fed. 576, 24 C. C. A. 321, holding that Tenn. Code, §§ 2291, 2292, giving a right of action for death to the widow, and if there is no widow, to the children "or" personal representative for the benefit of the widow or next of kin, does not affect the right of children to share with the widow the damages recovered.

See 15 Cent. Dig. tit. "Death," § 132 *et seq.* See Trafford *v.* Adams Express Co., 8 Lea (Tenn.) 96 (holding that damages awarded for injuries resulting in the death of a married woman go exclusively to the husband, and not to the next of kin); Gores *v.* Graff, 77 Wis. 174, 46 N. W. 48 (holding that under the Wisconsin statute the widow alone is entitled to the damages recovered, and it is error to direct the jury to give damages to recompense the estate of the deceased, since such instruction in fact directs them to compensate the children as well as the widow).

"Child" or "children" construed.— Under Ga. Code, § 3828, providing that a widow or a child or children may recover for the homicide of a husband or parent, and that they may recover where the death results from a crime, or from criminal or other negligence, it has been held that the children intended

(III) *Apportionment by Jury.* In some jurisdictions the statute provides that the jury may direct in what proportion the damages awarded shall be distributed among beneficiaries designated in the statute.[46] However, under these statutes it has been held that in an action by parents for the death of a child, there being no other interested parties, the amount recovered is community property, and a finding by the jury of a separate amount for each is unnecessary.[47]

b. What Law Governs. The rule is well recognized that in an action for death by wrongful act brought under the statute of a foreign state, the distribution of the amount recovered in such action should be made in accordance with the law of the foreign state.[48]

G. Questions For Jury[49] **— 1. Cause of Death.** A substantial conflict in the

are the minor children of the deceased, and that adult children are not entitled to any portion of the amount recovered for his death. Coleman *v.* Hyer, 113 Ga. 420, 38 S. E. 962. See also Lewis *v.* Hunlock's Creek, etc., Co., 203 Pa. St. 511, 53 Atl. 349, 93 Am. St. Rep. 774, holding that children of full age, whose family relations with the deceased had been severed, were not entitled to share in the judgment. For definition of "children" see 7 Cyc. 123.

Next of kin.— Under Minn. Gen. St. (1894) § 5913, providing that damages recovered for wrongful act of a person causing the death of another shall be for the exclusive benefit of the widow and next of kin, it has been held that the husband is not the next of kin of the deceased wife within the meaning of this statute. Watson *v.* St. Paul City R. Co., 70 Minn. 514, 73 N. W. 400. See also Drake *v.* Gilmore, 52 N. Y. 389. See, however, Steel *v.* Kurtz, 28 Ohio St. 191, holding that the Ohio act authorizing an action for causing the death of a person, and providing that it shall be brought for the exclusive benefit of "the widow and next of kin," does not exclude the widower from all benefit from the recovery, when the person killed was a married woman.

In the absence of surviving children, it has been held under the Pennsylvania act that the widow alone is entitled to the damages recovered, and that the parents of deceased are entitled to no part thereof. Lehigh Iron Co. *v.* Rupp, 100 Pa. St. 95.

Beneficiaries omitted from petition.— In an action brought by one of the beneficiaries designated in the statute, or the personal representative of the deceased, the fact that plaintiff in his petition for damages fails to name all the legal beneficiaries provided for in the act will not bar any of such beneficiaries not named in the petition from receiving his distributive share of the judgment recovered. Duzan *v.* Myers, 30 Ind. App. 227, 65 N. E. 1046; Oyster *v.* Burlington Relief Dept., (Nebr. 1902) 91 N. W. 699, 59 L. R. A. 291.

46. Houston City St. R. Co. *v.* Sciacca, 80 Tex. 350, 16 S. W. 31; Galveston, etc., R. Co. *v.* Le Gierse, 51 Tex. 189; International, etc., R. Co. *v.* Lehman, (Tex. Civ. App. 1903) 72 S. W. 619 (holding, however, that the failure of the jury to apportion damages among the several parties plaintiff is not reversible error where the plaintiffs do not object, the general verdict for all the plaintiffs being sufficient to bar a subsequent action by any of them); International, etc., R. Co. *v.* Johnson, 23 Tex. Civ. App. 160, 55 S. W. 772; Texas, etc., R. Co. *v.* Hudman, 8 Tex. Civ. App. 309, 28 S. W. 388 (holding, however, that the fact that the verdict apportioned a certain amount to the children of the deceased collectively was not prejudicial to defendant, and not ground for reversal on appeal); Dallas Rapid Transit R. Co. *v.* Elliott, 7 Tex. Civ. App. 216, 26 S. W. 455 (holding, however, that where one of the beneficiaries by counsel waived his claim in open court, a verdict for the other beneficiary alone was proper); Norfolk, etc., R. Co. *v.* Stevens, 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367; Powell *v.* Powell, 84 Va. 415, 4 S. E. 744 (in which case, however, the administrator compromised the action, and it was held that after paying costs and attorney's fees the amount received as the result of the compromise should be distributed according to the statute of distribution); Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. (Va.) 431, 441, 26 Am. Rep. 384 (where the court said: "The manner in which the damages are to be distributed is no concern of the defendant, and not under the control of the plaintiff. It is a question for the jury exclusively, not involved in the issue").

47. Galveston, etc., R. Co. *v.* Hughes, 22 Tex. Civ. App. 134, 54 S. W. 264; Missouri, etc., R. Co. *v.* Evans, 16 Tex. Civ. App. 68, 41 S. W. 80; San Antonio St. R. Co. *v.* Mechler, (Tex. Civ. App. 1894) 29 S. W. 202.

48. Weaver *v.* Baltimore, etc., R. Co., 21 D. C. 499; McDonald *v.* McDonald, 96 Ky. 209, 28 S. W. 482, 16 Ky. L. Rep. 412, 49 Am. St. Rep. 289; Matter of Degaramo, 86 Hun (N. Y.) 390, 33 N. Y. Suppl. 502 (where an action was brought in New York for death by wrongful act, occurring in Ohio, of a person residing in Michigan, and it was held that the amount recovered was not assets of the estate of the decedent, to be distributed according to the laws of her residence, but should be distributed according to the laws of Ohio); Dennick *v.* New Jersey Cent. R. Co., 103 U. S. 11, 26 L. ed. 439.

49. Questions of law and fact generally see Trial.

testimony as to the cause of the injury resulting in death or as to the cause of death will ordinarily justify the submission of the question to the jury;[50] and such conflict will likewise warrant the court in refnsing to disturb the findings of the jury.[51] So where the evidence bearing on the question of contributory negligence on the part of the decedent is conflicting it should be left to the jury.[52] Evidence tending to show that decedent's death was caused by the negligence of defendant or his agents, which evidence is not rebutted on behalf of defendant, will jnstify a verdict by the jury in favor of plaintiff.[53]

2. QUANTUM OF DAMAGES. Since it is the exclusive province of the jury to determine the facts in a case where the liability of defendant for the death of the decedent is established, questions as to the *quantum* of damages in regard to the

50. *California.*— Kerrigan *v.* Market St. R. Co., 138 Cal. 506, 71 Pac. 621.

Illinois.— Chicago, etc., R. Co. *v.* Huston, 196 Ill. 480, 63 N. E. 1028 [*affirming* 95 Ill. App. 350]; Martin *v.* Chicago, etc., R. Co., 194 Ill. 138, 62 N. E. 599 [*reversing* 92 Ill. App. 133]; East St. Louis Connecting R. Co. *v.* Dwyer, 41 Ill. App. 522.

Iowa.— Hopkinson *v.* Knapp, etc., Co., 92 Iowa 328, 60 N. W. 653.

Kentucky.— Madisonville *v.* Pemberton, 75 S. W. 229, 25 Ky. L. Rep. 347.

Massachusetts.— Knight *v.* Overman Wheel Co., 174 Mass. 455, 54 N. E. 890.

Missouri.— Wiese *v.* Remme, 140 Mo. 289, 41 S. W. 797; Kelly *v.* Hannibal, etc., R. Co., 70 Mo. 604; Ray *v.* Poplar Bluff, 70 Mo. App. 252.

Nebraska.—Brotherton *v.* Manhattan Beach Imp. Co., 48 Nebr. 563, 67 N. W. 479, 58 Am. St. Rep. 709, 33 L. R. A. 598.

New York.— Shortsleeve *v.* Stebbins, 77 N. Y. App. Div. 588, 79 N. Y. Suppl. 40; Grace *v.* Fassott, 67 N. Y. App. Div. 443, 73 N. Y. Suppl. 906 (where the evidence connecting the death with the injury was held insufficient to go to the jury); Purcell *v.* Lauer, 14 N. Y. App. Div. 33, 43 N. Y. Suppl. 988, 4 N. Y. Annot. Cas. 129; Lyons *v.* Second Ave. R. Co., 89 Hun 374, 35 N. Y. Suppl. 372, 2 N. Y. Annot. Cas. 402; Potter *v.* New York Cent., etc., R. Co., 61 N. Y. Super. Ct. 351, 19 N. Y. Suppl. 862; Taft *v.* Brooklyn Heights R. Co., 14 Misc. 390, 35 N. Y. Suppl. 1042.

North Carolina.— Powell *v.* Southern R. Co., 125 N. C. 370, 34 S. E. 530.

Ohio.— Cameron *v.* Heister, 10 Ohio Dec. (Reprint) 651, 22 Cinc. L. Bul. 384.

Pennsylvania.— Brashear *v.* Philadelphia Traction Co., 180 Pa. St. 392, 36 Atl. 914.

Texas.— Klatt *v.* Houston Electric St. R. Co., (Civ. App. 1900) 57 S. W. 1112.

See 15 Cent. Dig. tit. "Death," § 141 *et seq.*

Wilful negligence.— It was held in Claxton *v.* Lexington, etc., R. Co., 13 Bush (Ky.) 636, that to make out a case of wilful negligence under Gen. St. c. 57, giving punitive damages for death caused by wilful negligence, it must be shown that the conduct of the party in fault was such as to evidence reckless indifference to the safety of the public, or an intentional failure to perform a plain duty, in the performance of which the public or the party injured has an interest, and that in this case the question whether the negligence was wilful or not was a question for the jury to determine.

51. *Indiana.*— Chicago, etc., R. Co. *v.* Beatty, 13 Ind. App. 604, 40 N. E. 753, 42 N. E. 284.

Massachusetts.— Maher *v.* Boston, etc., R. Co., 158 Mass. 36, 32 N. E. 950; Nourse *v.* Packard, 138 Mass. 307.

Minnesota.— Deisen *v.* Chicago, etc., R. Co., 43 Minn. 454, 45 N. W. 864.

Mississippi.— Illinois Cent. R. Co. *v.* Harris, (1901) 29 So. 760.

Missouri.— Walsh *v.* Missouri Pac. R. Co., 102 Mo. 582, 14 S. W. 873, 15 S. W. 757.

New York.— Looram *v.* Third Ave. R. Co., 57 N. Y. Super. Ct. 165, 6 N. Y. Suppl. 504; Rettig *v.* Fifth Ave. Transp. Co., 6 Misc. 328, 26 N. Y. Suppl. 896.

Wisconsin.— Carpenter *v.* Rolling, 107 Wis. 559, 83 N. W. 953.

United States.— Sorenson *v.* Northern Pac. R. Co., 36 Fed. 166.

See 15 Cent. Dig. tit. "Death," § 141 *et seq.*

52. Griffin *v.* Brunswick, etc., R. Co., 113 Ga. 642, 38 S. E. 968; Boyle *v.* Degnon-McLean Constr. Co., 47 N. Y. App. Div. 311, 61 N. Y. Suppl. 1043; Cogdell *v.* Wilmington, etc., R. Co., 124 N. C. 302, 32 S. E. 706. See also Au *v.* New York, etc., R. Co., 29 Fed. 72, holding that in an action for damages for the negligent killing of an employee, where one defense is that the deceased contributed to the loss of his life by his own negligence, if the facts proved be such that the court would not sustain a verdict imputing negligence to him, it is proper to withdraw the subject from the consideration of the jury by directing a verdict on that issue for plaintiff.

Self-defense.— Where by defendant's own testimony it is shown that he brought on the difficulty, used the first offensive language, and struck the first blow, and that he pursued and shot deceased while the latter was trying to escape, it was held not to be error for the court to refuse to submit the issue of self-defense to the jury. Morgan *v.* Barnhill, 118 Fed. 24, 55 C. C. A. 1.

53. Suburban Electric Co. *v.* Nugent, 58 N. J. L. 658, 34 Atl. 1069, 32 L. R. A. 700. See also Norris *v.* Kohler, 41 N. Y. 42, where the evidence was held to be sufficient to justify a finding in favor of plaintiff.

life expectancy,[54] earning capacity,[55] and under statutes allowing damages for the mental or physical suffering of deceased, as to whether deceased died without conscious suffering,[56] and value of loss of services,[57] pecuniary dependence,[58] and general damages of the beneficiaries are all questions of fact which should under proper instructions from the court be submitted to them.[59] Where, however, the evidence introduced on the part of plaintiff clearly fails to establish any liability on the part of defendant, it is proper for the court to direct a verdict for defendant.[60]

54. *Alabama.*— Decatur Car Wheel, etc., Co. *v.* Mehaffey, 128 Ala. 242, 29 So. 646; Alabama Mineral R. Co. *v.* Jones, 114 Ala. 519, 21 So. 507, 62 Am. St. Rep. 121, holding that it was an invasion of the province of the jury to charge that if deceased was at the time of his death in good health, of sober habits, and forty-eight years old his expectancy of life was as much as eighteen years.

California.—Redfield *v.* Oakland Consol. St. R. Co., 110 Cal. 277, 42 Pac. 822. See also Harrison *v.* Sutter St. R. Co., 116 Cal. 156, 47 Pac. 1019.

Georgia.— Western, etc., R. Co. *v.* Clark, 117 Ga. 548, 44 S. E. 1; Fink *v.* Ash, 99 Ga. 106, 24 S. E. 976; Georgia R. Co. *v.* Pittman, 73 Ga. 325.

Illinois.— Chicago, etc., R. Co. *v.* Kelly, 182 Ill. 267, 54 N. E. 979.

Indiana.— See Malott *v.* Shimer, 153 Ind. 35, 54 N. E. 101, 74 Am. St. Rep. 278.

Kentucky.—Louisville, etc., R. Co. *v.* Kelly, 100 Ky. 421, 38 S. W. 852, 40 S. W. 452, 19 Ky. L. Rep. 69; McClurg *v.* Ingleheart, 33 S. W. 80, 17 Ky. L. Rep. 913.

Maryland.— Baltimore, etc., Turnpike Road *v.* State, 71 Md. 573, 18 Atl. 884.

Michigan.— Jones *v.* McMillan, 129 Mich. 86, 88 N. W. 206; Nelson *v.* Lake Shore, etc., R. Co., 104 Mich. 582, 62 N. W. 993; Balch *v.* Grand Rapids, etc., R. Co., 67 Mich. 394, 34 N. W. 884.

New York.— Johnson *v.* Hudson River R. Co., 2 Sweeny 298.

North Carolina.— Russell *v.* Windsor Steamboat Co., 126 N. C. 961, 36 S. E. 191.

Pennsylvania.— Waechter *v.* Second Ave. Traction Co., 198 Pa. St. 129, 47 Atl. 967.

Texas.— Missouri Pac. R. Co. *v.* Lee, 70 Tex. 496, 7 S. W. 857.

See 15 Cent. Dig. tit. "Death," § 141 *et seq.*

55. *Georgia.*— Georgia R. Co. *v.* Pittman, 73 Ga. 325.

Maryland.— Baltimore, etc., R. Co. *v.* State, 24 Md. 271.

Michigan.— Jones *v.* McMillan, 129 Mich. 86, 88 N. W. 208.

Wisconsin.— Carpenter *v.* Rolling, 107 Wis. 559, 83 N. W. 953.

United States.— Missouri, etc., R. Co. *v.* Elliott, 102 Fed. 96, 42 C. C. A. 188, holding likewise that the jury were authorized, where the deceased was a railroad fireman, to take notice of the fact that such employees were paid in accordance with the general schedule of wages.

See 15 Cent. Dig. tit. "Death," § 141 *et seq.*

56. Leiter *v.* Kinnare, 68 Ill. App. 558; Green *v.* Smith, 169 Mass. 485, 48 N. E. 621; Western, etc., R. Co. *v.* Roberson, 61 Fed. 592, 9 C. C. A. 646. See also Sweetland *v.* Chicago, etc., R. Co., 117 Mich. 329, 75 N. W. 1066, 43 L. R. A. 568, where it was held that the evidence did not justify a finding that deceased was conscious at any time after the accident.

57. Crawford *v.* Southern R. Co., 106 Ga. 870, 33 S. E. 826; McCahill *v.* Detroit City R. Co., 96 Mich. 156, 55 N. W. 668; Morhart *v.* North Jersey St. R. Co., 64 N. J. L. 236, 45 Atl. 812; Davis *v.* Columbia, etc., R. Co., 21 S. C. 93.

58. St. Louis, etc., R. Co. *v.* Davis, 55 Ark. 462, 18 S. W. 628; Welch *v.* New York, etc., R. Co., 176 Mass. 393, 57 N. E. 668; Mulhall *v.* Fallon, 176 Mass. 266, 57 N. E. 386, 79 Am. St. Rep. 309, 54 L. R. A. 934; Tilley *v.* Hudson River R. Co., 29 N. Y. 252, 86 Am. Dec. 297.

59. *Alabama.*— Richmond, etc., R. Co. *v.* Freeman, 97 Ala. 289, 11 So. 800.

California.—McKeever *v.* Market St. R. Co., 59 Cal. 294.

Illinois.— Lake Shore, etc., R. Co. *v.* Parker, 131 Ill. 557, 23 N. E. 237.

Iowa.— McMarshall *v.* Chicago, etc., R. Co., 80 Iowa 757, 45 N. W. 1065, 20 Am. St. Rep. 445.

Missouri.— Rapp *v.* St. Joseph, etc., R. Co., 106 Mo. 423, 17 S. W. 487; King *v.* Missouri Pac. R. Co., 98 Mo. 235, 11 S. W. 563; Schlereth *v.* Missouri Pac. R. Co., 96 Mo. 509, 10 S. W. 66.

Texas.— Houston, etc., R. Co. *v.* Bryant, (Civ. App. 1903) 72 S. W. 885; Cole *v.* Parker, (Civ. App. 1901) 66 S. W. 135.

Utah.— Utah Sav., etc., Co. *v.* Diamond Coal, etc., Co., 26 Utah 299, 73 Pac. 524.

United States.— St. Louis, etc., R. Co. *v.* Needham, 52 Fed. 371, 3 C. C. A. 129.

See 15 Cent. Dig. tit. "Death," § 141 *et seq.*

Province of court.— While it is not the province of the court to assess damages, or to say what is "reasonable and just compensation" for the pecuniary injuries in a suit for damages for death by wrongful act, it may express the extreme limit beyond which the verdict would be clearly wrong. Conley *v.* Maine Cent. R. Co., 95 Me. 149, 49 Atl. 668.

60. *Georgia.*— Jones *v.* Georgia Cent. R. Co., 116 Ga. 27, 42 S. E. 363.

Illinois.— Chicago, etc., R. Co. *v.* Fitzsimmons, 40 Ill. App. 360.

Iowa.— Pearson *v.* Wilcox, 109 Iowa 123, 80 N. W. 228.

Mississippi.— Southern R. Co. *v.* Miller, (1901) 30 So. 68.

New York.— White *v.* New York Cent., etc.,

H. Instructions[61] — **1. In General.** The instructions to the jury should be based upon the pleadings, and supported by the evidence in the case,[62] and instructions enlarging or restricting the issues are equally faulty.[63]

2. Basis For Computing Damages. Under statutes awarding damages with reference to the pecuniary injuries to the beneficiaries resulting from the death, it is the duty of the court to instruct the jury as to the basis upon which the damages are to be computed, and the pecuniary value of the life of the deceased to the beneficiaries ascertained.[64] However, where the instruction fairly

R. Co., 68 N. Y. App. Div. 209, 74 N. Y. Suppl. 4.

Washington.— Armstrong *v.* Cosmopolis, 32 Wash. 110, 72 Pac. 1038.

United States.— Hastings Lumber Co. *v.* Garland, 115 Fed. 15, 52 C. C. A. 609.

See 15 Cent. Dig. tit. "Death," § 141 *et seq.*

61. Instructions generally see Trial.

62. *California.*— Kerrigan *v.* Market St. R. Co., 138 Cal. 506, 71 Pac. 621.

Illinois.— North Chicago St. R. Co. *v.* Irwin, 202 Ill. 345, 66 N. E. 1077; Baltimore, etc., R. Co. *v.* Then, 159 Ill. 535, 42 N. E. 971 [*affirming* 59 Ill. App. 561]; Chicago, etc., R. Co. *v.* Kneirim, 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259; North Chicago Rolling Mill Co. *v.* Morrissey, 111 Ill. 646; Chicago, etc., R. Co. *v.* Sykes, 96 Ill. 162; Locher *v.* Kluga, 97 Ill. App. 518; Illinois Cent. R. Co. *v.* Bartle, 94 Ill. App. 57.

Indiana.— Delphi *v.* Lowery, 74 Ind. 520, 39 Am. Rep. 98.

Iowa.— Brooke *v.* Chicago, etc., R. Co., 81 Iowa 504, 47 N. W. 74.

Kentucky.— McClurg *v.* Ingleheart, 33 S. W. 80, 17 Ky. L. Rep. 913.

Maryland.— Baltimore, etc., R. Co. *v.* State, 81 Md. 371, 32 Atl. 201.

Michigan.— Balch *v.* Grand Rapids, etc., R. Co., 67 Mich. 394, 34 N. W. 884.

Missouri.— Rinard *v.* Omaha, etc., R. Co., 164 Mo. 270, 64 S. W. 124; Tobin *v.* Missouri Pac. R. Co., (1891) 18 S. W. 996; McGowan *v.* St. Louis Ore, etc., Co., (1891) 16 S. W. 236: Nichols *v.* Winfrey, 90 Mo. 403, 2 S. W. 305; Nichols *v.* Winfrey, 79 Mo. 544.

New York.— Ingrafra *v.* Samuels, 71 N. Y. App. Div. 14, 75 N. Y. Suppl. 718.

North Carolina.— Mendenhall *v.* North Carolina R. Co., 123 N. C. 275, 31 S. E. 480; Coley *v.* Statesville, 121 N. C. 301, 28 S. W. 482.

Ohio.— Darling *v.* Williams, 35 Ohio St. 58.

Tennessee.— Freeman *v.* Illinois Cent. R. Co., 107 Tenn. 340, 64 S. W. 1; Nashville, etc., R. Co. *v.* Seaborn, 85 Tenn. 391, 4 S. W. 661.

Texas.—Missouri, etc., R. Co. *v.* Eyer, (Civ. App. 1902) 69 S. W. 453; Campbell *v.* Houston, etc., R. Co., 2 Tex. Unrep. Cas. 473. See also Johnson *v.* Galveston, etc., R. Co., 27 Tex. Civ. App. 616, 66 S. W. 906; Houston, etc., R. Co. *v.* Loeffler, (Civ. App. 1899) 51 S. W. 536.

Wisconsin.— Seaman *v.* Farmers' L. & T. Co., 15 Wis. 578.

See 15 Cent. Dig. tit. "Death," § 142 *et seq.*

63. *Alabama.*— Williams *v.* South, etc., R. Co., 91 Ala. 635, 9 So. 77.

Colorado.— Denver, etc., R. Co. *v.* Spencer, (1898) 52 Pac. 211.

Georgia.— Western, etc., R. Co. *v.* Moore, 94 Ga. 457, 20 S. E. 640; Central R. Co. *v.* Thompson, 76 Ga. 770.

Idaho.— Colt *v.* Spokane, etc., R. Co., (1893) 35 Pac. 39.

Illinois.— Illinois Cent. R. Co. *v.* Reardon, 157 Ill. 372, 41 N. E. 871; North Chicago Rolling Mill R. Co. *v.* Morrissey, 111 Ill. 646 (where an instruction was held to be faulty in that it ignored the question of contributory negligence); Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177. See also Chicago, etc., R. Co. *v.* Austin, 69 Ill. 426.

Michigan.— Rouse *v.* Detroit Electric R. Co., 128 Mich. 149, 87 N. W. 68.

Missouri.—Barth *v.* Kansas City El. R. Co., 142 Mo. 535, 44 S. W. 778.

North Carolina.— Pickett *v.* Wilmington, etc., R. Co., 117 N. C. 616, 23 S. E. 264, 53 Am. St. Rep. 611, 30 L. R. A. 257.

Texas.— Ft. Worth, etc., R. Co. *v.* Morrison, 93 Tex. 527, 56 S. W. 745; Galveston, etc., R. Co. *v.* Kutac, 76 Tex. 473, 13 S. W. 327 (holding that under a statute giving a right of action against a railroad company for death caused by the gross negligence of its servants, a charge authorizing recovery on the ground of ordinary negligence of defendant's servants, and a refusal to charge that gross negligence must be shown, is error); Galveston, etc., R. Co. *v.* Power, (Civ. App. 1899) 54 S. W. 629 (holding that in an action by parents to recover for the death of an adult son, an instruction that proof that the deceased was contributing to the support of his parents entitled them to damages was erroneous, since it did not require the jury to consider the probable willingness and ability of the deceased to continue such contributions in the future, and thereby unduly restricted the issue); Gulf, etc., R. Co. *v.* Letsch, (Civ. App. 1897) 40 S. W. 181; St. Louis, etc., R. Co. *v.* Williams, (Civ. App. 1896) 37 S. W. 992 (where the instruction was held to be erroneous in not limiting the liability to the "natural and probable consequences"). See also Galveston, etc., R. Co. *v.* Cook, (Sup. 1891) 16 S. W. 1038.

Wisconsin.— Gores *v.* Graff, 77 Wis. 174, 46 N. W. 48.

United States.— St. Louis, etc., R. Co. *v.* Needham, 52 Fed. 371, 3 C. C. A. 129.

64. *Alabama.*— Decatur Car Wheel, etc., Co. *v.* Mehaffey, 128 Ala. 242, 29 So. 646.

embodies a general statement of the law as to the basis upon which the damages are to be computed, it is not open to objection upon the ground of vagueness, in the absence of a request for more explicit instructions.[65]

I. Verdict[66]— **1. In General.** The principal is elementary that the verdict and judgment must follow the pleadings, and that a verdict for an amount in excess of that claimed in the pleadings cannot be sustained.[67]

2. Special Findings. Where a special finding of facts[68] is inconsistent with the general verdict, the former should control the latter and the court should

Arkansas.— St. Louis, etc., R. Co. *v.* Haist, (1903) 72 S. W. 893.

California.— Keast *v.* Santa Ysabel Gold Min. Co., 136 Cal. 256, 68 Pac. 771 (where the instructions as to the basis of damages were held to be correct); Harrison *v.* Sutter St. R. Co., 116 Cal. 156, 47 Pac. 1019; Redfield *v.* Oakland Consol. St. R. Co., (1896) 42 Pac. 1063.

Colorado.— Hayes *v.* Williams, 17 Colo. 465, 30 Pac. 352.

Georgia.— Western, etc., R. Co. *v.* Clark, 117 Ga. 548, 44 S. E. 1; Central R. Co. *v.* Thompson, 76 Ga. 770.

Illinois.— Economy Light, etc., Co. *v.* Stephen, 187 Ill. 137, 58 N. E. 359; Chicago, etc., R. Co. *v.* Kneirim, 48 Ill. App. 243.

Iowa.— Coates *v.* Burlington, etc., R. Co., 62 Iowa 486, 17 N. W. 760.

Kentucky.— Louisville, etc., R. Co. *v.* Brooks, 5 Ky. L. Rep. 749.

Missouri.— Browning *v.* Wabash Western R. Co., 124 Mo. 55, 27 S. W. 644 [*affirming* (Sup. 1893) 24 S. W. 731]; McGowan *v.* St. Louis Ore, etc., Co., 109 Mo. 518, 19 S. W. 199 [*reversing* (1891) 16 S. W. 236]; Knight *v.* Sadtler Lead, etc., Co., 91 Mo. App. 574; Goss *v.* Missouri Pac. R. Co., 50 Mo. App. 614; Fugler *v.* Bothe, 43 Mo. App. 44.

New Jersey.— Hackney *v.* Delaware, etc., Tel., etc., Co., (Err. & App. 1903) 55 Atl. 252.

New York.— Green *v.* Hudson River R. Co., 32 Barb. 25.

Pennsylvania.—Steinbrunner *v.* Pittsburgh, etc., R. Co., 146 Pa. St. 504, 23 Atl. 239, 28 Am. St. Rep. 806; Pennsylvania R. Co. *v.* Butler, 57 Pa. St. 335; Pennsylvania R. Co. *v.* Ogier, 35 Pa. St. 60, 78 Am. Dec. 322.

Tennessee.—Davidson Benedict Co. *v.* Severson. 109 Tenn. 572, 72 S. W. 967; Illinois Cent. R. Co. *v.* Spence, 93 Tenn. 173, 23 S. W. 211, 42 Am. St. Rep. 907.

Texas.— Merchants', etc., Oil Co. *v.* Burns, 96 Tex. 573, 74 S. W. 758 (holding that an instruction that plaintiff could only recover such sum as would represent the "present worth" of the probable amount which deceased would have contributed to plaintiff's support had he lived was erroneous, as prescribing a mathematical rule for the determination of the damages without reference to the facts and circumstances of the particular case); San Antonio Traction Co. *v.* White, 94 Tex. 468, 61 S. W. 706; Citizens' R. Co. *v.* Washington, 24 Tex. Civ. App. 422, 58 S. W. 1042; Houston, etc., R. Co. *v.* White, 23 Tex. Civ. App. 280, 56 S. W. 204; De Palacios *v.* Rio Grande, etc., R. Co., (Civ. App. 1898) 45 S. W. 612; Storrie *v.* Marshall, (Civ. App. 1894) 27 S. W. 224 (where plaintiff's counsel argued that plaintiff's mental anguish and suffering were elements of damage, and the court refused to charge that they were not, and laid down no measure of damages, and it was held that a judgment for plaintiff should be reversed, although the verdict was not excessive under the facts).

Utah.— Corbett *v.* Oregon Short Line R. Co., 25 Utah 449, 71 Pac. 1065.

United States.— Hunt *v.* Kile, 98 Fed. 49, 38 C. C. A. 641.

See 15 Cent. Dig. tit. "Death," § 145 *et seq.*

An instruction relating solely to the measure of damages need not state the rule that the deceased must have exercised ordinary care in order to entitle plaintiff to recovery. Illinois Cent. R. Co. *v.* Gilbert, 157 Ill. 354, 41 N. E. 724.

Married woman.— An instruction that the damages accruing to the estate of a married woman, from her death by wrongful act, should be assessed as though she were unmarried is erroneous, because a part of a married woman's time must ordinarily be devoted to her family. Stulmuller *v.* Cloughly, 58 Iowa 738, 13 N. W. 55.

65. *Illinois.*— Chicago, etc., R. Co. *v.* Kneirim, 48 Ill. App. 243.

Indiana.— Malott *v.* Shimer, 153 Ind. 35, 54 N. E. 101, 74 Am. St. Rep. 278.

Iowa.— Andrews *v.* Chicago, etc., R. Co., 86 Iowa 677, 53 N. W. 399.

Missouri.— Geismann *v.* Missouri-Edison Electric Co., 173 Mo. 654, 73 S. W. 654 (where defendant asked for no instructions, or for a modification of instructions given); Browning *v.* Wabash Western R. Co., 124 Mo. 55, 27 S. W. 644 [*affirming* (Sup. 1893) 24 S. W. 731]; Stumbo *v.* Duluth Zinc Co., 100 Mo. App. 635, 75 S. W. 185.

Texas.— Galveston, etc., R. Co. *v.* Worthy, (Civ. App. 1894) 27 S. W. 426.

See 15 Cent. Dig. tit. "Death," § 145 *et seq.*

66. Verdict generally see Trial.

67. International, etc., R. Co. *v.* McDonald, 75 Tex. 41, 12 S. W. 860, where plaintiff sued for herself and the minor children of deceased, and claimed certain specified sums as damages for each, and it was held that a verdict for an amount in excess of that claimed by any one of them could not be sustained, although the total verdict was within the gross sum asked.

68. In some jurisdictions the rule is laid down that it is within the discretion of the court whether it will direct the jury to make

render judgment accordingly, provided the special finding is of an ultimate and not a mere probative fact.[69]

J. Appeal and Error. Applying the general rules relating to review on appeal or by writ of error[70] to actions for death by wrongful act it has been held that questions not raised in the trial court will not be considered on appeal;[71] and that a judgment will not be reversed for error which results in no prejudice to the party urging the objection on appeal.[72] Nor will the judgment be reversed for errors which on the consideration of the whole record are shown not to have affected the judgment.[73]

DEATH-BED. In Scots law, a state of sickness which ends in death.[1]

DEATH-BED DEED. A deed made by a person ill of an illness of which he afterwards dies.[2]

DEATHSMAN. The executioner; hangman; he that executes the extreme penalty of the law.[3]

DE ATTORNATO RECIPIENDO. A writ which lay to the judges of a court, requiring them to receive and admit an attorney for a party.[4]

DE AUDIENDO ET TERMINANDO. Literally, "for hearing and determining; to hear and determine."[5]

special findings of fact or not, and that it is not error to refuse to do so. Webb *v.* Denver, etc., R. Co., 7 Utah 17, 24 Pac. 616.

69. Cleveland, etc., R. Co. *v.* Doerr, 41 Ill. App. 530, holding likewise that defendant might require a specific, categorical finding of "yes" or "no" where the interrogatory called for a finding of an ultimate and not an evidentiary fact); Treffert *v.* Ohio, etc., R. Co., 36 Ill. App. 93; Hamner *v.* Chicago, etc., R. Co., 61 Iowa 56, 15 N. W. 597; Needham *v.* Louisville, etc., R. Co., (Ky. 1887) 11 S. W. 306. See also Chicago, etc., R. Co. *v.* Dunleavy, 129 Ill. 132, 22 N. E. 15; Pittsburgh, etc., R. Co. *v.* Burton, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594.

70. See, generally, APPEAL AND ERROR.

71. Hughes *v.* Richter, 161 Ill. 409, 43 N. E. 1066; Long *v.* Morrison, 14 Ind. 595, 77 Am. Dec. 72 (holding that an objection to an action by an administrator, on the ground that the husband of deceased had not been joined, could not be taken for the first time on appeal); Kennayde *v.* Pacific R. Co., 45 Mo. 255 (holding that where the petition does not properly refer to the statute giving the right of action, the objection must be raised below or it will not be considered on appeal); Paschal *v.* Owen, 77 Tex. 583, 14 S. W. 203.

Thus the question of the contributory negligence of the intestate will not be considered on appeal unless such question was urged in the court below. Taylor *v.* Woburn, 130 Mass. 494.

72. *Georgia.*— Middle Georgia, etc., R. Co. *v.* Barnett, 104 Ga. 582, 30 S. E. 771; Western, etc., R. Co. *v.* Bussey, 95 Ga. 584, 23 S. E. 207.

Illinois.— St. Louis Consol. Coal Co. *v.* Maehl, 130 Ill. 551, 22 N. E. 715.

Missouri.— Schlereth *v.* Missouri Pac. R. Co., (Sup. 1892) 19 S. W. 1134.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Conway, 112 Pa. St. 511, 4 Atl. 362; South Easton *v.* Reinhart, 13 Wkly. Notes Cas. 389.

Texas.— Missouri, etc., R. Co. *v.* Evans, 16 Tex. Civ. App. 68, 41 S. W. 80.

Illustrations of harmless error.— Where the damages awarded are clearly less than plaintiff is entitled to, the judgment will not be disturbed on account of an erroneous instruction as to the measure of damages (Ohio, etc., R. Co. *v.* Johnson, 31 Ill. App. 183; Brunswig *v.* White, 70 Tex. 504, 8 S. W. 85), or because of the introduction of improper evidence (Chicago *v.* Powers, 42 Ill. 169, 89 Am. Dec. 418; Hyde *v.* Union Pac. R. Co., 7 Utah 356, 26 Pac. 979).

73. *Georgia.*— Boswell *v.* Barnhart, 96 Ga. 521, 23 S. E. 414.

Illinois.— See Chicago, etc., R. Co. *v.* Kneirim, 48 Ill. App. 243.

Kentucky.— Louisville, etc., R. Co. *v.* Brooks, 5 Ky. L. Rep. 749.

Michigan.— Cooper *v.* Lake Shore, etc., R. Co., 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482.

Missouri.—McGowan *v.* St. Louis Ore, etc., Co., 109 Mo. 518, 19 S. W. 199 [*reversing* (Sup. 1891) 16 S. W. 236]; Soeder *v.* St. Louis, etc., R. Co., 100 Mo. 673, 13 S. W. 714, 18 Am. St. Rep. 724.

New York.— Burns *v.* Houston, etc., Ferry R. Co., 15 Misc. 19, 36 N. Y. Suppl. 774.

Texas.— Texas, etc., R. Co. *v.* Lester, 75 Tex. 56, 12 S. W. 955.

See 15 Cent. Dig. tit. "Death," § 154.

1. Kinney L. Dict.
2. Kinney L. Dict.
3. Black L. Dict.
4. Black L. Dict.
5. The name of a writ or commission granted to certain justices to hear and determine cases of heinous misdemeanor, trespass, riotous breach of the peace, etc. Cyclopedic L. Dict.

DE AVERIIS CAPTIS IN WITHERNAM. A writ which lies to take other cattle of the defendant where he has taken and carried away cattle of the plaintiff out of the country, so that they cannot be reached by replevin.[6]

DE AVERIIS REPLEGIANDIS. A writ directed to the sheriff, commanding him to cause to be replevied for a party his beasts or chattels, &c., which another had taken and unjustly detained.[7] (See, generally, REPLEVIN.)

DE AVERIIS RETORNANDIS. Literally, "for returning the cattle." A term applied to pledges given in the old action of replevin.[8]

DE BANCO. Literally, "of the bench." A term formerly applied in England to the justices of the court of common pleas, or "bench," as it was originally styled.[9]

DEBATUM. In old European law, a dispute or controversy.[10]

DEBAUCH.[11] To seduce and vitiate a woman;[12] to seduce and violate a woman;[13] to ravish, deflower, violate.[14] (See ABDUCTION; HUSBAND AND WIFE; INCEST; RAPE; SEDUCTION.)

DEBAUCHED.[15] Carnally known;[16] enticed; led astray; vitiated or corrupted.[17]

DE BENE ESSE. Formally;[18] conditionally;[19] provisionally.[20] A technical phrase applied to certain acts deemed at the time to be well done, or until an exception or other avoidance.[21] (De Bene Esse: Bills to Take Testimony, see DEPOSITIONS.)

DEBENT. In old English law, they owe; they ought.[22]

DEBENTURE.[23] An instrument in the nature of a mortgage, to secure a certain

6. Bouvier L. Diet. [*citing* 3 Blackstone Comm. 149].

7. Burrill L. Diet.

8. Black L. Diet. [*citing* 2 Reeve Eng. L. 177].

9. Black L. Diet.

10. Burrill L. Diet. [*citing* Spelman Gloss.].

11. "The verb 'to debauch' is a word of French origin, compounded of the preposition '*de*,' from, and '*bauche*,' an old Armorican word in use in Brittany, meaning shop, and signifying, in its compound sense, to entice or draw one away from his work, employment, or duty. It is in this sense of enticing and corrupting that it came into use in our language, as will be found by a reference to one of the earliest authorities for the meaning of English words, (Phillips' New World of Words, 1696,) where it is defined 'to corrupt one's manners, to make lewd, to mar or spoil;' a sense in which it had been previously used by Ben Jonson and by Shakspeare." Koenig *v.* Nott, 2 Hilt. (N. Y.) 323, 329.

12. Koenig *v.* Nott, 2 Hilt. (N. Y.) 323, 330 [*quoting* Bailey Diet.], where it is said: "As applied to a woman, the word, as thus defined, meant merely seduction."

13. Koenig *v.* Nott, 2 Hilt. (N. Y.) 323, 330 [*quoting* Bailey Diet. folio ed. (by Scott, 1755)], where it is said: "It is in this twofold sense that it is used in the law forms, and which it has now fully acquired as a general word."

14. Koenig *v.* Nott, 2 Hilt. (N. Y.) 323, 330 [*quoting* McKenzie Eng. Synonyms, (London, 1854)], where it is said: "It is used in Worcester's Dictionary (Boston, 1847), as an appropriate definition for the word 'constuprate,' from the Latin *constupro*, meaning to violate."

15. Distinguished from "seduced."—Where a statute provided that, "If any person shall, under promise of marriage, seduce and debauch any unmarried female of good repute," etc., the court, after defining the words "seduce" and "debauch," said "that a female may be seduced without being debauched, or debauched without being seduced." State *v.* Reeves, 97 Mo. 668, 675, 10 S. W. 841, 10 Am. St. Rep. 349 [*cited* in Putman *v.* State, 29 Tex. App. 454, 457, 16 S. W. 97, 25 Am. St. Rep. 738].

"Debauched habits" see Wiekwire's Appeal, 30 Conn. 86, 88.

16. State *v.* Wheeler, 108 Mo. 658, 662, 18 S. W. 924; State *v.* Eekler, 106 Mo. 585, 590, 17 S. W. 814, 27 Am. St. Rep. 372; State *v.* Reeves, 97 Mo. 668, 676, 10 S. W. 841, 10 Am. St. Rep. 349 [*cited* in Putman *v.* State, 29 Tex. App. 454, 457, 16 S. W. 97, 25 Am. St. Rep. 738].

17. Koenig *v.* Nott, 2 Hilt. (N. Y.) 323, 329.

18. Bouvier L. Diet.

19. Blair *v.* Weaver, 11 Serg. & R. (Pa.) 84, 85.

20. Bouvier L. Diet.

It is equivalent to provisionally, with which meaning the phrase is commonly employed. For example, a declaration is filed or delivered, special bail is put in, a witness is examined, etc., *de bene esse*, or provisionally. Bouvier L. Diet. [*citing* 3 Blackstone Comm. 383].

21. Bouvier L. Diet.

Appearance de bene esse see 3 Cyc. 502.

22. Burrill L. Diet.

23. "This is an old word, and is derived from the Latin *debentur*." Levy *v.* Abercorris Slate, etc., Co., 37 Ch. D. 260, 57 L. J. Ch. 202, 58 L. T. Rep. N. S. 218, 36 Wkly. Rep. 411, 412 [*citing* Blount L. Diet.; Skeat Etym. Diet.].

sum of money, with interest;[24] an instrument which shows that the party owes and is bound to pay;[25] an acknowledgment of a debt;[26] a document which either creates a debt or acknowledges a debt;[27] a writing acknowledging a debt; specifi-

A term not clearly defined.— In Edmonds *v.* Blaina Furnaces Co., 36 Ch. D. 215, 218, 56 L. J. Ch. 815, 57 L. T. Rep. N. S. 139, 35 Wkly. Rep. 798, Chitty, J., said: "The term 'debenture' has not, so far as I am aware, ever received any precise legal definition. It is, comparatively speaking, a new term. I do not mean a new term in the English language, because there is a passage in Swift which has been mentioned to me where the term 'debenture' is used. . . . But although it is not a term with any legal definition, it is a term which has been used by lawyers frequently with reference to instruments under Acts of Parliament." See also British India Steam Nav. Co. *v.* Inland Revenue Com'rs, 7 Q. B. D. 165, 50 L. J. Q. B. 517, 519, 44 L. T. Rep. N. S. 378, 29 Wkly. Rep. 610, where Grove, J., said: "The question [in the case under consideration] apparently a simple one and certainly easy to state, is not free from difficulty, owing to the curious fact that the word 'debenture' does not appear to admit of any accurate definition. A very general definition is given in the dictionaries, and neither the counsel in the case nor any information that we have been able to obtain defines exactly what 'debenture' means. The difficulty arises from the fact that in the Act of Parliament (33 & 34 Vict. c. 97) the word 'debenture' is mentioned in the schedule of duties in two senses, namely, 'Debenture for securing the payment or repayment of money, or the transfer or retransfer of stock,' and 'Debenture or certificate for entitling any person to receive any drawback,' etc.; and — in another portion of the schedule, where mortgages are spoken of — 'Mortgage, bond debenture, covenant, warrant of attorney, and foreign security of any kind." Lindley, J., said: "Now what the exact meaning of 'debenture' is I do not know. I do not find any particular definition of it, and we know that there are various classes of instruments called 'debentures.' You may have mortgage debentures, which are charges of some kind on property; you may have debentures which are bonds, and if this were under seal it would be a debenture of this kind. You may have a debenture which is nothing more than an acknowledgment of debt. You may have an instrument like this which is something more — it is a statement by two directors that a company will pay. I think any instruments of that sort may be debentures."

Distinguished from "promissory note."— In British India Steam Nav. Co. *v.* Inland Revenue Com'rs, 7 Q. B. D. 165, 50 L. J. Q. B. 517, 44 L. T. Rep. N. S. 378, 381, 29 Wkly. Rep. 610, Grove, J., said: "Now it seems to me that there is a real difference here between what the company themselves call a 'debenture' and a promissory note. The statute contemplates in a debenture something different from a promissory note, because in the former case it imposes a higher duty. The document may be a promissory note in one sense of the word, but it may also be something more, for there are matters attached to it which have a purpose in them and which may be attached to a promissory note, and yet make it none the less a promissory note." See also Brown *v.* Inland Revenue Com'rs, 64 L. J. M. C. 209.

24. *In re* Rogers, 1 D. & Sm. 338, 342, 6 Jur. N. S. 1363, 30 L. J. Ch. 153, 9 Wkly. Rep. 64, where it is said: "And there are coupons attached to the debenture, which make the interest payable half-yearly."

In the nature of a mortgage security.— In *In re* Standard Mfg. Co., [1891] 1 Ch. 627, 645, 60 L. J. Ch. 292, 64 L. T. Rep. N. S. 487, 2 Meg. 418, 39 Wkly. Rep. 369, where the question was whether certain debentures of a joint stock company were bills of sale, to which a statute in relation to bills of sale applied, Bowen, L. J., said: "That these debentures are 'agreements by which a right in equity to a charge or security on personal chattels is conferred,' appears to be clear."

No distinction between "debentures" and "mortgage debentures."— Where the articles of association conferred power upon the company "to borrow money and to issue transferable bonds to bearer, or otherwise debentures and mortgage debentures based on all or any of the assets real or personal of the company," Jessel, M. R., said: "I do not feel myself bound to put a different meaning on the words 'debentures' and 'mortgage debentures' used in this article. I do not know what the difference can be if you get 'bonds,' 'debentures,' and 'mortgage debentures,' and I do not feel myself concerned to inquire." *In re* Florence Land, etc., Co., 10 Ch. D. 530, 539, 48 L. J. Ch. 137, 39 L. T. Rep. N. S. 589, 27 Wkly. Rep. 236.

25. *In re* Imperial Land Co., L. R. 11 Eq. 478, 489, 40 L. J. Ch. 343, 24 L. T. Rep. N. S. 255 [*quoted* in Toronto Bank *v.* Cobourg, etc., R. Co., 7 Ont. 1, 7].

26. Edmonds *v.* Blaina Furnaces Co., 36 Ch. D. 215, 219, 56 L. J. Ch. 815, 57 L. T. Rep. N. S. 139, 35 Wkly. Rep. 798 (where Chitty, J., said: "And speaking of the numerous and various forms of instruments which have been called debentures without anyone being able to say the term is incorrectly used, I find that generally, if not always, the instrument imports an obligation or covenant to pay"); Toronto Bank *v.* Cobourg, etc., R. Co., 7 Ont. 1, 7 [*quoting* Skeats Dict.] (where it is said: "Etymologically debenture is but debt 'writ large.' At first, during the Protectorate, when the term seems to have originated, it was spelled 'Debenter,' that being the Latin word with which the instrument began, 38 Vict. ch. 47"). See also Richards *v.* Kidderminster, [1896] 2 Ch. 212, 221, 65 L. J. Ch. 502, 74 L. T. Rep. N. S. 483, 4 Manson 169, 44 Wkly. Rep. 505.

27. Levy *v.* Abercorris Slate, etc., Co., 37 Ch. D. 260, 264, 57 L. J. Ch. 202, 58 L. T. Rep. N. S. 218, 36 Wkly. Rep. 411, where it is

cally, an instrument, generally under seal, for the repayment of money lent; usually if not exclusively used of obligations of corporations or large moneyed copartnerships, issued in a form convenient to be bought and sold as investments;[28] a writing which is first, a simple acknowledgment under seal of the debt; secondly an instrument acknowledging the debt and charging the property of the company with repayment; and thirdly, an instrument acknowledging the debt, charging the property of the company with repayment, and further restricting the company from giving prior charge.[29] Also a certificate given by the collector of a port, under the United States customs laws, to the effect that an importer of merchandise therein named is entitled to a drawback, specifying the amount and time when payable;[30] an instrument in use in some government departments, by which the government is charged to pay to a creditor or his assigns, the sum found due on auditing his accounts.[31] (See, generally, Corporations.)

DEBENTURE STOCK. A stock or fund representing money borrowed by a company or public body, in England, and charged on the whole or part of its property.[32]

DEBET. He owes.[33] (See, generally, Debt, Action of.)

DEBET ESSE FINIS LITIUM. A maxim meaning "There ought to be an end of lawsuits."[34]

DEBET ET DETINET. He owes and detains.[35] (See, generally, Debt, Action of.)

DEBET ET SOLET. He owes and is used, [or has been used to do].[36] (See, generally, Debt, Action of.)

DEBET QUIS JURI SUBJACERE UBI DELINQUIT. A maxim meaning "Every one ought to be subject to the law of the place where he offends."[37]

DEBET SUA CUIQUE DOMUS ESSE PERFUGIUM TUTISSIMUM. A maxim meaning "Every man's house should be a perfectly safe refuge."[38]

DE BIEN ESTRE. See De Bene Esse.

said: "And any document which fulfils either of these conditions is a 'debenture.' I cannot find any precise legal definition of the term, it is not either in law or commerce a strictly technical term, or what is called a term of art. It must be 'issued,' but 'issued' is not a technical term; it is a mercantile term well understood; 'issue' here means the delivery over by the company to the person who has the charge."

28. Barton Nat. Bank *v.* Atkins, 72 Vt. 33, 45, 47 Atl. 176 [*citing* Century Dict.], where it is said: "Sometimes a specific fund or property is pledged by the debentures, in which case they are usually termed mortgage debentures".

29. English, etc., Mercantile Invest. Co. *v.* Brunton, [1892] 2 Q. B. 700, 712, 62 L. J. Q. B. 136, 67 L. T. Rep. N. S. 406, 4 Reports 58, 41 Wkly. Rep. 133 [*cited* in Brown *v.* Inland Revenue Com'rs, 64 L. J. M. C. 209, 211].

30. Black L. Dict.

31. Burrill L. Dict.

32. Black L. Dict.

"That there is a material difference between debenture stock and proprietary stock" see *In re* Bodman, [1891] 3 Ch. 135, 137, 61 L. J. Ch. 31, 65 L. T. Rep. N. S. 522, 40 Wkly. Rep. 60.

33. Abbott L. Dict.

34. Bouvier L. Dict. [*citing* Jenkins Cent. 61].

35. Abbott L. Dict.

In the old forms employed in the common-law act of debt, if the action was between the original contracting parties to the obligation in suit the plaintiff used to declare that defendant "owes and detains" the money due. If the action was between representatives, the allegation was "*detinet*" only: he detains it. Abbott L. Dict. [*citing* Termes de la Ley].

36. Burrill L. Dict.

Words anciently used in writs, showing both a right and a custom as the ground of the claim; as in the writs De secta ad molendinum, De molendino, domo, et ponte reparanda, etc. Burrill L. Dict.

Where a person sued to recover any right whereof his ancestor was disseised by the tenant or his ancestor, he used only the word *debet* in his writ, *solet* not being proper because his ancestor was disseised and the estate discontinued. But if he sued for anything that was for the first time denied him, he used both the words *debet et solet*, because his ancestor before him, as well as he himself had usually enjoyed the thing for which he sued, until the present refusal of the tenant. Burrill L. Dict. [*citing* Termes de la Ley].

37. Bouvier L. Dict. [*citing* Finch L. 14, 36; Inst. 34; Wingate Max.].

38. Bouvier L. Dict. And see Clason *v.* Shotwell, 12 Johns. (N. Y.) 31, 54, in the opinion of the chancellor.

DE BIEN ET DE MAL. For good and evil. A phrase by which a party accused of a crime anciently put himself upon a jury; indicating his entire submission to their verdict.[39] See De Bono Et Malo.

DE BIENS LE MORT. Of the goods of the deceased.[40]

DE BIGAMIS. Concerning men twice married.[41]

DEBILE FUNDAMENTUM FALLIT OPUS. A maxim meaning "Where the foundation fails all goes to the ground."[42]

DEBIT. A sum charged as due or owing;[43] the left-hand page of a ledger, to which all items are carried that are charged to an account.[44] (See Credit.)

DEBITA. Debts.[45] (See Debt.)

DEBITA FUNDI. In Scotch law, debts secured upon land.[46]

DEBITA LAICORUM. In old English law, debts of the laity, or of lay persons.[47]

DEBITA NON PRÆSUMITUR DONARE. A maxim meaning "A debtor is not presumed to give."[48]

DEBITA SEQUUNTUR PERSONAM DEBITORIS. A maxim meaning "Debts follow the person of the debtor."[49]

DEBITOR. In the civil and old English law, a debtor.[50]

DEBITORUM PACTIONIBUS, CREDITORUM PETITIO NEC TOLLI NEC MINUI POTEST. A maxim meaning "The right of creditors to sue cannot be taken away or lessened by the contracts of their debtors."[51]

DEBITRIX. A female debtor.[52]

DEBITUM. A thing due or owing; an obligation; a Debt,[53] *q. v.*

DEBITUM ET CONTRACTUS SUNT NULLIUS LOCI. A maxim meaning "Debt and contract are of no particular place."[54]

DEBITUM FUNDI. In Scotch law, a debt of the ground; a debt which is a charge upon real estate.[55]

DEBITUM IN PRÆSENTI SOLVENDUM IN FUTURO.[56] A debt due at present to be paid in future.[57]

39. Burrill L. Dict.

40. Burrill L. Dict.

41. Black L. Dict.

The title of the statute 4 Edw. I, St. 3; so called from the initial words of the fifth chapter. Black L. Dict. [*citing* 2 Reeve Eng. L. 142].

42. Broom Leg. Max.

Applied in Ward *v.* Lee, 1 Bibb (Ky.) 18, 24; Anderson *v.* Stapel, 80 Mo. App. 115, 122; Davies *v.* Lowndes, 7 M. & G. 762, 803, 49 E. C. L. 762; Davies *v.* Lowndes, 8 Scott N. R. 539, 567.

43. Black L. Dict.

The term is used in bookkeeping to denote the charging of a person or an account with all that is supplied to or paid out for him or for the subject of the account. Black L. Dict.

44. Wharton L. Lex.

45. Burrill L. Dict.

46. Burrill L. Dict.

47. Burrill L. Dict. [*citing* Crabb Hist. Eng. L. 107].

48. Wharton L. Lex.

Applied in Byrne *v.* Byrne, 3 Serg. & R. (Pa.) 54, 56, 8 Am. Dec. 641; Richardson *v.* Greese. 3 Atk. 65, 68, 26 Eng. Reprint 840.

49. Wharton L. Lex.

50. Black L. Dict.

51. Bouvier L. Dict. [*citing* Broom Leg. Max.].

52. Black L. Dict.

53. Anderson L. Dict. And see New Jersey Ins. Co. *v.* Meeker, 37 N. J. L. 282, 301, where it is said: "And Sir Edward Coke, in commenting on the word '*debitum*,' in the statute of Merton, ch. 5, says: 'Debitum signifieth not only debt, for which an action of debt doth lie, but here in this ancient act of parliament, it signifieth generally any duty to be yielded or paid.'" See also Daniels *v.* Palmer, 41 Minn. 116, 121, 42 N. W. 855.

54. Bouvier L. Dict.

Applied in British South Africa Co. *v.* Companhia de Mocambique, [1893] A. C. 602, 631, 63 L. J. Q. B. 70, 69 L. T. Rep. N. S. 604, 6 Reports 1; Warrener *v.* Kingsmill, 8 U. C. Q. B. 407, 414.

55. Burrill L. Dict. [*citing* Bell Dict.].

56. "Accruing debt."—In Webb *v.* Stenton, 11 Q. B. D. 518, 524, 52 L. J. Q. B. 584, 49 L. T. Rep. N. S. 432 [*citing* Tapp *v.* Jones, L. R. 10 Q. B. 591, 44 L. J. Q. B. 127, 33 L. T. Rep. N. S. 201, 23 Wkly. Rep. 694], the court said: "There again it is obvious that in 1875 that learned judge construed the words 'accruing debt' to mean a debt *debitum in presenti, solvendum in futuro*. Now that is a debt known to the law and which the law has always recognised. The law has always recognised as a debt two kinds of debt, a debt payable at the time, and a debt payable in the future, and unless the legislature intended to invent a new kind of debt not known to the law, 'accruing debt' can only be what the judges have so stated."

57. Eppright *v.* Nickerson, 78 Mo. 482, 488 [*citing* Abbott L. Dict.; Bouvier L. Dict.; Burrill L. Dict.; Wharton L. Lex.].

DE BONE MEMORIE. Of good memory; of sound mind.[58]

DE BONIS ASPORTATIS. For goods taken away; for carrying away goods.[59]

DE BONIS NON ADMINISTRATIS. Of the goods not administered.[60] (See Executors and Administrators.)

DE BONIS NON AMOVENDIS. A writ for not removing goods.[61]

DE BONIS PROPRIIS. Of his own goods.[62]

DE BONIS TESTATORIS AC SI. From the goods of the testator, if he has any, and, if not, from those of the executor.[63]

Applied or explained in the following cases:

California.— People *v.* Arguello, 37 Cal. 524, 525.

Florida.— Fiolyau *v.* Laverty, 3 Fla. 72, 107.

Maryland.— Baltimore City *v.* Rice, 50 Md. 302, 316; Reese *v.* Bank of Commerce, 14 Md. 271. 283, 74 Am. Dec. 536.

Massachusetts.— *In re* Foote, 22 Pick. 299, 305; Wood *v.* Partridge, 11 Mass. 488, 493; Wentworth *v.* Whittemore, 1 Mass. 471, 473.

Minnesota.—Wilson *v.* Eigenbrodt, 30 Minn. 4, 7, 13 N. W. 907.

New York.— Adams *v.* Tator, 57 Hun 302, 305, 10 N. Y. Suppl. 617; Utica Ins. Co. *v.* American Mut. Ins. Co., 16 Barb. 171, 176; Burrill *v.* Sheil, 2 Barb. 457, 470; Fullerton *v.* Chatham Nat. Bank, 17 Misc. 529. 533, 40 N. Y. Suppl. 874; Adams *v.* Tator, 19 N. Y. Civ. Proc. 114, 118.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Clarke, 29 Pa. St. 146, 151; Commonwealth Bank *v.* Wise, 3 Watts 394, 401; Magoffin *v.* Patton, 4 Rawle 113, 115; Flintham's Appeal, 11 Serg. & R. 16, 24; West *v.* Sink, 2 Yeates 273, 274; Crall *v.* Ford, 28 Wkly. Notes Cas. 366, 367; Wilson *v.* Corbin, 1 Pars. Sel. Cas. 347, 357.

Virginia.— Major *v.* Major, 32 Gratt. 819, 823.

Wisconsin.— Trowbridge *v.* Sickler, 42 Wis. 417, 420.

United States.— U. S. *v.* North Carolina Bank, 6 Pet. 29, 39, 8 L. ed. 308 (where it is said: "In the strictest sense, then, the bond is a *debitum in presenti*, though, looking to the condition, it may be properly said to be *solvendum in futuro*; and we think that it is in the sense of this maxim that the Legislature is to be understood in the use of the words 'debt due to the United States.' Wherever the common law would hold a debt to be *debitum in presenti, solvendum in futuro*, the statute embraces it just as much as if it were presently payable"); *In re* Glen Iron Works, 20 Fed. 674, 681.

England.— Wallace *v.* Universal Automatic Machines Co., [1894] 2 Ch. 547, 550, 63 L. J. Ch. 598, 70 L. T. Rep. N. S. 852, 1 Manson 315, 7 Reports 316; *In re* Hargreaves, 44 Ch. D. 236, 241, 39 L. J. Ch. 375, 62 L. T. Rep. N. S. 819; Parker *v.* Hodgson, 1 Dr. & Sm. 568, 573, 7 Jur. N. S. 750, 30 L. J. Ch. 590, 4 L. T. Rep. N. S. 762, 9 Wkly. Rep. 607; Atty.-Gen. *v.* Ansted, 13 L. J. Exch. 101, 104, 12 M. & W. 520; King *v.* Sackett, W. W. & H. 341, 342.

Canada.— Robertson *v.* Williams, 18 Nova Scotia 393, 398; Cockburn *v.* Sylvester, 1 Ont. App. 471, 476; Upper Canada Bank *v.* Grand Trunk R. Co., 13 U. C. C. P. 304, 312; Perrin *v.* Hamilton, 5 U. C. C. P. 57, 75; Marmora Foundry Co. *v.* Boswell, 1 U. C. C. P. 175, 185; Hall *v.* Brown, 15 U. C. Q. B. 419, 420; Hill *v.* Lott, 13 U. C. Q. B. 463, 465, 467; Dack *v.* Currie, 12 U. C. Q. B. 334, 340; Warrener *v.* Kingsmill, 8 U. C. Q. B. 407, 414.

That a debt payable in futuro may be set off against a debt *in presenti* see 5 Cyc. 380 note 7.

58. Black L. Dict. [*citing* 2 Inst. 510].

59. Adams Gloss.

At common law, the action of trespass for wrongfully taking and carrying away personal property is technically termed trespass *de bonis asportatis*. Adams Gloss. [*citing* 3 Blackstone Comm. 150, 151; 1 Chitty Pl. 171].

60. Adams Gloss.

Where, in consequence of the death or removal of an administrator, a new administrator is appointed, the latter is termed an administrator *de bonis non*, i. e., of the goods not administered by the former. Adams Gloss. [*citing* 2 Stephen Comm. 243]. And see Mass. Pub. St. (1882) c. 166, § 11, where it is provided that where an executor or administrator dies, etc., during the pendency of a suit, the same may be prosecuted by or against the administrator *de bonis non*, etc.

61 Black L. Dict.

A writ anciently directed to the sheriffs of London, commanding them, in cases where a writ of error was brought by a defendant against whom a judgment was recovered, to see that his goods and chattels were safely kept without being removed, while the error remained undetermined, so that execution might be had of them, etc. Black L. Dict. [*citing* Termes de la Ley].

62. Adams Gloss. [*citing* 1 Parsons Contr. 31]. And see Siglar *v.* Haywood, 8 Wheat. (U. S.) 675, 680, 5 L. ed. 713 (where it is said: "There is also additional error in the judgment which is rendered against the administrators, *de bonis propriis* instead of being *de bonis testatoris*"); Elwell *v.* Quash, 1 Str. 20 (where it is said: "A judgment was entered against all the executors *de bonis testatoris* for the debt, and against the executor, who gave the warrant, *de bonis propriis* for the costs"); Hancocke *v.* Prowd, 1 Saund. 328, 335, note 10 (where it is said: "But if the judgment be entered *de bonis propriis*, instead of *bonis testatoris si*, &c. it is considered as a mere clerical mistake, which the court below will amend on motion"); Sickles *v.* Asselstine, 10 U. C. Q. B. 203, 206 (where it is said: "If the plea be true, it also protects the executor from liability to the plaintiff's costs, *de bonis propriis*").

63. Black L. Dict.

DE BONIS TESTATORIS, OR INTESTATI. Of the goods of the testator, or intestate.[64]

DE BONO ET MALO. Literally, "for good and ill." The Latin form of the law French phrase "*De bien et de mal*."[65]

DE BONO GESTU. For good behaviour.[66]

DEBRIS. Defined with reference to mining, tumble stuff, or matter which may have been brought to its position by the action of the elements, as distinguished from the vast body of the earth which lies below.[67] (See, generally, MINES AND MINERALS.)

DEBT.[68] In legal acceptation, a sum of money due by certain and express agreement;[69] where the quantity is fixed and does not depend on any subsequent

A judgment rendered where an executor falsely pleads any matter as a release, or, generally, in any case where he is to be charged in case his testator's estate is insufficient. Black L. Dict. [*citing* 1 Williams' Saund. 336*b*; Bacon Abr. "Executor," B, 3].

64. Black L. Dict.

A term applied to a judgment awarding execution against the property of a testator or intestate, as distinguished from the individual property of his executor or administrator. Black L. Dict. [*citing* 2 Archbold Pr. K. B. 148, 149].

65. Black L. Dict.

In ancient criminal pleading, this was the expression with which the prisoner put himself upon a jury, indicating his absolute submission to their verdict. Black L. Dict.

This was also the name of the special writ of jail delivery formerly in use in England, which issued for each particular prisoner, of course. It was superseded by the general commission of jail delivery. Black L. Dict.

66. Burrill L. Dict.

67. Stevens *v.* Williams, 23 Fed. Cas. No. 13,414, where it is said: "There are quite a number of words which may be applied to that superficial deposit; that which is movable, as contrasted with the immovable mass that lies below, such as alluvium, detritus, débris."

68. **"Debt" is a common-law word** (Harris *v.* Larsen, 24 Utah 139, 146, 66 Pac. 782) and is a technical term (Ripon Knitting Works *v.* Schreiber, 101 Fed. 810, 816, 4 Am. Bankr. Rep. 299).

Change of form of debt as affecting chattel mortgage see 7 Cyc. 67.

Compared with "default" and "miscarriage."— In Wood Frauds, § 114 [*quoted* in Gansey *v.* Orr, 173 Mo. 532, 544, 73 S. W. 477, it is said the words "debt," "default," and "miscarriage" "apply (1) to guaranties for an existing debt, (2) guaranties for future debts, or for future losses, which may be incurred by the acts of a third party, (3) to some past or future default in duty by a third party." And see Moorehouse *v.* Crangle, 36 Ohio St. 130, 133, 38 Am. Rep. 564.

Compared with "indebtedness."— Where a clause of a will used the words "that the said indebtedness be canceled," etc., the court said: "The words 'debt' and 'indebtedness' are not always used in the same sense; that is, they do not always import a legal obligation on the part of one to pay another something due him. They often imply a mere moral or equitable obligation, as well as a strictly legal one." Scott *v.* Neeves, 77 Wis. 305, 310, 45 N. W. 421.

Debt and costs paid see Phillips *v.* Israel, 10 Serg. & R. (Pa.) 391, 392.

"Debt" as affected by renewal of note see 7 Cyc 877.

"Debts due to the public" as used in a statute see Baxter *v.* Baxter, 23 S. C. 114, 117.

"Debts first to be paid" as used in a will see Owen *v.* Ellis, 64 Mo. 77, 88.

"Debt had been fraudulently contracted" within the meaning of the attachment law see Sunday Mirror Co. *v.* Galvin, 55 Mo. App. 412, 418.

"Debt" secured by a chattel mortgage see 6 Cyc. 1014.

"Existing debts" as used in a statute see Victory Webb Printing, etc., Mach. Mfg. Co. *v.* Beecher, 26 Hun (N. Y.) 48, 52. Within the meaning of the statute of frauds see Severs *v.* Dodson, 53 N. J. Eq. 633, 637, 34 Atl. 7, 51 Am. St. Rep. 641.

69. *California.*— Melvin *v.* State, 121 Cal. 16, 24, 53 Pac. 416 [*citing* 3 Blackstone Comm. 154].

Colorado.— Troy Laundry, etc., Co. *v.* Denver, 11 Colo. App. 368, 53 Pac. 256, 257 [*quoting* Blackstone Comm. 155].

Connecticut.— New Haven Saw-Mill Co. *v.* Fowler, 28 Conn. 103, 108.

Georgia.— Dawson *v.* Dawson Waterworks Co., 106 Ga. 696, 710, 32 S. E. 907 [*citing* Anderson L. Dict.; 3 Blackstone Comm. 154]; Tompkins *v.* Augusta Southern R. Co., 102 Ga. 436, 446, 30 S. E. 992 [*citing* Anderson L. Dict.].

Idaho.— Haas *v.* Misner, 1 Ida. 170, 177 [*quoting* Bouvier L. Dict.]

Indiana.— Cassady *v.* Laughlin, 3 Blackf. 134, 135 [*citing* Blackstone Comm. 153].

Iowa.—Swanson *v.* Ottumwa, 118 Iowa 161, 171, 91 N. W. 1048, 59 L. R. A. 620 [*citing* Bouvier L. Dict.; Jacob L. Dict.].

Kentucky.—Watson *v.* McNairy, 1 Bibb 356 [*citing* 3 Blackstone Comm. 153].

Maryland.— Hyatt *v.* Vanneck, 82 Md. 465, 475, 33 Atl. 972 [*citing* 3 Blackstone Comm. 154]; Baltimore City *v.* Rice, 50 Md. 302, 316 [*citing* Jacob L. Dict.].

Massachusetts.— Gray *v.* Bennett, 3 Metc. 522, 526 [*quoted* in *In re* Sutherland, 23 Fed. Cas. No. 13,639, Deady 416].

Missouri.— Boatman's Sav. Inst. *v.* State Bank, 33 Mo. 497, 518, 84 Am. Dec. 61 [*quot-*

valuation to settle it;[70] a fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future.[71] And the term has

ing 3 Blackstone Comm. 154]; Dryden *v.* Kellogg, 2 Mo. App. 87, 94.

Montana.— Davenport *v.* Kleinschmidt, 6 Mont. 502, 536, 13 Pac. 249 [*citing* 3 Blackstone Comm. 154].

New Jersey.— Camden *v.* Allen, 26 N. J. L. 398, 399.

New York.— Leggett *v.* Sing Sing Bank, 24 N. Y. 283, 290 [*citing* 3 Blackstone Comm. 154]; Latimer *v.* Veader, 20 N. Y. App. Div. 418, 425, 46 N. Y. Suppl. 823 [*citing* Blackstone Comm.]; Commercial Nat. Bank *v.* Taylor, 64 Hun 499, 502, 19 N. Y. Suppl. 533; Kimpton *v.* Bronson, 45 Barb. 618, 625 [*citing* Newell *v.* People, 7 N. Y. 9, 124]; Andrews *v.* Murray, 9 Abb. Pr. 8, 14 [*citing In re* Denny, 2 Hill (N. Y.) 220, 223; 3 Blackstone Comm. 154; Jacob L. Dict.], where it is said: "It is also said by Jacobs, under 'debt,' that 'whatever the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge.'"

North Dakota.— Sonnesyn *v.* Akin, (1903) 97 N. W. 557, 562 [*quoting* Anderson L. Dict.].

Ohio.— Amazon Ins. Co. *v.* Cappeller, 8 Ohio Dec. (Reprint) 493, 494, 8 Cinc. L. Bul. 247 [*citing* 2 Blackstone Comm. 154].

Pennsylvania.— Solis *v.* Blank, 199 Pa. St. 600, 604, 39 Atl. 302 [*citing* 3 Blackstone Comm. 154]; McKeesport *v.* Fidler, 147 Pa. St. 532, 540, 23 Atl. 799 [*citing* Camden *v.* Allen, 26 N. J. L. 398, 399]; Respublica *v.* Le Caze, 1 Yeates 55, 69 [*citing* 3 Blackstone Comm. 153].

South Dakota.—Finch *v.* Armstrong, 9 S. D. 255, 261, 68 N. W. 740 [*citing* Anderson L. Dict.].

Tennessee.— Parker *v.* Savage, 6 Lea 406, 409 [*citing* Bouvier L. Dict.].

Utah.— Harris *v.* Larsen, 24 Utah 139, 147, 66 Pac. 782 [*citing* 3 Blackstone Comm. 154].

United States.— Lane County *v.* Oregon, 7 Wall. 71, 80, 19 L. ed. 101; *In re* Radway, 20 Fed. Cas. No. 11,523, 3 Hughes 309 [*citing* Bouvier L. Dict.]; *In re* Sutherland, 23 Fed. Cas. No. 13,639, Deady 416 [*quoting* 3 Blackstone Comm. 154].

Canada.— Lynch *v.* Canada North West Land Co., 19 Can. Supreme Ct. 204, 209.

Debt in common speech involves the idea of a sum certain and definite, as a sum due by bond, note, book, etc., or that can be made certain and definite by data arising out of the transaction itself. Stanly *v.* Ogden, 2 Root (Conn.) 259, 266.

"Whatever, therefore, the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge." Powell *v.* Oregonian R. Co., 36 Fed. 726, 730, 13 Sawy. 535, 2 L. R. A. 270 [*citing* 3 Blackstone Comm. 158].

"The word 'debt' has generally been confined to a contract obligation." Latimer *v.* Veader, 20 N. Y. App. Div. 418, 425, 46 N. Y. Suppl. 823 [*citing* Blackstone Comm.].

Imprisonment for "debt."— Where a statute provided that "no person shall be imprisoned by debt in any action," the court said that the provision "is not confined to the technical meaning of debt; it includes debt in the popular sense of a demand founded on contract express or implied, and comprises all actions *ex contractus*." Perry *v.* Orr, 35 N. J. L. 295, 298. And where a statute provided that "no person shall be imprisoned for debt," etc., the court said: "The term 'debt,' as employed in § 15, is manifestly used in a broad sense, and hence will embrace such obligations to pay money as arise upon the law, as well as those which arise upon contract." Granholm *v.* Sweigle, 3 N. D. 476, 479, 57 N. W. 509. For effect upon bail of statute abolishing imprisonment for debt see 5 Cyc. 34.

70. Morimura *v.* Traeger, 11 Pa. Dist. 378, 382 [*citing* 3 Blackstone Comm. 154]; Powell *v.* Oregonian R. Co., 36 Fed. 726, 730, 13 Sawy. 535, 2 L. R. A. 270 [*citing* 3 Blackstone Comm. 154], where it is said: "And where the agreement to pay is implied by law, the sum to be paid is also a debt"]; U. S. *v.* Colt, 25 Fed. Cas. No. 14,839, Pet. C. C. 145 [*quoting* 3 Blackstone Comm. 154].

71. Erie's Appeal, 91 Pa. St. 398 [*quoted* in State *v.* Hiskman, 11 Mont. 541, 551, 29 Pac. 92]; Morimura *v.* Traeger, 11 Pa. Dist. 378, 382.

"Debt owing" distinguished from "debt due."— "Standing alone the word 'debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due. In other words, debts are of two kinds: *solvendum in præsenti and solvendum in futuro*. Whether a claim or demand is a debt or not, is in no respect determined by a reference to the time of payment. A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt, or does not become a debt until the contingency has happened." People *v.* Arguello, 37 Cal. 524, 525.

Under legal tender act.— Speaking of the intent of the act of congress declaring treasury notes to be legal tender in payment of debts, except, etc., the court said: "We think the term 'debt' employed in the Act of Congress is not limited to a demand, for which a personal liability exists against the party offering or making the payment, but that it comprehends, also, all liens, claims and charges upon property for the payment of money." People *v.* Mayhew, 26 Cal. 655, 661.

"Debt" may include: The year's allowance to a widow and minor children (Watts *v.* Watts, 38 Ohio St. 480, 491); a cause of action whereon judgment was rendered within the homestead exemption statute (Warner *v.* Cammack, 37 Iowa 642, 644); certificates issued by a municipal corporation for a temporary loan (Law *v.* People, 87 Ill. 385, 393); cotton due by tenant to the landlord for rent (State *v.* Barden, 64 S. C. 206, 208, 41 S. E. 959);

also been defined to mean an unconditional promise to pay a fixed sum at some speci-

a charge upon a specific parcel of a person's property for the payment of a sum of money (People *v.* Mayhew, 26 Cal. 655, 661); damages for property taken for public use (State *v.* Beackmo, 8 Blackf. (Ind.) 246, 249. But see Lowell *v.* Street Com'rs, 106 Mass. 540, 542); a judgment (McHarg *v.* Eastman, 7 Rob. (N. Y.) 137, 140, 35 How. Pr. (N. Y.) 205); judgments for money (State *v.* Mace, 5 Md. 337, 338; Rhodes *v.* O'Farrell, 2 Nev. 60, 61); judgments for pecuniary fines (Walsh *v.* Ringer, 2 Ohio 328, 334, 15 Am. Dec. 555. But see McCool *v.* State, 23 Ind. 127, 131; *In re* McDonald, 4 Wyo. 150, 158, 38 Pac. 18); mortgage debts under the provisions of a will (Turner *v.* Laird, 68 Conn. 198, 200, 35 Atl. 1124); the liability of a person who obtained money from another by reason of false and fraudulent representations in the sale of a patent-right within the meaning of the word, as used in the homestead exemption statute (Warner *v.* Cammack, 37 Iowa 642 [*cited* in Commercial Nat. Bank *v.* Taylor, 64 Hun (N. Y.) 499, 502, 19 N. Y. Suppl. 533]); an equitable obligation to pay (Longworth *v.* Mitchell, 26 Ohio St. 334, 343; Thompson *v.* Thompson, 4 Ohio St. 333, 351. *Contra*, see People *v.* Halsey, 37 N. Y. 344, 347); the obligation to pay freight (Wilson *v.* Morgan, 4 Rob. (N. Y.) 58, 68); penalties recoverable by civil action (Western Union Tel. Co. *v.* Sullivan, 70 Miss. 447, 449, 12 So. 460); a promise to pay a certain or definite sum in U. S. gold coin (Milliken *v.* Sloat, 1 Nev. 573, 590); and a specific legacy (Morton *v.* Church Home, 70 S. W. 841, 24 Ky. L. Rep. 1122).

"Debt" does not include: A claim for damages (Clark *v.* Nevada Land, etc., Co., 6 Nev. 526, 529); a claim for unliquidated damages (Bolden *v.* Jensen, 69 Fed. 745, 746; Powell *v.* Oregonian R. Co., 36 Fed. 726, 731, 13 Sawy. 535, 2 L. R. A. 270. But see Carver *v.* Braintree Mfg. Co., 5 Fed. Cas. No. 2,485, 2 Story 432); a claim for uncertain and unliquidated damages (Jackson *v.* Bell, 31 N. J. Eq. 554, 558 [*citing* Duncan *v.* Lyon, 3 Johns. Ch. (N. Y.) 351, 8 Am. Dec. 513]. But see Rosenbaum *v.* U. S. Credit System Co., 61 N. J. L. 543, 549, 40 Atl. 591); a claim for unliquidated damages alleged to have been caused by a permissive waste (Powell *v.* Oregonian R. Co., 36 Fed. 726, 730, 13 Sawy. 535, 2 L. R. A. 270); unliquidated claims for breaches of contract, and causes of action incidentally arising thereon (Victory Webb Printing, etc., Mach. Mfg. Co. *v.* Beecher, 26 Hun (N. Y.) 48, 52); appropriations and revenue provided for payment as prescribed by a constitution (State *v.* Parkinson, 5 Nev. 15, 27); liquidation of damages by judgment (Child *v.* Boston, etc., Iron Works, 137 Mass. 516, 519, 50 Am. Rep. 328); a claim for damages for a tort (Zimmer *v.* Schleehauf, 115 Mass. 52; Detroit Post, etc., Co. *v.* Reilly, 46 Mich. 459, 460, 9 N. W. 492); Cable *v.* Gaty, 34 Mo. 573, 574, 86 Am. Dec. 126; Kirkland *v.* Kille, 99 N. Y. 390, 395, 2 N. E. 36; Esmond *v.* Bullard, 16 Hun (N. Y.) 65, 68; Chase *v.* Curtis, 113 U. S. 452, 463, 5 S. Ct. 554, 28 L. ed. 1038); a claim for damages for a trespass (Kellogg *v.* Schuyler, 2 Den. (N. Y.) 73, 74); a claim for damages for slander and malicious prosecution (Zimmer *v.* Schleehauf, 115 Mass. 52, 53); a claim arising out of the official neglect of a county court clerk (Dunlop *v.* Keith, 1 Leigh (Va.) 430, 432, 19 Am. Dec. 755); a claim against a corporation for damages for the negligent loss of a steamboat (Cable *v.* McCune, 26 Mo. 371, 381, 72 Am. Dec. 214); a claim for a tort, not reduced to judgment (Maysville St. R., etc., Co. *v.* Marvin, 59 Fed. 91, 93, 8 C. C. A. 21); judgments in tort (Strohcim *v.* Deimel, 77 Fed. 802, 806, 23 C. C. A. 467. But see Mertz *v.* Berry, 101 Mich. 32, 35, 59 N. W. 445, 45 Am. St. Rep. 379, 24 L. R. A. 789); costs (*In re* Long, L. R. 20 Q. B. 316, 318. But see Clingman *v.* Kemp, 57 Ala. 195, 196); interest upon securities (Du Belloix *v.* Waterpark, 1 D. & R. 16, 16 E. C. L. 12); interest upon a bill of exchange or promissory note (Du Belloix *v.* Waterpark, 1 D. & R. 16, 16 E. C. L. 12); a judgment against the father of an illegitimate child in bastardy proceedings (*In re* Wheeler, 34 Kan. 96, 99, 8 Pac. 276); the qualified liability of members of manufacturing corporations under a statute (Kelton *v.* Phillips, 3 Metc. (Mass.) 61, 63); a liability arising from infringement of patent-right (Roberts *v.* Reed, 4 Wkly. Notes Cas. (Pa.) 417, 419); an obligation to pay, conditional upon the enjoyment of an estate, etc. (Beecher *v.* Detroit, 110 Mich. 456, 457, 68 N. W. 237); a rent service (Bosler *v.* Kuhn, 8 Watts & S. (Pa.) 183, 186); and a sum ordered to be paid for support during suit (Stewart *v.* Stewart, 10 Ohio Dec. (Reprint) 662, 664, 23 Cinc. L. Bul. 38).

It has also been held that it does not include a tax. *Arkansas.*— Texarkana Water Co. *v.* State, 62 Ark. 188, 196, 35 S. W. 788.

Illinois.— Jack *v.* Weiennett, 115 Ill. 105, 109, 3 N. E. 445, 56 Am. Rep. 129.

Kentucky.— Louisville, etc., R. Co. *v.* Com., 89 Ky. 531, 538, 12 S. W. 1064, 11 Ky. L. Rep. 734; Slaughter *v.* Louisville, 89 Ky. 112, 123, 8 S. W. 917.

Louisiana.—Morris *v.* Lalaurie, 39 La. Ann. 47, 53, 1 So. 659; Shreveport *v.* Gregg, 28 La. Ann. 836, 837.

Maine.— Augusta *v.* North, 57 Me. 392, 394, 2 Am. Rep. 55.

Maryland.— Bonaparte *v.* State, 63 Md. 465, 470.

Missouri.— Carondelet *v.* Picot, 38 Mo. 125, 130.

Nebraska.— Reynolds *v.* Fisher, 43 Nebr. 172, 182, 61 N. W. 695; Richards *v.* Clay County, 40 Nebr. 45, 48, 58 N. W. 594, 42 Am. St. Rep. 650.

Nevada.— Rhodes *v.* O'Farrell, 2 Nev. 60, 61.

New Jersey.— Camden *v.* Allen, 26 N. J. L. 398, 399, where the court said: "A debt universally bears interest from the time it is due. A tax never carries interest. . . . Debt

fied time;[72] an obligation or legal liability to pay a sum certain;[73] a precise sum due by express agreement;[74] a sum of money due by contract;[75] a sum of money due upon contract,[76] express or implied,[77] or established by judgment;[78] a sum of money due from one person or party to another;[79] something arising from and due upon contract;[80] an obligation founded upon contract, express or implied;[81] any pecuniary

is the subject matter of set-off, and is liable to set-off; a tax is neither."

North Carolina.— Davie *v.* Blackburn, 117 N. C. 383, 385, 23 S. E. 321; State *v.* Georgia Co., 112 N. C. 34, 37, 17 S. E. 10, 19 L. R. A. 485; Gatling *v.* Carteret County, 92 N. C. 536, 539, 53 Am. Rep. 432.

North Dakota.— Sonnesyn *v.* Akin, (1903) 97 N. W. 557, 560.

Oregon.— Whiteaker *v.* Haley, 2 Oreg. 128, 139.

Pennsylvania.— McKeesport *v.* Fidler, 29 Wkly. Notes Cas. 535, 537.

South Dakota.— Hanson County *v.* Gray, 12 S. D. 124, 125, 80 N. W. 175, 76 Am. St. Rep. 591; Danforth *v.* McCook County, 11 S. D. 258, 264, 76 N. W. 940, 74 Am. St. Rep. 808; Iowa Land Co. *v.* Douglas County, 8 S. D. 491, 504, 67 N. W. 52.

West Virginia.— State *v.* Baltimore, etc., R. Co., 41 W. Va. 81, 91, 23 S. E. 677.

United States.— Meriwether *v.* Garrett, 102 U. S. 472, 513, 26 L. ed. 197; Lane County *v.* Oregon, 7 Wall. 71, 19 L. ed. 101; Emsheimer *v.* New Orleans, 116 Fed. 893, 895; Bolden *v.* Jensen, 69 Fed. 745, 746; Crabtree *v.* Madden, 54 Fed. 426, 431, 4 C. C. A. 408; U. S. *v.* Pacific R. Co., 27 Fed. Cas. No. 15,983, 4 Dill. 66, 68.

Canada.— Lynch *v.* Canada North West Land Co., 19 Can. Supreme Ct. 204, 209.

72. Saleno *v.* Neosho, 127 Mo. 627, 639, 30 S. W. 190, 48 Am. St. Rep. 653, 27 L. R. A. 769, where it is said: "And [it] is quite different from a contract to be performed in the future, depending upon a condition precedent, which may never be performed, and which can not ripen into a debt until performed."

73. Rhodes *v.* O'Farrell, 2 Nev. 60, 61, where it is said: "And it makes no difference how that liability arises, whether it be by contract or is imposed by law without contract. Whether such an obligation or liability should be evidenced by a promissory note, or a judgment rendered for trespass or slander, whenever it becomes a legal liability for a definite sum of money due from one person, corporation or government, to another, it is technically a debt."

It implies a sum certain; a sum actually ascertained,— not to be ascertained hereafter. *Ex p.* Marshall, 2 Deac. & C. 589, 595, 3 Deac. & C. 120, 1 Mont. & A. 118, 1 Mont. & B. 242 [*citing Ex p.* Thompson, 2 Deac. & C. 126, 2 L. J. Bankr. 5, Mont. & B. 219]. See also Commercial Nat. Bank *v.* Taylor, 64 Hun (N. Y.) 499, 502, 19 N. Y. Suppl. 533; Mail Printing Co. *v.* Clarkson, 25 Ont. App. 1, 9.

74. Fisher *v.* Consequa, 9 Fed. Cas. No. 4,816, 2 Wash. 382.

75. Dellinger *v.* Tweed, 66 N. C. 206, 213; Sonnesyn *v.* Akin, (N. D. 1903) 97 N. W. 557, 562 [*quoting* Anderson L. Dict.]; Whiteacre *v.* Rector, 29 Gratt. (Va.) 714, 715, 26 Am. Rep. 420; U. S. *v.* Colt, 25 Fed. Cas. No. 14,839, Pet. C. C. 145, where it is said: "And it most frequently is due by a certain and express agreement, which also fixes the sum, independent of any extrinsic circumstances. But it is not essential, that the contract should be express, or that it should fix the precise amount of the sum to be paid."

76. Cole *v.* Anne, 40 Minn. 80, 81, 41 N. W. 934.

77. *Alabama.*— U. S. Rolling Stock Co. *v.* Clark, 95 Ala. 322, 323, 10 So. 917 [*citing In re* Denny, 2 Hill (N. Y.) 220; Drews *v.* Coles, 2 Tyrw. 503, 510].

California.— Perry *v.* Washburn, 20 Cal. 318, 350.

Nevada.— Rhodes *v.* O'Farrell, 2 Nev. 60, 61.

New York.— Rodman *v.* Munson, 13 Barb. 63, 77 [*citing* 2 Blackstone Comm. 464]; Rochester *v.* Gleichauf, 40 Misc. 446, 448, 82 N. Y. Suppl. 750; Zinn *v.* Ritterman, 2 Abb. Pr. N. S. 261, 262 [*citing* 3 Blackstone Comm. 154]; *In re* Denny, 2 Hill 220, 223 [*citing* 3 Blackstone Comm. 154].

Utah.— Harris *v.* Larsen, 24 Utah 139, 141, 66 Pac. 782.

A debt, in a general sense, arises out of an express or an implied promise made by one person to another to pay a sum of money. Wilcoxon *v.* Bluffton, 153 Ind. 267, 280, 54 N. E. 110 [*citing* Anderson L. Dict.]; Heinl *v.* Terre Haute, (Ind. Sup. 1903) 66 N. E. 450, 452 [*citing* Anderson L. Dict.]. It imports a sum of money arising upon a contract express or implied, and not a mere claim for damages. McElhaney *v.* Crawford, 96 Ga. 174, 176, 22 S. E. 895; Zinn *v.* Ritterman, 2 Abb. Pr. N. S. (N. Y.) 261, 262 [*citing* 3 Blackstone Comm. 154].

78. Hampton *v.* Truckee Canal Co., 19 Fed. 1, 4, 9 Sawy. 381. See also Mertz *v.* Berry, 101 Mich. 32, 35, 59 N. W. 445, 45 Am. St. Rep. 379, 24 L. R. A. 789 [*citing* Gray *v.* Bennett, 3 Metc. (Mass.) 522, 526], where it is said: "The word "debt' is one of large import, including debts of record or judgments."

79. Harris *v.* Larsen, 24 Utah 139, 141, 66 Pac. 782 [*citing* Anthony *v.* Savage, 3 Utah 277, 280, 3 Pac. 546, per Baskin, J., in dissenting opinion]; Wharton L. Lex. [*quoted* in Fraser *v.* McLanders, 25 Nova Scotia 542, 549].

80. Whiteaker *v.* Haley, 2 Oreg. 128, 139, where it is said: "And before an enforcement of that something due can happen, there must come the processes of the law and the solemn adjudications of the courts."

81. Slaughter *v.* Louisville, 89 Ky. 112, 123, 8 S. W. 917; Danforth *v.* McCook County, 11 S. D. 258, 264, 76 N. W. 940, 74 Am. St. Rep. 808; Meriwether *v.* Garrett, 102 U. S. 472, 513, 26 L. ed. 197. See also Heacock *v.* Sherman, 14 Wend. (N. Y.) 58, 60 [*cited* in

obligation imposed by contract;[82] a sum due by express or implied agreement;[83] something owed; money due or to become due upon express or implied agreement;[84] money due or owing on account of a contract express or implied;[85] a liquidated money obligation;[86] a liquidated demand;[87] a liquidated money demand;[88] a demand;[89] a demand for a certain sum;[90] a sum payable in respect of a liquidated money demand;[91] money due upon contract;[92] a pecuniary obligation;[93] an obli-

Kelly *v.* Clark, 21 Mont. 291, 341, 53 Pac. 959, 69 Am. St. Rep. 668, 42 L. R. A. 621].

The obligation may arise *ex contractu* or *ex delicto*. *In re* Radway, 20 Fed. Cas. No. 11,523, 3 Hughes 609, where it is said: "The obligation may be express, *ex contractu*; or implied, *quasi ex contractu*. It may arise *ex delicto*, upon actual tort; or *quasi ex delicto*, upon what the law chooses to treat as a tort."

82. McNeal *v.* Waco, 89 Tex. 83, 88, 33 S. W. 322.

83. Augusta *v.* North, 57 Me. 392, 394, 2 Am. Rep. 55.

84. Burnham *v.* Milwaukee, 98 Wis. 128, 132, 73 N. W. 1018 [*citing* Bouvier L. Dict.].

85. Thornburg *v.* Buck, 13 Ind. App. 446, 41 N. E. 85. And see Milliken *v.* Sloat, 1 Nev. 573, 590 (where the court said: "Burrill [L. Dict.] gives Mr. Stephens as authority for the proposition that a debt is not a contract, 'but the result of a contract.'" See also Holcomb *v.* Winchester, 52 Conn. 447, 448, 52 Am. Rep. 608 [*citing* Cook *v.* Walthall, 20 Ala. 334; Freeman Executions, §§ 162, 167] (where it is said: "The word 'debt' as used in the law of garnishment, . . . includes only legal debts, or causes of action for which debt or assumpsit may be maintained, but never includes claims for torts"); Parker *v.* Savage, 6 Lea (Tenn.) 406, 409 (where it is said: "Debt, then, cannot be regarded as a synonym of tort").

86. Solis *v.* Blank, 199 Pa. St. 600, 604, 39 Atl. 302 [*citing* Webster *v.* Webster, 31 Beav. 393].

87. Somesyn *v.* Akin, (N. D. 1903) 97 N. W. 557, 562 [*quoting* Anderson L. Dict.]. But see Carver *v.* Braintree Mfg. Co., 5 Fed. Cas. No. 2,485, 2 Story 432, 449 [*quoted* in Child *v.* Boston, etc., Iron Works, 137 Mass. 516, 520, 50 Am. Rep. 328], where Story, J., said: "I follow out the doctrine of the case of Mill Dam Foundry *v.* Hovey, 21 Pick. (Mass.) 417, 455, which, as far as it goes, disclaims the interpretation of the word 'debt' as limited to contracts for the payment of determinate sums of money. Passing that line, it does not seem to me easy to say, that if cases of unliquidated damages may be treated as debts, because they end in the ascertainment of a fixed sum of money, that we are at liberty to say, that the doctrine is not equally applicable to all cases of unliquidated damages, whether arising *ex contractu* or *ex delicto*. If ultimately it ends in a debt, as a judgment for damages does, that case asserts, that its character as a debt relates back to its origin."

88. Thomson *v.* Harding, 3 C. B. N. S. 254, 265, 4 Jur. N. S. 94, 27 L. J. C. P. 38, 91 E. C. L. 254. And see Scott *v.* Davenport, 34 Iowa 208, 213, where it is said: "A debt is created when one person binds himself to pay money to another."

That a dividend is not a debt until it has been declared see 10 Cyc. 546.

89. Hibbard *v.* Clark, 56 N. H. 155, 157, 22 Am. Rep. 432, where the court said: "These words 'debt and demand' are often used as synonymous. The former is the more specific and the latter the more general term. Either would include a claim for money alleged to be due."

"A debt or demand" means "any debt or demand," and is of universal application. Van Ingen *v.* Justices Municipal Ct., 166 Mass. 128, 130, 44 N. E. 121.

"Debt, duty or demand."— Where a bankrupt act contained the words "debt, duty or demand," the court said: "A debt may be created by the unjust appropriation of the chattel of another. The word demand is the most comprehensive in its import that technical language affords, as to debts or duties; and for the purpose of promoting substantial justice, there can be no insurmountable restraint to extend it so far as to embrace real estate, and to consider an inequitable appropriation of it as creating an equitable demand, equivalent to a debt by implication of law." Sands *v.* Codwise, 4 Johns. (N. Y.) 536, 557, 4 Am. Dec. 305. And see Barstow *v.* Adams, 2 Day (Conn.) 70, 98; Manion *v.* Ohio Valley R. Co., 99 Ky. 504, 507, 36 S. W. 530, 18 Ky. L. Rep. 159; Stiff *v.* Fisher, 2 Tex. Civ. App. 346, 349, 21 S. W. 291.

90. Matter of Adams, 12 Daly (N. Y.) 454, 457 [*citing Ex p.* Thompson, 1 Deac. & C. 126, 2 L. J. Bankr. 5, Mont. & B. 219].

Distinguished from "demand."— "In ordinary legal usage the words 'debt' and 'demand' are of kindred meaning, but the latter word is a term of much more comprehensive signification than the former. The word 'debt' imports a sum of money owing upon a contract, express or implied; while the term 'demand' embraces rightful claims, whether founded upon a contract, a tort, or a superior right of property." U. S. Rolling Stock Co. *v.* Clark, 95 Ala. 322, 323, 10 So. 917 [*citing In re* Denny, 2 Hill (N. Y.) 220; Drews *v.* Coles, 2 Tyrw. 503, 510]. And see Dowling *v.* Stewart, 4 Ill. 193, 195.

91. Stroud Jud. Dict. [*quoted* in Fraser *v.* McLanders, 25 Nova Scotia 542, 549].

92. Baltimore *v.* Gill, 31 Md. 375, 390; Brown *v.* Corry, 17 Pa. Co. Ct. 490, 496.

93. State *v.* Mace, 5 Md. 337, 338.

"Debt" for which a director in a corporation is liable see 10 Cyc. 857.

"Debt" for which a stock-holder is liable see 10 Cyc. 684.

gation to pay a certain sum of money due from a debtor to his creditor;[94] a CLAIM,[95] *q. v.*; any legal claim for money;[96] any claim for money[97]—that which one is bound to pay;[98] a legal liability to pay a specific sum of money;[99] a sum of money reduced to a certainty, and distinguished from a claim for uncertain damages.[1] In its broad sense, debt means duty,[2] or what one owes to another;[3] that which one person owes and is bound to pay to another;[4] that which is due from one

94. Johnson *v.* Hines, 61 Md. 122, 136.

95. Berson *v.* Ewing, 84 Cal. 89, 94, 23 Pac. 1112, where a statute provided that "a partner authorized to act in liquidation may collect, compromise, or release any debts due to the partnership, pay or compromise any claims against it," etc., and the court said: "Now, while the word 'debt,' in its legal sense, does not, like the word 'claim,' include a demand for damages arising from a tort, still we think they were used in the above section synonymously, and probably to avoid repetition, and that the term 'debt' was intended to have an application as broad as that of the word 'claim.'" See also Stokes *v.* Mason, 10 R. I. 261, 264 (where it is said: "The word debt, as used in the [National Bankrupt] act, seems to be used as synonymous with claim"); Coats *v.* Arthur, 5 S. D. 274, 279, 58 N. W. 675 (where a statute provided for an attachment when it appeared "that the debt was incurred for property obtained under false pretenses," and the court said: "In this subdivision the term 'debt' is evidently used as synonymous with 'claim,' in the first subdivision"). But see Cable *v.* McCune, 26 Mo. 371, 376, 72 Am. Dec. 214.

96. Kalkhoff *v.* Nelson, 60 Minn. 284, 290, 62 N. W. 332. And see Leggett *v.* Sing Sing Bank, 24 N. Y. 283, 290 [*citing* Bouvier L. Dict.; Burrill L. Dict.], where it is said: "A debt in ordinary parlance means any claim for money, and a debt is properly said to be due, in the sense of owing, when it has been contracted and the liability of the debtor is fixed."

97. New Haven Steam Saw-Mill Co. *v.* Fowler, 28 Conn. 103, 108 [*citing* Bouvier L. Dict.].

98. *In re* Lambrie, 94 Mich. 489, 491, 54 N. W. 173, where it is said: "Coke says that 'debitum' signifies not only a debt for which an action of debt lies, but generally any duty to be yielded or paid."

Blackstone says: "Whatever the laws order any one to pay, that becomes instantly a debt which he hath beforehand contracted to discharge." 3 Blackstone Comm. 160 [*quoted* in Gray *v.* Bennett, 3 Metc. (Mass.) 522, 526; State *v.* Hickman, 11 Mont. 541, 551, 29 Pac. 92].

99. Allen *v.* Dickson, Minor (Ala.) 119, 120.

"**The words 'debts now due,'** should be held as synonymous with the word 'liabilities,' whether arising *ex contractu* or *ex delicto*." Hunter *v.* Windsor, 24 Vt. 327, 338.

1. Tompkins *v.* Augusta Southern R. Co., 102 Ga. 436, 446, 30 S. E. 992 [*quoting* Anderson L. Dict.]; Frazer *v.* Tunis, 1 Binn. (Pa.) 254, 260. See also Cable *v.* McCune, 26 Mo. 371, 382, 72 Am. Dec. 214 (where it is said: "Judge Story concedes that the interpretation he gives to the word 'debts' is a very loose one, and in short is making it synonymous with 'demands.' He substituted for the words 'debts contracted,' the phrase 'dues owing' or 'liabilities incurred,' regarding them as essentially equivalent expressions"); Matter of Adams, 12 Daly (N. Y.) 454, 457 [*citing* Zinn *v.* Ritterman, 2 Abb. Pr. N. S. (N. Y.) 261, 263]; Millington *v.* Texas, etc., R. Co., 2 Tex. App. Civ. Cas. § 171 [*citing* Bouvier L. Dict.] (where it is said: "Debt" does not mean 'damages,' and an action to recover damages is not an action to recover a debt").

"**Debt or damages demanded**" within the meaning of a statute see Cole *v.* Hayes, 78 Me. 539, 540, 7 Atl. 391; Wright *v.* Potomska Mills Corp., 138 Mass. 328, 329.

The legal definition of the word is opposed to unliquidated damages, or a liability in the sense of an inchoate or contingent debt, or an obligation not enforceable by ordinary process. Davenport *v.* Kleinschmidt, 6 Mont. 502, 536, 13 Pac. 249; Commercial Nat. Bank *v.* Taylor, 64 Hun (N. Y.) 499, 502, 19 N. Y. Suppl. 533; Morimura *v.* Traeger, 11 Pa. Dist. 378, 382 [*citing* Rapalje & L. L. Dict.]; Bolden *v.* Jensen, 69 Fed. 745, 746 [*citing* Rapalje & L. L. Dict.].

2. Gilbert *v.* Vail, 60 Vt. 261, 266, 14 Atl. 542.

The word debt is of large import, including not only debts of record or judgment, and debts by specialty, but also obligations arising under simple contract, to a very wide extent, and in its popular sense includes all that is due to a man under any form of obligation or promise. Milliken *v.* Sloat, 1 Nev. 573, 590 [*citing* Burrill L. Dict.]; New Jersey Ins. Co. *v.* Meeker, 37 N. J. L. 282, 301.

The word "debt" even in its broadest signification implies that the consideration of the obligation of the debtor has been executed on the part of the creditor, and the payment of the debt discharges the obligation. Pettibone *v.* Toledo, etc., R. Co., 148 Mass. 411, 418, 19 N. E. 337, 1 L. R. A. 787.

3. Charleston *v.* Ashley Phosphate Co., 34 S. C. 541, 545, 13 S. E. 845, where it is said: "That is the dominant idea. A debt is not always a license tax due, but a license tax due and properly charged is a debt." And see Pine *v.* Rikert, 21 Barb. (N. Y.) 469, 475, where it is said: "The debts of a person may be such as are due to him, although the more usual signification is those owing by him."

4. Cole *v.* Aune, 40 Minn. 86, 87, 41 N. W. 934 [*citing* New Jersey Ins. Co. *v.* Meeker, 37 N. J. L. 282, 301; Newell *v.* People, 7 N. Y. 9, 124].

person to another,[5] whether money, goods or services;[6] that which one person is bound to pay to another, or to perform for his benefit;[7] any kind of a just demand;[8] those secured or unsecured liabilities owing by a person;[9] an obligation of a DEBTOR,[10] *q. v.*; all obligations to pay money, whether arising from contract or imposed by law as a compensation for injuries;[11] something due;[12] all that is due to a man under any form of obligation or promise;[13] that which one is bound

5. Leggett *v.* Sing Sing Bank, 24 N. Y. 283, 290; Matter of Foley, 39 N. Y. App. Div. 248, 249, 57 N. Y. Suppl. 131 [*quoting* Century Dict.]; Lewis *v.* New York Cent. R. Co., 49 Barb. (N. Y.) 330, 336 [*quoting* Webster Dict.].

As used in a statute.—Where a statute provided that "any person, for a debt *bona fide* due, may confess judgment by himself or attorney duly authorized," etc., the court said: "The word 'debt,' in this statute, is used as indicative of a sum certain that is owing from one person to another." Little *v.* Dyer, 138 Ill. 272, 277, 27 N. E. 905, 32 Am. St. Rep. 140.

6. *California.*— Melvin *v.* State, 121 Cal. 16, 24, 53 Pac. 416 [*citing* Webster Dict.].

Connecticut.— Cook *v.* Bartholomew, 60 Conn. 24, 26, 22 Atl. 444, 13 L. R. A. 452 [*citing* Webster Dict.].

Iowa.— Equitable L. Ins. Co. *v.* Board of Equalization, 74 Iowa 178, 180, 37 N. W. 141 [*citing* Bouvier L. Dict.; Webster Dict.]; Dubuque *v.* Illinois Cent. R. Co., 39 Iowa 56, 63 [*quoting* Webster Dict.].

New York.— Newell *v.* People, 7 N. Y. 9, 124; Latimer *v.* Veader, 20 N. Y. App. Div. 418, 426, 46 N. Y. Suppl. 823 [*quoting* Imperial Dict.]; Kimpton *v.* Bronson, 45 Barb. 618, 625 [*citing In re* Denny, 2 Hill 220]; Warner *v.* Warner, 18 Abb. N. Cas. 151, 155 [*quoting* Webster Dict.].

North Carolina.— State *v.* Georgia Co., 112 N. C. 34, 37, 17 S. E. 10, 19 L. R. A. 485 [*quoting* Century Dict.].

Ohio.— Amazon Ins. Co. *v.* Cappeller, 8 Ohio Dec. (Reprint) 493, 494, 8 Cinc. L. Bul. 247 [*citing* Bouvier L. Dict.; Webster Dict.].

Pennsylvania.—Brooke *v.* Philadelphia, 162 Pa. St. 123, 128, 29 Atl. 387, 24 L. R. A. 781.

Utah.— Harris *v.* Larsen, 24 Utah 139, 141, 66 Pac. 782 [*citing* Newell *v.* People, 7 N. Y. 9, 124; Kimpton *v.* Bronson, 45 Barb. (N. Y.) 618, 625].

7. Melvin *v.* State, 121 Cal. 16, 24, 53 Pac. 416 [*citing* Webster Dict.].

8. *Connecticut.*— New Haven Saw-Mill Co. *v.* Fowler, 28 Conn. 103, 108, where it is said: "It is, therefore, equally proper to say of one who is under obligation to discharge some duty, or to pay damages for its non-performance, that he is a debtor, as it is to say the same of one who is under obligation by bond to pay a sum of money."

Iowa.— Swanson *v.* Ottumwa, 118 Iowa 161, 171, 91 N. W. 1048, 59 L. R. A. 620 [*quoting* Bouvier L. Dict.]; Equitable L. Ins. Co. *v.* Board of Equalization, 74 Iowa 178, 181, 37 N. W. 141 [*quoting* Bouvier L. Dict.].

New York.— Latimer *v.* Veader, 20 N. Y. App. Div. 418, 426, 46 N. Y. Suppl. 823; Lewis *v.* New York Cent. R. Co., 49 Barb. 330, 336 [*citing* Newell *v.* People, 7 N. Y. 9, 124; Bouvier L. Dict.].

North Carolina.— State *v.* Georgia Co., 112 N. C. 34, 37, 17 S. E. 10, 19 L. R. A. 485 [*quoting* Bouvier L. Dict.].

Texas.— Barber *v.* East Dallas, 83 Tex. 147, 150, 18 S. W. 438.

United States.— Carver *v.* Braintree Mfg. Co., 5 Fed. Cas. No. 2,485, 2 Story 432, 450 (where it is said: "And in the Roman law it had sometimes the like enlarged signification. *Sed utrum ex delicto an ex contractu debitor sit, nihil refert,* says the Digest Dig. lib. 5, tit. 3, 1, 14"); *In re* Radway, 20 Fed. Cas. No. 11,523, 3 Hughes 609.

9. Mont. Pol. Code (1895), § 3680, subs. 6; Utah Rev. St. (1898) § 2505, subs. 7.

A debt is not the less owing, because it is not yet due. *Ex p.* Tower, 1 N. Y. Leg. Obs. 8, 9.

10. Bullock *v.* Guilford, 59 Vt. 516, 519, 9 Atl. 360, where it is said: "It only possesses value in the hands of the creditor: with him it is property, and in his hands it may be taxed."

11. Smith *v.* Omans, 17 Wis. 395, 396.

Everything is a debt which is of absolute obligation, but, in its more limited sense, it imports only a particular kind of duty, and in this sense is substantially synonymous with contract. Webster *v.* Seymour, 8 Vt. 135, 140.

12. Leggett *v.* Sing Sing Bank, 24 N. Y. 283, 290; Cole *v.* Montreal Bank, 39 U. C. Q. B. 54, 74.

Synonymous with "due."— In Leggett *v.* Sing Sing Bank, 24 N. Y. 283, 290, the court said: "Debt and due are both derived from the same verb; the former is a substantive, and in this instance the latter is used as an adjective. Debt also means that which is due from one person to another, and the word due does not necessarily vary the meaning; as that means, in one sense, simply owed. It may, when used with that intent, mean a debt actually payable, the time for the payment of which has arrived. The context and the circumstances under which it is used must determine in what sense it is used. Due, when used as a noun, is synonymous with debt."

13. *Colorado.*— Arapahoe County *v.* Fidelity Sav. Assoc., (Sup. 1903) 71 Pac. 376, 377.

Georgia.— Dawson *v.* Dawson Waterworks Co., 106 Ga. 696, 710, 32 S. E. 907, where it is said: "It is apparent that the word, when taken in a broad and comprehensive sense, includes any obligation that one is under to another to pay money or other thing of value, and arises the very moment

to pay to another;[14] anything for which one is liable or bound to another, or which may be exacted of one;[15] what one owes;[16] a thing owed;[17] obligation; liability;[18] trespass;[19] what is owed — and must be paid;[20] any thing had or held of or from another, his property or right, his due; that which is owed to him, which ought at some time to be delivered or paid to him.[21] It denotes not only the obligation of the debtor to pay, but also the right of the creditor to receive and enforce payment.[22] In its common signification, it imports the moneyed obligation of a person incurred in his private capacity, or from his individual acts; and not such obligations as are imposed upon him by law in his public relations, or in common with all other citizens.[23] It is the correlative of CREDIT,[24] *q. v.* As defined by statute the word includes any claim or demand upon which a judgment for a sum of money or directing the payment of money could be recovered in an action.[25] As used in the statutes relating to the estates

that the obligation is undertaken, and continues until discharged by payment."

Massachusetts.— Gray *v.* Bennett, 3 Metc. 522 [*quoted* in Shane *v.* Francis, 30 Ind. 92, 93].

Minnesota.— Daniels *v.* Palmer, 41 Minn. 116, 121, 42 N. W. 855 [*quoting* Burrill L. Dict.].

Ohio.— Amazon Ins. Co. *v.* Cappeller, 8 Ohio Dec. (Reprint) 493, 494, 8 Cinc. L. Bul. 247.

Rhode Island.— Brouillard's Petition, 20 R. I. 617, 619, 40 Atl. 762 [*citing* Burrill L. Dict.].

Utah.— Harris *v.* Larsen, 24 Utah 139, 141, 66 Pac. 782 [*citing* Erie's Appeal, 91 Pa. St. 398, 402].

14. Lovejoy *v.* Foxcraft, 91 Me. 367, 382, 40 Atl. 141; Lockhart *v.* Van Alstyne, 31 Mich. 75, 78, 18 Am. Rep. 156. See also Dawson *v.* Dawson Waterworks Co., 106 Ga. 696, 710, 32 S. E. 907 [*citing* Standard Dict.].

15. Western Union Tel. Co. *v.* Sullivan, 70 Miss. 447, 449, 12 So. 460.

16. Dunsmoor *v.* Furstenfeldt, 88 Cal. 522, 529, 26 Pac. 518, 22 Am. St. Rep. 331, 12 L. R. A. 508 [*quoted* in Melvin *v.* State, 121 Cal. 16, 25, 53 Pac. 416]; Rodman *v.* Munson, 13 Barb. (N. Y.) 188, 197 [*citing* 2 Blackstone Comm. 53; 2 Inst. 198; Jacob L. Dict.], where it is said: "There is always some obligation that it shall be paid; but the manner in which, or the condition upon which it is to be paid, or the means of coercing payment, do not enter into the definition."

17. Melvin *v.* State, 121 Cal. 16, 24, 53 Pac. 416 [*citing* Webster Dict.]; Dawson *v.* Dawson Waterworks Co., 106 Ga. 696, 710, 32 S. E. 907 [*citing* Webster Dict.].

18. Melvin *v.* State, 121 Cal. 16, 24, 53 Pac. 416 [*citing* Webster Dict.]; Warner *v.* Warner, 18 Abb. N. Cas. (N. Y.) 151, 155.

19. Beste *v.* Berastain, 20 N. Brunsw. 106, 109, where it is said: "And in this sense it is used in the 12th verse of the 6th chapter of St. Matthew's Gospel, that reads, 'and forgive us our debts as we forgive our debtors.'"

20. Reynolds *v.* Waterville, 92 Me. 292, 319, 42 Atl. 553, per Savage, J., in dissenting opinion.

21. Lewis *v.* New York Cent. R. Co., 49 Barb. (N. Y.) 330, 336 [*quoting* Encycl. Met.].

22. Monroe County *v.* Harrell, 147 Ind. 500, 508, 46 N. E. 124; Laporte *v.* Gamewell F. Alarm Tel. Co., 146 Ind. 466, 469, 45 N.E. 588, 58 Am. St. Rep. 359, 35 L. R. A. 686; State *v.* Hawes, 112 Ind. 323, 326, 14 N. E. 87 [*citing* Rapalje & L. L. Dict.]; Davenport *v.* Kleinschmidt, 6 Mont. 502, 536, 13 Pac. 249 [*citing* Rapalje & L. L. Dict.]; Morimura *v* Traeger, 11 Pa. Dist. 378, 382 [*citing* Rapalje & L. L. Dict.]; Burnham *v.* Milwaukee, 98 Wis. 128, 132, 73 N. W. 1018 [*citing* Monroe County *v.* Harrell, 147 Ind. 500, 46 N. E. 124].

A debt exists when a certain sum of money is owing from one person (the debtor) to another (the creditor); Davenport *v.* Kleinschmidt, 6 Mont. 502, 536, 13 Pac. 249.

23. Bonaparte *v.* State, 63 Md. 465, 470.

24. Wentworth *v.* Whittemore, 1 Mass. 471, 473. And see Hugg *v.* Booth, 24 N. C. 282, 286 [*cited* in Wilde *v.* Mahaney, 183 Mass. 455, 459, 67 N. E. 337, 62 L. R. A. 813], where Ruffin, C. J., points out not only that the word "credits" is the correlative of "debts" and that the use of that word in describing what choses in action can be trusteed means that liquidated demands alone can be reached. See also 11 Cyc. 1191 note 89.

Distinguished from "credits."— Where a statute provided that "debts and credits, and other personal property, not capable of manual delivery, must be attached by leaving with the person owing such debts, or having in his possession, or under his control, such credits and other personal property," the court said: "It is evident that by these provisions debts and credits are treated as separate and distinct things. A debt is money owing by the garnishee to the defendant which may be paid over to the sheriff, while credits are something belonging to the defendant, but in the possession and under the control of the garnishee, like promissory notes or other evidences of indebtedness of third parties, which may be delivered up or transferred to the sheriff." Gow *v.* Marshall, 90 Cal. 565, 568, 27 Pac. 422 [*citing* Robinson *v.* Tevis, 38 Cal. 611, 614].

Debts or credits as used in a statute see Adams *v.* Hackett, 7 Cal. 187, 204.

25. N. Y. Code Civ. Proc. § 2514, subs. 3 [*quoted* in Matter of Flint, 15 Misc. (N. Y.) 598, 601, 38 N. Y. Suppl. 188; Wilcox's Es-

of deceased persons, the term is not limited to such as are strictly legal debts, but includes every claim and demand by a creditor, whether recoverable at law or in equity.[26] (Debt: Action of, see DEBT, ACTION OF. Arrest For, see ARREST. Assignment of as Constituting Champerty, see CHAMPERTY AND MAINTENANCE. Attachment For, see ATTACHMENT. Attachment of, see ATTACHMENT; GARNISHMENT. Book, see ACCOUNTS AND ACCOUNTING. Discharge of, see ACCORD AND SATISFACTION; COMPOMISE AND SETTLEMENT; PAYMENT; RELEASE. Election to Declare Due Before Maturity, see ACTIONS. Garnishment of, see GARNISHMENT. Imprisonment For, see ARREST. Guaranty of, see FRAUDS, STATUTE OF; GUARANTY. Of Assignor, see ASSIGNMENTS FOR BENEFIT OF CREDITORS. Of Bankrupt, see BANKRUPTCY. Of Decedent, see DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS. Of Insolvent, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; INSOLVENCY. Promise to Answer For Another's, see FRAUDS, STATUTE OF; GUARANTY.)

tate, 11 N. Y. Civ. Proc. 115, 125; Cook *v.* Woodard, 5 Dem. Surr. (N. Y.) 97, 100]. And see Lewis *v.* New York Cent. R. Co., 49 Barb. (N. Y.) 330, 336, where the court, in speaking of a legal tender act, said: "The word 'debts' in the act of 1862 is undoubtedly used in no narrow or restricted sense, but rather in a broad and general sense."

In Alabama.— "'Debt,' in subdivision 1 of section 524 of the Code of 1896, may import only such demands as arise from contract, express or implied, but 'any money demand' as used in subdivision 2 is much more comprehensive than debt, and includes all rightful claims, whether founded upon contract, tort, or penalties given by statute, and may be enforced by attachment when the amount is fixed or can be certainly ascertained." Dittman Boot, etc., Co. *v.* Mixon, 120 Ala. 206, 210, 24 So. 547 [*citing* U. S. Rolling Stock Co. *v.* Clark, 95 Ala. 322, 10 So. 917; Bouvier L. Dict.].

Under Idaho Rev. St. the term "debts" means those liabilities owing by the person, firm, corporation or association assessed to *bona fide* residents of the territory, or firms, associations, or corporations doing business therein. Salisbury *v.* Lane, 7 Ida. 370, 379, 63 Pac. 383. And see Idaho Pol. Code (1901), § 1313, subs. 6.

Defined in reference to an assessment of taxes.— Where a statute in relation to an assessment of taxes contained the words "debts due from solvent debtors," the court said: "The term 'debts,' in the statute, is to be understood in its usual legal sense, and means nothing more nor less than sums of money due from inhabitants of the state, to the non-residents mentioned, by certain and express agreements or judicial sentence, and for the purchase of real estate. Primarily, it looks to the relation of vendor and purchaser, by contract valid in law, and to no other relation." People *v.* Halsey, 53 Barb. (N. Y.) 547, 554.

Includes demands or obligations upon contracts.— In Melvin *v.* State, 121 Cal. 16, 25, 53 Pac. 416, it is said: "So far as we have observed, wherever the term 'debt' is used in our code it is so used in that broader sense which includes demands or obligations upon contracts payable in money. To illustrate: An executor or an administrator 'must . . . collect all debts due to the decedent or to the estate.' (Code Civ. Proc. § 1581.)"

26. Sellis' Case, 4 Abb. Pr. (N. Y.) 272, 273; Snyder *v.* State, 5 Wyo. 318, 324, 40 Pac. 441, 63 Am. St. Rep. 60. And see Percival *v.* Reg., 3 H. & C. 217, 230, 10 Jur. N. S. 1059, 33 L. J. Exch. 289, 10 L. T. Rep. N. S. 622, 12 Wkly. Rep. 966, where it is said: "The expression [in a statute] 'debts payable by law out of the personal estate' means such debts as of themselves and in their own nature and character were payable out of the personal estate, and has no relation to any provision which the testator may make in the will for their payment."

"Debt" against a decedent.— In Emerick's Estate, 172 Pa. St. 191, 194, 33 Atl. 550, the court, in speaking of a debt against a decedent, said: "The 'debt' must be established or admitted, and susceptible of enforcement, — not a debt barred by the statute."

"Debts and expenses" as used in a will see Stebbins *v.* Stebbins, 86 Mich. 474, 482, 49 N. W. 294.

"Debt against the estate" as used in a statute see Lambie's Estate, 94 Mich. 489, 491, 54 N. W. 173.

"Debt of the father."— See Meyer's Succession, 44 La. Ann. 871, 877, 11 So. 532.

DEBT, ACTION OF

By Frank E. Jennings

CROSS-REFERENCES

For Matters Relating to:
Action of:
Assumpsit, see ASSUMPSIT, ACTION OF.
Book-Account or Book-Debt, see ACCOUNTS AND ACCOUNTING.
Covenant, see COVENANT, ACTION OF.
Debt:
Bail in, see BAIL.
Joined With Other Action, see JOINDER AND SPLITTING OF ACTIONS.
Action on the Case, see CASE, ACTION ON.
Election of Remedy, see ELECTION OF REMEDIES.

I. DEFINITION.

"Debt," as used in this article,[1] is a form of action which lies at law to recover

1. For debt, like assumpsit or covenant, is a name both for a right of action and for a remedy allowed for enforcing it. Abbott L. Dict.; Bacon Abr. tit. "Debt."

a certain specific sum of money, or a sum that can readily be reduced to a certainty.[2]

II. HISTORY.

Debt is among the oldest actions known to the common law, and in its origin was of a droitural or proprietary nature.[3] The enforcement of what is now considered a mere contractual right, by an action in form proprietary, did not arise, however, by mere chance; as the action of covenant would lie only on sealed instruments,[4] there was an urgent necessity of employing some existing form of action for the enforcement of parol or implied obligations.[5] After the evolution and development of the action of assumpsit[6] that action for a time supplanted debt on simple contracts, for the reason that in the former a defendant could not invoke trial by wager of law,[7] a right which he retained in the latter until the abolition of that procedure in the reign of King William the fourth,[8] when it

2. Black L. Dict.

Other definitions are: "The appropriate action upon any contract, express or implied, for the payment of a sum certain in money, or which can be reduced to certainty, . . . and proceeds for the recovery of a debt, as contradistinguished from damages." Gregory *v.* Bewly, 5 Ark. 318, 319.

"An action at law to recover a specified sum of money alleged to be due." Burrill L. Dict. [*quoted* in Melvin *v.* State, 121 Cal. 16, 24, 53 Pac. 416].

"An action, . . . which is a remedy for the recovery of a debt *eo nomine* and *in numero*, though damages, generally nominal, are awarded for its detention." Bacon Abr. tit. "Debt." For further definitions see January *v.* Poyntz, 2 B. Mon. (Ky.) 404; Watson *v.* McNairy, 1 Bibb (Ky.) 356; State *v.* Yellow Jaeket Silver Min. Co., 14 Nev. 220, 249; Lacaze *v.* State, Add. (Pa.) 58, 86; Russell *v.* Louisville, etc., R. Co., 93 Va. 322, 326, 25 S. E. 99; State *v.* Harmon, 15 W. Va. 115, 124; Omaha Nat. Bank *v.* Mutual Ben. L. Ins. Co., 81 Fed. 935, 939; U. S. *v.* Colt, 25 Fed. Cas. No. 14,839, Pet. C. C. 145; U. S. *v.* Lyman, 26 Fed. Cas. No. 15,647, 1 Mason 482, 498; Fraser *v.* McLanders, 25 Nova Scotia 542, 549; 3 Blackstone Comm. 154; Bouvier L. Dict.; Viner Abr. tit. "Debt."

The three distinguishing points in the action of debt are that the contract must be: Firstly, for money; secondly, for a sum certain; thirdly, specifically recoverable. Cassady *v.* Laughlin, 3 Blackf. (Ind.) 134; Watson *v.* McNairy, 1 Bibb (Ky.) 356. And see *infra*, III, C, *et seq.*

3. Martin Civ. Proc. 34; 2 Pollock & M. Hist. Eng. L. 173, where the authors, after discussing the action of detinue, say: "This action slowly branches off from the action of debt. The writ of debt as given by Glanvill is closely similar to that form of the writ of right for land which is known as a *Præcipe in capite*. The sheriff is to bid the defendant render to the plaintiff so many marks or shillings, 'which, so the plaintiff says, the defendant owes him, and whereof he unjustly deforces him;' and if the defendant will not do this, then he is to give his reason in the king's court. The writ is couched in terms which would not be inappropriate were the plaintiff seeking the restoration of certain specific coins, of which he was the owner, but which were in the defendant's keeping." Further (p. 205) the same learned authors continue: "The creditor is being 'deforced' of money just as the demandant who brings a writ of right is being 'deforced' of land. There may be trial by battle in the one case as in the other. The bold crudity of archaic thought equates the repayment of an equivalent sum of money to the restitution of specific land or goods. To all appearance our ancestors could not conceive credit under any other form. The claimant of a debt asks for what is his own. . . . If we would rethink the thoughts of our forefathers we must hold that the action of debt is proprietary, while at the same time we must hold, as we saw in the last chapter, that there is no action for the recovery of a chattel that would be called proprietary by a modern lawyer."

4. See COVENANT, ACTION OF, 11 Cyc. 1022.

5. Martin Civ. Proc. 35, 36.

Until Slade's Case, 4 Coke 92*b*, on all simple contracts for money demands, actions of debt were in general use, and it was not without a contest between the courts in Westminster Hall, that assumpsit was ever permitted in such cases. By the ancient common law all matters of personal contract were considered as binding only in the light of debts, and the only means of recovery in a court was by action of debt. Norris *v.* Windsor School Dist. No. 1, 12 Me. 293, 28 Am. Dec. 182 [*citing* 1 Reeve Hist. Eng. L. 159]. See also Gregory *v.* Thomson, 31 N. J. L. 166 [*citing* 1 Reeve Hist. Eng. L. 159].

6. See ASSUMPSIT, ACTION OF, 4 Cyc. 317. See also Mahaffey *v.* Petty, 1 Ga. 261, 264, where the court said: "Originally, debt was the only form of action for money demands; and assumpsit was not generally introduced to recover money, until the latter end of the reign of Elizabeth or the beginning of that of James, her successor. It is asserted that Slade's Case, in 4 Coke 92*b*, is the first to be found, where the Court of King's Bench held that assumpsit would lie concurrently with debt, for the recovery of money."

7. Smith *v.* Lowell First Cong. Meeting-house, 8 Pick. (Mass.) 178; Hickman *v.* Searcy, 9 Yerg. (Tenn.) 47; 3 Blackstone Comm. 154.

8. Martin Civ. Proc. 38.

again came to be used as well in actions on simple contracts as in actions on specialties under seal.

III. NATURE AND SCOPE OF REMEDY.

A. In General. At common law there was perhaps no action which had so extensive and varied an application as that of debt;[9] and while it would perhaps be unwise in modern procedure to extend this form of remedy where its limits are definite and clearly established,[10] it has nevertheless been given a much wider scope than the language of the elementary writers would seem to justify.[11] In some jurisdictions statutes have expressly declared this remedy to be appropriate for the enforcement of certain obligations or the recovery of designated penalties.[12]

B. Concurrent With Assumpsit.[13] It has long been held, and is now so well recognized by the courts as a whole that it may be said to be a general rule, that debt is a concurrent remedy with assumpsit upon all simple contracts where the sum to be recovered is certain or may readily be ascertained either from the contract itself or by operation of law.[14]

9. Mahaffey *v.* Petty, 1 Ga. 261; Payne *v.* Smith, 12 N. H. 34; Planters' Bank *v.* Galloway, 11 Humphr. (Tenn.) 342; Union Iron Co. *v.* Pierce, 24 Fed. Cas. No. 14,367, 4 Biss. 327; 1 Chitty Pl. 110.

To revive a judgment, recovered by a deceased administrator, it was the proper remedy. Austin *v.* Townes, 10 Tex. 24.

10. Gregory *v.* Thomson, 31 N. J. L. 166, 170, where the court, in refusing to sanction the maintenance of the action upon collateral undertakings, and after referring to the opinion of Story, J., in Bullard *v.* Bell, 4 Fed. Cas. No. 2,121, 1 Mason 243, said: "The limits of the action, in the nature of things, must be arbitrary; the chief concern being to have those limits definite and stationary. To extend the formula is merely to unsettle its boundaries — a result which would, at least, be attended with the mischief of inconvenience. . . . If this form of action is liable to change, so is every other, and the consequence would be that the lines of demarkation between the several forms would soon become so obscure as not to be easily definable."

11. Thus Blackstone defines a debt which is properly enforceable by this action to be a sum of money due by certain and express agreement where the amount is fixed and specific, and does not depend upon any subsequent valuation to settle it; and that in the action of debt plaintiff must prove the whole debt he claims, or recover nothing at all. The limited scope by which this language would seem to circumscribe the action has not been acquiesced in by many of the courts, either in England or in this country. 3 Blackstone Comm. 154. And see Mahaffey *v.* Petty, 1 Ga. 261; U. S. *v.* Colt, 25 Fed. Cas. No. 14,839, Pet. C. C. 145.

12. Orne *v.* Roberts, 51 N. H. 110 (holding that as the statute had specifically declared that an action by a person injured by a vicious dog against the owner should be an action of debt, this action would lie without previously determining the actual damages in an action on the case); Dunham *v.* Rappleyea, 16 N. J. L. 75; Riker *v.* Jacobus, 2 N. J. L. 328; Chattin *v.* Payday, 2 N. J. L. 138 (holding that by virtue of the statute debt must be brought on simple contracts in courts for the trial of small causes); Witherly *v.* Morgan, 2 N. J. L. 83; McKeon *v.* Caherty, 3 Wend. (N. Y.) 494 (where, by virtue of the statute, debt was the only remedy to recover money bet on a race from a stakeholder); Pierce *v.* Sheldon, 13 Johns. (N. Y.) 191 (where, by virtue of the statute, debt was the only action that would lie against a constable for not serving or returning an execution in a justice's court). See also Bradley *v.* Goodyear, 1 Day (Conn.) 104; Janvrin *v.* Scammon, 29 N. H. 280.

13. **Compared with book-debt** see 1 Cyc. 494 note 77.

Compared with and distinguished from assumpsit see 4 Cyc. 320 note 2.

Compared with and distinguished from covenant see 11 Cyc. 1023.

Distinguished from case.— In all cases where the consideration has been executed and there is an express or implied promise to pay in money the value thereof, debt or assumpsit is the proper remedy; but in cases where the consideration is not executed, or if executed, the promise to be performed in consideration thereof is not to pay money but to do some other thing, then the remedy is by a special action on the case. Thompson *v.* French, 10 Yerg. (Tenn.) 452. And see 6 Cyc. 681 *et seq.*

14. *Arkansas.*— Hudspeth *v.* Gray, 5 Ark. 157.

Georgia.— Mahaffey *v.* Petty, 1 Ga. 261; Farrar *v.* Baber, Ga. Dec. 125, Pt. II.

Illinois.— Bedell *v.* Janney, 9 Ill. 193.

Maine.— Norris *v.* Windsor School Dist. No. 1, 12 Me. 293, 28 Am. Dec. 182.

New Jersey.— Flanagan *v.* Camden Mut. Ins. Co., 25 N. J. L. 506; Furman *v.* Parke, 21 N. J. L. 310.

Pennsylvania.—Weiss *v.* Mauch Chunk Iron Co., 58 Pa. St. 295; De Haven *v.* Bartholomew, 57 Pa. St. 126; Barber *v.* Chester County, 1 Chest. Co. Rep. 162.

Tennessee.— Hickman *v.* Searcy, 9 Yerg. 47.

United States.— Collins *v.* Johnson, 6 Fed.

C. Essential and Distinguishing Characteristics or Features — **1. Certainty of Sum Due — a. Rule.** A distinguishing feature of this action is that it lies only for the recovery of a sum certain, or readily reducible to a certainty from fixed data or agreement,[15] as distinguished from unliquidated or unascertained damages.[16]

b. Limitation of Rule. The authorities are not fully agreed as to the exact limitation of the expression "sum certain," when used with reference to the action of debt.[17] It is not at present, nor even under the strictness of the common-law proceedure was it, essential that the sum be ascertained at the time the action was brought;[18] and it is no objection to the maintenance of the action that the amount may depend upon the finding of a jury.[19] If the contract of the parties provides a specific mode and rule of payment, or if its terms furnish the means of ascertaining the exact amount due for specific articles or services, debt will lie.[20] Thus it will lie upon an obligation to pay a specific sum in goods at

Cas. No. 3,015*a*, Hempst. 279; U. S. *v.* Colt, 25 Fed. Cas. No. 14,839, Pet. C. C. 145.

England.— Walker *v.* Witter, Dougl. (3d ed.) 1; Emery *v.* Fell, 2 T. R. 28. See also Herries *v.* Jamieson, 5 T. R. 553; Comyns Dig. tit. "Debt."

See 15 Cent. Dig. tit. "Debt, Action of," § 2.

An ancient exception to the rule that debt and assumpsit were concurrent remedies is cited in Comyns Dig. tit. "Debt." It is that they were not concurrent for the recovery of interest on money due upon a loan. This arose from the fact that before the case of Cooke *v.* Whorwood, 2 Saund. 337, a party who brought assumpsit upon an agreement to pay a stipulated sum by instalments, after the first failure, was entitled to the whole sum in damages; hence until this decision the only difference between the two forms of action in such a case was that debt could not be brought until after the last instalment was due; while assumpsit might be brought after the first failure, and recovery be had for the whole, as in neither form could a second action be maintained on the one contract. See U. S. *v.* Colt, 25 Fed. Cas. No. 14,839, Pet. C. C. 145.

15. *Alabama.*— Wetumpka, etc., R. Co. *v.* Hill, 7 Ala. 772.

Illinois.— Fox River Mfg. Co. *v.* Reeves, 68 Ill. 403.

Maine.— Mitchell *v.* McNabb, 58 Me. 506.

Massachusetts.— Knowles *v.* Eastham, 11 Cush. 429.

Mississippi.— Lee *v.* Gardiner, 26 Miss. 521.

Missouri.— Little *v.* Mercer, 9 Mo. 218.

New Hampshire.— Lovell *v.* Bellows, 7 N. H. 375.

New Jersey.— Morgan *v.* Guttenberg, 40 N. J. L. 394; Sayres *v.* Springfield, 8 N. J. L. 166; Young *v.* Brick, 3 N. J. L. 663.

New York.— New York *v.* Butler, 1 Barb. 325; Long *v.* Long, 1 Hill 597.

Pennsylvania.— Baum *v.* Tonkin, 110 Pa. St. 569, 1 Atl. 535.

Tennessee.— Bloomfield *v.* Hancock, 1 Yerg. 101.

Virginia.— Dungan *v.* Henderlite, 21 Gratt. 149; Byrd *v.* Cocke, 1 Wash. 232.

United States.— Circleville Bank *v.* Inglehart, 2 Fed. Cas. No. 860, 6 McLean 568; Dillingham *v.* Skein, 7 Fed. Cas. No. 3,912*a*, Hempst. 181; Union Iron Co. *v.* Pierce, 24 Fed. Cas. No. 14,367, 4 Biss. 327.

See 15 Cent. Dig. tit. "Debt, Action of," § 5. See also Hunter *v.* Stroud, 3 N. C. 403; Viner Abr. tit. "Debt," where it is said: "If a man puts his cloth to the tailor who makes of it a robe, and does not agree for the price, the tailor shall not have action of debt. Otherwise it is of victuals or wine in a tavern; for there the price is ascertained by the clerk of the market."

16. District of Columbia *v.* Washington, etc., R. Co., 1 Mackey (D. C.) 361; Flanagan *v.* Camden Mut. Ins. Co., 25 N. J. L. 506; Van Horn *v.* Hamilton, 5 N. J. L. 477; Long *v.* Long, 1 Hill (N. Y.) 597; Nelson *v.* Ford, 5 Ohio 473.

17. No small amount of confusion regarding the use of this action has been perhaps produced by the employment of such terms as "*eo nomine*," "*in numero*," and "unliquidated damages." It is at the present time well settled that although a specific sum must be demanded in the declaration, a less amount may be recovered; and that the action is maintainable in cases where goods, wares, and merchandise have been sold and delivered, or work and labor performed, where the law implies a promise and gives the consideration as executed, although the damages are necessarily unliquidated. By "*eo nomine*" and "*in numero*" it is only meant that a specific sum is sought to be recovered which is improperly detained, and that the action does not sound in damages as does the action of assumpsit. The words "unliquidated damages" mean such damages as are sustained by the non-performance of an executory contract which cannot be considered as a money demand; the amount of which depends upon such a variety of considerations and circumstances that its determination is exceedingly difficult. Thompson *v.* French, 10 Yerg. (Tenn.) 452.

18. Walker *v.* Witter, Dougl. (3d ed.) 1.

19. Janvrin *v.* Seammon, 29 N. H. 280.

20. *Alabama.*— Wetumpka, etc., R. Co. *v.* Hill, 7 Ala. 772.

New York.— New York *v.* Butler, 1 Barb. 325.

stipulated prices,[21] and in some instances it has been maintained for services rendered or goods delivered where there was no express contract as to the amount of consideration.[22] But it is also said that where the sum must be ascertained by resorting to extraneous evidence by the tribunal before which the suit is brought the action cannot be maintained;[23] and if the action be brought upon specialties the instrument itself must with clearness and certainty fix the *quantum* of the debt or furnish such data as will infallibly lead to an ascertainment thereof.[24]

2. MEDIUM OF PAYMENT — a. Rule. Another distinguishing feature of debt is that it lies on an obligation which is payable in money only.[25]

b. Application of Rule — (i) *OBLIGATIONS PAYABLE IN BANK-NOTES.* While by common consent bank-notes or state paper may circulate and answer the purpose of money, it is nevertheless subject to fluctuations and change in value, and hence debt will not lie on an obligation payable in the same.[26]

Pennsylvania.— Kirk *v.* Hartman, 63 Pa. St. 97.

Tennessee.—Crockett *v.* Moore, 3 Sneed 145.

England.— Incledon *v.* Crips, 2 Salk. 658.

Statutory provision.— So too where the amount is rendered certain by statute. Brown *v.* Barry, 3 Dall. (U. S.) 365, 1 L. ed. 638.

21. Nelson *v.* Ford, 5 Ohio 473; Crockett *v.* Moore, 3 Sneed (Tenn.) 145; Langtry *v.* Walker, 6 Humphr. (Tenn.) 336; Bloomfield *v.* Hancock, 1 Yerg. (Tenn.) 101 [*citing* Bacon Abr. tit. "Debt," where it is laid down that debt may be brought for twenty pounds to be paid in watches].

22. Jenkins *v.* Richardson, 6 J. J. Marsh. (Ky.) 441, 442, 22 Am. Dec. 82 (where it is said: "In order to facilitate the procurement of justice, it is not necessary, that a price should be agreed on for an article sold and delivered, before debt or *indebitatus assumpsit* can be maintained. The value of the article sold, may be recovered in either of those actions, provided, from the nature of the contract, the vendor was to be compensated in money"); Thompson *v.* French, 10 Yerg. (Tenn.) 452, 454 (where it is said: "This court cannot, therefore, say that the test is the difficulty of ascertaining the value of the goods sold and delivered, and the work and labor done, because they may be of a kind and character about which men may well differ in opinion").

23. Fox River Mfg. Co. *v.* Reeves, 68 Ill. 403; Crockett *v.* Moore, 3 Sneed (Tenn.) 145; Randall *v.* Jaques, 20 Fed. Cas. No. 11,553, where it is said: "If a specific sum of money is stipulated to be paid in a definite quantity of a collateral article of fluctuating value, then it is clear that no debt, in a legal sense, results, but in case of a breach by the failure to deliver, a jury must be impaneled to inquire of damages, which cannot be ascertained except by a resort to extrinsic evidence. Thus, if a farmer gives his bond or note for the payment of one thousand dollars, by a given day, in one thousand bushels of wheat, and there is a breach, the loss of the creditor is not necessarily one thousand dollars, but more or less, according to the market price of the wheat on the day of the breach, and at the place of delivery. Here, debt will not lie, but assumpsit or covenant only, according to the nature of the contract." See also Dungan *v.* Henderlite, 21 Gratt. (Va.) 149.

24. Hale *v.* Hall, 2 Brev. (S. C.) 316.

The fact that the statute designates a recovery as "damages" will not preclude a recovery of such amount by the action of debt where from the nature of the case the action is clearly maintainable. Spence *v.* Thompson, 11 Ala. 746.

What constitutes stipulated damages.— Where a party agreed that he would pay to the plaintiff one thousand dollars in case he set up and carried on a tailoring business in a certain town, such sum, upon the doing or happening of this contingency, is as much due and payable as if it had been payable upon the accrual of a fixed time, or the happening of any other event; and debt is maintainable therefor. Applegate *v.* Jacoby, 9 Dana (Ky.) 206.

25. If the contract is to be discharged by the delivery of stock, merchandise, or other articles of trade or value the action cannot be maintained.

Georgia.— Farrar *v.* Baber, Ga. Dec. 125, Pt. II.

Illinois.— Mix *v.* Nettleton, 29 Ill. 245.

Indiana.— Cassady *v.* Laughlin, 3 Blackf. 134.

Kentucky.— Brown *v.* Durbin, 5 J. J. Marsh. 170; Mattox *v.* Craig, 2 Bibb 584; Thayer *v.* Campbell, 2 Bibb 472 (holding that a written acknowledgment that the person signing it had borrowed a watch of the value of twenty dollars was but evidence of a loan of the watch, and not of a sale of it, and that therefore debt would not lie); Bruner *v.* Kelsoe, 1 Bibb 487; Watson *v.* McNairy, 1 Bibb 356.

Missouri.— Curle *v.* Pettus, 6 Mo. 497; Snell *v.* Kirby, 3 Mo. 21, 22 Am. Dec. 456.

Pennsylvania.—Weiss *v.* Mauch Chunk Iron Co., 58 Pa. St. 295.

Rhode Island.— See Burges *v.* Souther, 15 R. I. 202, 2 Atl. 441.

Virginia — Butcher *v.* Carlile, 12 Gratt. 520.

See 15 Cent. Dig. tit. "Debt, Action of," § 10.

26. *Alabama.*— Young *v.* Scott, 5 Ala. 475; Jackson *v.* Waddill, 1 Stew. 579.

(II) *Where Medium of Payment Is Optional.* An obligation so conditioned that it may be discharged by a payment of money or by the delivery of some other article or articles of sufficient value at or before the expiration of a certain time at the option of the obligor is, after the expiration of such option, one for money only, and may be enforced by the action of debt.[27] And where the obligation is payable in merchandise or articles at a fixed price, it has been held that there is an implied contract that if such articles are not delivered on the day set the debt should be paid in money; and that the action of debt would be maintainable therefor.[28] So too on a parity of reasoning, after an option to discharge the obligation in money has passed or has not been availed of, debt would not lie for the payment in collateral articles provided for in the condition of a contract.[29]

D. Grounds of Action — 1. In General. Generally speaking it is immaterial whether the obligation arose by contract or by operation of common or statute law, in what manner the obligation was incurred, or by what the obligation is evidenced; if it possesses the essential requisites of a foundation for this action debt will lie.[30]

Arkansas.— Hudspeth *v.* Gray, 5 Ark. 157, "Louisiana funds."

Indiana.— Harper *v.* Levi, 1 Blackf. 294; Osborne *v.* Fulton, 1 Blackf. 233; Wilson *v.* Hickson, 1 Blackf. 230.

Kentucky.—January *v.* Henry, 2 T. B. Mon. 58 ("Philadelphia funds"); Campbell *v.* Weister, 1 Litt. 30.

Mississippi.— Dowell *v.* Boyd, 3 Sm. & M. 592.

New Jersey.— Scott *v.* Conover, 6 N. J. L. 222.

North Carolina.—Lackey *v.* Miller, 61 N. C. 26.

Ohio.— Salisbury *v.* Wilson, Tapp. 198.

Tennessee.— Kirkpatrick *v.* McCullough, 3 Humphr. 171, 39 Am. Dec. 158; Deberry *v.* Darnell, 5 Yerg. 451 ("North Carolina bank-notes"); Hicklin *v.* Tucker, 2 Yerg. 448 ("Tennessee currency").

Virginia.— Beirne *v.* Dunlap, 8 Leigh 514. See also Gibbon *v.* Jameson, 5 Call 294.

See 15 Cent. Dig. tit. "Debt, Action of," § 6.

The fact that the notes were at par when the obligation became payable cannot affect the form of remedy. Butcher *v.* Carlile, 12 Gratt. (Va.) 520; Beirne *v.* Dunlap, 8 Leigh (Va.) 514. And therefore an averment that the bank-notes in which the obligation is payable were of equal value with specie will not cure the defects or help the form of action. Deberry *v.* Darnell, 5 Yerg. (Tenn.) 451.

The fact that an obligation uses the word "money" in designating its medium of payment is immaterial, if from the construction of the whole instrument it is evident that bank-notes or other medium not possessing all the legal attributes of money were intended by the parties. Sinclair *v.* Piercy, 5 J. J. Marsh. (Ky.) 63 (an obligation for the payment of "one hundred dollars to be paid in money receivable in the United States Land Office"); Dungan *v.* Henderlite, 21 Gratt. (Va.) 149 (an obligation payable in the currency of Virginia and North Carolina money). But where the medium designated serves in the legal capacity of money this construction will not be given it. Wilburn *v.* Greer, 6 Ark. 255 (note payable in Arkansas money); Gift *v.* Hall, 1 Humphr. (Tenn.) 480 (an obligation payable in Tennessee, Alabama or Brandon money); Searcy *v.* Vance, Mart. & Y (Tenn.) 225 (an obligation payable in Tennessee money). See also Burton *v.* Brooks, 25 Ark. 215; Gregory *v.* Bewly, 5 Ark. 318.

An assignee of a sealed note payable in cash may maintain debt thereon, notwithstanding the fact that the assignment states the note to be payable in specific bank paper. Fischli *v.* Cowan, 1 Blackf. (Ind.) 350.

27. *Alabama.*—Bradford *v.* Stewart, Minor 44; Henry *v.* Gamble, Minor 15.

Arkansas.— Gregory *v.* Bewly, 5 Ark. 318.

Illinois.— Fox River Mfg. Co. *v.* Reeves, 68 Ill. 403.

Indiana.— Taylor *v.* Meek, 4 Blackf. 388.

Kentucky.—Dorsey *v.* Lawrence, Hard. 508.

Missouri.— Edwards *v.* McKee, 1 Mo. 123, 13 Am. Dec. 474.

South Carolina.— Bollinger *v.* Thurston, 2 Mills 447.

Tennessee.— Young *v.* Hawkins, 4 Yerg. 171 [*following* Bloomfield *v.* Hancock, 1 Yerg. 101].

Virginia.— Minnick *v.* Williams, 77 Va. 758; Butcher *v.* Carlile, 12 Gratt. 520; Crawford *v.* Daigh, 2 Va. Cas. 521.

United States.— Randall *v.* Jaques, 20 Fed. Cas. No. 11,553.

See 15 Cent. Dig. tit. "Debt, Action of," § 9.

28. Sarchett *v.* Bell, Tapp. (Ohio) 316. See also Barrett *v.* Twombly, 23 Me. 333.

29. Nesbitt *v.* Ware, 30 Ala. 68.

A bond conditioned to be paid in gold or silver (Turpin *v.* Sledd, 23 Gratt. (Va.) 238) or in specie (Rhyne *v.* Wacaser, 63 N. C. 36), or its equivalent, will sustain an action of debt.

30. *Mississippi.*— Dowell *v.* Boyd, 3 Sm. & M. 592.

New Jersey.—Knapp *v.* Hoboken, 38 N. J. L. 371.

Pennsylvania.— Baum *v.* Tonkin, 110 Pa. St. 569, 1 Atl. 535; Kirk *v.* Hartman, 63 Pa.

2. **Simple Contracts.** It is not necessary that the contractual obligation on which the action rests be a specialty;[31] it may be an express simple contract or an implied one arising from the acts of the parties or by operation of law, so long as it possesses the other necessary and distinguishing requisites.[32]

3. **Specialties.**[33] Debt as a rule lies on specialties[34] whenever they contain an acknowledgment of debt[35] or an express promise to pay a particular sum.[36] Thus debt lies on a mortgage containing an express covenant to pay a certain amount[37]

St. 97; Huber *v.* Burke, 11 Serg. & R. 238; Lacaze *v.* Com., Add. 59; McKeesport *v.* Harrison, 27 Pittsb. Leg. J. 57.

South Carolina.— Bradley *v.* Jennings, 15 Rich. 34.

West Virginia.— Somerville *v.* Grim, 17 W. Va. 803.

United States.—Stockwell *v.* U. S., 13 Wall. 531, 20 L. ed. 491.

England.— Viner Abr. tit. "Debt."

See 15 Cent. Dig. tit. "Debt, Action of," § 15.

At common law debts, for which an action of debt may be brought, may be classed under four general heads: (1) Judgments obtained in a court of record on a suit; (2) specialties acknowledged to be entered or record, as a recognizance, statutes merchant, or staple, or such like; (3) specialties indented, or not indented; and (4) contracts, without specialties, either express or implied. Respublica *v.* Shaffer, 1 Dall. (U. S.) 236, 1 L. ed. 116.

It has been held that debt lies on an award of arbitrators where the submission contained a condition that judgment rendered on the report should be final (Day *v.* Hooper, 51 Me. 178; 3 Cyc. 778); on a policy of insurance, although it be not under seal (Flanagan *v.* Camden Mut. Ins. Co., 25 N. J. L. 506; People's Ins. Co. *v.* Spencer, 53 Pa. St. 353, 91 Am. Dec. 217; Miller *v.* Ins. Co., 34 Leg. Int. (Pa.) 339); upon an account (Collins *v.* Johnson, 6 Fed. Cas. No. 3,015*a*, Hempst. 279); upon an account stated (Somerville *v.* Grim, 17 W. Va. 803); upon an open account (Dillingham *v.* Skein, 7 Fed. Cas. No. 3,912*a*, Hempst. 181); or to recover a reward offered for the apprehension and conviction of a criminal, although assumpsit is the remedy more generally employed (Furman *v.* Parke, 21 N. J. L. 310). So too debt has been held to be an appropriate remedy to recover damages for injury to (Genung *v.* Vigo County, 5 Blackf. (Ind.) 440), or for the appropriation of (Blanchard *v.* Maysville, etc., Turnpike Co., 1 Dana (Ky.) 86), land.

Collateral matters provided for in a bond, such as a provision binding the obligor to give further security when required by a school commissioner, does not preclude the action, when the bond is otherwise sufficient for its maintenance. Casey *v.* Barcroft, 5 Mo. 128.

Where there is a penalty and a covenant in the same deed, debt may be brought for the penalty, or an action of covenant may be maintained for the damages. McLaughlin *v.* Hutchins, 3 Ark. 207.

31. See *infra*, III, D, 9.

32. *Connecticut.*— Knapp *v.* Hanford, 6 Conn. 170, holding that debt would lie upon the implied promise to pay of an executor who had assets in his possession.

Kentucky.— Jenkins *v.* Richardson, 6 J. J. Marsh. 442, 22 Am. Dec. 82.

Maine.— Portland *v.* Atlantic, etc., R. Co., 66 Me. 485.

New Jersey.— Little *v.* Gibbs. 4 N. J. L. 211, holding that debt would lie where a constable had paid money on the execution, at the request of defendant.

North Carolina.— Love *v.* Schenck, 34 N. C. 304.

Pennsylvania.— Metropolitan L. Ins. Co. *v.* Drach, 101 Pa. St. 278; Kirk *v.* Hartman, 63 Pa. St. 97; Respublica *v.* Lacaze, 2 Dall. 118, 1 L. ed. 313.

Tennessee.— Thompson *v.* French, 10 Yerg. 452; Hickman *v.* Scarcy, 9 Yerg. 47, holding that debt would lie on behalf of one of two defendants, against whom a joint judgment had been rendered, who had paid the whole of the judgment, against his co-defendant.

United States.—Dillingham *v.* Skein, 7 Fed. Cas. No. 3,912*a*, Hempst. 181; U. S. *v.* Colt, 25 Fed. Cas. No. 14,839, Pet. C. C. 145.

England.—Emery *v.* Fell, 2 T. R. 28, which was one of the earliest cases distinctly establishing the proposition that debt would lie upon an implied as well as upon an express contract, although no precise sum was agreed upon. And see Comyns Dig. tit. "Debt."

See 15 Cent. Dig. tit. "Debt, Action of," § 16.

Quantum meruit.— The action of debt may be maintained on a *quantum meruit* for work and labor performed or for materials furnished. Jenkins *v.* Richardson, 6 J. J. Marsh. (Ky.) 441, 22 Am. Dec. 82; McVicker *v.* Beedy, 31 Me. 314, 50 Am. Dec. 666; Norris *v.* Windsor School Dist. No. 1, 12 Me. 293, 28 Am. Dec. 182; Van Deusen *v.* Blum, 18 Pick. (Mass.) 229, 29 Am. Dec. 582; Smith *v.* Lowell First Cong. Meetinghouse, 8 Pick. (Mass.) 178.

33. **Debt on a bond** see 5 Cyc. 812. On bail-bond see 5 Cyc. 52 note 11; 137 note 13.

34. Leland *v.* Barry, 69 Ill. 348; Massey *v.* Chance, 7 Blackf. (Ind.) 160; Applegate *v.* Jacoby, 9 Dana (Ky.) 206; Jackson *v.* York, etc., R. Co., 48 Me. 147; Comyns Dig. tit. "Debt."

35. Newby *v.* Forsyth, 3 Gratt. (Va.) 308.

36. Mitchell *v.* McNabb, 58 Me. 506, where the action was held not to lie upon a sealed bill of sale of a shoe business, and an agreement not to carry on the same within a specific time and place, as such instrument contained no covenant to pay any particular sum.

37. **The text in Chitty Pl. 124,** where it is laid down that debt lies on a mortgage deed,

or expressly acknowledging a certain sum to be due;[38] but these attributes are essential, and the action cannot be maintained upon a mortgage in the form commonly executed in this country.[39]

4. MATTERS OF RECORD. Generally speaking this action may be maintained upon matters of record[40] or decrees or orders having the force and effect thereof. Thus it lies on a recognizance[41] or a judgment.[42] So debt will lie to recover of a sum decreed as alimony.[43] And in some jurisdictions debt is the only remedy to recover costs awarded in certain actions.[44]

5. COLLATERAL UNDERTAKINGS. From the fact that in the origin of the action of debt the debtor was usually the party who received the consideration, and alone owed the debt, the doctrine was enunciated and came to prevail that debt was inapplicable as a remedy in case of a breach of promise to pay money primarily due from a third party;[45] and our courts, being unwilling to extend its common-law limits in this regard, have usually held that it does not lie on collateral undertakings.[46]

6. CONDITIONAL PROMISES. Debt does not lie upon a conditional promise for the payment of money.[47]

has no application to the usual mortgage which is executed in this country, but refers to mortgages as they exist in England, which contain, after the proviso, an express covenant by the mortgagor for the payment of the mortgage money. On such an undertaking debt or covenant will lie. See Larmon *v.* Carpenter, 70 Ill. 549.

38. Elder *v.* Rouse, 15 Wend. (N. Y.) 218; Couger *v.* Lancaster, 6 Yerg. (Tenn.) 477.

39. *Illinois.*— Larmon *v.* Carpenter, 70 Ill. 549.

Indiana.— Smith *v.* Stewart, 6 Blackf. 162.

Maryland.— Barrell *v.* Glover, 2 Gill 171.

New York.— Culver *v.* Sisson, 3 N. Y. 264.

Pennsylvania.— Fidelity Ins., etc., Co. *v.* Miller, 89 Pa. St. 26; Scott *v.* Fields, 7 Watts 360.

Canada.— Hall *v.* Moreley, 8 U. C. Q. B. 584. See also McLaughlin *v.* Brouse, 11 U. C. Q. B. 609.

See 15 Cent. Dig. tit. "Debt, Action of," § 17.

40. Leland *v.* Barry, 69 Ill. 348.

41. State *v.* Folsom, 26 Me. 209; Com. *v.* Green, 12 Mass. 1; State *v.* Davis, 43 N. H. 600; State *v.* Stevens, Smith (N. H.) 251; People *v.* Van Eps, 4 Wend. (N. Y.) 387; Comyns Dig. tit. "Debt;" Viner Abr. tit. "Debt." And see 4 Cyc. 1073; 5 Cyc. 52 note 11; 137 note 13; RECOGNIZANCES.

42. Lee *v.* Gardiner, 26 Miss. 521; Comyns Dig. tit. "Debt;" Viner Abr. tit. "Debt."

The question of whether or no debt would lie on a judgment within a year and a day at common law is discussed in Kingsland *v.* Forrest, 18 Ala. 519, 52 Am. Dec. 232, where the conclusion reached was that the question was a rather mooted one, but that by the decided weight of American authority it would so lie, and that it was clearly maintainable at common law after the expiration of such time. See, generally, JUDGMENTS.

The reason for inference that debt does not lie on a judgment.— Inasmuch as in personal suits actions of debt upon a judgment have been discountenanced by the courts as being vexatious and oppressive, by harassing defendant with the costs of two actions instead of one, because of this discontinuance, a supposition existed at one time that it did not so lie; but the court, in Denison *v.* Williams, 4 Conn. 402, after a thorough discussion of the subject, clearly showed that the "right" to bring the action could not be denied.

43. Howard *v.* Howard, 15 Mass. 196.

Debt to enforce order for support of bastard see 5 Cyc. 670 note 98.

44. Cole *v.* Lunger, 42 N. J. L. 381; Baird *v.* Johnson, 14 N. J. L. 120.

45. Gregory *v.* Thomson, 31 N. J. L. 166.

46. *Alabama.*—Whiting *v.* King, Minor 122.

Arkansas.— Thompson *v.* Shreve, 24 Ark. 261.

Maine.— Reid *v.* Blaney, 2 Me. 128.

New Jersey.— Gregory *v.* Thomson, 31 N. J. L. 166.

Tennessee.— Tappan *v.* Campbell, 9 Yerg. 436 [*explaining* and *limiting* Bayley *v.* Hazard, 3 Yerg. 487]; Olive *v.* Napier, Cooke 11.

England.— Randall *v.* Rigby, 6 Dowl. P. C. 650, 7 L. J. Exch. 240, 4 M. & W. 130 [*cited* in Gregory *v.* Thomson, 31 N. J. L. 166].

Canada.— See McLean *v.* Tinsley, 7 U. C. Q. B. 40.

See 15 Cent. Dig. tit. "Debt, Action of," § 11.

A statutory exception arises in some states respecting the writ of audita querela, which provides that such writ must be indorsed, and that an action of debt may be brought against the indorser. Reid *v.* Blaney, 2 Me. 128.

47. Blevins *v.* Blevins, 4 Ark. 441.

Money to be paid out of particular fund.— Debt does not lie against a corporation or municipality to recover compensation or salary which by the terms of the employment were to be paid from a particular fund. Illinois State Hospital *v.* Higgins, 15 Ill. 185; Addison *v.* Preston, 12 C. B. 108, 16 Jur. 643, 21 L. J. C. P. 146, 74 E. C. L. 108, 10 Eng. L. & Eq. 489; Jones *v.* Carmarthen, 10 L. J. Exch. 401, 8 M. & W. 605. *Aliter* if the obligor individually promises to pay a sum certain, although it is to be raised from

7. Debts Payable in Instalments.[48] Where the obligation consists of an entire sum, payable in instalments, debt will not lie for any particular instalment until all become due;[49] but where a bond conditioned to be paid by instalments is given, and a penalty is also attached thereto, debt will lie for the penalty upon a default in payment of the condition.[50]

8. Interest Before Maturity of Debt. It has been held that debt does not lie for the recovery of interest payable at certain intervals before the debt itself becomes due.[51]

9 Statutory Penalties or Obligations — a. In Absence of Specific Remedy. Where a statute creates a duty or imposes an obligation upon a person to pay money, or gives a plaintiff a right to a penalty or specific damages, without specifically providing a remedy for the recovery of such money, it is universally conceded that debt is an appropriate remedy.[52]

b. Where Remedy Is Provided. Where a statutory remedy is given for the enforcement of a common-law liability, such remedy is usually held to be cumu-

a particular fund. Pollard *v.* Yoder, 2 A. K. Marsh. (Ky.) 264.

48. Accrual of debt payable in instalments see 1 Cyc. 740.

49. *Illinois.*—Hoy *v.* Hoy, 44 Ill. 469, holding, however, that it would lie on an indenture conditioned for the payment of a specified sum annually for ten years, on a particular day in each year, as such several payments did not constitute a part of a gross sum, but each was a separate and distinct obligation.

Indiana.— Farnham *v.* Hay, 3 Blackf. 167.

Tennessee.— Blakemore *v.* Wood, 3 Sneed 470.

Virginia.— Peyton *v.* Harman, 22 Gratt. 643.

Canada.— De Tuyl *v.* McDonald, 8 U. C. Q. B. 171 (holding, however, that the facts involved in that case would not warrant the application of this doctrine); Forsyth *v.* Johnson, 6 U. C. Q. B. O. S. 97.

See 15 Cent. Dig. tit. "Debt, Action of," § 24; and 1 Cyc. 740.

50. Fontaine *v.* Aresta, 9 Fed. Cas. No. 4,905, 2 McLean 127 [*citing* Comyns Dig. tit. "Debt"]. For further statement of this doctrine see Forsyth *v.* Johnson, 6 U. C. Q. B. O. S. 97; and 1 Cyc. 740.

51. Lyall *v.* London, 8 U. C. C. P. 365, 369, where the court said: "[If] I find no authority for holding that interest on a debt certain, contracted to be paid at fixed days, before the debt itself is to fall due, can be treated as becoming a separate and distinct debt, payable on each of such days, and recoverable in an action of debt, though I confess I cannot frame to my own mind a satisfactory and convincing reason why it should not; I suppose that it must be, that it is one contract to pay one sum, with interest, and that there can only be one action of debt on one contract, and the interest is regarded as inseparably connected with the debt, though payable from time to time before the debt falls due. It cannot be as damages; first, because it is an actual term of the contract. Secondly, because there can be no damages for detaining until the debt itself has become payable and is unpaid. But why the agreement to pay a sum certain, or capable of being made certain by computation, half-yearly, until another sum is paid on a distant fixed day, is not to me so clear. Still it is not the practice to treat interest, although expressly reserved by the terms of the contract, and payable at fixed days before the principal becomes due, as forming an independent item and debt certain on each of those days, for which an action of debt could be maintained. If it were so, then the plaintiff would be entitled to claim interest upon each such sum by way of damages for its detention, which would in effect be the recovery of compound interest, which it is not the practice of courts of law to allow." *Compare* Sparks *v.* Garrigues, 1 Binn. (Pa.) 152. And see, generally, Interest.

52. *Alabama.*— Strange *v.* Powell, 15 Ala. 452; Blackburn *v.* Baker, 7 Port. 284; Pettigrew *v.* Pettigrew, 1 Stew. 580.

California.—State *v.* Poulterer, 16 Cal. 514.

Maine.— Houghton *v.* Stowell, 28 Me. 215.

Massachusetts.— Jeffrey *v.* Blue-Hill Turnpike Corp., 10 Mass. 368; Bigelow *v.* Cambridge, etc., Turnpike Corp., 7 Mass. 202; Rice *v.* Barre Turnpike Corp., 4 Pick. 130.

Missouri.—See Miller *v.* Conway, 2 Mo. 213.

New Hampshire.—Orne *v.* Roberts, 51 N. H. 110; Janvrin *v.* Seammon, 29 N. H. 280; Morrison *v.* Bedell, 22 N. H. 234; Lebanon *v.* Olcott, 1 N. H. 339.

New York.— Simonson *v.* Spencer, 15 Wend. 548; Van Hook *v.* Whitlock, 3 Paige 408.

Pennsylvania.— Garman *v.* Gamble, 10 Watts 382; McKeesport *v.* Harrison, 24 Pittsb. Leg. J. 57.

Virginia.— See Sims *v.* Alderson, 8 Leigh 479.

United States.—U. S. *v.* Mundel, 27 Fed. Cas. No. 15,834, 1 Hughes 415, 6 Call. (Va.) 245.

England.— Tilson *v.* Warwick Gas Light Co., 4 B. & C. 962, 7 D. & R. 376, 4 L. J. K. B. O. S. 53, 28 Rev. Rep. 529, 10 E. C. L. 877; Comyns Dig. tit. "Debt;" Viner Abr. tit. "Debt."

Canada.— Jones *v.* Chace, Draper (U. C.) 322.

See 15 Cent. Dig. tit. "Debt, Action of," §§ 3, 4, 10; and, generally, Penalties.

lative only,[53] and debt may be maintained at the option of plaintiff;[54] but where the statute creates the right or liability as well as prescribes the mode of enforcement, such remedy will be held to be exclusive, and debt will not lie.[55]

10. TORTS — a. In General. It is essential that the ground of action be of a contractual nature; debt will not, in the absence of statute,[56] lie where the cause of action grows out of a tort,[57] although in some jurisdictions the tort may be waived and debt maintained.[58]

b. Escape. While debt did not lie at common law against an officer for the escape of a prisoner,[59] this remedy was by statute extended to an escape upon execution,[60] which change has been generally recognized and the remedy applied in this country;[61] but its application has been denied for an escape on mesne process.[62]

IV. PARTIES.[63]

A. Necessity of Privity. As debt is an action *ex contractu*, it follows that it lies only between parties to an obligation between whom there exists either a privity of contract or estate, express or implied.[64]

B. Plaintiff. Where the other essentials for the maintenance of the action

53. See ACTIONS, 1 Cyc. 709.

54. *Alabama.*— Kingsland *v.* Forrest, 18 Ala. 519, 52 Am. Dec. 232, holding that debt would lie on a judgment after a year and a day, although execution might also legally issue thereon.

California.— State *v.* Poulterer, 16 Cal. 514, holding that the duty imposed by the statute for selling goods at public auction might be collected by an action of debt, the penal remedy afforded not being exclusive.

Illinois.— Geneva *v.* Cole, 61 Ill. 397, holding that debt would lie for the collection of a tax, notwithstanding the statute gave a remedy by distress.

Maine.— Ware *v.* Pike, 12 Me. 303.

Massachusetts.— Green *v.* Dana, 13 Mass. 493; Storer *v.* Storer, 6 Mass. 390, holding that the remedy on the bond of an administrator being merely cumulative debt would lie against him on a decree of probate to pay over money.

North Carolina.—Casey *v.* Giles, 18 N. C. 1.

Vermont.—Shelburn *v.* Eldridge, 10 Vt. 123.

See 15 Cent. Dig. tit. "Debt, Action of," § 4.

55. People *v.* Craycroft, 2 Cal. 243, 56 Am. Dec. 331; Smith *v.* Drew, 5 Mass. 514; Gedney *v.* Tewksbury, 3 Mass. 307; Dennis *v.* Arnold, 12 Metc. (Mass.) 449; Moyer *v.* Kirby, 14 Serg. & R. (Pa.) 162; Viner Abr. tit. "Debt."

Debt on statute staple.— It was for this reason that debt would not lie on a statute staple, as it did on a statute merchant; such statute created a duty not known to the common law, and therefore the only remedy was that provided by the statute. Moyer *v.* Kirby, 14 Serg. & R. (Pa.) 162 [*citing* Viner Abr. tit. "Debt;" 1 Rolle Abr. 599].

56. See *infra*, III, D, 10, b.

57. Eads *v.* Pitkin, 3 Greene (Iowa) 77; Chamberlin *v.* Cox, 2 N. J. L. 313. And see, generally, TORTS.

58. Alsbrook *v.* Hathaway, 3 Sneed (Tenn.) 454.

59. Steere *v.* Field, 22 Fed. Cas. No. 13,350, 2 Mason 486, where the court said: "There does not seem any reason to suppose, that debt was a remedy for an escape at the common law; for according to all analogies of that law, it lay not in cases of tort, but of contract only, where the claim was for a sum certain; and it seems impossible to conceive, that the injury to the plaintiff in cases of escape could always be a sum certain. From the nature of the case, it is a tort, sounding in damages, and perpetually varying in measure and extent."

60. Statute of Westminster II, c. 11; 13 Edw. I; 1 Richard II, c. 12 [*cited* in Plumleigh *v.* Cook, 13 Ill. 669; Lovell *v.* Bellows, 7 N. H. 375; Steere *v.* Field, 22 Fed. Cas. No. 13,350, 2 Mason 486; Bonafous *v.* Walker, 2 T. R. 126].

61. Plumleigh *v.* Cook, 13 Ill. 669; Porter *v.* Sayward, 7 Mass. 377; Steere *v.* Field, 22 Fed. Cas. No. 13,350, 2 Mason 486.

62. Lovell *v.* Bellows, 7 N. H. 375, which is in direct accord with the proposition that it lies for an escape upon execution.

Debt and case are concurrent remedies for an escape upon execution.— If the party elects to bring the action of debt, he is entitled to recover the amount of his judgment and costs; if he brings case, the measure of damages is the actual loss which he has sustained. Plumleigh *v.* Cook, 13 Ill. 669.

63. Parties generally see PARTIES.

64. *Illinois.*— Turney *v.* Penn, 16 Ill. 485, holding that debt on a sealed lease would not lie against a party who bound himself as surety for rent by a writing not under seal, as he was in no way a party to the specialty, and that an action could be maintained against him only on his simple contract.

North Carolina.— Taylor *v.* Grace, 6 N. C. 66.

Pennsylvania.— Beach *v.* Morris, 12 Serg. & R. 16.

Virginia.— Ross *v.* Milne, 12 Leigh 204, 37 Am. Dec. 646.

exist, it may generally speaking be maintained, regardless of the *personnel* of the plaintiff.[65]

C. Defendant — 1. In General. So too the *personnel* of the party defendant is usually immaterial.[66]

2. Executors and Administrators.[67] At common law debt would not lie against an executor or an administrator where the testator could have waged his law,[68] but as this defense has never been allowed by our courts, it follows that the action will generally be held to lie against such parties in this country;[69] and even when the rule was otherwise, the executor could waive the benefit thereof, and if instead of demurring he entered a plea he could not take advantage of the objection to arrest judgment.[70]

V. Pleading[71] and Process.[72]

A. Writ.[73] The writ usually runs in the *debit* and *detinet*,[74] although at present this precise expression is usually not required;[75] yet it must be sufficiently

Canada.— Dougall *v.* Turnbull, 10 U. C. Q. B. 121.

See 15 Cent. Dig. tit. "Debt, Action of," § 21 *et seq.*

Privity of estate.— That debt for rent will lie against the assignee of a lessee because there exists a privity of estate see Outtoun *v.* Dulin, 72 Md. 536, 20 Atl. 134; Howland *v.* Coffin, 9 Pick. (Mass.) 52 [*affirmed* in 12 Pick. 125]; Norton *v.* Vultee, 1 Hall (N. Y.) 427. And see, generally, Landlord and Tenant.

65. Thus it may be maintained by executors or administrators (Comyns Dig. tit. "Debt") or by the beneficiaries of a beneficial association (Abe Lincoln Mut. L., etc., Soc. *v.* Miller, 23 Ill. App. 341). So too it may be brought on behalf of the United States. Stockwell *v.* U. S., 13 Wall. (U. S.) 531, 20 L. ed. 491. See also McKnight *v.* U S., Morr. (Iowa) 444.

66. Thus he may be a public officer who has collected or received money in that capacity (Sandford School Dist. No. 2 *v.* Tebbetts, 67 Me. 239; Bodenhamer *v.* Bodenhamer, 6 Humphr. (Tenn.) 264), a trustee for a specific sum, payable *in præsenti* (Chandler *v.* Warren, 30 Vt. 510), or a stayer of an execution (Humphreys *v.* Buie, 12 N. C. 378; Gardner *v.* Henry, 5 Coldw. (Tenn.) 458).

67. **Executors and administrators** generally see Executors and Administrators.

68. Barry *v.* Robinson, 1 B. & P. N. R. 293 [*cited* in Childress *v.* Emory, 8 Wheat. (U. S.) 642, 5 L. ed. 705].

The reason being that plaintiff could not by his form of action deprive the executor of any lawful plea that might have been pleaded by his testator; and as the executor could in no case wage his law he ought not be compelled to answer to an action in which his testator might have availed himself of that defense. Childress *v.* Emory, 8 Wheat. (U. S.) 642, 5 L. ed. 705.

69. *New Jersey.*— Harrison *v.* Vreeland, 38 N. J. L. 366 [*citing* Plumer *v.* Marchant, 3 Burr. 1380] where, while the action was against an executor, the principal point at issue was whether or not it would lie on an obligation of a testator that the executor should pay after his death. And the court held that such promise created a debt on the part of the executor as much as if he himself had promised to pay it.

Ohio.— Tupper *v.* Tupper, 3 Ohio 387.

South Carolina.— McEwen *v.* Joy, 7 Rich. 33.

Tennessee.— Thompson *v.* French, 10 Yerg. 452.

United States.— Childress *v.* Emory, 8 Wheat. 642, 5 L. ed. 705.

Compare Carson *v.* Hood, 4 Dall. (Pa.) 108, 1 L. ed. 762.

See 15 Cent. Dig. tit. "Debt, Action of," § 22.

70. Carson *v.* Hood, 4 Dall. (Pa.) 108, 1 L. ed. 762; Childress *v.* Emory, 8 Wheat. (U. S.) 642, 5 L. ed. 705 [*citing* Norwood *v.* Read, Plowd. 180, 2 Saund. 73 note 2].

71. **Pleading** in common-law actions generally see Pleading.

72. **Process** generally see Process.

73. **For form of writ** in debt on a judgment against one who is discharged from imprisonment on execution in the original action see Cooke *v.* Gibbs, 3 Mass. 193; Willington *v.* Stearns, 1 Pick. (Mass.) 497.

Arrest in debt see 3 Cyc. 935.

Foreign attachment in debt see 4 Cyc. 439 note 38.

74. 3 Blackstone Comm. 155, where it is said: "The form of the writ of debt is sometimes in the debit and detinet, and sometimes in the detinet only; that is, the writ states, either that the defendant owes and unjustly detains the debt or thing in question, or only that he unjustly detains it. It is brought in the debit as well as detinet, when sued by one of the original contracting parties who personally gave the credit, against the other who personally incurred the debt, or against his heirs, if they are bound to the payment; as by the obligee against the obligor, the landlord against the tenant, etc. But if it be brought by or against an executor for debt due to or from the testator, this not being his own debt, shall be sued for in the detinet only." See also Watson *v.* McNairy, 1 Bibb (Ky.) 356.

75. Page *v.* Farmer, 6 N. C. 288; Guion *v.* McCullough, 11 Fed. Cas. No. 5,863, Brunn.

technical to enable defendant to determine the style of action.[76] And while it would perhaps be more conformable to the rules of good pleading to state the debt as a sum certain in the writ,[77] in most jurisdictions a failure so to do is not fatal.[78] In other jurisdictions the debt must be demanded therein as a particular sum.[79]

B. Declaration[80] **— 1. In General.** While a declaration in debt is sufficient if it declare on the instrument according to its legal effect,[81] it should nevertheless state any inducement necessary to explain the contract, aver that defendant agreed to pay,[82] and show an interest of plaintiff in the cause of action.[83] If the obligation has been assigned, the declaration must show that payment has not been made to the assignor.[84] If the liability of defendant is conditional upon the performance of acts by plaintiff, a performance of such conditions or a tender thereof must be alleged.[85] But as the action is contractual and not local, it is unnecessary when brought for use and occupation to allege the location of the premises or the particulars of the demise.[86]

2. Must Distinguish Form of Action. A declaration in debt must be sufficiently technical to distinguish the form of action.[87]

Col. Cas. 1. See also Bailey *v.* Beckwith, 7 Leigh (Va.) 604.

Surplusage in writ.— A statement in a writ of the kind of debt, such for instance as "debt on award," is surplusage, and if objectionable at all it is only so as matter in abatement. Brown *v.* Warnock, 5 Dana (Ky.) 492.

76. Hoy *v.* Brown, 16 N. J. L. 157.

To recover a penalty under the timber act, by virtue of the early statutes of New Jersey, the process must contain an indorsement of the name of the prosecutor and of the title of the statute. Miller *v.* Stoy, 5 N. J. L. 476.

77. St. John Sewing Mach. Co. *v.* Reinhart, I Chest. Co. Rep. (Pa.) 528.

78. Stickney *v.* Stickney, 16 N. H. 163; Marsteller *v.* Marsteller, 93 Pa. St. 350; St. John Sewing Mach. Co. *v.* Reinhart, 1 Chest. Co. Rep. (Pa.) 528.

79. Weld *v.* Hubbard, 11 Ill. 573. See also Butler *v.* Limerick, Minor (Ala.) 115.

80. Forms of declaration in whole or in part may be found in the following cases:

Alabama.— Williams *v.* Harper, 1 Ala. 502.

Indiana.— Massey *v.* Chance, 7 Blackf. 160.

Maine.— Portland *v.* Atlanta, etc., R. Co., 66 Me. 485.

New Hampshire.— State *v.* Stevens, Smith 251.

Pennsylvania.— Metropolitan L. Ins. Co. *v.* Drach, 101 Pa. St. 278; Gebhart *v.* Francis, 32 Pa. St. 78.

If the statute prescribes the form of declaring in actions of a particular nature, compliance therewith will be sufficient. Hanger *v.* Dodge, 24 Ark. 208; Yeates *v.* Heard, 2 Ark. 459. See also Harvey *v.* Renfro, 7 Mo. 187.

81. Nash *v.* Nash, 16 Ill. 79; Newby *v.* Forsyth, 3 Gratt. (Va.) 308. See also Foltz *v.* Stevens, 54 Ill. 180.

Effect of misnomer of instrument.— The mere fact that the pleader has misnamed the instrument sued on by calling it a note instead of a covenant or an agreement is not fatal to the declaration, especially upon general demurrer. Smith *v.* Webb, 16 Ill. 105.

82. Metcalf *v.* Robinson, 17 Fed. Cas. No. 9,497, 2 McLean 363.

Necessity of averring consideration in debt on promissory note see Commercial Paper, 8 Cyc. 109.

Omission of the debit and detinet in a declaration in debt has been held fatal if taken advantage of by special demurrer. Adams *v.* Campbell, 4 Vt. 447.

Sufficient averment as to time of payment. —Where a declaration in debt sets forth the instrument sued on, and declares on it as acknowledging the debt without any postponement of the time of payment, the court will take notice therefrom that the debt is payable and demandable immediately. Payne *v.* Mattox, 1 Bibb (Ky.) 164.

Where the action is against one of several obligors, the declaration need not aver that the debt has not been paid by the coöbligors, as this should be taken advantage of by plea if true. Clay *v.* Drake, Minor (Ala.) 164.

83. Hamilton *v.* Ewing, 6 Blackf. (Ind.) 88.

84. Keeton *v.* Scantland, Hard. (Ky.) 149.

85. Caldwell *v.* Richmond, 64 Ill. 30.

86. Gray *v.* Johnson, 14 N. H. 414 [*citing* King *v.* Fraser, 6 East 348, 2 Smith K. B. 462; Wilkins *v.* Wingate, 6 T. R. 62].

87. Thus in debt on a recognizance, a declaration which sets forth the facts in a manner appropriate to a declaration in scire facias would be bad. State *v.* Folsom, 26 Me. 209. So too a count declaring that defendant "undertook and promised to pay" would be assumpsit and not debt. McGinnity *v.* Laguereme, 10 Ill. 101; Cruikshank *v.* Brown, 10 Ill. 75; Metcalf *v.* Robinson, 17 Fed. Cas. No. 9,497, 2 McLean 363; Brill *v.* Neele, 3 B. & Ald. 208, 5 E. C. L. 127; Dalton *v.* Smith, 2 Smith K. B. 618 [*cited* in Metcalf *v.* Robinson, 17 Fed. Cas. No. 9,497, 2 McLean 363]; but a count upon a contract, itself creating the liability to pay, which possesses all the attributes of a count in debt, commencing and concluding as such, will not be regarded as a count in assumpsit

3. When Dependent on Statute. If the action is brought on a statute, all the facts necessary to the incurring of the liability or penalty must be alleged.[88]

4. Averment of Breach. A declaration in debt on a writing obligatory should aver the breach in the words of the contract, or in terms co-extensive therewith;[89] and where the ground of action is a recognizance[90] to prosecute an appeal, it should aver that the breach appears of record.[91]

5. Averment of Sum Due — a. Rule. It is essential that the declaration declare for a sum certain,[92] with sufficient precision and consistency to enable the court to render final judgment thereon on demurrer or default.[93]

b. Application of Rule — (i) *In General.* Where the ground of action is a judgment for a certain sum which may be discharged by payment of a less amount, declaration may be for the lesser sum;[94] and where the obligation is to pay money, with the privilege to pay in some other medium, on or before a certain day, it is unnecessary to take any notice of such privilege in the declaration.[95]

(ii) *Statement of Sum in Quæritur.* It is not, however, necessary that the sum mentioned in the *quæritur* or commencement of the declaration should correspond to the aggregate of the amounts set forth in the different counts[96]

merely because "promise" is used instead of "agreed." Smith *v.* Webb, 16 Ill. 105; Cruikshank *v.* Brown, 10 Ill. 75 [*citing* Bishop *v.* Young, 2 B. & P. 78]; National Exch. Bank *v.* Abell, 63 Me. 346. See also Payne *v.* Smith, 12 N. H. 34.

The recognition of the distinction is material inasmuch as its disregard would be a hardship upon defendant, since what would be a good defense to one action might not be to the other, as for instance in some jurisdictions the statute of limitations of five years could be pleaded if the action were assumpsit, but would constitute no defense if the action were debt. McGinnity *v.* Laguerenne, 10 Ill. 101.

When the word "promised" is used as descriptive of the instrument sued upon, and not by way of averment to show the liability of defendant to pay, it is very clear that the declaration will be sufficient as a pleading in debt. McGinnity *v.* Laguerenne, 10 Ill. 101.

88. Whitecraft *v.* Vanderver, 12 Ill. 235; Donohoe *v.* Chappell, 4 Mo. 34 (holding that in debt for a trespass upon land, brought by virtue of the statute of that state, a written statement showing that the land was located in the state of Missouri and describing it was essential); Miller *v.* Stoy, 5 N. J. L. 476.

Where it clearly appears that the declaration is founded on the statute, it need not necessarily be alleged that the acts complained of and creating the liability were done contrary to the form thereof. Whitecraft *v.* Vanderver, 12 Ill. 235.

89. Green *v.* Thornton, 7 Ark. 383.

An averment is not too broad which alleges that defendant has not paid plaintiff "or any other person whomsoever." Pike *v.* Fraser, 17 Ark. 597.

Sufficient averment of actio accrevit.— Where the declaration, after stating that the executor had received a legacy and certain assets, alleges that he assented to and promised to pay the same, whereby he became liable to plaintiffs to pay said legacy, such averment is equivalent to saying that a right of action had accrued; at least this is true after verdict. Payne *v.* Smith, 12 N. H. 34.

90. Filing.— As a recognizance does not strictly speaking become a debt of record until it is filed or recorded in the court in which it is returnable an averment of such filing is necessary. People *v.* Van Eps, 4 Wend. (N. Y.) 387.

Whether or not the occasion for taking the recognizance should be stated in the declaration does not seem to be fully settled. See State *v.* Stevens, Smith (N. H.) 251.

91. That is, the breach should set out with a *prout patet per recordum*. Philbrick *v.* Buxton, 43 N. H. 462.

92. Ashton *v.* Fitzhugh, 2 Fed. Cas. No. 583, 1 Cranch C. C. 218.

93. McKenzie *v.* Connor, 1 Stew. (Ala.) 162; Blane *v.* Sansum, 2 Call (Va.) 495.

94. Carter *v.* Crews, 2 Port. (Ala.) 81. And see Anderson *v.* Price, 4 Munf. (Va.) 307.

95. Minnick *v.* Williams, 77 Va. 758; Butcher *v.* Carlile, 12 Gratt. (Va.) 520. But see Gregory *v.* Bewly, 5 Ark. 318.

96. *Alabama.*— Williams *v.* Harper, 1 Ala. 502.

Indiana.— Cozine *v.* Tousey, 5 Blackf. 46.

Kentucky.— Hampton *v.* Barr, 3 Dana 578; White *v.* Walker, 1 T. B. Mon. 34.

Missouri.— Boyd *v.* Sargent, 1 Mo. 437. See also Pinkston *v.* Stone, 3 Mo. 119.

North Carolina.— Dowd *v.* Seawell, 14 N. C. 185.

England.— Lord *v.* Houstoun, 11 East 62; McQuillin *v.* Cox, 1 H. Bl. 249.

See 15 Cent. Dig. tit. "Debt, Action of," § 27.

In England it is the practice to state a sum certain in the *quæritur* in the court of common pleas, because in that court the commencement of the suit is by a writ, and that part of the declaration has reference to it; but in the king's bench, where the proceedings are by bill, the rule is different, and it is there held that no sum whatever need be stated in the beginning of the dec-

of the declaration, although it seems that it is perfectly regular and proper that it should do so.[97]

(III) *PRINCIPAL AND INTEREST IN AGGREGATE.* A declaration in debt should not claim the principal and interest in an aggregate sum,[98] or interest as a part of the debt when no interest is allowable,[99] although it would seem that a claim of interest might be rejected as surplusage, there being a specific sum demanded;[1] and where interest has accrued it may be demanded in the declaration if not included as a part of the debt due.[2]

6. FOR RECOVERY OF RENT. The declaration in an action of debt for rent in arrear need not declare upon the deed, but will be sufficient if it states the substance of the demise.[3]

7. WHEN AGAINST EXECUTOR OR ADMINISTRATOR.[4] Where the action is against an executor or administrator, the declaration should at common law be in the *detinet* only, unless defendant has by devastavit or otherwise rendered himself personally responsible.[5]

8. JOINDER OF COUNTS. Counts in debt cannot be joined with counts in assumpsit;[6] but counts in debt on simple contracts may be joined with counts in debt on a specialty.[7]

C. Profert. Where debt is brought on a writing, profert thereof must be made before judgment can be taken by default;[8] if brought on articles of agreement for the price of land, such articles should be set out;[9] if brought on a judgment, the instrument itself or a regular certified copy must be produced.[10] If the proceedings have been regulated by statute, a compliance therewith with regard to profert is sufficient.[11]

laration, and that if one is erroneously inserted it is superfluous and may be rejected. Cozine *v.* Tousey, 5 Blackf. (Ind.) 46 [*citing* Lord *v.* Houstoun, 11 East 62].

97. People *v.* Van Eps, 4 Wend. (N. Y.) 387.

98. Butler *v.* Limerick, Minor (Ala.) 115. In this case the amount of the interest until the maturity of the note was added by the plaintiff to the principal, and included in his writ and declaration as part of the debt *in numero*. The judgment was rendered for the whole amount and interest from the maturity of the note on that sum. Thus interest on interest was demanded by the writ and declaration, which of course is not allowable.

99. Shelton *v.* Welsh, 7 Leigh (Va.) 175.

1. Nunnellee *v.* Morton, Cooke (Tenn.) 21.

2. Boddie *v.* Ely, 3 Stew. (Ala.) 182 [*distinguishing* Butler *v.* Limerick, Minor (Ala.) 115]. See also Dudley *v.* Lindsey, 9 B. Mon. (Ky.) 486, 50 Am. Dec. 522; Kemp *v.* Mundell, 9 Leigh (Va.) 12.

3. Garvey *v.* Dobyns, 8 Mo. 213; Gates *v.* Wheeler, 2 Hill (N. Y.) 232 (where the original authorities for this exception to the general rule of pleading are commented upon and the reasons for the exception discussed); Davis *v.* Shoemaker, 1 Rawle (Pa.) 135; Atty *v.* Parish, 1 B. & P. N. R. 104; Warren *v.* Consett, 2 Ld. Raym. 1500. See also Miller *v.* Blow, 68 Ill. 304 (holding that in a declaration in debt for rent on a written lease, the lease would be admissible in evidence, although the demised premises were not described); McLean *v.* Young, 1 U. C. C. P. 62; and, generally, LANDLORD AND TENANT.

4. Executors and administrators generally see EXECUTORS AND ADMINISTRATORS.

5. Leather *v.* McGlasson, 3 T. B. Mon. (Ky.) 223 (holding that, while this was the rule at common law, defendant was, by 16 & 17 Car. II, cured by verdict, and, by 4 & 5 Anne, c. 16, rendered good on general demurrer); Childress *v.* Emory, 8 Wheat. (U. S.) 642, 5 L. ed. 705; Hope *v.* Bague, 3 East 2.

6. McGinnity *v.* Laguerenne, 10 Ill. 101; Cruikshank *v.* Brown, 10 Ill. 75; Metcalf *v.* Robinson, 17 Fed. Cas. No. 9,497, 2 McLean 363; Brill *v.* Neele, 3 B. & Ald. 208, 5 E. C. L. 127.

7. Norris *v.* Windsor School Dist. No. 1, 12 Me. 293, 28 Am. Dec. 182; Van Deusen *v.* Blum, 18 Pick. (Mass.) 229, 29 Am. Dec. 582.

8. Scott *v.* Curd, Hard. (Ky.) 64.

9. Huber *v.* Burke, 11 Serg. & R. (Pa.) 238.

10. Berry *v.* Mead, 3 N. J. L. 612; Rush *v.* Cobbett, 2 Johns. Cas. (N. Y.) 256; Fitch *v.* Porter, 30 N. C. 511 (holding that a record showing merely an award of execution upon a judgment recited therein to have been rendered is insufficient); Anderson *v.* Dudley, 5 Call (Va.) 529 (holding that in debt upon a judgment in the same court where the judgment was rendered the original and not a transcript of the record should be offered and inspected). See Gardner *v.* Henry, 5 Coldw. (Tenn.) 458, holding that in debt on a domestic judgment rendered by a justice of the peace in Tennessee, profert of the original or of an exemplified copy was unnecessary.

If on a probate bond it is sufficient to make profert of a duly authenticated copy. Judge *v.* Merrill, 6 N. H. 256.

11. Rawlings *v.* Paty, 23 Ark. 204, holding that in a petition in debt, under the statute,

D. Bill of Particulars. In the absence of statute no bill of particulars is necessary.[12]

E. Pleas — 1. Necessity of. In an action of debt, if no plea is offered by defendant it is error to submit the cause to the court[13] or jury,[14] as upon issue joined.

2. Form of. It is also essential that the plea be adapted to the form of action.[15]

3. Special or Particular Pleas — a. Nil Debet[16] — (i) *On Simple Contract.* The plea of *nil debet* in debt on all simple contracts is the general issue, and of course constitutes a sufficient plea.[17]

(ii) *On Specialty.* With regard to a domestic judgment or other specialty, a matter of record, or any instrument raised by statute to the status of a sealed instrument, the rule is otherwise. On all such instruments *nil debet* is improper,[18] even though extrinsic facts be alleged;[19] but it is the duty of plaintiff to demur thereto, and if he joins issue such plea cannot be treated as a nullity.[20] This rule is limited in its application by another familiar rule, often, however, much more difficult of application, that where the specialty is merely an inducement to the action, while its foundation depends upon other extrinsic matters of fact, then *nil debet* may be pleaded.[21]

by an administrator, profert of the letters of administration was unnecessary. See also Bostwick *v.* Fleming, 2 Ark. 462.

12. For the reason that the declaration must set out the nature of the obligation with sufficient thoroughness to apprise defendant of the essential facts relied on as constituting the liability, and to enable him to formulate his defense. Williams *v.* Williams, 11 Sm. & M. (Miss.) 393, holding that the statute of that state requiring a bill of particulars to be filed applied only to actions of assumpsit, and that no bill was necessary in an action of debt.

13. Crist *v.* Crist, 8 Blackf. (Ind.) 574.

14. McAdams *v.* Massey, 1 Sm. & M. (Miss.) 660.

15. Thus a plea of non-assumpsit in an action of debt is bad.

Alabama.— Stone *v.* Gover, 1 Ala. 287, holding, however, that such mispleading could not be urged to avoid the judgment if issue had been joined and the case tried on such plea.

Illinois.— Harlow *v.* Boswell, 15 Ill. 56; Lancaster *v.* Lancaster, 29 Ill. App. 510.

Indiana.— Smith *v.* Moore, 1 Ind. 228; Mahan *v.* Sherman, 8 Blackf. 63; Smith *v.* Moore, Smith 154.

New York.— Van Vechten *v.* Cowell, 1 Hill 203.

England.— Perry *v.* Fisher, 6 East 549.

See 15 Cent. Dig. tit. "Debt, Action of," § 29.

16. Further of plea nil debet see 5 Cyc. 145, 831; 4 Cyc. 349; 2 Cyc. 960 note 42.

17. McConnell *v.* State Bank, 6 Ark. 250; Poole *v.* Vanlandingham, 1 Ill. 47; Baum *v.* Tonkin, 110 Pa. St. 569, 1 Atl. 535.

General issue where amount is for a penalty.— *Nil debet* is the best adapted and constitutes the general issue in an action of debt for a penalty, although not guilty may be pleaded. Stilson *v.* Tobey, 2 Mass. 521. See also Burnham *v.* Webster, 5 Mass. 266.

18. *Kentucky.*— Griffith *v.* Com., 1 Dana 270; Scott *v.* Colmesnil, 7 J. J. Marsh. 416; Bradford *v.* Ross, 3 Bibb 238.

Maine.— Dunn *v.* Hill, 63 Me. 174.

Missouri.— Boynton *v.* Reynolds, 3 Mo. 79.

New Hampshire.— Tappan *v.* Heath, 16 N. H. 34.

New Jersey.— English *v.* Jersey City, 42 N. J. L. 275; Canfield *v.* Allen, 1 N. J. L. 203.

New York.— Wheaton *v.* Fellows, 23 Wend. 375.

Pennsylvania.— Com. *v.* McGoulrick, 16 Wkly. Notes Cas. 130; Association *v.* Maxwell, 1 Wkly. Notes Cas. 222; Brown *v.* Dougherty, 34 Leg. Int. 248.

Tennessee.— Bayley *v.* Hazard, 3 Yerg. 487.

United States.— Sneed *v.* Wistar, 8 Wheat. 690, 5 L. ed. 717; Hampton *v.* McConnel, 3 Wheat. 234, 4 L. ed. 378; Westerwelt *v.* Lewis, 29 Fed. Cas. No. 17,446, 2 McLean 511.

England.— Warren *v.* Consett, 2 Ld. Raym. 1500.

See 15 Cent. Dig. tit. "Debt, Action of," § 29.

19. Tappan *v.* Heath, 16 N. H. 34; Gates *v.* Wheeler, 2 Hill (N. Y.) 232.

20. Tate *v.* Wymond, 7 Blackf. (Ind.) 240; Sleeth *v.* Cutler, Morr. (Iowa) 56; Parkinson *v.* Parker, 85 Pa. St. 313; Brubaker *v.* Taylor, 76 Pa. St. 83; Malone *v.* Philadelphia, 12 Phila. (Pa.) 270.

If plaintiff instead of demurring takes issue upon it he will be held to have admitted its validity as a general issue (Meyer *v.* McLean, 1 Johns. (N. Y.) 509) and will have to prove every allegation in his declaration (Dartmouth College *v.* Clough, 8 N. H. 22).

21. *Mississippi.*— Matthews *v.* Redwine, 23 Miss. 233.

New Hampshire.— See Tappan *v.* Heath, 16 N. H. 34, where the rule is laid down and its application commented upon.

New York.— Blydenburgh *v.* Carpenter, Lalor 169; Gates *v.* Wheeler, 2 Hill 232; Minton *v.* Woodworth, 11 Johns. 474.

(III) *Judgment of Sister State.* Since by national enactments the judgment of a court in any one of the states shall be accorded the same faith and credit in other states as in the one wherein it was rendered,[22] it follows that as a rule *nil debet* is not a good plea in debt on the judgment of another state.[23] But where it is clearly shown, or the courts from the nature of the case conceive that such judgment or decree would not be considered a verity or matter of record in the state where rendered, *nil debet* is proper.[24] Again inasmuch as a judgment is not entitled to full faith and credit when obtained by fraud, or when there was no jurisdiction of the parties or of the subject-matter, it is clear that a party must be allowed these defenses by a plea of some nature, and the courts do not require him to plead them specially, but admit such defenses under *nil debet*.[25]

b. Non Est Factum.[26] *Non est factum* is appropriate in an action on a specialty only,[27] and puts in issue only the lawful execution of the instrument sued on,[28] unless the instrument is not set out on oyer, but is pleaded according to its supposed legal effect, in which case not only the execution but its proper construction as well is put in issue.[29]

c. Nul Tiel Record.[30] The plea of *nul tiel record* is the general issue where debt is brought on a domestic judgment or other specialty importing a verity.[31]

Ohio.— Hyatt *v.* Robinson, 15 Ohio 372.

United States.— U. S. *v.* Cumpton, 25 Fed. Cas. No. 14,902, 3 McLean 163.

See 15 Cent. Dig. tit. "Debt, Action of," § 29.

22. U. S. Const. art. 4, § 1; U. S. Rev. St. (1878) § 905 [U. S. Comp. St. (1901) p. 677].

23. *Arkansas.*— Hensley *v.* Force, 12 Ark. 756.

Illinois.— Knickerbocker L. Ins. Co. *v.* Barker, 55 Ill. 241; Lawrence *v.* Jarvis, 32 Ill. 304; Chipps *v.* Yancey, 1 Ill. 19.

Indiana.— Buchanan *v.* Port, 5 Ind. 264; Davis *v.* Lane, 2 Ind. 548, 54 Am. Dec. 458.

Mississippi.— Marx *v.* Logue, 71 Miss. 905, 15 So. 890. See also Wright *v.* Weisinger, 5 Sm. & M. 210.

New Jersey.— Lanning *v.* Shute, 5 N. J. L. 778; Curtis *v.* Gibbs, 2 N. J. L. 377. But *compare* Beale *v.* Berryman, 30 N. J. L. 216.

Vermont.— Newcomb *v.* Peck, 17 Vt. 302, 44 Am. Dec. 340. See also St. Albans *v.* Bush, 4 Vt. 58, 23 Am. Dec. 246.

Virginia.— Kemp *v.* Mundell, 9 Leigh 12; Clarke *v.* Day, 2 Leigh 172.

United States.— Mills *v.* Duryee, 7 Cranch 481, 3 L. ed. 411.

See 15 Cent. Dig. tit. "Debt, Action of," § 29.

24. Graham *v.* Grigg, 3 Harr. (Del.) 408 (entertaining the plea in an action on a judgment rendered by a justice of the peace of another state); McElfatrick *v.* Taft, 10 Bush (Ky.) 160; Williams *v.* Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179 (admitting the plea in an action in a decree rendered by a court of Virginia, the Kentucky court holding that such a decree would have been only *prima facie* and not conclusive evidence in Virginia); Warren *v.* Flagg, 2 Pick. (Mass.) 448 (also admitting the plea on a judgment of a justice of the peace of another state); Curtis *v.* Gibbs, 2 N. J. L. 377 (admitting the plea in an action on judgment founded on proceedings of foreign attachment). See also Wheaton *v.* Fellows, 23 Wend. (N. Y.) 375; Mills *v.* Duryee, 7 Cranch (U. S.) 481, 3 L. ed. 411.

25. But defendant has no right to retry the merits and set up defenses which have been or might have been relied on in the original case. Hindman *v.* Mackall, 3 Greene (Iowa) 170; Judkins *v.* Union Mut. F. Ins. Co., 37 N. H. 470; Draper *v.* Gorman, 8 Leigh (Va.) 628. See also Westerwelt *v.* Lewis, 29 Fed. Cas. No. 17,446, 2 McLean 511.

26. **Further of plea non est factum** see 9 Cyc. 131 note 10; 8 Cyc. 27, 153 note 83, 187 note 97, 194; 5 Cyc. 811 note 9, 829 note 50, 831.

27. Hence it is a nullity in an action of debt on a simple contract. Gebhart *v.* Francis, 32 Pa. St. 78.

28. Rudesill *v.* Jefferson County Ct., 85 Ill. 446; Utter *v.* Vance, 7 Blackf. (Ind.) 514; Haggart *v.* Morgan, 5 N. Y. 422, 55 Am. Dec. 350; People *v.* Rowland, 5 Barb. (N. Y.) 449; Dale *v.* Roosevelt, 9 Cow. (N. Y.) 307. See also English *v.* Jersey City, 42 N. J. L. 275, holding that this plea in debt on a sealed certificate of indebtedness, issued by street commissioners, put in issue the lawful sealing by the commissioners, and whether it was the deed of defendant by force of the statute under which it was assumed to have been issued.

29. North *v.* Wakefield, 13 Q. B. 536, 13 Jur. 731, 18 L. J. Q. B. 214, 66 E. C. L. 536.

30. **Further of plea nul tiel record** see 5 Cyc. 145, 832; 4 Cyc. 1060 note 13.

31. *Alabama.*— Crawford *v.* Simonton, 7 Port. 110.

Iowa.— Hindman *v.* Mackall, 3 Greene 170.

New Hampshire.— Wilbur *v.* Abbott, 59 N. H. 132.

New York.— Gassner *v.* Sandford, 2 Sandf. 440; Wheaton *v.* Fellows, 23 Wend. 375.

United States.— Westerwelt *v.* Lewis, 29 Fed. Cas. No. 17,446, 2 McLean 511.

See 15 Cent. Dig. tit. "Debt, Action of," § 29.

A plea that no such record is on file or exhibited is insufficient, and cannot be consid-

As the issue presented thereby is the existence of the record which in the absence of statute is to be determined by the court,[32] this plea ought not to conclude with an issue to the country.[33]

4. SUFFICIENCY OF PLEA. Defendant need not plead acts or facts necessarily implied from facts admitted or constituting matters of record;[34] and where the action is on a specialty for money, a plea of conditions performed is equivalent to a plea of payment.[35] The plea must, however, tender a material issue,[36] and offer a denial going to the merits of the action.[37]

5. VERIFICATION. Verification by defendant of a plea of *nil debet* when the action is on a note or bond is usually necessary to put in issue the execution of the instrument.[38] So too *non est factum* should be sworn to;[39] but as a rule verification of *nul tiel record* is unnecessary.[40]

F. Replication.[41] As a plea of payment completely answers the declaration in an action of debt, a replication thereto is necessary.[42] So too if plaintiff relies upon the appearance of defendant in an action in which a judgment was rendered against him as constituting notice of its rendition, he must so reply to defendant's plea of want of notice;[43] and a reply to a plea of performance should assign a particular breach.[44]

G. Demurrer. Mere matters of form in a declaration of debt must be taken advantage of by special demurrer,[45] but a judgment on which the action of debt is brought does not thereby become a part of the record, in the sense that defendant may demur for defects therein.[46]

ered as a plea of *nul tiel record*. Egan *v.* Tewksbury, 32 Ark. 43.

As foreign judgments are only *prima facie* evidence of an indebtedness, *nul tiel record* is not an appropriate plea in an action of debt thereon. Tourigny *v.* Houle, 88 Me. 406, 34 Atl. 158.

32. Gassner *v.* Sandford, 2 Sandf. (N. Y.) 440.

33. Endicott *v.* Morgan, 66 Me. 456.

34. Curtiss *v.* Beardsley, 15 Conn. 518, holding that a plea by defendant that he had moved an appeal from judgment rendered against him by a justice, which was allowed, necessarily implied that a bond or recognizance was given on the appeal, and that such fact therefore need not be pleaded.

35. Hammitt *v.* Bullett, 1 Call (Va.) 567.

A legal presumption of payment should be pleaded as payment. Henderson *v.* Henderson, 3 Den. (N. Y.) 314.

36. Williams *v.* Wann, 8 Blackf. (Ind.) 477.

A special plea, denying an acknowledgment of a recognizance, is insufficient in an action of debt upon a recognizance. State *v.* Daily, 14 Ohio 91.

37. Frink *v.* King, 4 Ill. 144, holding that a plea in an action of debt for services rendered, where the declaration set out as collateral a note averring to have been made by defendant's clerk, and under proper authority, merely denying the authority is bad, as it does not go to the merits of the action.

A plea that the debtor has been committed thereon, without alleging a discharge, or that the debt had been otherwise satisfied, is insufficient in an action of debt on a judgment. Farnsworth *v.* Tilton, 1 D. Chipm. (Vt.) 297.

38. State Bank *v.* Kerby, 9 Ark. 345; Ferguson *v.* State Bank, 8 Ark. 416; McKinney *v.* Patterson, 10 Humphr. (Tenn.) 493.

The affidavit is not part of the plea, and where a joint plea is sworn to by one of defendants only, the effect of the affidavit is a question for the court on the trial and should not be demurred to. State Bank *v.* Ward, 8 Ark. 506.

Verification of a plea is not necessary to compel joint plaintiffs to prove that their cause of action is joint. McKinney *v.* Patterson, 10 Humphr. (Tenn.) 493.

39. Garnett *v.* Roper, 10 Ala. 842; Sevier *v.* Wilson, 8 Ark. 496.

40. Wright *v.* Weisinger, 5 Sm. & M. (Miss.) 210.

41. **That a reply to immaterial matter** does not make the replication bad for duplicity see Herford *v.* Crow, 4 Ill. 423.

42. Pearl *v.* Wellman, 8 Ill. 311.

Nor will a general replication to such plea be sufficient. Nadenbousch *v.* McRea, Gilm. (Va.) 228.

43. Wright *v.* Weisinger, 5 Sm. & M. (Miss.) 210.

Form of replication to plea of limitation.— A replication in an action of debt, to a plea of limitations, that defendant did, within sixteen years before the action was brought, "undertake and promise to pay," while a sufficient reply in an action of assumpsit, is not good in debt; the proper form being to reply that the cause of action did not accrue to plaintiff within sixteen years anterior to the commencement of the action. Chenot *v.* Lefevre, 8 Ill. 637.

44. Cheshire Bank *v.* Robinson, 2 N. H. 126. See also Curtiss *v.* Beardsley, 15 Conn. 518.

45. Probate Judge *v.* Merrill, 6 N. H. 256; Crawford *v.* Ellison, 1 Brev. (S. C.) 378.

46. Deem *v.* Crume, 46 Ill. 69.

H. Amendments. In this action the general rule that no amendment introducing a new cause of action will be allowed applies.[47] So too it is proper for the court to refuse an amendment which would operate as a hardship or a surprise.[48] But it is held that the court may upon certain terms or conditions allow an amendment of a declaration on a recognizance which had set forth the facts in a manner appropriate to a declaration in scire facias.[49]

VI. Issues and Proof.

A. In General. An objection to the jurisdiction of the person may be taken under *nul tiel record*;[50] and under a general plea of payment parol admissions of partial payments are admissible.[51] Under *non est factum*[52] it has been held that proof that the deed or bond was delivered as an escrow[53] or that it was obtained by fraud[54] may be shown, although it is not permissible under this plea to show a failure of consideration.[55]

B. Matters Admissible Under General Issue. Generally speaking all evidence tending to show that the plaintiff never had any cause of action or that he has none at the commencement of the suit may be given under *nil debet*;[56] although want of consideration may also be pleaded specially if defendant so desires.[57]

C. Variance. The declaration and writ must correspond.[58] When plaintiff declares on a judgment or matter of record he must take care that the instrument offered in evidence corresponds in amount and date to his declaration; any variance changing the legal tenor and effect thereof is fatal.[59] But a record showing

47. Postmaster-Gen. *v.* Ridgway, 19 Fed. Cas. No. 11,313, Gilp. 135, holding that a declaration in debt against a coöbligor, setting forth a joint and several bond, could not be amended by adding a new count setting forth a joint bond of defendant and another person.

48. Pinkston *v.* Stone, 3 Mo. 119.

49. The terms and conditions in this case being the relinquishment of costs. State *v.* Folsom, 26 Me. 209.

50. Kimball *v.* Merrick, 20 Ark. 12.

51. Rice *v.* Annatt, 8 Gratt. (Va.) 557.

Tortious injury to land, in an action of debt for the price thereof, cannot be shown under the plea of payment. Kachlein *v.* Ralston, 1 Yeates (Pa.) 571.

Under a plea of nul tiel record, payment, and set-off, in an action on a judgment obtained in another state, defendant cannot show record of an injunction in such state restraining the collection of such judgment, but must plead this defense specially. Palmer *v.* Palmer, 2 Miles (Pa.) 373.

52. **Issues raised** by plea of *non est factum* see 8 Cyc. 194, 201, 217 note 57; 2 Cyc. 917 note 87.

53. Stoytes *v.* Pearson, 4 Esp. 255.

54. Van Valkenburgh *v.* Rouk, 12 Johns. (N. Y.) 337.

55. Bollinger *v.* Thurston, 2 Mill (S. C.) 447.

56. *Connecticut.*— Anderson *v.* Henshaw, 2 Day 272.

Indiana.— Stipp *v.* Cole, 1 Ind. 146.

Maine.— Clark *v.* Mann, 33 Me. 268, holding that under this plea in an action on a judgment recovered in another state payment might be proved.

New Jersey.—Armstrong *v.* Hall, 1 N. J. L. 207.

New York.— Brown *v.* Littlefield, 7 Wend. 454.

Pennsylvania.— Mannerbach *v.* Keppleman, 2 Woodw. 137.

Tennessee.— Beaty *v.* McCorkle, 11 Heisk. 593; Gillespie *v.* Darwin, 6 Heisk. 21; McGavock *v.* Puryear, 6 Coldw. 34; Phœnix Ins. Co. *v.* Munday, 5 Coldw. 547, holding that where the action was brought on a fire-insurance policy, proof of an attempted fraud, or false swearing as to his loss, by the assured, might be given under this plea.

Virginia.— Fant *v.* Miller, 17 Gratt. 47; Newton *v.* Wilson, 3 Hen. & M. 470.

United States.— Welsh *v.* Lindo, 29 Fed. Cas. No. 17,409, 1 Cranch C. C. 508, holding that a former recovery may be given under this plea.

Payment shown under plea of *nil debet* see 3 Cyc. 785 note 42.

57. Keckley *v.* Winchester Union Bank, 79 Va. 458.

58. For where the writ is in case and the declaration in debt the variance is fatal. Christian Bank *v.* Greenfield, 7 T. B. Mon. (Ky.) 290; Ketchum *v.* Rapelje, 1 C. L. Chamb. (U. C.) 152.

59. Caldwell *v.* Bell, 3 Ark. 419 (holding that a record showing a judgment "for all costs expended, etc.," where the declaration alleged that judgment was rendered for a certain debt and nine dollars and thirty-two cents costs would be a fatal variance); Summers *v.* Mantz, Ga. Dec. 73, Pt. II; Howard *v.* Cousins, 7 How. (Miss.) 114 (holding that a judgment of the December term, 1831, could not be offered in evidence where the declaration described it as the December term, 1830); Thompson *v.* Jameson, 1 Cranch (U. S.) 282, 2 L. ed. 109.

the writ in a former suit to have been directed to the coroner, while the declaration alleged it to have been directed to the sheriff, is an immaterial variance;[60] and as the amount stated in the writ[61] or *quæritur*[62] is immaterial,[63] a variance therefrom in the declaration would likewise be immaterial; but it is otherwise in a jurisdiction where the same must be stated with certainty in the writs.[64]

VII. EVIDENCE.[65]

A. Burden of Proof. On a plea of *non est factum* the burden of proof is on plaintiff,[66] while on a plea of payment the burden is on defendant.[67]

B. Admissibility. In debt on simple contract any writing containing evidence pertinent to the issue is admissible;[68] but the record of a judgment is not itself evidence to support the money counts in debt.[69]

C. Sufficiency. On the general issue plaintiff must of course prove all material facts on which his claim is founded;[70] and where the liability arises by virtue of statute or depends upon a compliance with statutory provisions evidence showing due compliance must be offered.[71]

VIII. TRIAL.[72]

This action, although brought upon a penal statute, is nevertheless a civil one, and the jury may be returned to a second consideration of the cause, under a practice allowing such procedure in civil cases only.[73] While final judgment may be rendered on demurrer, default, or *nil dicit*,[74] the whole and not a part only of the issue must be tried,[75] and judgment cannot be rendered while a material plea remains untried or undisposed of;[76] and final judgment by default or upon *nil*

Variance as to names of parties to the instrument.— Where the declaration in debt on a specialty alleged an agreement with plaintiff, but from the instrument itself it appeared to be with the trustees of plaintiff, the variance, in the absence of explanatory averments, is fatal. Baltimore Cemetery Co. *v.* First Independent Church, 13 Md. 117.

60. Especially is this true where the coroner was by virtue of his office competent to perform such service. State Bank *v.* Magness, 11 Ark. 343. See also Fenton *v.* Williams, 3 Mo. 228; Paine *v.* Emery, 2 C. M. & R. 304, 4 Dowl. P. C. 191, 1 Gale 266, 4 L. J. Exch. 250, 5 Tyrw. 1097.

61. Fulcher *v.* Lyon, 4 Ark. 445.

62. Cozine *v.* Tousey, 5 Blackf. (Ind.) 46.

63. See *supra*, V, A; V, B, 5, b, (II).

64. Emmons *v.* Bailey, 1 Strobh. (S. C.) 422.

65. Evidence generally see EVIDENCE.

66. Robards *v.* Wolfe, 1 Dana (Ky.) 155. And see 8 Cyc. 217 note 57.

67. Owens *v.* Chandler, 16 Ark. 651.

68. Marsteller *v.* Marsteller, 93 Pa. St. 350. See also Welsh *v.* Lindo, 29 Fed. Cas. No. 17,409, 1 Cranch C. C. 508, holding that in debt on a promissory note, a former recovery upon a count for goods sold and delivered may be given in evidence, together with parol evidence that judgment was confessed in the former action upon and for the note declared upon in the suit.

69. This arises from the fact that a judgment is simply a finding by a court that one person owes another a certain sum of money and a sentence that it be collected; it is no evidence of money had and received, loaned, or account stated. Runnamaker *v.* Cordray, 54 Ill. 303.

70. McKinney *v.* Patterson, 10 Humphr. (Tenn.) 493.

71. Bradbury *v.* Cumberland County, 52 Me. 27.

Debt on a note will be sustained by the production of the note. Gillaspie *v.* Wesson, 7 Port. (Ala.) 454, 31 Am. Dec. 715.

In an action of debt for a penalty for cutting timber, plaintiff must show a fee-simple title in himself to the land on which the timber was unlawfully cut. Jarrot *v.* Vaughn, 7 Ill. 132; Whiteside *v.* Divers, 5 Ill. 336.

72. For matters relating to trial generally in civil cases see TRIAL.

73. Pettis *v.* Dixon, Kirby (Conn.) 179.

74. Pettigrew *v.* Pettigrew, 1 Stew. (Ala.) 580.

75. State *v.* Leak, 7 Blackf. (Ind.) 462. But this does not preclude plaintiff, where his declaration contains both a count upon the note and an *indebitatus* count upon an account stated, from disregarding the second and taking judgment for the amount of the note upon the first count, where defendant makes default. Pleasants *v.* State Bank, 8 Ark. 456.

76. Riley *v.* Loughrey, 22 Ill. 97; Merriweather *v.* Gregory, 3 Ill. 50 (holding that where defendant pleads *nil debet* and also offers two special pleas, to the latter of which a demurrer is sustained, judgment cannot be given for plaintiff without disposing of the plea of *nil debet*); Hindman *v.* Mackall, 3 Greene (Iowa) 170; Haggin *v.* Squires, 2 Bibb (Ky.) 334 (holding that where defendant pleads both *nil debet* and *nul tiel record*, judgment for plaintiff cannot be given on the plea of *nil debet* until the other plea is tried).

debet, where the action is upon a bond or judgment, should not be rendered by the court until evidence concerning the amount of damages has been taken.[77]

IX. VERDICT[78] AND JUDGMENT.[79]

A. Form — 1. In General — a. Verdict. The verdict must correspond to the issue presented[80] and dispose of the whole defense[81] upon which issue has been joined;[82] and if for plaintiff, the verdict must be for a certain sum.[83]

b. Judgment — (I) *In General.*[84] The judgment should be responsive to the writ,[85] and for the same nature of speeie as that in whieh the debt was demandable.[86] But the judgment will be referred to the pleadings, and will be assumed to correspond therewith;[87] and it has been held not to be fatal that the judgment is entered up in the form of a judgment in assumpsit, if it is for the proper amount.[88]

(II) *Against Joint Defendants.* If the aetion is against joint defendants the judgment must be against all,[89] and for the same amount against eaeh.[90]

2. Distinguishing Debt From Damages. In some jurisdictions it has been considered neeessary that the verdict or judgment should distinguish the amount which is intended to be awarded for the debt and also the amount awarded as

77. Deem *v.* Crume, 46 Ill. 69; Rany *v.* Governor, 4 Blackf. (Ind.) 2. See also Clarke *v.* Pratt, 20 Ala. 470, holding that where by the practice of a state the rate of interest on a judgment rendered in another state must be tried by a jury, final judgment by *nil debet* for the amount of the debt and interest at a certain per cent is erroneous.

78. Verdict generally see Trial.

79. Judgment generally see Judgments.

80. Hawkins *v.* Rapier, Minor (Ala.) 113; Albright *v.* Tapscott, 53 N. C. 473.

If a verdict is substantially an answer to the issue formed in the case and tried by the jury and corresponds to the cause of action as set out in the declaration it will be sufficient, although in some respects informal. Brown *v.* Keller, 38 Ill. 63.

81. Crutcher *v.* Williams, 4 Humphr. (Tenn.) 345.

82. Ross *v.* Gill, 1 Wash. (Va.) 87, where it was held to be no objection to the verdict that it referred to one of the counts only in the declaration, the other count having been abandoned by the parties.

83. Schmertz *v.* Shreeve, 62 Pa. St. 457, 1 Am. Rep. 439; Miller *v.* Hower, 2 Rawle (Pa.) 53.

It is sufficiently certain if given for the debt claimed, with interest, etc., subject to a credit for a specified sum paid at a specified date. Barrett *v.* Wills, 4 Leigh (Va.) 114, 26 Am. Dec. 315.

84. It is a practice in some jurisdictions in an action of debt to enter judgment for the amount of the debt to be discharged on the payment of the damages and costs. Caldwell *v.* Richmond, 64 Ill. 30; Toles *v.* Cole, 11 Ill. 562; Austin *v.* State, 11 Ill. 452. This procedure is an anomaly resulting from statutory innovations, upon common-law principles; and is the usual course in actions of debt for penalties. At common law the whole penalty was recovered and execution issued for the whole amount; courts of chancery first interposed to relieve defendant at law, and to restrict the recovery to the amount of the injury actually sustained; and by 8 & 9 Wm. III, c. 11, § 8, actions for debt for penalties were so modified that the debt was commuted by the damages actually sustained. Harrison *v.* Park, 1 J. J. Marsh. (Ky.) 170.

85. Hughes *v.* Baltimore Union Ins. Co., 8 Wheat. (U. S.) 294, 5 L. ed. 620, holding that it should therefore be given either for the whole sum demanded, or show cause why it was given for a less sum; otherwise it would not appear but that the difference still remained due; but that this might appear by the pleadings or by a remittitur entered by plaintiff. See also Bullock *v.* Ballew, 9 Tex. 498.

The word "debt," when used in a judgment, does not necessarily make it a judgment in debt. Foster *v.* Jared, 12 Ill. 451, holding that the judgment therein should be considered a judgment in assumpsit.

86. Skipwith *v.* Baird, 2 Wash. (Va.) 165; Scott *v.* Call, 1 Wash. (Va.) 115.

87. Cook *v.* Brister, 19 N. J. L. 73. See also Brown *v.* Keller, 38 Ill. 63.

The omission of the word "debt" from the judgment will not destroy its validity as a judgment in debt, where it is rendered for a specified sum, where the action and claim are clearly in debt; in such case the judgment will be referred thereto. Tindall *v.* Tindall, 18 N. J. L. 437.

88. Sanford *v.* Richardson, 1 Ala. 182; Carroll *v.* Meeks, 3 Port. (Ala.) 226; Davis *v.* Morford, 1 Morr. (Iowa) 99.

Where the distinction between debt and assumpsit has been obliterated by the code, the form of judgment is of course the same in either. Knapp *v.* Kingsbury, 51 Ala. 563.

89. People *v.* Organ, 27 Ill. 26, 79 Am. Dec. 391; Hoxey *v.* Macoupin County, 3 Ill. 36; Peasley *v.* Boatwright, 2 Leigh (Va.) 195.

90. Howell *v.* Barrett, 8 Ill. 433.

damages,[91] and that it would be error to render a judgment for damages in the aggregate;[92] nor could the court amend a verdict by adding the amount of the penalty of a bond as the debt,[93] although if the finding is for a part only of the debt due, such specification need not be made, as it will all be considered debt.[94] In other jurisdictions this has been considered more of a technical nicety than as a matter of substance,[95] and the courts have refused to reverse for this irregularity.[96]

B. Amount of Recovery[97] **— 1. In General.** It is a well settled and established rule of practice that plaintiff in debt cannot recover beyond the amount of damages claimed in the declaration,[98] although it is at present well settled that he may recover a less sum[99] unless he is suing for a penalty or forfeiture, the amount of which is rendered fixed and certain by statute, in which case he should recover the entire sum,[1] but no more.[2] If, however, too large an amount

91. Pulliam *v.* Pencenneau, 23 Ill. 93; Bowman *v.* Bartley, 21 Ill. 30; Wilcoxon *v.* Roby, 8 Ill. 475; Williams *v.* State Bank, 6 Ill. 667; Jones *v.* Lloyd, 1 Ill. 225; Reece *v.* Knott, 3 Utah 451, 24 Pac. 757.

92. Ross *v.* Taylor, 63 Ill. 215; Maguire *v.* Zenia, 54 Ill. 299; Chapman *v.* Wright, 20 Ill. 120; March *v.* Wright, 14 Ill. 248; O'Conner *v.* Mullen, 11 Ill. 57; Howell *v.* Barrett, 8 Ill. 433; Mager *v.* Hutchinson, 7 Ill. 265; Pattison *v.* Hood, 4 Ill. 152; Heyl *v.* Stapp, 4 Ill. 95; Jackson *v.* Haskell, 3 Ill. 565; Jones *v.* Lloyd, 1 Ill. 225; Spooner *v.* Warner, 2 Ill. App. 240. See also Knox *v.* Breed, 12 Ill. 61. But *compare* Guild *v.* Johnson, 2 Ill. 404, holding that where enough evidence is before the supreme court to enable it to distinguish the amount of the debt, a judgment erroneously entered for damages in the aggregate will be corrected and the judgment given which should have been awarded by the lower court.

In later Illinois cases it has been held that this irregularity is cured by the practice act of 1872. Bowden *v.* Bowden, 75 Ill. 111; Rockford, etc., R. Co. *v.* Steele, 69 Ill. 253.

93. Hinckley *v.* West, 9 Ill. 136; Frazier *v.* Laughlin, 6 Ill. 347.

94. Lucas *v.* Farrington, 21 Ill. 31. See also Reed *v.* Pedan, 8 Serg. & R. (Pa.) 263.

95. See Freidly *v.* Scheetz, 9 Serg. & R. (Pa.) 156, 11 Am. Dec. 691.

96. Sanford *v.* Richardson, 1 Ala. 182; Boardman *v.* Poland, 2 Port. (Ala.) 431; Garrard *v.* Zachariah, 2 Stew. (Ala.) 410; Briggs *v.* Greenlee, Minor (Ala.) 123; Downs *v.* Ladd, 4 How. (Miss.) 40; Ross *v.* Jackson, Cooke (Tenn.) 406. But see Brandon *v.* Diggs, 1 Heisk. (Tenn.) 472.

97. Damages generally see DAMAGES.

98. *Arkansas.*— Pleasants *v.* State Bank, 8 Ark. 456; Hudspeth *v.* Gray, 5 Ark. 157.

Illinois.— Russell *v.* Chicago, 22 Ill. 283; Stephens *v.* Sweeney, 7 Ill. 375.

Mississippi.— Hudson *v.* Poindexter, 42 Miss. 304.

New Jersey.— Smock *v.* Warford, 4 N. J. L. 306, holding that, while this was the practice at common law, it had been modified by an early practice act in that state.

South Carolina.— Hale *v.* Hall, 2 Brev. 316.

Compare Phillips *v.* Runnels, Morr. (Iowa) 391, 43 Am. Dec. 109.

See 15 Cent. Dig. tit. "Debt, Action of," § 47.

99. *Connecticut.*— Perrin *v.* Sikes, 1 Day 19.

New York.— New York *v.* Butler, 1 Barb. 325.

North Carolina.— Waugh *v.* Chaffin, 14 N. C. 101.

South Carolina.—Hale *v.* Hall, 2 Brev. 316.

United States.— U. S. *v.* Colt, 25 Fed. Cas. No. 14,839, Pet. C. C. 145.

See 15 Cent. Dig. tit. "Debt, Action of," § 47.

Blackstone explained.— In 3 Blackstone Comm. 154, the author, in discussing the action of debt, says: "For the debt is one single cause of action, fixed and determined; and which, therefore, if the proof varies from the claim, cannot be looked upon as the same contract whereof the performance is sued for. If, therefore, I bring an action of debt for 30*l.*, I am not at liberty to prove a debt of 20*l.* and recover a verdict thereon; any more than if I bring an action of detinue for a horse, I can thereby recover an ox." If that learned writer, when thus laying down the proposition that plaintiff must prove the whole debt he claims or he can recover nothing, merely meant to say that where a special contract was laid in the declaration it must be proved as laid, and that when debt is brought on a written instrument, the contract produced in evidence must correspond in all respects with that stated in the declaration, his doctrine was of course clearly correct; but if he meant to say that in every case where debt is brought on a simple contract, plaintiff must prove the whole debt as claimed by the declaration or he can recover nothing, it is conceived that he is opposed by not only every modern decision but by the ancient ones as well. U. S. *v.* Colt, 25 Fed. Cas. No. 14,839, Pet. C. C. 145.

1. Dowd *v.* Seawell, 14 N. C. 185; Shewel *v.* Fell, 3 Yeates (Pa.) 17.

2. Dowd *v.* Seawell, 14 N. C. 185 (holding that while damages could not be recovered in debt under a penal statute, it was not fatal error to demand them); Stroble *v.* Large, 3 McCord (S. C.) 112 (holding that in an action for a penalty it was erroneous to render judgment for a penalty with interest from the date thereof, and that a new trial would be granted unless plaintiff would

is awarded, plaintiff may cure the verdict by remitting the excess and taking judgment for the amount claimed.[3]

2. ALLOWANCE OF INTEREST.[4] Where the statute has limited the liability of an officer for an escape to the amount of the debt and damages, interest is not recoverable;[5] nor is interest recoverable in debt for rent.[6] When properly recoverable, if it is not specifically claimed as such in the declaration,[7] or not allowable as such under the count employed,[8] interest should be awarded as damages for the detention of the debt; and when allowed as such the judgment must clearly show the exact amount on which interest was intended to be awarded.[9]

DEBT BY SIMPLE CONTRACT. A debt where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any, or by notes unsealed, which are capable of more easy proof, and (therefore only) better than a verbal promise.[1] (See DEBT; and, generally, DEBT, ACTION OF.)

DEBT BY SPECIALTY. A debt whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal.[2] (See DEBT; and, generally, DEBT, ACTION OF.)

DEBT CONTRACTED.[3] A term which indicates that a debtor has come under a voluntary obligation to a creditor,[4] and in its ordinary acceptation it will include liabilities incurred.[5] In an enlarged or literal sense, these words may be used to

remit the interest or damages found by the jury beyond the amount of the penalty).

3. Stephens *v.* Sweeney, 7 Ill. 375.

Nominal damages should not be awarded in a judgment for debt rendered on default; such judgment should be for the debt and costs and no more. People *v.* Hallett, 4 Cow. (N. Y.) 67.

4. **Interest as damages** generally see DAMAGES; INTEREST.

5. Rawson *v.* Dole, 2 Johns. (N. Y.) 454.

6. Newton *v.* Wilson, 3 Hen. & M. (Va.) 470. See, generally, LANDLORD AND TENANT.

7. Mareh *v.* Wright, 14 Ill. 248. See also Brooke *v.* Gordan, 2 Call (Va.) 212.

If it is the duty of a clerk to issue execution for the prineipal with interest from the time a bill becomes payable until payment is made, a judgment in debt on a bill single may be entered for the interest as well as the prineipal, although interest is not demanded in the declaration. Baird *v.* Peter, 4 Munf. (Va.) 76.

8. North River Meadow Co. *v.* Christ Chureh, 22 N. J. L. 424, 53 Am. Dec. 258, holding that interest as sueh cannot be reeovered in an action of debt under a count for money borrowed. See also Reeee *v.* Knott, 3 Utah 451, 24 Pae. 757.

9. Wooster *v.* Clarke, 2 Ark. 101.

1. Stockwell *v.* Coleman, 10 Ohio St. 33, 38 [*citing* 2 Blaekstone Comm. 465].

2. Kimball *v.* Whitney, 15 Ind. 280, 283 [*citing* 2 Blackstone Comm. 465]; Kerr *v.* Lydecker, 51 Ohio St. 240, 252, 37 N. E. 267, 23 L. R. A. 842 [*citing* 2 Blackstone Comm. 465]; Tyler *v.* Winslow, 15 Ohio St. 364, 366; Stockwell *v.* Coleman, 10 Ohio St. 33, 38; Orleans Dist. Probate Ct. *v.* Child, 51 Vt. 82, 86 [*quoting* 2 Blackstone Comm. 465].

3. "Debt contracted" in the erection of a building within the purview of the acts regarding mechanic's liens see McCall *v.* Eastwick, 2 Miles (Pa.) 45, 47.

Within the meaning of a constitution or a statute see, as to the purport of these words, Schuessler *v.* Dudley, 80 Ala. 547, 551, 2 So. 526, 60 Am. Rep. 124.

4. Whiteaere *v.* Reetor, 29 Gratt. (Va.) 714, 715, 26 Am. Rep. 420.

5. State *v.* O'Neil, 7 Oreg. 141, 142 [*quoted* in Flanagan *v.* Forsythe, 6 Okla. 225, 229, 50 Pae. 152], where the eourt, in eonstruing U. S. Rev. St. (1878) § 2296, said: "The words 'debts eontracted' do not neeessarily mean debts or obligations ineurred by an agreement of parties. The word 'eontraet' has a more extensive signification than to make an agreement. Debts eontraeted in the ordinary aeeeptation of the term will include liabilities ineurred."

Applied to a neglect of duty.— Where a statute rendered eertain offieers of a corporation liable in ease of negleet of duty "for all debts of sueh eorporation eontracted during the period or any sueh negleet or refusal," the eourt said: "There eannot be a 'debt eontraeted' without two or more eontraeting parties, one of whom in this case must be the eorporation. The phrase therefore neeessarily implies some aet on the part of the eorporation with some party dealing with it, whereby an obligation is ineurred, the eompany reeeiving and the other party giving eredit on the faith of their solveney and proper organization as a corporation." Armstrong *v.* Cowles, 44 Conn. 44, 48. And see Bohn *v.* Brown, 33 Mieh. 257, 265 [*citing* Fox *v.* Hills, 1 Conn. 295], where the court, in speaking of a person's eause of aetion against a corporation for a tort, said: "A legal liability would have existed, but it would be a gross abuse of terms to eall it a debt contracted."

"The words 'debts contracted' before and after the passage of a law, etc., must, *ex vi termini*, mean all debts, and not some particular debts to the exclusion of others."

indicate any kind of a just demand incurred.[6] (See DEBT; and, generally, DEBT, ACTION OF.)

DEBTEE. A person to whom a debt is due; a CREDITOR,[7] *q. v.*

DEBT OF RECORD. A sum which appears to be due by the evidence of a court of record;[8] a contract of the highest nature, being established by the sentence of a court of judicature;[9] any specific sum of money adjudged to be due from the defendant to the plaintiff in an action.[10] (See DEBT; and, generally, DEBT, ACTION OF.)

DEBTOR.[11] A person who owes another anything, or is under obligation, arising from express agreement, implication of law, or from the principles of natural justice, to render and pay a sum of money to another;[12] one who by reason of an existing obligation is or may become liable to pay money to another whether such liability is certain or contingent;[13] every one who owes to another the performance of an obligation;[14] the person who has engaged to perform

Darling *v.* Berry, 13 Fed. 659, 664, 4 McCrary 470.

6. *In re* Radway, 20 Fed. Cas. No. 11,523, 3 Hughes 609.

7. Black L. Dict. [*citing* 3 Blackstone Comm. 18].

8. *Indiana.*— Kimball *v.* Whitney, 15 Ind. 280, 283 [*citing* 2 Blackstone Comm. 465].

Kansas.— Burnes *v.* Simpson, 9 Kan. 658, 664 [*citing* 2 Blackstone Comm. 465].

New York.— Lewis *v.* Armstrong, 8 Abb. N. Cas. 385, 389 [*citing* 2 Blackstone Comm. 465].

Ohio.— Tyler *v.* Winslow, 15 Ohio St. 364, 366 [*citing* 2 Blackstone Comm. 465].

United States.— Carver *v.* Braintree Mfg. Co., 5 Fed. Cas. No. 2,485, 2 Story 432, 450 [*quoting* 3 Blackstone Comm. 160].

Canada.— Reg. *v.* Creelman, 25 Nova Scotia 404, 418.

9. Burnes *v.* Simpson, 9 Kan. 658, 664 [*quoting* 2 Blackstone Comm. 464, 465]; Lewis *v.* Armstrong, 8 Abb. N. Cas. (N. Y.) 385, 389; Carver *v.* Braintree Mfg. Co., 5 Fed. Cas. No. 2,485, 2 Story 432, 450.

10. Lewis *v.* Armstrong, 8 Abb. N. Cas. (N. Y.) 385, 389 [*citing* 2 Blackstone Comm. 465]. And see Matter of Cotton, 2 N. Y. Leg. Obs. 370, 371.

11. **Distinguished from "creditor"** see New Haven Steam Saw-Mill Co. *v.* Fowler, 28 Conn. 103, 108.

"Debtor" and "delinquent debtor" as used in a statute in relation to assignments for the benefit of creditors see Matter of H. Herrman Lumber Co., 21 N. Y. App. Div. 514, 516, 48 N. Y. Suppl. 509.

"Debtor" as used in a statute relative to usury see Gifford *v.* Whitcomb, 9 Cush. (Mass.) 482, 484.

"Debtors to the bank."— In a case involving the winding up of a bank pursuant to statute, the court said: "By debtors to the bank are meant all those who, at the appointment of the receiver, were liable to the bank for the payment of money, whether their liability had matured or not, and without any regard to the exact nature of the liability, whether as principal or surety." Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 328, 19 S. E. 371, 23 L. R. A. 322.

"The term 'any debtor' [as used in an insolvent act] includes any one who is capable of contracting a debt, and has done so." Kinney *v.* Sharvey, 48 Minn. 93, 96, 50 N. W. 1025.

12. Keith *v.* Hiner, 63 Ark. 244, 247, 38 S. W. 13; Melvin *v.* State, 121 Cal. 16, 24, 53 Pac. 416; Stanly *v.* Ogden, 2 Root (Conn.) 259, 262. See also Sands *v.* Codwise, 4 Johns. (N. Y.) 536, 557, 4 Am. Dec. 305, where the court, in speaking of a bankrupt law, said: "The word debtor seems to have been intended as a correlative to the words debt, duty or demand."

"The relation of debtor and creditor may arise by direct agreement, or breach of duty between the parties." Commercial Nat. Bank *v.* Taylor, 64 Hun (N. Y.) 499, 502, 19 N. Y. Suppl. 533. But see Whiteacre *v.* Rector, 29 Gratt. (Va.) 714, 715, 26 Am. Rep. 420, where the court said: "The relation of debtor and creditor implies, as of course, that the one has given credit to the other in a contract."

May include corporations.— "The term 'debtor' is a broad one, and must include corporations likewise with individuals and partnerships. We know of no principle of construction which would justify this court in holding that the word 'debtor,' as here used, does not include corporations." Merced Bank *v.* Ivett, 127 Cal. 134, 137, 59 Pac. 393. See also *In re* Levin, (Cal. 1900) 63 Pac. 335, 336 (where it is said: "The word 'debtor' [in an insolvent law] includes partnerships and corporations"); South Carolina R. Co. *v.* McDonald, 5 Ga. 531, 535 (where it is said: "Those words [in a statute] are 'person,' 'party,' 'defendant,' 'debtor.' Either of these words describe a corporation").

13. Sonnesyn *v.* Akin, (N. D. 1903) 97 N. W. 557, 560. See also Cal. Civ. Code (1899), § 3429; Mont. Civ. Code (1895), § 4480.

Includes a bankrupt.— In U. S. *v.* Pusey, 27 Fed. Cas. No. 16,098, the court said: "In order to be a bankrupt a person must first be a debtor. But a bankrupt, in the sense of the English act, as well as of our own, is a debtor, and something more. He is a debtor who has committed an act of bankruptcy, declared to be such by the bankrupt law." And see Buckingham *v.* McLean, 13 How. (U. S.) 151, 167, 14 L. ed. 91; Rex *v.* Jones, 4 B. & Ad. 345, 349, 24 E. C. L. 156.

14. N. D. Civ. Code (1899), § 5113.

some obligation;[15] one who owes a debt; he who may be constrained to pay what he owes;[16] one who owes anything to another, as money, goods, or services.[17] (Debtor: Account Stated, see Accounts and Accounting. Arrest of, see Arrest. Certiorari to Review Proceedings Against Fraudulent, Insolvent or Poor, see Certiorari. Examination in Supplementary Proceedings, see Executions. Imprisonment of, see Arrest. See, also, generally, Assignments For Benefit of Creditors; Bankruptcy; Compositions With Creditors; Creditors' Suits; Debt, Action of; Fraudulent Conveyances; Insolvency; Marshaling Assets and Securities; Novation.)

DECALOGUE. The ten commandments given by God to Moses.[18]

DECAPITATION. The act of beheading.[19]

DECAY. A gradual failure of health, strength, soundness, prosperity; any species of excellence or perfection declined to a worse or less perfect state.[20]

DECEASE. As a noun, death; departure from life.[21] As a verb, to depart from this life; to die.[22] (See, generally, Death; Descent and Distribution.)

DECEASED. Departed from life; dead.[23] (See, generally, Death; Descent and Distribution; Wills.)

DECEDENT.[24] A deceased person.[25] As defined by statute, either a testator or a person dying intestate.[26] (Decedent: Actions by or against, see Abatement and Revival. Appeals by or against, see Appeal and Error. Declarations against Interest of, see Evidence. Escheat of Estate of, see Escheat. Estates of, see Descent and Distribution; Executors and Administrators; Wills. Testimony as to Transactions With, see Witnesses.)

DECEIT. See Fraud.

"The word 'debtor,' in its broad sense, implies liability, and if our exemption statute is taken as having been enacted with the view that the words 'creditor' and 'debtor' were to be understood, although not used, then, in view of the purpose and spirit of the law, they should be given their broadest meaning." Rudd *v.* Ford, 91 Ky. 183, 186, 15 S. W. 179, 12 Ky. L. Rep. 740.

15. Merrick Civ. Code La. (1900) art. 3556, subs. 21.

The term "debtor" clearly embraces the indorser of a promissory note before maturity. Dodson *v.* Taylor, 53 N. J. L. 200, 204, 21 Atl. 293, where it is said: "From the time of endorsement, he is bound for the payment of the debt, and a person so circumstanced is, in both common and legal parlance, a debtor."

16. Scott *v.* Davenport, 34 Iowa 208, 213 [*citing* Bouvier L. Dict.].

17. Beste *v.* Berastain, 20 N. Brunsw. 106, 109 [*quoting* Worcester Dict.].

18. Black L. Dict.

19. Rapalje & L. L. Dict. where it is said that this mode of punishment was formerly resorted to in cases of treason, and is still employed in some countries.

20. Fisk *v.* Spring, 25 Hun (N. Y.) 367, 369, 1 N. Y. Civ. Proc. 378, 384 [*quoting* Webster Dict.].

"The decay of wood is gradual in its nature, imperceptible in its progress, and necessarily involves unsoundness or rottenness. The word decay, in its appropriate sense, shows the true source of unsoundness or rottenness, in the particular instance [the case of a vessel]." Steinmetz *v.* U. S. Insurance Co., 2 Serg. & R. (Pa.) 293, 298.

21. Burrill L. Dict.

"The decease of either of them [children] leaving a family" as used in a will see Rickards *v.* Gray, 6 Houst. (Del.) 232, 271.

22. Webster Dict. [*quoted* in Matter of Zeph, 50 Hun (N. Y.) 523, 524, 3 N. Y. Suppl. 460].

23. Century Dict.

"Deceased child" as used in a will see Bell *v.* Smalley, 45 N. J. Eq. 478, 485, 18 Atl. 70.

"Deceased debtor" as used in a bankrupt act see Hasluck *v.* Clark, [1899] 1 Q. B. 699, 702, 68 L. J. Q. B. 486, 80 L. T. Rep. N. S. 454, 6 Manson 146, 47 Wkly. Rep. 471.

"Deceased grandchild or grandchildren" as used in a will see Scott *v.* West, 63 Wis. 529, 533, 24 N. W. 161, 25 N. W. 18.

"Deceased legatee" as used in a will see Hills *v.* Barnard, 152 Mass. 67, 72, 25 N. E. 96, 9 L. R. A. 211.

"Deceased person" and "the deceased," as used in a statute imposing estate duty and settlement duty, mean "the same thing — namely, a person dying after the commencement of that Act." *In re* Gibbs, 46 Wkly. Rep. 477, 478.

24. This term, which is becoming a common one in our jurisprudence, is closely formed from the Latin participle, *decedens*, and like that, strictly signifies "deceasing." Burrill L. Dict.

25. Webster Dict. [*quoted* in Matter of Zeph, 50 Hun (N. Y.) 523, 524, 3 N. Y. Suppl. 460].

26. Md. Pub. Gen. Laws (1888), p. 2, art. 1, § 5.

The word "decedent" as used in N. Y. Code Civ. Proc. §§ 2660–2665, authorizing surrogates to grant letters of administration, does not include persons civilly dead. Matter of Zeph, 50 Hun 523, 524, 3 N. Y. Suppl. 460.

DECEITFULLY. In a manner or with a view to deceive.[27] (See, generally, FRAUD.)

DECEITFUL PLEA. A sham plea; one where the facts stated are obviously false, on the face of the plea.[28] (See, generally, PLEADING.)

DECEPTION. The act of deceiving — the intentional misleading of another by a falsehood spoken or acted;[29] FRAUD, *q. v.*, CHEAT, *q. v.*, CRAFT, *q. v.*, COLLUSION, *q. v.*, used to deceive and defraud others.[30] (See, generally, FRAUD.)

DECEPTIS NON DECIPIENTIBUS, JURA SUBVENIUNT. A maxim meaning "The laws help or succor persons who are deceived, not those deceiving."[31]

DECIDE. To determine, to form a definite opinion;[32] to render judgment.[33]

DECIDED. Determined, ended, concluded.[34]

DECIPI QUAM FALLERE EST TUTIUS. A maxim meaning "It is safer to be deceived than to deceive."[35]

DECISION.[36] A word which has been used as signifying the judgment of the

27. Webster Dict. [*quoted* in Dougherty's Contested Election, 6 Pa. Co. Ct. 507, 509].

28. Gray *v.* Gidiere, 4 Strobh. (S. C.) 438, 443.

29. Hall *v.* State, 134 Ala. 90, 118, 32 So. 750; Suther *v.* State, 118 Ala. 88, 99, 24 So. 43.

30. English L. Dict.

31. Trayner Leg. Max.

32. Webster Dict. [*cited* in Darden *v.* Lines, 2 Fla. 569, 571].

Applied to functions of a jury.— "'To decide' includes the power and right to deliberate, to weigh the reasons for and against, to see which preponderate, and to be governed by that preponderance." Com. *v.* Anthes, 5 Gray (Mass.) 185, 253.

33. Webster Int. Dict. [*quoted* in Milford, etc., R. Co.'s Petition, 68 N. H. 570, 576, 36 Atl. 545].

34. Webster Dict. [*cited* in Darden *v.* Lines, 2 Fla. 569, 571].

"Decided," or "took part in the decision" as applied to the participation of a judge in the disposition of a case see Corning *v.* Slosson, 16 N. Y. 294, 296.

Applied to an election contest.— Where a statute provided that "the person holding the certificate of election may give bond, qualify and take the office . . . and exercise the duties thereof until the contest shall be decided, and if the contest be decided against him, the court . . . shall make an order for him to give up the office to the successful party in the contest," the court said: "If the contest is 'decided' whenever final judgment is rendered by the circuit court, then, according to the very terms of the section under review, the right of the certificate holder to exercise the duties of the office only lasts 'until the contest be decided,' provided it 'be decided against him.'" State *v.* Woodson, 128 Mo. 497, 514, 31 S. W. 105.

35. Bouvier L. Dict. [*citing* Lofft Max.].

36. This is "a popular, and not a technical or legal, word." *Ex p.* Kent County Council, [1891] 1 Q. B. 725, 728, 55 J. P. 647, 60 L. J. Q. B. 435, 65 L. T. Rep. N. S. 213, 39 Wkly. Rep. 465. And it "is a very comprehensive term." Pierre Water-Works Co. *v.* Hughes County, 5 Dak. 145, 37 N. W. 733.

Distinguished from "argument" see Gaillard *v.* Trenholm, 5 Rich. (S. C.) 356, 360.

Distinguished from "opinion."— "A decision of the Court is its judgment, the opinion is the reasons given for that judgment." Houston *v.* Williams, 13 Cal. 24, 27, 73 Am. Dec. 565 [*quoted* in Craig *v.* Bennent, 158 Ind. 9, 13, 62 N. E. 273; Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 304, 24 So. 200, 317, 28 So. 956]. But see Pierce *v.* State, 109 Ind. 535, 10 N. E. 302, holding that an exception to the "opinion" of the court in overruling a motion for a new trial instead of to its "decision," which is more technically accurate, is sufficient to present the question for review.

Distinguished from "ruling" see State *v.* O'Brien, 18 Mont. 1, 5, 43 Pac. 1091, 44 Pac. 399.

Distinguished from "verdict."— "The terms 'verdict' or 'decision,' as used in the statute, have reference to the finding upon the facts, the term 'verdict' signifying the finding by the jury, and the term 'decision' the finding by the court. The judgment or decree is not the decision, but follows, and is based upon the verdict of the jury or the decision of the court." Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, 573, 33 N. E. 345, 34 N. E. 511. And see Marshall *v.* Golden Fleece Gold, etc., Min. Co., 16 Nev. 156, 172, where it is said: "It has been decided by the supreme court of California, and, we think, correctly, that the terms 'verdict and decision,' as used in the statute, are appositional; and that what is predicted of one, is, also, of the other."

Synonymous with "ascertainment and liquidation."— In U. S. *v.* Cousinery, 25 Fed. Cas. No. 14,878, 7 Ben. 251, the court said: "The 14th section of the act of 1864 [relative to customs duties], uses the phrase 'decision of the collector of customs,' and the phrase 'ascertainment and liquidation of the duties by the proper officers of the customs,' as synonymous phrases." And see U. S. *v.* Beebe, 117 Fed. 670, 679, where the court, in speaking of a customs administrative act, said: "The 'ascertainment and liquidation of duties' is plainly a 'decision' within the meaning of the section."

Synonymous with "judgment."—Where a statute provided that an application for a new trial must be made at the term at which the verdict, report, or decision is rendered,

court;[37] a judgment given by a competent tribunal;[38] the findings;[39] the findings of fact;[40] the finding by the court[41] upon which a decree or judgment may be entered;[42] the judicial opinion, oral or written, pronounced or delivered, upon which the judgment or order is founded;[43] the written statement of the court's

the court said: "'Decision,' as used in that section, has the same meaning as the word 'judgment.'" Board of Education *v.* State, 7 Kan. App. 620, 52 Pac. 466, 467 [*citing* Houston *v.* Williams, 13 Cal. 24, 27, 73 Am. Dec. 565]. But see Wolfley *v.* McPherson, 61 Kan. 492, 494, 59 Pac. 1054, where a statute provided that "appeals shall be allowed from the decision of the probate court to the district court," etc., and the court said: "The word 'decision' used in this statute is one of broader signification than judgment. It is generic in meaning and includes rulings of the probate court, whether technically termed orders or judgments." And see Buckeye Pipe Line Co. *v.* Fee, 62 Ohio St. 543, 555, 57 N. E. 446, 78 Am. St. Rep. 743, where it is said: "It is true that in an abstract sense there is a shade of difference between the import of the word 'decision' and the word 'judgment.'"

"Written decision."— Where a statute defines the findings and conclusions of the court as a "written decision," and concludes with the provision that "judgment upon the decision shall be entered accordingly," the court said: "This 'written decision,' is something which must precede the judgment, and upon which it is entered, as upon the verdict of a jury." Corbett *v.* Job, 5 Nev. 201, 205.

37. Houston *v.* Williams, 13 Cal. 24, 27, 73 Am. Dec. 565; Rapalje & L. L. Dict. [*quoted* in Milford, etc., R. Co.'s Petition, 68 N. H. 570, 576, 36 Atl. 545]; Wharton L. Lex. [*quoted* in Buckeye Pipe Line Co. *v.* Fee, 62 Ohio St. 543, 555, 57 N. E. 446, 78 Am. St. Rep. 743].

"To constitute a 'decision' within the meaning of the statute [relative to new trials], it must be a final decision of the court upon an issue or issues under the pleadings." Ashton *v.* Thompson, 28 Minn. 330, 336, 9 N. W. 876.

That a "nonsuit" is not a "decision" see 1 Cyc. 77 note 83.

38. Bouvier L. Dict. [*quoted* in Halbert *v.* Alford, (Tex. Sup. 1891) 16 S. W. 814, 815].

"The refusal of the judge to do a ministerial act can hardly, with propriety, be called a 'ruling' or 'decision.'" Cruse *v.* McQueen, (Tex. Civ. App. 1894) 25 S. W. 711, 712.

That a decree pro confesso or by default is manifestly not a "decision" as contemplated by a statute see Kerosene Lamp Heater Co. *v.* Monitor Oil Stove Co., 41 Ohio St. 287, 293.

39. Dodge *v.* Pope, 93 Ind. 480, 484; Jones *v.* Jones, 91 Ind. 72, 76; Weston *v.* Johnson, 48 Ind. 1, 2.

Including "decision" in making up judgment-roll see Garr *v.* Spaulding, 2 N. D. 414, 417, 51 N. W. 867.

The word "decisions" as used in a statute in relation to practice embraces the findings both of fact and of law. Kahn *v.* Central Smelting Co., 2 Utah, 371, 383.

40. Froman *v.* Patterson, 10 Mont. 107, 113, 24 Pac. 692, where it is said: "If the decision of the issue was made by a jury it is usually termed a 'verdict,' if made by a referee, or by the judge trying an issue without a jury, the determination of the issue of fact is usually termed the 'decision' or 'findings of fact.'" And see Hibernia Sav., etc., Soc. *v.* Moore, 68 Cal. 156, 159, 8 Pac. 824, where it is said: "The 'decision' includes not only the conclusions of law, but the facts found."

The word "decision" and the phrase "finding of fact" as used in the constitution limiting appeals to the court of appeals are construed in People *v.* Barker, 152 N. Y. 417, 434, 46 N. E. 875.

41. Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, 573, 33 N. E. 345, 34 N. E. 511; Matter of Winslow, 12 Misc. (N. Y.) 254, 256, 34 N. Y. Suppl. 637.

Applied to an application for a new trial.— Where a statute provided that "the application for a new trial must be made at term at which the verdict or decision is rendered," the court said: "The term 'decision,' as used in the above statute is clearly used in the sense of finding upon the facts, where the cause is tried by the court." Wilson *v.* Vance, 55 Ind. 394, 396 [*quoted* in Gates *v.* Baltimore, etc., R. Co., 154 Ind. 338, 342, 56 N. E. 722; Allen *v.* Adams, 150 Ind. 409, 411, 50 N. E. 387; Weaver *v.* Apple, 147 Ind. 304, 306, 46 N. E. 642; Rodefer *v.* Fletcher, 89 Ind. 556, 564; Christy *v.* Smith, 80 Ind. 573, 577; Hubbs *v.* State, 20 Ind. App. 181, 50 N. E. 402]. See also Clement *v.* Hartzell, 60 Kan. 317, 319, 56 Pac. 504.

Under a statute providing that after "decision" in an action to recover damages for a personal injury, the action does not abate by the death of a party, the court said: "The word 'decision' as used in this section, refers to a decision made by a court upon a trial of issues without a jury." Corbett *v.* Twenty-Third St. R. Co., 114 N. Y. 579, 581, 21 N. E. 1033 [*cited* in Peetsch *v.* Quinn, 6 Misc. (N. Y.) 50, 51, 26 N. Y. Suppl. 728].

42. Matter of Winslow, 12 Misc. (N. Y.) 254, 256, 34 N. Y. Suppl. 637.

"Decision" on trial by court.— Under a statute requiring the party in whose favor judgment is rendered to file and serve a memorandum of his costs and disbursements within five days after notice of the "decision" of the court when the case is tried without a jury, the decision" referred to is the finding of facts and conclusions of law signed by the court and filed with the clerk as the basis of the judgment entered. Porter *v.* Hopkins, 63 Cal. 53, 55 [*quoted* in Mullally *v.* Irish-American Benev. Soc., 69 Cal. 559, 561, 11 Pac. 215].

43. Fawkes *v.* Swayzie, 31 Ont. 256, 258.

Decisions deemed judicial see 2 Cyc. 539 note 7.

findings of fact and conclusions of law;[44] the result of the deliberations of a tribunal; the judicial determination of the question or cause;[45] an account or report of a conclusion, especially of a legal adjudication;[46] the resolution of the principles which determine the controversy.[47] The term also includes, in legal parlance, both orders and judgments, as well as the report or account of the opinions or judicial determinations of courts.[48] (Decision: Appeal From, see APPEAL AND ERROR. As Law of Case on Appeal, see APPEAL AND ERROR. Former as Controlling, see COURTS. In Civil Action, see JUDGMENTS. In Criminal Prosecution, see CRIMINAL LAW. Of Arbitrator or Umpire, see ARBITRATION AND AWARD. Of Architect, see BUILDERS AND ARCHITECTS. Of Assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS. Of Referee in Bankruptcy, see BANKRUPTCY. Review of, see APPEAL AND ERROR. Rule of, see COURTS.)

DECISION UPON THE MERITS. A decision upon the justice of the cause, and not upon technical grounds only.[49]

DECISIVELY. That which cannot be disputed, that which cannot be contradicted by any other evidence;[50] in a conclusive manner, to end deliberation, doubt, or contest.[51]

DECLARATION. In pleading,[52] a specification, in legal and technical form, of the circumstances which constitute the plaintiff's cause of action;[53] the statement of the plaintiff's cause of action;[54] a statement in legal form of the plaintiff's

44. De Lendrecie *v.* Peck, 1 N. D. 422, 423, 48 N. W. 342.

45. Buckeye Pipe Line Co. *v.* Fee, 62 Ohio St. 543, 555, 57 N. E. 446, 78 Am. St. Rep. 743 [*quoting* Abbott L. Dict.].

46. "As a decision of arbitrators, a decision of the supreme court." Webster Dict. [*quoted* in Pierre Water-Works Co. *v.* Hughes County, 5 Dak. 145, 37 N. W. 733, 739].

47. Buckeye Pipe Line Co. *v.* Fee, 62 Ohio St. 543, 555, 57 N. E. 446, 78 Am. St. Rep. 743 [*quoting* Abbott L. Dict.], where it is said: "The judgment is the formal paper applying them to the rights of the parties."

48. Halbert *v.* Alford, (Tex. Sup. 1891) 16 S. W. 814, 815 [*citing* Webster Dict.]. And see Hanna *v.* Putnam County, 29 Ind. 170, 173, where it is said: "For the purpose of authorizing an appeal, the word 'decisions' will be applied to every ruling, final in its nature, upon any subject upon which the board of county commissioners are not authorized to take legislative action." But see O'Boyle *v.* Shannon, 80 Ind. 159, 161, where it is said: "[An] order of sale, . . . [is] not a 'decision' within the meaning of the statute authorizing appeals from the decisions of county commissioners."

49. Mulhern *v.* Union Pac. R. Co., 2 Wyo. 465, 472.

50. Bouvier L. Dict. [*quoted* in Hilliard *v.* Beattie, 58 N. H. 112].

51. Webster Dict. [*quoted* in Hilliard *v.* Beattie, 58 N. H. 112].

52. Anciently called a *tale*, and now known by the name of *narratio*, or usually abbreviated *narr.* or *count.*" 4 Bouvier Inst. 204 (No. 2815).

"Though 'declaration' be the general term, yet in real actions it is more properly called a 'count.'" 4 Bouvier Inst. 204 (No. 2815) [*citing* Stephen Pl. 36].

"The term declaration is applicable only to civil procedure." State *v.* McCann, 67 Me. 372, 374.

Distinguished from "writ" or "summons." —Where an act of congress relative to the removal of a cause from a state to a federal court provided that the moving party must file his petition "at the time, or at any time before the time, the defendant is required by the laws of the state . . . to answer or plead to the declaration or complaint of the plaintiff," the court said: "It must be apparent to the legal mind that when congress employed the words 'declaration' and 'complaint,' in the act they were used in a legal sense, and not as synonymous with the word 'writ' or 'summons,' which is, at common law, the process to commence the suit, and is the first step taken to bring the party sued before the court, while the declaration or complaint is necessarily the second step, which manifests the cause of action, and sets out a narrative of the case; and this must be true where the practice exists by commencing a suit by petition." Wilson *v.* Winchester, etc., R. Co., 82 Fed. 15, 17.

In Vermont "the writ and declaration are blended in the same instrument. The declaration is made a part of the writ, and the whole is treated and construed as one instrument." Moulthrop *v.* Rutland School Dist. No. 1, 59 Vt. 381, 385, 9 Atl. 608.

53. King *v.* Wilmington, etc., R. Co., 1 Pennew. (Del.) 452, 454, 41 Atl. 975 [*citing* 2 Chitty Pl. 240]; Moore *v.* Hobbs, 79 N. C. 535, 536 [*citing* 1 Chitty Pl. 240]; Dixon *v.* Sturgeon, 6 Serg. & R. (Pa.) 25, 27, distinguishing "declaration" from "statement."

54. Buckingham *v.* Murray, 7 Houst. (Del.) 176, 178, 30 Atl. 779; Baltimore City Pass. R. Co. *v.* Nugent, 86 Md. 349, 362, 38 Atl. 779, 39 L. R. A. 161; Jordan *v.* Boone, 5 Rich. (S. C.) 528, 532.

cause of action;[55] the plea by which a plaintiff in a suit at law sets out his cause of action;[56] an exposition of the plaintiff's original writ, wherein he expresses at large his cause of action or complaint, with the additional circumstances of time and place, when and where the injury was committed.[57] In evidence, an unsworn statement or narration of facts made by a party to the transaction, or by one who has an interest in the existence of the facts recounted.[58] (Declaration: Dying, see Homicide. Of Dividend, see Declaration of Dividend. Of Intention to Become Citizen, see Declaration of Intention. Of Rights, see Declaration of Rights. Of Trust, see Trusts. Of War, see Declaration of War. See, generally, Evidence; Pleading.)

DECLARATION OF DIVIDEND.[59] A disposition *pro tanto* of the property of a corporation.[60] (See, generally, Corporations.)

DECLARATION OF INTENTION. The act by which an alien declares, before a court of record, that he intends to become a citizen of the United States.[61] (See, generally, Aliens.)

DECLARATION OF RIGHTS. A formal declaration enumerating somewhat in detail the rights of the citizen which the state government must respect.[62] (See Civil Liberty; and, generally, Civil Rights; Constitutional Law.)

DECLARATION OF TRUST. See Trusts.

DECLARATION OF WAR. A manifesto, or proclamation, issued by the sovereign power of a nation, making known that war exists between it and another nation named.[63] (See, generally, War.)

DECLARATORY. Explanatory; designed to fix or elucidate what before was uncertain or doubtful.[64]

DECLARATORY ACT. An act which, by profession at least, declares no new law, but only the formerly existing law, removing certain doubts which have arisen on the subject.[65] (See, generally, Statutes.)

DECLARATORY JUDGMENT. A judgment which simply declares the rights of the parties, or expresses the opinion of the court on a question of law, without ordering anything to be done.[66] (See, generally, Judgments.)

DECLARATORY LAW. One whereby the rights to be observed and the wrongs to be eschewed are clearly defined and laid down.[67] (See, generally, Statutes.)

DECLARATORY STATUTES. Statutes which are expressive of the common law.[68] (See, generally, Statutes.)

DECLARE.[69] To state; to assert; to publish; to utter; to announce; to

55. Smith *v.* Fowle, 12 Wend. (N. Y.) 9, 10 [*citing* Graham Pr. 160].

56. U. S. *v.* Ambrose, 108 U. S. 336, 340, 2 S. Ct. 682, 27 L. ed. 746.

57. Cheetham *v.* Tillotson, 5 Johns. (N. Y.) 430, 434.

58. Black L. Dict.

Distinguished from "admission" see 8 Cyc. 562 note 77.

59. This is "one of the most important acts of a corporation." Dennis *v.* Joslin Mfg. Co., 19 R. I. 666, 667, 36 Atl. 129, 61 Am. St. Rep. 805.

60. Dennis *v.* Joslin Mfg. Co., 19 R. I. 666, 667, 36 Atl. 129, 61 Am. St. Rep. 805.

61. Burrill L. Dict. [*citing* 3 Kent Comm. 64, 65].

62. McMasters *v.* West Chester Normal School, 13 Pa. Co. Ct. 481, 487.

It is not a mere enunciation of abstract principles, but a solemn enactment by the people themselves, guarded by a sufficient sanction. McMasters *v.* West Chester Normal School, 13 Pa. Co. Ct. 481, 487.

63. Abbott L. Dict.

64. Black L. Dict. [*citing* 1 Blackstone Comm. 86].

65. For example, 25 Edw. 3, St. 5, c. 2, professes to create no new treasons, but only to enumerate the already existing treasons. Brown L. Dict.

66. Black L. Dict.

67. Irwin *v.* Irwin, 2 Okla. 180, 216, 37 Pac. 548, per Scott, J., in dissenting opinion.

68. Gray *v.* Bennent, 3 Metc. (Mass.) 522, 527.

Blackstone says: "Statutes also are either declaratory of the common law, or remedial of some defects therein. Declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper, *in perpetuum rei testimonium* (as a lasting testimony of the thing), and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been." 1 Blackstone Comm. 86.

69. Used in act of parliament.— In Utterson *v.* Vernon, 3 T. R. 539, 546, 4 T. R. 570, 1 Rev. Rep. 767, Lord Kenyon, C. J., said:

announce clearly some opinion or resolution;[70] to make known, to assert to others, to show forth.[71] In pleading, to set forth in a formal writing, served when an action according to the common law has been commenced, the cause of action and claim of recovery which plaintiff alleges against defendant.[72]

DECLARED.[73] Exhibited or published.[74]

DECLARE THE LAW. A term used in reference to the duty of a judge to charge the law arising upon the evidence.[75] (See, generally, CRIMINAL LAW; TRIAL.)

DECLINATION. In Scotch law, a plea to the jurisdiction, on the ground that the judge is interested in the suit.[76]

DECLINE. In Scotch practice, to object to.[77]

"It is to be observed that the word 'declare' is always inserted in acts of parliament with great caution."

Used in a commitment.—In Vintners' Co. *v.* Clerke, 5 Mod. 151, 162, under the sixth exception it is said: "That the word '*concetiret*' being insensible, it is therefore void; it was said, that the following word '*declararet*' hath a certain signification, and is more comprehensive than '*consentiret*' if it had been right, because a man may *consent* to a thing, and never *declare* his consent openly; but when he makes a declaration thereof, he does both."

70. Knecht *v.* New York Mut. L. Ins. Co., 90 Pa. St. 118, 121, 35 Am. Rep. 641 note [*citing* Worcester Dict.].

"Declare" to a witness.— In Remsen *v.* Brinkerhoff, 26 Wend. (N. Y.) 325, 336, 37 Am. Dec. 251 [*cited* in Lane *v.* Lane, 95 N. Y. 494, 498], the court said: "All usage shows that 'to declare' to a witness that the instrument subscribed was the testator's will, must mean 'to make it at the time distinctly known to him by some assertion, or by clear assent in words or signs."

"Declare within the year,"—Where a statute relative to practice required plaintiff to give notice of the declaration within a year after the service of the writ, Parke, B., said: "We are all of opinion that, according to the true meaning of the words 'declare within the year,' the plaintiff must have either delivered his declaration within the year, or, having filed it, must have given notice to the defendant within that time. In short, the term to 'declare' means either the delivery of the declaration itself, or the giving notice of it, so that a plaintiff does not declare until he informs the defendant of the cause of action." Eadon *v.* Roberts, 9 Exch. 226, 229.

The use of the word "declare" in the oath of a surveyor of highways is synonymous with to "promise" required by the statute. Bassett *v.* Denn, 17 N. J. L. 432, 433.

71. Remsen *v.* Brinkerhoff, 26 Wend. (N. Y.) 325, 336, 37 Am. Dec. 251 [*cited* in Lane *v.* Lane, 95 N. Y. 494, 498], where it is said: "And this in any manner, either by words or by acts, in writing, or by signs. Thus. in our English Bible, we read, 'Declare ye among the heathen, publish, conceal not;' an example at once and an explanation; the same idea being enforced and illustrated after the usage of the Hebrew parallelisms, in other words. So again of declaration by signs or other indications, it is said: 'Ye are manifestly declared to be the epistle of God.'"

Applied to profits of any contract with a company.— Where one of the articles of association of a company provided that the office of a director should be vacated if he should contract or participate in the profits of any contract with the company . . . without declaring his interest, etc., the court said: "It must be observed that the words of the article are not 'to declare that he has an interest,' but to 'declare his interest,' which seem to involve not merely the declaration of the existence of an interest but the nature of that interest." Imperial Mercantile Credit Assoc. *v.* Coleman, L. R. 6 H. L. 189, 200, 42 L. J. Ch. 644, 29 L. T. Rep. N. S. 1, 21 Wkly. Rep. 696.

72. Abbott L. Dict.

73. **That a change in the revision of the statutes** from "created and manifested" to "created or declared" was more than a mere change of phraseology see McClellan *v.* McClellan, 65 Me. 500, 505.

When the general words "it is declared and agreed," etc., amount to a covenant see Montfort *v.* Cadogan, 2 Meriv. 3, 17 Ves. Jr. 485, 19 Ves. Jr. 635, 638, 13 Rev. Rep. 270, 16 Rev. Rep. 135.

74. Koopman *v.* Carroll, 50 Nebr. 824, 828, 70 N. W. 395 [*citing* Webster Dict.].

"Declared" in reference to any navigable stream of water being a public highway see Brown *v.* Com., 3 Serg. & R. (Pa.) 273, 276.

Making of will.— The words used in the statute, "acknowledgment" and "declared." demand an open expression either in words or unmistakable acts. Ludlow *v.* Ludlow, 36 N. J. Eq. 597, 601.

75. Crabtree *v.* State, 1 Lea (Tenn.) 267, 270. And see Conner *v.* State, 4 Yerg. (Tenn.) 137, 141, 26 Am. Dec. 217, where it is said: "The judge may 'state the evidence, and charge the law.' This means that he is to charge the law arising upon the evidence so stated by him."

Under a constitutional provision that the judge "shall declare the law," etc., see Wagener *v.* Parrott, 51 S. C. 489, 493, 29 S. E. 240, 64 Am. St. Rep. 695.

76. Black L. Dict.

77. Burrill L. Dict.

"Declines to appeal" as applied to an administrator under a statute see Groner *v.* Hield, 22 Wis. 200, 204.

DECLINED. Objected to.[78]

DECOCTION.[79] An extract prepared by boiling something in water.[80]

DE COMMON DROIT. Of common right; that is, by the common law.[81]

DECORATED. Adorned; ornamented; embellished.[82]

DE CORONATORE ELIGENDO. The name of a writ issued to the sheriff, commanding him to proceed to the election of a coroner.[83] (See, generally, CORONERS.)

DE CORPORE COMITATUS. From the body of the county.[84]

DECOUPER. To cut down; to cut off.[85]

DECOY.[86] As a noun, a pond used for the breeding and maintenance of waterfowl;[87] also a device for enticing and catching wild fowl.[88] As a verb, to entice, to tempt, to lure, or allure.[89] (Decoy: Entrapment Into Crime, see BURGLARY; CRIMINAL LAW; LARCENY; POST-OFFICE. Letters, see DECOY LETTERS. See, generally, ABDUCTION; KIDNAPPING.)

DECOYED. Inveigled.[90]

DECOY LETTERS. Letters prepared and mailed on purpose to detect an offender.[91] (See DECOY; and, generally, POST-OFFICE.)

DECREASED CAPACITY. A term applied to a person whose capacity to earn money has been diminished through physical injury or lack of strength to labor.[92]

DECREE. See EQUITY.

DECREE NISI. See DIVORCE.

DECREE PRO CONFESSO. See EQUITY.

DECREPIT. Broken down with age; wasted or worn by the infirmities of old age; being in the last stage of decay; weakened by age.[93]

DECREPIT PERSON. One who is disabled, incapable or incompetent, from either physical or mental weakness or defects whether produced by age or other

78. Thus a judge may be declined as incompetent to decide a cause. Burrill L. Dict. [*citing* Bell Dict.].

79. In an indictment "decoction" and "infusion" are *ejusdem generis*; and if one is alleged to have been administered, instead of the other, the variance is immaterial. Black L. Dict. [*citing* Crown Side, 3 Campb. 73, 75].

80. Sykes *v.* Magone, 38 Fed. 494, 497.

81. Black L. Dict. [*citing* Coke Litt. 142*a*].

82. Century Dict.

Decorated china or porcelain ware as used in a statute see Arthur *v.* Jacoby, 103 U. S. 677, 678, 26 L. ed. 454.

83. Black L. Dict.

84. State *v.* Kemp, 34 Minn. 61, 63, 24 N. W. 349, where it is said: "As they [these words] appear in the English statutes and in American constitutions and laws, mean no more, as applied to jurors, than that they must come from some part of the given county."

85. Burrill L. Dict. [*citing* Malcverer *v.* Spinke, 1 Dyer 35*b*].

86. When the acts of a detective or "decoy" do not render his evidence unworthy of belief see 5 Cyc. 1047.

Use by promoters of corporations of prominent names as "decoys" see 10 Cyc. 433.

87. Black L. Dict. [*citing* Keble *v.* Hickringill, 11 Mod. 74, 130, 3 Salk. 9, 10, where it is said: "A decoy pond is a kind of trade, and of great profit to the owner."

88. Sterling *v.* Jackson, 69 Mich. 488, 497, 37 N. W. 845, 13 Am. St. Rep. 405.

89. Eberling *v.* State, 136 Ind. 117, 120, 35 N. E. 1023 [*quoted* in John *v.* State, 6 Wyo. 203, 210, 44 Pac. 51].

Decoying party into jurisdiction see Higgins *v.* Dewey, 13 N. Y. Suppl. 570, 573 note.

90. Campbell *v.* Hudson, 106 Mich. 523, 525, 64 N. W. 483. And see Higgins *v.* Dewey, 13 N. Y. Suppl. 570, 571.

91. U. S. *v.* Whittier, 28 Fed. Cas. No. 16,688, 5 Dill. 35, where Dillon, Cir. J., said: "We do not decide that decoy letters cannot be used to detect persons engaged, or suspected to be engaged, in violating criminal laws, but recognize the doctrine that such letters may be so used." See also Reg. *v.* MacDonald, 2 Can. Cr. Cas. 221, 224 note.

92. Haden *v.* Sioux City, etc., R. Co., 92 Iowa 226, 230, 60 N. W. 537, where it is said: "The evidence shows total incapacity to work for a time, and then that he [the person injured] was able to work some, but that his capacity to earn money was lessened. We think the instruction should be, and was, understood to mean that an allowance for 'decreased capacity' applied only to the part of the time when he was able to work, but not to his full capacity."

93. Webster Dict. [*quoted* in Hall *v.* State, 16 Tex. App. 6, 11, 49 Am. Rep. 824, where it is said: "Mr. Webster makes the word 'decrepit' a dependant of old age; that is, according to his definition, before a person can be decrepit old age must have supervened upon such a person. . . . This word is not defined in the Code, nor do we find any definition of it in the law lexicographies. In our opinion, as used in Article 496 of the Penal Code, and as commonly understood in this country, it has a more comprehensive signification than that given it by Mr. Webster"].

causes, to such an extent as to render the individual comparatively helpless in a personal conflict with one possessed of ordinary health and strength.[94]

DECRETA CONCILIORUM NON LIGANT REGES NOSTROS. A maxim meaning "The decrees of councils bind not our kings."[95]

DECRETAL ORDER. Such an order as finally determines some right between the parties.[96] (See, generally, EQUITY.)

DECRY. To cry down; to deprive of credit.[97]

DE CUSTODE AMOVENDO. A writ for removing a guardian.[98] (See, generally, GUARDIAN AND WARD.)

94. Hall *v.* State, 16 Tex. App. 6, 11, 49 Am. Rep. 824, where it is said: "We think that, within the meaning of the word as used in the Code, a person may be decrepit without being old; otherwise the use of the word in the Code would be tautology. It certainly was intended by the legislature that it should signify another state or condition of the person than that of old age. Thus, where the party assaulted was a man about fifty years old, disabled by rheumatism to such an extent that he was compelled to carry his arm in an unnatural position, and in such a manner as to render it almost if not entirely useless to him in a personal difficulty, it was held that, whilst his condition might not come technically within the meaning of the word decrepit as defined by Mr. Webster, yet it might with propriety be said that it fell in the measure of that word as used in common acceptation."

95. Wharton L. Lex.

96. Thompson *v.* McKim, 6 Harr. & J. (Md.) 302, 319. But see Bissell Carpet-Sweeper Co. *v.* Goshen Sweeper Co., 72 Fed. 545, 554, 19 C. C. A. 25, where it was said that a decretal order is "a preliminary order, by which no question is determined upon the merits, and no right established."

97. "The king may at any time decry or cry down any coin of the kingdom, and make it no longer current." Black L. Dict. [*citing* 1 Blackstone Comm. 278].

98. Black L. Dict.

DEDICATION

Edited by William Alexander Martin

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Effect of Dedication Upon Boundary, see BOUNDARIES.
Taxation of Dedicated Property, see TAXATION.

I. DEFINITION AND NATURE.

A. Of Common-Law Dedication — 1. IN GENERAL. Dedication (unknown to the civil law)[1] is a common-law method of creating public easements.[2] The doctrine of dedication rests upon public convenience and has been sanctioned by the

1. See discussion of public uses under the civil law in New Orleans *v.* U. S., 10 Pet. (U. S.) 662, 9 L. ed. 573. See also Doe *v.* Jones, 11 Ala. 63; Renthorp *v.* Bourg, 4 Mart. (La.) 97; Baker *v.* Johnston, 21 Mich. 319; Mitchell *v.* Bass, 33 Tex. 259; Mackeldy Civ. L. §§ 278, 293 *et seq.*

2. The only way in which the public could acquire an easement at common law was by dedication. Stevens *v.* Nashua, 46 N. H. 192; Post *v.* Pearsall, 22 Wend. (N. Y.) 425.

It has been variously defined as follows: "A devotion to public uses of the land, or an easement in it, by any equivocal act of the owner of the fee manifesting such clear intention." Jersey City *v.* Morris Canal, etc., Co., 12 N. J. Eq. 547, 562.

"An act by which the owner of the fee gives to the public, for some proper object, an easement in his lands." Curtis *v.* Keesler, 14 Barb. (N. Y.) 511, 521; 1 Boone Real Prop. (2d ed.) § 139.

"An appropriation of land to some public use, made by the owner of the fee, and accepted for such use by or on behalf of the public." Angell Highw. (3d ed.) § 132 [*quoted* in Kenyon *v.* Knipe, 2 Wash. 394, 401, 27 Pac. 227, 13 L. R. A. 142]; Bouvier L. Dict. [*citing* Smith *v.* San Luis Obispo, 95 Cal. 463, 30 Pac. 591; Hoboken M. E. Church *v.* Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696; Barteau *v.* West, 23 Wis. 416, and *quoted* in Close *v.* Swanson, 64 Nebr. 389, 393, 89 N. W. 1043].

"Appropriation of land by its owners for any general and public use." Bushnell *v.* Scott, 21 Wis. 451, 456, 94 Am. Dec. 555.

"Appropriation to a certain use or uses." Burrill L. Dict. [*quoted* in Wyandotte County *v.* Wyandotte First Presb. Church, 30 Kan. 620, 637, 1 Pac. 109]. See also Williams *v.* Wiley, 16 Ind. 362.

"The act of devoting or giving property for some proper object, and in such manner as to conclude the owner." Hunter *v.* Sandy Hill, 6 Hill (N. Y.) 407, 411 [*quoted* in Patrick *v.* Kalamazoo Y. M. C. A., 120 Mich. 185, 193, 79 N. W. 208; State *v.* Otoe County Com'rs, 6 Nebr. 129, 133].

"The act of giving or devoting property to some public use, an appropriation of realty by the owner to the use of the public, and the adoption thereof by the public." Anderson L. Dict. [*quoted* in Sturmer *v.* Randolph County Ct., 42 W. Va. 724, 730, 26 S. E. 532, 36 L. R. A. 300].

"The appropriation to public uses of some right or property." Anderson L. Dict. [*quoted* in Sturmer *v.* Randolph County Ct., 42 W. Va. 724, 730, 26 S. E. 532, 36 L. R. A. 300].

"The deliberate appropriation of land by its owner for any general and public uses, reserving to himself no other rights in the soil than such as are perfectly compatible with the full exercise and enjoyment of the public uses to which he has devoted his property." Post *v.* Pearsall, 22 Wend. (N. Y.) 425, 472 [*quoted* in Gardiner *v.* Tisdale, 2 Wis. 153, 187, 60 Am. Dec. 407].

"The setting apart of land for the public use." People *v.* Dreher, 101 Cal. 271, 273, 35 Pac. 867; Elliott Roads and Streets 85 [*quoted* in Gooderham *v.* Toronto Corp., 21 Ont. 120, 143].

According to Senator Furman, a dedication, in the New York court of errors, is,

experience of ages;[3] it is based upon public policy and good faith, in that while securing to the public only such rights as it has honestly enjoyed or learned to depend on, it takes from the landowner nothing that he did not intend to give.[4] While the doctrine of dedication is based upon good faith and is thus analogous to the doctine of estoppel, and while many decisions refer to dedication as operating on the principle of an estoppel,[5] the technical requirements of an estoppel need not exist to make a good dedication, and the true view seems to be that

"an act by which the owner of the fee gives to the public an easement in his land." See Post *v.* Pearsall, 22 Wend. (N. Y.) 425, 444. This definition does not convey fully to the mind the legal import of the word. Where one being the owner of lands consents, either expressly or by his actions, that it may be used by the public for any particular purpose, it is a dedication. Macon *v.* Franklin, 12 Ga. 239, 244.

"A dedication of land for public purposes is simply a devotion of it, or of an easement in it, to such purposes by the owner, manifested by some clear declaration of the fact." Grogan *v.* Hayward, 4 Fed. 161, 163, 6 Sawy. 498. "A dedication of property to public use occurs when the owner abandons the use, occupancy, and control of such property to the public." Lamar County *v.* Clements, 49 Tex. 347, 355.

"In its technical legal sense dedication is the appropriation of land for a public use." Benn *v.* Hatcher, 81 Va. 25, 29, 59 Am. Rep. 645 [*quoted* in Patrick *v.* Kalamazoo Y. M. C. A., 120 Mich. 185, 191, 79 N. W. 208].

3. McLean, J., in New Orleans *v.* U. S., 10 Pet. (U. S.) 662, 9 L. ed. 573.

4. Noyes *v.* Ward, 19 Conn. 250; Morse *v.* Ranno, 32 Vt. 600; Cincinnati *v.* White, 6 Pet. (U. S.) 431, 8 L. ed. 452; Bateman *v.* Bluck, 18 Q. B. 870, 17 Jur. 386, 21 L. J. Q. B. 406, 83 E. C. L. 870, 14 Eng. L. & Eq. 69.

5. *Alabama.*— Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26; Vansandt *v.* Wier, 109 Ala. 104, 19 So. 424, 32 L. R. A. 201; Forney *v.* Calhoun County, 86 Ala. 463, 5 So. 750.

California.— Wolfskill *v.* Los Angeles County, 86 Cal. 405, 24 Pac. 1094.

Colorado.— Denver *v.* Clements, 3 Colo. 472.

Connecticut.—Noyes *v.* Ward, 19 Conn. 250.

Georgia.— Macon *v.* Franklin, 12 Ga. 239.

Illinois.— Ottawa *v.* Yentzer, 160 Ill. 509, 43 N. E. 601; Waggeman *v.* North Peoria, 155 Ill. 545, 40 N. E. 485; Chicago *v.* Hill, 124 Ill. 646, 17 N. E. 46; Chicago *v.* Stinson, 124 Ill. 510, 17 N. E. 43; Littler *v.* Lincoln, 106 Ill. 353; Chicago *v.* Johnson, 98 Ill. 618; Field *v.* Carr, 59 Ill. 198.

Indiana.— Marion *v.* Skillman, 127 Ind. 130, 26 N. E. 676, 11 L. R. A. 55. And see Indianapolis *v.* Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; Carr *v.* Kolb, 99 Ind. 53; Haynes *v.* Thomas, 7 Ind. 38.

Iowa.— Marratt *v.* Deihl, 37 Iowa 250; Dubuque *v.* Maloney, 9 Iowa 450, 74 Am. Dec. 358.

Kansas.— Hayes *v.* Houke, 45 Kan. 466, 25 Pac. 860.

Kentucky.— Caperton *v.* Humpick, 95 Ky. 105, 23 S. W. 875, 15 Ky. L. Rep. 430.

Louisiana.— Leonard *v.* Baton Rouge, 39 La. Ann. 275, 4 So. 241; Sheen *v.* Stothart, 29 La. Ann. 630.

Maine.— Cole *v.* Sprowl, 35 Me. 161, 56 Am. Dec. 696.

Maryland.—Boyce *v.* Kalbaugh, 47 Md. 334, 28 Am. Rep. 464. See also Hiss *v.* Baltimore, etc., Pass. R. Co., 52 Md. 242, 36 Am. Rep. 371; McCormick *v.* Baltimore, 45 Md. 512.

Massachusetts.— Hobbs *v.* Lowell, 19 Pick. 405, 31 Am. Dec. 145.

Minnesota.— Mankato *v.* Willard, 13 Minn. 13, 97 Am. Dec. 208; Wilder *v.* St. Paul, 12 Minn. 192.

Missouri.— Perkins *v.* Fielding, 119 Mo. 149, 24 S. W. 444, 27 S. W. 1100.

Montana.— Territory *v.* Deegan, 3 Mont. 82.

Nebraska.— State *v.* Otoe County Com'rs, 6 Nebr. 129.

New Jersey.— Vanatta *v.* Jones, 42 N. J. L. 561.

New York.— Cook *v.* Harris, 61 N. Y. 448.

Oregon.— Lewis *v.* Portland, 25 Oreg. 133, 35 Pac. 256, 42 Am. St. Rep. 772, 22 L. R. A. 736.

Pennsylvania.— Pennsylvania R. Co. *v.* Greensburg, etc., Electric St. R. Co., 176 Pa. St. 559, 35 Atl. 122, 36 L. R. A. 839.

Rhode Island.— Simmons *v.* Mumford, 2 R. I. 172.

Vermont.— State *v.* Trask, 6 Vt. 355, 27 Am. Dec. 554.

Utah.— Whittaker *v.* Ferguson, 16 Utah 240, 51 Pac. 980.

Washington.— Ball *v.* Tacoma, 9 Wash. 592, 38 Pac. 133.

Wisconsin.— Williams *v.* Smith, 22 Wis. 594.

United States.— McKey *v.* Hyde Park, 134 U. S. 84, 10 S. Ct. 512, 33 L. ed. 860 (good illustration of dedication by estoppel); Morgan *v.* Chicago, etc., R. Co., 96 U. S. 716, 24 L. ed. 743.

England.— Grand Surrey Canal Co. *v.* Hall, 9 L. J. C. P. 329, 1 M. & G. 392, 1 Scott N. R. 264, 39 E. C. L. 818.

Estoppel in general see ESTOPPEL.

Estoppel often operates to prevent denial of dedication (Sussman *v.* San Luis Obispo County, 126 Cal. 536, 59 Pac. 24; Whittaker *v.* Deadwood, 12 S. D. 523, 81 N. W. 910; Ashland *v.* Chicago, etc., R. Co., 105 Wis. 398, 80 N. W. 1101) just as one may be estopped from setting up dedication (see Hanger *v.* Des Moines, 109 Iowa 480, 80 N. W. 549). It must be remembered that it is not every statement referring to a public use that creates an estoppel. Cerf *v.* Pfleging, 94 Cal.

dedication is a common-law doctrine of itself based upon analogous principles.[6] There are cases, however, in which a dedication may properly arise through a technical estoppel.[7] So where the owner in dealing with an individual instead of binding himself by an estoppel *in pais* binds himself by an express or implied covenant in a deed, the public may accept the public use called for in the deed, and a dedication may become effective on the doctrine of covenant or grant.[8] The elementary distinction between these cases and the true dedication is that the estoppel or covenant is merely an offer as to the public and there is no dedication to the public until the public accepts.[9]

2. DISTINGUISHED FROM GRANT OR PRESCRIPTION. A dedication, although often spoken of as operating by way of grant,[10] differs from a grant in the very material particular that there need not be a grantee *in esse* at the time of the dedication to give it effect.[11] An appropriation or dedication of property to public uses is an exception to the general rule requiring a particular grantee.[12] It is not essential that the right of use should be vested in a corporate body.[13] The public, it has been said, is an ever existing grantee capable of taking dedications for public uses, and its interests are a sufficient consideration to support them.[14] If there is a common-law dedication of land to public use prior to the existence of a municipal corporation, then upon such corporation being organized and including such land within its limits the use of the land in trust for the public at once vests in it.[15] So the doctrine of prescription has been said not to strictly apply to public easements.[16] But dedication may be implied from facts and

131, 29 Pac. 417; Williams *v.* New York, etc., R. Co., 39 Conn. 509.

6. See Angell Highw. (3d ed.) c. 3, § 156.

7. Thus through his representations to some individual that he has abandoned his land to a public use, intended to be relied upon, and relied upon by that individual, the owner is bound, and being so bound to the individual to dedicate his land to a public use, he gives the public an option to accept the use. Such acceptance may be made by the public at any time while the estoppel lasts, and the dedication may thus become effective. Barney *v.* Lincoln Park, 203 Ill. 397, 67 N. E. 801.

8. Davis *v.* Morris, 132 N. C. 435, 43 S. E. 950. See also Flersheim *v.* Baltimore, 85 Md. 489, 36 Atl. 1098; Rutherford *v.* Taylor, 38 Mo. 315.

Presumption of a grant is imposed on the jury as a duty. Coolidge *v.* Learned, 8 Pick. (Mass.) 504.

9. See *infra*, VI.

10. Cincinnati *v.* Hamilton County Com'rs, 7 Ohio 88; Brown *v.* Manning, 6 Ohio 298, 27 Am. Dec. 255.

11. *Alabama.*— Doe *v.* Jones, 11 Ala. 63.

Indiana.— Gwynn *v.* Homan, 15 Ind. 201.

Minnesota.— Winona *v.* Huff, 11 Minn. 119.

Mississippi.— Vick *v.* Vicksburg, 1 How. 379, 31 Am. Dec. 167.

Ohio.— Williams *v.* Cincinnati First Presb. Soc., 1 Ohio St. 478; Bryant *v.* McCandless, 7 Ohio Pt. II, 135; Brown *v.* Manning, 6 Ohio 298, 27 Am. Dec. 255.

Pennsylvania.— Scranton *v.* Griffin, 8 Leg. Gaz. 86.

Texas.— Atkinson *v.* Bell, 18 Tex. 474; Llano *v.* Llano County, 5 Tex. Civ. App. 132, 23 S. W. 1008.

Washington.— Meeker *v.* Puyallup, 5 Wash. 759, 32 Pac. 727.

United States.— Cincinnati *v.* White, 6 Pet. 431, 8 L. ed. 452; Beatty *v.* Kurtz, 2 Pet. 566, 7 L. ed. 521; Coffin *v.* Portland, 27 Fed. 412.

See 15 Cent. Dig. tit. "Dedication," §§ 8, 9.

12. Cincinnati *v.* White, 6 Pet. (U. S.) 431, 8 L. ed. 452; Beatty *v.* Kurtz, 2 Pet. (U. S.) 566, 7 L. ed. 521; Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735.

13. New Orleans *v.* U. S., 5 Pet. (U. S.) 449, 8 L. ed. 187.

14. Warren *v.* Jacksonville, 15 Ill. 236, 58 Am. Dec. 610; Cincinnati *v.* White, 6 Pet. (U. S.) 431, 8 L. ed. 452. A dedication of land to public use implies and vests in the public a right to use th same without a grantee being named or being in existence. Coffin *v.* Portland, 27 Fed. 412.

15. *Alabama.*—Harn *v.* Dadeville, 100 Ala. 199, 14 So. 9.

Illinois.— Waggeman *v.* North Peoria, 160 Ill. 277, 43 N. E. 347.

Minnesota.— Mankato *v.* Willard, 13 Minn. 13, 97 Am. Dec. 208; Winona *v.* Huff, 11 Minn. 119.

Texas.—Llano *v.* Llano County, 5 Tex. Civ. App. 132, 23 S. W. 1008.

United States.— Cincinnati *v.* White, 6 Pet. 431, 8 L. ed. 452.

See 15 Cent. Dig. tit. "Dedication," §§ 8, 9.

16. The doctrine of prescription as applicable to public easements does not seem to be recognized in England at all. The origin of easements from immemorial user is founded on custom. "And, upon referring to the several authorities which have been cited in support of the validity of such a prescription, it will be found that the claim by the inhabitants, *quâ* inhabitants, to any easement, wherever it has been allowed, has been invariably vested on the ground of custom, not on that of prescription. A custom which has existed from time immemorial without inter-

circumstances,[17] and just as the doctrine of dedication grew up upon the foundation of public policy, so the doctrine of public easements by presumptive dedication or prescription has a legitimate foundation and is generally recognized, although there is some conflict of opinion on the question.[18]

3. Easements Created by Dedication Distinguished From Private Easements. Public easements differ from private easements in that there is no dominant tenement, and they are therefore in gross;[19] and the incidents of public easements, largely owing to the intervention of the state or of municipalities or other public authorities representing the public, differ in important respects from the incidents of private easements.[20]

B. Of Statutory Dedication — 1. In General. Just as statutes commonly define how a person may deed his lands to legal persons, so in many states statutes provide how lands may be on the records dedicated to the public.[21] Such statutes usually provide that where an owner has had his land surveyed, platted, and acknowledged, and has recorded the plat, then such parts as the plat shows he intended to dedicate as streets, parks, etc., shall be as fully beyond his control as if he had deeded them to a legal person for the uses mentioned,[22] and this is called a statutory dedication.[23] Such statutes are constitutional.[24] When a statutory dedication has been duly made, contemporaneous or subsequent acts of the dedicator will be referred to such statutory dedication and not raise against him a presumption of a wider common-law dedication.[25]

2. Effect of Statutes on Power to Make Common-Law Dedication. It is well settled that statutes providing means whereby lands may be dedicated to public

ruption within a certain place, and which is certain and reasonable in itself, obtains the force of a law, and is, in effect, the common law within that place to which it extends, though contrary to the general law of the realm. In the case of a custom, therefore, it is unnecessary to look out for its origin: but, in the case of prescription, which founds itself upon the presumption of a grant that has been lost by process of time, no prescription can have had a legal origin where no grant could have been made to support it." Lockwood *v.* Wood, 6 Q. B. 31, 50, 64, 8 Jur. 543, 13 L. J. Q. B. 365, 51 E. C. L. 31, 50. Mr. Justice Story in Beatty *v.* Kurtz, 2 Pet. (U. S.) 566, 7 L. ed. 521, after showing how the appropriation of a lot to the use of the "Lutheran Church," there being no such church, and therefore no grantee, could not take effect as a grant express or presumed, supports it as a dedication to public and pious uses. See also Stevens *v.* Nashua, 46 N. H. 192. And see Easements.

17. See *infra*, V, C, 5.

18. See *infra*, VII, D, 4. "The adjudged cases, with respect to highways by dedication or by prescription, are not, in all points, susceptible of being reconciled. Some deny that highways can be established by prescription, and affirm that they can be established in two ways only: First, under the statute; and, second, by dedication. Other cases hold that highways may derive a lawful existence from long continued use by the public under a claim of right. The cases differ as to the effect of long user by the public. Some hold that, if continued for the period which, under the statute of limitations, would bar the right of the owner of land to recover the same, this is conclusive evidence against the owner, of an intent to dedicate for a highway the land so used. The period fixed by the statute of limitation is applied to such cases by way of analogy. Others hold that user, even for such a period, does not conclude the right of the owner, who may, nevertheless, show that he did not intend to dedicate and rebut, if he can, any presumption of such an intent derived from mere use by the public. Many of the authorities make the effect of user by the public, depend largely upon the character of the land and of the country in or through which the highway is situate." Onstott *v.* Murray, 22 Iowa 457, 466.

19. See Easements.

20. See *infra*, VIII; and, generally, Municipal Corporations; Streets and Highways.

21. See *infra*, V, D.

22. Ill. Rev. St. (1879) c. 109, is a fair illustration. It is there provided that a person who desires to lay out a town shall have the land surveyed and a plat made showing streets, squares, etc., and what parts of the land he wishes to dedicate to public uses or to the uses of corporations or individuals. It is also provided that after such a plat has been prepared and is acknowledged and recorded title shall vest in the parts donated on the plat, and that the title to any parts dedicated to public use shall be vested in the municipal corporation, if any, in trust for the purposes declared. See Winnetka *v.* Prouty, 107 Ill. 218; Morgan *v.* Chicago, etc., R. Co., 96 U. S. 716, 24 L. ed. 743.

23. Morgan *v.* Chicago, etc., R. Co., 96 U. S. 716, 24 L. ed. 743.

24. See Bumpus *v.* Miller, 4 Mich. 159.

25. Hogue *v.* Albina, 20 Oreg. 182, 25 Pac. 386, 10 L. R. A. 673. And see Cotter *v.* Philadelphia, 194 Pa. St. 496, 45 Atl. 336.

uses do not prevent such uses being created by dedication as at common law.[26] They merely provide a new mode by which the dedicator's intention to grant or convey his land may be carried into effect,[27] and there may be a statutory dedication by some of the owners and a common-law dedication by others.[28] Nevertheless the statutes in no way enlarge either expressly or by implication the class of cases where an easement may be created in favor of the public by common-law dedication.[29]

3. Defective Statutory Dedication When Operative as Common-Law Dedication. An incomplete or defective statutory dedication will, when accepted by the public or when rights are acquired under it by third persons, operate as a common-law dedication.[30] Thus a town plat, although not acknowledged, may operate as a common-law dedication,[31] and the same is the case in respect to a plat which is not recorded,[32] or in respect to a plat which has not been signed.[33] But where a map of a city addition was not sufficient to constitute a statutory dedication of the streets thereon, the fact that a map showed certain lines along certain property

26. *Connecticut.*—Noyes *v.* Ward, 19 Conn. 250.

Illinois.— Lake Erie, etc., R. Co. *v.* Whitham, 155 Ill. 514, 40 N. E. 1014, 46 Am. St. Rep. 355, 28 L. R. A. 612; Manly *v.* Gibson, 13 Ill. 308.

Indiana.— State *v.* Hill, 10 Ind. 219; Hays *v.* State, 8 Ind. 425.

Iowa.— Baldwin *v.* Herbst, 54 Iowa 168, 6 N. W. 257.

Maryland.— Day *v.* Allender, 22 Md. 511.

Michigan.— Grandville *v.* Jenison, 84 Mich. 54, 47 N. W. 600; Baker *v.* Johnston, 21 Mich. 319; People *v.* Beaubien, 2 Dougl. 256.

Missouri.— McGinnis *v.* St. Louis, 157 Mo. 191, 57 S. W. 755; Downend *v.* Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170; Rose *v.* St. Charles, 49 Mo. 509.

New York.— *In re* Hunter, 164 N. Y. 365, 58 N. E. 288.

Ohio.— See Fulton *v.* Mehrenfeld, 8 Ohio St. 440.

Tennessee.— Young *v.* State, 9 Yerg. 390.

United States.— District of Columbia *v.* Robinson, 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440; Sargeant *v.* Indiana State Bank, 21 Fed. Cas. No. 12,360, 4 McLean 339.

Creation of highways.— In Massachusetts the statutes provide that no way opened and dedicated to the public use which has not become a public way shall be chargeable upon a city or town as a highway or townway unless the same is laid out and established by such city or town in the manner therein prescribed, and requires highways and townways to be kept in repair at the expense of the town, city, or place in which they are situated. The effect of these statutes, it has been declared, is to prohibit the creation of a public highway or townway by dedication. Guild *v* Shedd, 150 Mass. 255, 22 N. E. 896.

27. Lake Erie, etc., R. Co. *v.* Whitham, 155 Ill. 514, 40 N. E. 1014, 46 Am. St. Rep. 355, 28 L. R. A. 612.

28. Daiber *v.* Scott, 3 Ohio Cir. Ct. 313.

29. Lake Erie, etc., R. Co. *v.* Whitham, 155 Ill. 514, 40 N. E. 1014, 46 Am. St. Rep. 355, 28 L. R. A. 612, holding that although the statute authorizes gifts or grants to railroad corporations by plat, common-law dedications cannot be made in like cases, but must be to the general public.

30. *Illinois.*— Russell *v.* Lincoln, 200 Ill. 511, 65 N. E. 1088; Augusta *v.* Tyner, 197 Ill. 242, 64 N. E. 378; Earll *v.* Chicago, 136 Ill. 277, 26 N. E. 370; Gould *v.* Howe, 131 Ill. 490, 23 N. E. 602; Smith *v.* Flora, 64 Ill. 93; Waugh *v.* Leech, 28 Ill. 488.

Maine.—Danforth *v.* Bangor, 85 Me. 423, 27 Atl. 268.

Michigan.— Ruddiman *v.* Taylor, 95 Mich. 547, 55 N. W. 376; Baker *v.* Johnston, 21 Mich. 319.

Minnesota.— Downer *v.* St. Paul, etc., R. Co., 22 Minn. 251.

Mississippi.— Vicksburg *v.* Marshall, 59 Miss. 563.

Missouri.— Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593.

Nebraska.— Pillsbury *v.* Alexander, 40 Nebr. 242, 58 N. W. 859.

Ohio.— Harrison *v.* Pike, 7 Ohio Dec. (Reprint) 603, 4 Cinc. L. Bul. 156. See also Fulton *v.* Mehrenfeld, 8 Ohio St. 440; Morris *v.* Bowers, Wright 749.

Wisconsin.— Donohoo *v.* Murray, 62 Wis. 100, 22 N. W. 167.

United States.— Banks *v.* Ogden, 2 Wall. 57, 17 L. ed. 818; U. S. *v.* Illinois Cent. R. Co., 26 Fed. Cas. No. 15,437, 2 Biss. 174.

See 15 Cent. Dig. tit. "Dedication," § 57 *et seq.*

31. Giffen *v.* Olathe, 44 Kan. 342, 24 Pac. 470; Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593; Morris *v.* Bowers, Wright (Ohio) 749. See also Gould *v.* Howe, 131 Ill. 490, 23 N. E. 602.

32. Danforth *v.* Bangor, 85 Me. 423, 27 Atl. 268; Vicksburg *v.* Marshall, 59 Miss. 563; Donohoo *v.* Murray, 62 Wis. 100, 22 N. W. 167.

33. Ruddiman *v.* Taylor, 95 Mich. 547, 55 N. W. 376. Nevertheless where a recorded plat does not correspond with the survey of the premises, the fact that the plat indicates the existence of a street which is intended by the survey does not constitute a common-law dedication in the street, where the intent to dedicate on the part of the landowner and its use by the public are

claimed as the street, without other evidence, was insufficient to constitute a common-law dedication.[34]

II. Capacity of Dedicator.[35]

A. In General. There are few cases in which the question of capacity to dedicate has been raised. There seems to be no valid reason why the same rules as to capacity which apply to grants should not apply to dedications, so that as a general rule it may be said that no dedication can be established as the act of a person incapable of making a grant.[36]

B. Corporation. A corporation which owns and deals with land can make dedications within its powers.[37] Just how far a corporation is bound by the declarations of its officers depends upon the circumstances of each particular case,[38] but where a use is opened by an officer of a corporation and is enjoyed by the public the assent of the corporation will be presumed.[39]

III. Title or Interest of Dedicator.

A. In General. As it is essential that to be valid a dedication must create a use unlimited as to the time of its duration,[40] and as it is the very essence of a dedication that the owner of the land has consented to abandon it,[41] it is a necessary conclusion that no one except the owner of an unlimited estate or an estate in fee simple can make a dedication of land.[42] Nevertheless mere defects of title

wanting. Bradstreet *v.* Dunham, 65 Iowa 248, 21 N. W. 592.

34. Coe College *v.* Cedar Rapids, 120 Iowa 541, 95 N. W. 267.

35. For dedication by agent see Principal and Agent. Commissioners in Partition see Partition. Executors and Administrators see Executors and Administrators. Guardian see Guardian and Ward. Infants see Infants. Landlord and Tenants see Landlord and Tenants. Married Women see Husband and Wife. Mortgagor or Mortgagee see Mortgages. Municipal Corporations see Municipal Corporations. Remainder-man see Remainder-man. State see States. Tenants in Common see Tenants in Common. Trustees see Trusts. United States see United States.

36. See Edson *v.* Munsell, 10 Allen (Mass.) 557; Roehdale Canal Co. *v.* Radeliffe, 18 Q. B. 287, 16 Jur. 1111, 21 L. J. Q. B. 297, 83 E. C. L. 289. It is assumed in McKey *v.* Hyde Park, 134 U. S. 84, 10 S. Ct. 512, 33 L. ed. 860, that nothing done by plaintiff before he came of age could affect his rights. So in Pittsburgh, etc., R. Co. *v.* Crown Point, 150 Ind. 536, 50 N. E. 741.

37. *California.*— San Francisco *v.* Calderwood, 31 Cal. 585, 91 Am. Dec. 542.

Connecticut.— Green *v.* Canaan, 29 Conn. 157.

Georgia.— Macon *v.* Franklin, 12 Ga. 239.

Ohio.— Gall *v.* Cincinnati, 18 Ohio St. 563.

Texas.— Wright *v.* Victoria, 4 Tex. 375.

Vermont.— State *v.* Woodward, 23 Vt. 92.

United States.— Boston *v.* Lecraw, 17 How. 426, 15 L. ed. 118.

England.— Grand Surrey Canal Co. *v.* Hall, 9 L. J. C. P. 329, 1 M. & G. 392, 1 Scott N. R. 264, 39 E. C. L. 818.

Railroad companies are often held bound by dedications. See *infra*, IV, F.

Turnpike companies have been held to have dedicated to the public by taking down their gates (especially after the expiration of their right to collect toll), and allowing the public to freely use their roads.

Connecticut.— New York, etc., R. Co. *v.* Fair Haven, etc., R. Co., 70 Conn. 610, 40 Atl. 607, 41 Atl. 169.

Illinois.— Marseilles *v.* Howland, 124 Ill. 547, 16 N. E. 883.

Michigan.— Highway Com'rs *v.* Cobb, 104 Mich. 395, 62 N. W. 554.

Nevada.— State *v.* Dayton, etc., Toll Road Co., 10 Nev. 155.

New Hampshire.— Presumption not conclusive. State *v.* New-Boston, 11 N. H. 407.

New Jersey.— State *v.* New Brunswick, 32 N. J. L. 548; State *v.* Snedeker, 30 N. J. L. 80.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Com., 104 Pa. St. 583.

Vermont.— Barton *v.* Montpelier, 30 Vt. 650.

Wisconsin.—Valley Pulp, etc., Co. *v.* West, 58 Wis. 599, 17 N. W. 554.

England.— Reg. *v.* Thomas, 7 E. & B. 399, 3 Jur. N. S. 713, 5 Wkly. Rep. 321, 90 E. C. L. 399.

38. These declarations generally go in as evidence for what they are worth. Hitchcock *v.* Oberlin, 46 Kan. 90, 26 Pac. 466.

39. Union Co. *v.* Peckham, 16 R. I. 64, 12 Atl. 130; Hughes *v.* Providence, etc., R. Co., 2 R. I. 493.

40. See *infra*, V, E, 3, e.

41. See *infra*, V, B.

42. *Alabama.*— Johnson *v.* Dadeville, 127 Ala. 244, 28 So. 700; Hoole *v.* Atty.-Gen., 22 Ala. 190.

Connecticut.— Pierce *v.* Roberts, 57 Conn. 31, 17 Atl. 275.

Illinois.— James *v.* Illinois Cent. R. Co., 195 Ill. 327, 63 N. E. 153; People *v.* Herbel,

or the non-concurrence of mere formal interests will not defeat a dedication.[43] And any person, no matter how small his interest in the land and even if he has no interest, may estop himself from denying a dedication of it.[44] Generally in establishing a dedication the title of the dedicator as well as the act of dedication must be proved.[45]

B. Holder of Fee-Simple Title. When the dedication is made by one who at the time holds the fee-simple title to the land, no question as to its validity on the ground of title can arise.[46] But a dedication made before the dedicator acquires his title is not good[47] unless he ratifies it after acquiring title,[48] or unless he has some kind of equitable title in or equitable right to the land,[49] this rule differing from the rule in the case of grants.[50] And no dedication can be made by one who has parted with his title.[51]

C. Holder of Equitable Interest or Title. While a purpose to dedicate, declared before the acquisition of title, is at most an offer to dedicate in the future and may be abandoned or withdrawn, and is not binding unless repeated

96 Ill. 384; Fisk *v.* Havana, 88 Ill. 208; Kyle *v.* Logan, 87 Ill. 64; Baugan *v.* Mann, 59 Ill. 492.

Kansas.— Boerner *v.* McKillip, 52 Kan. 508, 35 Pac. 5; Smith *v.* Smith, 34 Kan. 293, 8 Pac. 385.

Maryland.— Baltimore *v.* Northern Cent. R. Co., 88 Md. 427, 41 Atl. 911.

Michigan.— Lee *v.* Lake, 14 Mich. 12, 90 Am. Dec. 220.

Missouri.— Kansas City Milling Co. *v.* Riley, 133 Mo. 574, 34 S. W. 835; McBeth *v.* Trabue, 69 Mo. 642; Sarcoxie *v.* Wild, 64 Mo. App. 403.

New Jersey.—Vanatta *v.* Jones, 42 N. J. L. 561.

New York.— Donahue *v.* State, 112 N. Y. 142, 19 N. E. 419, 2 L. R. A. 576; Pearsall *v.* Post, 20 Wend. 111.

Oregon.— Leland *v.* Portland, 2 Oreg. 46.

Rhode Island.— Clark *v.* Providence, 10 R. I. 437; State *v.* Richmond, 1 R. I. 49.

Wisconsin.— Lawe *v.* Kaukauna, 70 Wis. 306, 35 N. W. 561; Bushnell *v.* Scott, 21 Wis. 451, 94 Am. Dec. 555.

United States.— Irwin *v.* Dixion, 9 How. 10, 13 L. ed. 25; Nelson *v.* Madison, 17 Fed. Cas. No. 10,110, 3 Biss. 244.

England.— Wood *v.* Veal, 5 B. & Ald. 454, 1 D. & R. 20, 24 Rev. Rep. 454, 7 E. C. L. 250; Baxter *v.* Taylor, 4 B. & Ad. 72, 2 L. J. K. B. 65, 1 N. & M. 14, 24 E. C. L. 41.

See 15 Cent. Dig. tit. "Dedication," § 6.

For example it is held that a valid dedication cannot be made by a trespasser (Gentleman *v.* Soule, 32 Ill. 271, 83 Am. Dec. 264), a squatter (Smith *v.* Smith, 34 Kan. 293, 8 Pac. 385), or a mere stranger (Kyle *v.* Logan, 87 Ill. 64; Bushnell *v.* Scott, 21 Wis. 451, 94 Am. Dec. 555), or one who owns a mere easement in the land (State *v.* Richmond, 1 R. I. 49). And a person cannot dedicate to public uses land which belongs to his wife and children. McBeth *v.* Trabue, 69 Mo. 642.

43. See *infra*, III, C.

The owners of all the stock of a corporation may dedicate without any corporate act. Atty.-Gen. *v.* Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251.

44. Simmons *v.* Mumford, 2 R. I. 172; Anderson *v.* Bigelow, 16 Wash. 198, 47 Pac. 426; Rae *v.* Trim, 27 Grant Ch. (U. C.) 374. Similarly it has been held that the fact that part of the land dedicated for a street does not belong to the dedicator does not avoid the dedication as to that part of the land owned by him. Earll *v.* Chicago, 136 Ill. 277, 26 N. E. 370.

45. *California.*— Eureka *v.* Fay, 107 Cal. 166, 40 Pac. 235.

Indiana.— Lawrenceburgh *v.* Wesler, 10 Ind. App. 153, 37 N. E. 956.

Iowa.— Edenville *v.* Chicago, etc., R. Co., 77 Iowa 69, 41 N. W. 568; Porter *v.* Stone, 51 Iowa 373, 1 N. W. 601.

Missouri.— Hannibal *v.* Draper, 36 Mo. 332.

Oregon.— Leland *v.* Portland, 2 Oreg. 46.

In a case between a city and a party not claiming title ownership by the dedicator is presumed. Fowler *v.* Linquist, 138 Ind. 566, 37 N. E. 133; Roberts *v.* Columbia, etc., Turnpike Co., 98 Tenn. 133, 38 S. W. 587. But in a case between a city and a party claiming title ownership by dedication must be proved. Lawrenceburgh *v.* Wesler, 10 Ind. App. 153, 37 N. E. 956.

46. See *supra*, III, A.

47. Boerner *v.* McKillip, 52 Kan. 508, 35 Pac. 5; Smith *v.* Smith, 34 Kan. 293, 8 Pac. 385; Lee *v.* Lake, 14 Mich. 12, 90 Am. Dec. 220; Kansas City Milling Co. *v.* Riley, 133 Mo. 574, 34 S. W. 835; Nelson *v.* Madison, 17 Fed. Cas. No. 10,110, 3 Biss. 244.

48. Hagaman *v.* Dittmar, 24 Kan. 42; Lee *v.* Lake, 14 Mich. 12, 90 Am. Dec. 220.

49. See *infra*, III, C.

50. In the case of a deed an after-acquired title inures to the grantee by estoppel. Barry *v.* Guild, 126 Ill. 439, 18 N. E. 759, 2 L. R. A. 334 and note; Funk *v.* Newcomer, 10 Md. 301.

51. Baltimore *v.* Northern Cent. R. Co., 88 Md. 427, 41 Atl. 911; Warren *v.* Brown, 31 Nebr. 8, 47 N. W. 633.

An offer to dedicate land conveyed prior to the acceptance of the offer is inoperative as a dedication. Buffalo *v.* Delaware, etc., R.

or ratified after title acquired,[52] it has been held sufficient if the dedicator at the time of the declaration has an equitable title or an equitable right which he is perfecting;[53] and this question has often arisen in the case of government lands. While a mere occupier of government lands cannot dedicate them,[54] one who is perfecting his title can.[55]

D. Holders of Interests Differing as to Time of Enjoyment or Amount of Interest. If land belongs to several persons who have estates and interests in it, differing as to time of enjoyment or amount of interest, there can be no dedication except with the consent of them all.[56] But if one does not own the whole bed of a street he may dedicate his half.[57]

E. Effect of Judgments and Other Liens. If a judgment has attached to the land it cannot be defeated by dedication,[58] but a judgment attaching after the dedication is a lien subject thereto.[59]

IV. For What Uses Property May Be Dedicated.

A. In General. The most familiar illustration of a public easement is a common-law public highway or road as distinguished from a private way.[60] The doctrine expounded in the early English cases was applied to highways,[61] but was

Co., 68 N. Y. App. Div. 488, 74 N. Y. Suppl. 343.

52. Boerner *v.* McKillip, 52 Kan. 508, 35 Pac. 5. And see *supra*, III, B.

53. *California.*—Watkins *v.* Lynch, 71 Cal. 21, 11 Pac. 808.

Iowa.— Getchell *v.* Benedict, 57 Iowa 121, 10 N. W. 321.

Kansas.— Hagaman *v.* Dittmar, 24 Kan. 42.

Maryland.— South Baltimore Harbor, etc., Co. *v.* Smith, 85 Md. 537, 37 Atl. 27.

Massachusetts.—Wright *v.* Tukey, 3 Cush. 290.

Minnesota.— Mankato *v.* Warren, 20 Minn. 144; Mankato *v.* Meagher, 17 Minn. 265; Mankato *v.* Willard, 13 Minn. 13, 97 Am. Dec. 208; Wilder *v.* St. Paul, 12 Minn. 192.

Missouri.— Reid *v.* Board of Education, 73 Mo. 295.

Nebraska.— Pillsbury *v.* Alexander, 40 Nebr. 242, 58 N. W. 859.

South Dakota.— Deadwood *v.* Whittaker, 12 S. D. 515, 81 N. W. 908.

Tennessee.— Roberts *v.* Columbia, etc., Turnpike Co., 98 Tenn. 133, 38 S. W. 587.

United States.— Cincinnati *v.* White, 6 Pet. 431, 8 L. ed. 452; Lownsdale *v.* Portland, 15 Fed. Cas. No. 8,578, Deady 1, 1 Oreg. 381.

See 15 Cent. Dig. tit. "Dedication," § 7.

54. Smith *v.* Smith, 34 Kan. 293, 8 Pac. 385; Lewis *v.* Portland, 25 Oreg. 133, 35 Pac. 256, 42 Am. St. Rep. 772, 22 L. R. A. 736; Lownsdale *v.* Portland, 15 Fed. Cas. No. 8,579, Deady 39, 1 Oreg. 397; Chapman *v.* Portland School Dist. No. 1, 5 Fed. Cas. No. 2,608, Deady 139; Rae *v.* Trim, 27 Grant Ch. (U. C.) 374.

55. Getchell *v.* Benedict, 57 Iowa 121, 10 N. W. 321; Mankato *v.* Willard, 13 Minn. 13, 97 Am. Dec. 208; Deadwood *v.* Whittaker, 12 S. D. 515, 81 N. W. 908.

56. Niles *v.* Los Angeles, 125 Cal. 572, 58 Pac. 190; Pierce *v.* Roberts, 57 Conn. 31, 17 Atl. 275; Clark *v.* Providence, 10 R. I. 437; Gate City *v.* Richmond, 97 Va. 337, 33 S. E. 615.

Manner of consent or concurrence.— The several owners of different interests or estates need not, in order to make a dedication good, concur in one act or act in the same way; it is necessary only that in some way they shall have all together or separately shown their intention to dedicate. See Longworth *v.* Sedevic, 165 Mo. 221, 65 S. W. 260; Schenley *v.* Com., 36 Pa. St. 29, 78 Am. Dec. 359; Rex *v.* Barr, 4 Campb. 16, 15 Rev. Rep. 721; Vernon *v.* St. James, 49 L. J. Ch. 130, 42 L. T. Rep. N. S. 82.

57. Bright *v.* Palmer, 47 S. W. 590, 20 Ky. L. Rep. 771.

58. Hays *v.* Perkins, 109 Mo. 102, 18 S. W. 1127.

59. Baker *v.* Chester Gas Co., 73 Pa. St. 116.

60. For private ways see EASEMENTS.

So intimately connected is the law of dedication with the law of highways that in old English digests the subject of Dedication is a subtitle under the title Ways. See 9 Jacob Fisher Dig. col. 13426.

61. There are three English cases generally referred to as the first English cases recognizing the law of dedication. Rex *v.* Hudson, 2 Str. 909 (where the chief justice held that leaving a way open for four years from 1728 to 1732 would not be long enough "to amount to a gift of it to the public"); Lade *v.* Shepherd, 2 Str. 1004 (where defendant had put a bridge from his property across a ditch to and on an alleged road, the court said simply: "It is certainly a dedication to the public, so far as the public has occasion for it, which is only for a right of passage; but it never was understood to be a transfer of the absolute property in the soil"); Rugby Charity *v.* Merryweather, 11 East 376 note *a*, 10 Rev. Rep. 528 (where the court said: "All that time [about eight years] they permitted the public at large to

gradually extended to all kinds of public easements, such as squares, parks, wharves, etc.,[62] and has been held to include even privileges of a semi-public character, such as those in churches and cemeteries.[63] A dedication may indeed be made for any use of a nature which the general public can enjoy,[64] but the doctrine has no application to uses the public cannot enjoy.[65] Under miscellaneous public uses for which land may be dedicated, some of which might perhaps be classified under subsequent heads, may be mentioned a "college green,"[66] a "training ground,"[67] a "mews,"[68] a "resort for air and exercise,"[69] a "lake,"[70] a "ford over a stream,"[71] a "stream for public use,"[72] as for example, to be turned into a

have the free use of this way, without any impediment whatever; and therefore it is now too late to assert the right; for this is quite a sufficient time for presuming a dereliction of the way to the public. In a great case, which was much contested, six years was held sufficient"). This last case was affirmed in the case of Bateman *v.* Bluch, 18 Q. B. 870, 17 Jur. 386, 21 L. J. Q. B. 406, 83 E. C. L. 870, 14 Eng. L. & Eq. 69, 72, where Lord Campbell says: "There may be a large square with only one entrance to it, and if the owner allows the public to use it without restriction for a great many years, he cannot afterwards turn round and say they were all trespassers." Dovaston *v.* Payne, 2 H. Bl. 527, 3 Rev. Rep. 497, 2 Smith Lead. Cas. 1388, is annotated as the leading English case.

The supreme court of the United States in its early history recognized the doctrine of dedication as a common-law doctrine, and referred to the above early English cases, as will be seen in the following quotation: "The land, therefore, must have passed out of the donors, if at all, without a grantee, by way of public appropriation or dedication to pious uses. In this respect it would form an exception to the generality of the rule, that to make a grant valid there must be a person *in esse* capable of taking it. . . . Nor is this a novel doctrine in the common law. In the familiar case where a man lays out a public street or highway, there is, strictly speaking, no grantee of the easement, but it takes effect by way of grant or dedication, to public uses." Pawlet *v.* Clark, 9 Cranch 292, 331, 3 L. ed. 735. See also New Orleans *v.* U. S., 10 Pet. 662, 9 L. ed. 573; Barclay *v.* Howell, 6 Pet. 498, 8 L. ed. 477; Cincinnati *v.* White, 6 Pet. 431, 8 L. ed. 452; Beatty *v.* Kurtz, 2 Pet. 566, 7 L. ed. 521.

62. See *infra*, IV, B *et seq.*

63. See *infra*, IV, B. In New Orleans *v.* U. S., 10 Pet. (U. S.) 662, 9 L. ed. 573, the principle was applied to quays along the Mississippi, and its applicability to pious uses and to places of public amusement or business was asserted. The doctrine reached its extreme limit when applied to preserve the single tomb of Mary Washington. Colbert *v.* Shepherd, 89 Va. 401, 16 S. E. 246.

64. *Iowa.*— Scott *v.* Des Moines, 64 Iowa 438, 20 N. W. 752.

Michigan.— Baker *v.* Johnston, 21 Mich. 319.

New Jersey.— Lennig *v.* Ocean City Assoc., 41 N. J. Eq. 606, 7 Atl. 491, 56 Am. Rep. 16.

New York.— Pearsall *v.* Post, 20 Wend. 111 [*affirmed* in 22 Wend. 425].

Rhode Island.— Mowry *v.* Providence, 10 R. I. 52.

Wisconsin.— Trerice *v.* Barteau, 54 Wis. 99, 11 N. W. 244; Tupper *v.* Huson, 46 Wis. 646, 1 N. W. 332.

United States.— New Orleans *v.* U. S., 10 Pet. 662, 9 L. ed. 573; Beatty *v.* Kurtz, 2 Pet. 566, 7 L. ed. 521; McConnell *v.* Lexington, 12 Wheat. 582, 6 L. ed. 735; Pawlet *v.* Clark, 9 Cranch 292, 3 L. ed. 735.

A religious use is a public use. Wyandotte County *v.* Wyandotte First Presb. Church, 30 Kan. 620, 1 Pac. 109.

65. See *infra*, IV, I. "A right like that to use a landing place upon the shore of navigable waters for depositing articles, such as wood and the like, cannot be claimed for the public, nor for all the inhabitants of a State, by prescription or custom" (Washburn Easem. (3d ed. 122), because from the nature of such user it must be confined to a few, for such use by a few would prevent others from using it at all (Thomas *v.* Ford, 63 Md. 346, 354, 52 Am. Rep. 513; Cortelyou *v.* Van Brundt, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439; Pearsall *v.* Post, 20 Wend. (N. Y.) 111). A railroad company, although a public servant, could not acquire rights by common-law dedication. Lake Erie, etc., R. Co. *v.* Whitham, 155 Ill. 514, 40 N. E. 1014, 46 Am. St. Rep. 355, 28 L. R. A. 612.

66. State *v.* Catlin, 3 Vt. 530, 23 Am. Dec. 230.

67. Mowry *v.* Providence, 10 R. I. 52.

68. Vernon *v.* St. James, 49 L. J. Ch. 130, 42 L. T. Rep. N. S. 82.

69. Schwinge *v.* Dowell, 2 F. & F. 845.

"Purpose of recreation" see Tyne Imp. Com'rs *v.* Imrie, 81 L. T. Rep. N. S. 174.

"Bathing ground" see Atlantic City *v.* Atlantic City Steel Pier Co., 62 N. J. Eq. 139, 49 Atl. 822.

"Light, air, and view of sea" see Atty.-Gen. *v.* Vineyard Grove Co., 181 Mass. 507, 64 N. E. 75.

70. De Long *v.* Spring Lake, etc., Co., 65 N. J. L. 1, 47 Atl. 491; Gillean *v.* Frost, 25 Tex. Civ. App. 371, 61 S. W. 345.

71. Compton *v.* Waco Bridge Co., 62 Tex. 715.

72. Shaw *v.* Crawford, 10 Johns. (N. Y.) 236; Weynand *v.* Lutz, (Tex. Civ. App. 1895) 29 S. W. 1097.

public canal,[73] a "spring,"[74] a "camp-meeting ground,"[75] and a right to have land unbuilt upon for the purpose of light, air, and a view of the sea.[76] Apparently sewers may be dedicated to public use;[77] but the dedication of a street does not carry the private sewer pipes laid in it.[78]

B. Religious and Pious Uses. Whether, because recognized under 43 Eliz. c. 4,[79] or under the general principles of equity relating to charitable uses;[80] or because in a civilized community a religious use is in its very nature a public use,[81] it has invariably been held that land may be dedicated to pious or religious uses,[82] without a grantee in being to take,[83] and although the proposed beneficiaries were a limited class of the public.[84] Thus land may be dedicated for churches,[85] burial-grounds,[86] cemeteries,[87] or tombs,[88] even though limited to the use of a particular sect.[89]

73. People *v.* Williams, 64 Cal. 498, 2 Pac. 393; Delaney *v.* Boston, 2 Harr. (Del.) 489.

74. Oswald *v.* Grenet, 22 Tex. 94; Smith *v.* Cornelius, 41 W. Va. 59, 23 S. E. 599, 30 L. R. A. 747; Raleigh County *v.* Ellison, 8 W. Va. 308; McConnell *v.* Lexington, 12 Wheat. (U. S.) 582, 6 L. ed. 735.

75. Lennig *v.* Ocean City Assoc., 41 N. J. Eq. 606, 7 Atl. 491, 56 Am. Rep. 16.

76. Atty.-Gen. *v.* Vineyard Grove Co., 181 Mass. 507, 64 N. E. 75.

77. Oak Cliff Sewerage Co. *v.* Marsalis, 30 Tex. Civ. App. 42, 69 S. W. 176.

78. Hugh *v.* Haigh, 69 Iowa 382, 28 N. W. 650; Davis *v.* Clinton, 58 Iowa 389, 10 N. W. 768; Kruger *v.* La Blanc, 70 Mich. 76, 37 N. W. 880; Coleman *v.* Flint, etc., R. Co., 64 Mich. 160, 31 N. W. 47; Bumpus *v.* Miller, 4 Mich. 159; Harrison County *v.* Seal, 66 Miss. 129, 5 So. 622, 14 Am. St. Rep. 545, 3 L. R. A. 659.

79. "To this extent, at least, it [the Maryland bill of rights] recognizes the doctrines of the statute of Elizabeth for charitable uses, under which it is well known that such uses would be upheld, although there were no specific grantee or trustee." Beatty *v.* Kurtz, 2 Pet. (U. S.) 566, 583, 7 L. ed. 521, opinion of Story, J.

80. See CHARITIES, 6 Cyc. 895 *et seq.*

81. Wyandotte County *v.* Wyandotte First Presb. Church, 30 Kan. 620, 1 Pac. 109; Hannibal *v.* Draper, 15 Mo. 634.

82. *Illinois.*— Davidson *v.* Reed, 111 Ill. 167, 53 Am. Rep. 613.

Indiana.— Redwood Cemetery Assoc. *v.* Bandy, 93 Ind. 246.

Kentucky.— Griffey *v.* Bryars, 7 Bush 471.

Maryland.— Boyee *v.* Kalbaugh, 47 Md. 334, 28 Am. Rep. 464.

New Jersey.— Stockton *v.* Newark, 42 N. J. Eq. 531, 9 Atl. 203.

New York.— Cooper *v.* Sandy Hill First Presb. Church, 32 Barb. 222; Still *v.* Lansingburgh, 16 Barb. 107; Pearsall *v.* Post, 20 Wend. 111 [*affirmed* in 22 Wend. 425].

Rhode Island.— Mowry *v.* Providence, 10 R. I. 52.

Texas.— Atkinson *v.* Bell, 18 Tex. 474.

United States.— Cincinnati *v.* White, 6 Pet. 431, 8 L. ed. 452; Beatty *v.* Kurtz, 2 Pet. 566, 7 L. ed. 521; Pawlet *v.* Clark, 9 Cranch 292, 3 L. ed. 735; Young *v.* Mahoning County, 51 Fed. 585.

See 15 Cent. Dig. tit. "Dedication," § 1.

83. Redwood Cemetery Assoc. *v.* Bandy, 93 Ind. 246.

Equity will not allow a grant of land for cemetery purposes to fail, because granted to a community unable as such to receive it and because the description of the grantees is too indefinite to confer any title on the individual members of the community, but will appoint trustees to control the property for the purposes specified, unless such control is placed elsewhere by statute. Hunt *v.* Tolles, 75 Vt. 48, 52 Atl. 1042.

84. For example a Lutheran church (Beatty *v.* Kurtz, 2 Pet. (U. S.) 566, 7 L. ed. 521); a Presbyterian church (Wyandotte *v.* Wyandotte First Presb. Church, 30 Kan. 620, 1 Pac. 109); the tomb of Mary Washington (Colbert *v.* Shepherd, 89 Va. 401, 16 S. E. 246), or some particular class or society (McKinney *v.* Griggs, 5 Bush (Ky.) 401, 96 Am. Dec. 360). And see Mowry *v.* Providence, 10 R. I. 52.

85. Still *v.* Lansingburgh, 16 Barb. (N. Y.) 107. And see cases cited *supra*, note 84.

86. Mowry *v.* Providence, 10 R. I. 52. But the owner of land upon which is a graveyard who permits his neighbors to use the same as a burial-ground is not estopped from the exclusive use of such land, upon the ground that the same has been dedicated for public use. This right is merely permissory and the granting thereof does not amount to a dedication. Brown *v.* Gunn, 75 Ga. 441.

87. *Illinois.*— Davidson *v.* Reed, 111 Ill. 167, 53 Am. Rep. 613.

Indiana.— Redwood Cemetery Assoc. *v.* Bandy, 93 Ind. 246.

Maryland.— Boyee *v.* Kalbaugh, 47 Md. 334, 28 Am. Rep. 464.

Missouri.— Kansas City *v.* Scarritt, 169 Mo. 471, 69 S. W. 283.

Nebraska.— Pawnee City First Nat. Bank *v.* Hazels, 63 Nebr. 844, 89 N. W. 378, 56 L. R. A. 765.

New Jersey.— Stockton *v.* Newark, 42 N. J. Eq. 531, 9 Atl. 203.

New York.— Hunter *v.* Sandy Hill, 6 Hill 407.

Pennsylvania.— Pott *v.* Pottsville, 42 Pa. St. 132.

Vermont.— Hunt *v.* Tolles, 75 Vt. 48, 52 Atl. 1042.

88. Colbert *v.* Shepherd, 89 Va. 401, 16 S. E. 246.

89. See cases cited *supra*, note 84.

C. Highways, Streets, and Alleys. Highways, streets, and alleys may be dedicated to the public.[90] So a road or street which is a mere *cul de sac* may be dedicated to the public use in the same manner as a thoroughfare,[91] although this seems to have been doubted formerly.[92] So the dedication of a street generally carries with it the right to a sidewalk,[93] and the dedication of a footway may carry with it a bordering carriage-drive.[94] Special ways may be dedicated, such as a path along a canal,[95] a footway over a railroad bridge,[96] or a path along the surface of a sea wall, erected to protect the neighboring lands from the waters.[97] There is practically no difference in the rules applicable to a street and to an alley;[98] and the principles governing the dedication are the same whether the dedication be of a country road or a city street; but the weight of facts like public user,[99] non-inclosure,[1] as evidence of dedication, is much greater in the case of a city street where lots are small and land valuable, than in the country where land is in the state of nature, is held in great tracts, or is not inhabited.[2]

90. *Alabama.*— Steele *v.* Sullivan, 70 Ala. 589; Sultzner *v.* State, 43 Ala. 24.
Connecticut.— Noyes *v.* Ward, 19 Conn. 250.
Illinois.— Grube *v.* Nichols, 36 Ill. 92; Daniels *v.* People, 21 Ill. 439.
Indiana.— Green *v.* Elliott, 86 Ind. 53.
Iowa.— Wilson *v.* Sexon, 27 Iowa 15.
Kansas.— City Cemetery Assoc. *v.* Meninger, 14 Kan. 312.
Massachusetts.— Valentine *v.* Boston, 22 Pick. 75, 33 Am. Dec. 711; Hobbs *v.* Lowell, 19 Pick. 405, 31 Am. Dec. 145.
Missouri.— Garnett *v.* Slater, 56 Mo. App. 207; Bailey *v.* Culver, 12 Mo. App. 175.
Nebraska.— State *v.* Otoe County Com'rs, 6 Nebr. 129.
New Hampshire.— State *v.* Atherton, 16 N. H. 203.
New Jersey.— Smith *v.* State, 23 N. J. L. 712 [*affirming* 23 N. J. L. 130]; Holmes *v.* Jersey City, 12 N. J. Eq. 299.
Oregon.— Douglas County Road Co. *v.* Abraham, 5 Oreg. 318.
Pennsylvania.— Pittsburg, etc., R. Co. *v.* Dunn, 56 Pa. St. 280.
See 15 Cent. Dig. tit. "Dedication," § 2.
This is the most common use to which the doctrine of dedication applies. See *supra*, IV, A.

91. *California.*— Stone *v.* Brooks, 35 Cal. 489; Sherman *v.* Buick, 32 Cal. 241, 91 Am. Dec. 577.
Indiana.— Adams *v.* Harrington, 114 Ind. 66, 14 N. E. 603.
Kansas.— City Cemetery Assoc. *v.* Meninger, 14 Kan. 312; Masters *v.* McHolland, 12 Kan. 17.
Maine.— Bartlett *v.* Bangor, 67 Me. 460.
Maryland.— Baltimore *v.* Broumel, 86 Md. 153, 37 Atl. 648.
Michigan.— People *v.* Jackson, 7 Mich. 432, 74 Am. Dec. 729.
Minnesota.— Hanson *v.* Eastman, 21 Minn. 509.
New Jersey.— State *v.* Bishop, 39 N. J. L. 226.
New York.— People *v.* Kingman, 24 N. Y. 559.
Pennsylvania.—Smith *v.* Union Switch, etc., Co., 31 Pittsb. Leg. J. N. S. 21.
Rhode Island.— Greene *v.* O'Connor, 18 R. I. 56, 25 Atl. 692, 19 L. R. A. 262.
Wisconsin.— Schatz *v.* Pfeil, 56 Wis. 429, 14 N. W. 628; Moll *v.* Benckler, 30 Wis. 584.
England.— Bateman *v.* Bluck, 18 Q. B. 870, 17 Jur. 386, 21 L. J. Q. B. 406, 14 Eng. L. & Eq. 69, 83 E. C. L. 870; Reg. *v.* Burney, 31 L. T. Rep. N. S. 828.

92. Jordan *v.* Otis, 37 Barb. (N. Y.) 50; Simmons *v.* Mumford, 2 R. I. 172; Wood *v.* Veal, 5 B. & Ald. 454, 1 D. & R. 20, 24 Rev. Rep. 454, 7 E. C. L. 250; Woodyer *v.* Hadden, 5 Taunt. 125, 14 Rev. Rep. 706, 1 E. C. L. 74.

93. Stevens *v.* Nashua, 46 N. H. 192; Pomfrey *v.* Saratoga Springs, 104 N. Y. 459, 11 N. E. 43 [*affirming* 34 Hun 607].
Dedication of sidewalk.— The principles governing the dedication of land to public use for a street are equally applicable to the dedication of land to public use for sidewalks or pavements in towns. Boughner *v.* Clarksburg, 15 W. Va. 394.

94. Atty.-Gen. *v.* Esher Linoleum Co., [1901] 2 Ch. 647, [1901] W. N. 173, 70 L. J. Ch. 808, 85 L. T. Rep. N. S. 414, 50 Wkly. Rep. 22.

95. Grand Junction Canal Co. *v.* Petty, 21 Q. B. Div. 273, 52 J. P. 692, 57 L. J. Q. B. 572, 59 L. T. Rep. N. S. 767, 36 Wkly. Rep. 795.

96. Kentucky Cent. R. Co. *v.* Paris, 95 Ky. 627, 27 S. W. 84, 16 Ky. L. Rep. 170.
"Gangway" see Baker *v.* Barry, 22 R. I. 471, 48 Atl. 795.

97. Greenwich Dist. *v.* Maudslay, L. R. 5 Q. B. 397, 39 L. J. Q. B. 205, 23 L. T. Rep. N. S. 121, 18 Wkly. Rep. 948.

98. Van Witsen *v.* Gutman, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403.

99. Existence of Indian trail and subsequent travel of citizens over such trail do not show dedication. Russell *v.* State, 3 Coldw. (Tenn.) 119.

1. "A man cannot lose the title to his lands by leaving them in their natural state." Boston *v.* Lecraw, 17 How. (U. S.) 426, 15 L. ed. 118.

2. *California.*— Harding *v.* Jasper, 14 Cal. 642.
Illinois.— Herhold *v.* Chicago, 108 Ill. 467.

D. Squares, Parks, and Public Commons. The full applicability of the doctrine of dedication to parks and public squares and commons is now generally recognized,[3] and where land is dedicated for a public square without any specific designation of the uses to which it can be put, it will be presumed to have been dedicated for such appropriate uses as would under user and custom be deemed to have been fairly in contemplation at the time of the dedication.[4] A dedication of a square for public buildings can only be used for that purpose — no other use will be permitted.[5] And where a public square is dedicated to be used for the erection of a designated kind of building no other kind of building can be erected thereon.[6] Where the use of a block on a plat is not designated but the declarations of the proprietor made at the time of the dedication show that it should remain an open public square public buildings cannot be placed thereon.[7] So it has been held that a city cannot run streets through a public square.[8]

E. Schools and Educational Uses. Dedications for school or educational uses, although not very common, are generally recognized, partly because such uses are public uses, but generally under statutes.[9]

F. Railroad Tracks, Depots, and Crossings. A railroad company, although a quasi-public corporation, cannot take by dedication except under statutes allowing dedications to individuals and corporations.[10] It may, however,

Louisiana.— Vicksburg, etc., R. Co. *v.* Monroe, 48 La. Ann. 1102, 20 So. 664.

New York.—Strong *v.* Brooklyn, 68 N. Y. 1.

Ohio.— Boeres *v.* Strader, 1 Cinc. Super. Ct. 57.

Texas.— San Antonio *v.* Sullivan, 4 Tex. Civ. App. 451, 23 S. W. 307.

Vermont.— Morse *v.* Ranno, 32 Vt. 600.

United States.— Boston *v.* Lecraw, 17 How. 426, 15 L. ed. 118.

England.— Chapman *v.* Cripps, 2 F. & F. 864.

Canada.— Reg. *v.* Deane, 7 N. Brunsw. 233.

3. *California.*— Amador County *v.* Gilbert, 133 Cal. 51, 65 Pac. 130; San Leandro *v.* Le Breton, 72 Cal. 170, 13 Pac. 405; Hoadley *v.* San Francisco, 50 Cal. 265.

Georgia.— Macon *v.* Franklin, 12 Ga. 239.

Illinois.— Alton *v.* Illinois Transp. Co., 12 Ill. 38, 52 Am. Dec. 479.

Indiana.— Doe *v.* Attica, 7 Ind. 641.

Iowa.— Youngerman *v.* Polk County, 110 Iowa 731, 81 N. W. 166; Scott *v.* Des Moines, 64 Iowa 438, 20 N. W. 752; Pella *v.* Scholte, 24 Iowa 283, 95 Am. Dec. 729 ("grand square"); Warren *v.* Lyons, 22 Iowa 351.

Louisiana.— Xiques *v.* Bujac, 7 La. Ann. 498.

Maryland.— Steuart *v.* Baltimore, 7 Md. 500; White *v.* Flannigain, 1 Md. 525, 54 Am. Dec. 668; Howard *v.* Rogers, 4 Harr. & J. 278.

Massachusetts.— Atty.-Gen. *v.* Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251, annotated.

Michigan.— Cass County Sup'rs *v.* Banks, 44 Mich. 467, 7 N. W. 49.

Minnesota.— Hennepin County Com'rs *v.* Dayton, 17 Minn. 260; Mankato *v.* Willard, 13 Minn. 13, 97 Am. Dec. 208.

Missouri.— Cummings *v.* St. Louis, 90 Mo. 259, 2 S. W. 130; Rutherford *v.* Taylor, 38 Mo. 315.

New Jersey.— De Long *v.* Spring Lake, etc., Co., 65 N. J. L. 1, 47 Atl. 491; Price *v.* Plainfield, 40 N. J. L. 608; Hoboken M. E. Church *v.* Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696 ("square" defined); Atlantic City *v.* Atlantic City Steel Pier Co., 62 N. J. Eq. 139, 49 Atl. 822; Haskell *v.* Wright, 23 N. J. Eq. 389.

New York.— New York *v.* Stuyvesant, 17 N. Y. 34; Ward *v.* Davis, 3 Sandf. 502, terrace along stream.

Ohio.— Le Clercq *v.* Gallipolis, 7 Ohio 217, 28 Am. Dec. 641.

Oregon.— Carter *v.* Portland, 4 Oreg. 339.

Pennsylvania.— Mahon *v.* Luzerne County, 197 Pa. St. 1, 46 Atl. 894; Baird *v.* Rice, 63 Pa. St. 489.

Texas.— State *v.* Travis County, 85 Tex. 435, 21 S. W. 1029; Lamar County *v.* Clements, 49 Tex. 347 ("public square"); Llano *v.* Llano County, 5 Tex. Civ. App. 132, 23 S. W. 1008.

Vermont.— State *v.* Atkinson, 24 Vt. 448.

West Virginia.— Sturmer *v.* Randolph County Ct., 42 W. Va. 724, 26 S. E. 532, 36 L. R. A. 300.

4. Com. *v.* Beaver Borough, 171 Pa. St. 542, 33 Atl. 112.

5. Campbell County Ct. *v.* Newport, 12 B. Mon. (Ky.) 538.

6. Harris County *v.* Taylor, 58 Tex. 690; Llano *v.* Llano County, 5 Tex. Civ. App. 132, 23 S. W. 1008; Frederick County *v.* Winchester, 84 Va. 467, 4 S. E. 844.

7. Princeville *v.* Auten, 77 Ill. 325.

8. Price *v.* Thompson, 48 Mo. 361.

9. Carpenteria School Dist. *v.* Heath, 56 Cal. 478; Chapman *v.* Floyd, 68 Ga. 455; Board of Education *v.* Kansas City, 62 Kan. 374, 63 Pac. 600; Johnson County School Dist. No. 2 *v.* Hart, 3 Wyo. 563, 27 Pac. 919, 29 Pac. 741.

10. Elyton Land Co. *v.* South Alabama, etc., R. Co., 95 Ala. 631, 10 So. 270; Lake Erie, etc., R. Co. *v.* Whitham, 155 Ill. 514, 40 N. E. 1014, 46 Am. St. Rep. 355, 28 L. R. A. 612; McWilliams *v.* Morgan, 61 Ill. 89; Louisville, etc., R. Co. *v.* Stephens, 96 Ky. 401, 29 S. W. 14, 16 Ky. L. Rep. 552, 49 Am.

acquire rights of way and rights for its depots by statutory dedication.[11] In some cases analogous rights have been held to have been acquired by railroads through estoppel.[12] Railroads, however, can make dedications, and it is well settled that they can dedicate to the public the right of crossing their tracks.[13] When evidence of its intent to dedicate consists of its planking a way over the tracks the width of the crossing is limited to the planking.[14] The fact that a railroad has dedicated a crossing does not interfere with its right to lay an additional track.[15]

G. Wharves and Landing-Places. The owner of the soil can dedicate the soil to the public for the use of a landing-place or wharf.[16] The difficulties met

St. Rep. 303; Southern R. Co. *v.* Standiford, 53 S. W. 668, 21 Ky. L. Rep. 1023; Todd *v.* Pittsburg, etc., R. Co., 19 Ohio St. 514.

11. Illinois Cent. R. Co. *v.* Indiana, etc., R. Co., 85 Ill. 211; McWilliams *v.* Morgan, 61 Ill. 89; Noblesville *v.* Lake Erie, etc., R. Co., 130 Ind. 1, 29 N. E. 484; Ritchie *v.* Kansas, etc., R. Co., 55 Kan. 36, 39 Pac. 718; Pennsylvania R. Co. *v.* Ayres, 50 N. J. L. 660, 14 Atl. 901 [*affirming* 48 N. J. L. 44, 3 Atl. 885, 57 Am. Rep. 538].

12. Evans *v.* Savannah, etc., R. Co., 90 Ala. 54, 7 So. 758; Minneapolis Mill Co. *v.* Minneapolis, etc., R. Co., 46 Minn. 330, 48 N. W. 1132; Venable *v.* Wabash Western R. Co., 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68.

13. *Delaware.*— Ogle *v.* Philadelphia, etc., R. Co., 3 Houst. 302.

Georgia.— Atlanta R., etc., Co. *v.* Atlanta Rapid Transit Co., 113 Ga. 481, 39 S. E. 12; Brunswick, etc., R. Co. *v.* Waycross, 91 Ga. 573, 17 S. E. 674.

Illinois.— Illinois Cent. R. Co. *v.* People, 49 Ill. App. 538.

Indiana.— Lake Erie, etc., R. Co. *v.* Boswell, 137 Ind. 336, 36 N. E. 1103.

Kentucky.—Louisville, etc., R. Co. *v.* Sonne, 53 S. W. 274, 21 Ky. L. Rep. 848.

Maryland.— Ogle *v.* Cumberland, 90 Md. 59, 44 Atl. 1015, as where a railroad laid out a public road crossing under its tracks.

Minnesota.— St. Paul, etc., R. Co. *v.* Minneapolis, 44 Minn. 149, 46 N. W. 324.

New Jersey.— State *v.* Bayonne, 52 N. J. L. 503, 20 Atl. 69; New York, etc., R. Co. *v.* Drummond, 46 N. J. L. 644, 45 N. J. L. 511.

West Virginia.— Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155.

United States.— Northern Pac. R. Co. *v.* Spokane, 56 Fed. 915.

How made.— A dedication by a railroad company, to bind the corporation beyond revocation, must be made by the directors or recognized by them or by such public use as to justify the inference of ratification. Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155.

14. New York, etc., R. Co. *v.* Drummond, 45 N. J. L. 511, 46 N. J. L. 644.

Establishing place for hacks at depot is no evidence of intent to dedicate to public. Williams *v.* New York, etc., R. Co., 39 Conn. 509.

15. Brunswick, etc., R. Co. *v.* Waycross, 91 Ga. 573, 17 S. E. 674.

16. *California.*— California Nav., etc., Co. *v.* Union Transp. Co., 126 Cal. 433, 58 Pac. 936, 46 L. R. A. 825; San Francisco *v.* Calderwood, 31 Cal. 585 91 Am. Dec. 542.

Iowa.— Grant *v.* Davenport, 18 Iowa 179.

Kentucky.— Newport *v.* Taylor, 16 B. Mon. 699.

Louisiana.— Barrett *v.* New Orleans, 13 La. Ann. 105; Municipality No. 2 *v.* Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624.

Massachusetts.— Coolidge *v.* Learned, 8 Pick. 504.

Minnesota.— Mankato *v.* Willard, 13 Minn. 13, 97 Am. Dec. 208.

Missouri.— Whyte *v.* St. Louis, 153 Mo. 80, 54 S. W. 478 (common-law dedication by call in deed); Moses *v.* St. Louis Sectional Dock Co., 84 Mo. 242.

New Jersey.—O'Neill *v.* Annett, 27 N. J. L. 290, 72 Am. Dec. 364.

New York.— Child *v.* Chappell, 9 N. Y. 246.

Oregon.— Lewis *v.* Portland, 25 Oreg. 133, 35 Pac. 256, 42 Am. St. Rep. 772, 22 L. R. A. 736.

Pennsylvania.— Ball *v.* Slack, 2 Whart. 508, 30 Am. Dec. 278; Cooper *v.* Smith, 9 Serg. & R. 26, 11 Am. Dec. 658.

United States.— New Orleans *v.* U. S., 10 Pet. 662, 9 L. ed. 573.

England.—Blundell *v.* Catterall, 5 B. & Ald. 268, 24 Rev. Rep. 353, 7 E. C. L. 152.

"In the litigation arising in towns on the Mississippi and Ohio rivers, questions relating to the dedication and use of the river bank or front as a landing for the convenience of river commerce have been considered and decided on the theory that a dedication of such ground to public use implies and vests in the public a right to use the same as a highway, quay, landing, or levee, without any grantee being named or in existence; and that the legislature, as the representative of the general public, may regulate such use, and promote the same by the improvement of the premises, directly or through the agency of the corporation within whose limits the same are situated. Godfrey *v.* Alton, 12 Ill. 29, 52 Am. Dec. 476; Rowan *v.* Portland, 8 B. Mon. (Ky.) 232; Gardiner *v.* Tisdale, 2 Wis. 153, 60 Am. Dec. 407; New Orleans *v.* U. S., 10 Pet. (U. S.) 662, 9 L. ed. 573; Barclay *v.* Howell, 6 Pet. (U. S.) 498, 8 L. ed. 477; Cincinnati *v.* White, 6 Pet. (U. S.) 431, 8 L. ed. 452. And when, as in this case, the dedication is unconditionally made to a public use, as a levee or landing-place, no formal acceptance of the same is necessary; nor does the existence or continuance of the easement depend on the extent of the use or improvement of the premises, or that they are used or improved at all; and it is even doubtful if the same can be lost by the adverse

in a case of this kind arise from the different rules as to the ownership of the soil along navigable and non-navigable rivers.[17] The establishment of a wharf or landing-place which is used by the public is perfectly consistent with private ownership, and there is no such presumption from so doing of the owner's intent to dedicate.[18] The right to use a landing-place for depositing articles, such as wood and the like, is one of the uses which cannot be claimed for the general public,[19] and a claim of a right to deposit fertilizers or other offensive materials would be doubly bad because unreasonable.[20]

H. Bridges. Some bridges have the characteristics of piers or wharves and such bridges may be dedicated under principles applicable to wharves.[21] But as a rule bridges are parts of ways and are so regarded.[22] Public bridges are thus a part of public highways and may be dedicated just as highways may be dedicated.[23] A bridge may be built and dedicated to the public use at once,[24] or a private bridge may become a public bridge by dedication.[25] A bridge is still a public bridge, although the use of it by the public be limited to certain times or certain emergencies.[26] Usually the rights and liabilities which arise out of bridges are the same as those which arise out of highways and streets.[27]

I. Uses Which Cannot be Created by Dedication. A dedication cannot be made for a use prohibited by statute[28] or for other than public uses.[29] Dedi-

occupation of the premises by private parties for any length of time. 2 Dillon Mun. Corp. (3d ed.) § 675." Coffin *v.* Portland, 27 Fed. 412, 416.

Implied dedication.— Whether there can be an implied dedication of land for a public landing where freight may be unloaded has been questioned. See California Nav., etc., Co. *v.* Union Transp. Co., 126 Cal. 433, 58 Pac. 936, 46 L. R. A. 825.

17. See California Nav., etc., Co. *v.* Union Transp. Co., 126 Cal. 433, 58 Pac. 936, 46 L. R. A. 825; O'Neill *v.* Annett, 27 N. J. L. 290, 72 Am. Dec. 364; Sage *v.* New York, 154 N. Y. 61, 47 N. E. 1096, 61 Am. St. Rep. 592, 38 L. R. A. 606 and note.

18. *Delaware.*— State *v.* Reybold, 5 Harr. 484.

Maine.— State *v.* Wilson, 42 Me. 9; Littlefield *v.* Maxwell, 31 Me. 134, 50 Am. Dec. 653; Bethum *v.* Turner, 1 Me. 111, 10 Am. Dec. 36.

Michigan.— Horn *v.* People, 26 Mich. 221.

New York.— Post *v.* Pearsall, 22 Wend. 425 [*affirming* 20 Wend. 111].

Oregon.— Lewis *v.* Portland, 25 Oreg. 133, 35 Pac. 256, 42 Am. St. Rep. 772, 22 L. R. A. 736.

Dedication of road along stream does not dedicate land for landing as well. California Nav., etc., Co. *v.* Union Transp. Co., 126 Cal. 433, 58 Pac. 936, 46 L. R. A. 825.

Presumptions see *infra*, VII, C.

19. Thomas *v.* Ford, 63 Md. 346, 52 Am. Rep. 513.

20. Post *v.* Pearsall, 22 Wend. (N. Y.) 425.

21. See *supra*, IV, G.

22. Chicago *v.* Powers, 42 Ill. 169, 89 Am. Dec. 418. And see BRIDGES, 5 Cyc. 1049.

23. *California.*— Sussman *v.* San Luis Obispo County, 126 Cal. 536, 59 Pac. 24.

Illinois.— Dayton Highway Com'rs *v.* Rutland Highway Com'rs, 84 Ill. 279, 25 Am. Rep. 457.

Kansas.— Eudora *v.* Miller, 30 Kan. 494, 2 Pac. 685.

Massachusetts.— Cambridge *v.* Charlestown Branch R. Co., 7 Metc. 70; Williams *v.* Cummington, 18 Pick. 312.

New Hampshire.— State *v.* Campton, 2 N. H. 513.

New York.— Dygert *v.* Schenck, 23 Wend. 446, 35 Am. Dec. 575.

Pennsylvania.— Erie *v.* Schwingle, 22 Pa. St. 384, 60 Am. Dec. 87.

Vermont.— Folsom *v.* Underhill, 36 Vt. 580.

England.— Rex *v.* Lindsey, 14 East 317, 12 Rev. Rep. 529; Grand Surrey Canal Co. *v.* Hall, 9 L. J. C. P. 329, 1 M. & G. 392, 1 Scott N. R. 264, 39 E. C. L. 818; Rex *v.* Kerrison, 3 M. & S. 526, 16 Rev. Rep. 342.

Canada.—Reg. *v.* Haldiniand County Corp., 38 U. C. Q. B. 396.

24. Sussman *v.* San Luis Obispo County, 126 Cal. 536, 59 Pac. 24; Springfield *v.* Hampden County Com'rs, 10 Pick. (Mass.) 59.

25. State *v.* Campton, 2 N. H. 513; Grand Surrey Canal Co. *v.* Hall, 9 L. J. C. P. 329, 1 M. & G. 392, 1 Scott N. R. 264, 39 E. C. L. 818.

26. Rex *v.* Buckingham, 4 Campb. 189; Rex *v.* Devon County, R. & M. 144, 21 E. C. L. 720.

Occasional participation by the public with the private proprietor of a bridge in the use of it does not necessarily render it a public bridge. Rex *v.* Bucks County, 12 East 192, 1 Salk. 359, 11 Rev. Rep. 347.

27. Eudora *v.* Miller, 30 Kan. 494, 2 Pac. 685; Erie *v.* Schwingle, 22 Pa. St. 384, 60 Am. Dec. 87; Beaver *v.* Manchester, 8 E. & B. 44, 4 Jur. N. S. 23, 26 L. J. Q. B. 311, 92 E. C. L. 44. And see BRIDGES, 5 Cyc. 1049.

28. Thus where the law prohibits streets of less than thirty feet in width, a street of less than the specified width cannot be dedicated. Philadelphia *v.* Ball, 147 Pa. St. 243, 23 Atl. 564.

29. Post *v.* Pearsall, 22 Wend. (N. Y.) 425 [*affirming* 20 Wend. 111].

cation is not a mode of conferring a private property right in land.[30] Not only must the use be intended for the whole public, but it must be a use which the whole public might possibly enjoy.[31] Everyone could use a highway, and its legitimate use by one person would not interfere with the use of it by others; but if one person deposited his goods in a particular place no one else could use that place; and so it has been held that the right to deposit wood or other goods cannot be a public use;[32] and the right to deposit manure is doubly objectionable because offensive and unreasonable.[33] For analogous reasons a right to fish in private waters cannot be created by dedication,[34] nor can the right of fishermen to build huts during the fishing season on shore near fishing grounds.[35] So the right to float logs down a stream in time of flood and thus endanger dams and riparian property cannot be a public use, because such right would be given to some to the damage of others.[36] Moreover a public use is a free use, so that a use dependent upon the payment of toll, like a toll-bridge,[37] or upon the payment of an annual rent, like a way, cannot be claimed by dedication.[38] Then the use must be a permanent one, and no use subject to expiration by limitation of time,[39] or by revocation,[40] can be dedicated at common law.

V. The Act of Dedication.

A. Introductory Statement. The act of dedication may be one act complete in itself as when contained in a deed,[41] or it may be equivocal, like opening a road without expressly stating for whose use;[42] or it may be negative or permissive, like suffering or permitting without objection a public user;[43] still it is always in the nature of an offer, because to be complete it must be actually or constructively accepted.[44] But whatever the nature of the act or acts relied on to create a dedication may be, it is the universal rule that the intention to dedicate (*animus dedicandi*) must also exist.[45] And the mere intention is not enough as there must be acts[46] accompanied by declarations of intention to dedicate, a mere declaration of future intent is not sufficient,[47] or the acts must themselves be such that

30. Elyton Land Co. *v.* South Alabama, etc., R. Co., 95 Ala. 631, 10 So. 270; Cobb *v.* Davenport, 33 N. J. L. 223, 97 Am. Dec. 718; Tupper *v.* Huson, 46 Wis. 646, 1 N. W. 332.

31. Thomas *v.* Ford, 63 Md. 346, 353, 52 Am. Rep. 513.

As to hotel site on plat see Hanes *v.* West End Hotel, etc., Co., 129 N. C. 311, 40 S. E. 114.

32. Thomas *v.* Ford, 63 Md. 346, 52 Am. Rep. 513.

33. Post *v.* Pearsall, 22 Wend. (N. Y.) 425.

34. Cobb *v.* Davenport, 33 N. J. L. 223, 97 Am. Dec. 718.

35. Cortelyou *v.* Van Brundt, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439.

36. Munson *v.* Hungerford, 6 Barb. (N. Y.) 265.

37. Rives *v.* Dudley, 56 N. C. 126, 67 Am. Dec. 231. And see BRIDGES, 5 Cyc. 1049.

38. Austerberry *v.* Oldham Corp., 29 Ch. D. 750, 49 J. P. 532, 55 L. J. Ch. 633, 53 L. T. Rep. N. S. 543, 33 Wkly. Rep. 807; Barraclough *v.* Johnson, 8 A. & E. 99, 2 Jur. 839, 7 L. J. Q. B. 172, 3 N. & P. 233, 35 E. C. L. 499.

39. Dawes *v.* Hawkins, 8 C. B. N. S. 848, 7 Jur. N. S. 262, 29 L. J. C. P. 343, 4 L. T. Rep. N. S. 288, 98 E. C. L. 848. And see *infra*, V, E, 3.

40. See, generally, *infra*, VIII, D, 1.

41. See *infra*, V, C, 3.

42. Gowen *v.* Philadelphia Exch. Co., 5 Watts & S. (Pa.) 141, 40 Am. Dec. 489; Biddle *v.* Ash, 2 Ashm. (Pa.) 211.

43. Harding *v.* Hale, 61 Ill. 192; O'Neill *v.* Annett, 27 N. J. L. 290, 72 Am. Dec. 364; Rozell *v.* Andrews, 10 N. Y. 150, 8 N. E. 513; Worth *v.* Dawson, 1 Sneed (Tenn.) 59. And see, generally, *infra*, VII, D, 4.

44. Steuart *v.* Baltimore, 7 Md. 500. And see *infra*, VI, A.

45. See *infra*, V, B.

46. Flack *v.* Green Island, 122 N. Y. 107, 25 N. E. 267; Yates *v.* West Grafton, 33 W. Va. 507, 11 S. E. 8; Mahler *v.* Brumder, 92 Wis. 477, 66 N. W. 502, 31 L. R. A. 695; Atty.-Gen. *v.* Biphosphated Guano Co., 11 Ch. D. 327, 49 L. J. Ch. 68, 40 L. T. Rep. N. S. 201, 37 Wkly. Rep. 621.

"As long as wanted."— An agreement of a landowner with his neighbors for a consideration to allow them to use certain of his lands as a highway "as long as it should be wanted" amounts to a dedication. Hugh *v.* Haigh, 69 Iowa 382, 28 N. W. 650.

47. *Illinois.*— Waggeman *v.* North Peoria, 42 Ill. App. 132.

Indiana.— New Albany *v.* Williams, 126 Ind. 1, 25 N. E. 187.

Kansas.—Boerner *v.* McKillip, 52 Kan. 508, 35 Pac. 5.

Massachusetts.— Brown *v.* Worcester, 13 Gray 31.

intention may be inferred.[48] The act of dedication need not be based upon any consideration.[49] Nor is any particular form necessary.[50]

B. Necessity of Intent to Dedicate. In order to constitute a valid dedication there must be an intention on the part of the owner to devote his property to the public use,[51] and the intention must be clearly and unequivocally manifested.[52] Nevertheless the intention to which courts give heed is not an intention hidden in the mind of the landowner, but an intention manifested by his acts.[53]

New York.— Rummel *v.* New York, etc., R. Co., 9 N. Y. Suppl. 404.

Ohio.— Cincinnati *v.* McMakin, 8 Ohio S. & C. Pl. Dec. 691.

48. See *infra*, VI, E, 5.

49. See Hoole *v.* Atty.-Gen., 22 Ala. 190; Rees *v.* Chicago, 38 Ill. 322; New York, etc., R. Co. *v.* Pixley, 19 Barb. (N. Y.) 428; Richards *v.* Cincinnati, 31 Ohio St. 506.

Public interests are sufficient consideration. Warren *v.* Jacksonville, 15 Ill. 236, 58 Am. Dec. 610.

50. See *infra*, V, C.

51. *Alabama.*— Harper *v.* State, 109 Ala. 66, 19 So. 901.

California.— California Nav., etc., Co. *v.* Union Transp. Co., 126 Cal. 433, 58 Pac. 936, 46 L. R. A. 825; Niles *v.* Los Angeles, 125 Cal. 572, 58 Pac. 190; Eureka *v.* McKay, 123 Cal. 666, 56 Pac. 439; People *v.* Dreher, 101 Cal. 271, 35 Pac. 867; Monterey *v.* Malarin, 99 Cal. 290, 33 Pac. 840.

Colorado.— Denver *v.* Jacobson, 17 Colo. 497, 30 Pac. 246; Starr *v.* People, 17 Colo. 458, 30 Pac. 64; Ward *v.* Farwell, 6 Colo. 66.

Connecticut.— Hartford *v.* New York, etc., R. Co., 59 Conn. 250, 22 Atl. 37; Williams *v.* New York, etc., R. Co., 39 Conn. 509; Riley *v.* Hammel, 38 Conn. 574.

Georgia.— Swift *v.* Lithonia, 101 Ga. 706, 29 S. E. 12.

Illinois.— Guttery *v.* Glenn, 201 Ill. 275, 66 N. E. 305; Moffett *v.* South Park Com'rs, 138 Ill. 620, 28 N. E. 975; Manrose *v.* Parker, 90 Ill. 581; Princeton *v.* Templeton, 71 Ill. 68; Chicago *v.* Wright, 69 Ill. 318; Havana *v.* Biggs, 58 Ill. 483; Gentleman *v.* Soule, 32 Ill. 271, 83 Am. Dec. 264; Marcy *v.* Taylor, 19 Ill. 634; Warren *v.* Jacksonville, 15 Ill. 236, 58 Am. Dec. 610; Chicago *v.* Thompson, 9 Ill. App. 524.

Indiana.— Shellhouse *v.* State, 110 Ind. 509, 11 N. E. 484; Tucker *v.* Conrad, 103 Ind. 349, 2 N. E. 803; Indianapolis *v.* Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; Mansur *v.* Haughey, 60 Ind. 364; Mansur *v.* State, 60 Ind. 357; Indianapolis, etc., R. Co. *v.* Indianapolis, 12 Ind. 620.

Iowa.— State *v.* Green, 41 Iowa 693.

Kentucky.— Hall *v.* McLeod, 2 Metc. 98, 74 Am. Dec. 400.

Louisiana.— De Grilleau *v.* Frawley, 48 La. Ann. 184, 19 So. 151; Shreveport *v.* Drouin, 41 La. Ann. 867, 6 So. 656; Carrollton R. Co. *v.* Municipality No. 2, 19 La. 62.

Maryland.— Lonaconing Midland, etc., R. Co. *v.* Consolidated Coal Co., 95 Md. 630, 53 Atl. 420.

Massachusetts.— Hayden *v.* Stone, 112 Mass. 346.

Michigan.— Ellsworth *v.* Grand Rapids, 27 Mich. 250; Lee *v.* Lake, 14 Mich. 12, 90 Am. Dec. 220; People *v.* Jones, 6 Mich. 176.

Minnesota.— Morse *v.* Zeize, 34 Minn. 35, 24 N. W. 287; Wilder *v.* St. Paul, 12 Minn. 192.

Missouri.— Missouri Institute, etc. *v.* How, 27 Mo. 211; Kansas City *v.* Ratekin, 30 Mo. App. 416.

Nebraska.— Langan *v.* Whalen, (1903) 93 N. W. 393; Close *v.* Swanson, 64 Nebr. 389, 89 N. W. 1043; Warren *v.* Brown, 31 Nebr. 8, 47 N. W. 633; Graham *v.* Hartnett, 10 Nebr. 517, 7 N. W. 280.

New Hampshire.— State *v.* Nudd, 23 N. H. 327.

New York.— Holdane *v.* Cold Spring, 21 N. Y. 474; McMannis *v.* Butler, 51 Barb. 436; Gould *v.* Glass, 19 Barb. 179.

Ohio.— Fulton *v.* Mehrenfeld, 8 Ohio St. 440.

Oregon.— Heiple *v.* East Portland, 13 Oreg. 97, 8 Pac. 907.

Pennsylvania.— *In re* Bellefield Ave., 2 Pa. Super. Ct. 148; *In re* Girard Ave., 18 Phila. 499; Scranton *v.* Griffin, 8 Leg. Gaz. 86.

Rhode Island.— Simmons *v.* Mumford, 2 R. I. 172.

Texas.— Oak Cliff Sewerage Co. *v.* Marsalis, 30 Tex. Civ. App. 42, 69 S. W. 176.

Vermont.— State *v.* Trask, 6 Vt. 355, 27 Am. Dec. 554.

Virginia.— Gate City *v.* Richmond, 97 Va. 337, 37 S. E. 615; Harris *v.* Com., 20 Gratt. 833.

West Virginia.— Miller *v.* Aracoma, 30 W. Va. 606, 5 S. E. 148; Walker *v.* Summers, 9 W. Va. 533; Pierpoint *v.* Harrisville, 9 W. Va. 215.

Wisconsin.— Tupper *v.* Huson, 46 Wis. 646, 1 N. W. 332.

United States.— Coburn *v.* San Mateo County, 75 Fed. 520; Ruch *v.* Rock Island, 20 Fed. Cas. No. 12,105, 5 Biss. 95.

See 15 Cent. Dig. tit. "Dedication," § 13.

52. *Nebraska.*— Graham *v.* Hartnett, 10 Nebr. 517, 7 N. W. 280.

New York.— McMannis *v.* Butler, 51 Barb. 436.

Pennsylvania.—*In re* Girard Ave., 18 Phila. 499.

Rhode Island.— Simmons *v.* Mumford, 2 R. I. 172.

Virginia.— Harris *v.* Com., 20 Gratt. 833.

West Virginia.— Miller *v.* Aracoma, 30 W. Va. 606, 5 S. E. 148; Pierpoint *v.* Harrisville, 9 W. Va. 215.

53. It is the intention which finds expression in conduct, and not that which is secreted in the heart of the owner, that the law re-

C. Form of Dedication at Common Law — 1. In General. No particular form is necessary to the validity of a common-law dedication and it need not be in writing,[54] as the statute of frauds has no application to the doctrine of dedication.[55] All that is necessary to the validity of a dedication is the assent and intent of the owner to appropriate it to public use,[56] and any act or acts clearly manifesting an intent to dedicate is sufficient.[57] Dedications have been established in every conceivable way by which the intent of the dedicator could be evinced.[58]

2. Oral Dedication. As already shown no writing is necessary to the validity of a dedication.[59] Express dedications may be made orally, when the use is inaugurated,[60] or while it is being enjoyed,[61] and may consist of declarations made directly to the public.[62] So a dedication may arise from statements made by the dedicator to individuals who rely upon them and acquire easements by estoppel or otherwise,[63] for it is a well-settled rule that where an individual acquires the right to

gards. Acts indicate the intention, and upon the intention clearly expressed by open acts and visible conduct the public and individual citizens may act. Indianapolis *v.* Kingsbury, 101 Ind. 200, 213, 51 Am. Rep. 749; Columbus *v.* Dahn, 36 Ind. 330.

The intent must be determined from the acts and statements of the landowner explanatory thereof, in connection with all the circumstances surrounding and throwing light upon the subject and not from what he may subsequently testify as to his real intention in relation to the matter. Columbus *v.* Dahn, 36 Ind. 330.

54. *Alabama.*—Forney *v.* Calhoun County, 84 Ala. 215, 4 So. 153.

California.— Harding *v.* Jasper, 14 Cal. 642.

Georgia.— Macon *v.* Franklin, 12 Ga. 239.

Illinois.— McIntyre *v.* Storey, 80 Ill. 127; Hiner *v.* Jeanpert, 65 Ill. 428; Rees *v.* Chicago, 38 Ill. 322; Warren *v.* Jacksonville, 15 Ill. 236, 58 Am. Dec. 610; Manly *v.* Gibson, 13 Ill. 308; Godfrey *v.* Alton, 12 Ill. 29, 52 Am. Dec. 476; Willey *v.* People, 36 Ill. App. 609.

Indiana.— Indianapolis *v.* Kingsbury, 101 Ind. 200, 51 Am. Dec. 749; Gwynn *v.* Homan, 15 Ind. 201.

Kentucky.— Griffey *v.* Bryars, 7 Bush 471; McKinney *v.* Griggs, 5 Bush 401, 96 Am. Dec. 360; Hall *v.* McLeod, 2 Metc. 98, 74 Am. Dec. 400; Conner *v.* Clark, 15 Ky. L. Rep. 126; L. St. L. & T. R. Co. *v.* Stephens, 14 Ky. L. Rep. 919; Hastings *v.* Girty, 9 Ky. L. Rep. 57; Wilkins *v.* Barner, 2 Ky. L. Rep. 278.

Louisiana.— Shreveport *v.* Walpole, 22 La. Ann. 526; Baton Rouge *v.* Bird, 21 La. Ann. 244; Pickett *v.* Brown, 18 La. Ann. 560; Linton *v.* Guillotte, 10 Rob. 357; Carrollton R. Co. *v.* Municipality No. 2, 19 La. 62; Lafayette *v.* Holland, 18 La. 286; Municipality No. 2 *v.* Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624.

Maine.— Cole *v.* Sprowl, 35 Me. 161, 56 Am. Dec. 696.

Massachusetts.— Wright *v.* Tukey, 3 Cush. 290.

Mississippi.— Vick *v.* Vicksburg, 1 How. 379, 31 Am. Dec. 167.

Missouri.— State *v.* Walters, 69 Mo. 463; McKee *v.* St. Louis, 17 Mo. 184; Rector *v.* Hartt, 8 Mo. 488, 41 Am. Dec. 650.

Nebraska.— State *v.* Otoe County Com'rs, 6 Nebr. 129.

New Hampshire.— State *v.* Atherton, 16 N. H. 203.

New Jersey.— Den *v.* Dummer, 20 N. J. L. 86, 40 Am. Dec. 213.

New York.— Curtis *v.* Keesler, 14 Barb. 511; Clements *v.* West Troy, 10 How. Pr. 199.

Ohio.— Gest *v.* Kenner, 2 Handy 86; Cincinnati *v.* Longworth, 10 Ohio Dec. (Reprint) 196, 19 Cinc. L. Bul. 178.

Pennsylvania.— *In re* Penny Pot Landing, 16 Pa. St. 79; Scranton *v.* Griffin, 8 Leg. Gaz. 86.

Vermont.— State *v.* Trask, 6 Vt. 355, 27 Am. Dec. 554.

Virginia.— Skeen *v.* Lynch, 1 Rob. 186.

Wisconsin.— Connehan *v.* Ford, 9 Wis. 240.

United States.— Morgan *v.* Chicago, etc., R. Co., 96 U. S. 716, 24 L. ed. 743; Cincinnati *v.* White, 6 Pet. 431, 8 L. ed. 452; Robertson *v.* Wellsville, 20 Fed. Cas. No. 11,930, 1 Bond 81.

See 15 Cent. Dig. tit. "Dedication." § 12.

55. Alden Coal Co. *v.* Challis, 200 Ill. 222, 65 N. E. 665.

56. Den *v.* Dummer, 20 N. J. L. 86, 40 Am. Dec. 213.

57. Lonaconing Midland, etc., R. Co. *v.* Consolidation Coal Co., 95 Md. 630, 53 Atl. 420.

58. Smith *v.* Flora, 64 Ill. 93; Godfrey *v.* Alton, 12 Ill. 29, 52 Am. Dec. 476.

59. See *supra*, V, C, 1.

60. Gilder *v.* Brenham, 67 Tex. 345, 3 S. W. 309.

As a part of the res gestæ see Denver *v.* Jacobson, 17 Colo. 497, 30 Pac. 246; Buchanan *v.* Curtis, 25 Wis. 99, 3 Am. Rep. 23.

61. Havana *v.* Biggs, 58 Ill. 483. Subsequent declarations of owner are admissible only if against his interest, and not as part of the *res gestæ*. See also Helm *v.* McClure, 107 Cal. 199, 40 Pac. 437; Gazley *v.* Huber, 3 Ohio St. 399; Lawe *v.* Kaukauna, 70 Wis. 306, 35 N. W. 361.

62. See Territory *v.* Deegan, 3 Mont. 82.

63. Simmons *v.* Mumford, 2 R. I. 172.

have land subjected to a public use or easement the public may avail itself of this right.[64]

3. Dedication by Deed. Although a deed to the public cannot take effect as such, because of the absence of a legal grantee, it may, if it be the declaration of a use, take effect as a common-law dedication.[65] A dedication may also be made by a deed from the dedicator to an individual, in which the dedicator declares that a part of his land is subject to a public use;[66] the grantee by such a deed acquires an easement by grant or covenant, express or implied,[67] but the deed constitutes at the same time an offer to the public of the use declared which the public can by acceptance render binding.[68]

4. Dedication by Other Writing. So express written dedications may be made by less formal writings than deeds, such as an agreement to allow a way if another is closed;[69] or a petition to have a way opened over one's land if acted on by the authorities,[70] unless others have failed to sign the petition and no action is taken thereon.[71] So an express dedication may be contained in a will.[72] But a mere agreement to dedicate on demand does not constitute a dedication,[73] and a recorded return of a surveyor stating that part of a lot is given to a town for a public landing does not import dedication.[74]

5. Implied Dedication — a. In General. Implied or presumptive dedications are of two kinds. One kind includes dedications arising by estoppel.[75] Again, although what constitutes a dedication is a question of law,[76] whether a dedication has been made is essentially a question of fact, and a fact which may be established by indirect evidence,[77] as no formalities in making a dedication are essential.[78] Therefore the dedications which may be truly said to be implied are those

64. Augusta *v.* Tyner, 197 Ill. 242, 64 N. E. 378; Smith *v.* Union Switch, etc., Co., 17 Pa. Super. Ct. 444.

65. A deed of streets to "the present and future owners of town lots" is a dedication to the general public (Mayo *v.* Wood, 50 Cal. 171) and so is a deed to the "inhabitants" of a town (Brown *v.* Bowdoinham, 71 Me. 144; Corbin *v.* Dale, 57 Mo. 297). And see Atlantic City *v.* Atlantic City Steel Pier Co., 62 N. J. Eq. 139, 49 Atl. 822.

66. Barney *v.* Lincoln Park, 203 Ill. 397, 67 N. E. 801; Richeson *v.* Richeson, 8 Ill. App. 204; Jersey City *v.* Morris Canal, etc., Co., 12 N. J. Eq. 547; Trerice *v.* Barteau, 54 Wis. 99, 11 N. W. 244.

A limitation in a conveyance, "it being understood that Ogden avenue is extended . . . and dedicated as a public highway," when accepted amounts to a dedication. Booraem *v.* North Hudson County R. Co., 40 N. J. Eq. 557, 5 Atl. 106, 39 N. J. Eq. 465.

67. Baltimore *v.* Northern Cent. R. Co., 88 Md. 427, 41 Atl. 911. And see Van Witsen *v.* Gutman, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403.

68. Fulton *v.* Dover, 6 Del. Ch. 1, 6 Atl. 633.

Personal covenant.— A covenant as to use may be personal only, as where there is a partition. Baltimore *v.* White, 62 Md. 362; Whyte *v.* St. Louis, 153 Mo. 80, 54 S. W. 478.

69. Atty.-Gen. *v.* Biphosphated Guano Co., 11 Ch. D. 327, 49 L. J. Ch. 68, 40 L. T. Rep. N. S. 201, 27 Wkly. Rep. 621.

70. Trickey *v.* Schlader, 52 Ill. 78; Plumb *v.* Grand Rapids, 81 Mich. 381, 41 N. W. 1024.

71. Gray *v.* Haas, 98 Iowa 502, 67 N. W. 394.

72. South Covington, etc., R. Co. *v.* Newport, etc., Turnpike Co., 110 Ky. 691, 62 S. W. 687, 23 Ky. L. Rep. 68. And see Wicks *v.* Thompson, 13 N. Y. Suppl. 651.

73. Cincinnati *v.* McMakin, 8 Ohio S. & C. Pl. Dec. 691.

74. Bacon *v.* Mulford, 41 N. J. L. 59.

75. See *supra*, I, A, 1. In such cases the party is estopped or precluded from going into the question as to whether or not there has been a valid dedication of the public use in question. It therefore makes no difference whether the essentials of a valid dedication do exist; inquiry is precluded by estoppel; and whether or not it is precluded depends upon the principles of estoppel, and not upon the doctrine of dedication. Thus no dedication can be implied if the grantor does not own the bed of a street referred to, because such ownership is essential to valid dedication. Baltimore *v.* Northern Cent. R. Co., 88 Md. 427, 41 Atl. 911. But he might under similar circumstances be estopped from denying a dedication. Territory *v.* Deegan, 3 Mont. 82. So, although no dedication is implied from references in partition deeds, parties may so act as to estop them from denying such intention. Caperton *v.* Hmmpick, 95 Ky. 105, 23 S. W. 875, 15 Ky. L. Rep. 430.

76. Wolfe *v.* Sullivan, 133 Ind. 331, 32 N. E. 1017; Downer *v.* St. Paul, etc., R. Co., 23 Minn. 271; Talbott *v.* Richmond, etc., R. Co., 31 Gratt. (Va.) 685; State *v.* Schwin, 65 Wis. 207, 26 N. W. 568.

77. See *infra*, VII.

78. See *supra*, V, C, 1.

which depend upon various circumstances or upon indirect evidence. The questions arising in this class of cases are for the most part mere questions of evidence and are considered under that head.[79]

b. By Acquiescence in User by Public. Long acquiescence in user by the public may under certain circumstances operate as a dedication of land to the public use.[80]

c. By Sale of Land With Reference to Map or Plat. Where the owner of real property lays out a town upon it, and divides the land into lots and blocks, intersected by streets and alleys, and sells any of the lots with reference to such plan, or where he sells with reference to the map of a town or city, in which his land is so laid off, he thereby dedicates the streets and alleys to the use of the public,[81]

79. See *infra*, VII,

80. See *infra*, VII, D, 4.

81. *Alabama.*— Webb *v.* Demopolis, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62; Reed *v.* Birmingham, 92 Ala. 339, 9 So. 161; Evans *v.* Savannah, etc., R. Co., 90 Ala. 54, 7 So. 758; Demopolis *v.* Webb, 87 Ala. 659, 6 So. 408; Steele *v.* Sullivan, 70 Ala. 589.

California.— Eureka *v.* Fay, 107 Cal. 166, 40 Pac. 235; Cerf *v.* Pfleging, 94 Cal. 131, 29 Pac. 417; Archer *v.* Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; Griffiths *v.* Galindo, 86 Cal. 192, 24 Pac. 1025; San Leandro *v.* Le Breton, 72 Cal. 170, 13 Pac. 405; Stone *v.* Brooks, 35 Cal. 489; Kittle *v.* Pleiffer, 22 Cal. 484.

Colorado.— Manitou *v.* International Trust Co., 30 Colo. 467, 70 Pac. 757; Mouat Lumber Co. *v.* Denver, 21 Colo. 1, 40 Pac. 237; Denver *v.* Clements, 3 Colo. 472.

Florida.— Price *v.* Stratton, (1903) 33 So. 644; Winter *v.* Payne, 33 Fla. 470, 15 So. 211.

Georgia.—Harrison *v.* Augusta Factory, 73 Ga. 447.

Illinois.— Russell *v.* Lincoln, 200 Ill. 511, 65 N. E. 1088; Simpson *v.* Mikkelsen, 196 Ill. 575, 63 N. E. 1036; Waugh *v.* Leech, 28 Ill. 488; Leech *v.* Waugh, 24 Ill. 228; Godfrey *v.* Alton, 12 Ill. 29, 52 Am. Dec. 476. And see Augusta *v.* Tyner, 197 Ill. 242, 64 N. E. 378.

Indiana.— Wolfe *v.* Sullivan, 133 Ind. 331, 32 N. E. 1017; Fossion *v.* Landry, 123 Ind. 136, 24 N. E. 96; Faust *v.* Huntington, 91 Ind. 493; Shanklin *v.* Evansville, 55 Ind. 240; Evansville *v.* Evans, 37 Ind. 229; Evansville *v.* Page, 23 Ind. 525; Logansport *v.* Dunn, 8 Ind. 378; Doe *v.* Attica, 7 Ind. 641; Conner *v.* Albany, 1 Blackf. 43.

Kentucky.— Schneider *v.* Jacob, 86 Ky. 101, 5 S. W. 350, 9 Ky. L. Rep. 382; West Covington *v.* Freking, 8 Bush 121; Hall *v.* McLeod, 2 Metc. 98, 74 Am. Dec. 400; Wickliffe *v.* Lexington, 11 B. Mon. 155; Rowan *v.* Portland, 8 B. Mon. 232; Moss *v.* Somerset, 11 Ky. L. Rep. 139; Dows *v.* Regenthal, 7 Ky. L. Rep. 594; Davis *v.* Louisville, 4 Ky. L. Rep. 721; Ballard *v.* Gleason, 1 Ky. L. Rep. 60.

Louisiana.— Leland University *v.* New Orleans, 47 La. Ann. 100, 16 So. 653; Land *v.* Smith, 44 La. Ann. 931, 11 So. 577; Arrowsmith *v.* New Orleans, 24 La. Ann. 194; Baton Rouge *v.* Bird, 21 La. Ann. 244; Burthe *v.* Fortier, 15 La. Ann. 9; New Orleans, etc., R. Co. *v.* Carrollton, 3 La. Ann. 282; McDonogh *v.* Calloway, 8 Rob. 92.

Maine.— Heselton *v.* Harmon, 80 Me. 326, 14 Atl. 286; Bartlett *v.* Bangor, 67 Me. 460.

Maryland.— Baltimore *v.* Frick, 82 Md. 77, 33 Atl. 435; Van Witsen *v.* Gutman, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403; Pitts *v.* Baltimore, 73 Md. 326, 21 Atl. 52; Hall *v.* Baltimore, 56 Md. 187; Tinges *v.* Baltimore, 51 Md. 600; McCormack *v.* Baltimore, 45 Md. 512; Hawley *v.* Baltimore, 33 Md. 270; White *v.* Flannigin, 1 Md. 525, 54 Am. Dec. 668.

Massachusetts.— Farnsworth *v.* Taylor, 9 Gray 162; Parker *v.* Smith, 17 Mass. 413, 9 Am. Dec. 157.

Michigan.— Sinclair *v.* Comstock, Harr. 404.

Minnesota.— State *v.* St. Paul, etc., R. Co., 62 Minn. 450, 64 N. W. 1140; Great Northern R. Co. *v.* St. Paul, 61 Minn. 1, 63 N. W. 96, 240; Hurley *v.* Mississippi, etc., River Boom Co., 34 Minn. 143, 24 N. W. 917.

Mississippi.— Witherspoon *v.* Meridian, 69 Miss. 288, 13 So. 843; Vicksburg *v.* Marshall, 59 Miss. 563; Briel *v.* Natchez, 48 Miss. 423; Vick *v.* Vicksburg, 1 How. 379, 31 Am. Dec. 167.

Missouri.— Buschmann *v.* St. Louis, 121 Mo. 523, 26 S. W. 687; Hannibal *v.* Draper, 15 Mo. 634.

Nebraska.— Gregory *v.* Lincoln, 13 Nebr. 352, 14 N. W. 423.

New Jersey.— New York, etc., R. Co. *v.* South Amboy, 57 N. J. L. 252, 30 Atl. 628; State *v.* Bayonne, 52 N. J. L. 503, 20 Atl. 69; Bayonne *v.* Ford, 43 N. J. L. 292; Elizabeth *v.* Price, 41 N. J. L. 191; State *v.* Plainfield, 41 N. J. L. 138; Clark *v.* Elizabeth, 40 N. J. L. 172; Central R. Co. *v.* Elizabeth, 37 N. J. L. 432 [*affirming* 35 N. J. L. 359]; Hoboken M. E. Church *v.* Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696; Atty.-Gen. *v.* Morris, etc., R. Co., 19 N. J. Eq. 386; Pope *v.* Union, 18 N. J. Eq. 282; Cleveland *v.* Bergen Bldg., etc., Co., (Ch. 1903) 55 Atl. 117; White *v.* Tide-Water Oil Co., (Ch. 1895) 33 Atl. 47.

New York.—Knickerbocker Ice Co. *v.* Forty-Second St., etc., Ferry R. Co., 176 N. Y. 408, 68 N. E. 864 [*affirming* 39 Misc. 27, 78 N. Y. Suppl. 838]; Lord *v.* Atkins, 138 N. Y. 184, 33 N. E. 1035; Storey *v.* New York El. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Bridges *v.* Wyckoff, 67 N. Y. 130; White's Bank *v.* Nichols, 64 N. Y. 65; Childs *v.*

unless it appears either by express statement in the conveyance[82] or other-

Chappell, 9 N. Y. 246; People *v.* Underhill, 69 Hun 86, 23 N. Y. Suppl. 388; De Witt *v.* Ithaca, 15 Hun 568; *In re* Public Parks Dept., 6 Hun 486; *In re* Ingraham, 4 Hun 495; Niagara Falls Suspension Bridge Co. *v.* Bachman, 4 Lans. 523; People *v.* Brooklyn, 48 Barb. 211; Buffalo *v.* Delaware, etc., R. Co., 39 N. Y. Suppl. 4; Port Jervis *v.* Barrett Bridge Co., 10 N. Y. St. 339; *In re* Twenty-ninth St., 1 Hill 189; Post *v.* Pearsall, 22 Wend. 425; *In re* Thirty-second St., 19 Wend. 128; *In re* Furman St., 17 Wend. 649; Wyman *v.* New York, 11 Wend. 486.

North Carolina.— Rives *v.* Dudley, 56 N. C. 126, 67 Am. Dec. 231. And see Davis *v.* Morris, 132 N. C. 435, 43 S. E. 950.

Ohio.— Huber *v.* Gazley, 18 Ohio 18; Brown *v.* Manning, 6 Ohio 298, 27 Am. Dec. 255.

Oregon.—Schooling *v.* Harrisburg, 42 Oreg. 494, 71 Pac. 605; Spencer *v.* Peterson, 41 Oreg. 257, 68 Pac. 519, 1108; Steel *v.* Portland, 23 Oreg. 176, 31 Pac. 479; Hicklin *v.* McClear, 18 Oreg. 126, 22 Pac. 1057; Carter *v.* Portland, 4 Oreg. 339; Portland *v.* Whittle, 3 Oreg. 126.

Pennsylvania.— Fereday *v.* Mankedick, 172 Pa. St. 535, 34 Atl. 46; Du Bois Cemetery Co. *v.* Griffin, 165 Pa. St. 81, 30 Atl. 840; *In re* Pearl St., 111 Pa. St. 565, 5 Atl. 430; Trutt *v.* Spotts, 87 Pa. St. 339; Allegheny City *v.* Moorehead, 80 Pa. St. 118; Baker *v.* Chester Gas Co., 73 Pa. St. 116; McKee *v.* Perchment, 69 Pa. St. 342; Davis *v.* Sabita, 63 Pa. St. 90; McCall *v.* Davis, 56 Pa. St. 431, 94 Am. Dec. 92; Darlington *v.* Com., 41 Pa. St. 68; Schenley *v.* Com., 36 Pa. St. 62; Com. *v.* McDonald, 16 Serg. & R. 390; Transue *v.* Sell, 14 Wkly. Notes Cas. 397; *In re* Girard Ave., etc., 18 Phila. 499; Billingfelt *v.* Borough, 5 Lanc. Bar 507.

Rhode Island.— Thaxter *v.* Turner, 17 R. I. 799, 24 Atl. 829.

South Carolina.— Aiken *v.* Lythgoe, 7 Rich. 435; McKenna *v.* Lancaster Dist., Harp. 381.

South Dakota.— Sweatman *v.* Bathrick, (1903) 95 N. W. 422.

Tennessee.— Sims *v.* Chattanooga, 2 Lea 694.

Texas.— Smith *v.* Navasota, 72 Tex. 422, 10 S. W. 414; Preston *v.* Navasota, 34 Tex. 684; Orrick *v.* Ft. Worth, (Civ. App. 1895) 32 S. W. 443.

Vermont.— Abbott *v.* Mills, 3 Vt. 521, 23 Am. Dec. 222.

Virginia.— Taylor *v.* Com., 29 Gratt. 780.

Wisconsin.— Weisbrod *v.* Chicago, etc., R. Co., 21 Wis. 602.

United States.— Gormley *v.* Clark, 134 U. S. 338, 10 S. Ct. 554, 33 L. ed. 909; Irwin *v.* Dixion, 9 How. 10, 13 L. ed. 25; New Orleans *v.* U. S., 10 Pet. 662, 9 L. ed. 573; Cincinnati *v.* White, 6 Pet. 431, 8 L. ed. 452; Snowden *v.* Loree, 122 Fed. 493; Kruger *v.* Constable, 116 Fed. 722; Rainey *v.* Herbert, 55 Fed. 443, 5 C. C. A. 183 [*modifying* 54 Fed. 248].

Canada.— Geoffrion *v.* Montreal Park, etc., R. Co., 20 Quebec Super. Ct. 559.

See 15 Cent. Dig. tit. "Dedication," §§ 34, 35, 36, 46.

Leasing land with reference to plat.— A coal company by staking out a town site upon its land, building houses, improving streets, and leasing residence and business sites is estopped to deny the dedication of the use of the streets to the public. Alden Coal Co. *v.* Challis, 200 Ill. 222, 65 N. E. 665 [*affirming* 103 Ill. App. 52].

Sales with reference to unopened streets.— The general rule stated in the text is, according to some decisions, subject to limitations. Thus where a street is laid out through municipal action without the concurrence of the owner of the land or any action on his part, and the street has not been opened, a conveyance describing the land conveyed as bounded on such street does not amount to a dedication to the public of the street. Cerf *v.* Pfleging, 94 Cal. 131, 29 Pac. 417; *In re* Wayne Ave., 124 Pa. St. 135, 16 Atl. 631; *In re* Brooklyn St., 118 Pa. St. 640, 12 Atl. 664, 4 Am. St. Rep. 618. *Contra*, Sherer *v.* Jasper, 93 Ala. 530, 9 So. 584. Such also seems to be the rule laid down by a number of decisions in case of conveyances with reference to unopened streets, although platted by the owner himself (Linton *v.* Guillotte, 10 Rob. (La.) 357; Matter of New York, 73 N. Y. App. Div. 394, 77 N. Y. Suppl. 31; Matter of Eleventh Ave., 49 How. Pr. (N. Y.) 208. And see *In re* Eleventh Ave., 81 N. Y. 436); but this is denied by other decisions (Fulton *v.* Dover, 8 Houst. (Del.) 78, 6 Del. Ch. 1, 6 Atl. 633, 12 Atl. 394, 31 Atl. 974; Zearing *v.* Raber, 74 Ill. 409; Matter of Twenty-Ninth St., 1 Hill (N. Y.) 139; McKenna *v.* Lancaster Dist., Harp. (S. C.) 381; Barney *v.* Baltimore, 2 Fed. Cas. No. 1,029, 1 Hughes 118. And see Eureka *v.* Armstrong, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085).

Conveyances including space designated as street.— Where lots sold are not bounded by, but so described as to actually include, a space that might constitute part of a street extended, it must appear that there was a dedication by the proprietor, and that it was accepted and recognized by the municipality in order to divest subsequent purchasers of the title and possession. Sandford *v.* Covington, 14 S. W. 497, 12 Ky. L. Rep. 450.

Subsequent change of location.— Where the owners of land platted it and laid out blocks and streets including a street, and afterward by four separate conveyances recognized a subsequent plat by the city engineer showing a changed location of the street, and made no objection to the public use of the street as so changed there was a dedication of the street, not only as originally platted, but as changed by the second plat. Sweatman *v.* Bathrick, (S. D. 1903) 95 N. W. 422.

82. Baltimore *v.* Fear, 82 Md. 246, 33 Atl. 637; Pitts *v.* Baltimore, 73 Md. 326, 21 Atl.

wise[83] that the mention of the street was solely for purposes of description and not as a dedication thereof. On the same principle the owner will be held to have dedicated to the public use such pieces of land as are marked on the plat or map as squares, courts, or parks.[84] The reason is that the grantor by making such a conveyance is estopped, as well in reference to the public as to his grantees, from denying the existence of the easement.[85] Nevertheless the mere laying out of a town and making a plat of it without selling any of the lots will not, in the absence of a statute, constitute a dedication of the streets;[86] and it has also been held essential that the sales be shown to have been rendered effectual by conveyances.[87] According to the great weight of authority a dedication made as hereinbefore described is irrevocable and the dedicator is forever concluded from

52; Glenn *v.* Baltimore, 67 Md. 390, 10 Atl. 70; Baker *v.* Vanderburg, 99 Mo. 378, 12 S. W. 462; Matter of New York, 83 N. Y. App. Div. 513, 82 N. Y. Suppl. 417; Lake Shore, etc., R. Co. *v.* Cleveland, 1 Ohio N. P. 1.

83. Meredith *v.* Sayre, 32 N. J. Eq. 557; Patterson *v.* People's Natural Gas Co., 172 Pa. St. 554, 33 Atl. 575. And see Hoole *v.* Atty.-Gen., 22 Ala. 190.

Conveyance by the owners of lots referring to two maps, in one of which a street is laid out and in the other of which a strip is marked reserved, do not amount to a dedication of the strip to public use. Cleveland *v.* Bergen Bldg., etc., Co., (N. J. Ch. 1903) 55 Atl. 117.

84. *California.*—Archer *v.* Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; San Leandro *v.* Le Breton, 72 Cal. 170, 13 Pac. 405.

Connecticut.— Pierce *v.* Roberts, 57 Conn. 31, 17 Atl. 275.

Indiana.— Rhodes *v.* Brightwood, 145 Ind. 21, 43 N. E. 942; Logansport *v.* Dunn, 8 Ind. 378.

Kentucky.— Rowan *v.* Portland, 8 B. Mon. 232.

New Jersey.— Bayonne *v.* Ford, 43 N. J. L. 292; Price *v.* Plainfield, 40 N. J. L. 608.

New York.— De Witt *v.* Ithaca, 15 Hun 568; Perrin *v.* New York Cent. R. Co., 40 Barb. 65; Watertown *v.* Cowen, 4 Paige 510, 27 Am. Dec. 80.

North Carolina.— Conrad *v.* West End Hotel, etc., Co., 126 N. C. 776, 36 S. E. 282.

Ohio.— Huber *v.* Gazley, 18 Ohio 18.

Oregon.— Church *v.* Portland, 18 Oreg. 73, 22 Pac. 528, 6 L. R. A. 259.

Vermont.— Abbott *v.* Mills, 3 Vt. 521, 23 Am. Dec. 222.

United States.— Grogan *v.* Haywood, 4 Fed. 161, 6 Sawy. 498; Ruch *v.* Rock Island, 20 Fed. Cas. No. 12,105, 5 Biss. 95.

See 15 Cent. Dig. tit. "Dedication," §§ 34, 35, 36, 40.

85. Denver *v.* Clements, 3 Colo. 472; Vanatta *v.* Jones, 42 N. J. L. 561; Cincinnati *v.* White, 6 Pet. (U. S.) 431, 8 L. ed. 452. And see Hall *v.* Baltimore, 56 Md. 187. "Of the propriety of the rule there can be no question. It is based on the most obvious principles of fair dealing; the principles which require the vendor to deliver to his vendee that which the latter has bought and paid for — the principles which hold men to their lawful bargains." Clark *v.* Elizabeth, 40 N. J. L. 172, 175.

86. *Alabama.*— Reed *v.* Birmingham, 92 Ala. 339, 9 So. 161. And see Webb *v.* Demopolis, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62.

Arkansas.— Holly Grove *v.* Smith, 63 Ark. 5, 37 S. W. 956.

California.— People *v.* Reed, 81 Cal. 70, 22 Pac. 474, 15 Am. St. Rep. 22.

Georgia.— Parsons *v.* Atlanta University, 44 Ga. 529.

Indiana.— Logansport *v.* Dunn, 8 Ind. 378.

Louisiana.— Leland University *v.* New Orleans, 47 La. Ann. 100, 16 So. 653.

Michigan.— Field *v.* Manchester, 32 Mich. 279; Wayne County *v.* Miller, 31 Mich. 447.

Mississippi.— Whitworth *v.* Berry, 69 Miss. 882, 12 So. 146; Sanford *v.* Meridian, 52 Miss. 383.

New Jersey.— New York, etc., R. Co. *v.* South Amboy, 57 N. J. L. 252, 30 Atl. 628; Vanatta *v.* Jones, 42 N. J. L. 561.

Ohio.— Bailey *v.* Copeland, Wright 150.

Oregon.— Nodine *v.* Union, 42 Oreg. 613, 72 Pac. 582; Meier *v.* Portland Cable R. Co., 16 Oreg. 500, 19 Pac. 610, 1 L. R. A. 856.

Tennessee.— Monaghan *v.* Memphis Fair, etc., Co., 95 Tenn. 108, 37 S. W. 497.

United States.— U. S. *v.* Chicago, 7 How. 185, 12 L. ed. 660; Kruger *v.* Constable, 116 Fed. 722.

"The mere laying out of a town upon a man's own land, and by his own private act, and the making and recording of a plan of the town, may not, and as we suppose, do not of themselves, conclude him to any extent. The land, notwithstanding these acts, is still his own, and neither any other individual nor the public, have any right to interfere with such use of it as any man may lawfully make of his own. Though he has laid out a town upon the land and upon paper, he is not bound to sell the lots or to make or authorize the making of a town in fact. If he never disposes of a lot or lots, as part of the town, no one has any interest in the town as such, or any right growing out of his acts in relation to it." Rowan *v.* Portland, 8 B. Mon. (Ky.) 232, 236.

87. Vanatta *v.* Jones, 42 N. J. L. 561. But see Vonderhite *v.* Walton, 7 Ky. L. Rep. 764.

exercising any authority or setting up any title to the same,[88] and that too, although there has been no formal acceptance by the public authorities.[89] Nor is the irrevocable character of the dedication affected by the fact that the property is not at once subjected to the uses designed.[90] There are, however, decisions which hold that the mere making of sales of lots with reference to a map does not constitute an irrevocable dedication to the public, but amounts to a mere offer of dedication which may be withdrawn at any time before acceptance by the public authority,[91] that the platting and sale of lots constitute a dedication of the streets and alleys delineated upon the plat only as between the grantors and purchasers from them.[92]

D. Form and Requisites of Statutory Dedications. A statutory dedication is not effective as such unless in making it the provisions of the statute are complied with. The plat or map by which the land is dedicated must conform with the statute in all of its substantial requirements.[93] It must sufficiently describe and designate the land proposed to be dedicated.[94] A plat not showing the location of the platted lands is ineffectual as a statutory dedication.[95] It is not necessary, however, that there should be any certificate or statement upon the plat to whom and for what purpose the easement is created.[96] So it must be certified in the manner required by statute or it does not operate as a dedication or conveyance of the fee.[97] It must be acknowledged in the manner required by the

88. *Alabama.*— Evans *v.* Savannah, etc., R. Co., 90 Ala. 54, 7 So. 758.

California.— San Leandro *v.* Le Breton, 72 Cal. 170, 13 Pac. 405.

Iowa.— Dubuque *v.* Maloney, 9 Iowa 450, 74 Am. Dec. 358.

Kentucky.— Rowan *v.* Portland, 8 B. Mon. 232.

Maine.— Bartlett *v.* Bangor, 67 Me. 460.

Mississippi.— Sanford *v.* Meridian, 52 Miss. 383; Briel *v.* Natchez, 48 Miss. 423.

New Jersey.— Price *v.* Plainfield, 40 N. J. L. 608.

New York.—Wiggins *v.* McCleary, 49 N. Y. 346.

North Carolina.— Conrad *v.* West End Hotel, etc., Co., 126 N. C. 776, 36 S. E. 282.

Oregon.— Spencer *v.* Peterson, 41 Oreg. 257, 68 Pac. 519, 1108; Steel *v.* Portland, 23 Oreg. 176, 31 Pac. 479; Hogue *v.* Albina, 20 Oreg. 182, 25 Pac. 386, 10 L. R. A. 673; Hicklin *v.* McClear, 18 Oreg. 126, 22 Pac. 1057; Church *v.* Portland, 18 Oreg. 73, 22 Atl. 528, 6 L. R. A. 259; Meier *v.* Portland Cable R. Co., 16 Oreg. 500, 19 Pac. 610, 1 L. R. A. 856; Carter *v.* Portland, 4 Oreg. 339.

Texas.— Oswald *v.* Grenet, 22 Tex. 94.

Vermont.— Abbott *v.* Mills, 3 Vt. 521, 23 Am. Dec. 222.

United States.— Grogan *v.* Hayward, 4 Fed. 161, 6 Sawy. 498; Cincinnati *v.* White, 6 Pet. 431, 8 L. ed. 452; Ruch *v.* Rock Island, 20 Fed. Cas. No. 12,105, 5 Biss. 95.

See 15 Cent. Dig. tit. "Dedication," §§ 34, 35, 36, 46.

89. Grogan *v.* Hayward, 4 Fed. 161, 6 Sawy. 498. And see cases cited *supra*, note 81.

90. Grogan *v.* Hayward, 4 Fed. 161, 6 Sawy. 498.

91. People *v.* Reed, 81 Cal. 70, 22 Pac. 474, 15 Am. St. Rep. 22; Mouat Lumber Co. *v.* Denver, 21 Colo. 1, 40 Pac. 237; Gilder *v.* Brenham, 67 Tex. 345, 3 S. W. 309. And see Chicago *v.* Drexel, 141 Ill. 89, 106, 30 N. E. 774, where it is said that "there is no rule of law which forbids the subdivision of land by the owner in such way as to establish over it only private ways for the sole benefit of those who may become owners of lots in the subdivision, and in which the public, as such, will have no interest and over which it will have no control." In such case, the rights of the lot owners in such easement in and over the ground laid off on the plat as ways, will have no tendency to establish the title of the public to such ways as public streets.

92. Mouat Lumber Co. *v.* Denver, 21 Colo. 1, 40 Pac. 237. And see Child *v.* Chappell, 9 N. Y. 246.

93. Chicago *v.* Drexel, 141 Ill. 89, 30 N. E. 774; Thomas *v.* Eckard, 88 Ill. 593; Hennepin County Com'rs *v.* Dayton, 17 Minn. 260; Tilzie *v.* Haye, 8 Wash. 187, 35 Pac. 583.

94. Coe College *v.* Cedar Rapids, 120 Iowa 541, 95 N. W. 267; Buffalo *v.* Harling, 50 Minn. 551, 52 N. W. 931.

95. Buffalo *v.* Harling, 50 Minn. 551, 52 N. W. 931; Downer *v.* St. Paul, etc., R. Co., 22 Minn. 251. Thus where a statute provides that the donation to the public must be marked and noted as such on the plat, merely writing the words "county block" on a plat is insufficient. This might furnish a conjecture that there was a dedication but nothing more than a conjecture. Hennepin County Com'rs *v.* Dayton, 17 Minn. 260.

96. Simpson *v.* Mikkelsen, 196 Ill. 575, 579, 63 N. E. 1036, where it is said: "The persons to be benefited by such a reservation are understood and need not be expressly mentioned or set forth."

97. Auburn *v.* Goodwin, 128 Ill. 57, 21 N. E. 212; Lake View *v.* Le Bahn, 120 Ill. 92, 9 N. E. 269; Thomas *v.* Eckard, 88 Ill. 593; Garfield Tp. *v.* Herman, 66 Kan. 256, 71 Pac. 517.

statute.[98] If a statute requires acknowledgment before a designated officer an acknowledgment before any other officer will be insufficient,[99] but if no particular officer is named any person who may take an acknowledgment is competent.[1] So if the statute provides for acknowledgment without defining the kind, acknowledgment need not necessarily be such as is required for a deed.[2] If acknowledgment by the owner is required acknowledgment by his agent will invalidate the dedication.[3] If indorsement by the auditor of his approval of a plat is required the absence of such approval will invalidate the dedication.[4] It must be recorded as provided by statute.[5] If recorded in the wrong place it will be fatal to the operation of the dedication as a statutory dedication.[6] It has been held, however, that defects in a plat may be cured by a subsequent plat or deed,[7] or by reference to the original city plat, where it renders certain the meaning of the plat used in making the dedication [8] or by statute.[9]

E. Conditions and Limitations Imposed by Dedicator — 1. THE GENERAL RULE. It is well settled that in dedicating land to the public the dedicator may impose such reasonable conditions, restrictions, and limitations as he may see fit,[10] and in order to vest the easement in the dedicatee the terms of the dedication must be strictly complied with.[11] Nevertheless the dedicator may waive any conditions, restrictions or limitations imposed by him.[12] If he desires to avoid his

98. *Illinois.*— Gould *v.* Howe, 131 Ill. 490, 23 N. E. 602; Gosselin *v.* Chicago, 103 Ill. 623; Thomas *v.* Eckard, 88 Ill. 593.

Kansas.— Garfield Tp. *v.* Herman, 66 Kan 256, 71 Pac. 517; Brooks *v.* Topeka, 34 Kan. 277, 8 Pac. 392.

Michigan.—Grandville *v.* Jenison, 84 Mich. 54, 47 N. W. 600, 86 Mich. 567, 49 N. W. 544; Burton *v.* Martz, 38 Mich. 761; Detroit *v.* Detroit, etc., R. Co., 23 Mich. 173.

Minnesota.— Winona *v.* Huff, 11 Minn. 119; Baker *v.* St. Paul, 8 Minn. 491.

Missouri.— Tatum *v.* St. Louis, 125 Mo. 647, 28 S. W. 1002; Putnam *v.* Walker, 37 Mo. 600.

Oregon.— Nodine *v.* Union, 42 Oreg. 613, 72 Pac. 582.

Wisconsin.— Gardiner *v.* Tisdale, 2 Wis. 153, 60 Am. Dec. 407.

See 15 Cent. Dig. tit. "Dedication," §§ 57, 58.

A county judge's order that a plat be recorded may under statute be conclusive as to sufficiency of acknowledgment. Scott *v.* Des Moines, 64 Iowa 438, 20 N. W. 752. And see State *v.* Schwin, 65 Wis. 207, 26 N. W. 568.

Omission of statement that party was known to officer taking acknowledgment is not fatal to its sufficiency. Ragan *v.* McCoy, 29 Mo. 356.

99. Gould *v.* Howe, 131 Ill. 490, 23 N. E. 602.

1. Stewart *v.* Perkins, 110 Mo. 660, 19 S. W. 989; State *v.* Schwin, 65 Wis. 207, 26 N. W. 568.

2. State *v.* Schwin, 65 Wis. 207, 26 N. W. 568.

3. Russell *v.* Lincoln, 200 Ill. 511, 65 N. E. 1088.

Acknowledgment by attorney is improper, unless authorized by statute. Earll *v.* Chicago, 136 Ill. 277, 26 N. E. 370; Gosselin *v.* Chicago, 103 Ill. 623.

4. St. Joseph *v.* Schulz, (Mich. 1903) 93 N. W. 432.

5. Brooks *v.* Topeka, 34 Kan. 277, 8 Pac. 392; Putnam *v.* Walker, 37 Mo. 600; Morris *v.* Bowers, Wright (Ohio) 749; Nelson *v.* Madison, 17 Fed. Cas. No. 10,110, 3 Biss. 244.

A plat may be recorded after the death of the dedicator. Scott *v.* Des Moines, 64 Iowa 438, 20 N. W. 752.

6. Nelson *v.* Madison, 17 Fed. Cas. No. 10,110, 3 Biss. 244.

7. Kansas City Milling Co. *v.* Riley, 133 Mo. 574, 34 S. W. 835; Burns *v.* Liberty, 131 Mo. 372, 33 S. W. 18; Weeping Water *v.* Reed, 21 Nebr. 261, 31 N. W. 797. But see Tilzie *v.* Haye, 8 Wash. 187, 35 Pac. 583.

8. Stange *v.* Hill, etc., St. R. Co., 54 Iowa 669, 7 N. W. 115.

9. Williams *v.* Milwaukee Industrial Exposition Assoc., 79 Wis. 524, 48 N. W. 665.

10. *Georgia.*— Brunswick, etc., R. Co. *v.* Waycross, 91 Ga. 573, 17 S. E. 674.

Minnesota.— Gilbert *v.* Eldridge, 47 Minn. 210, 49 N. W. 679, 13 L. R. A. 411.

New Jersey.— State *v.* Useful Manufactures Soc., 44 N. J. L. 502; Hoboken M. E. Church *v.* Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696.

New York.— Cohoes *v.* Delaware, etc., Canal Co., 134 N. Y. 397, 31 N. E. 887.

Oregon.— Church *v.* Portland, 18 Oreg. 73, 22 Pac. 528, 6 L. R. A. 259.

Rhode Island.— Peck *v.* Providence Steam Engine Co., 8 R. I. 353.

England.— Stafford *v.* Coyney, 7 B. & C. 257, 5 L. J. K. B. O. S. 285, 31 Rev. Rep. 186, 14 E. C. L. 120.

11. Boughner *v.* Clarksburg, 15 W. Va. 394.

12. Forney *v.* Calhoun County, 86 Ala. 463, 5 So. 750; Port Huron *v.* Chadwick, 52 Mich. 320, 17 N. W. 929.

Illustration.— Defendant having agreed to donate his undivided one-seventh interest in

gift for non-compliance with the conditions or non-observance of the restrictions imposed by him he must move promptly.[13]

2. Applications of Rule. In applying the general rule that the dedicator may impose reasonable conditions and restrictions on making a dedication of his property, it is of course competent for him to limit the use of his property to a specified use or purpose.[14] So the owner may make his dedication conditional on the making and maintenance of improvements on the property dedicated.[15] So he may reserve a right of way for a railroad track over the property dedicated.[16] He may reserve all private rights in land under water originally appurtenant to the estate,[17] or the right to plow up and temporarily interfere with the use of a highway.[18] He may prescribe the width and extent of the highway[19] or reserve to himself a strip of land between two streets, and the use made by him of the land so reserved at the time of the dedication will not deprive him or his assigns of the right to apply it afterward to other uses.[20] He may limit the use of a highway to certain purposes.[21]

3. Limitations of Rule — a. In General. There are, however, certain limitations on the dedicator's right in this regard. Thus he cannot attach to the dedication any conditions or limitations inconsistent with the legal character of the dedication,[22] or which take the property dedicated from the control of the public

a block of land to the county, as a site for a court-house, on condition that the building should be erected in the center of the block; and the county, after acquiring the remaining interest, having proceeded to erect a court-house, but not in the middle of the block, at a cost of nearly fifteen thousand dollars, with the knowledge of defendant, and without objection or active interference on his part until after the completion of the building, it was held that his conduct amounted to an implied waiver of the condition and an equitable estoppel against the assertion of his legal title as against the county. Forney *v.* Calhoun County, 86 Ala. 463, 5 So. 750.

13. Port Huron *v.* Chadwick, 52 Mich. 320, 17 N. W. 929.

14. It is elementary that the public can take only that which is the subject of the donation, and a limitation of the easement to given purposes, as well as conditions imposed, to be operative at the election of the owner of the grant in the future, has been sustained by the American and English courts. Buffalo *r.* Delaware, etc., R. Co., 39 N. Y. Suppl. 4.

15. *California.*— People *v.* Williams, 64 Cal. 498, 2 Pac. 393.

Illinois.— Princeton *v.* Templeton, 71 Ill. 68.

Massachusetts.— Com. *v.* Fisk, 8 Metc. 238.

Michigan.— Gregory *v.* Ann Arbor, 127 Mich. 454, 86 N. W. 1013.

Missouri.— Kemper *v.* Collins, 97 Mo. 644, 11 S. W. 245.

Illustration.— If town authorities accept a deed of land for the widening of a street upon the condition that the street or a portion thereof shall be altered so as to make it of the same width, and if not that the land shall revert, etc., and the change is not made, they will be estopped to claim the land, unless they can show that they have since acquired the same in some other mode. Princeton *v.* Templeton, 71 Ill. 68.

16. Brunswick, etc., R. Co. *v.* Waycross, 91 Ga. 573, 17 S. E. 674; Noblesville *v.* Lake Erie, etc., R. Co., 130 Ind. 1, 29 N. E. 484; Tallon *v.* Hoboken, 59 N. J. L. 383, 36 Atl. 693; Ayres *v.* Pennsylvania R. Co., 48 N. J. L. 44, 3 Atl. 885, 57 Am. Rep. 538.

Where a company reserves for itself the right to use and occupy the streets for the purpose of operating a railroad, such reservation does not relieve it from keeping the line of railroad in a legal and proper manner. Ottawa, etc., R. Co. *v.* Larson, 40 Kan. 301, 19 Pac. 661, 2 L. R. A. 59.

17. Duluth *v.* St. Paul, etc., R. Co., 49 Minn. 201, 51 N. W. 1163; Gilbert *v.* Eldridge, 47 Minn. 210, 49 N. W. 679, 13 L. R. A. 411.

18. Arnold *v.* Blaker, L. R. 6 Q. B. 433, 40 L. J. Q. B. 185, 19 Wkly. Rep. 1090; Mercer *v.* Woodgate, L. R. 5 Q. B. 26, 39 L. J. M. C. 21, 21 L. T. Rep. N. S. 458, 18 Wkly. Rep. 116.

19. New York, etc., R. Co. *v.* Drummond, 46 N. J. L. 644.

20. French *v.* New Orleans, etc., R. Co., 2 La. Ann. 80.

21. Stafford *v.* Coyney, 7 B. & C. 257, 5 L. J. K. B. O. S. 285, 31 Rev. Rep. 186, 14 E. C. L. 120; Poole *v.* Haskinson, 11 M. & W. 827.

So a highway may be dedicated subject to the preëxisting right of user by the occupiers of adjoining land for the purpose of depositing goods thereon. Morant *r.* Chamberlin, 6 H. & N. 541, 30 L. J. Exch. 299.

22. Noblesville *r.* Lake Erie, etc., R. Co., 130 Ind. 1, 29 N. E. 484; Des Moines *v.* Hall, 24 Iowa 234; Haight *v.* Keokuk, 4 Iowa 199; Cohoes *r.* Delaware, etc., Canal Co., 134 N. Y. 397, 31 N. E. 887; Arnold *v.* Blaker, L. R. 6 Q. B. 433, 40 L. J. Q. B. 185, 19 Wkly. Rep. 1090. And see *infra*, VII.

authorities,[23] or which are against public policy,[24] and the dedication will take effect regardless of such condition, which will be construed as void,[25] and of course it is not competent for the dedicator to impose conditions after acceptance.[26]

b. Limiting Use as to Persons. It is one of the essentials of a dedication that it be made to the public. The dedicator cannot as a general rule make a valid dedication to any private person or to any limited number of persons.[27] Nevertheless it has been held that pious, religious, and educational uses may be made for a limited class of the public.[28] And it has also been held that statutory dedications may be made to individuals and corporations as well as to the public for any purpose authorized by the statute.[29]

c. Limiting Use as to Time. A dedication cannot be limited as to the time of its duration.[30]

VI. THE ACCEPTANCE.

A. Necessity of Acceptance — 1. General Rule. Considering a dedication as the voluntary transfer of an interest in land, it partakes both of the nature of a grant[31] and of a gift,[32] and is governed by the fundamental principles which control grants and gifts. Hence a dedication, like a contract, consists of an offer

23. Noblesville *v.* Lake Erie, etc., R. Co., 130 Ind. 1, 29 N. E. 484; Des Moines *v.* Hall, 24 Iowa 234.

24. Richards *v.* Cincinnati, 31 Ohio St. 506, holding that where lands within a municipal corporation are laid out into lots, streets, and alleys, and the streets are dedicated to the public by a deed which contains a condition that the lots shall be exempt from charges for the improvement of the streets unless a majority of the abutting owners shall assent thereto in writing, is inoperative as against public policy.

25. Atty.-Gen. *v.* Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87; Richards *v.* Cincinnati, 31 Ohio St. 506.

26. Spring *v.* Pittsburg, 204 Pa. St. 530, 54 Atl. 310.

27. *California.*— California Academy of Sciences *v.* San Francisco, 107 Cal. 334, 40 Pac. 426.

Illinois.— Lake Erie, etc., R. Co. *v.* Whitham, 155 Ill. 514, 40 N. E. 1014, 46 Am. St. Rep. 355, 28 L. R. A. 612.

Massachusetts.— Atty.-Gen. *v.* Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87.

Ohio.— Todd *v.* Pittsburg, etc., R. Co., 19 Ohio St. 514.

Pennsylvania.— *In re* Penny Pot Landing, 16 Pa. St. 79.

Wisconsin.— Tupper *v.* Huson, 46 Wis. 646, 1 N. W. 332.

England.— Bermondsey *v.* Brown, L. R. 1 Eq. 204, 11 Jur. N. S. 1031, 13 L. T. Rep. N. S. 574, 14 Wkly. Rep. 213; Poole *v.* Huskinson, 11 M. & W. 827.

Illustration.— Thus a railroad corporation, while it serves a public purpose, is a private institution and private property cannot be acquired by dedication by it. Louisville, etc., R. Co. *v.* Stephens, 96 Ky. 401, 29 S. W. 14, 16 Ky. L. Rep. 552, 49 Am. St. Rep. 303; Todd *v.* Pittsburg, etc., R. Co., 19 Ohio St. 514.

28. This principle is illustrated by the recognition of the dedication of a lot for a Lutheran Church (Beatty *v.* Kurtz, 2 Pet. (U. S.) 566, 7 L. ed. 521) and of the dedication of a lot for Mary Washington's tomb and monument (Colbert *v.* Shepherd, 89 Va. 401, 16 S. E. 246).

29. Scott *v.* Des Moines, 64 Iowa 438, 20 N. W. 752; Wyandotte County *v.* Wyandotte First Presb. Church, 30 Kan. 620, 1 Pac. 109; Trerice *v.* Barteau, 54 Wis. 99, 11 N. W. 244; Morgan *v.* Chicago, etc., R. Co., 96 U. S. 716, 24 L. ed. 743.

30. San Francisco *v.* Canavan, 42 Cal. 541; Dawes *v.* Hawkins, 8 C. B. N. S. 848, 7 Jur. N. S. 262, 29 L. J. C. P. 343, 4 L. T. Rep. N. S. 288, 98 E. C. L. 848. But see Antones *v.* Eslava, 9 Port. (Ala.) 527.

It is one of the essential elements of a good dedication that it shall be irrevocable and that the land shall be forever dedicated for the public use, which is designated, provided the public sees fit to use it for that purpose. San Francisco *v.* Canavan, 42 Cal. 541.

31. Brown *v.* Manning, 6 Ohio 298, 27 Am. Dec. 255. And see Coolidge *v.* Learned, 8 Pick. (Mass.) 504; Rutherford *v.* Taylor, 38 Mo. 315.

Analogy to contract.— Because there must be two parties assenting to complete a contract, and because the ownership of property may involve responsibilities as well as benefits, it is reasonable, and it is the law, that no one can be a grantee of real estate without his consent — a deed executed and recorded without the knowledge and consent of a grantee passing no title. See Littler *v.* Lincoln, 106 Ill. 353; Parmelee *v.* Simpson, 5 Wall. (U. S.) 81, 18 L. ed. 542. See also, generally, DEEDS.

32. Flack *v.* Green Island, 122 N. Y. 107, 25 N. E. 267; State *v.* Trask, 6 Vt. 355, 27 Am. Dec. 554.

Analogy to gift.— As a gift is a voluntary act which the giver is not bound to complete, the only way in which a gift can become binding is by making it complete, namely, by delivery and acceptance. Neale *v.* Neale, 9

and acceptance;[33] and the general rule is well settled that no dedication can be valid and complete until the public use, which is offered, has been accepted.[34]

Wall. (U. S.) 1, 19 L. ed. 590. And see, generally, GIFTS.

33. *Missouri.*— Downend *v.* Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170.

New York.— Flack *v.* Green Island, 122 N. Y. 107, 25 N. E. 267.

Rhode Island.— Simmons *v.* Cornell, 1 R. I. 519.

Vermont.— State *v.* Trask, 6 Vt. 355, 27 Am. Dec. 554.

Wisconsin.— Ashland *v.* Chicago, etc., R. Co., 105 Wis. 398, 80 N. W. 1101.

34. *Alabama.*—Stewart *v.* Conley, 122 Ala. 179, 27 So. 303; Moore *v.* Johnston, 87 Ala. 220, 6 So. 50.

California.— Schmitt *v.* San Francisco, 100 Cal. 302, 34 Pac. 961; Monterey *v.* Malarin, 99 Cal. 290, 33 Pac. 840; Eureka *v.* Croghan, 81 Cal. 524, 22 Pac. 693; People *v.* Reed, 81 Cal. 70, 22 Pac. 474, 15 Am. St. Rep. 22, 20 Pac. 708; Hayward *v.* Manzer, 70 Cal. 476, 13 Pac. 141.

Colorado.— Trine *v.* Pueblo, 21 Colo. 102, 39 Pac. 330; Denver, etc., R. Co., *v.* Griffith, 17 Colo. 598, 31 Pac. 171.

Connecticut.— Williams *v.* New York, etc., R. Co., 39 Conn. 509; Riley *v.* Hammel, 38 Conn. 574; Curtiss *v.* Hoyt, 19 Conn. 154, 48 Am. Dec. 149.

Georgia.— Georgia R., etc., Co. *v.* Atlanta, 118 Ga. 486, 45 S. E. 256.

Illinois.— Shields *v.* Ross, 158 Ill. 214, 41 N. E. 985; Chicago *v.* Drexel, 141 Ill. 89, 30 N. E. 774; Princeton *v.* Templeton, 71 Ill. 68; Chicago *v.* Wright, 69 Ill. 318; O'Connell *v.* Bowman, 45 Ill. App. 654; Willey *v.* People, 36 Ill. App. 609; Schmitz *v.* Germantown, 31 Ill. App. 284; Chicago *v.* Thompson, 9 Ill. App. 524; Chicago *v.* Gosselin, 4 Ill. App. 570.

Indiana.— Shellhouse *v.* State, 110 Ind. 509, 11 N. E. 484; Mansur *v.* Haughley, 60 Ind. 364; Mansur *v.* State, 60 Ind. 357; Westfall *v.* Hunt, 8 Ind. 174.

Iowa.— State *v.* Tucker, 36 Iowa 485; Cook *v.* Burlington, 30 Iowa 94, 6 Am. Rep. 649; Wilson *v.* Sexon, 27 Iowa 15.

Kansas.— Franklin County Com'rs *v.* Lathrop, 9 Kan. 453.

Kentucky.— Gedge *v.* Com., 9 Bush 61; Coehran *v.* Shepherdsville, 43 S. W. 250, 19 Ky. L. Rep. 1192; La Grange *v.* Bain, 4 Ky. L. Rep. 256; Wilkins *v.* Barner, 2 Ky. L. Rep. 278; Elizabethtown, etc., R. Co. *v.* Thompson, 1 Ky. L. Rep. 395.

Louisiana.— Leonard *v.* Baton Rouge, 39 La. Ann. 275, 4 So. 241; David *v.* New Orleans, 16 La. Ann. 404, 79 Am. Dec. 586; David *v.* Municipality No. 2, 14 La. Ann. 872; Xiques *v.* Bujac, 7 La. Ann. 498; Carrollton *v.* Jones, 7 La. Ann. 233; Linton *v.* Guillotte, 10 Rob. 357; Carrollton R. Co. *v.* Municipality No. 2, 19 La. 62; Municipality No. 2 *v.* Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624; Livaudais *v.* Municipality No. 2, 16 La. 509.

Maine.— White *v.* Bradley, 66 Me. 254; Muzzey *v.* Davis, 54 Me. 361; State *v.* Wilson, 42 Me. 9; State *v.* Bradbury, 40 Me. 154; Cole *v.* Sprowl, 35 Me. 161, 56 Am. Dec. 695; Bangor House Proprietary *v.* Brown, 33 Me. 309.

Michigan.— Gregory *v.* Ann Arbor, 127 Mich. 454, 86 N. W. 1013; Lee *v.* Lake, 14 Mich. 12, 90 Am. Dec. 220; Tillman *v.* People, 12 Mich. 401; People *v.* Jones, 6 Mich. 176; People *v.* Beaubien, 2 Dougl. 256.

Minnesota.— Morse . Zeize. 34 Minn. 35, 24 N. W. 287; Mankato *v.* Willard, 13 Minn. 13, 97 Am. Dec. 208; Wilder *v.* St. Paul, 12 Minn. 192; Baker *v.* St. Paul, 8 Minn. 491.

Mississippi.—Sanford *v.* Meridian, 52 Miss. 383; Briel *v* Natchez, 48 Miss. 423.

Missouri.—Vossen *v.* Dauntel, 116 Mo. 379, 22 S. W. 734; St. Louis *v.* St. Louis University, 88 Mo. 155; Reagan *v.* McCoy, 29 Mo. 356.

Nebraska.— Close *v.* Swanson, 64 Nebr. 389, 89 N. W. 1043; Warren *v.* Brown, 31 Nebr. 8, 47 N. W. 633; Graham *v.* Hartnett, 10 Nebr. 517, 7 N. W. 280.

New Jersey.— Pease *v.* Paterson, etc., Traction Co., (Sup. 1903) 54 Atl. 524; State *v.* Glouecster City, 43 N. J. L. 544; Booraem *v.* North Hudson County R. Co., 40 N. J. Eq. 557, 5 Atl. 106 [*affirming* 39 N. J. Eq. 465]; Holmes *v.* Jersey City, 12 N. J. Eq. 299.

New York.— Niagara Falls Suspension Bridge Co. *v.* Bachman, 66 N. Y. 261; Wohler *v.* Buffalo, etc., R. Co., 46 N. Y. 686; Holdane *v.* Cold Springs, 21 N. Y. 474; Oswego *v.* Oswego Canal Co., 6 N. Y. 257; Fonda *v.* Borst, 2 Abb. Dec. 155, 2 Keyes 48; McMannis *v.* Butler, 49 Barb. 176; *In re* Brooklyn Heights, 48 Barb. 288; Bissell *v.* New York Cent. R. Co., 26 Barb. 630; Adams *v.* Saratoga, etc., R. Co., 11 Barb. 414.

North Carolina.— Kennedy *v.* Williams, 87 N. C. 6.

Ohio.— Fulton *v.* Mehrenfeld, 8 Ohio St. 440 [*affirming* 2 Handy 176, 12 Ohio Dec. (Reprint) 389]; Cincinnati *v.* McMicken, 6 Ohio Cir. Ct. 188.

Oregon.— Carter *v.* Portland, 4 Oreg. 339.

Pennsylvania.—*In re* Alley, 104 Pa. St. 622; *In re* Penny Pot Landing, 16 Pa. St. 79.

Rhode Island.— Simmons *v.* Mumford, 2 R. I. 172; Remington *v.* Millerd, 1 R. I. 93.

South Carolina.— State *v.* Carver, 5 Strobh. 217.

Tennessee.— Monaghan *v.* Memphis Fair, etc., Co., 95 Tenn. 108, 31 S. W. 497; Scott *v.* Cheatham, 12 Heisk. 713; Mathis *v.* Parham, 1 Tenn. Ch. 533.

Texas.—Galveston *v.* Williams, 69 Tex. 449, 6 S. W. 860; Gilder *v.* Brenham, 67 Tex. 345, 3 S. W. 309; French *v.* Scheuber, 6 Tex. Civ. App. 617, 26 S. W. 133.

Vermont.— Dodge *v.* Stacy, 39 Vt. 558.

Virginia.— Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830; Benn *v.* Hatcher, 81 Va. 25, 59 Am. Rep. 645.

Wisconsin.— State *v.* Paine Lumber Co., 84 Wis. 205, 54 N. W. 503.

United States.— Davenport *v.* Buffington,

2. EXCEPTIONS TO RULE — a. Statutory Dedication. In a number of jurisdictions, where a dedication is made in compliance with the statutes relating to the subject, no acceptance is necessary to complete the dedication.[35] Accordingly after such a dedication has been made ejectment will lie against the dedicator to recover possession of the land dedicated,[36] and in a number of cases it has been held that the burden devolves upon the municipality to keep the streets or alleys dedicated in repair,[37] and that it will be liable for personal injuries resulting from its neglect to do so.[38] In other jurisdictions, however, as is the case with common law dedications, an acceptance is necessary to complete a statutory dedication,[39] and if there is no acceptance within a reasonable time, the dedicator may revoke his offer and take possession of the land dedicated.[40]

b. Deed to Individual Calling For Public Use. According to the great weight of authority, if the owner of land has laid it off into blocks and lots with streets and alleys intersecting it and sells lots with reference to a map or plat in which the land is so laid off, or where there is a city map in which the land is so laid off, and he sells lots with reference to such map, he will be held to have made an irrevocable dedication of the designed streets and alleys. So far as he is concerned no acceptance is necessary to bind him[41] other than the mere purchase of his lots which some courts have construed as an acceptance on the part of the public.[42] However well settled this may be, it is equally well settled that in the absence of acceptance by some formal act on the part of the properly constituted authorities, or by their repairing or improving the land dedicated, or by user by the general public, no duty of improving or keeping in repair the land dedicated or liability for injuries caused by failure to do so is imposed on the public.[43]

B. Time of Acceptance. In order that rights may be claimed under an offer of dedication it must be accepted within a reasonable time,[44] and by parity

97 Fed. 234, 38 C. C. A. 453, 46 L. R. A. 377; Ruch *v.* Rock Island, 20 Fed. Cas. No. 12,105, 5 Biss. 95.

England.— Rex *v.* Leake, 5 B. & Ald. 469, 2 N. & M. 583, 27 E. C. L. 201; Rex *v.* Lynn, 1 C. & P. 527, 12 E. C. L. 303, 5 D. & R. 497, 16 E. C. L. 243, 3 L. J. K. B. O. S. 92, 27 Rev. Rep. 530.

See 15 Cent. Dig. tit. "Dedication," § 64.

35. *Colorado.*— Denver *v.* Clements, 3 Colo. 472.

Kansas.— Osage City *v.* Larkin, 40 Kan. 206, 19 Pac. 658, 10 Am. St. Rep. 186, 2 L. R. A. 56.

Minnesota.—Baker *v.* St. Paul, 8 Minn. 491.

Missouri.— Brown *v.* Carthage, 128 Mo. 10, 30 S. W. 312; Buschmann *v.* St. Louis, 121 Mo. 523, 26 S. W. 687; Reid *v.* Board of Education, 73 Mo. 295.

Nebraska.— Weeping Water *v.* Reed, 21 Nebr. 261, 31 N. W. 797.

36. Reid *v.* Board of Education, 73 Mo. 295.

37. Denver *v.* Clements, 3 Colo. 472; Osage City *v.* Larkin, 40 Kan. 206, 19 Pac. 658, 10 Am. St. Rep. 186, 2 L. R. A. 56.

38. Osage City *v.* Larkin, 40 Kan. 206, 19 Pac. 658, 10 Am. St. Rep. 186, 2 L. R. A. 56.

39. Jordan *v.* Chenoa, 166 Ill. 530, 47 N. E. 191; Hamilton *v.* Chicago, etc., R. Co., 124 Ill. 235, 15 N. E. 854 [*explaining* Gebhardt *v.* Reeves, 75 Ill. 301; Hunter *v.* Middleton, 13 Ill. 50; Illinois, etc., Canal Co. *v.* Haven, 11 Ill. 554]; Winnetka *v.* Prouty, 107 Ill. 218; Littler *v.* Lincoln, 106 Ill. 353; Edwardsville *v.* Barnsback, 66 Ill. App. 381; Schmitz *v.* Germantown, 31 Ill. App. 284; Field *v.* Manchester, 32 Mich. 279; Wayne County *v.* Miller, 31 Mich. 447; Wisby *v.* Bonte, 19 Ohio St. 238. The rule was formerly otherwise in Ohio. Fulton *v.* Mehrenfeld, 8 Ohio St. 440.

40. Field *v.* Manchester, 32 Mich. 279.

41. See *supra*, V, C, 5, c.

42. Sanford *v.* Meridian, 52 Miss. 383; Briel *v.* Natchez, 48 Miss. 423; Carter *v.* Portland, 4 Oreg. 339. And see Godfrey *v.* Alton, 12 Ill. 29, 52 Am. Dec. 476.

43. Bartlett *v.* Bangor, 67 Me. 460; Briel *v.* Natchez, 48 Miss. 423; Brigantine *v.* Holland Trust Co., (N. J. Ch. 1896) 35 Atl. 344; Booraem *v.* North Hudson County R. Co., 39 N. J. Eq. 465; Hoboken Land, etc., Co. *v.* Hoboken, 36 N. J. L. 540; Hoboken M. E. Church *v.* Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696.

44. *California.*— Niles *v.* Los Angeles, 125 Cal. 572, 58 Pac. 190; Wolfskill *v.* Los Angeles County, 86 Cal. 405, 24 Pac. 1094; People *v.* Reed, 81 Cal. 70, 22 Pac. 474, 15 Am. St. Rep. 22; Hayward *v.* Manzer, 70 Cal. 476, 13 Pac. 141.

Michigan.— White *v.* Smith, 37 Mich. 291; Field *v.* Manchester, 32 Mich. 279; Wayne County *v.* Miller, 31 Mich. 447; Baker *v.* Johnston, 21 Mich. 319.

New York.— Matter of Opening Beck St., 19 Misc. 571, 44 N. Y. Suppl. 1087.

Texas.—Galveston *v.* Williams, 69 Tex. 449, 6 S. W. 860.

of reasoning a reasonable time must be allowed in which to accept.[45] While a dedication and acceptance may both concur on a single day,[46] immediate acceptance is not necessary.[47] Dedications may be made *in præsenti* to be accepted by the public *in futuro*.[48] What constitutes a reasonable time must be largely governed by the circumstances of each case,[49] and as a general rule acceptance will be in time if made at such time as the public interest may require.[50] So in many cases it has been said that the acceptance will be in time if made at any time before revocation.[51] On the other hand acceptance is of course too late if

Vermont.— State *v.* Trask, 6 Vt. 355, 27 Am. Dec. 554.

See 15 Cent. Dig. tit. "Dedication," § 67.

45. Guthrie *v.* New Haven, 31 Conn. 308; Sarvis *v.* Caster, 116 Iowa 707, 89 N. W. 84.

46. Cook *v.* Harris, 61 N. Y. 448; Hunter *v.* Sandy Hill, 6 Hill (N. Y.) 407.

47. *Illinois.*— Augusta *v.* Tyner, 197 Ill. 242, 64 N. E. 378; Lake View *v.* Le Bahn, 120 Ill. 92, 9 N. E. 269.

Maryland.— Baltimore *v.* Frick, 82 Md. 77, 33 Atl. 435; McCormick *v.* Baltimore, 45 Md. 512.

New York.— Clements *v.* West Troy, 10 How. Pr. 199; Wyman *v.* New York, 11 Wend. 486.

Oregon.— Carter *v.* Portland, 4 Oreg. 339.

Texas.— Oswald *v.* Grenet, 22 Tex. 94.

United States.— Barclay *v.* Howell, 6 Pet. 498, 8 L. ed. 477.

See 15 Cent. Dig. tit. "Dedication," § 67.

"If immediate user by the public, or even immediate acceptance by a competent public authority, be, in all cases, necessary to give effect to a dedication of land to public uses, the doctrine of dedication is shorn of one of its most important uses." Jersey City *v.* Morris Canal, etc., Co., 12 N. J. Eq. 547, 563.

48. Denver *v.* Clements, 3 Colo. 472; Derby *v.* Alling, 40 Conn. 410; Jersey City *v.* Morris Canal, etc., Co., 12 N. J. Eq. 547.

49. *Illinois.*— Lake View *v.* Le Bahn, 120 Ill. 92, 9 N. E. 269.

Iowa.— Sarvis *v.* Caster, 116 Iowa 707, 89 N. W. 84; Cambridge *v.* Cook, 97 Iowa 599, 66 N. W. 884; Shea *v.* Ottumwa, 67 Iowa 39, 24 N. W. 582.

Michigan.— White *v.* Smith, 37 Mich. 291.

Mississippi.— Briel *v.* Natchez, 48 Miss. 423.

New Jersey.— Jersey City *v.* Morris Canal, etc., Co., 12 N. J. Eq. 547.

New York.— Matter of Opening Beck St., 19 Misc. 571, 44 N. Y. Suppl. 1087; Hunter *v.* Sandy Hill, 6 Hill 407.

See 15 Cent. Dig. tit. "Dedication," § 67.

50. *Colorado.*— Denver *v.* Clements, 3 Colo. 472.

Connecticut.— Derby *v.* Alling, 40 Conn. 410.

Illinois.— Lake View *v.* Le Bahn, 120 Ill. 92, 9 N. E. 269.

Iowa.— Sarvis *v.* Caster, 116 Iowa 707, 89 N. W. 84; Shea *v.* Ottumwa, 67 Iowa 39, 24 N. W. 582.

Louisiana.— Burthe *v.* Blake, 9 La. Ann. 214.

Michigan.— White *v.* Smith, 37 Mich. 291.

Mississippi.— Briel *v.* Natchez, 48 Miss. 423.

Oregon.— Meier *v.* Portland Cable R. Co., 16 Oreg. 500, 19 Pac. 610, 1 L. R. A. 856.

Tennessee.— Hardy *v.* Memphis, 10 Heisk. 127.

See 15 Cent. Dig. tit. "Dedication," § 67.

Statement of rule.— "Dedications of private property to the public enjoyment must always be considered with reference to the use to which the thing is to be appropriated. . . . It may be years before the convenience of the public, or of those who live upon adjacent lots, on account of the paucity of population, requires that they should be formally taken in charge by the municipal authorities. Such dedication of streets in a growing town must have such an interpretation as will comport with the common understanding. The proprietor of the ground ought to be held as proclaiming and offering to the public to change his property from rural to urban, to sell it in small parcels with reference to streets and squares. Because the neighborhood is not rapidly settled up, and years may elapse before the city undertakes to work and grade the streets, or before the necessity arises, the city should not, by such non-user, be held to have relinquished the easement and abandoned its acceptance of the dedication." Briel *v.* Natchez, 48 Miss. 423, 436.

Application of rule.— Where land in a city was dedicated to public use for a street but it was rough and hilly, and was needed and used by the public but little for thirty years, when the city proceeded to grade it, it was held that the delay in improving it did not cause it to revert to the dedicator. Shea *v.* Ottumwa, 67 Iowa 39, 24 N. W. 582. So failure to use a portion of land dedicated for city purposes is not an abandonment where at the time the dedication was made the city was a small village and it was contemplated that many years would elapse before all the land would be used. Hardy *v.* Memphis, 10 Heisk. (Tenn.) 127. And it is not necessary to an acceptance of an offer to dedicate land for a street that every street, or all of any street, should be forthwith opened and used when platted. Augusta *v.* Tyner, 197 Ill. 242, 64 N. E. 378.

51. *California.*— Wolfskill *v.* Los Angeles County, 86 Cal. 405, 24 Pac. 1094.

Michigan.— White *v.* Smith, 37 Mich. 291.

Missouri.— Price *v.* Breckenridge, 92 Mo. 378, 5 S. W. 20; Rosenberger *v.* Miller, 61 Mo. App. 422.

New York.— *In re* Extension of North Third Ave., 3 N. Y. Suppl. 641.

Rhode Island.— Simmons *v.* Cornell, 1 R. I. 519.

See 15 Cent. Dig. tit. "Dedication," § 67.

made after revocation.[52] An acceptance is also too late where the dedicator has or those claiming under him have occupied and used the land dedicated for a long period of time.[53]

C. Form and Sufficiency of Acceptance — 1. In General. Ordinarily, in the absence of any statutory provision to the contrary, no formality is necessary to a valid acceptance.[54]

2. Acceptance by the General Public — a. Sufficiency to Bind Dedicator. An offer of dedication, to bind the dedicator, need not be accepted by the city or county or other public authorities, but may be accepted by the general public[55] — to deny this would be to deny the whole doctrine of dedication.[56] The general public accepts by entering upon the land and enjoying the privileges offered — or briefly, by user.[57] Except when user is relied on to raise a presumption of dedication the duration of the user is wholly immaterial. It is not necessary that such user should continue any definite length of time,[58] or that so long as the persons enjoying it have done so as members of the general public and not as neigh-

52. Forsyth *v.* Dunnagan, 94 Cal. 438, 29 Pac. 770; State *v.* Fisher, 117 N. C. 733, 23 S. E. 158.

Acceptance ten years after dedication and after the death of the dedicator is not in time. People *v.* Kellogg, 67 Hun (N. Y.) 546, 22 N. Y. Suppl. 490.

53. *California.*—People *v.* Reed, 81 Cal. 70, 22 Pac. 474, 15 Am. St. Rep. 22; Hayward *v.* Manzer, 70 Cal. 476, 13 Pac. 141.

Illinois.— Vermont *v.* Miller, 161 Ill. 210, 43 N. E. 975; Schmitz *v.* Germantown, 31 Ill. App. 284.

Iowa.— Cambridge *v.* Cook, 97 Iowa 599, 66 N. W. 884.

Kentucky.—Lagrance *v.* Bain, 4 Ky. L. Rep. 256.

Michigan.—Grandville *v.* Jenison, 84 Mich. 54, 47 N. W. 600; Field *v.* Manchester, 32 Mich. 279.

See 15 Cent. Dig. tit. "Dedication," § 67.

Application of rule.— Thus the failure to take any steps to accept a dedicated street for twenty-one years, during which time the dedicator sold the *locus in quo* which was adversely occupied by the vendee for twenty years, bars any right of the public to the street. Hayward *v.* Manzer, 70 Cal. 476, 13 Pac. 141. So a village by allowing a period of twenty-three years to elapse without accepting the offer of dedication made by the filing of a plat insufficiently acknowledged, during which time grantees of the person making the plat have erected fences and occupied the land designated as a street, loses whatever right it might have had to an easement in the land so occupied. Vermont *v.* Miller, 161 Ill. 210, 43 N. E. 975.

54. *California.*— San Leandro *v.* Le Breton, 72 Cal. 170, 13 Pac. 405.

Illinois.—Forbes *v.* Balenseifer, 74 Ill. 183; Rees *v.* Chicago, 38 Ill. 322.

Iowa.— Keokuk *v.* Cosgrove, 116 Iowa 189, 89 N. W. 983.

Maine.— Cole *v.* Sprowl, 35 Me. 161, 56 Am. Dec. 696.

Michigan.— People *v.* Jones, 6 Mich. 176.

Missouri.— Downend *v.* Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170; Buschmann *v.* St. Louis, 121 Mo. 523, 26 S. W. 687; Taylor *v.* St. Louis, 14 Mo. 20, 55 Am. Dec. 89.

Oregon.— Carter *v.* Portland, 4 Oreg. 339.

See 15 Cent. Dig. tit. "Dedication," § 69 *et seq.*; and *supra*, VI, C, 4, b.

55. Wright *v.* Oberlin, 23 Ohio Cir. Ct. 509; Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155.

Illustration.— Where owners of land in a city graded a street, built a sidewalk, had telegraph poles strung along it, and a hotel was being erected fronting on the street, which had been extensively used as such for two or three years, such facts show an acceptance of the owner's implied dedication of the street, without proof of the formal acceptance by the city, or that it had ever caused it to be worked as a street. Hammond *v.* Maher, 30 Ind. App. 286, 65 N. E. 1055.

A city may at any time adopt an easement dedicated to the general public, but it cannot be made to do so. Smith *v.* San Luis Obispo, 95 Cal. 463, 30 Pac. 591; Hoboken Land, etc., Co. *v.* Hoboken, 36 N. J. L. 540.

56. The decisions that the general public can be dedicatee would be meaningless if a legal person had to accept the dedication. In Atty.-Gen. *v.* Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251, it was strongly argued that the general public could not accept a general dedication at all, as it would thus acquire rights without liabilities; but this contention was overruled, it being held that an easement so accepted was vested in the general public, and otherwise the rights and liabilities of the owner of the ground continued.

57. See *infra*, VII, D, 4.

58. Reg. *v.* Chorley, 12 Q. B. 515, 12 Jur. 822, 64 E. C. L. 515. Although this may be a fact for the jury to help out the proof of acceptance when the acts of acceptance are not positive. Case *v.* Favier, 12 Minn. 89. Occupation by a city for two or three weeks has been held not sufficient to show its intent to accept. Laughlin *v.* Washington, 63 Iowa 652, 19 N. W. 819. Two or three years has been held sufficient. Hammond *v.* Maher, 30 Ind. App. 286, 65 N. E. 1055; Strunk *v.* Pritchett, 27 Ind. App. 582, 61 N. E. 973.

bors[59] or licensees,[60] or otherwise in their individual capacity,[61] they should be of any defined number.[62] While no dedication will be presumed from user alone unless the user has been so long and so general that the public convenience would be materially affected by its interruption,[63] no such requirement applies strictly as to the user which constitutes the acceptance of a dedication otherwise established,[64] it being only necessary that those who would naturally be expected to enjoy it do, or have done so, at their pleasure and convenience.

b. Sufficiency to Bind Public Authorities For Care and Maintenance — (i) *In General.* Although the rule is almost unquestioned that user by the general public will not, in addition to binding the dedicator and consummating the dedication, bind the public authorities so that they will be responsible for its care and maintenance, this subject has presented difficulties and has caused confusion. The general rule is that the public by user cannot so accept as to bind the municipality.[65] The liability of cities, counties, commissioners, etc., for the condition

And likewise eighteen months. North London R. Co. *v.* St. Mary, 27 L. T. Rep. N. S. 672, 21 Wkly. Rep. 226. See also Hunter *v.* Sandy Hill, 6 Hill (N. Y.) 407.

59. Onstott *v.* Murray, 22 Iowa 457; People *v.* Osborn, 84 Hun (N. Y.) 441, 32 N. Y. Suppl. 358.

60. Barraclough *v.* Johnson, 8 A. & E. 99, 2 Jur. 839, 7 L. J. Q. B. 172, 3 N. & P. 233, 35 E. C. L. 499.

61. Private easements may be acquired by such individual use. See EASEMENTS.

62. **User by parties hauling wood and stone,** and no one else, over a rough way to a river bank, where there is no bridge, is not enough. Fairchild *v.* Stewart, 117 Iowa 734, 89 N. W. 1075. User begun by school children and then extended by general enjoyment is a sufficient acceptance. Winslow *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 89.

63. See *infra*, VIII, D, 4.

64. *Illinois.*— Mann *v.* Elgin, 24 Ill. App. 419.

New Hampshire.— State *v.* New-Boston, 11 N. H. 407.

Tennessee.— Mathis *v.* Parham, 1 Tenn. Ch. 533.

Wisconsin.— Mahler *v.* Brumder, 92 Wis. 477, 66 N. W. 502, 31 L. R. A. 695.

United States.— Cincinnati *v.* White, 6 Pet. 431, 8 L. ed. 452.

England.— Atty.-Gen. *v.* Biphosphated Guano Co., 11 Ch. D. 327, 49 L. J. Ch. 68, 40 L. T. Rep. N. S. 201, 27 Wkly. Rep. 621.

And see Taraldson *v.* Lime Springs, 92 Iowa 187, 60 N. W. 658.

See 15 Cent. Dig. tit. "Dedication," § 73.

65. *California.*—Smith *v.* San Luis Obispo, 95 Cal. 463, 30 Pac. 591; Archer *v.* Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; Stone *v.* Brooks, 35 Cal. 489.

Georgia.— Georgia R., etc., Co. *v.* Atlanta, 118 Ga. 486, 45 S. E. 256.

Illinois.— People *v.* Highway Com'rs, 52 Ill. 498; Willey *v.* People, 36 Ill. App. 609.

Indiana.— Indianapolis *v.* McClure, 2 Ind. 147. See Mansur *v.* State, 60 Ind. 357.

Kentucky.— Gedge *v.* Com., 9 Bush 61; Schuster *v.* Barber Asphalt Paving Co., 74 S. W. 226, 24 Ky. L. Rep. 2346; Greenup County *v.* Maysville, etc., R. Co., 21 S. W. 351, 14 Ky. L. Rep. 699.

Maine.— Mayberry *v.* Standish, 56 Me. 342; State *v.* Wilson, 42 Me. 9.

Maryland.—New Windsor *v.* Stocksdale, 95 Md. 196, 52 Atl. 596; Ogle *v.* Cumberland, 90 Md. 59, 44 Atl. 1015; Valentine *v.* Hagerstown, 86 Md. 486, 38 Atl. 931; Baltimore *v.* Broumel, 86 Md. 153, 37 Atl. 648; State *v.* Kent County, 83 Md. 377, 35 Atl. 62, 33 L. R. A. 291.

Massachusetts.— Bowers *v.* Suffolk Mfg. Co., 4 Cush. 332.

Michigan.— Detroit *v.* Detroit, etc., R. Co., 23 Mich. 173; Baker *v.* Johnston, 21 Mich. 319.

Mississippi.— Harrison County *v.* Seal, 66 Miss. 129, 5 So. 622, 14 Am. St. Rep. 545, 3 L. R. A. 659.

Missouri.—Downend *v.* Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170; Baldwin *v.* Springfield, 141 Mo. 205, 42 S. W. 717; Meiners *v.* St. Louis, 130 Mo. 274, 32 S. W. 637.

New Jersey.— Hoboken Land, etc., Co. *v.* Hoboken, 36 N. J. L. 540; Hoboken M. E. Church *v.* Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696; Booraem *v.* North Hudson County R. Co., 39 N. J. Eq. 465; Atty.-Gen. *v.* Morris, etc., R. Co., 19 N. J. Eq. 386, 20 N. J. Eq. 530; Pope *v.* Union, 18 N. J. Eq. 282.

New York.— Oswego *v.* Oswego Canal Co., 6 N. Y. 257; Holdane *v.* Cold Spring, 23 Barb. 103; Clements *v.* West Troy, 16 Barb. 251. And see Speir *v.* Utrecht, 121 N. Y. 420, 24 N. E. 692 (under statute); Loughman *v.* Long Island R. Co., 83 N. Y. App. Div. 629, 81 N. Y. Suppl. 1097.

Rhode Island.— State *v.* Richmond, 1 R. I. 49.

Vermont.—Blodget *v.* Royalton, 14 Vt. 288; State *v.* Trask, 6 Vt. 355, 27 Am. Dec. 554.

Virginia.— Com. *v.* Kelly, 8 Gratt. 632.

West Virginia.— Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155.

"**Neither upon precedent nor principle** is the contention true that mere user by the public, for any length of time, without any act of the city, of land can impress upon it the character of a street and thereby cast upon the city the duty to keep it in repair or

of the public streets, etc., is elsewhere[66] fully discussed, and here it need only be siad that such liability on the part of the public authorities can exist only in four cases: (1) Where the easement has been duly condemned or established by them,[67] (2) where the easement has been accepted by the state or by them expressly or by implication;[68] (3) where the easement has been established by long public user, on the doctrine of prescription;[69] and (4) where the easement is sought under some special statute to be established by proof of public user.[70]

(II) *User For Prescriptive Period.* It is stated by some authorities that "long public user" of the privilege in question may be an acceptance binding on the public authorities.[71] In England prior to the Highway Act mere public user was held sufficient for this purpose;[72] but there are few cases in America in which this doctrine has been accepted.[73] Some cases which seem to accept it are cases in which the liability of the municipality for the condition of the easement has not been involved, such as cases against individuals for obstructing a highway,[74] which cases do not involve the liability of the public authorities. The liability

make it liable for failure to do so." Downend *v.* Kansas City, 156 Mo. 60, 74, 56 S. W. 902, 51 L. R. A. 170.

66. See, generally, MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS.

67. See, generally, EMINENT DOMAIN.

68. See *infra*, VI, C, 3.

69. See *infra*, VII, D, 4.

70. The last two classes of cases come immediately within this discussion. See *infra*, VI, C, 2, b, (II), (III).

71. See Baltimore *v.* Broumel, 86 Md. 153, 37 Atl. 648.

72. At common law a road dedicated and used by the public became a highway, with the repair of which the parish was chargeable, although neither the dedication nor the user had been adopted or acquiesced in by the parish. Rex *v.* Leake, 5 B. & Ad. 469, 2 N. & M. 583, 27 E. C. L. 201; Rex *v.* St. Benedict, 4 B. & Ald. 447, 23 Rev. Rep. 341, 24 E. C. L. 555. The English Highway Act changed this rule, but was held not to apply to roads already dedicated. Reg. *v.* Westmark, 2 M. & Rob. 305. Although this act be not complied with dedicated roads are still public and parties may be liable for obstructing them. Roberts *v.* Hunt, 15 Q. B. 17, 69 E. C. L. 17.

73. **Connecticut.**— Except in the case of highways laid out by the selectmen, which highways towns are expressly authorized to accept, such towns have nothing to do with the acceptance of highways. If such ways are necessary to the public convenience and are used by the public, the town is bound to repair them. Green *v.* Canaan, 29 Conn. 157. See also Riley *v.* Hammel, 38 Conn. 574; Guthrie *v.* New Haven, 31 Conn. 308.

Iowa.— It was held that public user ought to apply in cases against the municipality, but in this case there was both public user and repairs made by the public authorities. It is said that the wants and convenience of the public must control and the public authorities, if they wish to avoid liabilities, ought to take proper action to refuse to accept and thus protect themselves. Evidence of repairs made subsequently to the accident were admitted as evidence of prior acceptance. Manderschid *v.* Dubuque, 29 Iowa 73, 4 Am. Rep. 196, decided by a divided court. In subsequent cases it is assumed that a public highway may exist by dedication or prescription, and may be shown by user in either case, but these were cases of an obstruction by an individual not involving municipal liability. State *v.* Birmingham, 74 Iowa 407, 38 N. W. 121; State *v.* Tucker, 36 Iowa 485.

Minnesota.— Acceptance by user binds the city to keep in repair. Phelps *v.* Mankato, 23 Minn. 276.

Wisconsin.— By a divided court it was held that public user bound the public authorities. Buchanan *v.* Curtis, 25 Wis. 99, 3 Am. Rep. 23. In Eastland *v.* Fogo, 66 Wis. 133, 27 N. W. 159, 28 N. W. 143, it was held that it was not necessary that a town should accept to make a highway which individuals could not obstruct.

Abandonment of toll-bridge and user by public.— Two bridge cases, one in Illinois (Marseilles *v.* Howland, 124 Ill. 547, 16 N. E. 883), and one in New York (Requa *v.* Rochester, 45 N. Y. 129, 6 Am. Rep. 52), hold that where a toll-bridge has been abandoned to the public and used by the public the public authorities are bound to take care of it. Against a presumption from the wants and convenience of the public that the authorities have accepted the dedication referred to in Manderschid *v.* Dubuque, 29 Iowa 73, 4 Am. Rep. 196, it is said that there is no presumption of such acceptance from the beneficial nature of the use, because such acceptance would impose a burden. Willey *v.* People, 36 Ill. App. 609.

74. *Illinois.*—Willey *v.* People, 36 Ill. App. 609.

Iowa.— State *v.* Birmingham, 74 Iowa 407, 38 N. W. 121; State *v.* Tucker, 36 Iowa 485.

Pennsylvania.— Com. *v.* Moorehead, 118 Pa. St. 344, 12 Atl. 424, 4 Am. St. Rep. 599.

Tennessee.— Nashville, etc., R. Co. *v.* State, 1 Baxt. 55.

Wisconsin.— Eastland *v.* Fogo, 66 Wis. 133, 27 N. W. 159, 28 N. W. 143.

England.— Roberts *v.* Hunt, 15 Q. B. 17, 69 E. C. L. 17.

of a municipality in cases where by dedication it has acquired the fee does not depend upon public user.[75] What is meant by long public user is not always defined and this has led in some cases to misunderstandings. Properly long public user means such user as has established an easement by prescription.[76] A like effect from any other user is negatived by the many decisions which hold that the general public cannot accept a dedication so as to bind the public authorities;[77] and prescriptive user is a kind of user which has been actually applied in authorities referring to long user[78] and is a kind of user from which it may properly be presumed that an easement was laid out by proceedings the records of which have been lost.[79] In some courts such effect is denied even to prescriptive user.[80]

(III) *Effect of Special Statutory Provisions.* Some statutes expressly provide that easements which have been used by the general public for a certain number of years shall be public easements just as if laid out by the public authorities.[81] In determining therefore in any state the effect of general user the statutes of the state must be referred to, it being the general rule that even such statutes do not affect in any way the binding effect upon the dedicator of an acceptance by the general public.[82]

3. Acceptance by Legislature. Inasmuch as the general public in any state is primarily represented by the legislature of the state it follows that the legislature of any state expressly or by referring in the statute to a public use existing may accept such use in behalf of the general public or municipality[83] just

75. This explains such decisions as Osage City *v.* Larkin, 40 Kan. 206, 19 Pac. 658, 10 Am. St. Rep. 186, 2 L. R. A. 56. See also Baldwin *v.* Springfield, 141 Mo. 205, 42 S. W. 717.

76. See Buchanan *v.* Curtis, 25 Wis. 99, 3 Am. Rep. 23.

77. See *supra*, VI, C, 2, b, (I).

78. *Kentucky.*— Beall *v.* Clore, 6 Bush 676. See also Wilkins *v.* Barnes, 79 Ky. 323; Greenup County *v.* Maysville, etc., R. Co., 21 S. W. 351, 14 Ky. L. Rep. 699.

Maine.— Bartlett *v.* Bangor, 67 Me. 460; Mayberry *v.* Standish, 56 Me. 342; State *v.* Bradbury, 40 Me. 154.

Maryland.— See Lonaconing Midland, etc., R. Co. *v.* Consolidated Coal Co., 95 Md. 630, 53 Atl. 420.

Massachusetts.— Jennings *v.* Tisbury, 5 Gray 73.

Mississippi.— Harrison County *v.* Seal, 66 Miss. 129, 5 So. 622, 14 Am. St. Rep. 545, 3 L. R. A. 659.

North Carolina.— Kennedy *v.* Williams, 87 N. C. 6.

Pennsylvania.— Com. *v.* Moorehead, 118 Pa. St. 344, 12 Atl. 424, 4 Am. St. Rep. 599. See Pittsburgh *v.* Pennsylvania R. Co., 104 Pa. St. 622.

Wisconsin.— Buchanan *v.* Curtis, 25 Wis. 99, 3 Am. Rep. 23.

79. See cases cited *supra*, note 78.

80. "The mere use by the public does not constitute the way a street or highway so as to cast the burden of keeping it in repair on the public authorities. As between the owner of the land and the public, prescriptive use or public use for longer than ten years bars the owner's right to close it up or to deny the use as a way. But the public acquire no right by such use to demand that the city shall keep it in repair, for the power to lay out, open and establish streets is vested by the organic law of the cities in Missouri, at least, in the city as a political subdivision of the State, and can only be exercised by the officers and in the manner specified in the charter of the city. Our government is a democracy, but a representative democracy. The people have themselves vested the power in certain city officers to acquire streets, but the people have not reserved to themselves, nor has such power been delegated to them, the power to acquire streets by user, nor by user to cast the burden of maintenance upon the city. The owner of the land may be barred by limitation, or estopped by acts *in pais* from claiming that the way belongs to him, but the city is not barred or estopped into accepting that as a public street which the officers authorized by its charter to speak on that subject, have never accepted or treated as a street." Downend *v.* Kansas City, 156 Mo. 60, 70, 56 S. W. 902, 51 L. R. A. 170.

81. See *infra*, VII, D, 4, c.

The expense of keeping public property in repair — of police protection, of lighting streets and roads, etc., is so great that generally it is provided directly or by implication, by legislative enactment or by city ordinances, that the public authorities shall not be liable for such expenses or for damages with reference to public easements unless such public easements have been adopted in a certain way. Baltimore *v.* Broumel, 86 Md. 153, 37 Atl. 648; Moffatt *v.* Kenny, 174 Mass. 311, 54 N. E. 850.

82. Jennings *v.* Tisbury, 5 Gray (Mass.) 73 [*approved* in Day *v.* Allender, 22 Md. 511].

83. Palmer *v.* Clinton, 52 Ill. App. 67; Requa *v.* Rochester, 45 N. Y. 129, 6 Am. Rep. 52; Buffalo *v.* Delaware, etc., R. Co., 39 N. Y.

as it may confirm or validate a defective charter theretofore granted by it to a corporation.[84]

4. ACCEPTANCE BY MUNICIPALITY — a. What Authorities May Accept. To constitute a valid acceptance by a municipality, such acceptance must be by the properly constituted authorities.[85]

b. What Acceptance Sufficient. Except in cases where a municipality may not have the charter powers to accept a dedication[86] an acceptance by a municipality by its duly authorized officers may be express by deed or by some matter of record,[87] or unless prohibited by statute or ordinance, the acceptance may be implied from some act or acts showing that the municipality has assumed control and possession of the property dedicated;[88] as for instance by opening up and

Suppl. 4; Depriest *v.* Jones, (Va. 1895) 21 S. E. 478; Taylor *v.* Com., 29 Gratt. (Va.) 780.

84. Kanawha Coal Co. *v.* Kanawha, etc., Coal Co., 14 Fed. Cas. No. 7,606, 7 Blatchf. 391. And see, generally, CORPORATIONS.

85. *California.*— Eureka *v.* Armstrong, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085.

Illinois.—Willey *v.* People, 36 Ill. App. 609.

Kentucky.— Wilkins *v.* Barnes, 79 Ky. 323.

Maine.— State *v.* Bradbury, 40 Me. 154.

New York.— Cook *v.* Harris, 61 N. Y. 448; Jordan *v.* Otis, 37 Barb. 50; Clements *v.* West Troy, 10 How. Pr. 199.

Rhode Island.— Remington *v.* Millerd, 1 R. I. 93.

Virginia.— Com. *v.* Kelly, 8 Gratt. 632.

West Virginia.— Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582; Boyd *v.* Woolwine, 40 W. Va. 282, 21 S. E. 1020; Taylor *v.* Philippi, 35 W. Va. 554, 14 S. E. 130.

See 15 Cent. Dig. tit. "Dedication," § 66.

This is perhaps largely a matter of statutory regulation, and where the statute confers the power of acceptance upon a designated officer or board, no other than the one designated can accept for the municipality. State *v.* Bradbury, 40 Me. 154; Jordan *v.* Otis, 37 Barb. (N. Y.) 50; Clements *v.* West Troy, 10 How. Pr. (N. Y.) 199.

Where the authority to repair, open, and improve streets and alleys is conferred upon a town by its charter and the city council is the only body by which the authority can be exercised, it may accept dedications of streets. Seattle *v.* Hill, 23 Wash. 92, 62 Pac. 446.

86. St. Louis *v.* St. Louis University, 88 Mo. 155 (where the streets are outside the corporate limits); Philadelphia *v.* Ball, 147 Pa. St. 243, 23 Atl. 564 (where the streets are of a width prohibited by ordinance).

87. *Arkansas.*— Little Rock *v.* Wright, 58 Ark. 142, 23 S. W. 876.

California.— Eureka *v.* Gates, 137 Cal. 89, 69 Pac. 850; Griffiths *v.* Galindo, 86 Cal. 192, 24 Pac. 1025.

Illinois.— See Shirk *v.* Chicago, 195 Ill. 298, 63 N. E. 193.

Kentucky.—Wilkins *v.* Barnes, 79 Ky. 323; Gedge *v.* Com., 9 Bush 61; Versailles *v.* Versailles, etc., R. Co., 8 Ky. L. Rep. 704.

Maryland.— Baltimore *v.* Broumel, 86 Md. 153, 37 Atl. 648; State *v.* Kent County, 83 Md. 377, 35 Atl. 62, 33 L. R. A. 291; Kennedy *v.* Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346.

Mississippi.— Harrison County *v.* Seal, 66 Miss. 129, 5 So. 622, 14 Am. St. Rep. 545, 3 L. R. A. 659.

New Hampshire.— State *v.* Atherton, 16 N. H. 203.

New York.— Smith *v.* Buffalo, 90 Hun 118, 35 N. Y. Suppl. 635.

West Virginia.— Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582.

See 15 Cent. Dig. tit. "Dedication," § 70.

By orders and ordinances.—An order of the common council that "all streets . . . which have been dedicated by the owners thereof . . . are hereby accepted and declared to be public streets" is a sufficient acceptance of streets which have been dedicated by duly recorded deeds, without specifying them by name. Eureka *v.* Armstrong, 83 Cal. 623, 625, 22 Pac. 928, 23 Pac. 1085. But an ordinance by the city council declaring that certain land alleged to have been dedicated by the owner for a street, "be, and the same is hereby dedicated and set apart to public use as a public street" without referring to the owner or his alleged dedication is not an acceptance thereof. People *v.* Reed, 81 Cal. 70, 22 Pac. 474, 15 Am. St. Rep. 22. So it has been held that an ordinance of a city, general in its terms, accepting an addition thereto, is not tantamount to an act of its council approving and fixing the line of the sidewalk of a street marked by the dedicator in the plat of such addition. To have such effect, more than a general acceptance must be shown. It must clearly appear that the council intended to make the line indicated the line of division between the street and sidewalk. Cox *v.* Lancaster, 24 Ohio Cir. Ct. 265.

88. *Colorado.*— Manitou *v.* International Trust Co., 30 Colo. 467, 70 Pac. 757; Durango *v.* Davis, 13 Colo. App. 285, 57 Pac. 733.

Illinois.— Rock Island *v.* Starkey, 189 Ill. 515, 59 N. E. 971; Gentlemen *v.* Soule, 32 Ill. 271, 83 Am. Dec. 264.

Maryland.— State *v.* Kent County, 83 Md. 377, 35 Atl. 62, 33 L. R. A. 291; Kennedy *v.* Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346.

Michigan.— People *v.* Jones, 6 Mich. 176.

Minnesota.— Brakken *v.* Minneapolis, etc., R. Co., 29 Minn. 41, 11 N. W. 124.

Mississippi.— Harrison County *v.* Seal, 66

improving a street or highway or improving other property dedicated,[89] by

Miss. 129, 5 So. 622, 14 Am. St. Rep. 545, 3 L. R. A. 659.

Missouri.—Baldwin *v.* Springfield, 141 Mo. 205, 42 S. W. 717; Maus *v.* Springfield, 101 Mo. 613, 14 S. W. 630, 20 Am. St. Rep. 634; Kaine *v.* Harty, 73 Mo. 316; Golden *v.* Clinton, 54 Mo. App. 100.

New Hampshire.— State *v.* Atherton, 16 N. H. 203; Hopkins *v.* Crombie, 4 N. H. 520.

New York.— Pomfrey *v.* Saratoga Springs, 104 N. Y. 459, 11 N. E. 43; Uhlefelder *v.* Mt. Vernon, 76 N. Y. App. Div. 349, 78 N. Y. Suppl. 500.

Oregon.— Carter *v.* Portland, 4 Oreg. 339.

Pennsylvania.— Philadelphia *v.* Thomas, 152 Pa. St. 494, 25 Atl. 873.

South Carolina.— Chafee *v.* Aiken, 57 S. C. 507, 35 S. E. 800.

Texas.— Heffron *v.* Galveston, (Civ. App. 1903) 75 S. W. 370.

West Virginia.— Taylor *v.* Philippi, 35 W. Va. 554, 14 S. E. 130; Ball *v.* Cox, 29 W. Va. 407, 1 S. E. 673.

Wisconsin.— Milwaukee *v.* Davis, 6 Wis. 377.

See 15 Cent. Dig. tit. "Dedication," § 75.

A statute of Iowa providing that no street or alley hereafter dedicated to the public use shall be under the use or control of the city council unless the dedication shall be accepted and confirmed by an ordinance especially passed for such purposes has been held not to prevent an acceptance by other acts than the adoption of a formal ordinance. Keokuk *v.* Cosgrove, 116 Iowa 189, 89 N. W. 983; Burlington, etc., R. Co. *v.* Columbus Junction, 104 Iowa 110, 73 N. W. 501; Taraldson *v.* Lime Springs, 92 Iowa 187, 60 N. W. 658; Byerly *v.* Anamosa, 79 Iowa 204, 44 N. W. 359, in which case it was held that where a city by ordinance has acquired a street to be improved and sidewalks to be constructed thereon and it has been used for many years as one of the principal thoroughfares of the city, the city is liable for any injuries resulting from its negligence in caring for it, although it has never accepted the street by special ordinance, in accordance with the statute. This case distinguishes Laughlin *v.* Washington, 63 Iowa 652, 19 N. W. 819, in which it was held that the reference of the matter of such a dedication by a city council to a committee to ascertain if the necessary requirements have been fulfilled, a report by them favorable to the acceptance, and an acceptance of the report of the committee by the council does not constitute an acceptance of the streets and alleys dedicated. In referring to this case, the court in Byerly *v.* Anamosa, 79 Iowa 204, 208, 44 N. W. 359, said: "There was no recognition of the existence, but only some uncompleted action of the city, begun with a view of determining whether the dedication of the street should be accepted."

Under the charter of a city of Michigan, requiring all resolutions or the council to be adopted by a vote of a majority thereof, a resolution accepting the dedication of a street which receives the affirmative votes of less than a majority of the council does not constitute a valid acceptance thereof. Gregory *v.* Ann Arbor, 127 Mich. 454, 86 N. W. 1013.

Under the Ohio act of 1852 an acceptance of a street by implication, passing ordinances for its improvement, is insufficient. It must be regularly accepted by ordinance, "specially passed for such purpose." Merchant *v.* Waterman, 2 Ohio Dec. (Reprint) 429, 3 West. L. Month. 48. And see Lough *v.* Machlin, 40 Ohio St. 332. But *compare* Steubenville *v.* King, 23 Ohio St. 610, in which it was held that where territory including a public road connecting with the streets of a city is annexed to the city and the road continues to be used as a street or thoroughfare it thereby becomes a public highway of the city, although it has never been "accepted and confirmed by an ordinance specially passed for such purposes" as provided by statute.

89. *Arizona.*— Evans *v.* Blankenship, (1895) 39 Pac. 812.

California.— People *v.* Marin County, 103 Cal. 223, 37 Pac. 203, 26 L. R. A. 659; Wolfskill *v.* Los Angeles County, 86 Cal. 405, 24 Pac. 1094.

Colorado.— Durango *v.* Davis, 13 Colo. App. 285, 57 Pac. 733.

District of Columbia.— Oettinger *v.* District of Columbia, 18 App. Cas. 375.

Illinois.—Fairbury Union Agricultural Bd. *v.* Holly, 169 Ill. 9, 48 N. E. 149; Rees *v.* Chicago, 38 Ill. 322.

Maryland.— Baltimore *v.* Broumel, 86 Md. 153, 37 Atl. 648.

Michigan.—Conkling *v.* Mackinaw City, 129 Mich. 67, 79 N. W. 6; Nichols *v.* New England Furniture Co., 100 Mich. 230, 59 N. W. 155.

Mississippi.—Harrison County *v.* Seal, 66 Miss. 129, 5 So. 622, 14 Am. St. Rep. 545, 3 L. R. A. 659.

New York.— Pomfrey *v.* Saratoga Springs, 104 N. Y. 459, 11 N. E. 43; Cook *v.* Harris, 61 N. Y. 448; Eckerson *v.* Haverstraw, 6 N. Y. App. Div. 102, 39 N. Y. Suppl. 635; Niagara Falls Suspension Bridge Co. *v.* Bachman, 4 Lans. 523; Port Jervis *v.* Barrett Bridge Co., 10 N. Y. St. 339.

Pennsylvania.— Du Bois Cemetery Co. *v.* Griffin, 165 Pa. St. 81, 30 Atl. 840.

Texas.— Orrick *v.* Ft. Worth, (Civ. App. 1895) 32 S. W. 443.

Wisconsin.— McHugh *v.* Minocqua, 102 Wis. 291, 78 N. W. 478.

See 15 Cent. Dig. tit. "Dedication," § 75.

Where the county court had from time to time appointed surveyors of the road as a public highway, and allotted hands, who worked it, it was held that an acceptance should be presumed, although the evidence strongly conduced to the belief that no order was ever made by the county court establishing or accepting the road. Elliott *v.* Treadway, 10 B. Mon. (Ky.) 22.

A resolution ordering a street to be opened up by working portions thereof constitutes an

attempting to open up a street,[90] by repairing a street,[91] by ordering repairs to be made,[92] by appropriating money for making repairs,[93] by knowingly paying for repairs made,[94] by laying a road off into precincts and appointing overseers over it,[95] by paving a street,[96] by lighting[97] or patroling a street with police,[98] by substituting a dedicated street for an ancient way,[99] by putting up city signs with name of street,[1] by clearing away snow,[2] by accepting a municipal charter providing that "whenever any street or alley shall have been opened or used as such by the public for a period of five years the same shall thereby become a street or alley for all purposes";[3] by accepting an amended charter which includes an addition previously laid off and platted,[4] by recognition in an ordinance providing for the construction of a street of the existence of another street in designating the territory to be assessed,[5] by recognition of streets in official maps,[6] by the passage of a resolution by the proper city authorities authorizing the construction of a railroad through land dedicated to the city as a street,[7] by leasing property dedicated as public property,[8] by using dedicated property for the purpose of maintaining sewers,[9] by bringing suits concerning the property,[10] or by ceasing

acceptance. McHugh *v.* Minocqua, 102 Wis. 291, 78 N. W. 478.

90. Russell *v.* Lincoln, 200 Ill. 511, 65 N. E. 1088.

91. *Alabama.*— Steele *v.* Sullivan, 70 Ala. 589.

Colorado.— Salida *v.* McKinna, 16 Colo. 523, 27 Pac. 810.

Illinois.— Rock Island *v.* Starkey, 189 Ill. 515, 59 N. E. 971; Woodburn *v.* Sterling, 184 Ill. 208, 56 N. E. 378; Lake View *v.* Le Bahn, 120 Ill. 92, 9 N. E. 269; Illinois Ins. Co. *v.* Littlefield, 67 Ill. 368; Marcy *v.* Taylor, 19 Ill. 634; Alvord *v.* Ashley, 17 Ill. 363; Whitfield *v.* Horrocks, 15 Ill. App. 315.

Iowa.— Hull *v.* Cedar Rapids, 111 Iowa 466, 83 N. W. 28.

Kentucky.—Elliott *v.* Treadway, 10 B. Mon. 22.

Maine.— State *v.* Wilson, 42 Me. 9.

Maryland.— Baltimore *v.* Broumel, 86 Md. 153, 37 Atl. 648; State *v.* Kent County, 83 Md. 377, 35 Atl. 62, 33 L. R. A. 291; Kennedy *v.* Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346.

Massachusetts.— Com. *v.* Holliston, 107 Mass. 232.

Michigan.— Ruddiman *v.* Taylor, 95 Mich. 547, 55 N. W. 376; Grand Rapids, etc., R. Co. *v.* Heisel, 47 Mich. 393, 11 N. W. 212; White *v.* Smith, 37 Mich. 291.

Minnesota.— Shartle *v.* Minneapolis, 17 Minn. 308.

Nebraska.— Rathman *v.* Norenberg, 21 Nebr. 467, 32 N. W. 305.

New Jersey.— Pope *v.* Union, 18 N. J. Eq. 282.

New York.— Smith *v.* Buffalo, 90 Hun 118, 35 N. Y. Suppl. 635.

Rhode Island.— Union County *v.* Peckham, 16 R. I. 64, 12 Atl. 130.

Vermont.— Tower *v.* Rutland, 56 Vt. 28; Folsom *v.* Underhill, 36 Vt. 580.

West Virginia.— Ball *v.* Cox, 29 W. Va. 407, 1 S. E. 673.

See 15 Cent. Dig. tit. "Dedication," § 75.

92. Kennedy *v.* Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346.

93. Wright *v.* Tukey, 3 Cush. (Mass.) 290.

94. State *v.* Kent County, 83 Md. 377, 35 Atl. 62, 33 L. R. A. 291.

95. Com. *v.* Kelly, 8 Gratt. (Va.) 632.

96. Westmount *v.* Warmington, 9 Quebec Q. B. 101, putting down a macadamized pavement.

97. Usually a city lights only city streets, and lighting is therefore evidence of acceptance, but lighting a light where it serves other city property as well as the disputed street is of little weight. Ogle *v.* Cumberland, 90 Md. 59, 44 Atl. 1015; Downend *v.* Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170; Robertson *v.* Meyer, 59 N. J. Eq. 366, 45 Atl. 983.

98. Louisville *v.* Snow, 107 Ky. 536, 54 S. W. 860, 21 Ky. L. Rep. 1263, including a street within a policeman's beat.

99. State *v.* Atherton, 16 N. H. 203.

1. See People *v.* Underhill, 144 N. Y. 316, 39 N. E. 333.

2. Hull *v.* Cedar Rapids, 111 Iowa 466, 83 N. W. 28.

3. Requa *v.* Rochester, 45 N. Y. 129, 6 Am. Rep. 52.

4. Des Moines *v.* Hall, 24 Iowa 234, holding that this amounts to an acceptance of such addition of streets and alleys therein.

5. Schaefer *v.* Selvage, 41 S. W. 569, 19 Ky. L. Rep. 797.

6. Steele *v.* Sullivan, 70 Ala. 589; Matter of Public Parks, 53 Hun (N. Y.) 556, 6 N. Y. Suppl. 779; Schade *v.* Albany, 16 N. Y. Suppl. 262; Smith *v.* Navasota, 72 Tex. 422, 10 S. W. 414; Dallas *v.* Gibbs, 27 Tex. Civ. App. 275, 65 S. W. 81.

7. Michigan Cent. R. Co. *v.* Bay City, 129 Mich. 264, 88 N. W. 658.

8. Heffron *v.* Galveston, (Tex. Civ. App. 1903) 75 S. W. 370.

9. *In re* Hunter, 163 N. Y. 542, 57 N. E. 735, 79 Am. St. Rep. 616, 164 N. Y. 365, 58 N. E. 288, an ordinance directing the construction of sewer in way. See Schrack's Estate, 9 Pa. Dist. 149.

10. In no way can a city more plainly accept a street than by a suit asserting its ownership. Atlantic City *v.* Snee, 68 N. J. L. 39, 52 Atl. 372; Hohokus Tp. *v.* Erie R. Co.,

to tax the property as private property.[11] When so accepted, either expressly or impliedly by the proper authorities, the municipality is charged with the duty of keeping in repair and is liable for injuries caused by neglect to do so,[12] and of course the dedicator and those claiming under him are also bound by the acceptance.[13]

D. Extent of Acceptance. Acceptance may be in whole or in part,[14] the presumption being, when the dedication is clearly defined, in favor of the acceptance of the whole.[15]

VII. EVIDENCE AND DETERMINATION.

A. Admissibility — 1. Parol Evidence — a. To Show Intent — (I) *Declarations of Dedicator.* To show the intention of the alleged dedicator with reference to acts of dedication, either for or against[16] the dedication, his declarations made at the time of the acts or so near that time as to be a part of the transaction are admissible in evidence as a part of the *res gestæ*.[17] Such declara-

65 N. J. L. 353, 47 Atl. 566; Atlantic City *v.* Groff, 64 N. J. L. 527, 45 Atl. 916. But see Cass County Sup'rs *v.* Banks, 44 Mich. 467, 7 N. W. 49.

11. Taking the dedicated property off the tax-books may be an implied recognition that it is city property. *In re* Hunter, 163 N. Y. 542, 57 N. E. 735, 79 Am. St. Rep. 616, 164 N. Y. 365, 58 N. E. 288. And continuing to tax may be evidence of non-acceptance. Hanger *v.* Des Moines, 109 Iowa 480, 80 N. W. 549; Lunkenheimer Co. *v.* Cincinnati, 23 Ohio Cir. Ct. 617; Chafee *v.* Aiken, 57 S. C. 507, 35 S. E. 800; Westmount *v.* Warmington, 9 Quebec Q. B. 101.

12. *Colorado.*— Durango *v.* Davis, 13 Colo. App. 285, 57 Pac. 733.

Illinois.— Rock Island *v.* Starkey, 189 Ill. 515, 59 N. E. 971.

Indiana.— Fowler *v.* Linquist, 138 Ind. 566, 37 N. E. 133.

Maryland.— State *v.* Kent County, 83 Md. 377, 35 Atl. 62, 33 L. R. A. 291; Kennedy *v.* Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346.

Missouri.— Golden *v.* Clinton, 54 Mo. App. 100.

New York.— Pomfrey *v.* Saratoga Springs, 104 N. Y. 459, 11 N. E. 43; Requa *v.* Rochester, 45 N. Y. 129, 6 Am. Rep. 52.

Vermont.—Folsom *v.* Underhill, 36 Vt. 580.

Wisconsin.—McHugh *v.* Minocqua, 102 Wis. 291, 78 N. W. 478.

13. *Illinois.*—Fairbury Union Agricultural Bd. *v.* Holly, 169 Ill. 9, 48 N. E. 149; Rees *v.* Chicago, 38 Ill. 322.

Michigan.—Conkling *v.* Mackinaw City, 120 Mich. 67, 79 N. W. 6.

New York.— Vandemark *v.* Porter, 40 Hun 397.

South Carolina.— Chafee *v.* Aiken, 57 S. C. 507, 35 S. E. 800.

West Virginia.— Taylor *v.* Philippi, 35 W. Va. 554, 14 S. E. 130.

14. *California.*— Taft *v.* Tarpey, 125 Cal. 376, 58 Pac. 24; Wolfskill *v.* Los Angeles County, 86 Cal. 405, 24 Pac. 1094.

Connecticut.— Hall *v.* Meriden, 48 Conn. 416.

Illinois.— Augusta *v.* Tyner, 197 Ill. 242, 64 N. E. 378; Chicago *v.* Drexel, 141 Ill. 89, 30 N. E. 774; Winnetka *v.* Prouty, 107 Ill. 218.

Iowa.— Bell *v.* Burlington, 68 Iowa 296, 27 N. W. 245.

Maryland.— Kennedy *v.* Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346.

Michigan.— Field *v.* Manchester, 32 Mich. 279.

Ohio.— Fulton *v.* Mehrenfeld, 8 Ohio St. 440.

Vermont.— State *v.* Trask, 6 Vt. 355, 27 Am. Dec. 554.

Wisconsin.— Yates *v.* Judd, 18 Wis. 118.

See 15 Cent. Dig. tit. "Dedication," § 76.

15. *Connecticut.*— Derby *v.* Alling, 40 Conn. 410.

Illinois.— Sullivan *v.* Tichenor, 179 Ill. 97, 53 N. E. 561; McDonald *v.* Stark, 176 Ill. 456, 52 N. E. 37.

Missouri.— Heitz *v.* St. Louis, 110 Mo. 618, 19 S. W. 735.

Rhode Island.— See Simmons *v.* Cornell, 1 R. I. 519.

South Carolina.— Chafee *v.* Aiken, 57 S. C. 507, 35 S. E. 800.

Wisconsin.—McHugh *v.* Minocqua, 102 Wis. 291, 78 N. W. 478.

United States.— London, etc., Bank *v.* Oakland, 90 Fed. 691, 33 C. C. A. 237.

See 15 Cent. Dig. tit. "Dedication," § 76.

16. Fox *v.* Virgin, 11 Ill. App. 513; Brown *v.* Worcester, 13 Gray (Mass.) 31.

17. *Alabama.*— Steele *v.* Sullivan, 70 Ala. 589.

Colorado.— Starr *v.* People, 17 Colo. 458, 30 Pac. 64.

Illinois.— Smith *v.* Flora, 64 Ill. 93; Proctor *v.* Lewiston, 25 Ill. 153; Willey *v.* People, 36 Ill. App. 609.

Indiana.— Columbus *v.* Dahn, 36 Ind. 330.

Iowa.— Fisher *v.* Beard, 32 Iowa 346.

Minnesota.— Downer *v.* St. Paul, etc., R. Co., 23 Minn. 271; Wilder *v.* St. Paul, 12 Minn. 192.

Vermont.— Abbott *v.* Mills, 3 Vt. 521, 23 Am. Dec. 222.

Wisconsin.— Buchanan *v.* Curtis, 25 Wis. 99, 3 Am. Rep. 23.

tions will not be admissible, however, after the dedication has become irrevocable by acceptance.[18] So the declarations to be admissible must have been made by the owner while owner,[19] and must have been made by himself[20] or by his authority.[21]

(II) *Acts of Dedicator.* Acts of the owner are always competent on the question of intent to dedicate.[22] Thus the fact that the owner of land makes improvements upon his land which are in their nature public, as for instance fencing land and leaving a way through it,[23] laying out a road and allowing the public to use it,[24] constructing a sidewalk,[25] and making a canal through property for general use[26] are competent evidence on the question of dedication, and so is evidence of his erecting a hedge along an alleged way,[27] erecting a building fronting on a way with windows opening on it,[28] or extending a public street by filling in a bay.[29] On the other hand acts tending to show a continued dominion over his property, as where he erects a fence or gate across a road, alleged to be dedicated,[30]

United States.— Irwin *v.* Dixion, 9 How. 10, 13 L. ed. 25.

"The more remote from the time when the alleged dedication was made, the less weight, no doubt, would they be entitled to, as tending to rebut the intention of the dedication, but it would be for the jury to determine whether such declarations were the result of a change of purpose, and a design to resume a dedication which he at the time intended in fact to make to the public, or whether they were consistent with the original purpose." Proctor *v.* Lewiston, 25 Ill. 153.

18. Chapin *v.* State, 24 Conn. 236; Downer *v.* St. Paul, etc., R. Co., 23 Minn. 271.

19. Pierce *v.* Roberts, 57 Conn. 31, 17 Atl. 275; Hitchcock *v.* Oberlin, 46 Kan. 90, 26 Pac. 466; Kansas City *v.* Banks, (Kan. App. 1901) 61 Pac. 333; Patterson *v.* People's Natural Gas Co., 172 Pa. St. 554, 33 Atl. 575; Smith *v.* Navasota, 72 Tex. 422, 10 S. W. 414.

20. Johnson *v.* Dadeville, 127 Ala. 244, 28 So. 700. And see cases cited *supra*, note 19.

21. Kansas City *v.* Banks, (Kan. App. 1901) 61 Pac. 333.

Declarations of a corporation's agent can be admissible to prove dedication only if a part of the *res gestæ*. State *v.* Atherton, 16 N. H. 203.

22. *Alabama.*— Steele *v.* Sullivan, 70 Ala. 589.

Colorado.— Starr *v.* People, 17 Colo. 458, 30 Pac. 64.

Indiana.— Bidinger *v.* Bishop, 76 Ind. 244.

Iowa.— Fisher *v.* Beard, 32 Iowa 346.

Massachusetts.— Wright *v.* Tukey, 3 Cush. 290.

Minnesota.— Wilder *v.* St. Paul, 12 Minn. 192.

Missouri.—Bailey *v.* Culver, 12 Mo. App. 175.

See 15 Cent. Dig. tit. "Dedication," § 50.

23. Moffett *v.* South Park Com'rs, 138 Ill. 620, 28 N. E. 975; McMillan *v.* McCormick, 38 Mich. 693; Parisa *v.* Dallas, 83 Tex. 253, 18 S. W. 568; Bartlett *v.* Beardmore, 77 Wis. 356, 46 N. W. 494. So removing fences and hedges so as to leave opening for way. Wragg *v.* Penn Tp., 94 Ill. 11, 34 Am. Rep. 199. But this may be explained by showing that this was done under a mistake as to true boundaries. Bloomington *v.* Bloomington Cemetery Assoc., 126 Ill. 221, 18 N. E. 298; State *v.* Welpton, 34 Iowa 144.

24. *California.*— People *v.* Davidson, 79 Cal. 166, 21 Pac. 538.

Illinois.— Whitfield *v.* Horrocks, 15 Ill. App. 315.

Iowa.— Wilson *v.* Sexon, 27 Iowa 15.

Louisiana.— Lafayette *v.* Holland, 18 La. 286.

Massachusetts.— Com. *v.* Petitcler, 110 Mass. 62.

Mississippi.— New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374.

Missouri.— McGinnis *v.* St. Louis, 157 Mo. 191, 57 S. W. 755.

See 15 Cent. Dig. tit. "Dedication," § 18.

Requesting parties laying out a road to construct it over his land is evidence of intent to dedicate. Ryan *v.* Kennedy, 62 Iowa 37, 17 N. W. 142.

The fact that a road laid out by the owner leads to a market or other public place is evidence that it was laid out for the public. Witter *v.* Harvey, 1 McCord (S. C.) 67, 10 Am. Dec. 650.

25. Pomfrey *v.* Saratoga Springs, 34 Hun (N. Y.) 607.

26. Delaney *v.* Boston, 2 Harr. (Del.) 489. But reserving in a deed a canal and road is not, as it may be for private use. Taft *v.* Tarpey, 125 Cal. 376, 58 Pac. 24.

27. Quinton *v.* Burton, 61 Iowa 471, 16 N. W. 569.

28. Wilder *v.* St. Paul, 12 Minn. 192.

29. Peck *v.* Providence Steam Engine Co., 8 R. I. 353, holding that this amounted to evidence of intent to dedicate the extension.

30. *Arkansas.*— Jones *v.* Phillips, 59 Ark. 35, 26 S. W. 386.

California.— Cook *v.* Sudden, 94 Cal. 443, 29 Pac. 949.

Indiana.— Shellhouse *v.* State, 110 Ind. 509, 11 N. E. 484; Bidinger *v.* Bishop, 76 Ind. 244.

Iowa.— Gray *v.* Haas, 98 Iowa 502, 67 N. W. 394; State *v.* Green, 41 Iowa 693.

Kansas.— State *v.* Adkins, 42 Kan. 203, 21 Pac. 1069.

Maine.— Cyr *v.* Madore, 73 Me. 53.

Massachusetts.— Com. *v.* Newbury, 2 Pick. 51.

Missouri.— Field *v.* Mark, 125 Mo. 502, 28 S. W. 1004.

New York.— Bridges *v.* Wyckoff, 67 N. Y. 130; Carpenter *v.* Gwynn, 35 Barb. 395.

or keeps a building upon the property alleged to be dedicated,[31] incloses the land claimed to be dedicated,[32] puts up a sign or notice that the road is private property,[33] makes a conveyance of the premises about the time of the alleged dedication,[34] occupies the property[35] or pays taxes on it,[36] marks strips in a plat made by him as a "depot,"[37] makes conveyances reciting that the property claimed to be dedicated shall be kept open for the benefit of adjoining owners,[38] or objects to the use of his property by the public[39] are competent as tending to negative the intention to dedicate.

(III) *Reputation.* The intent to dedicate cannot be proved by witnesses who would testify as to what they or the public thought about the use and its creation.[40]

b. To Show Extent and Purpose of Dedication. When nothing appears in the act of dedication to indicate for what particular use the donation of land is made to the public, parol evidence is admissible to define and limit any purpose for which it was in fact devoted.[41]

c. To Show Acceptance. As has already been shown, acceptance by the general public can be proved only indirectly or by user,[42] while acceptance by the public authorities can be proved by legislative or municipal acts or by municipal user and recognition.[43] Acceptance of a dedication by the public cannot be shown by approving the declaration of citizens or inhabitants that they considered the property in question to be a public square.[44]

2. Written Evidence. There would seem to be no limitation to the kind of writings that may be produced and given in evidence at the trial of a cause involving questions of a dedication to a public use or purpose. Acts of congress,[45]

Oregon.— Lewis *v.* Portland, 25 Oreg. 133, 35 Pac. 256, 42 Am. St. Rep. 772, 22 L. R. A. 736.

Wisconsin.— Jones *v.* Davis, 35 Wis. 376.

See 15 Cent. Dig. tit. "Dedication," § 51.

31. Marion *v.* Skillman, 127 Ind. 130, 26 N. E. 676, 11 L. R. A. 55; St. Louis *v.* Wetzel, 110 Mo. 260, 19 S. W. 534.

32. Huffman *v.* Hall, 102 Cal. 26, 36 Pac. 417; Ottawa *v.* Yentzer, 160 Ill. 509, 43 N. E. 601; Waggeman *v.* North Peoria, 155 Ill. 545, 40 N. E. 485; Bidinger *v.* Bishop, 76 Ind. 244; Brown *v.* Stein, 38 Nebr. 596, 57 N. W. 401.

33. Durgin *v.* Lowell, 3 Allen (Mass.) 398; Union Co. *v.* Peckham, 16 R. I. 64, 12 Atl. 130.

34. Case *v.* Favier, 12 Minn. 89. See also Quinn *v.* State, 49 Ala. 353; Trine *v.* Pueblo, 21 Colo. 102, 39 Pac. 330.

35. *Colorado.*—Denver *v.* Clements, 3 Colo. 472.

Illinois.— Peoria *v.* Johnston, 56 Ill. 45.

Maryland.— Baltimore *v.* Frick, 82 Md. 77, 33 Atl. 435; Steuart *v.* Baltimore, 7 Md. 500.

Minnesota.— Case *v.* Favier, 12 Minn. 89.

Montana.— Helena *v.* Albertose, 8 Mont. 499, 20 Pac. 817.

New York.— Rothbager *v.* Tonawanda, 13 N. Y. Suppl. 937.

Tennessee.— Monaghan *v.* Memphis Fair, etc., Co., 95 Tenn. 108, 31 S. W. 497.

Virginia.— Skeen *v.* Lynch, 1 Rob. 186.

Wisconsin.— Trerice *v.* Barteau, 54 Wis. 99, 11 N. W. 244.

See 15 Cent. Dig. tit. "Dedication," § 54.

36. Topeka *v.* Cowee, 48 Kan. 345, 28 Pac. 560; Case *v.* Favier, 12 Minn. 89; Trerice *v.* Barteau, 54 Wis. 99, 11 N. W. 244.

Where a statutory dedication is relied on, it is not competent for the owner in order to disprove a dedication to prove that he has paid taxes on the land. Winona *v.* Huff, 11 Minn. 119.

37. McWilliams *v.* Morgan, 61 Ill. 89.

38. Steele *v.* Sullivan, 70 Ala. 589.

39. Lawe *v.* Kaukauna, 70 Wis. 306, 35 N. W. 561.

40. Bennett *v.* Mitchell County, 111 Ga. 847, 36 S. E. 461.

41. Chicago *v.* Ward, 169 Ill. 392, 48 N. E. 927, 61 Am. St. Rep. 185, 38 L. R. A. 849; Princeville *v.* Auten, 77 Ill. 325; Pott *v.* School Directors, 42 Pa. St. 132; Daniels *v.* Wilson, 27 Wis. 492. Thus where the land was donated as "public ground" and so marked on the plat, it was shown *aliunde* that it was "not to be occupied with buildings of any description." Chicago *v.* Ward, 169 Ill. 392, 48 N. E. 927, 61 Am. St. Rep. 185, 38 L. R. A. 849. But no oral testimony is admissible as to the meaning of a statutory plat. Baltimore, etc., R. Co. *v.* Seymour, 154 Ind. 17, 55 N. E. 953.

42. See *supra*, VI, C, 2.

43. See *supra*, VI, C, 4. So that the fact of a municipality's paving, repairing, using for sewers, bringing suits about, lighting, patroling with police, and ceasing to tax property dedicated for a public use is all testimony relevant to establish an acceptance. See *supra*, VI, C, 4. But an acceptance has never been found as against a municipality from some one isolated equivocal act respecting the use. State *v.* Tucker, 36 Iowa 485.

44. Price *v.* Breckenridge, 92 Mo. 378, 5 S. W. 20.

45. Cook *v.* Burlington, 30 Iowa 94, 6 Am. Rep. 649; Lewis *v.* Portland, 25 Oreg. 133, 35 Pac. 256, 42 Am. St. Rep. 772, 22 L. R. A. 736; Minnesota *v.* Bachelder, 1 Wall. (U. S.) 109, 17 L. ed. 551; Bennett *v.* Chicago, etc.,

and statutes of states,[46] records of courts,[47] ordinances and resolutions of municipalities,[48] resolutions and votes of corporations,[49] deeds, although in themselves insufficient to constitute a dedication,[50] maps and plats of all kinds,[51] agreements,[52] signs and notices,[53] circulars and advertisements,[54] and every conceivable kind of written or printed matter may be involved and found referred to in cases on dedication.[55] Writings may in themselves negative the intention to dedicate streets referred to,[56] and several deeds may make up one transaction and all be taken together.[57]

B. Burden of Proof. The burden of proof to establish a dedication is generally upon the party setting it up.[58] Thus if the city is seeking to establish a public use and take from another the possession of property the burden is upon the city to establish the dedication.[59] If on the other hand a dedication is set up, as in the case of trespass, as a defense, it must be proved by defendant.[60] The establishment of certain facts may, however, raise certain presumptions and shift the burden of proof.[61]

C. Presumptions. There is no presumption in favor of a dedication,[62] except perhaps in the case of ways of necessity.[63] There is a presumption in favor of the creation of an easement as against the vesting of a fee,[64] of public as against private easements,[65] and of a thoroughfare as against a *cul de sac*.[66] If the acts of dedication are proved,[67] or are presumed from user,[68] there is a presumption that

R. Co., 73 Fed. 696; Pacific Gas Imp. Co. *v.* Ellert, 64 Fed. 421.

46. Little Rock *v.* Wright, 58 Ark. 142, 23 S. W. 876; State *v.* Waholz, 28 Minn. 114, 9 N. W. 578; State *v.* Lake, 8 Nev. 276.

A legislative act incorporating a town does not dedicate streets referred to if the owner of the land never offered the street and the map was made by an unauthorized person. Eureka *v.* McKay, 123 Cal. 666, 56 Pac. 439.

47. Scott *v.* Des Moines, 64 Iowa 438, 20 N. W. 752.

48. Macon *v.* Franklin, 12 Ga. 239; White *v.* Smith, 37 Mich. 291.

49. Pitcher *v.* New York, etc., R. Co., 5 Sandf. (N. Y.) 587.

50. Atlantic City *v.* Groff, 68 N. J. L. 670, 54 Atl. 800.

51. Wright *v.* Oberlin, 23 Ohio Cir. Ct. 509.

52. Campbell *v.* O'Brien, 75 Ind. 222; Hathaway *v.* Hathaway, 159 Mass. 584, 35 N. E. 85; Cook *v.* Harris, 61 N. Y. 448.

53. Union Co. *v.* Peckham, 16 R. I. 64, 12 Atl. 130.

54. Pitts *v.* Baltimore, 73 Md. 326, 21 Atl. 52; Atty.-Gen. *v.* Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251.

55. The ordinary rules for proving ordinances, writings, records, etc., apply. See Cemetery Assoc. *v.* Mcninger, 14 Kan. 312.

56. Central Land Co. *v.* Providence, 15 R. I. 246, 2 Atl. 553.

57. Indianapolis, etc., R. Co. *v.* Indianapolis, 12 Ind. 620; Pitts *v.* Baltimore, 73 Md. 326, 21 Atl. 52; McCormick *v.* Baltimore, 45 Md. 512.

58. *California.*— Tate *v.* Sacramento, 50 Cal. 242.

Illinois.— Schmitz *v.* Ritterholz, 20 Ill. App. 614.

Indiana.— Fowler *v.* Linquist, 138 Ind. 566, 37 N. E. 133.

Louisiana.— Shreveport *v.* Drouin, 41 La. Ann. 867, 6 So. 656.

Maryland.— Oliver *v.* Hook, 47 Md. 301.

Oregon.— Hogue *v.* Albina, 20 Oreg. 182, 25 Pac. 386, 10 L. R. A. 673.

West Virginia.— Miller *v.* Aracoma, 30 W. Va. 606, 5 S. E. 148; Mason City Salt, etc., Co. *v.* Mason, 23 W. Va. 211.

See 15 Cent. Dig. tit. "Dedication," § 82.

What a man once had he is not to be presumed to have parted with, but the fact must be shown beyond conjecture. And although in the case of streets and public grounds in towns, from the nature of the case a dedication may be shown by acts resting in parol, they must be of such a public and deliberate character as makes them generally known and not of doubtful intention." Hogue *v.* Albina, 20 Oreg. 182, 188, 25 Pac. 386, 10 L. R. A. 673.

59. Mason City Salt, etc., Co. *v.* Mason, 23 W. Va. 211.

60. District of Columbia *v.* Robinson, 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440.

61. See *infra*, VII, C.

62. Quinn *v.* Anderson, 70 Cal. 454, 11 Pac. 746; Tate *v.* Sacramento, 50 Cal. 242; Shreveport *v.* Drouin, 41 La. Ann. 867, 6 So. 656; Hogue *v.* Albina, 20 Oreg. 182, 25 Pac. 386, 10 L. R. A. 673; Lownsdale *v.* Portland, 15 Fed. Cas. No. 8,579, Deady 39, 1 Oreg. 397.

63. Warden *v.* Blakley, 32 Wis. 690.

64. New York, etc., R. Co. *v.* Providence, 16 R. I. 746, 19 Atl. 759.

65. Denver *v.* Clements, 3 Colo. 472; Pope *v.* Union, 18 N. J. Eq. 282.

66. Eureka *v.* Armstrong, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085.

67. Fowler *v.* Linquist, 138 Ind. 566, 37 N. E. 133.

68. Reg. *v.* Petrie, 30 Eng. L. & Eq. 207.

As in the case of contracts and deeds, the capacity of the dedicator is presumed unless specially questioned. See Yates *v.* Van de Bogert, 56 N. Y. 526; Battin *v.* Bigelow, 2 Fed. Cas. No. 1,108, Pet. C. C. 452.

the acts were the acts of a fully competent owner, unless the title or capacity is the gist of the dispute.[69] A user is presumed permissive and not adverse,[70] and proof of license never raises a presumption of an intent to dedicate.[71] There is a presumption of acceptance if the use is beneficial;[72] and a presumption against the dedicator that acceptance of a part is acceptance of the whole.[73] Lost records raise no presumption of a dedication,[74] nor do defective legal proceedings to establish ways.[75] An alteration in a plat is presumed to have been made before filing.[76] All such presumptions are rebuttable.[77] No presumption will arise which is inconsistent with the pleadings.[78]

D. Weight and Sufficiency — 1. In General. The ordinary rules of evidence in general apply to the proof of dedication.[79] In criminal suits, as in cases of indictments for obstructing ways, the dedication must be proved beyond a reasonable doubt,[80] but in civil cases a preponderance of evidence is sufficient.[81] Dedications being an exceptional and peculiar mode of passing title to interests in land,[82] the proof must usually be strict, cogent, and convincing and the acts proved must not be consistent with any construction other than that of a dedication.[83] A number of facts all consistent, although slight in weight, are sufficient to establish a dedication;[84] but evidence which is entirely inconclusive and contradictory must fail.[85] There seem to be some cases in which stricter proof is required than in others; for example stronger evidence is necessary to establish a local or timber road than to establish a thoroughfare between towns;[86] to establish acceptance to bind the municipal authorities than to establish acceptance to bind the dedicator;[87] to establish intent in case of a dedication for school purposes than in one where the dedicator may himself receive some benefit.[88]

2. Acts of Dedicator. A single act to be relied on as a dedication must be unequivocal,[89] but may be sufficient.[90] The mere failure to fence in one's land and thus prevent passage over it is of little weight to establish a dedication or an intent to dedicate.[91] So the opening of private ways is not sufficient evidence of

69. Lawrenceburgh *v.* Wesler, 10 Ind. App. 153, 37 N. E. 956. Parol evidence of undefined secret trust will not rebut presumption of ownership. Logan *v.* Rose, 88 Cal. 263, 26 Pac. 106. No such presumption exists against a reversioner. Baxter *v.* Taylor, 4 B. & Ad. 72, 2 L. J. K. B. 65, 1 N. & M. 14, 24 E. C. L. 41.

70. Noyes *v.* Ward, 19 Conn. 250; Harris *v.* Com., 20 Gratt. (Va.) 833; State *v.* Joyce, 19 Wis. 90; Nelson *v.* Madison, 18 Fed. Cas. No. 10,110, 3 Biss. 244.

71. Oliver *v.* Hoole, 47 Md. 301; Wood *v.* Hurd, 34 N. J. L. 87; Roberts *v.* Nillsville, 1 Barb. (N. Y.) 81; Com. *v.* Kelly, 8 Gratt. (Va.) 632.

72. Archer *v.* Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; Guthrie *v.* New Haven, 31 Conn. 308; Wayne County *v.* Miller, 31 Mich. 447.

73. Derby *v.* Alling, 40 Conn. 410.

74. Gaines *v.* Merryman, 95 Va. 660, 29 S. E. 738. But they may be proved. Perkins *v.* Fielding, 119 Mo. 149, 24 S. W. 444, 27 S. W. 1100.

75. Klenk *v.* Walnut Lake, 51 Minn. 381, 53 N. W. 703.

76. White Bear *v.* Stewart, 40 Minn. 284, 41 N. W. 1045.

77. Mansur *v.* State, 60 Ind. 357; South Baltimore Harbor, etc., Co. *v.* Smith, 85 Md. 537, 37 Atl. 27; Wayne County *v.* Miller, 31 Mich. 447.

78. Livaudais *v.* Municipality No. 2, 5 La. Ann. 8.

79. Cemetery Assoc. *v.* Meninger, 14 Kan. 312.

80. Mauck *v.* State, 66 Ind. 177.

81. Shugart *v.* Halliday, 2 Ill. App. 45; Spencer *v.* Peterson, 41 Oreg. 257, 68 Pac. 519, 1108.

82. Hunter *v.* Sandy Hill, 6 Hill (N. Y.) 407.

83. Vick *v.* Vicksburg, 1 How. (Miss.) 379, 31 Am. Dec. 167; Landis *v.* Hamilton, 77 Mo. 554; Lownsdale *v.* Portland, 15 Fed. Cas. No. 8,579, Deady 39, 1 Oreg. 397. See also Georgia R., etc., Co. *v.* Atlanta, 118 Ga. 486, 45 S. E. 256. To justify a claim that land has been dedicated by the owner for public use the proof should be very satisfactory, either of an actual intention to dedicate or of such acts and declarations as should equitably estop the owner from denying such intention. Waggeman *v.* North Peoria, 155 Ill. 545, 40 N. E. 485.

84. State *v.* McClure, 53 Kan. 295, 36 Pac. 355; Giles *v.* Ortman, 11 Kan. 59.

85. Morrison *v.* Marquardt, 24 Iowa 35, 92 Am. Dec. 444.

86. Onstott *v.* Murray, 22 Iowa 457.

87. Rector *v.* Hartt, 8 Mo. 448, 41 Am. Dec. 650.

88. Chapman *v.* School Dist. No. 1, 5 Fed. Cas. No. 2,608, Deady 139.

89. Logansport *v.* Dunn, 8 Ind. 378.

90. Ward *v.* Davis, 3 Sandf. (N. Y.) 502.

91. Cyr *v.* Madore, 73 Me. 53; Green *v.* Chelsea, 24 Pick. (Mass.) 71; Morse *v.* Ranno, 32 Vt. 600.

intent to dedicate.[92] Placing and maintaining a gate across a road is not conclusive evidence of an intention not to dedicate the road to public use,[93] and is not inconsistent with an intention to so dedicate it.[94] But where the owners of land adjacent to a municipality lay it out into lots and make and file a map showing a street on a strip in which appears the word "reserved" an intent not to dedicate the strip is shown.[95] Intention to dedicate is not proved by evidence that the landowner left a strip of land vacant outside his fence.[96] Nor does the passive permission by the owner of lands to the use of them by the public sufficiently show an intent to dedicate them to such use,[97] even though continued for fifteen years.[98] So merely building one's house back of the building line is alone no evidence of intent to dedicate the strip left as part of the street.[99] And it has been held that evidence that a railroad company purchased land for the purpose of dedicating it to public use as a street, tore down the fences around it, and threw it open to public use does not prove such a dedication of it as to render the dedication irrevocable.[1] Where a map is insufficient to constitute a statutory dedication of the streets thereon, the fact that it showed certain lines along certain property claimed as the street without other evidence is insufficient to show an intent to dedicate.[2]

3. WRITINGS. Writings claimed to operate as a dedication may be conclusive upon the dedicator, as when he makes a statutory dedication[3] or a deed;[4] or upon the dedicatee, as when a statute or an ordinance accepts a dedication.[5] Or they may be simply evidence of intent or of acceptance.[6] Whether, when a dedication is implied from a deed, the presumption is conclusive or the deed is to be taken along with other evidence, is a question that raises some difficulties.[7] Where the grantee in a deed claims that through an implied covenant he acquired by the deed the right to have land open to public use, it is clear that no evidence can be offered to explain or vary the deed except in the case of a latent

92. Cherry *v.* Howe, 17 Ohio Cir. Ct. 246; Ferdinando *v.* Scranton, 190 Pa. St. 321, 42 Atl. 692.

93. People *v.* Eel River, etc., R. Co., 98 Cal. 665, 33 Pac. 728; Indianapolis *v.* Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; Burkitt *v.* Battle, (Tenn. Ch. App. 1900) 59 S. W. 429; Davies *v.* Stephens, 7 C. & P. 570, 32 E. C. L. 763.

94. People *v.* Eel River, etc., R. Co., 98 Cal. 665, 33 Pac. 728.

95. Cleveland *v.* Bergen Bldg., etc., Co., (N. J. Ch. 1903) 55 Atl. 117.

96. Rozell *v.* Andrews, 103 N. Y. 150, 8 N. E. 513.

97. Postal *v.* Martin, (Nebr. 1903) 95 N. W. 8.

98. Hartley *v.* Vermillion, (Cal. 1902) 70 Pac. 273.

99. Biddle *v.* Ash, 2 Ashm. (Pa.) 211; Duncan *v.* Hanbest, 2 Brewst. (Pa.) 362; Neill *v.* Gallagher, 10 Phila. (Pa.) 172. But if this be the result of a concerted action of the abutting owners to widen the street it is evidence of dedication. Tyson *v.* McMullen, 3 Del. Co. (Pa.) 157. See Hargro *v.* Hodgdon, 89 Cal. 623, 26 Pac. 1106.

1. Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155.

2. Coe College *v.* Cedar Rapids, (Iowa 1903) 95 N. W. 267.

3. See *supra*, I, B.

4. See *supra*, V, C, 3, e.

5. See *supra*, VI, C, 4.

6. As where a landowner puts up a sign "private way" (Durgin *v.* Lowell, 3 Allen (Mass.) 398; Daniels *v.* Almy, 18 R. I. 244, 27 Atl. 330); or a city passes a resolution to repair a certain street (Kennedy *v.* Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346).

7. "Where a party sells property lying within the limits of a city, and in the conveyance, bounds such property by streets designated as such in the conveyance, or on a map made by the city, or by the owner of the property, such sale implies, necessarily, a covenant that the purchaser shall have the use of such streets." Moale *v.* Baltimore, 5 Md. 314, 321, 61 Am. Dec. 276. The court proceeds on page 323 to decide that where a deed as above had been executed, the vendor had created an "easement or right of way, not only in [the grantee], . . . but in the public." This was a case where the street was being opened by condemnation, and no user or acceptance appeared. And yet the parties to the deed could have rescinded the implied covenant and thus destroyed the public right of user. Hall *v.* Baltimore, 56 Md. 187. In these cases the public's rights seem to depend upon the grantee's rights, until by acceptance the public has acquired rights of its own. Where the deed creates such an easement in the grantee it seems conclusive against the grantor, but where the deed does not in itself create such an easement it is not conclusive against the public. See Rich-

ambiguity.[8] Likewise where a statutory dedication is claimed the legal effect of the paper is solely a matter of law.[9] But where the question is raised by a person not as a party to the deed, who claims a common-law dedication and exhibits a deed to another as evidence of the dedicator's offer to create, or intention to recognize, a public use, then the dedication is purely a question of fact, in reaching which all other relevant circumstances may be considered without infringing the rule against varying writings by oral testimony.[10] The true rule therefore seems to be that where a deed is only one of the circumstances surrounding an implied dedication, all the other circumstances may be considered together with the deed, and the implication, if any, is an implication of fact.[11] Although an estoppel by deed including an implied covenant can operate only in favor of the grantee or his privies in estate,[12] and although an estoppel *in pais* can operate only when representations have been made to a legal person who has so relied upon them that it would be inequitable to allow them to be withdrawn,[13] the cases are so full of general references to "estoppel," that they seem almost to recognize that an estoppel can arise in favor of the general public, or that the general public can avail itself of an estoppel in favor of a legal person.[14] There are cases in which proof of the existence of a way on old maps and documents and its long user is said to establish a way by dedication,[15] but such a way may with equal propriety base its existence upon a presumed grant[16] or statutory establishment.[17]

4. USER — a. User For Prescriptive Period. A considerable number of decisions lay down the rule that user of land by the public for the prescriptive period of twenty years is sufficient of itself to create the presumption of a dedication or grant to the public,[18] but in order that the presumption may arise, the use must

ardson *v.* Davis, 91 Md. 390, 46 Atl. 964; Story *v.* Ulman 88 Md. 244, 41 Atl. 120.

8. Howard *v.* Rogers, 4 Harr. & J. (Md.) 278.

9. Downer *v.* St. Paul, etc., R. Co., 23 Minn. 271.

10. This rule is analogous to the rule that where a contract is entirely in writing its meaning and effect is a question of law, but where it is made up partly by writing and partly by parol, its meaning and effect is a question of fact to be submitted to the jury in a jury case. See Edwards, etc., Co. *v.* Jasper County, 117 Iowa 365, 90 N. W. 1006, 94 Am. St. Rep. 301; Roberts *v.* Bonaparte, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689; Bolckow *v.* Seymour, 17 C. B. N. S. 107. But where the evidence consists of several documents the question seems to be one of law for the court, as where deeds called to "Payson street," and other streets "as mentioned on Poppleton's plat." The court said: "Standing by itself, without any other proof respecting its character, the intent to dedicate would be held to be patent on the face of the deed and conclusive of the question." But the court held that there was no dedication intended because this deed with another deed made out a case of partition. Baltimore *v.* White, 62 Md. 362, 369. The intention to dedicate may be shown by an agreement made by the grantee with the grantor that part of the land granted should be used as a highway, although in effect the deed is thus varied. People *v.* Eel River, etc., R. Co., 98 Cal. 665, 33 Pac. 728.

11. See Baltimore *v.* Northern Cent. R. Co., 88 Md. 427, 41 Atl. 911.

12. Kitzmiller *v.* Van Rensselaer, 10 Ohio St. 63; Sunderlin *v.* Struthers, 47 Pa. St. 411.

13. Stevens *v.* Ludlum, 46 Minn. 160, 48 N. W. 771, 24 Am. St. Rep. 210, 13 L. R. A. 270.

14. See *supra*, I, A, 1. "To hold otherwise would enable the proprietor of a body of lands which he sells in lots to perpetrate a gross fraud. When he sells and conveys the lots according to a plan which shows them to be on streets, he must be held to have stamped upon them the character of public streets. Not only can the purchasers of lots abutting thereon assert this character, but all others in the general plan may assert the same. The proprietor is in no condition to afterwards revoke this dedication." *In re* Opening Pearl St., 111 Pa. St. 565, 572, 5 Atl. 430.

15. Doe *v.* Jones, 11 Ala. 63; Stephenson *v.* Leesburgh, 33 Ohio St. 475; Wheeling *v.* Campbell, 12 W. Va. 36.

16. See *supra*, V, C, 5.

17. District of Columbia *v.* Robinson, 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440.

18. *Alabama.*—Rosser *v.* Bunn, 66 Ala. 89.
Georgia.—State *v.* Savannah, etc., Canal Co., 26 Ga. 665.
Kansas.—Hayes *v.* Houke, 45 Kan. 466, 25 Pac. 860.
Maryland.—Thomas *v.* Ford, 63 Md. 346, 52 Am. Rep. 513.
North Carolina.—State *v.* Cardwell, 44 N. C. 245; State *v.* Hunter, 27 N. C. 369, 44 Am. Dec. 41; State *v.* Marble, 26 N. C. 318. And see State *v.* Wolf, 112 N. C. 889, 17 S. E. 528; Askew *v.* Wynne, 52 N. C. 22. But *compare* these cases with later North Carolina decisions cited *infra*, note 24.

be adverse — that is to say, under some claim of right, real or pretended,[19] and it must be exclusive,[20] with the owner's knowledge and acquiescence,[21] continuous and uninterrupted,[22] and exist for at least twenty years — the prescriptive period.[23] Other decisions, however, hold that user alone however long continued vests no right in the public.[24]

Tennessee.— Woolard *v.* Clymer, (Ch. App. 1895) 35 S. W. 1086; Le Roy *v.* Leonard, (Ch. App. 1895) 35 S. W. 884.

United States.— Nelson *v.* Madison, 17 Fed. Cas. No. 10,110, 3 Biss. 244.

See 15 Cent. Dig. tit. "Dedication," § 20.

In Illinois it has been held that a continuous and uninterrupted use of a highway by the public for more than twenty years creates a prescriptive right to the use of the road. No mention of dedication was made in the case so holding. Lewiston *v.* Proctor, 27 Ill. 414. For Illinois cases basing a presumption of dedication on adverse user for the period prescribed by statute as necessary to bar an action for the recovery of real estate see *infra*, VII, D, 4, b.

In Maine the acquisition of public easements by dedication is distinguished from acquisition by dedication, but the same general result is reached in holding that in order to acquire a right of way by prescription the user must be adverse and continue at least twenty years. Mayberry *v.* Standish, 56 Me. 342.

In Massachusetts a highway may be proved by long and continued use and enjoyment by the public, upon the ground that a conclusive presumption arises from such use that it has been originally laid out or established by competent authority (Com. *v.* Coupe, 128 Mass. 63; Com. *v.* Belding, 13 Metc. 10; Folger *v.* Worth, 19 Pick. 108; Sprague *v.* Waite, 17 Pick. 309; Stedman *v.* Southbridge, 17 Pick. 162; Reed *v.* Northfield, 13 Pick. 94, 23 Am. Dec. 662; Com. *v.* Low, 3 Pick. 408; Com. *v.* Newbury, 2 Pick. 51), but the view is taken that ways by prescription and ways by dedication rest upon entirely different principles. The first is established upon evidence of user by the public, adverse and continuous for a period of twenty years or more; from which use arises a presumption of a reservation or grant, and the acceptance thereof, or that it has been laid out by the proper authorities, of which no record exists. The second is created by the permission or gift of the owner, and, upon the acceptance of such gift by the public authorities, it becomes a way and the owner cannot withdraw his dedication. Com. *v.* Coupe, 128 Mass. 63. It has also been declared that a public townway can be established only in the manner prescribed by statute, laying out by the selectmen, and a record of the establishment of such way cannot be presumed from user for any length of time. Com. *v.* Low, 3 Pick. 408; Com. *v.* Newberry, 2 Pick. 51. There are, however, decisions which seem to sanction the doctrine that a townway may under certain circumstances be proved by prescription, or by the presumption arising from user. See Com. *v.* Belding, 13 Metc. 10; Stedman *v.* Southbridge, 17 Pick. 162.

In England it has been held that dedication may be presumed from uninterrupted enjoyment for great length of time. Reg. *v.* East Mark, 11 Q. B. 877, 3 Cox C. C. 60, 12 Jur. 332, 17 L. J. Q. B. 177, 63 E. C. L. 877; Rex *v.* Lloyd, 1 Campb. 260, 10 Rev. Rep. 674. It has been held, however, that user is merely evidence of intent to dedicate, and that a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment. Poole *v.* Huskinson, 11 M. & W. 827.

19. *Alabama.*—Gage *v.* Mobile, etc., R. Co., 84 Ala. 224, 4 So. 415.

Kentucky.— Bowman *v.* Wickliffe, 15 B. Mon. 84.

Maryland.— Browne *v.* Baltimore M. E. Church, 37 Md. 108; Day *v.* Allender, 22 Md. 511. "If the enjoyment can be referred to the license of the party over whose lands the right of way is claimed, or can be placed upon any other footing, than a claim or assertion of right, it will repel the presumption of a grant." Browne *v.* Baltimore M. E. Church, 37 Md. 108, 119.

Tennessee.— Sharp *v.* Mynatt, 1 Lea 375; Jackson *v.* State, 6 Coldw. 532.

United States.— Nelson *v.* Madison, 17 Fed. Cas. No. 10,110, 3 Biss. 244.

20. Nelson *v.* Madison, 17 Fed. Cas. No. 10,110, 3 Biss. 244.

21. Kennedy *v.* Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346; Missouri Institute, etc. *v.* How, 27 Mo. 211; Nelson *v.* Madison, 17 Fed. Cas. No. 10,110, 3 Biss. 244; Robertson *v.* Wellsville, 20 Fed. Cas. No. 11,930, 1 Bond 81.

22. Kennedy *v.* Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346; Thomas *v.* Ford, 63 Md. 346, 52 Am. Rep. 513; Gore *v.* Brubaker, 55 Md. 87; Browne *v.* Baltimore M. E. Church, 37 Md. 108; Day *v.* Allender, 22 Md. 511.

23. Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26; Steele *v.* Sullivan, 70 Ala. 589; Rosser *v.* Bunn, 66 Ala. 89; Hoole *v.* Atty.-Gen., 22 Ala. 190; Oliphant *v.* Atchison County, 18 Kan. 386; Kennedy *v.* Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346; Missouri Institute, etc. *v.* How, 27 Mo. 211.

24. **Thus in Louisiana,** where there is a special statute on the subject providing that "discontinuous servitudes whether apparent or not, can be established only by a title," and that "immemorial possession itself is not sufficient to acquire them," mere user by the public of a road no matter how long continued does not establish any right in the public to the road. Torres *v.* Falgoust, 57 La. Ann. 497; Morgan *v.* Lombard, 26 La.

b. User For Period Prescribed by Statute as Bar to Real Action. A large class of cases hold that user by the public of land for a period equal to that prescribed by the statutes of limitation as a bar to actions for the recovery of land raises the presumption of a dedication or grant to the public.[25] The presumption so raised has in a number of cases been held conclusive to establish absolutely a right to an easement in the public.[26] Nevertheless to create any title in the public the use must be adverse and under a claim of right.[27] It must also be

Ann. 462; Crossman *v.* Vignaud, 14 La. 173. And see McCearley *v.* Lemennier, 40 La. Ann. 253, 3 So. 649. By the express terms of this statute a road (which is an interrupted servitude, and which requires the act of man to be exercised) cannot be established by prescription. Crossman *v.* Vignaud, 14 La. 173.

In Delaware it is held that the public do not acquire an easement in land by user for the prescriptive period but that such user is evidence of dedication. State *v.* Reybold, 5 Harr. (Del.) 484.

In North Carolina there are decisions to the effect that in addition to user for the prescriptive period the proper public authorities must have exerted control over the land for that period State *v.* Fisher, 117 N. C. 733, 23 S. E. 158; Kennedy *v.* Williams, 87 N. C. 6; Boyden *v.* Achenbach, 79 N. C. 539. And see State *v.* Purify, 86 N. C. 681. These decisions it will be noticed are in conflict with earlier North Carolina decisions set out *supra*, note 18, in this section. "The continuous use by the people living in the neighborhood or in the State for a period of even sixty years does not deprive the owner of his right to resume control, nor does it devolve upon the properly constituted authorities of the county or the town, as the case may be, the duty with the incidental expense to the public of its reparation." State *v.* Fisher, 117 N. C. 733, 739, 23 S. E. 158.

In Virginia it has been held that where no public or private interests have been acquired upon the faith of the dedication, the mere user by the public of the supposed street or alley, although long continued, should be regarded as a mere license, revocable at the pleasure of the owner; unless there be evidence of an express dedication; or unless, in connection with such long-continued user, the way has been by the proper town authority recognized as a street, so as to give notice that a claim to it as an easement was asserted. Harris *v.* Com., 20 Gratt. 833. And see Com. *v.* Kelly, 8 Gratt. 632.

25. *Arkansas.*— Howard *v.* State, 47 Ark. 431, 2 S. W. 331.

California.— Schwerdtle *v.* Placer County, 108 Cal. 589, 41 Pac. 448. And see San Francisco *v.* Scott, 4 Cal. 114.

Illinois.— Kyle *v.* Logan, 87 Ill. 64; Daniels *v.* People, 21 Ill. 439; Green *v.* Oakes, 17 Ill. 249; Maltman *v.* Chicago, etc., R. Co., 41 Ill. App. 229; Toof *v.* Decatur, 19 Ill. App. 204.

Iowa.— Gear *v.* Chicago, etc., R. Co., 39 Iowa 23; Manderschid *v.* Dubuque, 29 Iowa 73, 4 Am. Rep. 196; Ewell *v.* Greenwood, 26 Iowa 377; Onstott *v.* Murray, 22 Iowa 457.

Kentucky.— Beall *v.* Clore, 6 Bush 676; Greenup County *v.* Maysville, etc., R. Co., 21 S. W. 351, 14 Ky. L. Rep. 699.

Mississippi.— New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374.

Missouri.— Price *v.* Breckenridge, 92 Mo. 378, 5 S. W. 20; State *v.* Walters, 69 Mo. 463.

Nebraska.— Postal *v.* Martin, (1903) 95 N. W. 8; Shaffer *v.* Stull, 32 Nebr. 94, 48 N. W. 882; Rube *v.* Sullivan, 23 Nebr. 779, 37 N. W. 666.

New Jersey.— Wood *v.* Hurd, 34 N. J. L. 87; Smith *v.* State, 23 N. J. L. 130.

Pennsylvania.— Weiss *v.* South Bethlehem Borough, 136 Pa. St. 294, 20 Atl. 801.

Vermont.— Morse *v.* Ranno, 32 Vt. 600.

West Virginia.— Smith *v.* Cornelius, 41 W. Va. 59, 23 S. E. 599, 30 L. R. A. 747.

United States.— District of Columbia *v.* Robinson, 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440.

See 15 Cent. Dig. tit. "Dedication, § 20 *et seq.*

26. Schwerdtle *v.* Placer County, 108 Cal. 589, 41 Pac. 448; Onstott *v.* Murray, 22 Iowa 457; Greenup County *v.* Maysville, etc., R. Co., 21 S. W. 351, 14 Ky. L. Rep. 699; Smith *v.* State, 23 N. J. L. 130.

27. *Arkansas.*— Jones *v.* Phillips, 59 Ark. 35, 26 S. W. 386.

Illinois.— Chicago *v.* Chicago, etc., R. Co., 152 Ill. 561, 38 N. E. 768.

Iowa.— State *v.* Tucker, 36 Iowa 485; Daniels *v.* Chicago, etc., R. Co., 35 Iowa 129, 14 Am. Rep. 490; Onstott *v.* Murray, 22 Iowa 457.

Kansas.—Topeka *v.* Cowee, 48 Kan. 345, 29 Pac. 560.

Kentucky.— Beall *v.* Clore, 6 Bush 676.

Missouri.— Field *v.* Mark, 125 Mo. 502, 28 S. W. 1004; Price *v.* Breckenridge, 77 Mo. 447; Stacey *v.* Miller, 14 Mo. 478, 55 Am. Dec. 112; Rosenberger *v.* Miller, 61 Mo. App. 422.

Nebraska.— Postal *v.* Martin, (1903) 95 N. W. 8.

New Jersey.— Wood *v.* Hurd, 34 N. J. L. 87.

Ohio.— Penquite *v.* Lawrence, 11 Ohio St. 274.

Pennsylvania.— Weiss *v.* South Bethlehem Borough, 136 Pa. St. 294, 20 Atl. 801.

South Carolina.— Hutto *v.* Tindall, 6 Rich. 396.

United States.— District of Columbia *v.* Robinson, 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440; Boston *v.* Lecraw, 17 How. 426, 15 L. ed. 118; Irwin *v.* Dixion, 9 How. 10, 13 L. ed. 25.

See 15 Cent. Dig. tit. "Dedication," § 21 *et seq.*

exclusive,[28] with the knowledge and acquiescence of the owner, or so open and notorious that he will be charged with notice of the use,[29] continuous and uninterrupted,[30] and for a period at least equal to that which by statute is a bar to the recovery of real estate.[31]

c. User Under Special Statutes Relating to Highways. In a number of jurisdictions there are statutes specially providing for the acquisition and creation of public highways by user. As the decisions under these different statutes have not always been harmonious, each statute and the decisions arising thereunder will be considered separately. The Indiana[32] and New York[33] statutes provide that "all public highways which have been or may hereafter be used as such shall be deemed public highways." Under the Michigan statute providing that all roads not recorded which have been used as public highways ten years or more or which may hereafter be laid out and not recorded and which shall have been used ten years or more, shall be deemed public highways, it has been held that roads

28. Chicago *v.* Chicago, etc., R. Co., 152 Ill. 561, 38 N. E. 768; Postal *v.* Martin, (Nebr. 1903) 95 N. W. 8; Weiss *v.* South Bethlehem Borough, 136 Pa. St. 294, 20 Atl. 801.

29. Chicago *v.* Chicago, etc., R. Co., 152 Ill. 561, 38 N. E. 768; Duncombe *v.* Powers, 75 Iowa 185, 39 N. W. 261; State *v.* Mitchell, 58 Iowa 567, 12 N. W. 598; State *v.* Green, 41 Iowa 693; Daniels *v.* Chicago, etc., R. Co., 35 Iowa 129, 14 Am. Rep. 490; Manderschid *v.* Dubuque, 29 Iowa 73, 4 Am. Rep. 196; Postal *v.* Martin, (Nebr. 1903) 95 N. W. 8; Wilson *v.* Hull, 7 Utah 90, 24 Pac. 799.

30. Howard *v.* State, 47 Ark. 431, 2 S. W. 331; Chicago *v.* Chicago, etc., R. Co., 152 Ill. 561, 38 N. E. 768; State *v.* Tucker, 36 Iowa 485; Manderschid *v.* Dubuque, 29 Iowa 73, 4 Am. Rep. 196; Greenup County *v.* Maysville, etc., R. Co., 21 S. W. 351, 14 Ky. L. Rep. 699; Weiss *v.* South Bethlehem Borough, 136 Pa. St. 294, 20 Atl. 801.

31. *Colorado.*— Starr *v.* People, 17 Colo. 458, 30 Pac. 64.

Illinois.— Chicago *v.* Chicago, etc., R. Co., 152 Ill. 561, 38 N. E. 768.

Iowa.— State *v.* Tucker, 36 Iowa 485; Daniels *v.* Chicago, etc., R. Co., 35 Iowa 129, 14 Am. Rep. 490; Manderschid *v.* Dubuque, 29 Iowa 73, 4 Am. Rep. 196; Onstott *v.* Murray, 22 Iowa 457.

Kansas.— Topeka *v.* Cowee, 48 Kan. 345, 29 Pac. 560.

Mississippi.— New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374.

Missouri.— Field *v.* Mark, 125 Mo. 502, 28 S. W. 1004; State *v.* Walters, 69 Mo. 463; State *v.* Young, 27 Mo. 259; Missouri Institute, etc. *v.* How, 27 Mo. 211; Rosenberger *v.* Miller, 61 Mo. App. 422.

Nebraska.— Postal *v.* Martin, (1903) 95 N. W. 8; Shaffer *v.* Stull, 32 Nebr. 94, 48 N. W. 882; Rube *v.* Sullivan, 23 Nebr. 779, 37 N. W. 666; Graham *v.* Hartnett, 10 Nebr. 517, 7 N. W. 280.

New Jersey.— Wood *v.* Hurd, 34 N. J. L. 87.

Ohio.— Penquite *v.* Lawrence, 11 Ohio St. 274.

Pennsylvania.— Weiss *v.* South Bethlehem Borough, 136 Pa. St. 294, 20 Atl. 801.

Vermont.— Morse *v.* Ranno, 32 Vt. 600.

See 15 Cent. Dig. tit. "Dedication," § 22.

"The theory of the law is, where proof of devotion rests upon user, that the essential intention existed at the beginning of the use, and continued through the whole period necessary to evince a conclusive dereliction, and thus the user for the whole time of limitation must necessarily be of right; therefore, user by mere license, which is subject at any time to revocation, will afford no foundation from which to presume the gift." Wood *v.* Hurd, 34 N. J. L. 87, 91.

32. **Under the Indiana statute** twenty years' adverse user by the public vests in it an absolute right to the highway of which the owner cannot divest the public. Marion *v.* Skillman, 127 Ind. 130, 26 N. E. 676, 11 L. R. A. 55; Waltman *v.* Rund, 109 Ind. 366, 10 N. E. 117; Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743; Cleveland *v.* Obenchain, 107 Ind. 591, 8 N. E. 624; Strong *v.* Makeever, 102 Ind. 578, 1 N. E. 502, 4 N. E. 11; Ross *v.* Thompson, 78 Ind. 90. And this it is said is not because an intent to dedicate is conclusively presumed, but because the statute of limitations has divested all the owner's right by destroying his remedy. Marion *v.* Skillman, 127 Ind. 130, 26 N. E. 676, 11 L. R. A. 55.

It is the twenty years' use of a road that makes it a public highway regardless of its origin, and it is immaterial whether the use is with the consent or over the objections of the adjoining land-owners. Strong *v.* Makeever, 102 Ind. 578, 1 N. E. 502, 4 N. E. 11 [*disapproving* Greene County *v.* Huff, 91 Ind. 333].

33. **Under the New York statute,** the provisions of which are identical with those of Indiana, it is held that proof of user alone for twenty years is insufficient to show a road to be a public highway. The use must be associated with some act showing it to be a right independent of the will of the owner. The road must either be kept in repair or taken charge of by the public authorities. Lewis *v.* New York, etc., R. Co., 123 N. Y. 496, 26 N. E. 357; Speir *v.* Utrecht, 121 N. Y. 420, 24 N. E. 692; People *v.* Osborn, 84 Hun (N. Y.) 441, 32 N. Y. Suppl. 358;

may become public highways by mere user,[34] that highways so acquired are based upon an implied dedication by the owner,[35] and that user for this statutory period conclusively establishes dedication.[36] Under the New Hampshire statute providing that a highway used as such for public travel over it, other than travel to and from a toll-bridge or ferry, for twenty years, is a legal highway, adverse user of land by the public for twenty years is conclusive evidence of the right to so use the highway, not only as against the landowner but also as against the city or town to be charged with its maintenance or repair.[37] Under the Wisconsin statute which provides that "all roads not recorded which shall have been used as public highways twenty years or more and roads not recorded which shall hereafter be used ten years or more shall be deemed public highways," it has been held that a continuous and uninterrupted use of land as a highway during the period limited in the statute must be presumed, in the absence of proof to the contrary, to have been under claim of right and to create a prescriptive right in favor of the public,[38] and in the absence of an intent to dedicate the public acquires no rights by user for less than the statutory period.[39]

d. User For Such Length of Time That Interruption Would Affect Private Rights and Public Convenience. Where land has been used continuously by the public with the owner's acquiescence for such a length of time that private rights and the public convenience and accommodation will be materially affected by an interruption of the enjoyment a dedication will be presumed.[40] Under these cir-

Harriman *v.* Howe, 78 Hun (N. Y.) 280, 28 N. Y. Suppl. 858.

34. Adams *v.* Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270, 18 Am. St. Rep. 441; Kruger *v.* Le Blanc, 70 Mich. 76, 37 N. W. 880; Baker *v.* Johnston, 21 Mich. 319.

35. Kruger *v.* Le Blanc, 70 Mich. 76, 37 N. W. 880.

36. Campau *v.* Detroit, 104 Mich. 560, 562, 62 N. W. 718, where it is said: "We consider the statute one of repose, and the effect of user of land as a highway by the public is not dependent upon extrinsic evidence which might tend to show that, while the user implied a dedication, in fact none was made." It is to be noted that nothing is said in these cases as to the necessity of "adverse user."

37. Stevens *v.* Nashua, 46 N. H. 192; *In re* Campton, 41 N. H. 197. And see Ruland *v.* South Newmarket, 59 N. H. 291.

But where a highway has not been laid out agreeably to the provisions of another statute relating to highways, nothing short of twenty years' user can constitute a road a public highway, no matter whether the way was dedicated to the public or held adversely. Stevens *v.* Nashua, 46 N. H. 192; Smith *v.* Northumberland, 36 N. H. 38; Northumberland *v.* Atlantic, etc., R. Co., 35 N. H. 574; Haywood *v.* Charlestown, 34 N. H. 23.

38. Hanson *v.* Taylor, 23 Wis. 547 [*overruling* State *v.* Joyce, 19 Wis. 90], Dixon, C. J., dissenting.

39. Cunningham *v.* Hendricks, 89 Wis. 632, 62 N. W. 410.

40. *Connecticut.*—Noyes *v.* Ward, 19 Conn. 250.

Georgia.— Macon *v.* Franklin, 12 Ga. 239.

Illinois.— Chicago *v.* Wright, 69 Ill. 318; Smith *v.* Flora, 64 Ill. 93.

Indiana.— Indianapolis *v.* Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; Ross *v.* Thompson, 78 Ind. 90; Bidinger *v.* Bishop, 76 Ind. 244; Mauck *v.* State, 66 Ind. 177; Evansville *v.* Evans, 37 Ind. 229; Holcraft *v.* King, 25 Ind. 352; State *v.* Hill, 10 Ind. 219.

Louisiana.— Smith *v.* New Orleans, 24 La. Ann. 20; Saulet *v.* New Orleans, 10 La. Ann. 81.

Maine.— State *v.* Wilson, 42 Me. 9.

Minnesota.— Case *v.* Favier, 12 Minn. 89.

New Jersey.— New York, etc., R. Co. *v.* South Amboy, 57 N. J. L. 252, 30 Atl. 628; State *v.* Central R. Co., 32 N. J. L. 220.

Oregon.— Parrish *v.* Stephens, 1 Oreg. 59.

Pennsylvania.— Scranton *v.* Griffin, 8 Leg. Gaz. 86.

Rhode Island.—Hughes *v.* Providence, etc., R. Co., 2 R. I. 493.

Utah.— Whittaker *v.* Ferguson, 16 Utah 240, 51 Pac. 980.

Vermont.— State *v.* Catlin, 3 Vt. 530, 23 Am. Dec. 230.

Virginia.— Richmond *v.* Stokes, 31 Gratt. 713.

United States.— See Cincinnati *v.* White, 6 Pet. 431, 8 L. ed. 452.

England.— Jarvis *v.* Dean, 3 Bing. 447, 4 L. J. C. P. O. S. 144, 11 Moore C. P. 354, 11 E. C. L. 221.

See 15 Cent. Dig. tit. "Dedication," § 22.

Rule based on estoppel.— "This doctrine rests on the intelligible, rational, and wholesome principle of the common law, that, wherever a person has made representations, or pursued a line of conduct, with a view to lead or induce others to adopt a particular course of action, and such representations or conduct have produced that effect, they shall be held to be binding and conclusive against him, and he shall not afterwards be permitted to retract or repudiate them, to the injury of those who have been induced thus to act." Noyes *v.* Ward, 19 Conn. 250, 265.

cumstances no specific length of user is necessary to constitute a valid dedication.[41] It is not necessary that the use should be for the term of years necessary to presume a grant, but may be for a less term.[42] But the length of time of enjoyment is a fact for the jury to consider as tending to prove an actual dedication and an acceptance by the public.[43]

e. Public User of Private Way. Where the proprietor of land constructs a road over it for his own convenience, the mere user thereof by the public, by sufferance of the proprietor, no matter how long continued, will not show a dedication of the way to the public use or vest any right in the public to the way.[44] This is especially true where the intent not to dedicate is evinced by the maintenance of gates across the way,[45] and the proprietor can prohibit the use at any time or discontinue it altogether at his pleasure.[46] So where the owner of land grants a pri-

41. Parrish *v.* Stephens, 1 Oreg. 59; 2 Dillon Mun. Corp. § 631.

42. Macon *v.* Franklin, 12 Ga. 239.

43. Case *v.* Favier, 12 Minn. 89.

44. *Alabama.*—Gage *v.* Mobile, etc., R. Co., 84 Ala. 224, 4 So. 415.

Arkansas.— Jones *v.* Phillips, 59 Ark. 35, 26 S. W. 386.

Connecticut.— Williams *v.* New York, etc., R. Co., 39 Conn. 509; Chapin *v.* State, 24 Conn. 236.

Illinois.— Chicago *v.* Chicago, etc., R. Co., 152 Ill. 561, 38 N. E. 768; Illinois Ins. Co. *v.* Littlefield, 67 Ill. 368; Hemingway *v.* Chicago, 60 Ill. 324.

Indiana.— Pennsylvania Co. *v.* Plotz, 125 Ind. 26, 24 N. E. 343; Shellhouse *v.* State, 110 Ind. 509, 11 N. E. 484. See also Talbott *v.* Grace, 30 Ind. 389, 95 Am. Dec. 704.

Kentucky.— Hall *v.* McLeod, 2 Metc. 98, 74 Am. Dec. 400.

Maine.— White *v.* Bradley, 66 Me. 254.

Massachusetts.— Durgin *v.* Lowell, 3 Allen 398.

Missouri.— Vossen *v.* Dautel, 116 Mo. 379, 22 S. W. 734; Brinck *v.* Collier, 56 Mo. 160; Stacey *v.* Miller, 14 Mo. 478, 55 Am. Dec. 112; Coberly *v.* Butler, 63 Mo. App. 556.

New York.— People *v.* Osborn, 84 Hun 441, 32 N. Y. Suppl. 358; Carpenter *v.* Gwynn, 35 Barb. 395; Buffalo *v.* Delaware, etc., R. Co., 39 N. Y. Suppl. 4.

Oregon.— Lewis *v.* Portland, 25 Oreg. 133, 35 Pac. 256, 42 Am. St. Rep. 772, 22 L. R. A. 736.

Pennsylvania.— Frankford, etc., City Pass. R. Co. *v.* Philadelphia, 175 Pa. St. 120, 34 Atl. 577; Com. *v.* Barker, 140 Pa. St. 189, 21 Atl. 243; Weiss *v.* South Bethlehem Borough, 136 Pa. St. 294, 20 Atl. 801; Griffin's Appeal, 109 Pa. St. 150; Gowen *v.* Philadelphia Exch. Co., 5 Watts & S. 141, 40 Am. Dec. 489.

Tennessee.— Jackson *v.* State, 6 Coldw. 532.

Texas.— Ramthun *v.* Halfman, 58 Tex. 551.

Vermont.— Morse *v.* Ranno, 32 Vt. 600.

United States.— Irwin *v.* Dixion, 9 How. 10, 13 L. ed. 25.

See 15 Cent. Dig. tit. "Dedication," § 26.

In applying this doctrine, it has been uniformly held that a way constructed merely to provide convenient access to the owner's place of business, as for instance to a railroad depot (Williams *v.* New York, etc., R. Co., 39 Conn. 509) or to a wharf (Lewis *v.* Portland, 25 Oreg. 133, 35 Pac. 256, 42 Am. St. Rep. 772, 22 L. R. A. 736; Irwin *v.* Dixion, 9 How. (U. S.) 10, 13 L. ed. 25) or to a store (Morse *v.* Ranno, 32 Vt. 600) does not become a public way from user by the public in going to and from such place of business. "A license by a business man to enter his premises, extended to the public to attract custom, and as an auxiliary to the promotion of such business, cannot be construed to be a dedication however long continued." Gage *v.* Mobile, etc., R. Co., 84 Ala. 224, 226, 4 So. 415. So also in applying the general rule it has been held that where adjoining landowners agree to reserve an alley between their premises for their own use, the fact that the same for years is open to the public use and that in several conveyances it is described as an alley will not make it a public easement (Illinois Ins. Co. *v.* Littlefield, 67 Ill. 368), and that the leaving a lane open through one's farm to accommodate his own premises and his neighbors' cannot be construed as anything more than a mere license revocable at any time (Coberly *v.* Butler, 63 Mo. App. 556; Jackson *v.* State, 6 Coldw. (Tenn.) 532).

45. *Arkansas.*— Jones *v.* Phillips, 59 Ark. 35, 26 S. W. 386.

Iowa.— State *v.* Green, 41 Iowa 693.

Maine.— Cyr *v.* Madore, 73 Me. 53.

Missouri.— Field *v.* Mark, 125 Mo. 502, 28 S. W. 1004.

Wisconsin.— Jones *v.* Davis, 35 Wis. 376.

46. Hall *v.* McLeod, 2 Metc. (Ky.) 98, 74 Am. Dec. 400; Coberly *v.* Butler, 63 Mo. App. 556; Com. *v.* Barker, 140 Pa. St. 189, 21 Atl. 243.

"A different doctrine would have a tendency to destroy all neighborhood accommodation in the way of travel; for if it were once understood that a man, by allowing his neighbor to pass through his farm without objection over the passway which he used himself, would thereby, after the lapse of twenty or thirty years, confer a right on him to require the passway to be kept open for his benefit and enjoyment, a prohibition against all such travel would immediately ensue." Hall *v.* McLeod, 2 Metc. (Ky.) 98, 101, 74 Am. Dec. 400.

vate right of way over his land to neighboring owners, the mere fact that it is used without objection by others going to and from their own lands does not establish a dedication.[47]

f. User of Uninclosed Wild Land. A distinction is very generally observed between the claim of a way through inclosed and cultivated land and of a way over uninclosed woodland.[48] It is very generally held that user by the public of uninclosed wild lands, no matter for how long a period it may be continued, raises no presumption of dedication and confers no right in the public as against the proprietor of the land.[49]

g. Necessity of User by General Public. While the uninterrupted use and enjoyment of land as a road or way by a limited number of persons for a sufficient length of time may establish a private right of way, it is manifest that no public easement would arise from such user.[50] In order to acquire a public easement the user must be by the public at large.[51]

h. Necessity of User Along Definite Line. In order that user by the public may create a way by dedication or prescription the travel must be confined to a definite and specific line.[52] No public easement can be acquired where the line of travel varies to a considerable extent,[53] or where the owner of the land himself frequently changes the position of the road or pass-way,[54] which fact itself

47. Silva *v.* Spangler, (Cal. 1896) 43 Pac. 617. See also State *v.* McCabe, 74 Wis. 481, 43 N. W. 322.

48. Hutto *v.* Tindall, 6 Rich. (S. C.) 396.

49. *Alabama.*— Tutwiler *v.* Kendall, 113 Ala. 664, 21 So. 332; Rosser *v.* Bunn, 66 Ala. 89; Sultzner *v.* State, 43 Ala. 24; Hoole *v.* Atty.-Gen., 22 Ala. 190.

Illinois.— Herhold *v.* Chicago, 108 Ill. 467; Kyle *v.* Logan, 87 Ill. 64; Warren *v.* Jacksonville, 15 Ill. 236, 58 Am. Dec. 610; Peyton *v.* Shaw, 15 Ill. App. 192; Fox *v.* Virgin, 11 Ill. App. 513; Harper *v.* Dodds, 3 Ill. App. 331.

Indiana.— Phipps *v.* State, 7 Blackf. 512.

Iowa.— State *v.* Kansas City, etc., R. Co., 45 Iowa 139.

Kentucky.— Bowman *v.* Wickliffe, 15 B. Mon. 84.

Nebraska.— Rube *v.* Sullivan, 23 Nebr. 779; 37 N. W. 666; Rathman *v.* Norenberg, 21 Nebr. 467, 32 N. W. 305; Graham *v.* Hartnett, 10 Nebr. 517, 7 N. W. 280.

New York.— Harriman *v.* Howe, 78 Hun 280, 28 N. Y. Suppl. 858; Matter of Hand St., 52 Hun 206, 5 N. Y. Suppl. 158.

South Carolina.— Hutto *v.* Tindall, 6 Rich. 396.

Tennessee.— Russell *v.* State, 3 Coldw. 119; Hewitt *v.* Pulaski, (Ch. App. 1895) 36 S. W. 878.

Texas.— Gulf, etc., R. Co. *v.* Montgomery, 85 Tex. 64, 19 S. W. 1015.

Utah.— Whittaker *v.* Ferguson, 16 Utah 240, 51 Pac. 980; Wilson *v.* Hull, 7 Utah 90, 24 Pac. 799.

Contra.— Worrall *v.* Rhoads, 2 Whart. (Pa.) 427, 30 Am. Dec. 274.

See 15 Cent. Dig. tit. "Dedication," § 24.

In Connecticut in case of uninclosed and uncultivated land, dedication by the owners can be found upon mere user of the road by the public; but the fact that land over which a way by dedication is claimed is uninclosed woodland ought greatly to weaken and often to overcome the presumption of an intention to dedicate to be derived from the use. Ely *v.* Parsons, 55 Conn. 83, 10 Atl. 499.

The mere failure to manifest an objection under such circumstances "does not authorize an inference that the mind of the owner consents. The inference in that case is that the proprietor did not understand that the land was being appropriated for the permanent use of the public as a highway." Wilson *v.* Hull, 7 Utah 90, 92, 24 Pac. 799.

"When the way passes over woodland, those who travel over it commit no trespass, (at least not until after notice to desist,) and subjects the owner to no loss or inconvenience. To prohibit them would be considered churlish; and would be ineffectual, unless a constant watch was kept to prevent them. And to require the owner to secure his land against an adverse claim, by a use not actionable, of a way over it, would to that extent, exclude his property from the protection of the law." Hutto *v.* Tindall, 6 Rich. (S. C.) 396, 400.

50. Tupper *v.* Huson, 46 Wis. 646, 1 N. W. 332.

51. Harper *v.* Dodds, 3 Ill. App. 331; Tupper *v.* Huson, 46 Wis. 646, 1 N. W. 332. And see also People *v.* Osborn, 84 Hun (N. Y.) 441, 32 N. Y. Suppl. 358.

52. *Colorado.*— Starr *v.* People, 17 Colo. 458, 30 Pac. 64.

Delaware.— State *v.* Thomas, 4 Harr. 568.

Illinois.— Ottawa *v.* Yentzer, 160 Ill. 509, 43 N. E. 601; Gentleman *v.* Soule, 32 Ill. 271, 83 Am. Dec. 264.

South Carolina.— Turnbull *v.* Rivers, 3 McCord 131, 15 Am. Dec. 622.

England.— Chapman *v.* Cripps, 2 F. & F. 864; Schwinge *v.* Dowell, 2 F. & F. 845.

See 15 Cent. Dig. tit. "Dedication," § 25.

53. State *v.* Thomas, 4 Harr. (Del.) 568; Owens *v.* Crossett, 105 Ill. 354.

54. Bowman *v.* Wickliffe, 15 B. Mon. (Ky.) 84. And see Hibberd *v.* Mellville, (Cal.

creates the presumption that no right was claimed by others.[55] Nevertheless slight deviations in the line of travel leaving the road substantially the same will not destroy the rights of the public.[56]

E. Province of Court and Jury — 1. Questions For Court. It is the province of the court to instruct the jury what facts are relevant and what facts if believed by them would constitute a valid dedication,[57] and if the facts are undisputed it is for the court to decide whether there has been a dedication.[58] So where a statutory dedication is claimed it is for the court to construe the same and determine whether there has been a sufficient compliance with the statutes.[59] It is also for the court to construe and determine the effect of deeds, by which it is claimed a dedication must be made.[60]

2. Questions For Jury. The decisions very generally lay down the rule that the question whether an easement has been created by dedication is a question of fact to be submitted to and passed upon by the jury and not a mere question of law to be decided by the court,[61] provided of course the facts are not in dis-

1893) 33 Pac. 201, where it was held that a road which has been changed from time to time for its whole length by the owner, which has been barred by several gates, to be opened and closed by persons passing over it, and which for twelve years had no work done on it or money expended on it by the road overseers, is not a highway by dedication.

55. Bowman *v.* Wickliffe, 15 B. Mon. (Ky.) 84.

56. *Arkansas.*— Howard *v.* State, 47 Ark. 431, 2 S. W. 331.

Illinois.— Gentlemen *v.* Soule, 32 Ill. 271, 83 Am. Dec. 264.

Iowa.— Kelsey *v.* Furman, 36 Iowa 614.

Oregon.— Douglas County Road Co. *v.* Abraham, 5 Oreg. 318.

Texas.— Compton *v.* Waco Bridge Co., 62 Tex. 715.

See 15 Cent. Dig. tit. "Dedication," § 25.

57. Maenner *v.* Carroll, 46 Md. 193; Downend *v.* Kansas City, 71 Mo. App. 529; Wood *v.* Hurd, 34 N. J. L. 87.

58. Harding *v.* Hale, 61 Ill. 192; Kennedy *v.* Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346.

59. Wolfe *v.* Sullivan, 133 Ind. 331, 32 N. E. 1017; Miller *v.* Indianapolis, 123 Ind. 196, 24 N. E. 228; Evansville *v.* Page, 23 Ind. 525; Hanson *v.* Eastman, 21 Minn. 509; Sanborn *v.* Chicago, etc., R. Co., 16 Wis. 19.

If the plat is not in the strict and narrow sense of the word a written instrument, it is so closely analogous to one as to fall within the reason of and be governed by the general rule which confides the construction of written instruments to the court and not to a jury. Hanson *v.* Eastman, 21 Minn. 509.

Where the plat is not executed pursuant to the statute, but is used merely to show an intent to dedicate along with other facts and circumstances, it is not for the court to determine the force and effect of the plat, but the whole question should be left to the jury, by analogy to the rule that if a contract be shown partly by writing and partly by parol the entire question must go before the jury. Downer *v.* St. Paul, etc., R. Co., 23 Minn. 271.

60. See Baltimore *v.* Fear, 82 Md. 246, 33 Atl. 637; Pitts *v.* Baltimore, 73 Md. 326, 21 Atl. 52; Vicksburg *v.* Marshall, 59 Miss. 563; Talbott *v.* Richmond, etc., R. Co., 31 Gratt. (Va.) 685.

61. *California.*—Harding *v.* Jasper, 14 Cal. 642.

Colorado.— Ward *v.* Farwell, 6 Colo. 66.

Connecticut.— Hartford *v.* New York, etc., R. Co., 59 Conn. 250, 22 Atl. 37; Green *v.* Canaan, 29 Conn. 157.

Illinois.— Elgin *v.* Beckwith, 119 Ill. 367, 10 N. E. 558; Harding *v.* Hale, 61 Ill. 192; Grube *v.* Nichols, 36 Ill. 92; Alvord *v.* Ashley, 17 Ill. 363; Gerhards *v.* Johnson, 105 Ill. App. 65; Maltman *v.* Chicago, etc., R. Co., 41 Ill. App. 229.

Indiana.— Tucker *v.* Conrad, 103 Ind. 349, 2 N. E. 803; Indianapolis *v.* Kingsbury, 101 Ind. 200, 51 Am. Rep. 749.

Kentucky.—Greenup County *v.* Maysville, etc., R. Co., 21 S. W. 351, 14 Ky. L. Rep. 699.

Michigan.— Adams *v.* Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270, 18 Am. St. Rep. 441.

Minnesota.— Morse *v.* Zeize, 34 Minn. 35, 24 N. W. 287; Case *v.* Favier, 12 Minn. 89.

Mississippi.— New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374.

Nebraska.— Langan *v.* Whalen, (1903) 93 N. W. 393.

New Jersey.— Atlantic City *v.* Groff, (Err. & App. 1903) 54 Atl. 800.

New York.— Flack *v.* Green Island, 122 N. Y. 107, 25 N. E. 267; McVee *v.* Watertown, 92 Hun 306, 36 N. Y. Suppl. 870; Gould *v.* Glass, 19 Barb. 179.

Vermont.— Folsom *v.* Underhill, 36 Vt. 580.

Wisconsin.— Eastland *v.* Fogo, 58 Wis. 274, 16 N. W. 632; Gardiner *v.* Tisdale, 2 Wis. 153, 60 Am. Dec. 407.

United States.— District of Columbia *v.* Robinson, 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440; Boston *v.* Lecraw, 17 How. 426, 15 L. ed. 118.

See 15 Cent. Dig. tit. "Dedication," § 88.

The questions of the intention of the landowner, of the significance of his conduct in the premises, and of the public acceptance are addressed in a rather unusual degree to

pute,[62] that is to say, the question of intent[63] the fact of dedication,[64] and the acceptance[65] are questions of fact to be decided by the jury. There are, however, cases which declare that the question whether dedication has or has not been made is a mixed question of law and fact to be found by the jury under directions of the court on consideration of all the circumstances of the case, and this is perhaps a more accurate statement of the rule.[66] It is also for the jury to determine the territorial limit and boundaries of the property dedicated.[67]

VIII. Operation and Effect of Dedication.

A. Construction of Dedication. In all cases the dedication must be understood and construed with reference to the objects and purposes for which it was made,[68] and effect given to the dedication to the full extent intended by the grantors.[69] Where a dedication is made by two instruments (a recorded public act and a map) they may be considered and examined together in order to determine the completeness and sufficiency of the dedication.[70] In determining whether property has been dedicated a plat of the town as originally laid out and recorded will prevail over a plat recorded and adopted by the legislature since the beginning of an action to determine the question.[71] Where a dedication is made by a plat the plat will prevail over a certificate annexed thereto in determining the location of the property.[72] If in making the dedication the dedicator uses words which have a well defined meaning, he is precluded, as is the dedicatee, by the meaning of such words.[73]

B. Right or Title Acquired — 1. Under Common-Law Dedication. Where the owner of property makes a common-law dedication, the ultimate fee remains unaffected thereby.[74] The effect of a common-law dedication is not to deprive a party of title to his land but to estop him while the dedication continues in force

the plain common sense of a jury, to their knowledge of human nature, and their observation of the way things are ordinarily done. Morse *v.* Zeize, 34 Minn. 35, 24 N. W. 287.

62. Harding *v.* Hale, 61 Ill. 192.

63. Grube *v.* Nichols, 36 Ill. 92; Case *v.* Favier, 12 Minn. 89.

64. Ward *v.* Farwell, 6 Colo. 66.

65. Hartford *v.* New York, etc., R. Co., 59 Conn. 250, 22 Atl. 37; Flack *v.* Green Island, 122 N. Y. 107, 25 N. E. 267.

66. Kennedy *v.* Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346; Downend *v.* Kansas City, 71 Mo. App. 529; Wood *v.* Hurd, 34 N. J. L. 87. The jury are not the tribunal to determine what would constitute a legal dedication of a way to public use. They are competent to find the existence of facts to fulfil the definition of what would constitute such a dedication but not to determine the definition itself. Maenner *v.* Carroll, 46 Md. 193.

67. Taff *v.* State, 39 Conn. 82; Elgin *v.* Beckwith, 119 Ill. 367, 10 N. E. 558; Alvord *v.* Ashley, 17 Ill. 363; Barclay *v.* Howell, 6 Pet. (U. S.) 498, 8 L. ed. 477.

68. Godfrey *v.* Alton, 12 Ill. 29, 52 Am. Dec. 476.

69. Derby *v.* Alline, 40 Conn. 410.

Where the alleged dedication is made by a plat which contains ambiguous or doubtful statements as to the extent of the dedication intended, the contemporaneous and subsequent acts of the parties may be considered to show their intention in and the construction put by them on the dedication. Shreveport *v.* Drouin, 41 La. Ann. 867, 6 So. 656. And see McNeil *v.* Hicks, 34 La. Ann. 1090.

70. Armistead *v.* Vicksburg, etc., R. Co., 47 La. Ann. 1381, 17 So. 888. And see State *v.* Schwin, 65 Wis. 207, 26 N. W. 568.

71. Vonderhite *v.* Walton, 7 Ky. L. Rep. 764.

A recorded plat which does not show a dedication of certain property will govern an unrecorded plat to the contrary. Huelsman *v.* Mills, 6 Ohio Dec. (Reprint) 1192, 12 Am. L. Rec. 301, 10 Cinc. L. Bul. 194.

72. Winona *v.* Huff, 11 Minn. 119.

73. Goode *v.* St. Louis, 113 Mo. 257, 20 S. W. 1048; Pope *v.* Union, 18 N. J. Eq. 282. And in the cases words like "common" (Goode *v.* St. Louis, 113 Mo. 257, 20 S. W. 1048), "levee" (Napa *v.* Howland, 87 Cal. 84, 25 Pac. 247; St. Paul, etc., R. Co. *v.* Schurmeier, 7 Wall. (U. S.) 272, 19 L. ed. 74), and the uses to which they may be put are found defined.

"Square" means open square. Hoboken M. E. Church *v.* Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696; Com. *v.* Rush, 14 Pa. St. 186.

"Meeting-House Square" construed to be dedicated for religious purposes see Maysville *v.* Wood, 102 Ky. 263, 43 S. W. 403, 19 Ky. L. Rep. 1292, 80 Am. St. Rep. 355, 39 L. R. A. 93.

74. Neither the government, the municipality, nor the public acquires any other interest than that of a mere easement.

Alabama.— Perry *v.* New Orleans, etc., R. Co., 55 Ala. 413, 28 Am. Rep. 740.

Arkansas.— Taylor *v.* Armstrong, 24 Ark. 102.

from asserting that right of exclusive possession and enjoyment which the owner of property ordinarily has.[75] While the owner retains his exclusive right in the soil for every purpose of user or profit not inconsistent with the public easement,[76] he is nevertheless bound to hold the technical legal fee for the donated use so long as that use continues.[77]

2. UNDER STATUTORY DEDICATION. Under many of the statutes a dedication made in conformity therewith vests the fee-simple title to the property dedicated in the county, town, or city according as the statute may provide.[78] This fee, however, has been characterized as a qualified base or determinable fee,[79] which may continue forever, but is liable to be determined by some event or act circumscribing its continuance.[80] And that which is granted is held in trust for the

California.— San Francisco *v.* Spring Valley Water Works, 48 Cal. 493.

Colorado.— Denver *v.* Clements, 3 Colo. 472.

Connecticut.— Peck *v.* Smith, 1 Conn. 103, 6 Am. Dec. 216.

Illinois.— Chicago, etc., R. Co. *v.* Joliet, 79 Ill. 25.

Indiana.— Freedom *v.* Norris, 128 Ind. 377, 27 N. E. 869.

Iowa.— Dubuque *v.* Maloney, 9 Iowa 450, 74 Am. Dec. 358.

Kentucky.— West Covington *v.* Freking, 8 Bush 121; Louisville *v.* U. S. Bank, 3 B. Mon. 138.

Massachusetts.— Perley *v.* Chandler, 6 Mass. 454, 4 Am. Dec. 159; Atkins *v.* Bordman, 2 Metc. 457, 37 Am. Dec. 100; Webber *v.* Eastern R. Co., 2 Metc. 147.

Michigan.— Patrick *v.* Kalamazoo Y. M. C. A., 120 Mich. 185, 79 N. W. 208.

Minnesota.— Ellsworth *v.* Lord, 40 Minn. 337, 42 N. W. 389; Mankato *v.* Willard, 13 Minn. 13, 97 Am. Dec. 208; Wilder *v.* St. Paul, 12 Minn. 192.

Missouri.— Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593.

New York.— Williams *v.* New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Kelsey *v.* King, 1 Transcr. App. 133, 33 How. Pr. 39; Knox *v.* New York, 55 Barb. 404; Williams *v.* New York Cent. R. Co., 18 Barb. 222; Darker *v.* Beck, 11 N. Y. Suppl. 94; Syracuse Gas Light Co. *v.* Rome, etc., R. Co., 11 N. Y. Civ. Proc. 239; Clements *v.* West Troy, 10 How. Pr. 199; Hunter *v.* Sandy Hill, 6 Hill 407; Jackson *v.* Hathaway, 15 Johns. 447, 8 Am. Dec. 263.

Oregon.— Meier *v.* Portland Cable R. Co., 16 Oreg. 500, 19 Pac. 610, 1 L. R. A. 856.

Pennsylvania.— *In re* Philadelphia, etc., R. Co., 6 Whart. 25, 36 Am. Dec. 202; Scranton *v.* Griffin, 8 Leg. Gaz. 86.

South Carolina.— Charleston Rice Milling Co. *v.* Bennett, 18 S. C. 254.

Vermont.— Pomeroy *v.* Mills, 3 Vt. 279, 23 Am. Dec. 207.

Virginia.— Home *v.* Richards, 4 Call 441, 2 Am. Dec. 574.

West Virginia.— Raleigh County *v.* Ellison, 8 W. Va. 308.

United States.—Cincinnati *v.* White, 6 Pet. 431, 8 L. ed. 452.

England.— Goodtitle *v.* Alker, 1 Burr. 133, 1 Ld. Ken. 427; Lade *v.* Shepherd, 2 Str. 1004.

See 15 Cent. Dig. tit. "Dedication," §§ 96, 97.

75. Hunter *v.* Sandy Hill, 6 Hill (N. Y.) 407; Cincinnati *v.* White, 6 Pet. (U. S.) 431, 8 L. ed. 452.

76. Pomeroy *v.* Mills, 3 Vt. 279, 23 Am. Dec. 207; Stevenson *v.* Chattanooga, 20 Fed. 586.

77. Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593.

78. *Illinois.*— Union Coal Co. *v.* La Salle, 136 Ill. 119, 26 N. E. 506, 12 L. R. A. 326; Brooklyn *v.* Smith, 104 Ill. 429, 44 Am. Rep. 90; Chicago *v.* Rumsey, 87 Ill. 348; Chicago, etc., R. Co. *v.* Joliet, 79 Ill. 25; Gebhardt *v.* Reeves, 75 Ill. 301; Chicago *v.* McGinn, 51 Ill. 266, 2 Am. Rep. 295; Manly *v.* Gibson, 13 Ill. 308; Illinois, etc., Canal Co. *v.* Haven, 11 Ill. 554.

Iowa.— Blennerhassett *v.* Forest City, 117 Iowa 680, 91 N. W. 1044; Des Moines *v.* Hall, 24 Iowa 234; Milburn *v.* Cedar Rapids, 12 Iowa 246.

Kansas.— Wood *v.* National Waterworks Co., 33 Kan. 590, 7 Pac. 233; Randal *v.* Elder, 12 Kan. 257; Franklin County Com'rs *v.* Lathrop, 9 Kan. 453; Harden *v.* Metz, 10 Kan. App. 341, 58 Pac. 281.

Michigan.— Grandville *v.* Jenison, 84 Mich. 54, 47 N. W. 600; Wanzer *v.* Blanchard, 3 Mich. 11.

Missouri.— Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593.

Nebraska.— Jaynes *v.* Omaha St. R. Co., 53 Nebr. 631, 74 N. W. 67, 39 L. R. A. 751; Weeping Water *v.* Reed, 21 Nebr. 261, 31 N. W. 797.

Ohio.— Callen *v.* Columbus Edison Electric Light Co., 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782; Fulton *v.* Mehrenfeld, 8 Ohio St. 440; Lebanon *v.* Warren County, 9 Ohio 80, 34 Am. Dec. 422; Gest *v.* Kenner, 2 Handy 86, 12 Ohio Dec. (Reprint) 343.

Washington.— State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515.

United States.— Mahoning County Com'rs *v.* Young, 59 Fed. 96, 8 C. C. A. 27. See U. S. *v.* Illinois Cent. R. Co., 26 Fed. Cas. No. 15,437, 2 Biss. 174.

79. Matthiessen, etc., Zinc Co. *v.* La Salle, 117 Ill. 411, 2 N. E. 406, 8 N. E. 81; Callen *v.* Columbus Edison Electric Light Co., 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782.

80. Matthiessen, etc., Zinc Co. *v.* La Salle, 117 Ill. 411, 2 N. E. 406, 8 N. E. 81, as for

uses intended by the dedication.[81] Under other statutes it has been held that the fee does not vest in the municipality, which takes a mere easement as in the case of common-law dedications,[82] and it has been held that, although a statute provides that the acknowledgment and recording of town plats as therein described shall operate as a conveyance in fee simple, the owner, in the absence of express prohibition in the statute, may reserve the fee in himself, and if the public authorities are not satisfied with the offer they may reject it.[83]

C. Territorial Extent and Limits of Dedication — 1. In General. If a street is dedicated by the platting of land into blocks and lots intersected by streets and the sale of lots with reference to the plat, the width of the street is that fixed by the plat or map, and the failure to open and improve the street for its whole width does not operate as an abandonment of the part not opened and improved.[84] So if a highway of a definite width has been commenced by an actual and recorded location by proceedings not strictly conformable to law the public after twenty years' user is entitled to a way of the width originally laid out, although the part traveled during that time may not have been so wide,[85] and where a public street becomes such by dedication followed by an acceptance by use, the location of the street as delineated by the stakes which were set in the act of dedication according to which the street was opened and used determines the lines of the dedication.[86] But where the right to a highway depends solely upon user by the public, its width and the extent of the servitude imposed on the land are measured and determined by the character and extent of the user, for the easement cannot upon principle or authority be broader than the user.[87] This does not mean, however, that the public will be confined to the precise portion of the soil on which the wheels of passing vehicles may run — commonly called the

instanee by the vaeation of the plat or the entire and permanent disuse of the street by the publie and abutting lot owners.

81. *Illinois.*— Union Coal Co. *v.* La Salle, 136 Ill. 119, 26 N. E. 506, 12 L. R. A. 326.

Iowa.— Milburn *v.* Cedar Rapids, 12 Iowa 246.

Michigan.— Grandville *v.* Jenison, 84 Mieh. 54, 47 N. W. 600.

Nebraska.— Jaynes *v.* Omaha St. R. Co., 53 Nebr. 631, 74 N. W. 67, 39 L. R. A. 751. See also eases eited *supra*, note 78.

Ohio.— Callen *v.* Columbus Edison Electric Light Co., 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782; First German Reformed Chureh *v.* Summit County, 23 Ohio Cir. Ct. 553.

The dedicator himself may become the holder of the bare legal title in trust to earry out the purposes of the dedieation, where the fee passes under the statute and there is no grantee. Oakland Cemetery Co. *v.* People's Cemetery Assoc., 93 Tex. 569, 57 S. W. 27, 55 L. R. A. 503.

This trust is not a mere dry or passive trust but one in the execution of whieh the trustee has and holds the possession, eontrol, management, and supervision of the trust property. Union Coal Co. *v.* La Salle, 136 Ill. 119, 26 N. E. 506, 12 L. R. A. 326.

82. Peoria, etc., R. Co. *v.* Attica, etc., R. Co., 154 Ind. 218, 56 N. E. 210; Cox *v.* Louisville, etc., R. Co., 48 Ind. 178; Conner *v.* New Albany, 1 Blackf. (Ind.) 43; Winona *v.* Huff, 11 Minn. 119; Schurmeier *v.* St. Paul, etc., R. Co., 10 Minn. 82, 88 Am. Dec. 59; Hamilton County *v.* Rape, 101 Tenn. 222, 47 S. W. 416.

83. Dubuque *v.* Benson, 23 Iowa 248. And see Tousley *v.* Galena Min., etc., Co., 24 Kan. 328.

84. Southern Pae. R. Co. *v.* Ferris, 93 Cal. 263, 28 Pae. 828, 18 L. R. A. 510; Harrison County *v.* Seal, 66 Miss. 129, 5 So. 622, 14 Am. St. Rep. 545, 3 L. R. A. 659; Com. *v.* Shoemaker, 14 Pa. Super. Ct. 194. See also Derby *v.* Alling, 40 Conn. 410; Smith *v.* Union Switeh, ete., Co., 17 Pa. Super. Ct. 444. *Compare* Indianapolis *v.* United Presb. Chureh, 28 Ind. App. 319, 62 N. E. 715.

85. Pillsbury *v.* Brown, 82 Me. 450, 19 Atl. 858, 9 L. R. A. 94.

86. Jackson *v.* Perrine, 35 N. J. L. 137.

87. *Indiana.*— Hart *v.* Bloomfield Tp., 15 Ind. 226; Epler *v.* Niman, 5 Ind. 459.

Michigan.—Wayne County Sav. Bank *v.* Stockwell, 84 Mieh. 586, 48 N. W. 174, 22 Am. St. Rep. 708; Kruger *v.* Le Blane, 70 Mieh. 76, 37 N. W. 880; Seheimer *v.* Price, 65 Mich. 638, 32 N. W. 873; McKay *v.* Doty, 63 Mieh. 581, 30 N. W. 591; Pratt *v.* Lewis, 39 Mieh. 7; Wayne County *v.* Miller, 31 Mich. 447. But see Bumpus *v.* Miller, 4 Mich. 159.

Missouri.— Ehret *v.* Kansas City, ete., R. Co., 20 Mo. App. 251.

Wisconsin.— Bartlett *v.* Beardmore, 77 Wis. 356, 46 N. W. 494; Valley Pulp, etc., Co. *v.* West, 58 Wis. 599, 17 N. W. 554.

United States.— District *v.* Robinson, 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440.

England.— Atty.-Gen. *v.* Esher Linoleum Co., [1901] 2 Ch. 647, 70 L. J. Ch. 808, 85 L. T. Rep. N. S. 414, 50 Wkly. Rep. 22.

See 15 Cent. Dig. tit. "Dedication," § 91 *et seq.*

"track."[88] In respect to length a conveyance of lots as bounding on a street laid out over the grantor's land on a public or private plat but not opened operates as a dedication of only so much of the land occupied by the street in either direction as will enable the grantee to reach some other opened or unopened public way.[89] If a dedicated street terminates on a river or other navigable body of water, the city may build a wharf at its termination,[90] and if by act of the dedicator the length of the street is increased by made land the extension also becomes subject to the easement;[91] but where the river-bed in front of a street by legislative authority is filled in and the land so made sold by the state, the street terminates at the high-water mark and the made land is not affected by the dedication.[92] If land on a navigable river is platted with a street parallel thereto a strip of land between the street and the river not embraced in the plat will not be considered as dedicated to the public use.[93]

2. As Affected by Accretion. Where land bounded by a watercourse is dedicated to the public use, all accretions to the land so dedicated become subject to the same easement and are held by the same tenure.[94]

D. Rights of Dedicator — 1. Right to Revoke Dedication. As already shown the effect of acceptance may be twofold: (1) If made by or on behalf of the general public it completes the dedication and binds the dedicator; and (2) if made by or on behalf of the municipality it not only binds the dedicator but also binds the municipality to its responsibilities.[95] As also shown a dedicator may be bound without acceptance (1) by a statutory dedication, owing to the terms of the statute; and (2) by a deed, owing to covenants, express or implied, therein contained.[96] Unless bound as above, the act of the dedicator is a mere offer which he may revoke either expressly or by implication if not accepted within a reasonable time.[97] By statute also in some states statutory dedications may be

88. Hannum *v.* Belchertown, 19 Pick. (Mass.) 311; Sprague *v.* Waite, 17 Pick. (Mass.) 309; Marchand *v.* Maple Grove, 48 Minn. 271, 51 N. W. 606. See also Davis *v.* Clinton, 58 Iowa 389, 10 N. W. 768.

The way may include such adjacent land as may be necessary for ordinary repairs and improvements. Marchand *v.* Maple Grove, 48 Minn. 271, 51 N. W. 606.

89. Baltimore *v.* Frick, 82 Md. 77, 33 Atl. 435; Hawley *v.* Baltimore, 33 Md. 270. But *compare* Matter of Opening Sixty-seventh St., 60 How. Pr. (N. Y.) 264, holding that an owner of a tract of land in a city, by conveying a portion of it bounded on a street, dedicates the street not only to the next intersecting avenue, but as far as the same extends through or is laid out over his land.

90. McMurray *v.* Baltimore, 54 Md. 103; Backus *v.* Detroit, 49 Mich. 110, 13 N. W. 380, 43 Am. Rep. 447; Barney *v.* Baltimore, 2 Fed. Cas. No. 1,029, 1 Hughes 118. But see Rowan *v.* Portland, 8 B. Mon. (Ky.) 232, holding that where the proprietor of a town dedicated the use of the land on the bank of a river to the public and afterward himself built wharves thereon and charged wharfage the trustees of the town have no right to require payment to them of such moneys.

91. State *v.* Reybold, 5 Harr. (Del.) 484; Hoboken Land, etc., Co. *v.* Hoboken, 36 N. J. L. 540.

92. Hoboken *v.* Pennsylvania R. Co., 124 U. S. 656, 8 S. Ct. 643, 31 L. ed. 543 [*affirming* 16 Fed. 816].

93. Cowles *v.* Gray, 14 Iowa 1.

94. Davenport, etc., Bridge R., etc., Co. *v.* Hass, 188 Ill. 472, 59 N. E. 497; Brooklyn *v.* Smith, 104 Ill. 429, 44 Am. Rep. 90; Godfrey *v.* Alton, 12 Ill. 29, 52 Am. Dec. 476; Cook *v.* Burlington, 30 Iowa 94, 6 Am. Rep. 649; New Orleans *v.* U. S., 10 Pet. (U. S.) 662, 9 L. ed. 573.

The dedication of a park upon the waterfront of a bay carries with it the accretions thereto. Ruge *v.* Apalachicola Oyster Canning, etc., Co., 25 Fla. 656, 6 So. 489.

Where a duly dedicated street or highway terminates at a river and accretions take place over which it is necessary to pass to reach the river, the accretion also becomes subject to the easement. Doe *v.* Jones, 11 Ala. 63; State *v.* Reybold, 5 Harr. (Del.) 484; Freedom *v.* Norris, 128 Ind. 377, 27 N. E. 869.

95. See *supra*, VI, C, 2, a; VI, C, 4.

96. See *supra*, VI, A, 2, a, b.

97. *California.*— People *v.* Williams, 64 Cal. 498, 2 Pac. 393. Some California cases do not seem to recognize the doctrine of the dedicator's being bound by statute or covenant, or otherwise than by estoppel or public user or municipal acceptance. Schmitt *v.* San Francisco, 100 Cal. 302, 34 Pac. 961; Eureka *v.* Groghan, 81 Cal. 524, 22 Pac. 693; People *v.* Reed, 81 Cal. 70, 22 Pac. 474, 15 Am. St. Rep. 22.

Illinois.— Chicago *v.* Drexel, 141 Ill. 89, 30 N. E. 774.

Kansas.—Boerner *v.* McKillip, 52 Kan. 508, 35 Pac. 5.

revoked or changed if no private rights are thus affected, and no rights used by the public or uses accepted and laid out by the municipality are impaired,[98] otherwise not only no private dedicator can take back his property,[99] but the same rule applies to the nation, state, and municipality.[1] Within the above rules non-user does not give the right to revoke.[2] Nor does a mistake[3] nor the failure or disappointment in the plans or expectations under which the dedicator acted.[4] But if there has been no acceptance, and the party is bound by statute, covenant, or estoppel, the dedicator may revoke with the consent of those whose private rights are affected.[5] This happens through reuniting the title, as when a dedicator having deeded a lot calling to a street deeds the street to the same person,[6] but even then it can happen only if other rights have not intervened.[7] If conditions precedent are to be performed the right of revocation continues till performance,[8] unless this is waived and the offer thus made absolute.[9] If a change in the offer is made before acceptance the same act is a revocation and a new offer of dedication.[10] By the death of the dedicator the offer is revoked by implication,[11] and likewise by his conveying the property dedicated.[12] But a dedication which is revocable can be revoked in whole or in part.[13]

2. **Right of User.** At common law as the dedicator retains the fee and the full right of enjoyment so far as this does not interfere with the dedicated use,[14]

Michigan.— Field *v.* Manchester, 32 Mich. 279; Wayne County *v.* Miller, 31 Mich. 447.

Mississippi.— Sanford *v.* Meridian, 52 Miss. 383.

Missouri.— Mexico *v.* Jones, 27 Mo. App. 534.

New York.— Lee *v.* Sandy Hill, 40 N. Y. 442; Tallmadge *v.* East River Bank, 26 N. Y. 105.

North Carolina.—State *v.* Fisher, 117 N. C. 733, 23 S. E. 158.

Ohio.— Lockland *v.* Smiley, 26 Ohio St. 94.

See 15 Cent. Dig. tit. "Dedication," § 79.

98. Littler *v.* Lincoln, 106 Ill. 353; Uptagraff *v.* Smith, 106 Iowa 385, 76 N. W. 733; Brown *v.* Taber, 103 Iowa 1, 72 N. W. 416; Merchant *v.* Marshfield, 35 Oreg. 55, 56 Pac. 1013.

99. When the general public has not accepted, the dedicator may revoke only if no individual rights have accrued or if the holders of such rights consent. Rowan *v.* Portland, 8 B. Mon. (Ky.) 232; Bridges *v.* Wyckoff, 67 N. Y. 130; Grogan *v.* Hayward, 4 Fed. 161, 6 Sawy. 498. See also Manitou *v.* International Trust Co., 30 Colo. 467, 70 Pac. 757; Sarpy *v.* Municipality No. 2, 9 La. Ann. 597, 61 Am. Dec. 221.

1. Cook *v.* Burlington, 30 Iowa 94, 6 Am. Rep. 649; *In re* Penny Pot Landing, 16 Pa. St. 79; U. S. *v.* Illinois Cent. R. Co., 154 U. S. 225, 14 S. Ct. 1015, 38 L. ed. 971; New Orleans *v.* U. S., 10 Pet. 662, 9 L. ed. 573; Davenport *v.* Buffington, 97 Fed. 234, 38 C. C. A. 453, 46 L. R. A. 377.

2. See *infra*, IX, A, 2.

3. Burns *v.* Liberty, 131 Mo. 372, 33 S. W. 18; State *v.* Waterman, 79 Iowa 360, 44 N. W. 677; Reg. *v.* Boulton, 15 U. C. Q. B. 272.

4. McKenzie *v.* Gilmore, (Cal. 1893) 33 Pac. 262; Marratt *v.* Deihl, 37 Iowa 250.

5. *California.*— Schmitt *v.* San Francisco, 100 Cal. 302, 34 Pac. 961.

Indiana.— Lightcap *v.* North Judson, 154 Ind. 43, 55 N. E. 952; Indianapolis *v.* Croas, 7 Ind. 9.

Maryland.— Story *v.* Ulman, 88 Md. 244, 41 Atl. 120.

Minnesota.— State *v.* St. Paul, etc., R. Co., 62 Minn. 450, 64 N. W. 1140.

New Jersey.— Atty.-Gen. *v.* Morris, etc., R. Co., 19 N. J. Eq. 386.

New York.— Cohoes *v.* Delaware, etc., Canal Co., 134 N. Y. 397, 31 N. E. 887; Bridges *v.* Wyckoff, 67 N. Y. 130; Bissell *v.* New York Cent. R. Co., 26 Barb. 630.

Ohio.— Fulton *v.* Mehrenfield, 2 Handy 176, 12 Ohio Dec. (Reprint) 389.

Rhode Island.— Providence Steam Engine Co. *v.* Providence, etc., Steamship Co., 12 R. I. 348, 34 Am. Rep. 652.

See 15 Cent. Dig. tit. "Dedication," §§ 77, 79.

6. Rowan *v.* Portland, 8 B. Mon. (Ky.) 232; Story *v.* Ulman, 88 Md. 244, 41 Atl. 120; Clendenin *v.* Maryland Constr. Co., 86 Md. 80, 37 Atl. 709; Hall *v.* Baltimore, 56 Md. 187.

7. Providence Steam Engine Co. *v.* Providence, etc., Co., 12 R. I. 348, 34 Am. Rep. 662.

8. People *v.* Williams, 64 Cal. 498, 2 Pac. 393.

9. Port Huron *v.* Chadwick, 52 Mich. 320, 17 N. W. 929.

10. Matter of Hunter, 47 N. Y. App. Div. 102, 62 N. Y. Suppl. 169 [*reversing* 28 Misc. 314, 59 N. Y. Suppl. 874].

11. People *v.* Kellogg, 67 Hun (N. Y.) 546, 22 N. Y. Suppl. 490.

12. Chicago *v.* Drexel, 141 Ill. 89, 30 N. E. 774.

13. Eckerson *v.* Haverstraw, 6 N. Y. App. Div. 102, 39 N. Y. Suppl. 635; Mahler *v.* Brumder, 92 Wis. 477, 66 N. W. 502, 31 L. R. A. 695. *Compare* Caldwell *v.* Galt, 27 Ont. App. 162.

14. See *supra*, VIII, B, 1.

Dedicator has mere naked legal title coupled with the possibility that use may be-

he still has his full rights in the soil, owning the minerals,[15] the gravel,[16] and his sewer pipes,[17] although laid after dedication.[18] On the surface he may pasture his cattle, gather the crops or fruits,[19] and even store his goods[20] or plow up the ground,[21] if these rights were reserved by him on making the dedication. He may also build over an alley or highway if this does not interfere with its use,[22] and the fact that the dedicated street abuts against his wharf does not destroy his right to collect wharfage.[23] The principles applicable in this respect to highways and strictly public uses are somewhat different from those applicable to quasi-public uses, like religious or educational uses, and even at common law it seems that a dedicator will have no rights at all while the use continues in property dedicated for such uses as a school or a graveyard.[24] The dedicator cannot do anything which would interfere with the reasonable use of the public for the purpose dedicated, as by turning a stream into the highway to relieve his own land of the water.[25] A railroad dedicating highways, but on the plat reserving a strip for its right of way as crossed by a highway, dedicates the crossing and cannot obstruct it with its depot;[26] on the other hand a railroad which so dedicates a crossing is not thereby prevented from adding an additional track on its way.[27] If by statutory dedication the fee has passed from the dedicator he has nothing (other than that which he may reserve),[28] but he has at most a future estate contingent upon the fees determining and reverting,[29] and no present right.[30]

3. Rights in Case of Condemnation of Dedicated Property. If the fee subject to the easement be taken by the state, municipality, or other corporation under the right of eminent domain, the owner of the fee, while he may have to pay benefits,[31] can be awarded nominal damages only, if the use be not changed.[32] It is very common for cities to condemn and open public streets after they have been dedicated for the public use, and so long as the use is not changed the dedi-

come impossible and his right of possession be restored. Mahoning County Com'rs *v.* Young, 59 Fed. 96, 8 C. C. A. 27.

15. See La Salle *v.* Matthiessen, etc., Zinc Co., 16 Ill. App. 69.

Even when dedicating under statutes the dedicator may expressly or impliedly reserve mineral rights. Leadville *v.* Coronado Min. Co., 29 Colo. 17, 67 Pac. 289; Dubuque *v.* Benson, 23 Iowa 248; Tousley *v.* Galena Min., etc., Co., 24 Kan. 328.

16. See St. Anthony Falls Water Power Co. *v.* King Wrought Iron Bridge Co., 23 Minn. 186, 23 Am. Rep. 682; District of Columbia *v.* Robinson, 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440.

17. Kruger *v.* Le Blanc, 70 Mich. 76, 37 N. W. 880.

18. McElhone *v.* McManes, 118 Pa. St. 600, 12 Atl. 564, 4 Am. St. Rep. 616.

19. By the common law the fee in the soil remains in the original owner where a public road is established over it; but the use of the road is in the public. The owner parts with this use only, for if the road shall be vacated by the public, he resumes the exclusive possession of the ground; and while it is used as a highway, he is entitled to the timber and grass which may grow upon the surface, and to all minerals which may be found below it. He may bring an action of trespass against any one who obstructs the road. Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483. And see Marsh *v.* Fairbury, 163 Ill. 401, 45 N. E. 236.

20. Morant *v.* Chamberlin, 6 H. & N. 541, 30 L. J. Exch. 299.

21. Mercer *v.* Woodgate, L. R. 5 Q. B. 26, 39 L. J. M. C. 21, 21 L. T. Rep. N. S. 458, 18 Wkly. Rep. 116; Arnold *v.* Blaker, L. R. 6 Q. B. 433, 40 L. J. Q. B. 185, 19 Wkly. Rep. 1090.

22. Sutton *v.* Groll, 42 N. J. Eq. 213, 5 Atl. 901.

23. Rowan *v.* Portland, 8 B. Mon. (Ky.) 232; Verplanck *v.* New York, 2 Edw. (N. Y.) 220.

24. See the distinction made in Hunter *v.* Sandy Hill, 6 Hill (N. Y.) 407; Johnson County School Dist. No. 2 *v.* Hart, 3 Wyo. 563, 27 Pac. 919, 29 Pac. 741.

25. Wildrick *v.* Hager, 10 N. Y. St. 764.

26. Northern Pac. R. Co. *v.* Spokane, 56 Fed. 915.

27. Brunswick, etc., R. Co. *v.* Waycross, 91 Ga. 573, 17 S. E. 674.

28. See Simpson *v.* Mikkelsen, 196 Ill. 575, 63 N. E. 1036; Smith *v.* Heuston, 6 Ohio 101, 25 Am. Dec. 741; Van Ness *v.* Washington, 4 Pet. (U. S.) 232, 7 L. ed. 842.

29. See Gebhardt *v.* Reeves, 75 Ill. 301; Anderson *v.* Rochester, etc., R. Co., 9 How. Pr. (N. Y.) 553. And see *supra*, VIII, B, 2.

30. Hunter *v.* Middleton, 13 Ill. 50; Anderson *v.* Rochester, etc., R. Co., 9 How. Pr. (N. Y.) 553.

31. State *v.* Hudson, 34 N. J. L. 25.

32. San Francisco *v.* Sharp, 125 Cal. 534, 58 Pac. 173; Pitts *v.* Baltimore, 73 Md. 326, 21 Atl. 52; Moale *v.* Baltimore, 5 Md. 314, 61 Am. Dec. 276; Elizabeth *v.* Price, 41 N. J. L. 191; Clark *v.* Elizabeth, 40 N. J. L. 172; State *v.* Hudson, 34 N. J. L. 25; Easton Borough *v.* Rinek, 116 Pa. St. 1, 9 Atl. 63.

cator is not substantially injured.[33] The state or municipality has, however, no right to change the use without awarding compensation not only to the persons enjoying the use but to the owner of the fee upon which the use is an easement.[34]

4. Right to Preserve and Enforce Use. The dedicator has a right to maintain an action to preserve and enforce the use for which the property is dedicated.[35]

5. Right to Reversion on Abandonment. The property dedicated reverts to the dedicator in case of abandonment or in case the use becomes impossible.[36]

E. Rights of Dedicator's Heirs, Assigns, Etc. — 1. In General. With the exception of *bona fide* purchasers without notice, all parties holding under the dedicator take only his title. Grantees stand in the shoes of the dedicator.[37] Deeding land away does not affect prior dedications made.[38] Usually a dedicator's grantees of land bounding on a highway, in which the grantor has the reversion subject to the public use, take the fee to the middle of the highway,[39] or all

33. "In such a case [dedication] there could be no claim interposed for damages, for the party having given the ground to the community can set up no just claim to be compensated for it." Moale *v.* Baltimore, 5 Md. 314, 322, 61 Am. Dec. 276. Otherwise if a mere license to use until streets should be opened by city by condemnation. Pitts *v.* Baltimore, 73 Md. 326, 21 Atl. 52.

34. Jacksonville *v.* Jacksonville R. Co., 67 Ill. 540; Price *v.* Thompson, 48 Mo. 361; Bayonne *v.* Ford, 43 N. J. L. 292; Paterson *v.* St. Andrews, 6 App. Cas. 833.

35. See *infra*, XIII, A, 1.

36. See *infra*, X, B.

37. *California.*— Wheeler *v.* Benjamin, 136 Cal. 51, 68 Pac. 313.

Illinois.— Simpson *v.* Mikkelsen, 196 Ill. 575, 63 N. E. 1036; Morrison *v.* Hinkson, 87 Ill. 587, 29 Am. Rep. 77; Field *v.* Carr, 59 Ill. 198; Warren *v.* Jacksonville, 15 Ill. 236, 58 Am. Dec. 610.

Kansas.— Hayes *v.* Houke, 45 Kan. 466, 25 Pac. 860.

New Jersey.—Ayres *v.* Pennsylvania R. Co., 48 N. J. L. 44, 3 Atl. 885, 57 Am. Rep. 538.

New York.— Bridges *v.* Wyckoff, 67 N. Y. 130.

North Carolina.— Collins *v.* Asheville Land Co., 128 N. C. 563, 39 S. E. 21, 83 Am. St. Rep. 720.

Pennsylvania.— Com. *v.* Alburger, 1 Whart. 469; Richardson *v.* McKeesport, 31 Pittsb. Leg. J. N. S. 52.

Texas.— Bellar *v.* Beaumont, (Civ. App. 1900) 55 S. W. 410.

Utah.— Schettler *v.* Lynch, 23 Utah 305, 64 Pac. 955.

Virginia.— Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830; Taylor *v.* Com., 29 Gratt. 780.

West Virginia.— Ralston *v.* Weston, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834.

Remote vendee.— Dedication is binding on the remote vendees of the dedicator. Faller *v.* Latonia, 74 S. W. 287, 24 Ky. L. Rep. 2476.

38. Brown *v.* Stark, 83 Cal. 636, 24 Pac. 162.

A grantee cannot repudiate a dedication and fence in land conveyed to him which had been dedicated as a road. Bridges *v.* Wyckoff, 67 N. Y. 130.

39. Ayres *v.* Pennsylvania R. Co., 48 N. J. L. 44, 3 Atl. 885, 57 Am. Rep. 538; Banks *v.* Ogden, 2 Wall. (U. S.) 57, 17 L. ed. 818, annotated. At common law *prima facie* abutting owners own to the center of the road. Beckett *v.* Leeds Corp., L. R. 7 Ch. 421, 26 L. T. Rep. N. S. 375, 20 Wkly. Rep. 454; Salisbury *v.* Great Northern R. Co., 5 C. B. N. S. 174, 5 Jur. N. S. 70, 28 L. J. C. P. 40, 7 Wkly. Rep. 75, 94 E. C. L. 174; Cooke *v.* Green, 11 Price 736. And a conveyance calling to the street carries to the center. Berridge *v.* Ward, 10 C. B. N. S. 400, 7 Jur. N. S. 876, 30 L. J. C. P. 218, 100 E. C. L. 400; Reg. *v.* Strand, 4 B. & S. 526, 33 L. J. M. C. 33, 9 L. T. Rep. N. S. 374, 12 Wkly. Rep. 46, 828. But not if the street is not dedicated. Leigh *v.* Jack, 5 Ex. D. 264, 44 J. P. 488, 49 L. J. Exch. 220, 42 L. T. Rep. N. S. 463, 28 Wkly. Rep. 452.

The same principles are recognized in the United States; the grant includes to the center, title may be reserved, and the abutting owner is *prima facie* owner of the highway subject to the easement.

Connecticut.— Gear *v.* Barnum, 37 Conn. 229; Chatham *v.* Brainerd, 11 Conn. 60; Peck *v.* Smith, 1 Conn. 103, 6 Am. Dec. 216.

Kentucky.— Hawesville *v.* Lander, 8 Bush 679.

Maine.— Palmer *v.* Dougherty, 33 Me. 502, 54 Am. Dec. 636; Bucknam *v.* Bucknam, 12 Me. 463.

Maryland.—Baltimore, etc., R. Co. *v.* Gould, 67 Md. 60, 8 Atl. 754.

Massachusetts.— Stark *v.* Coffin, 105 Mass. 328; White *v.* Godfrey, 97 Mass. 472; Rice *v.* Worcester County, 11 Gray 283 note; Tyler *v.* Hammond, 11 Pick. 193.

New Hampshire.—Graves *v.* Amoskeag Mfg. Co., 44 N. H. 462.

New Jersey.— Overman *v.* Hoboken City Bank, 30 N. J. L. 61.

New York.— Munn *v.* Worrall, 53 N. Y. 44, 13 Am. Rep. 470; Dunham *v.* Williams, 37 N. Y. 251; Perrin *v.* New York Cent. R. Co., 36 N. Y. 120; Seneca Nation *v.* Knight, 23 N. Y. 498; Adams *v.* Rivers, 11 Barb. 390; Jackson *v.* Hathaway, 15 Johns. 447, 8 Am. Dec. 263.

Pennsylvania.— Falls *v.* Reis, 74 Pa. St. 439.

the grantor has, if he does not own to the center.[40] If he expressly conveys away the fee his grantees succeed to his rights,[41] provided they be rights which can be assigned.[42]

2. PURCHASERS WITHOUT NOTICE. The general rules as to the title taken by *bona fide* purchasers without notice apply when the encumbrance is a dedication to the public use.[43] Usually, however, the state of the property[44] or the records constitute notice by which the purchaser is bound, whether his knowledge of the easement be actual or not.[45]

F. Rights of the Public — 1. RIGHT OF USER. The general public, that is to say any and every one, has the right to use dedicated property to the full extent to which such easements are commonly used, unless there are reservations.[46] The public, however, takes the property as it is when dedicated, subject to the inconveniences and risks, and while ordinary obstructions can be removed and a way made smooth and clear,[47] no one has any rights against a dedicator on account of the condition of the property when dedicated.[48] Where there is a dedication of a public street across a railroad right of way, the public takes subordinate to the rights of the railroad company.[49]

2. RIGHTS IN SOIL. Members of the general public have no rights in the soil of dedicated land, and cannot remove coal, stone, or gravel therefrom.[50]

G. Rights of Municipality — 1. TO REGULATE AND DEFINE USE. The legislature or the municipality acting under legislative authority can apply the dedi-

Rhode Island.— Hughes *v.* Providence, etc., R. Co., 2 R. I. 508.

Vermont.— Marsh *v.* Burt, 34 Vt. 289; Cole *v.* Haynes, 22 Vt. 588.

Wisconsin.— Gove *v.* White, 20 Wis. 425.

This rule does not apply to parks or squares, in which the abutting owners have no fee. Douglass *v.* Montgomery, 118 Ala. 599, 24 So. 745, 43 L. R. A. 376.

Abutting owners acquire no interest if their deeds do not refer to the street. Knott *v.* Jefferson St. Ferry Co., 9 Oreg. 530; Valley Pulp, etc., Co. *v.* West, 58 Wis. 599, 17 N. W. 554.

40. Ayres *v.* Pennsylvania R. Co., 48 N. J. L. 44, 3 Atl. 885, 57 Am. Rep. 538.

41. See cases cited *supra*, note 27.

42. Ruch *v.* Rock Island, 97 U. S. 693, 24 L. ed. 1101.

43. "Where there is a continuous or apparent easement or servitude, the purchaser at private or judicial sale is bound to take notice, and he takes title subject thereto. So, where there is an apparent dedication of land for public use, the purchaser of the legal title could not defeat the right of the public. . . . It is reasonably certain that the Homestead Bank and Life Insurance Company dedicated the land to the public, and that a number of persons purchased lots expecting to enjoy the resulting advantage. However, nothing in the plan, or in the course of title or on the ground, was a warning to Ormsby Phillips of such dedication, and therefore he acquired a good title." Schuchman *v.* Homestead, 111 Pa. St. 48, 2 Atl. 407. See 5 Cyc. 719; and, generally, VENDOR AND PURCHASER.

44. Bellar *v.* Beaumont, (Tex. Civ. App. 1900) 55 S. W. 410.

45. Harbor, etc., Co. *v.* Smith, 85 Md. 537, 37 Atl. 27; Collins *v.* Asheville Land Co., 128 N. C. 563, 39 S. E. 21, 83 Am. St. Rep. 720.

46. California Nav., etc., Co. *v.* Union Transp. Co., 126 Cal. 433, 58 Pac. 936, 46 L. R. A. 825; People *v.* Kerr, 27 N. Y. 188; Reg. *v.* Mathias, 2 F. & F. 570. Thus the right to push a perambulator along a footway has been held proper (Reg. *v.* Mathias, 2 F. & F. 570); but not the right to have hurdle races along an ordinary road (Sowerby *v.* Wadsworth, 3 F. & F. 734).

47. See Brown *v.* Edmonton, 23 Can. Supreme Ct. 308.

48. Fisher *v.* Prowse, 2 B. & S. 770, 8 Jur. N. S. 1208, 31 L. J. Q. B. 212, 6 L. T. Rep. N. S. 711, 110 E. C. L. 770; Robbins *v.* Jones, 15 C. B. N. S. 221, 10 Jur. N. S. 239, 33 L. J. C. P. 1, 9 L. T. Rep. N. S. 523, 12 Wkly. Rep. 248, 109 E. C. L. 221; Cornwell *v.* Metropolitan Sewer Com'rs, 3 C. L. R. 417, 10 Exch. 771. Thus in New Windsor *v.* Stocksdale, 95 Md. 196, 52 Atl. 596, it was held that a city had no right to remove steps, etc., projecting in an alley, they having always been there, and there being no evidence of actual interference with public use. And it has been held that where a man dedicated a road which passed over an area-way projecting from his property, a passer falling over or into the area-way had no rights against the dedicator. Fisher *v.* Prowse, 2 B. & S. 770, 8 Jur. N. S. 1208, 31 L. J. Q. B. 212, 6 L. T. Rep. N. S. 711, 110 E. C. L. 770.

49. Brunswick, etc., R. Co. *v.* Waycross, 91 Ga. 573, 17 S. E. 674; Chicago, etc., R. Co. *v.* Hogan, 105 Ill. App. 136; Noblesville *v.* Lake Erie, etc., R. Co., 130 Ind. 1, 29 N. E. 484; Ayres *v.* Pennsylvania R. Co., 48 N. J. L. 44, 3 Atl. 885, 57 Am. Rep. 538.

50. La Salle *v.* Matthiessen, etc., Zinc Co., 16 Ill. App. 69; St. Anthony Falls Water Power Co. *v.* King Wrought Iron Bridge Co., 23 Minn. 186, 23 Am. Rep. 682; District of Columbia *v.* Robinson, 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440.

cated property to all public and beneficial purposes consistent with the terms and purpose of the dedication and regulate the public user.[51] Within the limits of the purposes and uses for which the dedication is made its authority to regulate the use is unlimited.[52] It may also define the use where the property is dedicated for public purposes generally without specifying any particular use.[53]

2. To Enforce and Preserve Use. The municipality through its proper officers may maintain suits to enforce and preserve the use for which the property was dedicated.[54]

H. Rights of Creditors — 1. Ordinary Debts. Property dedicated to the public use, just as it cannot be alienated,[55] so it cannot be seized or sold for the debts of any person or corporation.[56] This is true of both common-law[57] and statutory dedications.[58] In the case of a cemetery company which had a remaining substantial interest in certain dedicated cemetery lots, although the point was made that its interest in these lots should be liable for its debts subject to the public uses declared, this was denied.[59] At common law ecclesiastical property could not be seized for debt.[60] In modern times the law relating to religious societies is somewhat complicated, and whether or not their property, which is in a sense dedicated to public use, can be alienated, mortgaged, or seized for debt involves special consideration.[61]

2. Taxes, Assessments, Etc. The liability of property dedicated to public uses to be taxed for general or local purposes, which liability is generally denied, is considered under other titles, as the fact that the public use was created by dedication does not affect the question.[62]

51. *Illinois.*— Field *v.* Barling, 149 Ill. 556, 37 N. E. 850, 41 Am. St. Rep. 311, 24 L. R. A. 406.

Kentucky.— Flemingsburg *v.* Wilson, 1 Bush 203; Rowan *v.* Portland, 8 B. Mon. 232.

Ohio.— Gleason *v.* Cleveland, 49 Ohio St. 431, 31 N. E. 802; Langley *v.* Gallipolis, 2 Ohio St. 107; Cincinnati *v.* McMicken, 6 Ohio Cir. Ct. 188.

Pennsylvania.— Baird *v.* Rice, 63 Pa. St. 489.

United States.— Barclay *v.* Howell, 6 Pet. 498, 8 L. ed. 477; Cincinnati *v.* White, 6 Pet. 431, 8 L. ed. 452; Hoyt *v.* Gleason, 65 Fed. 685; Coffin *v.* Portland, 27 Fed. 412.

England.— Reg. *v.* Mathias, 2 F. & F. 570.

The legislature is primarily the representative of the public (see *supra*, VI, C, 3), and may regulate the use directly or through the municipality (Gleason *v.* Cleveland, 49 Ohio St. 431, 31 N. E. 802; Coffin *v.* Portland, 27 Fed. 412). Thus it can lay out and open dedicated streets. Church *v.* Portland, 18 Oreg. 73, 22 Pac. 528, 6 L. R. A. 259.

52. Hoboken M. E. Church *v.* Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696.

53. Chicago, etc., R. Co. *v.* Joliet, 79 Ill. 25; Burlington Gaslight Co. *v.* Burlington, etc., R. Co., 91 Iowa 470, 59 N. W. 292.

54. See *infra*, XIII, A, 4.

55. Oakland Cemetery Co. *v.* People's Cemetery Assoc., 93 Tex. 569, 57 S. W. 27, 55 L. R. A. 503.

56. *California.*— San Diego *v.* Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. 291, 35 L. R. A. 33; Hart *v.* Burnett, 15 Cal. 530.

Massachusetts.— Essex County *v.* Salem, 153 Mass. 141, 26 N. E. 431.

Nebraska.— Pawnee City First Nat. Bank *v.* Hazels, 63 Nebr. 844, 89 N. W. 378, 56 L. R. A. 765.

New Jersey.— Hoboken M. E. Church *v.* Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696.

New York.— Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70.

Pennsylvania.—McGonigle *v.* Allegheny, 44 Pa. St. 118.

Texas.— Oakland Cemetery Co. *v.* People's Cemetery Assoc., 93 Tex. 569, 57 S. W. 27, 55 L. R. A. 503; San Antonio *v.* Lewis, 15 Tex. 388.

"Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing-places, fire-engines, hose and hose-carriages, engine-houses, engineering instruments, and generally everything held for governmental purposes, cannot be subjected to the payment of the debts of the city. Its public character forbids such an appropriation. Upon the repeal of the charter of the city, such property passed under the immediate control of the State, the power once delegated to the city, in that behalf having been withdrawn." Meriwether *v.* Garrett, 102 U. S. 472, 501, 26 L. ed. 197.

57. Brown *v.* Lutheran Church, 23 Pa. St. 495.

58. Cox *v.* Griffin, 18 Ga. 728.

59. Pawnee City First Nat. Bank *v.* Hazels, 63 Nebr. 844, 89 N. W. 378, 56 L. R. A. 765.

60. Arbuckle *v.* Cowtan, 3 B. & P. 328.

61. Pawnee City First Nat. Bank *v.* Hazels, 63 Nebr. 844, 89 N. W. 378, 56 L. R. A. 765; Close *v.* Glenwood Cemetery, 107 U. S. 466, 2 S. Ct. 267, 27 L. ed. 408. And see, generally, Cemeteries; Religious Societies.

62. San Diego *v.* Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. 291, 35 L. R. A. 33.

IX. ABANDONMENT.

A. What Constitutes — 1. In General. An abandonment may be said to occur, when the use for which the property is dedicated becomes impossible of execution or where the object of the use for which the property is dedicated wholly fails.[63] Merely collecting taxes on land dedicated is not an abandonment of the use,[64] and misuser does not constitute abandonment.[65]

2. Non-User — a. Before Acceptance. As already shown the general public can accept a dedication only by user, and one of the ways in which the state or municipality may accept is also by using or assuming jurisdiction over the subject of the dedication. Such acceptance must be within a reasonable time after the offer of the dedication, so that non-user may avoid a dedication as non-acceptance. But when the dedicator is bound otherwise by statute, by deed, or by estoppel the user may begin at any time. In a sense therefore there may be abandonment by non-user before acceptance.[66]

b. After Acceptance. After acceptance, or if acceptance be unnecessary, the effect of non-user raises questions of considerable difficulty. The non-user may be of three kinds. It may be a mere negative non-user accompanied by no acts showing intention of never using, and not complicated by actual user by some private party, which non-user all the authorities agree has no effect upon the rights of the public;[67] and the public may begin the user or the municipality may open

63. Board of Education *v.* Van Wert, 18 Ohio St. 221, 98 Am. Dec. 114. And see Goode *v.* St. Louis, 113 Mo. 257, 20 S. W. 1048; Williams *v.* Cincinnati First Presb. Soc., 1 Ohio St. 478.

City property.— If a city is abandoned and the property reverts to the condition of a farm this will work an abandonment of the streets. Bayard *v.* Hargrove, 45 Ga. 342.

Graveyard.— Where the legislature prohibits the use of land dedicated for a graveyard for such purpose there is an abandonment. Newark *v.* Watson, 56 N. J. L. 667, 29 Atl. 487, 24 L. R. A. 843. So where land is dedicated for a burying-ground, whether by a common-law dedication under which the fee remains in the owner, or pursuant to a statute under which the fee is vested for the county in trust for the purposes named only, the abandonment of the land as a burying-ground restores the former owner to his right of possession. Mahoning County Com'rs *v.* Young, 59 Fed. 96, 8 C. C. A. 27. And an abandonment also occurs where a graveyard has entirely disappeared, leaving no traces of burial lots, tombstones, or graves. Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593.

Highways.—An abandonment occurs where a highway is declared useless and discontinued by the public authorities. Healey *v.* Babbitt, 14 R. I. 533. See also Gebhardt *v.* Reeves, 75 Ill. 301; Hunter *v.* Middleton, 13 Ill. 50; Atty.-Gen. *v.* Morris, etc., R. Co., 19 N. J. Eq. 386.

Public buildings.—Where property is dedicated for a public building an abandonment occurs when such building is erected on another site. State *v.* Travis County, 85 Tex. 435, 21 S. W. 1029. And see Sinclair *v.* Comstock, Harr. (Mich.) 404; Daniels *v.* Wilson, 27 Wis. 492.

Schools.— Where a railroad is opened near a place dedicated for a school, and the same becomes unsuitable and dangerous for a school and the city attempts to sell the lot it reverts to the dedicator. Board of Education *v.* Van Wert, 18 Ohio St. 221, 98 Am. Dec. 114.

64. Ashland *v.* Chicago, etc., R. Co., 105 Wis. 398, 80 N. W. 1101.

65. Parker *v.* St. Paul, 47 Minn. 317, 50 N. W. 247; Goode *v.* St. Louis, 113 Mo. 257, 20 S. W. 1048; Barclay *v.* Howell, 6 Pet. (U. S.) 498, 8 L. ed. 477.

66. The distinction between non-user after and non-user before acceptance is discussed, explained, and illustrated, the case being one of statutory dedication, in Archer *v.* Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145. And see Still *v.* Griffin, 27 Ga. 502; Plumer *v.* Johnston, 63 Mich. 165, 29 N. W. 687.

Where the owner of urban property, who has laid it off into lots, with streets, avenues, etc., sells such lots with reference to the plat, or with reference to a city plat which he adopts, his acts amount, as between him and the purchasers, to a dedication of the designated streets, avenues, and alleys to the public; but so far as the city is concerned, such acts amount to a mere offer of dedication, which may be withdrawn at any time prior to acceptance by the authorities of the city. Mouat Lumber Co. *v.* Denver, 21 Colo. 1, 40 Pac. 237.

67. *California.*—Archer *v.* Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145.

Illinois.— Lee *v.* Mound Station, 118 Ill. 304, 8 N. E. 759.

Kansas.—Wilgus *v.* Miami County, 54 Kan. 605, 38 Pac. 787; Osage City *v.* Larkin, 40 Kan. 206, 19 Pac. 658, 10 Am. St. Rep. 186, 2 L. R. A. 56; Wyandotte County *v.* Wyandotte First Presb. Church, 30 Kan. 620, 1 Pac. 109.

for public use at any time if the dedication is complete and the dedicator is bound by acceptance, by statute, by deed, or by estoppel.[68] And it may be a non-user under circumstances showing no intention of ever using, because of the unfitness of the subject of the dedication, or because of its inutility to the public, and such non-user constitutes abandonment.[69] Again the non-user may be, as in cases where the subject of the dedication is openly held by a private party by inclosure, such as would be compatible in the case of private property with title in another by adverse possession.[70] It also may be of importance whether the non-user begins after user or whether there never has been any user at all, the implication of an intent to abandon in the former case being perhaps the stronger.[71]

3. SUBSTITUTION OF USE. Where the offer of an owner to change the location of a road or street over his property is accepted, this amounts to a dedication of the ground accepted for the new road or street and operates as a substitute of the new way for the old,[72] and where an owner of land adjacent to a highway encroaches upon or closes it and gives the public another way it will become a public highway by dedication on acceptance by the public.[73] So if travel diverges from a portion of a highway across one's land and the owner acquiesces in the

Kentucky.— Rowan *v.* Portland, 8 B. Mon. 232.

Maryland.— Richardson *v.* Davis, 91 Md. 390, 46 Atl. 964.

Mississippi.— Briel *v.* Natchez, 48 Miss. 423.

New Jersey.— South Amboy *v.* New York, etc., R. Co., 66 N. J. L. 623, 50 Atl. 363; Hohokus Tp. *v.* Erie R. Co., 65 N. J. L. 353, 47 Atl. 566; Atlantic City *v.* Groff, 64 N. J. L. 527, 45 Atl. 916; Smith *v.* State, 23 N. J. L. 712; Jersey City *v.* Morris Canal, etc., Co., 12 N. J. Eq. 547.

Ohio.— Fenton *v.* Cheseldine, 11 Ohio Dec. (Reprint) 649, 28 Cinc. L. Bul. 223.

Oregon.— Spencer *v.* Peterson, 41 Oreg. 257, 68 Pac. 519, 1108; Meier *v.* Portland Cable R. Co., 16 Oreg. 500, 19 Pac. 610, 1 L. R. A. 856.

Pennsylvania.— Pittsburg *v.* Epping-Carpenter Co., 194 Pa. St. 318, 45 Atl. 129.

Tennessee.— Hardy *v.* Memphis, 10 Heisk. 127.

Texas.— Dallas *v.* Gibbs, 27 Tex. Civ. App. 275, 65 S. W. 81.

West Virginia.— Ralston *v.* Weston, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834.

Wisconsin.— Reilly *v.* Racine, 51 Wis. 526, 8 N. W. 417.

United States.— London, etc., Bank *v.* Oakland, 90 Fed. 691, 33 C. C. A. 237; Coffin *v.* Portland, 27 Fed. 412.

See 15 Cent. Dig. tit. "Dedication," § 103 *et seq.*

"Any ordinary observer traveling upon the public roads of the more thickly populated portions of this state will often perceive the land on one or both sides of a road-bed that is fenced out sowed in grain and pastured by the proprietors of the adjoining land, while all the travel for many years has been confined to the center of the road-bed, and yet we do not see that such acts should of themselves be held to show either an abandonment of the use of the road by the public, or its adverse possession by the person who has thus sowed, reaped, and pastured his stock thereon." Southern Pac. R. Co. *v.* Ferris, 93 Cal. 263, 265, 28 Pac. 828, 18 L. R. A. 510.

68. See cases cited *supra*, note 67.

69. See *supra*, IX, A, 1.

70. See ADVERSE POSSESSION, 1 Cyc. 1117, 1118.

71. A very clear case of abandonment was one in which a dedication was made for a court-house and the county having built a court-house, afterward abandoned it as a court-house and built a new court-house on another lot, renting the old building for private uses. State *v.* Travis County, 85 Tex. 435, 21 S. W. 1029. See also Kent County *v.* Grand Rapids, 61 Mich. 144, 27 N. W. 888; Sinclair *v.* Comstock, Harr. (Mich.) 404. Use was held abandoned when before user it was closed up and was kept closed for twenty years. Auburn *v.* Goodwin, 128 Ill. 57, 21 N. E. 212.

Where the non-user is due to natural causes, as where land is covered with water, there is no abandonment. Welton *v.* Wolcott, 50 Conn. 259. Jersey City *v.* Morris Canal, etc., Co., 12 N. J. Eq. 547.

Improving a street for part of its width is not of itself an abandonment of the rest. Shirk *v.* Chicago, 195 Ill. 298, 63 N. E. 193. It shows rather an acceptance of the whole. Southern Pac. R. Co. *v.* Ferris, 93 Cal. 263, 28 Pac. 828, 18 L. R. A. 510.

72. Sweatman *v.* Deadwood, 9 S. D. 380, 69 N. W. 582; Fairfield *v.* Morey, 44 Vt. 239. See also Kelsey *v.* Furman, 36 Iowa 614, holding that where the public have traveled for more than ten years a route deviating slightly from that originally established, by reason of an obstacle in the surveyed route and pursuant to some arrangement with adjacent owners, and not by mistake merely, such traveled route becomes a highway by prescription.

73. Green *v.* Stevens, 49 Ill. App. 24; Hobbs *v.* Lowell, 19 Pick. (Mass.) 405, 31 Am. Dec. 145; Hamilton *v.* White, 5 N. Y. 9; Almy *v.* Church, 18 R. I. 182, 26 Atl. 58.

user of the land taken to form the new portion of the highway he will be deemed to have dedicated it.[74]

B. Effect of Abandonment. Where the donees of dedicated lands fail or refuse to accept the dedication, the land reverts to the grantor as the title has never passed out of him.[75] In case of an abandonment after acceptance also the rights of the public therein fail and a reversion takes place, as the dedication has spent its force when the use ceases.[76] If land is dedicated for school purposes,[77] for a court-house,[78] for other public buildings,[79] for a park,[80] or for cemeteries or burial purposes,[81] the property so abandoned reverts to the dedicator or his heirs, and this is true whether the dedication is statutory or at common law.[82] In the case of streets or highways a different question is presented. As a general rule, where the dedication is made by map or plat dividing land into lots, streets, and alleys, and sales of lots are made with reference to such streets, the land included in the streets on vacation or abandonment thereof reverts to the owners of lots abutting thereon, the owners on each side acquiring title to one half of the width of the street,[83] unless the grantor in express terms reserved the right to himself in his deed conveying the lots or in his act of dedication.[84] So where a highway is laid out wholly on a person's land running along its margin and he conveys the land bounding it on the highway, the grantee is entitled to the whole of the land in the highway when it is abandoned.[85] Where, however, the owner of a strip of land conveys it by deed to a village in trust for the benefit of the inhabitants thereof, to be held and maintained for public streets only, the title to the land reverts to the owner on abandonment.[86]

74. Fitzgerald *v.* Saxton, 58 Ark. 494, 25 S. W. 499; Larned *v.* Larned, 11 Metc. (Mass.) 421; Prouty *v.* Bell, 44 Vt. 72.

75. Still *v.* Griffin, 27 Ga. 502. See also Plumer *v.* Johnston, 63 Mich. 165, 29 N. W. 687.

Under the civil law in the case of abandonment of the use the ownership of the property reverts to the state. Mitchell *v.* Bass, 33 Tex. 259.

76. Mahoning County Com'rs *v.* Young, 59 Fed. 96, 8 C. C. A. 27.

77. Board of Education *v.* Van Wert, 18 Ohio St. 221, 98 Am. Dec. 114; Johnson County School Dist. No. 2 *v.* Hart, 3 Wyo. 563, 27 Pac. 919, 29 Pac. 741.

78. Kent County *v.* Grand Rapids, 61 Mich. 144, 27 N. W. 888; Sinclair *v.* Comstock, Harr. (Mich.) 404.

Limitations of rule.—Where ground was donated to the county court for use as a "public square" so long as the seat of justice should remain there, and the seat of justice was removed, it was held that the title did not revert to the original dedicator but reverted to the use of the inhabitants of the town, first, because they had used the square for over fifty years, and second, because the adjoining property-owners had bought their lots relying upon the existence of the public square. Campbell County Ct. *v.* Newport, 12 B. Mon. (Ky.) 538.

79. Sinclair *v.* Comstock, Harr. (Mich.) 404.

80. Rowzee *v.* Pierce, 75 Miss. 846, 23 So. 307, 65 Am. St. Rep. 625, 40 L. R. A. 402; State *v.* Travis County, 85 Tex. 435, 21 S. W. 1029.

81. Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593; Newark *v.* Watson, 56 N. J. L. 667, 29 Atl. 487, 24 L. R. A. 843; Mahoning County Com'rs *v.* Young, 59 Fed. 96, 8 C. C. A. 27 [*reversing* 51 Fed. 585].

82. Mahoning County Com'rs *v.* Young, 59 Fed. 96, 8 C. C. A. 27.

83. *Georgia.*— Harrison *v.* Augusta Factory, 73 Ga. 447; Bayard *v.* Hargrove, 45 Ga. 342.

Illinois.— Thomsen *v.* McCormick, 136 Ill. 135, 26 N. E. 373.

Indiana.— Freedom *v.* Norris, 128 Ind. 377, 27 N. E. 869.

Iowa.— Day *v.* Schroeder, 46 Iowa 546; Pettingill *v.* Devin, 35 Iowa 344.

New York.— Wheeler *v.* Clark, 58 N. Y. 267.

But see Mendez *v.* Dugart, 17 La. Ann. 171.

See 15 Cent. Dig. tit. "Dedication," § 103 *et seq.*

In Illinois, on the abandonment of the streets, the property in the streets in case of statutory dedication will revert to the dedicator and not to the abutting lot owners as such. A conveyance of a lot abutting a street so dedicated does not carry title to the center of the street, but only to the street. Matthiessen, etc., Zinc Co. *v.* La Salle, 117 Ill. 411, 2 N. E. 406, 8 N. E. 81; Gebhardt *v.* Reeves, 75 Ill. 301; St. John *v.* Quitzow, 72 Ill. 334; Hunter *v.* Middleton, 13 Ill. 50.

In Pennsylvania, where a conveyance of lots in rural districts is bounded on a street laid out by the grantor, the streets on abandonment become part of the lots bound on them, but the rule is otherwise in a city where the line is specified. Ball *v.* Ball, 7 Leg. Int. (Pa.) 36.

84. Harrison *v.* Augusta Factory, 73 Ga. 447; Baltimore, etc., R. Co. *v.* Gould, 67 Md. 60, 8 Atl. 754.

85. Healey *v.* Babbitt, 14 R. I. 533.

86. Downes *v.* Dimock, etc., Co., 75 N. Y. App. Div. 513, 78 N. Y. Suppl. 348.

X. MISUSER OR DIVERSION.

A. Necessity of User For Purposes Specified in Dedication — 1. GENERAL RULE. If a dedication be made for a specific or defined purpose, neither the legislature, the municipality, nor the general public has any power to use the property for any other purpose than the one designated.[87] This can only be done under the right of eminent domain.[88] "Nothing can be clearer than that if a grant is made for a specific, limited, and defined purpose, the subject of the grant cannot be used for another."[89]

2. LIMITATIONS OF RULE — **a. Change by Consent of All Parties Interested.** In case all parties interested give their consent, the use for which the property is dedicated may perhaps be changed or destroyed;[90] but inasmuch as there are three parties interested in every dedication — the dedicator and his representative, the general public, and the property-owners with special interest, such as owners of lots abutting on streets,[91] no one of them without the consent of the others can change or destroy the use.[92]

b. Where Fee Is Vested in Municipality. Some decisions recognize a limitation of the general rule in respect to diversion or misuser and hold that if the fee of dedicated property is vested in the municipality by absolute deed, it may, if authorized by the legislature, discontinue the use, and apply the dedicated property to such purposes as it may see fit.[93]

B. What Constitutes Misuser or Diversion. Applying the general doctrine governing misuser it has been held that dedicated property cannot be sold,[94]

87. *Alabama.*—Western R. Co. *v.* Alabama Grand Trunk R. Co., 96 Ala. 272, 11 So. 483, 17 L. R. A. 474.

Arkansas.— Arkansas River Packet Co. *v.* Sorrels, 50 Ark. 466, 8 S. W. 683.

Florida.— Lutterloh *v.* Cedar Keys, 15 Fla. 306.

Illinois.— Jacksonville *v.* Jacksonville R. Co., 67 Ill. 540; Alton *v.* Illinois Transp. Co., 12 Ill. 38, 52 Am. Dec. 479.

Iowa.— Warren *v.* Lyons, 22 Iowa 351.

Kansas.— Franklin County Com'rs *v.* Lathrop, 9 Kan. 453.

Kentucky.— Campbell County Ct. *v.* Newport, 12 B. Mon. 538; Rowan *v.* Portland, 8 B. Mon. 232; Augusta *v.* Perkins, 3 B. Mon. 437.

Maryland.—Reed *v.* Stouffer, 56 Md. 236.

Michigan.— Cooper *v.* Alden, Harr. 72.

Missouri.— Normal School Dist. No. 3 *v.* Painter, 102 Mo. 464, 14 S. W. 938, 10 L. R. A. 493; Price *v.* Thompson, 48 Mo. 361, land dedicated for a public park.

New Jersey.— Hoboken M. E. Church *v.* Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696; Lennig *v.* Ocean City Assoc., 41 N. J. Eq. 606, 7 Atl. 491, 56 Am. Rep. 16.

New York.— Cady *v.* Conger, 19 N. Y. 256; People *v.* Vanderbilt, 38 Barb. 282; Still *v.* Lansingburgh, 16 Barb. 107.

Ohio.—Price *v.* Methodist Episcopal Church, 4 Ohio 515.

Oregon.— Church *v.* Portland, 18 Oreg. 73, 22 Pac. 528, 6 L. R. A. 259; Portland *v.* Whittle, 3 Oreg. 126.

Pennsylvania.— Com. *v.* Bowman, 3 Pa. St. 202; Rees *v.* West Pennsylvania Exposition Soc., 2 Pa. Co. Ct. 385.

Texas.— Harris County *v.* Taylor, 58 Tex. 690; San Antonio *v.* Lewis, 15 Tex. 388.

Vermont.— Pomeroy *v.* Mills, 3 Vt. 279, 23 Am. Dec. 207.

Virginia.— Frederick County *v.* Winchester, 84 Va. 467, 4 S. E. 844.

United States.— Barclay *v.* Howell, 6 Pet. 498, 8 L. ed. 477; U. S. *v.* Illinois Cent. R. Co., 26 Fed. Cas. No. 15,437, 2 Biss. 174.

Canada.— *In re* Peck, 46 U. C. Q. B. 211.

See 15 Cent. Dig. tit. "Dedication," § 107 *et seq.*

88. U. S. *v.* Illinois Cent. R. Co., 26 Fed. Cas. No. 15,437, 2 Biss. 174.

89. Warren *v.* Lyons, 22 Iowa 351.

90. See Board of Education *v.* Kansas City, 62 Kan. 374, 63 Pac. 600.

91. Bayard *v.* Hargrove, 45 Ga. 342; State *v.* Travis County, 85 Tex. 435, 21 S. W. 1029.

92. See cases cited *supra*, notes 90, 91.

93. Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; Clark *v.* Providence, 16 R. I. 337, 15 Atl. 763, 1 L. R. A. 725. See also opinion of Durfee, J., in State *v.* Dexter, 10 R. I. 341.

94. *Alabama.*— Douglass *v.* Montgomery, 118 Ala. 599, 24 So. 745, 43 L. R. A. 376; Harn *v.* Dadeville, 100 Ala. 199, 14 So. 9; Webb *v.* Demopolis, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62.

Illinois.— Alton *v.* Illinois Transp. Co., 12 Ill. 38, 52 Am. Dec. 479.

Kansas.— Franklin County Com'rs *v.* Lathrop, 9 Kan. 453.

Kentucky.— Covington *v.* McNickle, 18 B. Mon. 262; Alves *v.* Henderson, 16 B. Mon. 131; Giltner *v.* Carrollton, 7 B. Mon. 680; Augusta *v.* Perkins, 3 B. Mon. 437.

Maryland.— Reed *v.* Stouffer, 56 Md. 236.

even though the proceeds be applied to other public purposes.[95] Nor can property dedicated for a public purpose be treated as private property of the municipality.[96] So property donated for a graveyard cannot be used for a park,[97] nor property dedicated for a church for a graveyard,[98] nor property dedicated for a park for a school-house.[99] So a jail or cesspool cannot be erected on property dedicated for a court-house,[1] and a "landing" cannot be obstructed by buildings.[2] So buildings,[3] water-tanks,[4] or scales[5] cannot be set up on a street, nor can a wall be allowed to encroach thereon,[6] nor can a steam railway be constructed upon land dedicated for a street.[7] And so it has been held that a railway cannot be constructed across land dedicated for a private square.[8] So an agreement giving an individual the exclusive privilege of maintaining and renting chairs in the public parks of a city, under which chairs were substituted by him for park benches located under the trees in the park compelling the public to hire the chairs or sit in the sun, is illegal and in derogation of public rights.[9]

C. What Does Not Constitute Misuser or Diversion. While as before stated there can be no diversion of the use for which the property is dedicated,[10] it may be put to all customary uses within the definition of the use.[11] All public dedications must be considered with reference to the uses for which they were made.[12] For instance telephone poles may be erected along a street;[13] sewers may be constructed under the soil of the street[14] and also water mains.[15] An

Michigan.— Patrick *v.* Kalamazoo Y. M. C. A., 120 Mich. 185, 79 N. W. 208.

Missouri.— Cummings *v.* St. Louis, 90 Mo. 259, 2 S. W. 130.

New York.— Still *v.* Lansingburgh, 16 Barb. 107.

Ohio.—Board of Education *v.* Van Wert, 18 Ohio St. 221, 98 Am. Dec. 114.

Oregon.— Church *v.* Portland, 18 Oreg. 73, 22 Pac. 528, 6 L. R. A. 259.

Pennsylvania.— Com. *v.* Rush, 14 Pa. St. 186.

Texas.—Lamar County *v.* Clements, 49 Tex. 347; San Antonio *v.* Lewis, 15 Tex. 388.

Vermont.— Pomeroy *v.* Mills, 3 Vt. 279, 23 Am. Dec. 207.

West Virginia.— Sturmer *v.* Randolph County Ct., 42 W. Va. 724, 26 S. E. 532, 36 L. R. A. 300.

Canada.— *In re* Peck, 46 U. C. Q. B. 211.

See 15 Cent. Dig. tit. "Dedication," § 107 *et seq.*

95. Franklin County Com'rs *v.* Lathrop, 9 Kan. 453; Board of Education *v.* Van Wert, 18 Ohio St. 221, 98 Am. Dec. 114; Young *v.* Mahoning County, 53 Fed. 895.

96. Campbell County Ct. *v.* Newport, 12 B. Mon. (Ky.) 538; Barclay *v.* Howell, 2 Fed. Cas. No. 975. And see Church *v.* Portland, 18 Oreg. 73, 22 Pac. 528, 6 L. R. A. 259.

97. Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593.

98. Price *v.* Methodist Episcopal Church, 4 Ohio 515.

99. Rowzee *v.* Pierce, 75 Miss. 846, 23 So. 307, 65 Am. St. Rep. 625, 40 L. R. A. 402; Church *v.* Portland, 18 Oreg. 73, 22 Pac. 528, 6 L. R. A. 259. But *compare* Reid *v.* Board of Education, 73 Mo. 295.

1. Llano *v.* Llano County, 5 Tex. Civ. App. 132, 23 S. W. 1008. See also Harris County *v.* Taylor, 58 Tex. 690.

2. Atty.-Gen. *v.* Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87.

3. Lutterloh *v.* Cedar Keys, 15 Fla. 306.

4. Morrison *v.* Hinkson, 87 Ill. 587, 29 Am. Rep. 77.

5. Gibson *v.* Black, 9 S. W. 379, 10 Ky. L. Rep. 373.

6. Flemingsburg *v.* Wilson, 1 Bush (Ky.) 203.

7. Alabama Western R. Co. *v.* Alabama, etc., R. Co., 96 Ala. 272, 11 So. 483, 17 L. R. A. 474; Schurmeier *v.* St. Paul, etc., R. Co., 10 Minn. 82, 88 Am. Dec. 59; Kelsey *v.* King, 1 Transcr. App. (N. Y.) 133, 33 How. Pr. (N. Y.) 39; Fanning *v.* Osborne, 34 Hun (N. Y.) 121.

8. Jacksonville *v.* Jacksonville R. Co., 67 Ill. 540.

9. Kurtz *v.* Clausen, 38 Misc. (N. Y.) 105, 77 N. Y. Suppl. 97.

10. See *supra*, X, A, 1.

11. *Indiana* — Greene County *v.* Huff, 91 Ind. 333.

Kentucky.— Newport *v.* Taylor, 16 B. Mon. 699.

New York.— Burnet *v.* Bagg, 67 Barb. 154.

Pennsylvania.— Com. *v.* Connellsville Borough, 201 Pa. St. 154, 50 Atl. 825; Com. *v.* Beaver Borough, 171 Pa. St. 542, 33 Atl. 112; Pott *v.* School Directors, 42 Pa. St. 132.

South Carolina.— State *v.* Charleston Neck, 3 Hill 149.

United States.— District of Columbia *v.* Robinson, 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440; Cincinnati *v.* White, 6 Pet. 431, 8 L. ed. 452.

See 15 Cent. Dig. tit. "Dedication," § 107 *et seq.*

12. Cincinnati *v.* White, 6 Pet. (U. S.) 431, 8 L. ed. 452.

13. Magee *v.* Overshiner, 150 Ind. 127, 49 N. E. 951, 65 Am. St. Rep. 358, 40 L. R. A. 370; Julia Bldg. Assoc. *v.* Bell Telephone Co., 13 Mo. App. 477.

14. Kelsey *v.* King, 1 Transcr. App. (N. Y.) 133, 33 How. Pr. (N. Y.) 39.

15. Wood *v.* National Water Works Co., 33 Kan. 590, 7 Pac. 233.

electric railway may be constructed along a street,[16] provided the use does not occupy the street to the exclusion of ordinary travel.[17] If property is dedicated for a common, the building of a wharf thereon is not a diversion of the use.[18] So if property is dedicated for a public park, inclosure thereof and the planting of trees on the land so dedicated is not a diversion;[19] nor is the erection of a monument on a public square.[20] So the erection of a market-house on a public square in an incorporated town on which it was marked as it appeared on the map of the town "market" is not necessarily inconsistent with the purposes of the original dedication of the square,[21] and if land be dedicated for the "great square" of a town, a court-house can be erected thereon, if this is a customary use of such great squares.[22] If land is dedicated for burial and other purposes, user for other purposes than burial is permissible.[23]

D. Effect of Misuser or Diversion. As already shown misuser or diversion of the property to uses not contemplated in the dedication does not operate as an abandonment nor cause a reversion.[24] The only effect is that the misuser may be prevented and punished in appropriate proceedings.[25]

XI. ADVERSE POSSESSION.

It is generally recognized that "*nullus tempus occurrit regi*" and that no one can obtain title to property dedicated to public uses by adverse possession. The general public cannot lose or forfeit its rights by the neglect of its representatives or the unlawful acts of individuals.[26] But in some states by statute and in some by construction the rule prevails that public uses may be lost like private titles by adverse possession.[27]

XII. CONDEMNATION PROCEEDINGS.

The state, directly or through delegated powers, may take for a public use property dedicated to the public use, allowing compensation to the parties damaged thereby.[28]

XIII. PROCEEDINGS TO ENFORCE AND PRESERVE USE.

A. Who May Maintain — 1. The Dedicator and His Representatives. The dedicator, whether the dedication be statutory or at common law, has such an interest in the property dedicated as entitles him to enforce the uses for which

16. Briggs *v.* Lewiston, etc., R. Co., 79 Me. 363, 10 Atl. 47, 1 Am. St. Rep. 316; Poole *v.* Falls Road Electric R. Co., 88 Md. 533, 41 Atl. 1069; Green *v.* City, etc., R. Co., 78 Md. 294, 28 Atl. 626, 44 Am. St. Rep. 288; Koch *v.* North Ave. R. Co., 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377; Peddicord *v.* Baltimore, etc., R. Co., 34 Md. 463.

Consent of the city is necessary in New Jersey. Paterson, etc., R. Co. *v.* Paterson, 24 N. J. Eq. 158.

17. Lacoming *v.* Consolidated R. Co., 29 Daily Rec. (Md.) 515; Williams *v.* New York Cent. R. Co., 18 Barb. (N. Y.) 222.

18. Newport *v.* Taylor, 16 B. Mon. (Ky.) 699.

19. Burnet *v.* Bagg, 67 Barb. (N. Y.) 154. See also Langley *v.* Gallipolis, 2 Ohio St. 107, holding that the inclosure of land and the improvement thereof is not inconsistent with the restriction against obstructions of the placing of buildings on the property dedicated. If property is dedicated for moral, religious, and literary purposes, it may be used for a public library.

20. Hoyt *v.* Gleason, 65 Fed. 685.

21. Seguin *v.* Ireland, 58 Tex. 183.

22. Com. *v.* Bowman, 3 Pa. St. 202.

23. Methodist Protestant Church *v.* Laws, 11 Ohio Dec. (Reprint) 743, 29 Cinc. L. Bul. 47.

24. See *supra*, IX, A, 1.

25. See *infra*, XIII.

26. See comprehensive opinion in Ralston *v.* Weston, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 836 [*overruling* Teass *v.* St. Albans, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802].

27. See ADVERSE POSSESSION, 5 Cyc. 1117, 1119.

28. *Alabama.*— Douglass *v.* Montgomery, 118 Ala. 599, 24 So. 745, 43 L. R. A. 376.

Connecticut.— Woodruff *v.* Neal, 28 Conn. 165.

Delaware.— Fulton *v.* Dover, 6 Del. Ch. 1, 6 Atl. 633.

Illinois.— Proctor *v.* Lewiston, 25 Ill. 153.

Louisiana.— New Orleans *v.* Hopkins, 13 La. 326.

Maryland.— De Lauder *v.* Baltimore County, 94 Md. 1, 50 Atl. 427; Van Witsen *v.* Gutman, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403.

the dedication was made and to prevent a diversion therefrom,[29] whether against the dedicatee[30] or some third person who is interfering with the use of the property for the purposes for which it was dedicated,[31] or against both acting in conjunction.[32] And in case of his death his representatives succeed to his rights.[33] The dedicator at common law retains the fee and has a right to enforce the specified use.[34] In the case of statutory dedications he has likewise the right to enforce the trusts.[35] If he is dead his heirs and devisees succeed to his rights at the time of his death,[36] and his grantees succeed to his rights expressly or by implication as abutting owners.[37] Parties to whom he has sold land covenanting for a public use have rights to sue upon the covenants,[38] and have besides a special interest in the maintenance of the public use.[39]

2. Persons Whose Rights of Property May Be Affected by Misuser. It is very generally recognized that any citizen if likely to be injured in his individual rights with respect to his property by a misuser or diversion of dedicated property may maintain an action to enforce or preserve the use.[40] Thus persons owning prop-

Massachusetts.— *In re* Wellington, 16 Pick. 87, 26 Am. Dec. 631.

New York.—*In re* John, etc., Sts., 19 Wend. 659.

West Virginia.— Ralston *v.* Weston, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834.

Exercise of power by municipality.— Generally under statutes municipalities have powers to close highways, alleys (and sometimes parks, commons, etc.), or any part thereof according to their discretion, but abutting owners have interests which are valuable and these cannot be taken for the public use without compensation, nor for private use, on any terms whatsoever. Van Witsen *v.* Gutman, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403.

29. *Indiana.*—Freedom *v.* Norris, 128 Ind. 377, 27 N. E. 869.

Iowa.— Warran *v.* Lyons, 22 Iowa 351.

Mississippi.— Rowzee *v.* Pierce, 75 Miss. 846, 23 So. 307, 65 Am. St. Rep. 625, 40 L. R. A. 402.

New York.— People *v.* Vanderbilt, 38 Barb. 282.

Ohio.— Williams *v.* Cincinnati First Presb. Soc., 1 Ohio St. 478; Brown *v.* Manning, 6 Ohio 298, 27 Am. Dec. 255.

Oregon.— Church *v.* Portland, 18 Oreg. 73, 22 Pac. 528, 6 L. R. A. 259.

Tennessee.— Hardy *v.* Memphis, 10 Heisk. 127.

Vermont.— Pomeroy *v.* Mills, 3 Vt. 279, 23 Am. Dec. 207.

Wisconsin.— Williams *v.* Milwaukee Industrial Exposition Assoc., 79 Wis. 524, 48 N. W. 665; Weisbrod *v.* Chicago, etc., R. Co., 21 Wis. 602; Gardiner *v.* Tisdale, 2 Wis. 153, 60 Am. Dec. 407. But *compare* U. S. *v.* Illinois Cent. R. Co., 154 U. S. 225, 14 S. Ct. 1015, 38 L. ed. 971, holding that one who has platted land and sold all the lots by reference to streets has no further interest and cannot sue to enjoin diversion of the use declared by the dedication.

30. Hardy *v.* Memphis, 10 Heisk. (Tenn.) 127.

31. Freedom *v.* Norris, 128 Ind. 377, 27 N. E. 869; Pomeroy *v.* Mills, 3 Vt. 279, 23 Am. Dec. 207; Weisbrod *v.* Chicago, etc., R. Co., 21 Wis. 602.

Illustration.— Thus the owner of the fee may maintain ejectment against one who has exclusively appropriated a part of a public street or highway to his own private use. Brown *v.* Galley, Lalor (N. Y.) 308.

32. Rowzee *v.* Pierce, 75 Miss. 846, 23 So. 307, 65 Am. St. Rep. 625, 40 L. R. A. 402.

33. Gardiner *v.* Tisdale, 2 Wis. 153, 60 Am. Dec. 407.

34. Warren *v.* Lyons, 22 Iowa 351; Rowzee *v.* Pierce, 75 Miss. 846, 23 So. 307, 65 Am. St. Rep. 625, 40 L. R. A. 402; People *v.* Vanderbilt, 38 Barb. (N. Y.) 282; Barclay *v.* Howell, 6 Pet. (U. S.) 498, 8 L. ed. 477. The supreme court of the United States has adopted a different rule in U. S. *v.* Illinois Cent. R. Co., 154 U. S. 225, 14 S. Ct. 1015, 38 L. ed. 971 [*approved* in Burlington Gaslight Co. *v.* Burlington, etc., R. Co., 165 U. S. 370, 17 S. Ct. 359, 41 L. ed. 749], but the decision was not necessary to the case, and its questionability is shown in the dissenting opinion.

35. Rowzee *v.* Pierce, 75 Miss. 846, 23 So. 307, 65 Am. St. Rep. 625, 40 L. R. A. 402.

36. See *supra*, VIII, E.

37. Church *v.* Portland, 18 Oreg. 73, 22 Pac. 528, 6 L. R. A. 259. And see *supra*, VIII, E.

38. Trutt *v.* Spotts, 87 Pa. St. 339.

39. Marsh *v.* Fairbury, 163 Ill. 401, 45 N. E. 236.

40. *Alabama.*— Montgomery First Nat. Bank *v.* Tyson, 133 Ala. 459, 32 So. 144; Douglass *v.* Montgomery, 118 Ala. 599, 24 So. 745, 43 L. R. A. 376.

Connecticut.—Wheeler *v.* Bedford, 54 Conn. 244, 7 Atl. 22.

Illinois.— Clark *v.* McCormick, 174 Ill. 164, 51 N. E. 215; Chicago *v.* Ward, 169 Ill. 392, 48 N. E. 927, 61 Am. St. Rep. 185, 38 L. R. A. 849.

Indian Territory.—Davenport *v.* Buffington, 1 Indian Terr. 424, 45 S. W. 128.

Maryland.— Bembe *v.* Anne Arundel County, 94 Md. 321, 51 Atl. 179, 57 L. R. A. 279; Boyce *v.* Kalbaugh, 47 Md. 334, 28 Am. Rep. 464.

Missouri.— Longworth *v.* Sedevic, 165 Mo.

erty fronting on or adjacent to a public park or square have such special property interests as entitle them to maintain a suit for the enforcement and preservation of the use of the property as such,[41] and the same is the case with owners of lots abutting on streets.[42] So upon the application of members of a class interested in property devoted to religious or charitable purposes, such uses will be protected and upheld by the proper courts.[43]

3. Persons Without Special Property Interests to Be Affected by Misuser. According to some decisions the inhabitants of a town or city have such an interest in the use of the dedicated property, although not having any special property interests to be affected by a diversion of the use, that they may maintain a suit to enforce or preserve the use.[44] Other decisions, however, maintain the opposite view.[45]

4. Municipalities. The municipality in which the land dedicated is situated, as trustee for the public, may maintain proceedings to enforce and preserve the use.[46] Thus where lands are dedicated to the use of the inhabitants of a city or incorporated village for a public square, a bill may be filed in the name of the corporation to restrain the erection of a nuisance thereon or to protect the equitable right

221, 65 S. W. 260; Cummings *v.* St. Louis, 90 Mo. 259, 2 S. W. 130.

Nebraska.— Omaha, etc., R. Co. *v.* Rogers, 16 Nebr. 117, 19 N. W. 603.

New York.— Watertown *v.* Cowen, 4 Paige 510, 27 Am. Dec. 80.

North Dakota.— Northern Pac. R. Co. *v.* Lake, 10 N. D. 541, 88 N. W. 461.

Oregon.— Church *v.* Portland, 18 Oreg. 73, 22 Pac. 528, 6 L. R. A. 259; Parrish *v.* Stephens, 1 Oreg. 59.

Pennsylvania.— *In re* Pearl St., 111 Pa. St. 565, 5 Atl. 430.

Tennessee.— Wilson *v.* Acree, 97 Tenn. 378, 37 S. W. 90.

West Virginia.— Sturmer *v.* Randolph County Ct., 42 W. Va. 724, 26 S. E. 532, 36 L. R. A. 300.

Wisconsin.— Williams *v.* Smith, 22 Wis. 594.

United States.— Burlington Gaslight Co. *v.* Burlington, etc., R. Co., 165 U. S. 370, 17 S. Ct. 359, 41 L. ed. 749; Beatty *v.* Kurtz, 2 Pet. 566, 7 L. ed. 521.

41. *Connecticut.*— Wheeler *v.* Bedford, 54 Conn. 244, 7 Atl. 22.

Illinois.— Chicago *v.* Ward, 169 Ill. 392, 48 N. E. 927, 61 Am. St. Rep. 185, 38 L. R. A. 849; Jacksonville *v.* Jacksonville R. Co., 67 Ill. 540.

Indian Territory.—Davenport *v.* Buffington, 1 Indian Terr. 424, 45 S. W. 128.

Kansas.— Franklin County Com'rs *v.* Lathrop, 9 Kan. 453.

New York.— Cady *v.* Conger, 19 N. Y. 256.

Ohio.— Le Clercq *v.* Gallipolis, 7 Ohio 217, 28 Am. Dec. 641; Brown *v.* Manning, 6 Ohio 298, 27 Am. Dec. 255.

West Virginia.— Sturmer *v.* Randolph County Ct., 42 W. Va. 724, 26 S. E. 532, 36 L. R. A. 300.

One who owns a lot one hundred feet distant from a park from which there is an open and unobstructed view of the park can maintain a bill to enjoin a diversion from the uses to which the property was originally dedicated. Douglass *v.* Montgomery, 118 Ala. 599, 24 So. 745, 43 L. R. A. 376.

42. *Alabama.*— Montgomery First Nat. Bank *v.* Tyson, 133 Ala. 459, 32 So. 144.

Illinois.— Earll *v.* Chicago, 136 Ill. 277, 26 N. E. 370; Princeville *v.* Auten, 77 Ill. 325.

Michigan.— Cooper *v.* Alden, Harr. 72.

Missouri.— Longworth *v.* Sedevie, 165 Mo. 221, 65 S. W. 260.

Pennsylvania.— *In re* Pearl St., 111 Pa. St. 565, 5 Atl. 430.

Tennessee.— Wilson *v.* Acree, 97 Tenn. 378, 37 S. W. 90.

Virginia.— Norfolk *v.* Nottingham, 96 Va. 34, 30 S. E. 444.

43. Davidson *v.* Reed, 111 Ill. 167, 53 Am. Rep. 613; Boyce *v.* Kalbaugh, 47 Md. 334, 28 Am. Rep. 464; Beatty *v.* Kurtz, 2 Pet. (U. S.) 566, 7 L. ed. 521. Thus the relatives of dead persons can sue to prevent the disturbance of the graveyard in which they are buried. Davidson *v.* Reed, 111 Ill. 167, 53 Am. Rep. 613.

44. *Georgia.*— Macon *v.* Franklin, 12 Ga. 239.

Illinois.— Maywood Co. *v.* Maywood, 118 Ill. 61, 6 N. E. 866.

Kentucky.— See Campbell County Ct. *v.* Newport, 12 B. Mon. 538.

Massachusetts.— Atty.-Gen. *v.* Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87.

Ohio.— Le Clercq *v.* Gallipolis, 7 Ohio 217, 28 Am. Dec. 641.

Pennsylvania.— *In re* Pearl St., 111 Pa. St. 565, 5 Atl. 430.

Application of rule.—Not only can one who sells and conveys lots according to a place which shows them to be on streets sue to assert their character as such, but all others in the general plan may do likewise. *In re* Pearl St., 111 Pa. St. 565, 5 Atl. 430.

45. Armstrong *r.* Portsmouth Bldg. Co., 57 Kan. 62, 45 Pac. 67; Clark *r.* Providence, 16 R. I. 337, 15 Atl. 763, 1 L. R. A. 725; Norfolk *r.* Nottingham, 96 Va. 34, 30 S. E. 444.

46. *Illinois.*— Marsh *r.* Fairbury, 163 Ill. 401, 45 N. E. 236.

Indiana.— Rhodes *v.* Brightwood, 145 Ind. 21, 43 N. E. 942; Freedom *r.* Norris, 128 Ind. 377, 27 N. E. 869.

of the corporators to the use of the public square as such,[47] and it may maintain ejectment to recover possession of the dedicated property from any one wrongfully withholding it.[48]

5. JOINDER OF PARTIES HAVING DIFFERENT INTERESTS. The municipality and citizens thereof having property rights which may be injuriously affected by diversion or misuser of the dedicated property may join in a proceeding to enforce or preserve the use,[49] and it has been held that one who merely owns a lot in a village may join with the village in a bill to prevent any obstruction of the use of land dedicated for a public park.[50]

B. Who May Be Sued. Any person who obstructs a public use may be sued.[51]

C. Procedure and Pleadings. Outside of the questions relating to the proper parties to suits involving dedication, there are no special rules of procedure or of pleadings. The allegation of a private use may be supported by proof of a public use, as the latter includes the former;[52] but the allegation of rights as one of the general public will not support proof of rights as covenantee.[53] In setting up a dedication in pleadings it seems that it is not sufficient to allege merely the fact of dedication, but that the manner of dedication must be alleged and the facts upon which the claim of a dedication is based.[54]

DE DIE IN DIEM. From day to day.[1]

DEDIMUS POTESTATEM. Literally, "we have given power." In English practice, a writ or commission issuing out of chancery, empowering the persons named therein to perform certain acts, as to administer oaths to defendants in chancery and to take their answers, to administer oaths of office to justices of the peace, etc.[2] (See, generally, DEPOSITIONS.)

DEDIMUS POTESTATEM DE ATTORNATO RECIPIENDO. We have given the power of receiving an attorney.[3] (See, generally, ATTORNEY AND CLIENT.)

DE DIVERSIS REGULIS JURIS ANTIQUI. Of divers rules of the ancient law.[4]

New Jersey.— Den *v.* Dummer, 20 N. J. L. 86, 40 Am. Dec. 213.

Ohio.— Fulton *v.* Mehrenfeld, 8 Ohio St. 440.

Canada.— Brown *v.* Edmonton, 23 Can. Supreme Ct. 308.

Where ground is dedicated to a city for a public park the city and not the county is the proper party to recover possession. Hurd *v.* Harvey County, 40 Kan. 92, 19 Pac. 325.

47. Watertown *v.* Cowen, 4 Paige (N. Y.) 510, 27 Am. Dec. 80.

48. South Amboy *v.* New York, etc., R. Co., 66 N. J. L. 623, 50 Atl. 368; Den *v.* Dummer, 20 N. J. L. 86, 40 Am. Dec. 213.

49. Marsh *v.* Fairbury, 163 Ill. 401, 45 N. E. 236; Watertown *v.* Cowen, 4 Paige (N. Y.) 510, 27 Am. Dec. 80.

Illustration.— A grantee of a lot adjoining a public square, who has a special covenant from the original owner of the square, that it shall be kept open for the benefit of his lot, may also file a bill in equity to restrain the grantor from violating the covenant, and may join with the corporation in such a suit. Watertown *v.* Cowen, 4 Paige (N. Y.) 510, 27 Am. Dec. 80.

50. Maywood Co. *v.* Maywood, 118 Ill. 61, 6 N. E. 866.

51. Barclay *v.* Howell, 6 Pet. (U. S.) 498, 8 L. ed. 477.

The municipality which attempts to divert a use may itself be sued (Rowzee *v.* Pierce, 75 Miss. 846, 23 So. 307, 65 Am. St. Rep. 625, 40 L. R. A. 402), and if it obstructs a public use its officials may be liable to indictment (Com. *v.* Bowman, 3 Pa. St. 202).

52. Day *v.* Allender, 22 Md. 511.

53. Gore *v.* Brubaker, 55 Md. 87.

54. Chicago *v.* Ward, 76 Ill. App. 536.

1. Burrill L. Dict. [*citing* Bracton, fol. 205*b*]. And see Davy *v.* Salter, 6 Mod. 250, 252, where Holt, C. J., said: "And here, where we proceed *de die in diem*, we never enter '*à die S. Trin. in octo.*'"

2. Black L. Dict. [*citing* 3 Blackstone Comm. 447].

It was anciently allowed for many purposes not now in use, as to make an attorney, to take the acknowledgment of a fine, etc. Black L. Dict.

3. Burrill L. Dict.

In old English practice, the name of a writ or commission from the crown, directed to the judges of a court, authorizing them to receive or admit the attorney of a party; or, in other words, to permit him to appear by attorney. Burrill L. Dict. [*citing* Gilbert Com. Pl. 32].

4. This is a celebrated title of the digests, and the last in that collection. It consists of two hundred and eleven rules or maxims. Black L. Dict.

DE DOLO MALO. Of or founded upon fraud.[5]

DE DOMO REPARANDA. The name of an ancient common-law writ, by which one tenant in common might compel his co-tenant to concur in the expense of repairing the property held in common.[6]

DE DONIS. Concerning gifts, (or more fully, *de donis conditionalibus*, concerning conditional gifts.)[7]

DE DOTE ASSIGNANDA. For assigning dower.[8]

DE DOTE UNDE NIHIL HABET. Of dower in that whereof she has none.[9]

DE DROIT. Of right.[10]

DEDUCTION. A portion or thing which an heir has a right to take from the mass of the succession before any partition takes place.[11]

DEDUCTION FOR NEW. In marine insurance, an allowance or drawback credited to the insurers on the cost of repairing a vessel for damage arising from the perils of the sea insured against.[12] (See, generally, MARINE INSURANCE.)

DEEDED. In its popular acceptation, a transfer by deed.[13]

DEEDS TO LEAD AND DECLARE USES. In old conveyancing, a species of deed incident to the conveyances by fine and recovery, by which the latter were directed to operate to certain particular uses.[14] (See, generally, DEEDS.)

5. Black L. Dict.

6. Bouvier L. Dict. And see Cubitt *v.* Porter, 8 B. & C. 257, 267, 6 L. J. K. B. O. S. 306, 2 M. & R. 267, 15 E. C. L. 133.

7. Black L. Dict.

This is the name of a celebrated English statute, passed in the thirteenth year of Edw. I., and constituting the first chapter of the statute of Westm. 2, by virtue of which estates in fee-simple conditional (formerly known as "*dona conditionalia*") were converted into estates in fee-tail, and which, by rendering such estates inalienable, introduced perpetuities, and so strengthened the power of the nobles. Black L. Dict. [*citing* 2 Blackstone Comm. 112].

8. This was the name of a writ commanding the king's escheator to assign dower to the widow of a tenant *in capite*. Bouvier L. Dict.

9. This was the name of a writ of dower which lay for a widow where no part of her dower had been assigned. Bouvier L. Dict.

It is now much disused; but a form closely resembling it is still much used in the United States. Bouvier L. Dict. [*citing* 4 Kent Comm. 63].

10. Burrill L. Dict. [*citing* Britton, c. 107].

11. Black L. Dict. [*citing* La. Civ. Code, art. 1358].

12. Black L. Dict.

13. Jordan *v.* Jordan, 65 Ala. 301, 307.

"Deeded" is an apt word to signify the transmission of real estate. Dunham *v.* Marsh, 52 N. J. Eq. 256, 259, 30 Atl. 473.

14. If these deeds were made previous to the fine or recovery, they were called deeds to lead the uses; if subsequent, deeds to declare them. Burrill L. Dict. [*citing* 2 Blackstone Comm. 363].

DEEDS

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CROSS-REFERENCES

For Matters Relating to:
Absolute Deed as Mortgage, see MORTGAGES.
Abstracts of Title, see ABSTRACTS OF TITLE.
Acknowledgment of Deeds, see ACKNOWLEDGMENTS.
Adverse Possession Under Deed, see ADVERSE POSSESSION.
Alteration of Deed, see ALTERATIONS OF INSTRUMENTS.
Bond For Title, see VENDOR AND PURCHASER.
Boundaries, see BOUNDARIES.
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Covenants in Deeds, see COVENANTS.
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Deed as Cloud on Title, see QUIETING TITLE.
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Deeds by or to Particular Classes of Persons:
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For Matters Relating to — (*continued*)
Deeds by or to Particular Classes of Persons — (*continued*)
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Tenant in Common, see Tenancy in Common.
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Deeds of Particular Species of Property:
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Parol Evidence to Explain Deed, see Evidence.
Particular Classes of Deeds:
As Security or in Trust, see Chattel Mortgages; Mortgages; Trusts.
Assignment For Benefit of Creditors, see Assignments For Benefit of Creditors.
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For Matters Relating to — (*continued*)
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Of Composition, see COMPOSITIONS WITH CREDITORS.
Of Gift, see GIFTS.
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In Bankruptcy, see BANKRUPTCY.
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Under Execution, see EXECUTIONS.
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Partition Deeds, see PARTITION.
Tax Deeds, see TAXATION.
To Bar Dower, see DOWER.
Reformation of Deed, see REFORMATION OF INSTRUMENTS.
Rescission of Deed in Equity, see CANCELLATION OF INSTRUMENTS.
Statute of Frauds, see FRAUDS, STATUTE OF.

I. DEFINITIONS.

A. Deed — 1. IN GENERAL. As a noun, a deed[1] has been defined to be: A writing or instrument on paper or parchment, sealed and delivered;[2] a writing sealed and delivered by the parties;[3] an instrument in writing, upon paper or

1. **The term "deed" may include** a chattel mortgage (People *v.* Watkins, 106 Mich. 437, 64 N. W. 324), a mortgage (Hellman *v.* Howard, 44 Cal. 100; Morgan *v.* Wickliffe, 72 S. W. 1122, 24 Ky. L. Rep. 2104; Pfeaff *v.* Jones, 50 Md. 263; People *v.* Caton, 25 Mich. 388; Daley *v.* Minnesota Loan, etc., Co., 43 Minn. 517, 45 N. W. 1100; Sanders *v.* Riedinger, 30 N. Y. App. Div. 277, 51 N. Y. Suppl. 937; Lockridge *v.* McCommon, 90 Tex. 234, 38 S. W. 33; Eaton *v.* White, 18 Wis. 517; Parsons *v.* Denis, 7 Fed. 317, 2 McCrary 359), and an instrument by which a mortgagee acknowledges payment and satisfaction of the mortgage (Meserve *v.* Com., 137 Mass. 109).

2. Jeffery *v.* Underwood, 1 Ark. 108, 112 [*citing* Sheppard Touchst. 50, 367]; Gaskill *v.* King, 34 N. C. 211.

As to necessity of delivery see *infra*, III, H, 1.

As to necessity of seal see *infra*, III, G, 3, a.

As to necessity of writing see *infra*, III, F, 1.

A deed ex vi termini means a writing sealed and delivered. Hammond *v.* Alexander, 1 Bibb (Ky.) 333 [*citing* Worley *v.* Mourning, 1 Bibb (Ky.) 254].

To constitute a deed, the party executing it must accompany the acts of signing, sealing, and delivering, with the intention of making a deed. Hyman *v.* Moore, 48 N. C. 416, 418.

Coke says: "This word (deed) in the understanding of the common law is an instrument written in parchment or paper, whereunto ten things are necessarily incident: viz., First, writing. Secondly, in parchment or paper. Thirdly, a person able to contract. Fourthly, by a sufficient name. Fifthly, a person able to be contracted with. Sixthly, by a sufficient name. Seventhly, a thing to be contracted for. Eighthly, apt words required by law. Ninthly, sealing. And tenthly, delivery. A deed cannot be written upon wood, leather, cloath, or the like, but only upon parchment or paper, for the writing upon them can be least vitiated, altered, or corrupted." Coke Litt. 35*b*.

3. *Florida.*— Williams *v.* State, 25 Fla. 734, 740, 6 So. 831, 6 L. R. A. 821 [*citing* 2 Blackstone Comm. 295].

New York.— Sanders *v.* Riedinger, 30 N. Y.

parchment, between parties able to contract, subscribed, sealed, and delivered;[4] a written instrument under seal,[5] containing a contract or agreement, which has been delivered by the party to be bound and accepted by the obligee or covenantee;[6] a writing or instrument written on paper or parchment, sealed and delivered,[7] to prove and testify the agreement of the parties;[8] an instrument of writing signed, sealed, and delivered;[9] a contract in writing under seal;[10] a writing containing a contract sealed and delivered by the party thereto;[11] a written instrument, signed, sealed, and delivered by the parties;[12] an instrument consisting of three things, viz.: Writing, sealing, and delivery, comprehending a bargain or contract between party and party, man or woman;[13] a sealed instrument;[14] a writing sealed and delivered;[15] an instrument signed and sealed;[16] an instrument executed by a private citizen;[17] a contract executed;[18] a writing by which lands are conveyed;[19] an instrument in writing, duly executed and delivered, conveying real estate;[20] the act or instrument by which property in real estate is conveyed;[21] the method by which the title and possession of real

App. Div. 277, 284, 51 N. Y. Suppl. 937, 942 [*citing* Devlin Deeds, § 5], where it is said: "But in ordinary language the term is used in a much more limited and restricted sense as a conveyance of the fee of land."

Ohio.— Grogan *v.* Garrison, 27 Ohio St. 50, 63 [*citing* Moore *v.* Vance, 1 Ohio 1].

Tennessee.— Weihl *v.* Robertson, 97 Tenn. 458, 464, 37 S. W. 274, 39 L. R. A. 423 [*citing* 2 Blackstone Comm. 295; Coke Litt. 171].

West Virginia.— American Button-Hole Overseaming Sewing Mach. Co. *v.* Burlack, 35 W. Va. 647, 652, 14 S. E. 319 [*citing* 2 Coke Litt. 171*b*].

United States.— Rondot *v.* Rogers Tp., 99 Fed. 202, 209, 39 C. C. A. 462 [*citing* 2 Blackstone Comm. 295].

The term implies, at common law, a sealed instrument. Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374; Paige *v.* People, 3 Abb. Dec. (N. Y.) 439, 6 Park. Cr. (N. Y.) 683; Van Santwood *v.* Sandford, 12 Johns. (N. Y.) 197; Cabell *v.* Vaughan, 1 Saund. 288*h*. See also Jerome *v.* Ortman, 66 Mich. 668, 669, 33 N. W. 759. But in some states under statute the word "deed" is applied to an instrument conveying lands, and does not imply a sealed instrument. Iowa Code (1897), § 48, subd. 20; Kan. Gen. St. c. 104, § 7009.

"Sealing" is intended by the words "*per scriptum obligatum.*" Paige *v.* People, 3 Abb. Dec. (N. Y.) 439, 445, 6 Park. Cr. (N. Y.) 683 [*citing* Woodcock *v.* Morgan, 6 Mod. 306; Atkinson *v.* Coatsworth, 1 Str. 512; Bond *v.* Moyle, 2 Vent. 106].

4. American Ins. Co. *v.* Avery, 60 Ind. 566, 572.

Imports a complete instrument.— In State *v.* Fisher, 65 Mo. 437, 438 [*citing* Paige *v.* People, 3 Abb. Dec. (N. Y.) 439, 445, 6 Park. Cr. (N. Y.) 683, *cited* in State *v.* Hall, 85 Mo. 669, 671], the court said: "The word 'deed' of itself, imports and implies a complete instrument."

The only legal signification of a "deed in writing" is that of a "deed" in technical law, or a sealed writing. Taylor *v.* Morton, 5 Dana (Ky.) 365, 368.

5. People *v.* Watkins, 106 Mich. 437, 439, 64 N. W. 324 [*quoting* Bouvier L. Dict., and *citing* 2 Blackstone Comm. 295; Sheppard Touchst. 50]; Scott *v.* Detroit Young Men's Soc., 1 Dougl. (Mich.) 119, 152; McMurtry *v.* Brown, 6 Nebr. 368, 376 [*quoting* Bouvier L. Dict., and *citing* 2 Blackstone Comm. 295; Coke Litt. 171; 2 Sheppard Touchst. 56].

6. People *v.* Watkins, 106 Mich. 437, 439, 64 N. W. 324 [*quoting* Bouvier L. Dict., and *citing* 2 Blackstone Comm. 295; Sheppard Touchst. 50]; McMurtry *v.* Brown, 6 Nebr. 368, 376 [*quoting* Bouvier L. Dict., and *citing* 2 Blackstone. Comm. 295; Coke Litt. 171; Sheppard Touchst. 56].

7. Jeffery *v.* Underwood, 1 Ark. 108, 112.

8. American Button-Hole Overseaming Sewing Mach. Co. *v.* Burlack, 35 W. Va. 647, 652, 14 S. E. 319 [*quoting* 1 Sheppard Touchst. 50].

9. Strain *v.* Fitzgerald, 128 N. C. 396, 398, 38 S. E. 929 [*citing* 2 Blackstone Comm. 295].

10. Stirman *v.* Cravens, 29 Ark. 548, 557. And see Pierson *v.* Townsend, 2 Hill (N. Y.) 550, 551, where the court said: "The word 'contract,' does not, like 'deed,' 'bond,' 'bill of exchange,' 'promissory note,' and the like, necessarily import that there was a written instrument."

11. People *v.* Watkins, 106 Mich. 437, 439, 64 N. W. 324 [*quoting* 3 Washburn Real Prop. 553].

12. Fisher *v.* Pender, 52 N. C. 483, 485.

13. Best *v.* Brown, 25 Hun (N. Y.) 223, 224 [*quoting* Coke Litt. 171].

14. McLeod *v.* Lloyd, 43 Oreg. 260, 269, 71 Pac. 795, 74 Pac. 491.

15. Osborne *v.* Tunis, 25 N. J. L. 633, 660 [*citing* 2 Blackstone Comm. 295; Coke Litt. 171].

16. Davis *v.* Brandon, 1 How. (Miss.) 154, 155.

17. And it is or was formerly only known to be his act and deed, because he delivered it as such. U. S. *v.* The Planter, 27 Fed. Cas. No. 16,054, Newb. Adm. 262.

18. Watkins *v.* Nugen, (Ga. 1903) 45 S. E. 262, 263.

19. Eaton *r.* White, 18 Wis. 517, 519.

20. Lockridge *v.* McCommon, 90 Tex. 234, 38 S. W. 33.

21. Dudley *v.* Sumner, 5 Mass. 438, 472, where the court, in construing 9 Wm. III.

estate is transferred from one person to another.[22] A deed has also been defined by statute as every instrument in writing, by which any real estate or interest therein is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity, except last wills, and leases for one year or for a less time.[23] As a verb, to deed is to convey.[24]

2. DISTINGUISHED FROM OTHER INSTRUMENTS — a. Assignment. At common law an assignment differs from a deed in that it does not signify an instrument under seal.[25]

b. Title Bond. There is a difference between a deed for land and a title bond for land. The former is the evidence of an executed or consummated contract, the latter is the evidence of an executory contract.[26]

c. Will. If the instrument passes a present interest, although the right to its possession and enjoyment may not occur till some future time, it is a deed or contract; but if the instrument does not pass an interest or right till the death of the maker it is a will or testamentary paper.[27] The question is to be determined by the intention of the parties derived from the whole instrument.[28]

B. Deed Indented or Indenture. A deed indented or an indenture is a deed executed or purporting to be executed in parts, between two or more parties,

c. 7, said: "As grantor is the most comprehensive word to signify one who conveys lands, so conveyance is the common statute word to intend the deed."

22. American Net, etc., Co. *v.* Mayo, 97 Va. 182, 186, 33 S. E. 523, where the court said: "And there must be a grantor and a grantee."

23. Nebr. Comp. St. (1901) c. 73, § 46 [*cited* in Ames *v.* Miller, (Nebr. 1902) 91 N. W. 250, 252; Peterborough Sav. Bank *v.* Pierce, 54 Nebr. 712, 724, 75 N. W. 20].

24. Dodd *v.* Seymour, 21 Conn. 476.

25. Barrett *v.* Hinckley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331. And see, generally, ASSIGNMENTS.

26. Moseby *v.* Partee, 5 Heisk. (Tenn.) 26, 32, where it is said: "The former is evidence that a sale has been made, the latter that a sale is to be made — the one is a sale, and the other a contract for a sale." And see, generally, VENDOR AND PURCHASER.

27. *Alabama.*— Adair *v.* Craig, 135 Ala. 332, 33 So. 902; Whitten *v.* McFall, 122 Ala. 619, 26 So. 131; Abney *v.* Moore, 106 Ala. 131, 18 So. 60; Trawick *v.* Davis, 85 Ala. 342, 5 So. 83; Jordan *v.* Jordan, 65 Ala. 301; Hall *v.* Burkham, 59 Ala. 349; McGuire *v.* Mobile Bank, 42 Ala. 589; Gillham *v.* Mustin, 42 Ala. 365.

Arkansas.— Bunch *v.* Nicks, 50 Ark. 367, 7 S. W. 563.

California.— Mowry *v.* Heney, 86 Cal. 471, 25 Pac. 17. And see Nichols *v.* Emery, 109 Cal. 323, 41 Pac. 1089, 50 Am. St. Rep. 43.

Georgia.— Watkins *v.* Nugen, (1903) 45 S. E. 262; Wynn *v.* Wynn, 112 Ga. 214, 37 S. E. 378; Goff *v.* Davenport, 96 Ga. 423, 23 S. E. 395; Owen *v.* Smith, 91 Ga. 564, 18 S. E. 527; Worley *v.* Daniel, 90 Ga. 650, 16 S. E. 938; Seals *v.* Pierce, 83 Ga. 787, 10 S. E. 589, 20 Am. St. Rep. 344; Williams *v.* Tolbert, 66 Ga. 127; Daniel *v.* Veal, 32 Ga. 589; Wellborn *v.* Weaver, 17 Ga. 267, 63 Am. Dec. 235; Hester *v.* Young, 2 Ga. 31.

Indiana.— Cates *v.* Cates, 135 Ind. 272, 34 N. E. 957; Owen *v.* Williams, 114 Ind. 179, 15 N. E. 678; Spencer *v.* Robbins, 106 Ind. 580, 5 N. E. 726.

Iowa.— Craven *v.* Winter, 38 Iowa 471; Burlington University *v.* Barrett, 22 Iowa 60, 92 Am. Dec. 376.

Kansas.— Hazleton *v.* Reed, 46 Kan. 73, 26 Pac. 450, 26 Am. St. Rep. 86; Reed *v.* Hazleton, 37 Kan. 321, 15 Pac. 177.

Kentucky.— Rawlings *v.* McRoberts, 95 Ky. 346, 25 S. W. 601, 15 Ky. L. Rep. 771.

Massachusetts.— Bromley *v.* Mitchell, 155 Mass. 509, 30 N. E. 83.

Mississippi.— McDaniel *v.* Johns, 45 Miss. 632; Exum *v.* Cauty, 34 Miss. 533; Wall *v.* Wall, 30 Miss. 91, 64 Am. Dec. 147.

New York.— Diefendorf *v.* Diefendorf, 132 N. Y. 100, 30 N. E. 375.

Pennsylvania.— Knowlson *v.* Fleming, 165 Pa. St. 10, 30 Atl. 519; Book *v.* Book, 104 Pa. St. 240.

Tennessee.— Macrae *v.* Macrae, (Ch. App. 1899) 57 S. W. 423; Caldwell *v.* Bowman, 1 Tenn. Cas. 601. See also Armstrong *v.* Armstrong, 4 Baxt. 357.

Texas.— Chrisman *v.* Wyatt, 7 Tex. Civ. App. 40, 26 S. W. 759; Jenkins *v.* Adcock, 5 Tex. Civ. App. 466, 27 S. W. 21.

United States.— Bowdoin College *v.* Merritt, 75 Fed. 480.

England.— Vincent *v.* Stansfeld, 4 Bro. Ch. 353, 29 Eng. Reprint 931, 2 Ves. Jr. 204, 30 Eng. Reprint 595.

28. *Arkansas.*— Kelly *v.* Dooling, 23 Ark. 582.

Georgia.— West *v.* Wright, 115 Ga. 277, 41 S. E. 602; Daniel *v.* Veal, 32 Ga. 589.

Indiana.— Wilson *v.* Carrico, 140 Ind. 533, 40 N. E. 50, 49 Am. St. Rep. 213; Cates *v.* Cates, 135 Ind. 272, 34 N. E. 957.

Iowa.— Craven *v.* Winter, 38 Iowa 471.

South Carolina.— Williams *v.* Sullivan, 19 Rich. Eq. 217.

Tennessee.— Armstrong *v.* Armstrong, 4 Baxt. 357.

and distinguished by having the edge of the paper or parchment on which it is written indented or cut at the top in a particular manner.[29]

C. Deed Poll. A deed poll is a deed of one part or executed by one party only, instead of between parties and in two or more parts.[30]

II. PARTICULAR MODES OF CONVEYANCE.

A. In General. Conveyances are divided by Blackstone[31] into those at common law and those under the statute of uses. The former are original and primary,[32] or derivative and secondary.[33] Original conveyances are feoffment,[34] gift,[35] grant,[36] lease,[37] exchange,[38] and partition.[39] Derivative conveyances are

29. Burrill L. Dict.

"An indenture, in the language of the law, is a deed, that is, a writing sealed and delivered." Overseers of Poor *v.* Amwell Tp., 6 N. J. L. 169, 175. It is "a writing containing a conveyance, bargain, contract, covenants or agreements between two or more." Bowen *v.* Beck, 94 N. Y. 86, 89, 46 Am. Rep. 124 [*quoting* Coke Litt. 231*a*].

It takes its name from its being indented, or cut, on the top, or on the side, either by a waving line or a line of indenture, *instar dentium*, so as to fit or aptly join its counterpart, from which it is supposed to have been separated. Overseers of Poor *v.* Amwell Tp., 6 N. J. L. 169. The practice is now obsolete. Ratcliff *v.* Trimble, 12 B. Mon. (Ky.) 32.

30. Burrill L. Dict.

Distinguished from an indenture by having the edge of the parchment or paper on which it is written cut even (or *polled*, as it was anciently termed), that is, in a straight line, or plain, without being indented. This distinction, however, although once peculiar and essential, has in modern times become of comparative insignificance, in consequence of the disuse of the formality of indenting the other description of deeds. Burrill L. Dict. [*citing* Coke Litt. 229*a*].

A deed poll properly is made in the first person, and commences with that formula of address to all mankind so common in ancient written instruments: "Know all men," etc., that I, etc., have given," etc. Burrill L. Dict.

An instrument, in form an indenture, executed by one party only, if it contains the requisite clauses to pass the property described, will operate as a deed poll. Esson *v.* Tarbell, 9 Cush. (Mass.) 407.

31. 2 Blackstone Comm. 309–340.

32. Original or primary conveyances are those by means whereof the benefit or estate is created or first arises. 2 Blackstone Comm. 309.

33. Derivative or secondary conveyances are those whereby the benefit or estate originally created is enlarged, transferred, or extinguished. 2 Blackstone Comm. 309.

34. Feoffment or grant.— A feoffment, *feoffamentum*, is a substantive derived from the verb, to enfeoff, *feoffare* or *infeudare*, to give one a fend; and therefore feoffment is properly *donatio feudi*. It may properly be defined as the gift of any corporeal hereditament to another. He that so gives or enfeoffs is called the feoffor, and the person enfeoffed is called the feoffee. Although it may be performed by the word "enfeoff" or "grant," yet the aptest word of feoffment is "*do* or *dedi*." 2 Blackstone Comm. 310–317.

35. Gifts or donations.— Gift, *donatio*, is properly applied to the creation of an estate tail. It differs in nothing from a feoffment, but in the nature of the estate passing by it; for the operative words of conveyance in this case are *do* or *dedi*; and gifts in tail are imperfect without livery of seizin. 2 Blackstone Comm. 317.

36. Grants or concessions are the regular method by the common law of transferring the property of incorporeal hereditaments, or such things whereof no livery can be had. For which reason all corporeal hereditaments, as lands and houses, are said to lie in livery, incorporeal hereditaments passing merely by delivery of the deed. It differs but little from a feoffment, except in the subject-matter; for the operative words therein commonly used are *dedi et concessi*, "have given and granted." 2 Blackstone Comm. 317.

37. A lease is properly a conveyance of any lands or tenements made for life, for years, or at will, but always for a less time than the lessor hath in the premises, for if it be for the whole interest it is more properly an assignment than a lease. The usual words of operation in it are "demise, grant, and to farm let"; *demisi, concessi, et ad firmam traditi*. The consideration is usually rent or other annual recompense. 2 Blackstone Comm. 318–323.

Distinguished from "conveyance."— "A lease may be in a sense a conveyance, but such is not the commonly accepted nor the accurate meaning of the term. When we say premises are leased we generally mean that the use of them is transferred; and by the term conveyed that the title is deeded." Perkins *v.* Morse, 78 Me. 17, 18, 2 Atl. 130, 57 Am. Rep. 780. See also Hutchinson *v.* Bramhall, 42 N. J. Eq. 372, 7 Atl. 873.

38. An exchange is a mutual grant of equal interests, the one in consideration of the other. The word "exchange" is so individually requisite and appropriated by law to this case that it cannot be supplied by any other word or expressed by any consideration. But no livery of seizin is necessary. Hartwell *v.* De Vault, 159 Ill. 325, 42 N. E. 789; Anderson L. Dict.; 2 Blackstone Comm. 323.

39. A partition is where two or more joint tenants, coparceners, or tenants in common agree to divide the lands so held among them

release,[40] confirmation,[41] surrender,[42] assignment,[43] and defeasance.[44] Other species of conveyances are a covenant to stand seized to uses;[45] bargain and sale, introduced by statute;[46] and lease and release.[47]

B. Feoffment. A deed will not operate as a feoffment where there is a want of seizin;[48] and the terms of an instrument in writing must clearly show that it was to operate as a conveyance, and where it does not and is for the exchange of lands, it will not operate by way of feoffment to pass a life-estate to one of the parties.[49] A deed, however, which is defective as a feoffment for want of proof of livery of seizin, may operate as a covenant to stand seized to uses.[50]

C. Covenant to Stand Seized. A covenant to stand seized to uses is an effectual mode of conveying lands, and by it a freehold may be conveyed to commence *in futuro*.[51] There must, however, be a consideration of blood or mar-

in severalty, each taking a distinct part. Anderson L. Dict.; 2 Blackstone Comm. 323.

40. **Releases** are a discharge or a conveyance of a man's right in lands or tenements to another who hath some former estate in possession. The words generally used therein are "remised, released, and forever quitclaimed." Releases may operate by way of enlarging an estate; by way of passing an estate; by way of passing a right; and by way of entry and feoffment. Anderson L. Dict.; 2 Blackstone Comm. 324, 325.

41. **A confirmation** is of a nature nearly allied to a release. It is a conveyance of an estate or right *in esse* whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased; and the words of making it are these, "have given, granted, ratified, approved, and confirmed." Anderson L. Dict.; 2 Blackstone Comm. 325, 326. See also 8 Cyc. 566.

42. **A surrender** is of a nature directly opposite to a release; for as that operates by the greater estate descending upon the less a surrender is the falling of a less estate into the greater. It is defined as a yielding up of an estate for life or years to him that hath the immediate reversion or remainder. The words used are "hath surrendered, granted, and yielded up." There is no occasion for livery of seizin. 2 Blackstone Comm. 326, 365. See also Welcome *v.* Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145; Churchill *v.* Lammers, 60 Mo. App. 244; Buck *v.* Lewis, 46 Mo. App. 227.

43. **An assignment** is properly a transfer or making over to another of the right one has in any estate for life or years. It differs from a lease in that the whole property is parted with by an assignment. Anderson L. Dict.; 2 Blackstone Comm. 327.

44. **A defeasance** is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone. Mortgages were formerly so made. Anderson L. Dict.; 2 Blackstone Comm. 327.

45. **Covenant to stand seized to uses,** is where "a man, seized of lands, in consideration of blood or marriage, covenants that he will stand seized of the land to the use of his wife, child, or kinsman, for life, in tail, or in fee." Anderson L. Dict.; 2 Blackstone Comm. 338.

46. **Bargain and sale** is a kind of real contract whereby the bargainor for some pecuniary consideration bargains and sells, that is, contracts to convey, the land to the bargainee, and becomes by such a bargain a trustee for, or seized to the use of, the bargainee; and then when the statute of uses completes the purchase, the bargain vests the use and the statute vests the possession. Anderson L. Dict.; 2 Blackstone Comm. 338. See also 5 Cyc. 615.

47. **Lease and release** was a species of conveyance invented for the purpose of transferring a fee. It supplied the place of livery of seizin and amounted to a feoffment. It was a bargain and sale upon some pecuniary consideration for one year made by the tenant of the freehold to the lessee or bargainee. This without any enrolment made the bargainor stand seized to the use of the bargainee, and vested in him the use of the term for a year, and then the statute immediately annexed the possession. He therefore being in possession was capable of receiving a release of the freehold or reversion and the next day a release was granted. Anderson L. Dict.; 2 Blackstone Comm. 339.

48. Carroll *v.* Norwood, 5 Harr. & J. (Md.) 155; 2 Blackstone Comm. 310 *et seq.* But see Perry *v.* Price, 1 Mo. 553.

Feoffment with livery of seizin by the tenant for life of the legal estate, together with a release of right of entry by the person next entitled in remainder, passes a good title. Dehon *v.* Redfern, Dudley Eq. (S. C.) 115.

There may be a feoffment under a sealed agreement, with livery of seizin, where such an intent is clearly expressed, although such instrument may merely operate to make possession thereunder a tenancy at will. Sutherland *v.* Walter, 3 N. Brunsw. 141.

49. Sutherland *v.* Walter, 3 N. Brunsw. 141.

50. Rowlett *v.* Daniel, 4 Munf. (Va.) 473.

A feoffment by a feoffer out of possession, and a livery on the estate conveyed bring back the estate and vest the freehold perfectly in the feoffee; an operation not allowed to a deed of bargain and sale or any other mode of conveyance. Knox *v.* Jenks, 7 Mass. 488.

51. Chancellor *v.* Windham, 1 Rich. (S. C.) 161, 42 Am. Dec. 411. See also Kinsler *v.* Clark, 1 Rich. (S. C.) 170. And see, generally, TRUSTS.

riage to support such a covenant.[52] It is not necessary to express any consideration;[53] and where there are both a money consideration and a relation of blood such a covenant may be raised[54] in equity.[55] There may also be a limitation over to one, in a deed of gift to another, which will be valid as a covenant to stand seized to the use of the former.[56]

D. Bargain and Sale. Any writing that sufficiently identifies the parties, describes the land, acknowledges a sale in fee of the vendor's right for a valuable consideration, and is signed and sealed by the grantor and duly attested is held to be a good deed of bargain and sale.[57] And the deed will be none the less valid because the words used[58] are those of quitclaim and release.[59] The deed may, however, be insufficient as one of bargain and sale because of the consideration, although it may operate as a covenant to stand seized under the statute of uses.[60]

52. Rollins *v.* Riley, 44 N. H. 9.

Such a covenant is raised by a conveyance in the form of a deed from a husband to a wife, even though it embraces personalty (Watson *v.* Watson, 24 S. C. 228, 58 Am. Rep. 247); by a conveyance to a son, operating as a covenant to stand seized to the grantor during his life and after his death to the use of his wife for life (Jackson *v.* Swart, 20 Johns. (N. Y.) 85); by a conveyance to a son to operate to the use of the grantee (Sasser *v.* Blyth, 2 N. C. 259; Slade *v.* Smith, 2 N. C. 248) during life and for his children after his death (Borden *v.* Thomas, 28 N. C. 209); by a conveyance to children operating to their use (Barry *v.* Shelby, 4 Hayw. (Tenn.) 229); by a conveyance to a cousin (Dinkins *v.* Samuel, 10 Rich. (S. C.) 66); and a deed between two brothers that on the death of either the survivor should be his heir and take and enjoy his property is such a covenant (Fisher *v.* Streckler, 10 Pa. St. 348, 51 Am. Dec. 488). So an agreement by deed reciting that lands were purchased jointly "for promoting the joint interest of the parties by securing to them the timber on such land to be sawed into plank" will operate as a covenant on the part of each, to stand seized to the use of the other, or the individual use of the interest in the growing timber. Blackburn *v.* Baker, 1 Ala. 173.

Where a grantor for a good consideration conveys realty covenanting to hold it to the grantee, but recites that the grantee is not to interrupt the grantor's possession during his life, such recital is a covenant by the grantor for himself and his heirs to stand seized to the use of the grantee and his heirs on his death. Davenport *v.* Wynne, 28 N. C. 128, 44 Am. Dec. 70.

53. Sprague *v.* Woods, 4 Watts & S. (Pa.) 192.

54. Brewer *v.* Hardy, 22 Pick. (Mass.) 376, 33 Am. Dec. 747 (from father to daughter); Jackson *v.* Dunsbagh, 1 Johns. Cas. (N. Y.) 91.

55. Sprague *v.* Woods, 4 Watts & S. (Pa.) 192.

56. Ward *v.* Wooten, 75 N. C. 413.

57. Chiles *v.* Conley, 2 Dana (Ky.) 21. See also 5 Cyc. 615.

A deed conveying for a certain consideration all the grantor's title and interest in the premises described, and covenanting to have and to hold such premises unto the grantee, his heirs and assigns forever, and signed by the grantor and attested by witnesses, is a good bargain and sale of the land. Sanders *v.* Hartzog, 6 S. C. 479.

A mortgagee in fee of lands executed a deed, granting and transferring his interest and estate in the mortgage and in the mortgaged premises to A, and making A his attorney to collect the mortgage debt, in the mortgagee's name, to A's own use, but not otherwise assigning in terms the said debt. It was held that the instrument was a deed of bargain and sale of the mortgaged premises, which passed the use to A, and that the statute of uses transferred to A the possession. Givan *v.* Tout, 7 Blackf. (Ind.) 210.

58. Nelson *v.* Davis, 35 Ind. 474, holding that where the *habendum* was "unto them, the said B. and C., as trustees for the said D., and for her sole and proper benefit and behoof, and for no other purpose whatever, during the natural life of the said D., and at her death to descend to the children of the said D., if any she have, and if not, to her assigns forever," the instrument was a deed of bargain and sale.

Where, under a statute, the common mode of assurance is a deed of bargain and sale operating under the statute of uses, the words "bargains and sells unto the sole and separate use" of the grantee will mean in equity "bargains and sells unto" the grantee and to the only "proper use and behoof of" the said grantee. Pascault *v.* Cochran, 34 Fed. 358.

59. Holland *v.* Rogers, 33 Ark. 251 [*citing* Witter *v.* Biscoe, 13 Ark. 422].

The words "remise, release, and forever quitclaim" or the words "release and assign" will raise a use by way of bargain and sale. Jackson *v.* Fish, 10 Johns. (N. Y.) 456.

60. Horton *v.* Sledge, 29 Ala. 478; Gale *v.* Coburn, 18 Pick. (Mass.) 397; U. S. Bank *v.* Housman, 6 Paige (N. Y.) 526; Eckman *v.* Eckman, 68 Pa. St. 460. See also Kent *v.* Atlantic De Laine Co., 8 R. I. 305; Wardwell *v.* Bassett, 8 R. I. 302; Chancellor *v.* Windham, 1 Rich. (S. C.) 161, 42 Am. Dec. 411; Milledge *v.* Lamar, 4 Desauss. (S. C.) 617; Pledger *v.* David, 4 Desauss. (S. C.) 264.

E. Lease and Release. At common law a deed of release was operative only when made to a party in actual possession of the land,[61] a prior estate in possession in the releasee being necessary for a release to take effect.[62] But a release will be operative where there is a sufficient possession[63] or a constructive one.[64] And where such a deed is a substantive mode of conveyance the title will be transferred, notwithstanding an adverse possession at the time of execution.[65] But although neither the releasor nor releasee was in possession at the time of the release, it may operate as a confirmation of the first grantee's title;[66] or if made for a valuable consideration to one not in possession it may be construed to be any lawful conveyance by which the estate might pass.[67] Again the words "grant, bargain, sell, and convey" operate not merely to release but to transfer any interest which the grantor had in the granted premises at the date of the deed.[68] If, however, a deed cannot operate as a feoffment for want of seizin, it cannot operate as a release to enlarge the estate, for want of an estate in law in the releasee at the time of the execution of the deed.[69]

F. Quitclaim. Whether a deed is a quitclaim depends largely upon the words used, but it may be inferred, not only from the terms of the deed, but from the adequacy of the price given, and other circumstances showing the purpose of the instrument; and it is not to be determined by the mere omission of the covenant of general warranty of title.[70]

61. Runyon *v.* Smith, 18 Fed. 579.

A release is insufficient if neither party has any possession actual or legal. Mayo *v.* Libby, 12 Mass. 339; Warren *v.* Childs, 11 Mass. 222.

62. Branham *v.* San Jose, 24 Cal. 585. But see Ely *v.* Stannard, 44 Conn. 528.

63. **There is a sufficient possession** to support a deed of release, from the owner to the occupant, where there is an occupation of flats below high-water mark for laying wood coasters and other vessels upon them. Hamblet *v.* Francis, 4 Mass. 75. And where one hired a parcel of marsh, mowed it and removed the hay, but exercised no other act of possession, a deed of release will be operative. Thacher *v.* Cobb, 5 Pick. (Mass.) 423.

64. Sessions *v.* Doe, 7 Sm. & M. (Miss.) 130, holding that if the country abound in wild land a deed or grant is a constructive possession in the grantee sufficient to uphold a release from one having title to the land.

65. Hall *v.* Ashby, 9 Ohio 96, 34 Am. Dec. 424.

66. Oakes *v.* Marcy, 10 Pick. (Mass.) 195.

67. Russell *v.* Coffin, 8 Pick. (Mass.) 143; Pray *v.* Pierce, 7 Mass. 381, 5 Am. Dec. 59.

It may be construed as a bargain and sale, or other appropriate conveyance, where there is a valuable consideration. Baker *v.* Whiting, 2 Fed. Cas. No. 787, 3 Sumn. 475. See also Havens *v.* Sea-Shore Land Co., 47 N. J. Eq. 365, 20 Atl. 497; McBurney *v.* Cutler, 18 Barb. (N. Y.) 203; Lynch *v.* Livingston, 8 Barb. (N. Y.) 463 [*affirmed* in 6 N. Y. 422].

68. Muller *v.* Boggs, 25 Cal. 175.

69. Carroll *v.* Norwood, 5 Harr. & J. (Md.) 155.

70. Taylor *v.* Harrison, 47 Tex. 454, 26 Am. Rep. 304.

A deed is a quitclaim where it employs the word "quitclaim" in connection with the words "bargain," "sell," etc., and expressly limits its granting effect to the "right, title, interest, estate, claim, and demand" of the grantor. Derrick *v.* Brown, 66 Ala. 162. A deed is also only a quitclaim which recites that the grantors grant, bargain, and sell unto the grantee all their "right, title, claim and interest in and to the following described land," etc., and that they do, for themselves and their "heirs and assigns, warrant and defend the same unto the said" grantee. Reynolds *v.* Shaver, 59 Ark. 299, 27 S. W. 78, 43 Am. St. Rep. 36. So a deed which contains the words "bargain and sell" is a quitclaim, where it conveys all the grantor's right, title, and interest in the property and not the land itself. Wightman *v.* Spofford, 56 Iowa 145, 8 N. W. 680. It is also a quitclaim where in the granting part the printed words, "forever a certain piece of land lying and being" were stricken out, and the words "all my right, title, and interest in and unto" were written in lieu thereof, the *habendum* being "the above granted and bargained premises." Cummings *v.* Dearborn, 56 Vt. 441.

A deed is not a quitclaim, but one of bargain and sale, where it declared that the grantor did thereby "alien, release, grant, bargain, sell and convey" to the grantee, his heirs and assigns, the "undivided one-half of all and singular the lands lying and being in the State of Oregon, granted or intended to be granted to the state of Oregon by the act of Congress," "to have and to hold all and singular the lands and premises hereby conveyed," and "all the right, title and interest" of the grantor therein. U. S. *v.* California, etc., Land Co., 148 U. S. 31, 46, 13 S. Ct. 458, 37 L. ed. 354 [*affirming* 49 Fed. 496, 1 C. C. A. 330]. See also U. S. *v.* Dallas Military Road Co., 148 U. S. 49, 13 S. Ct. 465, 37 L. ed. 362. So a deed is an absolute conveyance and not a quitclaim, where by it the grantor assumes to "sell, alienate, convey, and quitclaim . . . the following de-

III. REQUISITES AND VALIDITY.

A. In General. The requisites or essentials of a deed are: (1) Competent or proper parties;[71] (2) a proper subject-matter;[72] (3) a good and sufficient consideration;[73] (4) a written or printed form;[74] (5) sufficient and legal words;[75] (6) reading, if desired, before the execution;[76] (7) execution,[77] signing,[78] sealing,[79] and attestation;[80] (8) delivery.[81]

B. By What Law Governed. The law of the place in which the land is situate governs the transfer of the land;[82] but a deed will convey land in one state, although executed in another, according to the law of the state where made.[82]

scribed tract of land." Abernathy *v.* Stone, 81 Tex. 430, 16 S. W. 1102. Again a deed is not a mere quitclaim which contains the words "do hereby sell and convey unto" (Sibley *v.* Bullis, 40 Iowa 429); nor where it contains the words "have bargained, sold and quitclaimed, and by these presents do bargain, sell and quitclaim" "all our right, title and interest, estate, claim and demand, both at law and in equity, and as well in possession as in expectancy" (Wilson *v.* Irish, 62 Iowa 260, 266, 17 N. W. 511); nor where certain land is demised, released, and quitclaimed to a specified person, his heirs and assigns, containing a covenant that the land is free from all encumbrances made or suffered by him, and that he will warrant the same to the grantee, his heirs and assigns, against the claims and demands of all persons claiming by, through, or under the grantor but against none others (Bourque *v.* Chappell, 2 N. Brunsw. Eq. 187). From the language "'Do by these presents sell, convey, remise, release, and quit claim unto [etc.]' . . . we think it quite clear that the parties intended by this instrument to convey the land itself, and that it is not simply a quit claim deed." Garrett *v.* Christopher, 74 Tex. 453, 454, 12 S. W. 67, 15 Am. St. Rep. 850. And a deed is not strictly a quitclaim where the words "bargain, sell, and quitclaim" are used. Touchard *v.* Crow, 20 Cal. 150, 81 Am. Dec. 108.

The word "quitclaim" is of equivalent meaning with the term "release." Hill *v.* Dyer, 3 Me. 441, 445.

71. 2 Blackstone Comm. 296, 308.
As to parties see *infra*, III, C; III, F, 3, b.
72. 2 Blackstone Comm. 296, 308.
As to subject-matter see *infra*, III, D.
73. 2 Blackstone Comm. 296, 308.
As to consideration see *infra*, III, E.
74. 2 Blackstone Comm. 297, 308.
As to form see *infra*, III, F.
75. 2 Blackstone Comm. 297, 305, 308.
As to operative words and parts of deed see *infra*, III, F, 2; III, F, 3, e.
76. 2 Blackstone Comm. 304, 308.

That reading is necessary to a good execution see Hatton *v.* Fish, 8 U. C. Q. B. 177.

That oral translation by notary when deed is in language not understood by a party is not equivalent to reading required by law see McAvoy *v.* Huot, 1 Quebec 97.

It is not necessary that the deed be read before sealing and delivery, for if the party executes without hearing, or desiring that it may be read, yet it binds him. But an illiterate man need not execute a deed before it is read to him, or before it be read in a language which he understands. So too as to a blind man, although he be well learned. Comyns Dig. tit. "Fait."

77. 2 Blackstone Comm. 305, 308.
As to execution see *infra*, III, G *et seq.*
78. 2 Blackstone Comm. 305, 308.
As to signing see *infra*, III, G, 2 *et seq.*
79. 2 Blackstone Comm. 305, 308.
As to sealing see *infra*, III, G, 3.
80. 2 Blackstone Comm. 307, 308.
As to attestation see *infra*, III, G, 4.
81. 2 Blackstone Comm. 306, 308.
As to delivery see *infra*, III, H.

In Kentucky, under an early decision, the requisites are only that the deed be in writing, signed, sealed, and delivered. Sicard *v.* Davis, 6 Pet. (U. S.) 124, 8 L. ed. 342.

82. *Alabama.*— Wheeler *v.* Walker, 64 Ala. 560.
Indiana.— Robards *v.* Marley, 80 Ind. 185; Butterfield *v.* Beall, 3 Ind. 203.
Iowa.— Loving *v.* Pairo, 10 Iowa 282, 77 Am. Dec. 108.
Maryland.— Harper *v.* Hampton, 1 Harr. & J. 622.
Missouri.— Miller *v.* Dunn, 62 Mo. 216; Depas *v.* Mayo, 11 Mo. 314, 49 Am. Dec. 88.
Nebraska.— Roode *v.* State, 5 Nebr. 174, 25 Am. Rep. 475.
New York.— Nicholson *v.* Leavitt, 4 Sandf. 252, 9 N. Y. Leg. Obs. 105 [*reversed* in 6 N. Y. 510].
North Carolina.— Smith *v.* Ingram, 130 N. C. 100, 40 S. E. 984, 61 L. R. A. 878.
Pennsylvania.— Donaldson *v.* Phillips, 18 Pa. St. 170, 55 Am. Dec. 614.
Texas.— Barnett *v.* Pool, 23 Tex. 517.
Vermont.— Harmon *v.* Taft, 1 Tyler 6.

A deed of chattels must be construed by the laws of the state where executed, when the property is conveyed to a person resident there, and if the common law has been there modified by local decisions, those decisions furnish the rule, and not the common law, as understood in the courts where the deed is brought in question. Inge *v.* Murphy, 10 Ala. 885.

83. *Illinois.*— Eagan *v.* Connelly, 107 Ill. 458.
Indiana.— Jackson *v.* Green, 112 Ind. 341, 14 N. E. 89.
Kansas.— Stinson *v.* Geer, 42 Kan. 520, 22 Pac. 586.
Louisiana.— Rabun *v.* Rabun, 15 La. Ann.

C. Parties — 1. General Rules. There must be persons able to contract and to be contracted with for the purposes intended by the deed.[84] Again a person cannot convey to himself alone, and if he makes a conveyance to himself and others the latter only will take as joint tenants.[85] But one acting under a power of attorney is a competent party to convey to trustees for the benefit of creditors with a power of appointment in case of refusal or inability, through death, to act.[86] A wife, however, should be a party where she has a dower interest.[87]

2. Title or Interest of Grantor — a. In General. There should be some title or interest, in law or equity, in the grantor to enable him to convey,[88] and

471. *Contra,* Tillman *v.* Mosely, 14 La. Ann. 710.

Minnesota.—Lowry *v.* Harris, 12 Minn. 255.

Nebraska.— Green *v.* Cross, 12 Nebr. 117, 10 N. W. 459.

Ohio.— Foster *v.* Dennison, 9 Ohio 121.

United States.— Farmers' L. & T. Co. *v.* McKinney, 8 Fed. Cas. No. 4,667, 6 McLean 1; Moore *v.* Nelson, 17 Fed. Cas. No. 9,771, 3 McLean 383; Root *v.* Brotherson, 20 Fed. Cas. No. 12,036, 4 McLean 230.

Compare Hubbard *v.* Sayre, 105 Ala. 440, 17 So. 17; Larendon's Succession, 39 La. Ann. 952, 3 So. 219; Criswell *v.* Altemus, 7 Watts (Pa.) 565.

See 16 Cent. Dig. tit. "Deeds," § 1.

Equitable rights are transferred by a deed executed in another state according to its laws, although insufficient under the laws of the state where the land is situate. Atwater *v.* Seely, 2 Fed. 133, 1 McCrary 264.

Where there is no evidence of the law of the state where the land is situate, and an action is brought in another state on a covenant to convey such land, the validity of a deed made in execution of said covenant is tested by the law of the latter state. Haney *v.* Marshall, 9 Md. 194.

84. 2 Blackstone Comm. 296.

As to capacity and assent of parties see *infra,* III, J, 1.

As to designation and description of parties see *infra,* III, F, 3, b.

Deed executed by infant is not binding upon him when he becomes of age. Martin *v.* Gale, 4 Ch. D. 428, 46 L. J. Ch. 84, 36 L. T. Rep. N. S. 357, 25 Wkly. Rep. 406.

Principle of estoppel may apply to infant executing a release upon which another acts, the infant having represented that he is of age. Wright *v.* Snowe, 2 De G. & Sm. 321. See, generally, Infants.

Trustee may pass estate by conveyance at law. See Doe *v.* Gilbert, 6 N. Brunsw. 520. And see, generally, Trusts.

There must be a grantee capable of taking (Douthitt *v.* Stinson, 63 Mo. 268; Jackson *v.* Cory, 8 Johns. (N. Y.) 385; Sloane *v.* McConahy, 4 Ohio 157) and of holding in his own right or as trustee (Jackson *v.* Cory, 8 Johns. (N. Y.) 385).

Equitable rights.— Rule that a conveyance without a grantee capable of receiving the grant is void does not apply to equitable rights growing out of such a conveyance. White Oak Grove Benev. Soc. *v.* Murray, 145 Mo. 622, 47 S. W. 501.

Grantee must be in esse. *California.*— Barr *v.* Schroeder, 32 Cal. 609.

Connecticut.— Hewit *v.* New York, etc., R. Co., 70 Conn. 637, 40 Atl. 605.

Georgia.— Davis *v.* Hollingsworth, 113 Ga. 210, 38 S. E. 827, 84 Am. St. Rep. 233.

Illinois.— Miller *v.* McAlister, 197 Ill. 72, 64 N. E. 254.

Indiana.— Harriman *v.* Southam, 16 Ind. 190.

Missouri.— Thomas *v.* Wyatt, 31 Mo. 188, 77 Am. Dec. 640.

North Carolina.— Newsom *v.* Thompson, 24 N. C. 277.

Tennessee.— Lillard *v.* Rucker, 9 Yerg. 64.

See 16 Cent. Dig. tit. "Deeds," § 19.

An exception exists to the rule that the grantee must be in esse where the deed is by way of remainder (Newsom *v.* Thompson, 24 N. C. 277) or where the grantee's name is assumed (Thomas *v.* Wyatt, 31 Mo. 188, 77 Am. Dec. 640).

Child in ventre sa mere cannot take as donee by a common-law conveyance. Dupree *v.* Dupree, 45 N. C. 164, 59 Am. Dec. 590.

Deed to heirs of a man deceased is valid. Hoover *v.* Malen, 83 Ind. 195; Shaw *v.* Loud, 12 Mass. 447; Boone *v.* Moore, 14 Mo. 420. See Gearheart *v.* Tharp, 9 B. Mon. (Ky.) 31.

Deed to heirs of living person is valid, at least to pass the equitable title. Bailey *v.* Willis, 56 Tex. 212.

Deed to living person or heirs is valid as to the person living or to his heirs if he be dead. Ready *v.* Kearsley, 14 Mich. 215.

Further as to "heirs" see *infra,* III, F, 3, b, (I). And see Heir.

85. Cameron *v.* Steves, 9 N. Brunsw. 141.

86. Doe *v.* Thompson, 17 N. Brunsw. 516.

87. Sweeny *v.* Godard, 9 N. Brunsw. 300. See Bonter *v.* Northcote, 20 U. C. C. P. 76.

88. Howe *v.* Harrington, 18 N. J. Eq. 495; Hoak *v.* Long, 10 Serg. & R. (Pa.) 9; Peters *v.* Condron, 2 Serg. & R. (Pa.) 80; Evans *v.* Spurgin, 6 Gratt. (Va.) 107, 52 Am. Dec. 105.

Conveyance of land adversely held see Champerty and Maintenance, 6 Cyc. 867.

Giving a bond for a deed does not enable one to avoid a release of a right of way as to a particular tract, and the fact that payment had been made would not show that he had no interest to release. Conwell *v.* Springfield, etc., R. Co., 81 Ill. 232.

One is not divested of title by his disability so as to prevent him from executing a valid deed when his disability is removed. Dawley *v.* Brown, 4 N. Y. St. 406.

Deed from trustees will be valid, although grantors were not trustees in the year on which the deed was given, but became such

the grantees, under a release and quitclaim, will take nothing where the grantor has no interest which he can convey.[89] Under a statute, however, so permitting, an after-acquired title may be conveyed, by a conveyance so executed as to have passed the grantor's estate when it was executed, had he then held the title.[90]

b. Seizin.[91] It is decided in several cases that one out of possession or actually disseized can convey no title to a stranger,[92] although the party making the conveyance has title.[93] Such a conveyance has, however, been decided to be good[94] as against the parties to it, whatever may be its operation as to third persons.[95] So a person having the seizin in law, but never the actual possession, can convey the same by lease and release, if no person has the actual possession at the time of the conveyance,[96] and the disseizin may be purged by entry so as to give operation to the deed.[97] So if the grantee is in possession, or the disseizor abandons his possession, and the grantee enters, a good title passes.[98] Again, although the grantor has been ousted, if the grantee was entitled to the conveyance under a prior contract with the grantor, the deed is valid.[99] It has also been decided in Maine that prior to the Revised Statutes a disseizor could make no valid title.[1]

D. Subject-Matter[2]**— 1. In General.** It is essential that there should be a subject-matter to be contracted for which must be sufficiently expressed.[3]

subsequently. The grantors having been jointly seized in fee at one time and competent to convey, the deed will be deemed to have been made then until the contrary appears by unequivocal proofs. Jackson *v.* Schoonmaker, 2 Johns. (N. Y.) 230.

89. Gray *v.* Williams, 130 N. C. 53, 40 S. E. 843.

90. Heaton *v.* Fryberger, 38 Iowa 185.

91. Conveyance of land adversely held see Champerty and Maintenance, 6 Cyc. 867.

92. Brinley *v.* Whiting, 5 Pick. (Mass.) 348; Fraser *v.* Hunter, 9 Fed. Cas. No. 5,063, 5 Cranch C. C. 470; Underwood *v.* Courtown, 2 Sch. & Lef. 65; Doe *v.* Barnes, 2 N. Brunsw. 426; Mayette *v.* Hubert, 3 Nova Scotia 420.

A deed of trust conveying a mere equity by one never in possession or having the right of possession conveys no title. Erskine *v.* North, 14 Gratt. (Va.) 60.

Bare right of possession without claim or color of title cannot be transferred by deed, nor otherwise than by the former possessor yielding up or abandoning the possession, and permitting a new possession to be taken by another. Daubenbiss *v.* White, (Cal. 1892) 31 Pac. 360.

Possession by grantor or grantee not being a factor see Field *v.* Columbet, 8 Fed. Cas. No. 4,764, 4 Sawy. 523.

93. Brinley *v.* Whiting, 5 Pick. (Mass.) 348.

94. Stoever *v.* Whitman, 6 Binn. (Pa.) 416.

One having the right of entry may convey. Pratt *v.* Pierce, 36 Me. 448, 58 Am. Dec. 759.

95. Den *v.* Geiger, 9 N. J. L. 225.

96. Lewis *v.* Beall, 4 Harr. & M. (Md.) 488.

97. Oakes *v.* Marcy, 10 Pick. (Mass.) 195.

Where grantees enter as tenants in common under a deed which does not pass the estate, because defectively executed, their occupancy, where actual and open, will operate as a disseizin of the grantor. Gookin *v.* Whittier, 4 Me. 16.

98. Ashcroft *v.* Eastern R. Co., 126 Mass. 196, 30 Am. Rep. 672.

99. Harral *v.* Leverty, 50 Conn. 46, 47 Am. Rep. 608.

1. Buck *v.* Babcock, 36 Me. 491.

2. Estates or property assignable in general see Assignments, 4 Cyc. 14–16, 69.

Validity of particular estates created see *infra*, V, C.

Construction and operation and property conveyed see *infra*, V, A, B.

3. 2 Blackstone Comm. 296.

A deed must not want a thing granted. Whitaker *v.* Miller, 83 Ill. 381.

Property which may be conveyed includes: Any interest in land (Whetstone *v.* Ottawa University, 13 Kan. 320); title by occupancy (Sears *v.* Taylor, 4 Colo. 38); the inchoate right of donation conferred by act of congress (Nixon *v.* Carco, 28 Miss. 414); standing timber (Mee *v.* Benedict, 98 Mich. 260, 57 N. W. 175, 39 Am. St. Rep. 543, 22 L. R. A. 641; Andrews *v.* Costican, 30 Mo. App. 29); an interest based upon actual possession for more than six years, although another has the better title (Holbrook *v.* Holbrook, 15 Me. 9); and an equitable title or right to a reconveyance (McCarthy *v.* McCarthy, 36 Conn. 177). Flats and uplands may also be separated by an alienation of one without the other. Valentine *v.* Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; Mayhew *v.* Norton, 17 Pick. (Mass.) 357, 28 Am. Dec. 300. So rights in land, such as profit *a prendre*, may be the subject of a separate grant. Engel *v.* Ayer, 85 Me. 448, 27 Atl. 352.

Proprietor of adjoining lands can convey the bed of a creek of which he is the owner separate from the land which it bounds. Hartshorn *v.* Wright, 11 Fed. Cas. No. 6,169, Pet. C. C. 64.

2. Executory or Contingent Interests.[4] At common law executory and contingent interests were not assignable by deed,[5] or the subject of a release,[6] as in case of the mere expectancy or chance of succession of an heir apparent; but although no immediate estate will vest by a conveyance of such expectancy, an assignment thereof may be enforced in equity as a contract, after the ancestor's decease, as against the grantor's creditors.[7]

E. Consideration[8] — **1. General Rules.** Subject to certain qualifications or exceptions hereinafter stated it is the rule that some consideration, which must be either a good or valuable one,[9] is essential to a valid deed.[10] Within the preceding rule a deed or conveyance will be supported by a consideration of blood,[11] or natural love and affection,[12] or of relationship.[13] So a voluntary convey-

4. Prohibition of remote limitations in general see Perpetuities.

5. Hall *v.* Chaffee, 14 N. H. 215.

Deed conveys no more than the grantor had on the date thereof, where it conveys the estate which the grantor has or may hereafter have as heir to an ancestor, even though he subsequently acquires a deceased brother's share. Gilbert *v.* James, 86 N. C. 244.

Where, however, such interests are vested, or the person has a present right but the possession depends upon the happening of a future event, they are alienable by deed. Goodell *v.* Hibbard, 32 Mich. 47; Miller *v.* Emans, 19 N. Y. 384; Sheridan *v.* House, 4 Abb. Dec. (N. Y.) 218, 4 Keyes (N. Y.) 569; Moore *v.* Littel, 40 Barb. (N. Y.) 488 [*affirmed* in 41 N. Y. 66); Lintner *v.* Snyder, 15 Barb. (N. Y.) 621; Jeffers *v.* Lampson, 10 Ohio St. 101; *In re* Coates St., 2 Ashm. (Pa.) 12. And see Assignments, 4 Cyc. 14.

A deed may be given of an interest of heirs in land, although the extent thereof has not been settled. Reinhard *v.* Commonwealth Bank, 6 B. Mon. (Ky.) 252. A warranty deed by an heir of all his reversionary right, title, and interest in his ancestor's land will pass a title thereto afterward inherited by him, although he had no reversionary interest as his ancestor owned the fee. Jerauld *v.* Dodge, 127 Ind. 600, 25 N. E. 186; Habig *v.* Dodge, 127 Ind. 31, 25 N. E. 182.

If a defeasible fee be given to one he may convey the claim to his heirs. Deboe *v.* Lowen, 8 B. Mon. (Ky.) 616.

6. See Assignments, 4 Cyc. 15.

A mere possibility not coupled with an interest is not transferable. Simpson *v.* Greeley, 8 Kan. 586; Beard *v.* Griggs, 1 J. J. Marsh. (Ky.) 22. And see Assignments, 4 Cyc. 15. On the other hand a mere possibility coupled with an interest may be conveyed at law. Lawrence *v.* Bayard, 7 Paige (N. Y.) 70.

An heir may by a contract with his ancestor relinquish all interest in his estate which might in future vest in such heir. *In re* Garcelon, 104 Cal. 570, 38 Pac. 414, 43 Am. St. Rep. 134, 32 L. R. A. 595.

7. Stover *v.* Eycleshimer, 46 Barb. (N. Y.) 84. And see Assignments, 4 Cyc. 15.

8. Presumption of consideration see *infra*, VII, A, 8.

Proof of consideration see *infra*, VII, B, 4, b; VII, C, 3.

9. 2 Blackstone Comm. 297.

"Good" and "valuable" considerations distinguished see Contracts, 9 Cyc. 319.

Money consideration is not essential to a valuable consideration. Crockford *v.* Equitable Ins. Co., 10 N. Brunsw. 651.

10. 2 Blackstone Comm. 296. See also the following cases:

California.— Richards *v.* Donner, 72 Cal. 207, 13 Pac. 584.

Maine.— Gault *v.* Hall, 26 Me. 561.

Massachusetts.— Soule *v.* Soule, 5 Mass. 61.

North Carolina.— Stanly *v.* Smith, 4 N. C. 124.

Vermont.— Wood *v.* Beach, 7 Vt. 522.

See 16 Cent. Dig. tit. "Deeds," § 23 *et seq.*

Necessity of a consideration to support a contract see 2 Blackstone Comm. 445; and Contracts, 9 Cyc. 309.

Deed under statute of uses can convey no title to land, unless there is a good or valuable consideration. Springs *v.* Hanks, 27 N. C. 30.

Where there is no consideration or benefit or advantage to the grantor, or of detriment to the grantee in a deed, it is *nudum pactum*. Southern L. Ins., etc., Co. *v.* Cole, 4 Fla. 359.

11. Frazer *v.* Western, 1 Barb. Ch. (N. Y.) 220.

12. *California.*— Springer *v.* Springer, (1901) 64 Pac. 470; Tillaux *v.* Tillaux, 115 Cal. 663, 47 Pac. 691.

Illinois.— Kirkpatrick *v.* Taylor, 43 Ill. 207.

Indiana.— St. Clair *v.* Marquell, (1903) 67 N. E. 693.

Kentucky.— Blackerby *v.* Holton, 5 Dana 520; Hanson *v.* Buckner, 4 Dana 251, 29 Am. Dec. 401.

Maryland.— Pennington *v.* Gittings, 2 Gill & J. 208.

Texas.— Parker *v.* Stephens, (Civ. App. 1897) 39 S. W. 164.

See 16 Cent. Dig. tit. "Deeds," § 28.

Consideration of natural love and affection will be assumed in a deed to a daughter, in the absence of fraud and pecuniary consideration. Loeschigk *v.* Hatfield, 51 N. Y. 660.

Deed for love and affection and for one dollar is upon valuable consideration and passes real and personal property. Fairley *v.* Fairley, 34 Miss. 18.

Love and affection of the grantor for a daughter is sufficient consideration for a conveyance to her husband. Parker *v.* Stephens, (Tex. Civ. App. 1897) 39 S. W. 164.

13. Relationship will support a conveyance: As in case of a deed from a husband

ance [14] is good [15] against the grantor's heirs, unless it was obtained by fraud or coercion.[16] And a benefit expressed in the grant to the party making such grant or donation precludes its being revocable by any *ex parte* act of the grantor, for any of the causes which warrant the revocation of a gratuitous donation.[17] Again a conveyance may be made to a town upon an expressed consideration for educational

to a wife as against his heirs (Brown *v.* Brown, 44 S. C. 378, 22 S. E. 412); from a wife to her husband as against her heirs (Todd *v.* Wickliffe, 18 B. Mon. (Ky.) 866. But see Schott *v.* Burton, 13 Barb. (N. Y.) 173); to a son (Young *v.* Young, 113 Ill. 430; McIntire *v.* Hughes, 4 Bibb (Ky.) 186; Nicholas *v.* Shiplett, 43 S. W. 248, 19 Ky. L. Rep. 1295; Warren *v.* Tobey, 32 Mich. 45), where creditors are not injured (Young *v.* Young, 113 Ill. 430; Warren *v.* Tobey, 32 Mich. 45); to a daughter (Sharpe *v.* Davis, 76 Ind. 17; Loeschigk *v.* Hatfield, 51 N. Y. 660 [*affirming* 5 Rob. 26, 4 Abb. Pr. N. S. 210]. See Morris *v.* Ward, 36 N. Y. 587; Ferguson's Appeal, 117 Pa. St. 426, 11 Atl. 885), as in case of a gift of inheritance (Pierson *v.* Armstrong, 1 Iowa 282, 63 Am. Dec. 440); to a child (Moore *v.* Pierson, 6 Iowa 279, 71 Am. Dec. 409; Hutsell *v.* Crewse, 138 Mo. 1, 39 S. W. 449); to children (Oliphant *v.* Liversidge, 142 Ill. 160, 30 N. E. 334 [*affirming* (1891) 27 N. E. 921]), or to some of them (Hester *v.* Sample, 95 Iowa 86, 63 N. W. 463; Bauer *v.* Bauer, 82 Md. 241, 33 Atl. 643); to a grandchild (Hanson *v.* Buckner, 4 Dana (Ky.) 251, 29 Am. Dec. 401; Stovall *v.* Barnett, 4 Litt. (Ky.) 207; Smith *v.* Grady, 13 N. C. 395. *Contra*, Borum *v.* King, 37 Ala. 606; Kinnebrew *v.* Kinnebrew, 35 Ala. 628); to an illegitimate child (Conley *v.* Nailor, 118 U. S. 127, 6 S. Ct. 1001, 30 L. ed. 112. See Ivey *v.* Granberry, 66 N. C. 223. *Contra*, Blount *v.* Blount, 4 N. C. 389. And see Pickett *v.* Garrard, 131 N. C. 195, 42 S. E. 579); to a stepdaughter (Randall *v.* Ghent, 19 Ind. 271; Schneitter *v.* Carman, 98 Iowa 276, 67 N. W. 249); to a son-in-law to stand seized, although said grantee was a widower (Bell *v.* Scammon, 15 N. H. 381, 41 Am. Dec. 706); to a widow of the grantor's deceased son of property left for the son, as between the parties (Beith *v.* Beith, 76 Iowa 601, 41 N. W. 371); and from a daughter to her father prior to her marriage (Pusey *v.* Gardner, 21 W. Va. 469). But a covenant to stand seized to uses cannot be made to a daughter-in-law. Jackson *v.* Cadwell, 1 Cow. (N. Y.) 622.

Conveyance is without consideration where plaintiff's wife, with intent to deceive him, promised to be a dutiful wife and requested that certain property be deeded to her, and stated that he might put the consideration at a certain sum which would show his interest in it, and relying upon her promises he deeded the property to her without other consideration. Basye *v.* Basye, 152 Ind. 172, 52 N. E. 797.

Although no consideration is expressed in a deed settling land in the wife's family, the estate will pass where the conveyance is made by a husband and wife, of her land, to trustees, by which deed an estate for life is given to their use during their joint lives, and then to such person as they should appoint. Ware *v.* Cary, 2 Call (Va.) 263.

14. A voluntary conveyance is a deed wholly without a valuable consideration (Washband *v.* Washband, 27 Conn. 424), or one for natural love and affection or for a valuable consideration merely nominal (Lore *v.* Truman, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250).

Conveyance is not voluntary but founded upon a legal and binding consideration when made in payment and discharge of alimony decreed to be paid by the grantor, although made to his children and his former wife who was entitled to the alimony. Preston *v.* Williams, 81 Ill. 176.

15. Barnes *v.* Bartlett, 47 Ind. 98; Henderson *v.* Rice, 1 Coldw. (Tenn.) 223.

A voluntary conveyance without a valuable consideration, duly recorded, and without fraud is valid against a subsequent purchaser. Lancaster *v.* Dolan, 1 Rawle (Pa.) 231, 18 Am. Dec. 625. See also Beal *v.* Warren, 2 Gray (Mass.) 447.

A voluntary contract for conveyance of land, made between parent and child, will not be disturbed at the instance of other children, after it has become executed, on the ground that there was no consideration. Mercer *v.* Mercer, 29 Iowa 557.

Conveyance ceases on marriage to be voluntary and becomes good as against a subsequent *bona fide* purchaser for a valuable consideration, where the grantee gains credit by the conveyance and a third person is induced to marry her on account of a provision made for her in such deed. Verplank *v.* Sterry, 12 Johns. (N. Y.) 536, 7 Am. Dec. 348 [*affirming* 1 Johns. Ch. 261].

Deed of land to a legitimate or illegitimate grandchild is voluntary, and must yield to a subsequent deed executed *bona fide* in consideration of money or marriage. Cains *v.* Jones, 5 Yerg. (Tenn.) 249.

Presumption of fraud from voluntary deed does not exist in favor of a subsequent purchaser with notice. Cooke *v.* Kell, 13 Md. 469.

Deeds fraudulent as to creditors or subsequent purchasers see FRAUDULENT CONVEYANCES.

Effect of want of consideration see *infra*, III, E, 5.

16. Lore *v.* Truman, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250. See Carnagie *v.* Diven, 31 Oreg. 366, 49 Pac. 891.

17. Fazende *v.* Morgan, 31 La. Ann. 549.

purposes for a term specified.[18] A deed may also be based upon marriage;[19] an intended marriage;[20] a promise to marry;[21] the transfer of a dower estate;[22] the surrender of a claim for alimony due or to become due;[23] a compromise or settlement,[24] even of a tort;[25] a devise;[26] the execution both of a deed and a reconveyance at the same time and as one transaction;[27] the execution of one conveyance for another;[28] an executory agreement;[29] support and maintenance;[30]

18. Castleton *v.* Langdon, 19 Vt. 210.

19. Verplank *v.* Sterry, 12 Johns. (N. Y.) 536, 7 Am. Dec. 348 [*affirming* 1 Johns. Ch. 261]; Frazer *v.* Western, 1 Barb. Ch. (N. Y.) 220 [*affirmed* in 3 Den. 610, 1 How. App. Cas. 448]; Herring *v.* Wickham, 29 Gratt. (Va.) 628, 26 Am. Rep. 405.

Deed given as an inducement to marry is based on a valuable consideration. Arnold *v.* Estis, 92 N. C. 162.

Marriage may constitute an ex post facto consideration for a previous voluntary settlement. Guardian Assur. Co. *v.* Avonmore, Ir. R. 6 Eq. 391.

Marriage with the grantor's daughter will support a conveyance. Thompson *v.* Thompson, 17 Ohio St. 649.

20. Snyder *v.* Grandstaff, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863.

21. Smith *v.* Allen, 5 Allen (Mass.) 454, 81 Am. Dec. 758; Prignon *v.* Daussat, 4 Wash. 199, 29 Pac. 1046, 31 Am. St. Rep. 914.

22. Howlett *v.* Dilts, 4 Ind. App. 23, 30 N. E. 313; Ellinger *v.* Crowl, 17 Md. 361; Randall *v.* Randall, 37 Mich. 563; McLaughlin *v.* Graves, 6 Ohio Dec. (Reprint) 873, 8 Am. L. Rec. 562, 5 Cinc. L. Bul. 80.

23. Droop *v.* Ridenour, 11 App. Cas. (D. C.) 224.

24. Rice *v.* Bixler, 1 Watts & S. (Pa.) 445 (of a doubtful right); St. Louis *v.* U. S., 92 U. S. 462, 23 L. ed. 731 (an equitable compromise of a controversy); Bartlett *v.* Smith, 17 Fed. 668, 5 McCrary 416 (settlement or compromise of a litigated question).

25. The seduction of an innocent woman by a pretended marriage is a valuable consideration for a deed subsequently made to her and her children. Doe *v.* Horn, 1 Ind. 363, 1 Am. Rep. 470. And an agreement by a corporation to waive a large money claim against an employee accused of embezzlement and to retain him in its employ is a sufficient consideration for a deed to such corporation by the employee's wife. Girty *v.* Standard Oil Co., 1 N. Y. App. Div. 224, 37 N. Y. Suppl. 369.

26. McMullin *v.* Glass, 27 Pa. St. 151. But *compare* Barr *v.* Wood, 27 Wash. 57, 67 Pac. 368.

27. Wilson *v.* Fairchild, 45 Minn. 203, 47 N. W. 642.

28. Where two parties have an interest contingent upon a life-estate, a conveyance by one to the other is a consideration for a conveyance to the former by the latter, even though only the first grantor survives the life-tenant. Weatherford *v.* Boulware, 43 S. W. 729, 19 Ky. L. Rep. 1535.

Where the grantee conveys other land as part of the consideration, and gives his note for the balance, there is a valuable consideration. Phœnix Ins. Co. *v.* Neal, 23 Tex. Civ. App. 427, 56 S. W. 91.

29. Gray *v.* Lake, 48 Iowa 505 (even though the agreement is never performed); Taylor *v.* Crockett, 123 Mo. 300, 27 S. W. 620; Towle *v.* Forney, 4 Duer (N. Y.) 164 [*affirmed* in 14 N. Y. 423] (deed was based partly on a pecuniary consideration); Jackson *v.* Peck, 4 Wend. (N. Y.) 300; Jackson *v.* Pike, 9 Cow. (N. Y.) 69. See Kirk *v.* King, 3 Pa. St. 436.

30. *Delaware.*—Doe *v.* Prettyman, 1 Houst. 334.

Iowa.— Gardner *v.* Lightfoot, 71 Iowa 577, 32 N. W. 510; Shaw *v.* Ball, 55 Iowa 55, 7 N. W. 413.

Kentucky.—Turners *v.* Turner, 1 T. B. Mon. 243.

Louisiana.— Vick *v.* Deshautel, 9 Mart. 85.

Michigan.— Goff *v.* Thompson, Harr. 60.

Mississippi.— Exum *v.* Canty, 34 Miss. 533.

Missouri.— Anderson *v.* Gaines, 156 Mo. 664, 57 S. W. 726; Cutts *v.* Young, 147 Mo. 587, 49 S. W. 548.

New York.— Spalding *v.* Hallenbeck, 30 Barb. 292. See Stanton *v.* Miller, 65 Barb. 58, 1 Thomps. & C. 23 [*reversed* in 58 N. Y. 192].

Ohio.— Kinie *v.* Addlesperger, 24 Ohio Cir. Ct. 397.

Pennsylvania.— Carney *v.* Carney, 196 Pa. St. 34, 46 Atl. 264; Shontz *v.* Brown, 27 Pa. St. 123.

Virginia.— Henderson *v.* Hunton, 26 Gratt. 926. See also Beverage's Committee *v.* Ralston, 98 Va. 625, 37 S. E. 283.

See 16 Cent. Dig. tit. "Deeds," § 33.

Necessity of performance see the following cases:

Delaware.— Doe *v.* Prettyman, 1 Houst. 334.

Illinois.— See McClelland *v.* McClelland, 176 Ill. 83, 51 N. E. 559.

Iowa.— Gardner *v.* Lightfoot, 71 Iowa 577, 32 N. W. 510.

Kentucky.— Arnett *v.* McGuire, 67 S. W. 60, 23 Ky. L. Rep. 2319. See also Bevins *v.* Keen, 64 S. W. 428, 23 Ky. L. Rep. 757.

Michigan.— Goff *v.* Thompson, Harr. 60. See also Lockwood *v.* Lockwood, 124 Mich. 627, 83 N. W. 613.

Mississippi.— Exum *v.* Canty, 34 Miss. 533.

Washington.— See Payette *v.* Ferrier, 20 Wash. 479, 55 Pac. 629.

Wisconsin.— Reoch *v.* Reoch, 98 Wis. 201, 73 N. W. 989.

Residence of the grantor on the land is not a condition of such support. Bonebrake *v.* Summers, 8 Pa. Super. Ct. 55. See also Chase *v.* Chase, 20 R. I. 292, 37 Atl. 804.

Rule applies where deed is bona fide, without fraud or undue influence, and no cred-

the support of the gospel;[31] a past consideration;[32] a previously incurred debt;[33] the extinguishment of a mortgage;[34] an agreement to pay the grantor's debts, which was subsequently done;[35] the signing of a note as surety;[36] or an agreement to go upon a bail-bond;[37] and even an illegal consideration has been held to pass the legal title.[38] But it is also determined that a pecuniary consideration is essential to support a deed of bargain and sale;[39] and a covenant to stand seized to uses requires a consideration of love and affection, blood, or marriage.[40]

2. QUALIFICATIONS OF OR EXCEPTIONS TO GENERAL RULES. A deed is good as between the parties even without a consideration,[41] nor is a deed necessarily void

itor's rights are involved. Shaw *v.* Bell, 55 Iowa 55, 7 N. W. 413; Henderson *v.* Hunton, 26 Gratt. (Va.) 926.

Agreement to pay the grantor a specified sum annually for life and a certain sum to legatees is a valuable consideration. Keagle *v.* Pessell, 91 Mich. 618, 52 N. W. 58.

A parol agreement to support one during life is a good consideration. Hutchinson *v.* Hutchinson, 46 Me. 154.

Parol statements by and between father and son may amount to an agreement to support as consideration for a deed, although it may be broken by the grantees denying the obligation. Walker *v.* Walker, 104 Iowa 505, 73 N. W. 1073.

31. Schenectady Dutch Church *v.* Veeder, 4 Wend. (N. Y.) 494.

32. If a husband has received property from his wife and used it this is a good consideration for a conveyance of land to her use. Hill *v.* West, 8 Ohio 222, 31 Am. Dec. 442.

Improvements are not a valuable consideration, although their value is set forth as such in the deed, where they are put upon the wife's land by the husband in expectation of a conveyance to himself. Blaesi *v.* Blaesi, 15 N. Y. St. 672, 14 N. Y. Civ. Proc. 216.

33. McMahan *v.* Morrison, 16 Ind. 172, 79 Am. Dec. 418; Reinach *v.* New Orleans Imp. Co., 50 La. Ann. 497, 23 So. 455; McElwee *v.* Kennedy, 56 S. C. 154, 34 S. E. 86. See also Dunbar *v.* Stickler, 45 Iowa 384.

Novation.—The rule applies where the debt is extinguished by way of novation. Smith *v.* Westall, 76 Tex. 509, 13 S. W. 540.

Transfer upon parol trust to pay debt of the grantee and of others constitutes a consideration. Page *v.* Chambers, 13 Nova Scotia 232.

Title does not pass by a deed of gift conditional on a release of the grantor from certain liabilities, there being no other consideration. Lusk *v.* McNamer, 24 Miss. 58.

34. If satisfaction of mortgage on land is not sufficient, extinguishment of mortgage on other land is sufficient. Brown *v.* Sumter Bank, 55 S. C. 51, 32 S. E. 816.

35. Washband *v.* Washband, 27 Conn. 424.

A deed given to pay or secure the indebtedness of the grantee's father passes the title, although no money is paid. Tunison *v.* Chamblin, 88 Ill. 378.

36. Grigsby *v.* Schwarz, 82 Cal. 278, 22 Pac. 1041.

The liability of a grantee as surety for the grantor will support an absolute conveyance of land, and even though the particular debt to be discharged is not designated in the deed it will operate as payment to the extent of the value of the land. Buffum *v.* Green, 5 N. H. 71, 20 Am. Dec. 562.

37. Sewell *v.* Lovett, 8 Ohio Dec. (Reprint) 157, 6 Cinc. L. Bul. 63. See also Crockford *v.* Equitable Ins. Co., 10 N. Brunsw. 651.

38. Hill *v.* Freeman, 73 Ala. 200, 49 Am. Rep. 48.

39. *Maryland.*—Cheney *v.* Watkins, 1 Harr. & J. 527, 2 Am. Dec. 530. And see Maccubbin *v.* Cromwell, 7 Gill & J. 157.

Missouri.— Perry *v.* Price, 1 Mo. 553.

New York.— Wood *v.* Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Corwin *v.* Corwin, 6 N. Y. 342, 57 Am. Dec. 455 [*affirming* 9 Barb. 219]; Schott *v.* Burton, 13 Barb. 173; Jackson *v.* Pike, 9 Cow. 69; Jackson *v.* Delancey, 4 Cow. 427; Jackson *v.* Cadwell, 1 Cow. 622; Jackson *v.* Sebring, 16 Johns. 515, 8 Am. Dec. 357.

North Carolina.— Jackson *v.* Hampton, 30 N. C. 457.

Ohio.— Thompson *v.* Thompson, 3 Ohio Dec. (Reprint) 468, 6 Am. L. Reg. N. S. 26.

But see Wolf *v.* Wolf, 12 La. Ann. 529.

See 16 Cent. Dig. tit. "Deeds," § 41.

The payment of the consideration mentioned in a deed of bargain and sale is necessary to transfer the use and render the instrument operative and effective. Boardman *v.* Dean, 34 Pa. St. 252. See Meriam *v.* Harsen, 2 Barb. Ch. (N. Y.) 232 [*affirming* 4 Edw. 70].

A covenant to perform personal services for the grantor is a sufficient consideration to support a deed of bargain and sale. Young *v.* Ringo, 1 T. B. Mon. (Ky.) 30.

40. Underwood *v.* Campbell, 14 N. H. 393; Corwin *v.* Corwin, 9 Barb. (N. Y.) 219 [*reversed* in 6 N. Y. 342, 57 Am. Dec. 453]; Jackson *v.* Delancey, 4 Cow. (N. Y.) 427; Jackson *v.* Cadwell, 1 Cow. (N. Y.) 622.

41. Fouty *v.* Fouty, 34 Ind. 433; McCaw *v.* Burk, 31 Ind. 56; Randall *v.* Ghent, 19 Ind. 271; Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638; Laberee *v.* Carleton, 53 Me. 211; Green *v.* Thomas, 11 Me. 318; Gale *v.* Gould, 40 Mich. 515; Ivey *v.* Granberry, 66 N. C. 223. Conveyance not supported by a valuable consideration but completely executed will be upheld as against the grantor or his heirs. Neurenberger *v.* Lehenbauer, 66 S. W. 15, 23 Ky. L. Rep. 1753.

because it wants a money consideration,[42] for it may exist as an exchange, a donation, or a pledge.[43] And a deed may be good for a special purpose, although for a nominal consideration and in trust.[44] Nor is actual payment[45] of a nominal consideration expressed in a deed essential.[46] Again deeds placed by the registration laws upon the footing of feoffments require no consideration to support them.[47]

3. SUFFICIENCY AND ADEQUACY IN GENERAL. Any valuable consideration, however small, will support a conveyance of land,[48] for the consideration need not equal the value of the property, especially where no creditor's rights are affected.[49] And where, as compared with the actual value of the property or interest received, the consideration is adequate, the deed will stand, whether such consideration be merely a valuable one,[50] or a valuable one coupled with pecuniary advances;[51] but it is decided that a meritorious consideration, as distinguished from a valuable one, is not sufficient to support the covenants of a deed.[52]

4. EFFECT OF INADEQUACY. The inadequacy of the consideration expressed will not affect the validity of the deed where the grantor was capable of making

Valuable consideration is not necessary to the validity of an instrument which is not an assignment but a gift. Sibley *v.* Somers, 62 N. J. Eq. 595, 50 Atl. 321.

Under a statute an estate in fee simple may be passed by a simple deed of grant without consideration. Adams *v.* Ore Knob Copper Co., 7 Fed. 634, 4 Hughes 589.

42. So if a deed is fairly made by a competent person, although entirely without consideration, it may be valid and should not be rescinded merely because its execution may appear absurd or improbable. Goodwin *v.* White, 59 Md. 503.

43. Wolf *v.* Wolf, 12 La. Ann. 529.

44. Lawrence *v.* Lawrence, 105 Pa. St. 335.

45. Keyser *v.* Hitz, 2 Mackey (D. C.) 513, holding that where, as part of an arrangement by which a loan was to be secured on real estate, a conveyance was made to a third person for an expressed consideration, and a trust deed made by such person for the use and benefit of the grantor, such arrangement is a sufficient consideration for the conveyance, although no money consideration was in fact paid.

46. Studybaker *v.* Cofield, 159 Mo. 596, 61 S. W. 246; Meriam *v.* Harsen, 2 Barb. Ch. (N. Y.) 232 [*affirming* 4 Edw. 70]. But see Boardman *v.* Dean, 34 Pa. St. 252.

47. Love *v.* Harbin, 87 N. C. 249; Mosely *v.* Mosely, 87 N. C. 69.

48. Ocheltree *v.* McClung, 7 W. Va. 232. See also Toncra *v.* Henderson, 3 Litt. (Ky.) 234; Lawrence *v.* McCalmont, 2 How. (U. S.) 426, 11 L. ed. 326, where the rule of the text is asserted as to contracts. And see 2 Blackstone Comm. 445; and CONTRACTS.

A deed conveying land to a city, reciting that the grantors and their assigns reserve "free access or right of way to or from any lots adjoining either line of" a certain street "to and over any wharf which may be upon said street," is supported by a valuable consideration. Aden *v.* Vallejo, 139 Cal. 165, 72 Pac. 905.

Where the deed has a consideration of one dollar, expressed in it, and none other is mentioned or can be inferred from the language used, such consideration is a valuable one, and for the purpose of determining the descent of real estate conveyed casts upon the grantee a title by purchase. Nave *v.* Marshall, 9 Ohio S. & C. Pl. Dec. 415, 6 Ohio N. P. 488.

49. Hennessy *v.* Corneille, 61 N. Y. App. Div. 620, 69 N. Y. Suppl. 1126; Diefendorf *v.* Diefendorf, 56 Hun (N. Y.) 639, 8 N. Y. Suppl. 617 [*affirmed* in 132 N. Y. 100, 30 N. E. 375]; Payson *v.* Good, 5 N. Brunsw. 272. *Compare* Clark *v.* Troy, 20 Cal. 219.

If a consideration be paid, although it be disproportioned to the value of the land, it will support the deed. Perley *v.* Catlin, 31 Ill. 533.

Where the transfer is to satisfy a creditor's claim, the courts will not, at the debtor's suit, set aside the conveyance, even though the consideration is less than the value of the property. Crum *v.* Meiher, 75 Ill. App. 666.

50. Uhlich *v.* Muhlke, 61 Ill. 499.

Deed for attorney's fees will not be canceled where the consideration is not unfair and the litigation was long and difficult. Fellows *v.* Smith, 190 Pa. St. 301, 42 Atl. 678.

Where the consideration was an agreement to pay debts in excess of the value of property and to pay additional sums to each of the grantor's children and to furnish him with proper support and maintenance for life, and a sum much in excess of one-half the value of the property was paid, it was decided that the deed was not voidable for inadequacy. Beverage *v.* Ralston, 98 Va. 625, 37 S. E. 283.

51. Rankin *v.* Wallace, 14 S. W. 79, 12 Ky. L. Rep. 97.

Where the deed recites merely a nominal consideration it is valid, as where defendant paid the purchase-price and the title was taken by plaintiff, who subsequently executed a full power of attorney to one to dispose of the land, a trust having resulted from such payment, it was a sufficient consideration for a deed of such attorney to defendant. Linnel *v.* Hudson, 59 S. C. 283, 37 S. E. 927.

52. Wilbur *v.* Warren, 104 N. Y. 192, 10 N. E. 263, 25 Wkly. Dig. 276. But *compare* Wallace *v.* Harris, 32 Mich. 380.

it.[53] Nor will a deed be set aside for mere inadequacy of consideration unless accompanied by fraud or undue influence, unless the inadequacy be so gross as to imply fraud,[54] or unless there was on the grantor's part a want of mental capacity to contract [55] or a lack of free will and ignorance of his rights.[56]

5. Effect of Want of Consideration. As between the parties and those claiming under them a deed cannot be impeached on the sole ground of want of consideration.[57] But an executory agreement or an imperfect conveyance, without a

53. Brockway *v.* Harrington, 82 Iowa 23, 47 N. W. 1013; Robinson *v.* Robinson, 4 Md. Ch. 176; Stevens *v.* New York, 46 N. Y. Super. Ct. 274 [*affirmed* in 84 N. Y. 296]; Jarrett *v.* Jarrett, 11 W. Va. 584.

54. *Alabama.*— Wood *v.* Craft, 85 Ala. 260, 4 So. 649.

Georgia.— Wormack *v.* Rogers, 9 Ga. 60.

Illinois.—Sturtevant *v.* Sturtevant, 116 Ill. 340, 6 N. E. 428; Reed *v.* Peterson, 91 Ill. 288; Fagan *v.* Schultz, 73 Ill. 529.

Iowa.— Herron *v.* Herron, 71 Iowa 428, 32 N. W. 407.

Kentucky.—Talbott *v.* Hooser, 12 Bush 408; Wallace *v.* Marshall, 9 B. Mon. 148; Robb *v.* Robb, 21 S. W. 580, 14 Ky. L. Rep. 747.

Maryland.— Wilson *v.* Farquharson, 5 Md. 134.

Michigan.— Keagle *v.* Pessell, 91 Mich. 618, 52 N. W. 58.

Missouri.— Morriso *v.* Phillibber, 30 Mo. 145.

New Jersey.— Hyer *v.* Little, 20 N. J. Eq. 443; Weber *v.* Weitling, 18 N. J. Eq. 441.

Pennsylvania.— Harris *v.* Tyson, 24 Pa. St. 347, 64 Am. Dec. 661.

Virginia.— Tebbs *v.* Lee, 76 Va. 744.

United States.— Holmes *v.* Holmes, 12 Fed. Cas. No. 6,638, 1 Abb. 525, 1 Sawy. 99; Walker *v.* Derby, 28 Fed. Cas. No. 17,068, 5 Biss. 134.

After grantor's death the transaction cannot be impeached for inadequacy of consideration, where there was no fraud or undue influence and the grantor had fixed the consideration. Keagle *v.* Pessell, 91 Mich. 618, 52 N. W. 58.

Inadequacy must be established as of the date of the contract. Pennybacker *v.* Laidley, 33 W. Va. 624, 11 S. E. 39.

In determining adequacy the value of property at the time of its conveyance and not at the time of the trial should be ascertained, where the action is to cancel the deed on the ground of fraud, false representations, and inadequacy. Wells *v.* Houston, 23 Tex. Civ. App. 629, 57 S. W. 584.

Possible litigation over the title of the grantor will be considered. Fagan *v.* Schultz, 73 Ill. 529.

That one tenant in common on a resale of his share obtained an increased price for it does not prove inadequacy of consideration, where a tenant for life of the undivided moiety purchased from the tenants in common their whole interest, including the reversion for a certain sum, and there was no evidence that the entire interest would have sold for more than that sum. Hamblin *v.* Bishop, 41 Fed. 74.

That the property was worth only two thirds of the price paid therefor is no ground for setting aside the sale, where the vendee, who was twenty-eight years old, examined the property before purchasing, and there was no evidence of fraud or undue influence, and the vendor offered to release him before the bargain was consummated but he refused to be released. Martinez *v.* Moll, 46 Fed. 724.

The case is not within the rule which sets aside an executed contract with an heir for mere inadequacy of price, where the vendor was not an heir expectant, but had a vested estate in half the land, and the remainder after a life-estate in the other half. Davidson *v.* Little, 22 Pa. St. 245, 60 Am. Dec. 81.

The sale will be set aside where the inadequacy, coupled with other circumstances of a suspicious nature, afford a vehement presumption of fraud (Wormack *v.* Rogers, 9 Ga. 60); where there are false representations and the consideration is grossly inadequate (Benter *v.* Patch, 7 Mackey (D. C.) 590); where the grantor was very old and feeble and survived but a few days, and the money consideration was not paid in the manner agreed, and the other consideration was that of support to be rendered (Collins *v.* Collins, 45 N. J. Eq. 813, 15 Atl. 849, 18 Atl. 860); where the grantor was eighty-two years old and he was induced while sick to convey land for half its value, taking unsecured notes in payment (Williams *v.* Longman, (Iowa 1899) 78 N. W. 198); or where there was a verbal promise to discharge a mortgage which the grantor was not obligated to pay, and a further verbal promise made by the grantee, who was executor under his father's will, that his stepmother might remain in the homestead during the rest of her life (Lamb *v.* Lamb, (N. J. Ch. 1892) 23 Atl. 1009).

Where there is inequality in the condition of the parties, a deed will be set aside for inadequacy of consideration. George *v.* Richardson, Gilm. (Va.) 320.

55. Sturtevant *v.* Sturtevant, 116 Ill. 340, 6 N. E. 428.

As to mental capacity see Insane Persons. And see *infra*, III, J, 1.

56. Robb *v.* Robb, 21 S. W. 580, 14 Ky. L. Rep. 747.

57. Prescott *v.* Hayes, 43 N. H. 593; Brown *v.* Brown, 44 S. C. 378, 22 S. E. 412.

Extent and limits of rule.— Where it does not appear that the grantor expected any other consideration than the amount of one dollar, which was tendered, he cannot have it set aside for want of consideration. Rendleman *v.* Rendleman, 156 Ill. 568, 41 N. E. 223. If, however, the consideration given

valid or meritorious consideration, will not be enforced in equity against the promisor or grantor or his personal representatives or subsequent voluntary grantees; and *a fortiori* it will not be enforced against subsequent grantees for a valuable consideration.[58]

6. Effect of Failure of Consideration. Failure of consideration is insufficient in law to avoid a specialty;[59] nor can failure to pay a nominal consideration be shown to avoid a deed;[60] nor is a party entitled to have his deed set aside and canceled simply because he has not received the full consideration.[61] The failure of consideration may, however, be governed by circumstances which will justify setting aside a deed.[62]

does not confer even an equitable right thereto upon the grantor, and the grantee knew the character thereof, the deed is without consideration. Austin *v.* Felton, 41 Fed. 161. So where the rights of third parties intervene the deed may be invalid for want of consideration or it may be shown as evidence of fraud. Howard *v.* Turner, 125 N. C. 107, 34 S. E. 229. Nor will anything pass under a deed without consideration where the grantor had previously executed and delivered a deed of the property to another. Stephenson *v.* Deuel, 125 Cal. 656, 58 Pac. 258. And a deed may be canceled upon a showing by the grantor, a married woman, that it is not authorized by statute and is without consideration, as where she transfers her separate estate to satisfy an obligation which she is under no legal duty to pay to one who is liable therefor. Vincent *v.* Walker, 93 Ala. 165, 9 So. 382. Again if the consideration is the transfer of property, which transfer the law prohibits, the conveyance will be set aside as being entirely without consideration. Steele *v.* Richardson, 24 Ark. 365.

For rights of creditors of grantor see Fraudulent Conveyances.

In a court of common law want of consideration cannot be shown in avoidance of a deed. Taylor *v.* King, 6 Munf. (Va.) 358, 8 Am. Dec. 746.

Want of consideration is only available to the grantor or those claiming under him. Hickman *v.* North British, etc., Ins. Co., 13 N. Brunsw. 235.

58. Burton *v.* Leroy, 4 Fed. Cas. No. 2,217, 5 Sawy. 510.

As to voluntary conveyances see *supra*, III, E, 1.

But as to subsequent grantees and creditors see Fraudulent Conveyances. See also Cathcart *v.* Robinson, 5 Pet. (U. S.) 264, 8 L. ed. 120.

59. Vrooman *v.* Phelps, 2 Johns. (N. Y.) 177. See also Kinnaman *v.* Pyle, 44 Ind. 275 (a failure of title to the land which was to be conveyed as a consideration for the deed); Chew *v.* Chew, 38 Iowa 405 (deed from husband to wife in consideration of love); Goodrich *v.* Proctor, 1 Gray (Mass.) 567; Rozell *v.* Redding, 59 Mich. 331, 26 N. W. 498 (consideration was the discontinuance of a divorce suit, a divorce based upon other wrongs was subsequently obtained, and equity refused a reconveyance); White *v.* Johnson, 4 Wash. 113, 29 Pac. 932.

Failure to deliver property agreed upon as a consideration does not invalidate the deed, but merely furnishes the grantor a right of action for the value of such consideration. Lake *v.* Gray, 35 Iowa 459.

The mere fact that an old woman who had deeded her home to her children on one occasion was dissatisfied with food furnished her when sick did not show a failure of consideration of the deed to give her kind treatment, care, and attention. Chadd *v.* Moser, 25 Utah 369, 71 Pac. 870.

60. Draper *v.* Shoot, 25 Mo. 197, 69 Am. Dec. 462.

61. Harkness *v.* Fraser, 12 Fla. 336. Nor will a deed be set aside because all the money that the grantee agreed to pay in cash was not paid when the deed was made, where such present payment was waived. Wood *v.* Stedwell, 91 Iowa 224, 59 N. W. 28. Even though it is stipulated in the deed that it shall be void unless the purchase-money is paid at the specified time, the grantor is the only person who can take advantage thereof, and he may waive his right. Dougal *v.* Fryer, 3 Mo. 40, 22 Am. Dec. 458.

62. As where the grantees have broken the agreement constituting the consideration, or have by their wrongful acts rendered performance impossible, or their conduct is such as to raise the presumption of an abandonment of the agreement and of a fraudulent intent in entering into it. McClelland *v.* McClelland, 176 Ill. 83, 51 N. E. 559; Bevins *v.* Keen, 64 S. W. 428, 23 Ky. L. Rep. 757. See also Lockwood *v.* Lockwood, 124 Mich. 627, 83 N. W. 613. And where the grantee's death prevents performance thereof the grantor may rescind. Payette *v.* Ferrier, 20 Wash. 479, 55 Pac. 629. If, however, performance is not made a condition subsequent, a failure to perform on the part of the grantee will not warrant a cancellation. Downing *v.* Rademacher, (Cal. 1900) 62 Pac. 1055. Nor is it warranted by a mere breach of the grantee's promise constituting the consideration. Brand *v.* Power, 110 Ga. 522, 36 S. E. 53.

Deeds have been set aside for a failure to perform services constituting the consideration (Pironi *v.* Corrigan, 47 N. J. Eq. 135, 20 Atl. 218); for a failure of certain parties to join in a conveyance, under a proviso that all should join (Donnelly *v.* Rafferty, 172 Pa. St. 587, 33 Atl. 754); for a failure to obtain other conveyances where the understanding was that the deed should not vest ownership until such other conveyances were obtained, and it also appears that the purpose for

7. Effect of Seal. Although a seal imports a consideration,[63] it is decided that a seal is not conclusive evidence thereof,[64] and also that a conveyance under seal must to be valid show a consideration.[65] Nevertheless it is also determined that a deed under seal is valid between the parties without any actual consideration.[66]

F. Form and Contents of Instruments — 1. Necessity of Writing. A deed must be in writing or printed,[67] although prior to the statute of frauds[68] conveyances were made by parol without writing.[69]

which the deed was given had been abandoned (Mack *v.* Consolidated Water-Power Co., 101 Fed. 869, 42 C. C. A. 67); for the breach of a condition that the grantee pay certain claims, where the title was not to pass until the condition was complied with (Steffy *v.* Esler, 6 Ida. 228, 55 Pac. 239); where the deed is given as collateral security, and the object for which it was given entirely fails owing to the grantee's death (Hollingshead *v.* McKenzie, 8 Ga. 457); and where the deed is given by a husband, so that his wife shall not be without support in case of his death, and she subsequently abandons him and removes to another state (Dickerson *v.* Dickerson, 24 Nebr. 530, 39 N. W. 429, 8 Am. St. Rep. 213).

63. Bond *v.* Wilson, 129 N. C. 325, 40 S. E. 179, holding also that the validity of a deed under seal and delivered cannot be questioned on the ground that the consideration has not been paid. See also Cook *v.* Cooper, 59 S. C. 560, 38 S. E. 218; and *infra*, VII, A, 8, a.

64. Kinnebrew *v.* Kinnebrew, 35 Ala. 628.

65. Thompson *v.* Thompson, 17 Ohio St. 649.

66. Croft *v.* Bunster, 9 Wis. 503.

The weight of these decisions must, however, rest upon the law in the several jurisdictions relating to the necessity for a seal. See *infra*, III, G, 1, 3.

67. 2 Blackstone Comm. 297.

"Every deed must be wrote on parchment or paper." Comyns Dig. tit. "Fait."

Title to real estate cannot be transferred by parol. Crowell *v.* Maughs, 7 Ill. 419, 43 Am. Dec. 62.

Writing is necessary to convey a freehold or estate in fee (McCabe *v.* Hunter, 7 Mo. 355; Kneller *v.* Lang, 63 Hun (N. Y.) 48, 17 N. Y. Suppl. 443 [*affirmed* in 137 N. Y. 589, 33 N. E. 555]; Jackson *v.* Wendell, 12 Johns. (N. Y.) 355; Jackson *v.* Wood, 12 Johns. (N. Y.) 73); to pass an estate for life, even as against the grantor and his heirs (Stewart *v.* Clark, 13 Metc. (Mass.) 79); or to pass any interest or estate in land greater than an estate at will (Whitney *v.* Swett, 22 N. H. 10, 53 Am. Dec. 228). And a sale of growing timber to be removed is held to be such an interest as requires a writing. Olmstead *v.* Niles, 7 N. H. 522. But see Sterling *v.* Baldwin, 42 Vt. 306. A proper conveyance in writing according to the state laws is also necessary to pass the legal title to lands. Morris *v.* Harmer, 7 Pet. (U. S.) 554, 8 L. ed. 781. So a writing is one of the requisites to a valid conveyance of lands in Kentucky under a decision in 1832. Sicard *v.* Davis, 6 Pet. (U. S.) 124, 8 L. ed. 342. Again a man's handing to his wife his patent for a certain piece of land, with the intention that she shall take title thereby, is not a conveyance in law. Taylor *v.* Irwin, 20 Fed. 615.

Deed is necessary to transfer land held under a descriptive warrant and payment of purchase-money (Woods *v.* Lane, 2 Serg. & R. (Pa.) 53); and the right or title to a freehold estate cannot be transferred, released, or barred, but by deed (Miller *v.* Graham, 1 Brev. (S. C.) 448).

68. 29 Car. II, c. 3, §§ 1, 2. And see, generally, Frauds, Statute of.

The object of the statute was to exclude all oral evidence as to contracts for the sale of land; and therefore any contract sought to be enforced must be proved by writing only. Brown Leg. Max. (7th Am. ed. 1875) 888.

69. 2 Blackstone Comm. 297.

Lands could be conveyed without a writing before 1816 under a Missouri decision (Moss *v.* Anderson, 7 Mo. 337); and evidence of the sale of a possessory interest in realty need not be by deed (Clark *v.* Gellerson, 20 Me. 18). So a corporation may transfer its equitable title to land to one of its officers who then holds the legal title, without execution of a written instrument, so as to vest such officer with a title superior to that vested in an attorney under a subsequent contract with the corporation authorizing him to sue such officer for the land and agreeing to give him half the land recovered. Tempel *v.* Dodge, 11 Tex. Civ. App. 42, 31 S. W. 686.

Legal title could not be acquired by parol before the statute of frauds. Lindsley *v.* Coats, 1 Ohio 243.

Parol release cannot prevail against a deed. Perry *v.* Clymore, 3 McCord (S. C.) 245.

A parol agreement to contribute land if others will erect a school passes a good title to those erecting it, and they are trustees, subject to the supervision of the courts. Martin *v.* McCord, 5 Watts (Pa.) 493, 30 Am. Dec. 342.

Under the Mexican law in vogue in California before its acquisition by the United State a parol sale of realty fully executed was valid as between the parties and passed the title. Cook *v.* Frink, 44 Cal. 331. But the requirement of that law that sales of real estate must be made before an escribano, or the judge of the first instance, was never in force in that state, although by custom there must have been a deed containing the names of the parties, the thing sold, the date of the transfer, and the price paid. Hayes *v.* Bona, 7 Cal. 153.

Under the Spanish law a deed was not necessary to convey the legal title. Any in-

2. Formal Requisites — Sufficient and Legal Words. Although there are certain formal parts [70] usual to deeds, yet it is not absolutely necessary that a deed should contain all these parts, it being sufficient that the matter written should be legally and orderly set forth, by words which clearly specify the agreement and meaning of the parties and bind them.[71] Nor is any prescribed form essential to the validity of a deed;[72] and a deed informally drawn will convey the fee.[73] Nor need the nature of the estate which the grantor had be set out.[74] So a defective deed will operate to convey as a release the fee to a grantee in possession to the exclusion of a subsequent grantee of the same land.[75] And a statutory provision as to what shall constitute a good deed does not imply that it cannot otherwise be made.[76] The preceding rules, however, do not preclude the necessity of using words of conveyance,[77] which are apt and proper,[78] expressive of an intention of the parties to be bound,[79] and sufficient to show an intention to convey.[80]

3. Premises — a. Generally. The premises may be used to set forth the names and number of the parties, the recitals explaining the operation of the deed and

strument showing the intention of the grantor, whether under seal or not, was sufficient. Long *v.* Stapp, 49 Mo. 506. And title would pass under a parol assignment. Langlois *v.* Crawford, 59 Mo. 456.

70. Formal parts of a deed are the premises; the *habendum*; the *tenendum*; the *reddendum*; the clause of warranty; the *cujus rei testimonium*, comprehending the sealing; the date; and lastly the *his testibus*. Bacon Abr. tit. "Feoffment."

71. 2 Blackstone Comm. 298. See also Bowdoin College *v.* Merritt, 75 Fed. 480.

Deed may be good although it has no formal parts. Comyns Dig. tit. "Fait."

Any words, where the statute so permits, indicating an intention to transfer the estate, interest, or claims of the grantor will be a sufficient conveyance, whether they be such as are generally used in a deed of feoffment, of bargain and sale, or of release, irrespective of the fact of the possession of the grantor or the grantee, or of the statute of uses. Field *v.* Columbet, 9 Fed. Cas. No. 4,764, 4 Sawy. 523.

Clause inserted after a warranty is sufficient to pass the estate, where it refers to the former consideration and therefore transfers the residue of the survey not before conveyed. Noel *v.* Dishman, 4 Bibb (Ky.) 51.

72. Bell *v.* McDuffie, 71 Ga. 264.

Any form of conveyance that will carry into execution the lawful objects of the makers, whether the form be feoffment, grant, bargain and sale, or release, will operate to pass title. Foster *v.* Dennison, 9 Ohio 121. And *compare* Dawson *v.* Dawson, Rice Eq. (S. C.) 243.

By the civil law the title is passed by an unsealed instrument, containing the names of the parties, the designation or description of the property, the date of the transfer, and the price paid. Stanley *v.* Green, 12 Cal. 148.

73. Armfield *v.* Walker, 27 N. C. 580.

An informal paper, purporting to be an assignment of the maker's interest in a tract of land, attested by but one witness, and based on a valuable consideration, is sufficient in equity to transfer such interest. Pope *v.* Montgomery, 24 S. C. 594.

A mere writing is not enforceable in equity as a conveyance, where it is sent by the owner of land to his mother, requesting her to make use thereof, and to sell it to the best advantage to support herself, although it will be supported as an authority to enjoy the profits. Craig *v.* Craig, Bailey Eq. (S. C.) 102.

74. Kottman *v.* Ayer, 1 Strobh. (S. C.) 552.

75. Carroll *v.* Norwood, 1 Harr. & J. (Md.) 167.

76. Burnham *v.* Kidwell, 113 Ill. 425.

77. Pierson *v.* Doe, 2 Ind. 123; Repp *v.* Lesher, 27 Ind. App. 360, 61 N. E. 609.

If a deed contains no words of conveyance and is not under seal it does not pass any legal title. Irwin *v.* Powell, 188 Ill. 107, 58 N. E. 941.

78. Mississippi Agricultural Bank *v.* Rice, 4 How. (U. S.) 225, 11 L. ed. 949. See also *infra*, III, F, 3, e.

79. Catlin *v.* Ware, 9 Mass. 218, 6 Am. Dec. 56.

If the transaction on which the deed purports to be founded and the consideration for which it was executed are made to appear to be untruthfully stated, such instrument may lose all its binding qualities in equity, even though it may be conclusive in law. Leonard *v.* Springer, 98 Ill. App. 530.

80. Bell *v.* McDuffie, 71 Ga. 264. See also Pluche *v.* Jones, 54 Fed. 860, 4 C. C. A. 622.

An agreement that does not purport to convey anything *in præsenti* will not stand as a conveyance or as a mutual covenant, although made between owners in common and providing that the survivor should take all the interest of both parties in the property. Hershy *v.* Clark, 35 Ark. 17, 37 Am. Rep. 1. See also Repp *v.* Lesher, 27 Ind. App. 360, 61 N. E. 609. But an instrument, while not a deed so as to pass the legal title because not purporting to presently convey the title, but binding the obligor to make a deed on demand of the obligee, passes the equitable title, it being shown on its face that the obligor had already sold the land to the obligee, and that the consideration for it had been paid. Tomp-

the reasons for executing it, and the consideration is here stated. Then follows the certainty of the grantor, the grantee, and the thing granted.[81]

b. Designation and Description of Parties — (i) *Generally.* Generally a deed is invalid which omits the names of either the grantor or the grantee;[82] and if a deed designates a person incapable of taking, it is void for want of a grantee.[83] Moreover the grantee should not be a fictitious person,[84] but a conveyance to and by a person under an assumed name is effectual to pass title.[85] If the deed in its entirety distinguishes the grantee from the rest of the world it is sufficient.[86] Nor is it indispensable that the name of the grantor[87] or that of the grantee be inserted in the premises,[88] or in the granting clause,[89] where such name appears in other parts of the deed,[90] or can be sufficiently and certainly ascer-

kins *v.* Broocks, (Tex. Civ. App. 1897) 43 S. W. 70.

81. 2 Blackstone Comm. 298. See also as to the purpose of recitals McCoy *v.* Fahrney, 182 Ill. 60, 55 N. E. 61.

82. Whitaker *v.* Miller, 83 Ill. 381.

A deed which does not contain the grantee's name is void as a conveyance. Wunderlin *v.* Cadogan, 50 Cal. 613; Chase *v.* Palmer, 29 Ill. 306; Westchester F. Ins. Co. *v.* Jennings, 70 Ill. App. 539; Garnett *v.* Garnett, 7 T. B. Mon. (Ky.) 545; Wright *v.* Lancaster, 48 Tex. 250. See also *infra*, III, F, 3, b, (III).

A deed must give the names of the heirs where the conveyance is to the heirs of a living person named. Booker *v.* Tarwater, 138 Ind. 385, 37 N. E. 979; Winslow *v.* Winslow, 52 Ind. 8.

83. Thus a deed to a dead man and his heirs is a nullity. Hunter *v.* Watson, 12 Cal. 363, 73 Am. Dec. 543; Morgan *v.* Hazlehurst Lodge, 53 Miss. 665. So a deed to the estate of a deceased person is void. Summons *v.* Spratt, (Fla. 1887) 1 So. 860; McInerney *v.* Beck, 10 Wash. 515, 39 Pac. 130. And the inhabitants of a town incapable of receiving the land is too indefinite a term to confer title on them as individuals. Hunt *v.* Tolles, 75 Vt. 48, 52 Atl. 1042. See also Hornbeck *v.* Westbrook, 9 Johns. (N. Y.) 73. Again the people of a county cannot take. Jackson *v.* Cory, 8 Johns. (N. Y.) 385. So a deed is void for want of a grantee when made "to members of the New Judson Church." Morris *v.* State, 84 Ala. 457, 4 So. 628. See also *supra*, III, C, 1.

By the common law nothing passed to the heirs under a grant to a deceased person. Dongherty *v.* Edmiston, 7 Fed. Cas. No. 4,025, Brumm. Col. Cas. 194.

By Ky. St. § 2063, a deed to a deceased person, when accepted by his children, vests in them the title that would have vested in the grantee if living. Northern Lake Ice Co. *v.* Orr, 102 Ky. 586, 44 S. W. 216, 19 Ky. L. Rep. 1634.

84. Anderson *v.* Bartels, 7 Colo. 256, 3 Pac. 225; Muskingum Valley Turnpike Co. *v.* Ward, 13 Ohio 120, 42 Am. Dec. 191; Weihl *v.* Robertson, 97 Tenn. 458, 37 S. W. 274, 39 L. R. A. 423; U. S. *v.* Southern Colo. Coal, etc., Co., 18 Fed. 273, 5 McCrary 563.

85. Wilson *v.* White, 84 Cal. 239, 24 Pac. 114; Wakefield *v.* Brown, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671.

A conveyance is sufficient if the grantee be designated by his customary name at the time of execution, no matter what may be his true name. Garwood *v.* Hastings, 38 Cal. 216.

Where one with intent to convey title executes a conveyance in a name not his own, he is bound by the name he thus adopts, which will be considered as his name *pro hac vice*, and the conveyance is effectual to vest title. David *v.* Williamsburgh City F. Ins. Co., 83 N. Y. 265, 38 Am. Rep. 418.

86. Henniges *v.* Paschke, 9 N. D. 489, 84 N. W. 350, 81 Am. St. Rep. 588. See also Newton *v.* McKay, 29 Mich. 1; Irwin *v.* Longworth, 20 Ohio 581; Vineyard *v.* O'Connor, 90 Tex. 59, 36 S. W. 424 [*reversing* (Civ. App. 1896) 35 S. W. 1084].

Grantee's name is not essential to validity of a deed. A grant may be made to classes of persons, if sufficiently designated by *descriptio personarum*. Friedman *v.* Goodwin, 9 Fed. Cas. No. 5,119, 1 McAll. 142. See also Hill *v.* Jackson, (Tex. Civ. App. 1899) 51 S. W. 357. It is sufficient that the donee can be identified by name or description where the deed is in the nature of a gift. Holeman *v.* Fort, 3 Strobh. Eq. (S. C.) 66, 51 Am. Dec. 665. But the grantee if not named must be so described as to make him capable of designation. Simmons *v.* Spratt, 20 Fla. 495.

87. Carr *v.* Lehugh, 1 Ohio Dec. (Reprint) 84, 2 West. L. J. 68.

88. Newton *v.* McKay, 29 Mich. 1.

89. Carr *v.* Lehugh, 1 Ohio Dec. (Reprint) 84, 2 West. L. J. 68.

If the recitals are insufficient proof of the identity of the grantees as the parties described is necessary. Wolf *v.* Holton, 104 Mich. 107, 62 N. W. 174.

90. Rule applies where the grantor's name was omitted in the premises and stated in the covenant of warranty (Carr *v.* Lehugh, 1 Ohio Dec. (Reprint) 84, 2 West. L. J. 68); where the grantors were named as husband and wife but were not named in the granting clause (Ferrill *v.* Cleveland, 6 Ky. L. Rep. 512); where the grantee's name appeared on the face of the deed but was omitted in the granting clause (Bay *v.* Posner, 78 Md. 42, 26 Atl. 1084); and where the grantee's name was omitted from the part preceding the *habendum* but was stated in that clause (Hardie *v.* Andrews, 13 N. Y. Civ. Proc. 413). Again, where there is no grantee named in the granting part, the party named in the *habendum*

tained or supplied therefrom.[91] The description, however, should not be such as that the deed will be void for uncertainty,[92] although a latent ambiguity may be explained by parol.[93] The rule also applies that a false description in a deed, when there is enough otherwise to show the intention, will be treated as surplusage.[94] Again, if it can be ascertained from the deed who is intended, the deed is not vitiated by a mistake in setting out the name,[95] in describing the place of residence of the parties,[96] or in using the word "with" instead of "to" before the grantee's name.[97] And if names are *idem sonans* the insertion of one name for another is immaterial.[98] The omission of a middle name is also unimportant, as the law knows but one christian name in a conveyance;[99] and a grant may stand, even though the name of baptism is not given,[1] or the christian or surname is omitted.[2] Nor does an abbreviation in the grantee's name necessarily invalidate

may take, and where the grantor is named as the grantee, the same rule applies as if no grantee were named in the premises. Irwin *v.* Longworth, 20 Ohio 581.

Limitations in remainder, contained in the *habendum*, may be good, although to persons not named in the premises. Milledge *v.* Lamar, 4 Desauss. (S. C.) 617. But except in cases of a limitation in remainder, or a declaration of a use, a person whose name is not mentioned with those of others in the premises of a deed cannot take an estate by the *habendum*. Cox *v.* Douglass, 20 W. Va. 175. See Hardie *v.* Andrews, 13 N. Y. Civ. Proc. 413.

91. Mardes *v.* Meyers, 8 Tex. Civ. App. 542, 28 S. W. 693 [*distinguishing* Stone *v.* Sledge, 87 Tex. 49, 26 S. W. 1068, 47 Am. St. Rep. 65].

A deed describing the grantors as "we the heirs and devisees of S," but not naming them, is valid. Blaisdell *v.* Morse, 75 Me. 542.

A condition that a third party was "to have the privilege of a support off of said lands during his lifetime without incumbrance" conveys a life-estate to such party, although he is not named in the deed as vendee. Stout *v.* Dunning, 72 Ind. 343.

Where a deed, although containing the name of the person who paid the price and with whom the covenants were made, did not express the name of any grantee, and the *habendum* was to the "grantor" and his heirs and assigns forever, and the covenantee had entered and held possession several years, and afterward conveyed the land in fee, nothing passed by it. Paul *v.* Moody, 7 Me. 455.

92. Chamberlain *v.* Bussey, 5 Me. 164 (conveyance valid as to grantee named but void as to grantees specified as all others interested); Allen *v.* Allen, 48 Minn. 462, 51 N. W. 473 (deed designating the intended grantee as one of the grantors, no grantee being otherwise named, is void); Morris *v.* Stephens, 46 Pa. St. 200 (conveyance by grantor to "heirs of his son A" who was then living, is void).

A deed is not void for uncertainty when it can be shown who is intended and that the grantees are parties capable of taking (Hogg *v.* Odom, Dudley (Ga.) 185); or where the grantee is so described that he may be made certain or discovered by proof *aliunde* (Wood *v.* Boyd, 28 Ark. 75); or where in the granting part the grantor is also named as grantee and the deed describes the grantor as the "party of the first part," and the grantee as the "party of the second part," with an *habendum* clause to the party of the second part (Irwin *v.* Longworth, 20 Ohio 581); or where in connection with the word "heirs" the word "grandchildren" shows that the former word is to be taken in the popular and not in its technical sense (Huss *v.* Stephens, 51 Pa. St. 282); or where a deed is to A and "his associates" (Duncan *v.* Beard, 2 Nott & M. (S. C.) 400).

93. Murray *v.* Blackledge, 71 N. C. 492, as in case of a deed to a copartnership in the firm-name instead of to the individual members thereof.

94. Jackson *v.* Hodges, 2 Tenn. Ch. 276.

95. *Alabama.*— Douglass *v.* Mobile Branch Bank, 19 Ala. 659.

Michigan.— Seofield *v.* Scofield, 47 Mich. 245, 10 N. W. 356.

Minnesota.— Wakefield *v.* Brown, 38 Minn. 261, 37 N. W. 788, 8 Am. St. Rep. 671.

North Carolina.— Asheville Div. No. 15, S. of T. *v.* Aston, 92 N. C. 578.

Texas.— Hanrick *v.* Jaekson, 55 Tex. 17.

The title vests, although the grantee is described by a wrong baptismal or christian name. Staak *v.* Sigelkow, 12 Wis. 234.

96. Stewart *v.* Sutherland, 93 Cal. 270, 28 Pac. 947.

97. Brooks *v.* Rateliff, 33 N. C. 321.

98. Kinney *v.* Harrett, 46 Mich. 87, 8 N. W. 708.

If the grantor's name in a deed to A is not *idem sonans* with the name in a deed from A to B, B's title is imperfect, and a subsequent deed from A to B reciting the facts does not cure the defect, and such a case is not within a statute providing that any person in whom the title of real estate is vested who shall afterward for any cause have his or her name changed shall in any conveyance of real estate set forth the name in which he or she derives title, for such statute does not cover a name erroneously written. Peckham *v.* Stewart, 97 Cal. 147, 31 Pac. 928.

99. Banks *v.* Lee, 73 Ga. 25; Dunn *v.* Games, 8 Fed. Cas. No. 4,176, 1 McLean 321 [*affirmed* in 14 Pet. (U. S.) 322, 10 L. ed. 476].

1. Newton *v.* McKay, 29 Mich. 1.

2. Irwin *v.* Longworth, 20 Ohio 581.

the conveyanee.[3] And a varianee in attaching a word to a name which is no part thereof will not vitiate, where it raises no doubt of the identity of the person and is readily accounted for.[4]

(II) *Variance Between Signature and Description in Body of Deed.* A deed signed and acknowledged by persons not named therein as grantors is not their deed;[5] and if it is signed and sealed by two only, one of whom is described in the instrument as grantor, it is the deed of that one only.[6] A deed signed by a part of those named in it is good as to those signing it.[7] And if one having the legal title gives a deed purporting to be exeeuted by his grantors, but it is in faet signed by third persons, the grantee acquires no legal title.[8] If the variance is between the name written in the body of the deed and the signature, or between sueh name so written and that signed, or in the acknowledgment, it may be generally stated that the deed is not vitiated if it sufficiently appears that the same person is intended,[9] especially where the error in deseription is clearly a blunder of the eonveyaneer.[10]

(III) *Leaving Name Blank.* If the grantee's name is left in blank in a conveyance, the legal title does not pass by the eonveyanee,[11] unless the blank is

3. Aultman, etc., Mfg. Co. *v.* Richardson, 7 Nebr. 1.

4. Blake *v.* Tucker, 12 Vt. 39.

5. Adams *v.* Medsker, 25 W. Va. 127. See also Gaston *v.* Weir, 84 Ala. 193, 4 So. 258. *Contra*, Elliot *v.* Sleeper, 2 N. H. 525.

Absence of wife's name from granting portion of deed by herself and husband does not render it ineffeetual to eonvey her homestead if it is signed by her, and there is a proper eertificate of her privy examination, showing that she exeeuted it to convey her homestead rights. Kelton *v.* Brown, (Tenn. Ch. App. 1897) 39 S. W. 541.

It is not a radieal defeet that the grantor's name fails to appear in the body of the deed. Hrouska *v.* Janke, 66 Wis. 252, 28 N. W. 166.

Where one jointly with others signs, seals, and delivers an instrument, supposed to be a perfeet deed, but his name appears in no other part thereof, his interest in the premises deseribed is not eonveyed. Peabody *v.* Hewett, 52 Me. 33, 83 Am. Dec. 486. See also Harrison *v.* Simons, 55 Ala. 510; Batchelor *v.* Brereton, 112 U. S. 396, 5 S. Ct. 180, 28 L. ed. 748.

6. Cox *v.* Wells, 7 Blaekf. (Ind.) 410, 43 Am. Dec. 98; Merrill *v.* Nelson, 18 Minn. 366; Stone *v.* Sledge, 87 Tex. 49, 26 S. W. 1068, 47 Am. St. Rep. 65 [*affirming* (Civ. App. 1894) 24 S. W. 697]; Laughlin *v.* Fream, 14 W. Va. 322.

7. Colton *v.* Seavey, 22 Cal. 496.

A deed to a son, purporting to be that of a father and mother and exeeuted by the father alone, eonveys his interest. Goodman *v.* Maleolm, (Kan. App. 1899) 58 Pac. 564.

8. Snyder *v.* Church, 70 Hun (N. Y.) 428, 24 N. Y. Suppl. 337 [*affirmed* in 149 N. Y. 587, 44 N. E. 1128].

9. Grand Tower Min., etc., Co. *v.* Gill, 111 Ill. 541; Erskine *v.* Davis, 25 Ill. 251; Houx *v.* Batteen, 68 Mo. 84; Rupert *v.* Penner, 35 Nebr. 587, 53 N. W. 598, 17 L. R. A. 824.

An apparent varianee in the middle initial of one in the chain of title does not render his deed ineompetent, when he and his grantee can prove his identity. Nieodemus *v.* Young, 90 Iowa 423, 57 N. W. 906.

Where an heir at law in one part of the deed deseribes himself as agent for the heirs of the deeeased, but in all other parts speaks of himself as the granting party and exeeutes the deed in his own name, sueh deed should be admitted in evidence as his own deed. Endsley *v.* Stroek, 50 Mo. 508.

10. Jenkins *v.* Jenkins, 148 Pa. St. 216, 23 Atl. 985.

11. *California.*—Arguello *v.* Bours, 67 Cal. 447, 8 Pac. 49.

Illinois.— Mickey *v.* Barton, 194 Ill. 446, 62 N. E. 802; Westchester F. Ins. Co. *v.* Jennings, 70 Ill. App. 539.

Iowa.— *Compare* Logan *v.* Miller, 106 Iowa 511, 76 N. W. 1005.

Minnesota.— Clark *v.* Butts, 73 Minn. 361, 76 N. W. 199.

South Carolina.— Hardin *v.* Hardin, 32 S. C. 599, 11 S. E. 102.

United States.—Allen *v.* Withrow, 110 U. S. 119, 3 S. Ct. 517, 28 L. ed. 90.

See 16 Cent. Dig. tit. "Deeds," § 64.

Exceptions to and qualifieations of the rule exist, where after delivery to the grantee he fills in his name and the grantor sues for the agreed consideration. Devin *v.* Himer, 29 Iowa 297. So where the grantor writes in the grantee's name after the deed is aeknowledged, it is good between the parties. Vought *v.* Vought, 50 N. J. Eq. 177, 27 Atl. 489. And where the blank is purposely left to enable the taker to write in the grantee's name, and he enters into possession and eontinues as owner, equity regards him as the owner. Vanderbilt *v.* Vanderbilt, 54 How. Pr. (N. Y.) 250. See also Frayer *v.* Holtom, 8 Kan. App. 718, 54 Pac. 918. The grantee may also after delivery insert the name of another for a eonsideration, who will own the fee as against the original grantor (Campbell *v.* Smith, 8 Hun (N. Y.) 6 [*affirmed* in 71 N. Y. 26, 27 Am. Rep. 5]) and the deed is valid where the grantee's name is given in the recital and it is clearly evident that the blank space was left by mistake (Henniges *v.* Paschke, 9 N. D.

filled by a person having authority to do so before the deed is actually delivered by the grantor.[12]

c. Recitals. An erroneous recital does not affect the operation of the deed.[13] So if the recitals show more land than is intended to be conveyed the deed is not void but is good as far as it is correct.[14] If the recital is incorrect there is no obligation to execute the deed.[15] In case a deed is made in performance of a decree it is good without reciting such decree, where such decree could add nothing to the validity of the conveyance.[16]

d. Consideration.[17] Although a deed ordinarily states the consideration,[18] and the expression of a valuable consideration is essential to a deed of bargain and sale,[19] yet a conveyance may be operative and of binding effect even though the consideration is not expressed therein.[20] Nor need the amount of the con-

489, 84 N. W. 350, 81 Am. St. Rep. 588. And see Fletcher *v.* Mansur, 5 Ind. 267).

An objection that the grantee's name was inserted after delivery cannot be made by one not claiming through or in right of the grantor. McNab *v.* Young, 81 Ill. 11.

Where one claiming to have a purchaser fraudulently obtains possession of the deed on the pretense of examining it and inserts a grantee's name in the blank, such grantee obtains no title. Golden *v.* Hardesty, 93 Iowa 622, 61 N. W. 613.

12. *Illinois.*— Mickey *v.* Barton, 194 Ill. 446, 62 N. E. 802.

Kansas.— El Dorado Exch. Nat. Bank *v.* Fleming, 63 Kan. 139, 65 Pac. 213.

Missouri.— Thummel *v.* Holden, 149 Mo. 677, 51 S. W. 404; Farmers' Bank *v.* Worthington, 145 Mo. 91, 46 S. W. 745.

Pennsylvania.—Bell *v.* Kennedy, 100 Pa. St. 215.

Texas.— Schleicher *v.* Runge, (Civ. App. 1896) 37 S. W. 982.

United States.— Allen *v.* Withrow, 110 U. S. 119, 3 S. Ct. 517, 28 L. ed. 90.

See 16 Cent. Dig. tit. "Deeds," § 64; and *infra*, III, G, 1, b.

An agent of the grantor with whom a deed executed in blank has been left with authority to fill out the blanks before delivery may by so doing render the deed effective. McClung *v.* Steen, 32 Fed. 373. See Adamson *v.* Hartman, 40 Ark. 58; Wilkins *v.* Tourtellott, 28 Kan. 825.

Where a blank was not filled in for seven years by the equitable grantee authorized to fill in any person's name, the legal title is vested in the grantee, except as to a portion of the land sold to one without notice of the deed. McClain *v.* McClain, 52 Iowa 272, 3 N. W. 60.

13. Hattan *v.* Dew, 7 N. C. 260. So if the recital as to the parties differs from the remaining parts of the deed, but agrees with the acknowledgment, it controls sufficiently to pass title with respect to said parties. Hawkins *v.* Gould, 3 Harr. & J. (Md.) 243.

Recital as to capacity to execute.— Where a grantor has power to execute a deed so that it is valid, an erroneous recital as to the capacity in which she executes it does not alter its validity. Williams *v.* Hardie, (Tex. Civ. App. 1892) 21 S. W. 267.

14. Hawkins *v.* Hudson, 45 Ala. 482.

15. Hartley *v.* Burton, L. R. 3 Ch. 365, 16 Wkly. Rep. 876.

16. Games *v.* Dunn, 14 Pet. (U. S.) 322, 10 L. ed. 476.

17. As to necessity of consideration see *supra*, III, E, 1.

18. A statement of a valuable consideration is of service, because a court of equity in respect to contracts concerning lands acts on valuable considerations and representations. Leonard *v.* Springer, 98 Ill. App. 530.

Specifying a valuable consideration in a deed does not preclude the determination by the jury of the question whether it is real or fictitious, where creditors' rights are concerned. Doe *v.* Hatfield, 4 N. Brunsw. 122. See also Doe *v.* Nevers, 18 N. Brunsw. 627.

19. Okison *v.* Patterson, 1 Watts & S. (Pa.) 395.

An instrument is void which grants to a certain person a lot to use or dispose of as may seem best to him, without reciting any consideration. Stafford *v.* Lick, 10 Cal. 12.

A pecuniary consideration mentioned in the first part of a deed of bargain and sale extends to any land conveyed in the deed to the person who paid the consideration. Jones *v.* Ruffin, 14 N. C. 404.

If the statute makes price essential to a contract of sale, a deed which expresses the consideration as "good conduct," and "as a payment" for "good services," does not sufficiently state the price. Kleinpeter *v.* Harrigan, 21 La. Ann. 196.

20. Goad *v.* Moulton, 67 Cal. 536, 8 Pac. 63; Ruth *v.* Ford, 9 Kan. 17; Boynton *v.* Rees, 8 Pick. (Mass.) 329, 19 Am. Dec. 326; Jackson *v.* Dillon, 2 Overt. (Tenn.) 261.

In case of a covenant to stand seized to uses, a consideration of blood and affection need not be named in the deed. It is sufficient if it can be inferred from the relation of the parties. French *v.* French, 3 N. H. 234.

A quitclaim deed without a valuable consideration expressed in it is valid as between the parties. Rogers *v.* Hillhouse, 3 Conn. 398.

An omission to recite the consideration of a transfer indorsed on a deed does not make it ineffective to convey title if otherwise sufficient. Tutt *v.* Morgan, (Tex. Civ. App. 1898) 46 S. W. 122.

Receipt attached.— A deed is good if there is a receipt for the amount of the considera-

sideration of the conveyance be stated in the conveyance in order to make it a valid one and pass the title.[21]

e. Operative Words. The thing and the estate granted may be granted either by words contained in the premises or in the *habendum* and *tenendum*,[22] and, although there are no words of grant in the premises, yet if from the other operative words of the deed the intent to pass a fee is manifest the deed is sufficient.[23] Certain technical words are, however, generally used to pass the interest intended to be conveyed, although other equivalent words may be sufficient.[24] It has also

tion subjoined. Hartley *v.* McAnulty, 4 Yeates (Pa.) 95, 2 Am. Dec. 396.

Under the Mexican law, before the acquisition of California by the United States, it was not necessary that a deed express a consideration in order to pass title to the premises. Schmitt *v.* Giovanari, 43 Cal. 617; De Merle *v.* Mathews, 26 Cal. 455; Havens *v.* Dale, 18 Cal. 359.

21. Lowry *v.* Harvard, 35 Ind. 170, 9 Am. Rep. 676.

In a deed of bargain and sale the amount of the consideration need not be stated (Okison *v.* Patterson, 1 Watts & S. (Pa.) 395), although a purchaser is not bound to accept such a deed where there is a blank left for the amount, even though the grantors have authorized an agent to fill the blank (Moore *v.* Bickham, 4 Binn. (Pa.) 1).

Where there is an expressed consideration of money, but the amount is left blank, such amount is of no importance in a deed which by the terms thereof may operate either as a feoffment or a bargain and sale. Wortman *v.* Ayles, 12 N. Brunsw. 63.

Words in a deed "a certain sum of money in hand paid" are sufficient, without stating the amount. Jackson *v.* Schoonmaker, 2 Johns. (N. Y.) 230.

22. Kenworthy *v.* Tullis, 3 Ind. 96.

23. Bridge *v.* Wellington, 1 Mass. 219.

Any language showing an intent to convey or mortgage is sufficient. Horton *v.* Murden, 117 Ga. 72, 43 S. E. 786.

24. *Alabama.*— Magee *v.* Fisher, 8 Ala. 320, "indenture," "covenant," "demise," "and to farm let," usually found in deeds, are not technical.

California.— Schmitt *v.* Giovanari, 43 Cal. 617 (Spanish word "cedo" was sufficient before acquisition of California by the United States, to pass title to land); San Francisco, etc., R. Co. *v.* Oakland, 43 Cal. 502 ("grant" is a generic term applicable to the transfer of all classes of real property, and is sufficient to convey an estate in a corporeal hereditament).

Illinois.— Johnson *v.* Filson, 118 Ill. 219, 8 N. E. 318, the words "I . . . have this day bargained, and do grant, bargain, sell, and confirm" are adequate.

Iowa.— Pierson *v.* Armstrong, 1 Iowa 282, 63 Am. Dec. 440, "give" will pass real estate in a deed of gift. "Have granted" is as good as "do hereby grant."

Kentucky.— Patterson *v.* Carneal, 3 A. K. Marsh. 618, 13 Am. Dec. 208, the word "convey" amounts to a grant and passes title.

Mississippi.— Fairley *v.* Fairley, 34 Miss. 18, "give, grant, and release" amount to an estoppel, if not to a conveyance.

New Hampshire.— Pray *v.* Great Falls Mfg. Co., 38 N. H. 442 ("embraces," in a clause, "embraces all the mill privileges," is not a term of grant so as to include a mill privilege not included in the land conveyed by metes and bounds); Hutchins *v.* Carleton, 19 N. H. 487 (the words "assign and make over" are sufficient to pass a freehold); Gordon *v.* Haywood, 2 N. H. 402 ("quit" is tantamount to "sell" or "release," and will pass the land).

New York.— Lynch *v.* Livingston, 6 N. Y. 422 ("remise, release and quitclaim," to a grantee not in possession, are effectual as words of bargain and sale); Pickert *v.* Windecker, 73 Hun 476, 26 N. Y. Suppl. 437 (the words "sell, set over, transfer, and assign all his right, title, and interest" are sufficient to convey a contingent remainder); Jackson *v.* Root, 18 Johns. 60 (words "I hereby make over and confirm unto them and their heirs" are sufficient to raise a use and to convey to the bargainee in fee); Jackson *v.* Alexander, 3 Johns. 484, 3 Am. Dec. 517 ("make over and transfer" pass lands by way of bargain and sale).

Oregon.— Lambert *v.* Smith, 9 Oreg. 185, "convey" is equivalent to "grant."

South Carolina.— Folk *v.* Varn, 9 Rich. Eq. 303, where property is to "go to" others in a certain event, it is a sufficient conveyance on the happening of the event.

South Dakota.—Evenson *v.* Webster, 3 S. D. 382, 53 N. W. 747, 44 Am. St. Rep. 802, "give" may be substituted where the word "grant" or other terms used in conveyancing land are omitted, and the instrument will be valid under Comp. Laws, § 3247.

Texas.— Threadgill *v.* Bickerstaff, 87 Tex. 520, 29 S. W. 757, the words, I "hereby relinquish unto the said" assignee "all the privileges thereunto belonging," gives to the assignee all the right of a locator in land, the latter being the grantor or the assignor.

Virginia.— Harman *v.* Stearns, 95 Va. 58, 27 S. E. 601.

West Virginia.— Chapman *v.* Charter, 46 W. Va. 769, 34 S. E. 768, "convey" is equivalent in effect to "grant," under a statute suggesting a general form for a deed to convey the grantor's interest.

England.— Shove *v.* Pincke, 5 T. R. 124, 310 (the words "limit and appoint" may pass reversion); Bernard *v.* Winchester, Lofft 401, 2 W. Bl. 936, 3 Wils. C. P. 458, 485 ("exchange" is necessary for an instrument to operate as an exchange). See also Beard *v.* Westcott, 5 B. & Ald. 801, 7 E. C. L. 435, 5

been held that, so long as creditors and *bona fide* purchasers are not defrauded, any words signifying an intention to sell or give land will pass the title.[25] If a specific purpose is intended, comprehending a beneficial use and enjoyment, words which describe that purpose will be sufficient.[26]

f. Description of Property[27]— (i) *Sufficiency in General.* Courts are not inclined to insist upon that accuracy of description in deeds *inter partes* as is required in sheriff's deeds or other transfers of property *in invitum*.[28] A deed, however, to be operative must contain some description or designation of the land intended to be conveyed.[29] A conveyance is also presumed to be made with reference to the state or condition of the premises at the time, and if the description is sufficient when made no subsequent change in conditions can invalidate it.[30]

(ii) *General Rules and Principles.* The want of a description of the subject-matter, so as to denote upon the instrument what it is in particular, or of a reference to something else which will render it certain, is a defect which makes the deed wholly inoperative.[31] A conveyance is also void if the description therein is too vague and uncertain;[32] but to have this effect the ambiguity must

Taunt. 393, 1 E. C. L. 206, 24 Rev. Rep. 553; Brundenell *v.* Elwes, 1 East 442, 7 Ves. Jr. 382, 6 Rev. Rep. 310, 32 Eng. Reprint 155.

Canada.— Hjorth *v.* Smith, 5 Brit. Col. 369; Doe *v.* Jardine, 2 N. Brunsw. 142, "remise, release, and quitclaim" is a good conveyance.

See 16 Cent. Dig. tit. "Deeds," § 56.

Words of grant or transfer are necessary. Webb *v.* Mullins, 78 Ala. 111; Hummelman *v.* Mounts, 87 Ind. 178; McKinney *v.* Settles, 31 Mo. 541; Brown *v.* Manter, 21 N. H. 528, 53 Am. Dec. 223.

The words "do hereby release, demise, and forever quitclaim" are sufficient to constitute a quitclaim to the grantee, his heirs and assigns. Brady *v.* Spurck, 27 Ill. 478; McConnel *v.* Reed, 5 Ill. 117, 38 Am. Dec. 124. See also Rowe *v.* Beckett, 30 Ind. 154, 95 Am. Dec. 676.

25. Pierson *v.* Armstrong, 1 Iowa 282, 63 Am. Dec. 440.

26. Johnson *v.* Rayner, 6 Gray (Mass.) 107.

27. As to sufficiency of description in executory contract to convey see VENDOR AND PURCHASER.

28. Carter *v.* Holman, 60 Mo. 498.

29. Wilson *v.* Johnson, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930; Bailey *v.* White, 41 N. H. 337.

30. Sengfelder *v.* Hill, 21 Wash. 371, 58 Pac. 250.

31. Ken *v.* Robeson, 40 N. C. 373. See also Brice *v.* Sheffield, 118 Ga. 128, 44 S. E. 843.

32. *California.*— Brandon *v.* Leddy, 67 Cal. 43, 7 Pac. 33; People *v.* Klumpke, 41 Cal. 263.

Georgia.— Huntress *v.* Portwood, 116 Ga. 351, 42 S. E. 513.

Illinois.— Carter *v.* Barnes, 26 Ill. 454.

Iowa.— Boyd *v.* Ellis, 11 Iowa 97; Glenn *v.* Malony, 4 Iowa 314.

Kansas.— Hamilton *v.* Ogee, 10 Kan. App. 241, 62 Pac. 708.

Massachusetts.— Worthington *v.* Hylyer, 4 Mass. 196.

Missouri.— Campbell *v.* Johnson, 44 Mo. 247; Holme *v.* Strautman, 35 Mo. 293.

New York.— Jackson *v.* Ransom, 18 Johns. 107.

North Carolina.—Deaver *v.* Jones, 114 N. C. 649, 19 S. E. 637; Proctor *v.* Pool, 15 N. C. 670.

Texas.— Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769; Herman *v.* Likens, (Civ. App. 1896) 37 S. W. 981.

See 16 Cent. Dig. tit. "Deeds," § 65.

If the deed makes clear what is granted it is not void for uncertainty. Pearse *v.* Owens, 3 N. C. 234.

That landmarks have become so obliterated by the lapse of time that the land cannot be located does not make a deed void for uncertainty. Nixon *v.* Porter, 34 Miss. 697, 69 Am. Dec. 408.

Uncertainty in starting-point.—A deed may be void for uncertainty in the place of the beginning of the boundaries (Pry *v.* Pry, 109 Ill. 466; Mann *v.* Taylor, 49 N. C. 272, 69 Am. Dec. 750); but a valid deed may be made without stating any natural object as being the beginning of its first line, if there be a boundary at the termination thereof (Wilson *v.* Inloes, 6 Gill (Md.) 121). The description will, however, be sufficient if such starting-point can be reasonably identified (Douthit *v.* Robinson, 55 Tex. 69) or ascertained from the entire description (Holston *v.* Needles, 115 Ill. 461, 5 N. E. 530; Chiniquy *v.* Chicago Catholic Bishop, 41 Ill. 148) or established by extrinsic evidence (Allen *v.* Sallinger, 108 N. C. 159, 12 S. E. 896); and in case of doubtful initial points, if one only will fit the description so as to cover the land that one will be sufficient (Wilkins *v.* Tourtellott, 28 Kan. 825).

Where only "a stake" fixes the beginning and all the corners, the deed is invalid. Barker *v.* Southern R. Co., 125 N. C. 596, 34 S. E. 701, 74 Am. St. Rep. 658.

Deeds not void for uncertainty of description.— *Indiana.*— Dale *v.* Travelers' Ins. Co., 89 Ind. 473.

Maine.— Carter *v.* Clark, 92 Me. 225, 42 Atl. 398; Day *v.* Hooper, 51 Me. 178.

Mississippi.— Jenkins *v.* Bodley, Sm. & M. Ch. 338.

appear on the face of the instrument.[33] The office of a description, however, is not to identify the land but to afford the means of identification, and when this is done it is sufficient.[34] Generally therefore any description is sufficient by which the identity of the premises can be established.[35] A conveyance is also good, if the description can be made certain within the terms of the instrument,[36] for the maxim, *id certum est quod certum reddi potest*, applies.[37] Extrinsic facts pointed out in the description may also be resorted to to ascertain the land conveyed,[38] and the property may be identified by extrinsic evidence, as in the case of records of the county where the land is situate.[39] Again where all the particulars in a description are essential, the description in the deed must agree with every particular or nothing will pass; but where they are not all essential, and it does not so agree, yet if there is sufficient to identify the estate granted the deed will be good.[40] If part of the description is proven inconsistent on being applied to the premises it does not vitiate the deed, the interest being apparent.[41]

(III) *Manner of Designation.* The property intended to be conveyed may be designated by the descriptive name of the tract[42] by which it is generally known,[43] or well known,[44] or can be identified,[45] or where there is no other tract

New York.— Pope *v.* Levy, 54 N. Y. App. Div. 495, 66 N. Y. Suppl. 1028; Ne-Ha-Sa-Ne Park Assoc. *v.* Lloyd, 25 Misc. 207, 55 N. Y. Suppl. 108.

Texas.— Knowles *v.* Torbitt, 53 Tex. 557; Mass *v.* Bromberg, 28 Tex. Civ. App. 145, 66 S. W. 468.

33. Campbell *v.* Johnson, 44 Mo. 247. See also Isaac *v.* Clarke, 2 Gill (Md.) 11.

34. Works *v.* State, 120 Ind. 119, 22 N. E. 127.

35. Stevens *v.* Wait, 112 Ill. 544; English *v.* Roche, 6 Ind. 62; Berry *v.* Wright, 14 Tex. 270; Gates *v.* Paul, 117 Wis. 170, 94 N. W. 55.

If a surveyor can locate the land from the description it is sufficient. Campbell *v.* Carruth, 32 Fla. 264, 13 So. 432; Smiley *v.* Fries, 104 Ill. 416; Pennington *v.* Flock, 93 Ind. 378; Oxford *v.* White, 95 N. C. 525.

If the description affords sufficient means of ascertaining and identifying the land intended to be conveyed it is sufficient. Armijo *v.* New Mexico Town Co., 3 N. M. 244, 5 Pac. 709.

If what the grantor intended to convey is shown so as to make its identification practicable the description is sufficient. Andrews *v.* Murphy, 12 Ga. 431.

36. Tucker *v.* Allen, 16 Kan. 312. See also Horton *v.* Murden, 117 Ga. 72, 43 S. E. 786.

37. Rutland R. Co. *v.* Chaffee, 71 Vt. 84, 42 Atl. 984, 48 Atl. 699. See also Armstrong *v.* Mudd, 10 B. Mon. (Ky.) 144, 50 Am. Dec. 545; Lohff *v.* Germer, 37 Tex. 578; Camley *v.* Stanfield, 10 Tex. 546, 60 Am. Dec. 219; Miller *v.* Mann, 55 Vt. 475.

Uncertainty is immaterial if the premises can be identified by means of the description in connection with other conveyances, plats, lines, or records well known in the neighborhood or on file in public offices. Pittsburgh, etc., R. Co. *v.* Beck, 152 Ind. 421, 53 N. E. 439.

38. Travellers' Ins. Co. *v.* Yount, 98 Ind. 454. See also Fudicker *v.* East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024.

39. Pierson *v.* Sanger, (Tex. Sup. 1899) 53 S. W. 1012 [*reversing* (Civ. App. 1899) 51 S. W. 869]. See also McWhirter *v.* Allen, 1 Tex. Civ. App. 649, 20 S. W. 1007.

If the land can be identified by parol the deed is not void. Adkins *v.* Moran, 67 Mo. 100; Shewalter *v.* Pirner, 55 Mo. 218.

Where land is described by the number of acres, grant, and county, without other description, and the grantor owned at the date of the grant that or a less number of acres the deed will be sufficient to pass the land, such facts being shown. Blackburn *v.* McDonald, 1 Tex. Unrep. Cas. 355.

40. Roberts *v.* Grace, 16 Minn. 126.

Land will pass, although it does not agree with some of the particulars, if the description be sufficient to ascertain the land intended to be conveyed. Lyman *v.* Loomis, 5 N. H. 408.

41. Hull *v.* Fuller, 7 Vt. 100.

42. Borchard *v.* Eastwood, (Cal. 1901) 65 Pac. 1047; Murray *v.* Tulare Irr. Co., 120 Cal. 311, 49 Pac. 563, 52 Pac. 586; Gwynn *v.* Thomas, 2 Gill & J. (Md.) 420; Vaughan *v.* Swayzie, 56 Miss. 704. See also Whitney *v.* Buckman, 13 Cal. 536.

A deed is not necessarily void where the land is described by a general name or designation. Tucker *v.* Field, 51 Miss. 191.

43. Murray *v.* Tulare Irr. Co., 120 Cal. 311, 49 Pac. 563, 52 Pac. 586; Charles *v.* Patch, 87 Mo. 450.

Where there is no proof that any particular portion of the land was known by the name given the description is too indefinite. McGlawhorn *v.* Worthington, 98 N. C. 199, 3 S. E. 633.

44. Haley *v.* Amestoy, 44 Cal. 132; Tetherow *v.* Anderson, 63 Mo. 96.

Description by metes and bounds is not necessary, where the premises are well known by name. Lennig *v.* White, (Va. 1894) 20 S. E. 831.

45. Trentman *v.* Neff, 124 Ind. 503, 24 N. E. 895; Coleman *v.* Manhattan Beach Imp. Co., 94 N. Y. 229 [*affirming* 26 Hun 525]. See also Enfala Nat. Bank *v.* Pruett, 128 Ala. 470, 30 So. 731.

of the same name in that locality,[46] even though there are defects in other parts of the description.[47] The designation may also be by name and number, which can be identified,[48] by a specific number,[49] by figures and abbreviations,[50] or by specifying sections, including subdivisions or fractional parts thereof, the ranges, townships, and relative points of the compass for identification.[51] Again the land conveyed may be described as bounded by natural or artificial objects,[52] as adjoining lands of certain persons or near a certain place,[53] as being all of the grantor's

If the designation is by name, coupled with reference to other papers, and the land is not located, and it does not appear with certainty what is intended to be conveyed, the deed is void. Blessing *v.* House, 3 Gill & J. (Md.) 290.

"Lot 36 in the town of Webb" is sufficiently certain in a trust deed, where it can be identified by other matter in the deed and acknowledgment. Wilkinson *v.* Webb, 75 Miss. 403, 23 So. 180.

46. Murray *v.* Tulare Irr. Co., 120 Cal. 311, 49 Pac. 563, 52 Pac. 586; Paroni *v.* Ellison, 14 Nev. 60; Harkey *v.* Cain, 69 Tex. 146, 6 S. W. 637; Burchard *v.* Record, (Tex. 1891) 17 S. W. 241.

47. Murray *v.* Tulare Irr. Co., 120 Cal. 311, 49 Pac. 563, 52 Pac. 586.

48. Stanley *v.* Green, 12 Cal. 148.

49. Smith *v.* Wilson, 99 Ga. 276, 25 S. E. 637.

50. Harrington *v.* Fish, 10 Mich. 415; Dupree *v.* Frank, (Tex. Civ. App. 1897) 39 S. W. 988.

51. *Alabama.*— Bromberg *v.* Smee, 130 Ala. 601, 30 So. 483; Scheuer *v.* Kelly, 121 Ala. 323, 26 So. 4; Cottingham *v.* Hill, 119 Ala. 353, 24 So. 552, 72 Am. St. Rep. 904.

Arkansas.— Walker *v.* David, 68 Ark. 544, 60 S. W. 418.

Illinois.— Evans *v.* Gerry, 174 Ill. 595, 51 N. E. 615; Hayden *v.* McCloskey, 161 Ill. 351, 43 N. E. 1091.

Iowa.— Egan *v.* Fountain (1899) 78 N. W. 912.

Mississippi.— McCready *v.* Landsdale, 58 Miss. 877.

Nebraska.— De Long *v.* Olsen, 63 Nebr. 327, 88 N. W. 512.

New York.— Wallace *v.* Curtis, 29 Misc. 415, 61 N. Y. Suppl. 994.

Wisconsin.— Mendota Club *v.* Anderson, 101 Wis. 479, 78 N. W. 185.

Canada.— Abell *v.* McLaren, 13 Manitoba L. Rep. 463.

A deed is void which describes land as three and five hundredths acres of unplatted land in an addition to G, situated on the east side of the southwest one fourth of the southwest one fourth of section 28, township 9 south, of range 20 west. Cooper *v.* Newton, 68 Ark. 150, 56 S. W. 867.

There is no objection in a deed to the phrase "the south one-fourth" or "the south 10 acres" of a government subdivision. McCartney *v.* Dennison, 101 Cal. 252, 35 Pac. 766.

52. *California.*— Havens *v.* Dale, 18 Cal. 359; Stanley *v.* Green, 12 Cal. 148.

Georgia.— Parker *v.* Salmons, 101 Ga. 160, 28 S. E. 681, 65 Am. St. Rep. 291.

Illinois.— Smiley *v.* Fries, 104 Ill. 416.

Indiana.— Pence *v.* Armstrong, 95 Ind. 191.

Louisiana.— Bryan *v.* Wisner, 44 La. Ann. 832, 11 So. 290.

Maine.— Cilley *v.* Childs, 73 Me. 130.

Massachusetts.— Ward *v.* Bartholomew, 6 Pick. 409.

Michigan.— Des Jardins *v.* Thunder Bay River Boom Co., 95 Mich. 140, 54 N. W. 718.

Missouri.— Coe *v.* Ritter, 86 Mo. 277; Burnam *v.* Banks, 45 Mo. 349.

Pennsylvania.— Twibill *v.* Lombard St., etc., Pass. R. Co., 3 Pa. Super. Ct. 487, 40 Wkly. Notes Cas. 134.

Texas.— Norton *v.* Conner, (Sup. 1890) 14 S. W. 193; Nye *v.* Moody, 70 Tex. 434, 8 S. W. 606.

Wisconsin.— Coats *v.* Taft, 12 Wis. 388.

United States.— Cox *v.* Hart, 145 U. S. 376, 12 S. Ct. 962, 36 L. ed. 741; U. S. *v.* Peralta, 19 How. 343, 15 L. ed. 678; Winnipisiogee Paper Co. *v.* New Hampshire Land Co., 59 Fed. 542.

See 16 Cent. Dig. tit. "Deeds," § 79.

Failure to name the meridian from which the township and range were numbered will not invalidate, as the courts take judicial notice of the meridian. Harrington *v.* Goldsmith, 136 Cal. 168, 68 Pac. 594.

If the land is incapable of identification from such boundaries and no other means of ascertainment are afforded the deed will be inoperative. Holley *v.* Curtis, 3 How. (Miss.) 230; Holmes *v.* Sapphire Valley Co., 121 N. C. 410, 28 S. E. 545; Coker *v.* Roberts, 71 Tex. 597, 9 S. W. 665; Hartshorn *v.* Wright, 11 Fed. Cas. No. 6,169, Pet. C. C. 64; Le Franc *v.* Richmond, 15 Fed. Cas. No. 8,209, 5 Sawy. 601.

53. Hanly *v.* Blackford, 1 Dana (Ky.) 1, 25 Am. Dec. 114 (adjoining land of vendee); Simpson *v.* Blaisdell, 85 Me. 199, 27 Atl. 101, 35 Am. St. Rep. 348 ("near or at"); Webb *v.* Cummings, 127 N. C. 41, 37 S. E. 154 (on the east side of a certain tract); McGlawhorn *v.* Worthington, 98 N. C. 199, 3 S. E. 633 (adjoining); Hinton *v.* Roach, 95 N. C. 106 (adjoining); Harris *v.* Ewing, 21 N. C. 369 (bounded by land of another, although he had no title); Swiney *v.* Swiney, 14 Lea (Tenn.) 316 ("two tracts adjoining . . . on which I now reside").

For uncertainty of such description see the following cases:

Indiana.— Lewis *v.* Owen, 64 Ind. 446.

Minnesota.— Roberts *v.* Grace, 16 Minn. 126.

Missouri.— Bell *v.* Dawson, 32 Mo. 79.

North Carolina.—Harrell *v.* Butler, 92 N. C. 20; Dickens *v.* Barnes, 79 N. C. 490.

property or interest,[54] as his interest in an estate,[55] as being land formerly owned by or granted to a certain person,[56] as owned in common with another,[57] or as occupied by or granted to the grantor.[58]

(iv) *Conveyance of Part of Tract.* If there is a conveyance of part of the tract, such part must be so distinguished as that it may be definitely ascertained and identified.[59]

Virginia.— George *v.* Bates, 90 Va. 839, 20 S. E. 828.

54. *California.*—Pettigrew *v.* Dobbelaar, 63 Cal. 396; Frey *v.* Clifford, 44 Cal. 335; De Levillain *v.* Evans, 39 Cal. 120.

Colorado.— Blair *v.* Bruns, 8 Colo. 397, 8 Pac. 569.

Louisiana.— *Compare* Pargoud *v.* Pace, 10 La. Ann. 613.

Maine.— Maker *v.* Lazell, 83 Me. 562, 22 Atl. 474, 23 Am. St. Rep. 795; Bird *v.* Bird, 40 Me. 398; Field *v.* Huston, 21 Me. 69.

Massachusetts.— Fitzgerald *v.* Libby, 142 Mass. 235, 7 N. E. 917. *Compare* Ingell *v.* Nooney, 2 Pick. 362, 13 Am. Dec. 434.

Mississippi.— Harmon *v.* James, 7 Sm. & M. 111, 45 Am. Dec. 296.

Missouri.— State Bank *v.* Bates, 17 Mo. 583. See also Attleboro First Nat. Bank *v.* Hughes, 10 Mo. App. 7.

Nevada.— Brown *v.* Warren, 16 Nev. 228.

North Carolina.— Carson *v.* Ray, 52 N. C. 609, 78 Am. Dec. 267.

Ohio.— Stambaugh *v.* Smith, 23 Ohio St. 584.

South Carolina.— Sally *v.* Gunter, 13 Rich. 72; Brown *v.* Wood, 6 Rich. Eq. 155.

Texas.— Curdy *v.* Stafford, 88 Tex. 120, 30 S. W. 551 [*reversing* (Civ. App. 1895) 28 S. W. 1011, 27 S. W. 823]; Brigham *v.* Thompson, 12 Tex. Civ. App. 562, 34 S. W. 358. See also Harvey *v.* Edens, 69 Tex. 420, 6 S. W. 306.

United States.— *Compare* Stafford Nat. Bank *v.* Sprague, 17 Fed. 784, 21 Blatchf. 473.

See 16 Cent. Dig. tit. "Deeds," § 75.

55. *Indiana.*— Barnes *v.* Bartlett, 47 Ind. 98.

Maine.— Patterson *v.* Snell, 67 Me. 559.

Massachusetts.— Butrick *v.* Tilton, 141 Mass. 93, 6 N. E. 563.

Michigan.— Huron Land Co. *v.* Robarge, 128 Mich. 686, 87 N. W. 1032; Austin *v.* Dolbec, 101 Mich. 292, 59 N. W. 608.

Mississippi.— Stewart *v.* Cage, 59 Miss. 558.

North Carolina.— Walker *v.* Moses, 113 N. C. 527, 18 S. E. 339; Moses *v.* Peak, 48 N. C. 520.

Ohio.— Barton *v.* Morris, 15 Ohio 408.

Tennessee.— McGavock *v.* Deery, 1 Coldw. 265.

Texas.— Hermann *v.* Likens, 90 Tex. 448, 39 S. W. 282 [*reversing* (Civ. App. 1896) 37 S. W. 981]; Vineyard *v.* O'Connor, 90 Tex. 59, 36 S. W. 424; Smith *v.* Westall, 76 Tex. 509, 13 S. W. 540; McCoy *v.* Pease, 19 Tex. Civ. App. 657, 48 S. W. 208; Harris *v.* Broiles, (Civ. App. 1893) 22 S. W. 421.

Compare Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356; Buckley *v.* Jones, 79 Miss. 1, 29 So. 1000; Munnink *v.* Jung, 3 Tex. Civ. App. 395, 22 S. W. 293.

See 16 Cent. Dig. tit. "Deeds," § 75.

Widow's right to the homestead under statute is not conveyed by the words "All of my property of whatsoever kind and wheresoever situated." *In re* King, (Cal. 1894) 36 Pac. 806.

56. *Illinois.*— Choteau *v.* Jones, 11 Ill. 300, 50 Am. Dec. 460.

Indiana.— Dunn *v.* Touscy, 80 Ind. 288.

Missouri.— Hogan *v.* Page, 22 Mo. 55.

Ohio.— McChesney *v.* Wainwright, 5 Ohio 452.

Texas.— Gresham *v.* Chambers, 80 Tex. 544, 16 S. W. 326; Smith *v.* Chatham, 14 Tex. 322; Mardez *v.* Meyers, 8 Tex. Civ. App. 542, 28 S. W. 693.

Virginia.— Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232.

See 16 Cent. Dig. tit. "Deeds," § 76.

57. Jeffers *v.* Radcliff, 10 N. H. 242.

58. Follendore *v.* Follendore, 110 Ga. 359, 35 S. E. 676; Brown *v.* Oldham, 123 Mo. 621, 27 S. W. 409; Slack *v.* Dawes, 3 Tex. Civ. App. 520, 22 S. W. 1053.

A description of land as that on which the grantor lives, stating the quantity and general location, is a sufficient description, there being no other land in the neighborhood belonging to the grantor, although a deed to which the grantor refers for a more particular description never was in fact executed. Smith *v.* Greaves, 15 Lea (Tenn.) 459.

59. *Alabama.*— Louisville, etc., R. Co. *v.* Boykin, 76 Ala. 560; Wilkinson *v.* Roper, 74 Ala. 140.

Arkansas.— Adams *v.* Edgerton, 48 Ark. 419, 3 S. W. 628; Howell *v.* Rye, 35 Ark. 470.

California.— Thompson *v.* Southern California Motor Road Co., 82 Cal. 497, 23 Pac. 130; Hall *v.* Shotwell, 66 Cal. 379, 5 Pac. 683; Speet *v.* Gregg, 51 Cal. 198; Mesick *v.* Sunderland, 6 Cal. 294; Lick *v.* O'Donnell, 3 Cal. 59, 58 Am. Dec. 383.

Georgia.— Gress Lumber Co. *v.* Coody, 94 Ga. 519, 21 S. E. 217.

Illinois.— Holston *v.* Needles, 115 Ill. 461, 5 N. E. 530; Colcord *v.* Alexander, 67 Ill. 581.

Indiana.— Burrow *v.* Terre Haute, etc., R. Co., 107 Ind. 432, 8 N. E. 167; Shoemaker *v.* McMonigle, 86 Ind. 421; Dawson *v.* James, 64 Ind. 162; Buchanan *v.* Whitham, 36 Ind. 257.

Iowa.— Soukup *v.* Union Invest. Co., 84 Iowa 448, 51 N. W. 167, 35 Am. St. Rep. 317; Barlow *v.* Chicago, etc., R. Co., 29 Iowa 276; Bosworth *v.* Farenholz, 3 Iowa 84.

Kansas.— Denver, etc., R. Co. *v.* Lockwood, 54 Kan. 586, 38 Pac. 794.

Maine.— Webber *v.* Webber, 6 Me. 127.

(v) *Conveyance of Platted Lots.* Platted lots may be conveyed by numbers corresponding with those of a township survey;[60] or the corners may be given and the lots run out according to the plan of the tract, even though the lots are not laid off upon the ground;[61] or the corner of a certain lot may be given as a beginning, thence giving also courses and distances, with metes and bounds.[62]

(vi) *Excepting Part of Tract.* The exception of land out of that described will operate as a conveyance of that remaining[63] where the land is capable of identification.[64] But a deed is void if the excepted land cannot be located[65] or if there is no evidence of what particular part is excepted.[66] A grant is not, however, necessarily vitiated because of the invalidity of an attempted reservation,[67] nor because of an ambiguity in the exception.[68] It has also been

Massachusetts.— Small *v.* Jenkins, 16 Gray 155.

Michigan.— Hoban *v.* Cable, 102 Mich. 206, 60 N. W. 466.

Minnesota.— McRoberts *v.* McArthur, 62 Minn. 310, 64 N. W. 903.

Mississippi.— Goodbar *v.* Dunn, 61 Miss. 618; Enochs *v.* Miller, 60 Miss. 19; Selden *v.* Coffee, 55 Miss. 41.

Missouri.— Smith *v.* Nelson, 110 Mo. 552, 19 S. W. 734; Jones *v.* Carter, 56 Mo. 403; Clemens *v.* Rannells, 34 Mo. 579; Vasquez *v.* Richardson, 19 Mo. 96; Hart *v.* Rector, 7 Mo. 531.

New Hampshire.— Bean *v.* Thompson, 19 N. H. 290, 49 Am. Dec. 154; Great Falls Co. *v.* Worster, 15 N. H. 412; Canning *v.* Pinkham, 1 N. H. 353.

North Carolina.— Warren *v.* Makeley, 85 N. C. 12.

Ohio.— Longworth *v.* U. S. Bank, Wright 51.

Pennsylvania.— Miller *v.* Smith, 33 Pa. St. 386.

Tennessee.— Savage *v.* Gaut, (Ch. App. 1900) 57 S. W. 170.

Texas.— Bassett *v.* Sherrod, 13 Tex. Civ. App. 327, 35 S. W. 312; Linnartz *v.* McCulloch, (Civ. App. 1893) 27 S. W. 279.

Wisconsin.— Morse *v.* Stoekman, 73 Wis. 89, 40 N. W. 679; Jenkins *v.* Sharpf, 27 Wis. 472.

See 16 Cent. Dig. tit. "Deeds," § 70.

Description is insufficient or the deed is void, where it fails to specify the portion or tract out of which the land is to be taken (Hanna *v.* Palmer, 194 Ill. 41, 61 N. E. 1051, 56 L. R. A. 93; Shackleford *v.* Bailey, 35 Ill. 387. See also Blow *v.* Vaughan, 105 N. C. 198, 10 S. E. 891); or does not designate some certain proportionate interest (Munson *v.* Munson, 30 Conn. 425) or quantity (Carter *v.* Barnes, 26 Ill. 454); or does not describe any specific tract (Lancey *v.* Brock, 110 Ill. 609); or does not identify the particular proportionate interest intended (Mutual Bldg., etc., Assoc. *v.* Wyeth, 105 Ala. 639, 17 So. 45. See also Swayze *v.* Doe, 13 Sm. & M. (Miss.) 317); or does not show which fractional part intended is conveyed (Plenny *v.* Ferrill, (Miss. 1892) 11 So. 6); or does not make apparent the intent to convey (Ryan *v.* Wilson, 9 Mich. 262); or where it is impossible to locate a tract of the particular shape specified without including lands previously sold (Dwyre *v.* Speer, 8 Tex. Civ. App. 88, 27 S. W. 585. See also Wofford *v.* McKinna, 23 Tex. 36, 76 Am. Dec. 53).

If land can be rendered certain by the grantee's election to take by definite boundaries consistent with the description it is sufficient. Armstrong *v.* Mudd, 10 B. Mon. (Ky.) 144, 50 Am. Dec. 545.

60. Middlebury College *v.* Cheney, 1 Vt. 336.

A strip of land described as lying between lots with certain numbers will pass, where by locating said numbered lots and by measurements the strip is found, even though said strip has a less frontage than that given in the description which also contained the words "more or less." Schuster *v.* Myers, 148 Mo. 422, 50 S. W. 103.

Subdivided lot may pass by a descriptive number, even though it is the same as the number of the lot out of which it is carved, there being sufficient to identify the sublot as that intended to be conveyed. Bowen *v.* Galloway, 98 Ill. 41.

61. Corbett *v.* Norcross, 35 N. H. 99.

62. Meikel *v.* Greene, 94 Ind. 344.

63. Baker *v.* Clay, 101 Mo. 553, 14 S. W. 734. See also Falls Land, etc., Co. *v.* Chisholm, 71 Tex. 523, 9 S. W. 479.

A deed is sufficient inter partes to convey all the land not previously sold, although the same had been laid off into town lots, with plats recorded, where it conveys "the south-west quarter of the south-east quarter of section twenty-seven," etc., "except what I have heretofore conveyed to divers persons." Cornwell *v.* Thurston, 59 Mo. 156.

64. Henry *v.* Whitaker, 82 Tex. 5, 17 S. W. 509.

65. Dwyre *v.* Speer, 8 Tex. Civ. App. 88, 27 S. W. 585.

66. Zundel *v.* Baldwin, 114 Ala. 328, 21 So. 420.

A deed is insufficient without proof of what part of the tract had been conveyed, where it contains no other description than that all the premises are of a designated tract, not theretofore conveyed by the grantors to a third party. Maier *v.* Joslin, 46 Minn. 228, 48 N. W. 909.

67. Baldwin *v.* Winslow, 2 Minn. 213; Torrey *v.* Thayer, 37 N. J. L. 339.

68. Although an ambiguity in the description of exeepted land may not make the conveyance void (McAllister *v.* Honea, 71 Miss.

determined that the granting part of a deed is not avoided by a defect in the exception.[69]

(VII) *Reference to Other Instruments or Records, Maps, and Plats.* It is not necessary that the description of the land be contained in the body of the deed. It is sufficient if it refers for identification to some other instrument or document, but the description must be contained in the instrument or its reference, express or implied, with such certainty that the locality of the land can be ascertained.[70] This rule applies generally to other deeds sufficiently identified;[71] a mortgage;[72] a sheriff's deed;[73] a patent;[74] recorded deeds;[75] government records;[76] records of the surveyors and of the general land-office;[77] an entry made in an entry-taker's office on a certain date and bearing a certain number;[78] and to a will.[79] The rule has also been held to apply to maps and plats,[80] including

256, 14 So. 264), yet there may be such an ambiguity as that the excepted property cannot be identified, when the deed will be inadmissible in evidence, if unaided by other testimony (Frost *v.* Erath Cattle Co., 81 Tex. 505, 17 S. W. 52, 26 Am. St. Rep. 831).

69. Waugh *v.* Richardson, 30 N. C. 470.

70. Nelson *v.* Brodhack, 44 Mo. 596, 100 Am. Dec. 328.

Instrument referred to may be considered as incorporated in the conveyance as to the description. U. S. Blowpipe Co. *v.* Spencer, 46 W. Va. 590, 33 S. E. 342.

71. *California.*— Saunders *v.* Schmælzle, 49 Cal. 59.

Florida.— Sanders *v.* Ransom, 37 Fla. 457, 20 So. 530.

Iowa.— American Emigrant Co. *v.* Clark, 62 Iowa 182, 17 N. W. 483.

Maryland.— Phelps *v.* Phelps, 17 Md. 120.

Massachusetts.—Dow *v.* Whitney, 147 Mass. 1, 16 N. E. 722; Allen *v.* Bates, 6 Pick. 460.

Mississippi.— Leake *v.* Caffey, (1896) 19 So. 716.

Nebraska.—Rupert *v.* Penner, 35 Nebr. 587, 53 N. W. 598, 17 L. R. A. 824.

New York.— Campbell *v.* Morgan, 68 Hun 490, 22 N. Y. Suppl. 1001.

Texas.— Sage *v.* Clopper, 19 Tex. Civ. App. 502, 48 S. W. 36; Birdseye *v.* Rogers, (Civ. App. 1894) 26 S. W. 841.

Virginia.— Clark *v.* Hutzler, 96 Va. 73, 30 S. E. 469.

West Virginia.— U. S. Blowpipe Co. *v.* Spencer, 46 W. Va. 590, 33 S. E. 342.

See 16 Cent. Dig. tit. "Deeds," § 84.

The deed referred to must be produced to identify property or the conveyance is insufficient to pass title. Hammond *v.* Norris, 2 Harr. & J. (Md.) 130. See also Johnston *v.* Case, 132 N. C. 795, 44 S. E. 617.

72. Key *v.* Ostrander, 29 Ind. 1.

73. Bowles *v.* Beal, 60 Tex. 322.

74. McCulloch County Land, etc., Co. *v.* Whiteford, 21 Tex. Civ. App. 314, 50 S. W. 1042; Vasquez *v.* Texas Loan Agency, (Tex. Civ. App. 1898) 45 S. W. 942.

A deed written on the back of the original patent and referring thereto for a description supplies the want of a definite description by metes and bounds or by number. Charter *v.* Graham, 56 Ill. 19.

75. Rogers *v.* McLaren, 53 Tex. 423; Steinbeck *v.* Stone, 53 Tex. 382; Sage *v.* Cooper, 19 Tex. Civ. App. 502, 48 S. W. 36. See also Moses *v.* Morse, 74 Me. 472.

Reference to the book and the page of public record is sufficient, where the property can be identified. Vose *v.* Bradstreet, 27 Me. 156; Marr *v.* Hobson, 22 Me. 321; Clamorgan *v.* Baden, etc., R. Co., 72 Mo. 139; Overand *v.* Menczer, 83 Tex. 122, 18 S. W. 301; Nacogdoches First Nat. Bank *v.* Hicks, 24 Tex. Civ. App. 269, 59 S. W. 842.

Reference to a recorded deed and to a deed of reconveyance, when supplemented by the testimony of a surveyor who has run the lines according to said deeds and found apparent monuments as described, is sufficient. Wright *v.* Lassiter, 71 Tex. 640, 10 S. W. 295.

76. Worden *v.* Williams, 24 Ill. 67.

77. Bitner *v.* New York, etc., Land Co., 67 Tex. 341, 3 S. W. 301. But see Gatewood *v.* House, 65 Mo. 663.

78. Tellico Mfg. Co. *v.* Williams, (Tenn. Ch. App. 1900) 59 S. W. 1075.

79. Morehead *v.* Hall, 126 N. C. 213, 35 S. E. 428.

80. *California.*— Redd *v.* Murry, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132; Thompson *v.* Thompson, 52 Cal. 154; Garwood *v.* Hastings, 38 Cal. 216.

Florida.— Sanders *v.* Ransom, 37 Fla. 457, 20 So. 530; Campbell *v.* Carruth, 32 Fla. 264, 13 So. 432.

Georgia.— See King *v.* Sears, 91 Ga. 577, 18 S. E. 830.

Indiana.— See Pittsburgh, etc., R. Co. *v.* Beck, 152 Ind. 421, 53 N. E. 439.

Michigan.— Daily *v.* Litchfield, 10 Mich. 29.

Minnesota.— Slosson *v.* Hall, 17 Minn. 95. See also Cunningham *v.* Willow River, 68 Minn. 249, 71 N. W. 532.

Missouri.— St. Louis *v.* Wiggins Ferry Co., 15 Mo. App. 227.

New York.— Scully *v.* Sanders, 44 N. Y. Super. Ct. 89.

Pennsylvania.— Deppen *v.* Bogar, 7 Pa. Super. Ct. 434; Vetter *v.* Flaherty, 4 Lack. Leg. N. 175.

Texas.— Zimpleman *v.* Stamps, 21 Tex. Civ. App. 129, 51 S. W. 341; Hitchler *v.* Scanlan, 15 Tex. Civ. App. 40, 39 S. W. 633.

Washington.— Hutchcraft *v.* Lutwig, 13 Wash. 240, 43 Pac. 29.

West Virginia.— U. S. Blowpipe Co. *v.* Spencer, 46 W. Va. 590, 33 S. E. 342.

surveys.[81] Nor is the deed void because the plat referred to is incomplete,[82] unacknowledged, unrecorded,[83] or even invalid.[84]

(VIII) *Omissions in Description.* A deed may be valid wherein there is an omission of a section,[85] meridian,[86] range,[87] town or township,[88] city,[89] county,[90] state,[91] territory,[92] or locality,[93] although an equitable interest merely has been held to pass by omissions of such a character.[94] Again it has been determined that an omission of part of the boundaries or calls is not fatal to the validity of a

Wisconsin.— Slauson *v.* Goodrich Transp. Co., 99 Wis. 20, 74 N. W. 574, 40 L. R. A. 825.

United States.— Deery *v.* Cray, 10 Wall. 263, 19 L. ed. 887.

See 16 Cent. Dig. tit. "Deeds," § 81.

The plat must be for the purpose of explanation and not to destroy the validity of the deed. Polk *v.* Hill, 19 Fed. Cas. No. 11,249, Brunn. Col. Cas. 126, 2 Overt. (Tenn.) 118.

The reference to a plat must be certain. Kenyon *v.* Nichols, 1 R. I. 411.

Loss of plat referred to.— A valid deed does not become void because by the loss of the plat referred to it has become difficult to define the boundaries. New Hampshire Land Co. *v.* Tilton, 19 Fed. 73.

81. Catlett *v.* Starr, 70 Tex. 485, 7 S. W. 844; Smith *v.* Clay, (Tex. Civ. App. 1900) 57 S. W. 74; Stevens *v.* Hollister, 18 Vt. 294, 46 Am. Dec. 154. See Slauson *v.* Goodrich Transp. Co., 99 Wis. 20, 74 N. W. 574, 40 L. R. A. 825.

82. Borer *v.* Lange, 44 Minn. 281, 46 N. W. 358. See also Marvin *v.* Elliott, 99 Mo. 616, 12 S. W. 899.

83. Johnstone *v.* Scott, 11 Mich. 232. See also Simmons *v.* Johnson, 14 Wis. 523.

84. A deed is not affected by the fact that the plat referred to is invalid (Young *v.* Cosgrove, 83 Iowa 682, 49 N. W. 1040), and it is immaterial to the validity of the conveyance whether a plat or map referred to in order to fix a boundary was illegally made or not (Noonan *v.* Braley, 2 Black (U. S.) 499, 17 L. ed. 278).

85. Dorr *v.* School Dist. No. 26, 40 Ark. 237; Bowen *v.* Prout, 52 Ill. 354; Alexander *v.* Knox, 1 Fed. Cas. No. 170, 6 Sawy. 54. But see Hamilton *v.* Ogee, 10 Kan. App. 241, 62 Pac. 708.

86. Garden City Sand Co. *v.* Miller, 157 Ill. 225, 41 N. E. 753. But see Hartigan *v.* Hoffman, 16 Wash. 34, 47 Pac. 217.

87. Columbian Oil Co. *v.* Blake, 13 Ind. App. 680, 42 N. E. 234. But see Fuller *v.* Fellows, 30 Ark. 657; Hamilton *v.* Ogee, 10 Kan. App. 241, 62 Pac. 708.

88. Dorr *v.* School Dist. No. 26, 40 Ark. 237. But see Fuller *v.* Fellows, 30 Ark. 657; Hamilton *v.* Ogee, 10 Kan. App. 241, 62 Pac. 708; Hartigan *v.* Hoffman, 16 Wash. 34, 47 Pac. 217.

A description of land as "fractional township 20 of range 13" is sufficiently definite, as the courts judicially know that there is but one fractional township answering the description in the state. Webb *v.* Mullins, 78 Ala. 111.

A reference to a congressional township is unnecessary. Columbian Oil Co. *v.* Blake, 13 Ind. App. 680, 42 N. E. 234.

89. McCullough *v.* Olds, 108 Cal. 529, 41 Pac. 420.

90. *Alabama.*—Hawkins *v.* Hudson, 45 Ala. 482.

Arkansas.— *Compare* Fuller *v.* Fellows, 30 Ark. 657.

California.— McCullough *v.* Olds, 108 Cal. 529, 41 Pac. 420.

Illinois.— Garden City Sand Co. *v.* Miller, 157 Ill. 225, 41 N. E. 753. But see Pfaff *v.* Cilsdore, 173 Ill. 86, 50 N. E. 670.

Iowa.— Beal *v.* Blair, 33 Iowa 318.

Michigan.— Russell *v.* Sweezey, 22 Mich. 235.

Mississippi.— Hanna *v.* Renfro, 32 Miss. 125.

Washington.— *Compare* Hartigan *v.* Hoffman, 16 Wash. 34, 47 Pac. 217.

See 16 Cent. Dig. tit. "Deeds," § 67.

Such deed is not incompetent as evidence. Norfleet *v.* Russell, 64 Mo. 176; Howe *v.* Williams, 51 Mo. 252.

Where the county is given in the recitals it need not be repeated in the granting clause. Roth *v.* Gabbert, 123 Mo. 21, 27 S. W. 528.

91. *California.*— McCullough *v.* Olds, 108 Cal. 529, 41 Pac. 420.

Illinois.— Garden City Sand Co. *v.* Miller, 157 Ill. 225, 41 N. E. 753.

Iowa.— Beal *v.* Blair, 33 Iowa 318.

Michigan.— Russell *v.* Sweezey, 22 Mich. 235. See also Mee *v.* Benedict, 98 Mich. 260, 57 N. W. 175, 39 Am. St. Rep. 543, 22 L. R. A. 641.

Mississippi.— Hanna *v.* Renfro, 32 Miss. 125.

Missouri.— Howe *v.* Williams, 51 Mo. 252.

See 16 Cent. Dig. tit. "Deeds," § 67.

Abbreviation of the name of a state, as "Miss.," does not make the description insufficient. Wilkinson *v.* Webb, 75 Miss. 403, 23 So. 180.

That the state is not mentioned in the body of the deed does not make the description insufficient. Calton *v.* Lewis, 119 Ind. 181, 21 N. E. 475.

Where a deed was made by the direction and authority of a particular county court, as appears from the recitals, the lands will be assumed to be situate in the state from which the court derived its authority. Long *v.* Wagoner, 47 Mo. 178.

92. Carson *v.* Railsback, 3 Wash. Terr. 168, 13 Pac. 618.

93. Banks *v.* Ammon, 27 Pa. St. 172.

94. Lloyd *v.* Bunce, 41 Iowa 660; Atkison *v.* Dixon, 70 Mo. 381.

deed, where such boundaries or calls can be supplied or the description be rendered certain.[95]

(IX) *Erroneous or Inapplicable Description.* If a mistaken or erroneous description is such that it can be disregarded and the property identified or sufficiently designated, or if the means of correcting the mistake is furnished from the same deed or other competent evidence, the deed is not void.[96] Nor will the conveyance be defeated because other circumstances are added which are inapplicable or false, if from any part of the description contained in the deed the premises intended to be conveyed clearly appear,[97] or can be shown by extraneous

95. *Georgia.*— Ray *v.* Pease, 95 Ga. 153, 22 S. E. 190; Parler *v.* Johnson, 81 Ga. 254, 7 S. E. 317.

Illinois.— Dickenson *v.* Breeden, 30 Ill. 279.

Massachusetts.— Woodward *v.* Nims, 130 Mass. 70. *Compare* Harvey *v.* Byrnes, 107 Mass. 518.

Missouri.— Hammond *v.* Gordon, 93 Mo. 223, 6 S. W. 93; Hammond *v.* Johnston, 93 Mo. 198, 6 S. W. 83.

New York.— Laub *v.* Buckmiller, 17 N. Y. 620; Johnson *v.* Williams, 22 N. Y. Suppl. 247.

Texas.— Montgomery *v.* Carlton, 56 Tex. 431; Wells *v.* Heddenberg, 11 Tex. Civ. App. 3, 30 S. W. 702.

Vermont.— Miller *v.* Mann, 55 Vt. 475.

United States.— Morton *v.* Root, 17 Fed. Cas. No. 9,866, 2 Dill. 312.

See 16 Cent. Dig. tit. "Deeds," § 68.

96. *Alabama.*— Bevans *v.* Henry, 49 Ala. 123.

California.—Borchard *v.* Eastwood, (1901) 65 Pac. 1047; Helm *v.* Wilson, 76 Cal. 476, 18 Pac. 604; Irving *v.* Cunningham, 66 Cal. 15, 14 Pac. 766.

Iowa.— Goodwin *v.* Goodwin, 113 Iowa 319, 85 N. W. 31.

Kentucky.— Shields *v.* Hinkle, 43 S. W. 485, 19 Ky. L. Rep. 1363; Grant *v.* Armstrong, 16 S. W. 531, 13 Ky. L. Rep. 187.

Michigan.— Wilt *v.* Cutler, 38 Mich. 189.

Minnesota.— Kiefer *v.* Rogers, 19 Minn. 32.

Mississippi.— Pegram *v.* Newman, 54 Miss. 612.

Missouri.— Blumenthal Real Estate, etc., Co. *v.* Broch, 126 Mo. 676, 29 S. W. 836.

New Hampshire.— Thompson *v.* Ela, 60 N. H. 562; Johnson *v.* Simpson, 36 N. H. 91.

New York.— Weeks *v.* Martin, 57 Hun 589, 10 N. Y. Suppl. 656; Marsh *v.* Ne-ha-sa-ne Park Assoc., 18 Misc. 314, 42 N. Y. Suppl. 996. See also Heller *v.* Cohen, 154 N. Y. 299, 48 N. E. 527 [*reversing* 9 N. Y. App. Div. 465, 41 N. Y. Suppl. 214].

North Carolina.— Campbell *v.* McArthur, 9 N. C. 33, 11 Am. Dec. 738.

Ohio.— Johnson *v.* Simpson, 3 Ohio Dec. (Reprint) 326.

Pennsylvania.— Stewart *v.* Shoenfelt, 13 Serg. & R. 360; Holmes *v.* Mealy, 1 Phila. 339.

Rhode Island.— Langley *v.* Honey, 20 R. I. 698, 38 Atl. 699.

Tennessee.— Faucher *v.* De Montegre, 1 Head 40.

Texas.— Douthit *v.* Robinson, 55 Tex. 69; Depree *v.* Frank, (Civ. App. 1897) 39 S. W. 988.

Vermont.— Armstrong *v.* Colby, 47 Vt. 359.

Wisconsin.— Mecklem *v.* Blake, 19 Wis. 397.

See 16 Cent. Dig. tit. "Deeds," § 85.

If different descriptions are irreconcilable, but one of them points out the thing intended, a false or mistaken reference to another particular will not avoid the deed. Proctor *v.* Pool, 15 N. C. 370.

The beneficial interest of the grantor is divested, although the description is erroneous, where there is an intent to convey. Johnson *v.* Robinson, 20 Minn. 189.

The equitable title is given, although the deed misdescribes the land. Fitch *v.* Gosser, 54 Mo. 267.

97. Clements *v.* Pearce, 63 Ala. 284; McLaughlin *v.* Bishop, 35 N. J. L. 512; Eggleston *v.* Bradford, 10 Ohio 312; Lippett *v.* Kelley, 46 Vt. 516. See also Schoenewald *v.* Rosenstein, 5 N. Y. Suppl. 766; Sheppard *v.* Simpson, 12 N. C. 237; Jones *v.* Powers, 65 Tex. 207.

Illustrations.— If the land is so described that it can be ascertained, it will pass by deed, although some part of the description is false (Scofield *v.* Lockwood, 35 Conn. 425), and if an alternative clause is bad for vagueness, it will not vitiate the deed if the description is good without it (Wright *v.* Cochran, 3 Greene (Iowa) 507). So where a repugnant call by the other descriptive terms clearly appears to have been made by mistake the conveyance is not void. Glenn *v.* Malony, 4 Iowa 314. Nor is a true and certain description in a grant invalidated by the insertion of a falsity in the description, when by rejecting the erroneous part the conveyance can be supported according to the intention of the parties. Abbott *v.* Pike, 33 Me. 204. Nor will a deed be avoided because some particulars of the description are false or inconsistent, if it is sufficient to identify the premises. Wing *v.* Burgis, 14 Me. 111. And if the description is sufficiently certain as to the estate to be conveyed it will pass the estate, although it does not agree with the particulars of the description. Bosworth *v.* Sturtevant, 2 Cush. (Mass.) 392. So the fact that one of the lines if followed would not conform with the other boundaries so as to describe the land conveyed does not render the deed insufficient. Hoban *v.* Cable, 102 Mich. 206, 60 N. W. 466. And where a deed correctly describes the boundaries on three sides, the misnomer of a street on the fourth side is immaterial. Lochte *v.* Austin, 69 Miss. 271, 13 So. 838. Nor does a manifestly erroneous

evidence.[98] A deed may therefore be valid and effective as to the portion of land properly described, although other portions are improperly designated.[99] But if the error is such that it does not come within these rules, and the property cannot be located or identified by following out the description, or if it is palpably inapplicable or designates no ascertainable land the deed will be void.[1]

(x) *Clerical Errors.* A clerical error in the description of the land will not vitiate the deed where the intent of the parties can be ascertained with certainty from the instrument when considered in connection with the situation of the parties and of the subject-matter.[2]

(xi) *Blanks.*[3] If lines, courses, and boundaries are left blank, there is such vagueness and uncertainty that the conveyance will be inoperative.[4] But a deed may be sufficiently specific to designate the subject-matter of a certificate purported to be conveyed, although the abstract and patent numbers and the volume are left blank where the recitals of the certificate subsequently issued supply sufficient to designate what was intended.[5]

4. Habendum and Tenendum. The office of the *habendum*, "to have," is properly to determine what estate or interest is granted by the deed; although this may be and sometimes is performed in the premises, in which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises. The *tenendum*, "to hold," is of little use.[6]

statement of a monument defeat the conveyance, when the remaining description is sufficiently certain to locate the land. Benton *v.* McIntire, 64 N. H. 598, 15 Atl. 413. Again if there are certain particulars sufficiently ascertained which designate the thing intended to be granted, the addition of circumstances, false or mistaken, will not frustrate the grant. Jackson *v.* Marsh, 6 Cow. (N. Y.) 281; Jackson *v.* Clark, 7 Johns. (N. Y.) 217.

Erroneous mention of an incident in the history of the title to a piece of land is to be held to have no force as against the mention of metes, bounds, courses, distances, and visible monuments, when the question is whether the deed is sufficient in form to convey the land intended. Sherwood *v.* Whiting, 54 Conn. 330, 8 Atl. 80, 1 Am. St. Rep. 116.

98. Robinson *v.* Allison, 109 Ala. 409, 19 So. 837.

99. Tatum *v.* Tatum, 81 Ala. 388, 1 So. 195.

1. Bailey *v.* Galpin, 40 Minn. 319, 41 N. W. 1054. See also Lee *v.* O'Quin, 103 Ga. 355, 30 S. E. 356; Powers *v.* Minor, 87 Tex. 83, 26 S. W. 1071.

Illustrations.— A deed is insufficient when it so misdescribes the land that after hearing parol proof to help out the description and rejecting the starting-point as given therein it is still a matter of conjecture where the land is located. Cunningham *v.* Thornton, 28 Ill. App. 58. And if property to which the grantor had no title is described without ambiguity in the granting clause, and further designated as "being the same premises formerly conveyed by" a certain other deed, which described property of the grantors, the deed is void. Cassidy *v.* Charlestown Five Cents Sav. Bank, 149 Mass. 325, 21 N. E. 372. And although a deed is not void upon its face, it is so when taken in connection with the fact that the particular lot fronted more than the specified feet on the street designated, and no particular part of it was known "as the property of said" J. Bernstein *v.* Humes, 71 Ala. 260. A conveyance is also void which describes the land as "the S. ½ of the N. E. ¼ of the S. E. ½ of section 19." Pry *v.* Pry, 109 Ill. 466.

2. Mathews *v.* Eddy, 4 Oreg. 225.

A mistake in spelling the name of a tract of land does not vitiate the deed, if the word misspelled resembles in sound or sense the right name. Huddleson *v.* Reynolds, 8 Gill (Md.) 332, 50 Am. Dec. 702.

3. **As to filling blanks and effect as alteration of instrument** see Alterations of Instruments.

4. Louisville, etc., R. Co. *v.* Boykin, 76 Ala. 560.

If blanks are left, with parol authority given to another to select the lots and insert their description, but the blanks are never filled, neither the agent nor the court, after the donor's death, can perfect the deed. Tarrant County *v.* McLemore, (Tex. Sup. 1888) 8 S. W. 94.

5. Bratton *v.* Adams, 7 Tex. Civ. App. 161, 26 S. W. 1108.

6. 2 Blackstone Comm. 298, 299. See also Heingley *v.* Harris, 1 Ky. L. Rep. 55.

Habendum is that part which declares and limits the use of the thing conveyed. Stockton *v.* Martin, 2 Bay (S. C.) 471.

Tenendum was sometimes formerly used to signify the tenure by which the estate granted was to be holden. 2 Blackstone Comm. 299.

When the premises in a deed are merely descriptive and mention no particular estate, a *habendum* clause, "to have and to hold," to a certain person and his heirs is good. Berry *v.* Billings, 44 Me. 416, 69 Am. Dec. 107.

This part of the deed may convey a fee-simple estate,[7] or the legal title as against trespassers.[8]

5. Terms and Conditions. The terms upon which the grant is made are: First the *reddendum* or reservation by which the grantor creates or reserves some new thing to himself out of what he has before granted; and secondly the condition or clause of contingency, on the happening of which the estate granted may be defeated.[9] A person cannot, however, by way of reservation, secure to himself a title in or to real estate of which he was not seized at the time of making the conveyance;[10] and a parol reservation of a life-estate by the grantor in an absolute conveyance constitutes him a tenant at will so long as he continues in possession.[11] Again a conveyance of land which is greater in extent than that reserved will not operate as a selection, where such reservation gives the right of selection and location.[12] If the estate is upon condition that the property shall revert to the grantor whenever it shall cease to be used for a particular purpose it is a determinable fee.[13]

6. Warranty and Covenants.[14] Under the clause of warranty the grantor, for himself and his heirs, warrants and secures to the grantee the estate granted. After the warranty covenants or conventions usually follow, which are clauses of agreement contained in a deed whereby either party may stipulate for the truth of certain facts, or may bind himself to perform or give something to the other.[15] A conveyance or assurance is, however, good without a warranty or personal covenants.[16]

7. Conclusion. The conclusion mentions the execution and date of the deed, either expressly or by reference to some day or year theretofore given. A deed is good, however, without a date, as it constitutes no part of the substance of a deed, and this is true as to a false or impossible date, where the real date when the deed was given or delivered can be proven, and a deed takes effect from delivery.[17] A blank may also be filled in for the date after execution without

7. Ahearn *v.* Ahearn, 1 N. Brunsw. Eq. 53, holding that an estate in fee simple passes by the words, "To have and to hold to them and their heirs only, to their sole use and benefit and behoof forever. And be it remembered that the said (grantees) shall not sell, grant nor bargain the said lot of land nor any part or portion thereof, but that it shall be kept to the true intent and meaning of within."

8. Rector *v.* Erath Cattle Co., 18 Tex. Civ. App. 412, 413, 45 S. W. 427, holding that the legal title is conveyed as against trespassers by the words "to have and to hold the described lands to, [grantee] . . . his heirs and assigns forever, and it is understood that I only convey . . . such title as vested in me by virtue of said shff. deeds, and nothing more."

9. 2 Blackstone Comm. 299. See also *infra*, V, D, 1.

10. Hathaway *v.* Payne, 34 N. Y. 92.

11. Wright *v.* Graves, 80 Ala. 416.

12. Butler *v.* Gosling, 130 Cal. 422, 62 Pac. 596.

13. Phœnix Ins. Co. *v.* Beechland Grange, 7 Ky. L. Rep. 667.

14. As to covenants generally see Covenants, 11 Cyc. 1035.

As to operation of covenants to pass title by estoppel see Estoppel.

15. 2 Blackstone Comm. 300-304.

Warranty, in its original form, it is presumed has never been known in the United States. The more plain and pliable form of a covenant has been adopted in its place, and the learning of warranties is now of little use even in England. 2 Bouvier Inst. (ed. 1851) pp. 399, 400, art. 6, §§ 2036, 2039.

16. Nixon *v.* Hyserott, 5 Johns. (N. Y.) 58.

A covenant to afterward make any other deed that might be required will not vitiate the one made nor take from it its validity, where the deed otherwise contains all that is necessary to pass title, and does not contemplate any subsequent deed or writing as necessary, and the clause so providing is in aid of and not inconsistent with the general covenants in the deed. Dussaume *v.* Burnett, 5 Iowa 95.

17. *Arkansas.*— Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374 (a deed is valid between parties, without a date, as it takes effect from delivery); Meech *v.* Fowler, 14 Ark. 29 (date unnecessary).

Indiana.— Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638, good without date.

Massachusetts.—Harrison *v.* Phillips Academy, 12 Mass. 456, date immaterial.

New York.— Jackson *v.* Schoonmaker, 2 Johns. 230, date no part of substance of deed.

Tennessee.— Swan *v.* Hodges, 3 Head 251, date not an essential part of deed.

England.— 2 Blackstone Comm. 304; Bacon Abr. tit. "Feoffment," C, § 7; Comyns Dig. tit. "Fait," B, 3.

Canada.— Hayward *v.* Thacker, 31 U. C.

constituting such an alteration as will avoid the instrument.[18] If no blank is left for the date at the time of execution, it is immaterial that the deed was in fact executed on a day prior to the date which the instrument purports to bear.[19] So where some of the parties sign a notarial deed prior to the notary, the real date is that of the notary's signing it.[20] Nor is a deed vitiated by its bearing a date anterior to a patent of the same land.[21]

G. Execution[22] — **1. Mode and Requisites in General** — **a. Necessity of Execution.** A conveyance deed should be executed in the name of the grantors.[23] It is not, however, essential to the validity of a deed that all the parties should execute it on the same day.[24] And such an instrument, although it purports to be made by several parties, but is executed by only a part of the grantors named therein, may be binding as to those who have executed it,[25] unless it appears that it was intended to be jointly executed.[26] Again, although a deed may be imperfectly executed, it may be good as a contract to convey so as to create an equitable estate in the purchaser.[27]

b. Execution in Blank. A deed executed in blank is void.[28] It has, however, been decided that a deed signed in blank but filled up when delivered is valid.[29]

c. Ratification of Defective Deed. A voidable deed may be rendered effectual by confirming the same prior to the intervention of the rights of third parties.[30] And an instrument which is void by reason of defective execution may be subsequently ratified by the grantor, subject, however, to certain limitations as to the manner of ratification.[31] Again, although a deed, executed in one state, of land

Q. B. 427, deed assumed to have been delivered on day of date.

If the deed has a sensible date, the word "date" elsewhere in the deed means not that of delivery but the day of date. Styles *v.* Wardle, 4 B. & C. 908, 7 D. & R. 507, 4 L. J. K. B. O. S. 81, 28 Rev. Rep. 501, 10 E. C. L. 854.

Notation in the attestation clause that the date of the deed is the third of January, 1842, is sufficient to make the deed proper evidence, where the words "January" and "two" in the date and acknowledgment are written over erasures. Bowlby *v.* Thunder, (Pa. 1886) 3 Atl. 588.

An immaterial mistake in the designation of a person as "its" instead of "his," in the conclusion, does not invalidate the conveyance. Haseltine *v.* Donahue, 42 Wis. 576.

18. Keane *v.* Smallbone, 17 C. B. 179, 25 L. J. C. P. 72, 4 Wkly. Rep. 11, 84 E. C. L. 179.

As to alteration and the effect thereof see Alterations of Instruments, 2 Cyc. 137.

19. Cockell *v.* Gray, 3 B. & B. 186, 6 Moore C. P. 482, 7 E. C. L. 676.

20. Guevremont *v.* Guevremont, 34 L. C. Jur. 317.

21. Bledsoe *v.* Doe, 4 How. (Miss.) 13.

22. **Proof of execution** see *infra*, VII, B, 1; VII, C, 1.

23. Hatch *v.* Barr, 1 Ohio 390.

24. Frost *v.* Deering, 21 Me. 156.

25. *California.*— Tustin *v.* Faught, 23 Cal. 237; Colton *v.* Seavey, 22 Cal. 496.

Georgia.— Jackson *v.* Stanford, 19 Ga. 14.

Maine.— Scott *v.* Whipple, 5 Me. 336.

South Carolina.— Harrelson *v.* Sarvis, 39 S. C. 14, 17 S. E. 368.

Texas.— Minor *v.* Powers, (Civ. App. 1896) 38 S. W. 400.

See 16 Cent. Dig. tit. "Deeds," § 88.

26. Johnson *v.* Brook, 31 Miss. 17, 66 Am. Dec. 547; Arthur *v.* Anderson, 9 S. C. 234. See also Fogal *v.* Pirro, 10 Bosw. (N. Y.) 100.

27. Switzer *v.* Knapps, 10 Iowa 72, 74 Am. Dec. 375; Williams *v.* Sprigg, 6 Ohio St. 585.

28. Wilson *v.* South Park Com'rs, 70 Ill. 46; Byington *v.* Oaks, 32 Iowa 488; Cooper *v.* Page, 62 Me. 192; Perminter *v.* McDaniel, 1 Hill (S. C.) 267, 26 Am. Dec. 179.

As to leaving grantee's name blank see *supra*, III, F, 3, b, (III).

Validity as against the grantor is not affected by the fact that the deed was signed by his wife in blank. Furnas *v.* Durgin, 119 Mass. 500, 20 Am. Rep. 341.

29. Anderson *v.* Lewis, Freem. (Miss.) 178. See also People *v.* Organ, 27 Ill. 27, 79 Am. Dec. 391.

30. Hone *v.* Woolsey, 2 Edw. (N. Y.) 289.

31. **Ratification** may be by a reacknowledgment of the instrument (Drury *v.* Foster, 7 Fed. Cas. No. 4,096, 1 Dill. 461; Riggs *v.* Boylan, 20 Fed. Cas. No. 11,822, 4 Biss. 445), by a subsequent deed confirming the prior one (Simmons *v.* McKissick, 6 Humphr. (Tenn.) 259. See Gouverneur *v.* Titus, 6 Paige (N. Y.) 347; Stokes *v.* Acklen, (Tenn. Ch. App. 1898) 46 S. W. 316), by a will which recognizes and confirms the deed (Broughton *v.* Telfer, 3 Rich. Eq. (S. C.) 431), or by an authorization under seal to a third party to complete and deliver the instrument, which he does (Ingram *v.* Little, 14 Ga. 173, 58 Am. Dec. 549). But mere subsequent assent of the grantor is not sufficient to render a deed binding which is insufficient under the statute of frauds to convey lands. Wallace *v.* McCollough, 1 Rich. Eq. (S. C.) 426. See Branham *v.* San José, 24 Cal. 585. It is not necessary, however, that an instrument which acknowledges or ratifies a deed previously made should be of the same formality as the deed

situated in another state, may not be valid in the former state because the execution is defective under its laws, yet the instrument will be valid if subsequently duly executed under the laws of the state in which the land is located.[32]

d. Curative Acts. Defective execution of a deed may be cured by statutory enactment.[33]

2. SIGNATURES — a. Of Grantor — (I) *In General.* An instrument purporting to be a deed cannot be given effect as such where it is not signed by the grantors,[34] although it may not be essential to the validity of a deed that it be subscribed at the end thereof.[35] And an indenture of two parts, one part only being signed by one party, is good as against him.[36] Again a signing by mark may be sufficient.[37] And as between the parties and their heirs and assigns, a deed under private signature, acknowledged, has the same credit as an authentic act.[38]

(II) *Erroneous Signature.* The fact that a party's name is misspelled in the signature to a deed will not enable him to avoid the instrument where its execution by him is shown.[39] This is also true where he has signed by a wrong name.[40]

(III) *Signing of Grantor's Name by Third Person.* It is not essential to the validity of a deed that the grantor should actually affix his signature thereto with his own hand, but the deed will be binding upon him if the signature is affixed by another in the presence and at the request of the grantor.[41] And a deed will be binding upon a person as grantor, although his name was

itself or that there should be more than one witness thereto by reason of the deed requiring two. Hadden *v.* Larned, 87 Ga. 634, 13 S. E. 806.

A deed ratifying a former defective deed will not affect a title acquired under a deed to a third person between the date of the original deed and that of the ratification. Union Pac. R. Co. *v.* Reed, 80 Fed. 234, 25 C. C. A. 389. And a confirmation of a deed, although it may be ineffective to validate such deed, may by its terms operate as a present conveyance. Montgomery *v.* Hornberger, (Tex. Civ. App. 1897) 40 S. W. 628.

32. Hosford *v.* Nichols, 1 Paige (N. Y.) 220.

33. Culbertson *v.* Parker, 15 Ind. 234; Stevenson *v.* Cloud, 5 Blackf. (Ind.) 92; Brooks *v.* Fairchild, 36 Mich. 231; Brown *v.* Cady, 11 Mich. 535; Meighen *v.* Strong, 6 Minn. 177, 80 Am. Dec. 441; Atwater *v.* Seely, 2 Fed. 133, 1 McCrary 264.

A defect is not cured if the deed is not embraced by the spirit of the act. Dulany *v.* Tilghman, 6 Gill & J. (Md.) 461. See McCroskey *v.* Ladd, (Cal. 1891) 28 Pac. 216.

Effect on prior interests.— The interests of parties who acquired title to land prior to the Minnesota act of July 26, 1858, providing that conveyances made prior thereto with but one subscribing witness should be legal, were not affected by such act. Thompson *v.* Morgan, 6 Minn. 292; Meighen *v.* Strong, 6 Minn. 177, 80 Am. Dec. 441.

34. Goodman *v.* Randall, 44 Conn. 321; Taylor *v.* Glaser, 2 Serg. & R. (Pa.) 502; Adams *v.* Medsker, 25 W. Va. 127; Wright *v.* Wakeford, 17 Ves. Jr. 454. But see Jeffrey *v.* Underwood, 1 Ark. 108; Judge *v.* Thomson, 29 U. C. Q. B. 523.

35. Saunders *v.* Hackney, 10 Lea (Tenn.) 194; Newton *v.* Emerson, 66 Tex. 142, 18 S. W. 348.

Signing at foot of deed see Winston *v.* Hodges, 102 Ala. 304, 15 So. 528.

36. Dudley *v.* Sumner, 5 Mass. 438; Hallett *v.* Collins, 10 How. (U. S.) 174, 13 L. ed. 376.

Possession of one part of a deed by one of the parties has been held presumptive evidence that the other part was executed by him. East India Co. *v.* Lewis, 3 C. & P. 358, 33 Rev. Rep. 680, 14 E. C. L. 608.

37. Doe *v.* Richardson, 76 Ala. 329; Watson *v.* Billings, 38 Ark. 278, 42 Am. Rep. 1; Devereux *v.* McMahon, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205; Sellers *v.* Sellers, 98 N. C. 13, 3 S. E. 917.

A signing by mark by an illiterate person has been held insufficient where the instrument was not read to him and he desired that it be read. Owens *v.* Thomas, 6 U. C. C. P. 383.

38. Rouyer *v.* Carroll, 47 La. Ann. 768, 17 So. 292.

39. Bierer *v.* Fretz, 32 Kan. 329, 4 Pac. 284; O'Meara *v.* North American Min. Co., 2 Nev. 112. See Williams *v.* Bryant, 7 Dowl. P. C. 502, 3 Jur. 632, 9 L. J. Exch. 47, 5 M. & W. 447.

A slight difference in the spelling of the grantee's name between that stated in the body of the deed and that by which he executed the instrument will not prevent title passing to him. Janes *v.* Whitbread, 11 C. B. 406, 15 Jur. 612, 20 L. J. C. P. 217, 73 E. C. L. 406.

A variance between the signature and the record title will not avoid a deed (Lyon *v.* Kain, 36 Ill. 362; Clow *v.* Plummer, 85 Mich. 550, 48 N. W. 795; Russell *v.* Oliver, 78 Tex. 11, 14 S. W. 264), although there should be proof establishing the signer of the deed and the holder of the title as the same person (Omaha Real-Estate, etc., Co. *v.* Reiter, 47 Nebr. 592, 66 N. W. 658).

40. Middleton *v.* Findla, 25 Cal. 76; Hommel *v.* Devinney, 39 Mich. 522.

41. *Alabama.*— Middlebrook *v.* Barefoot, 121 Ala. 642, 25 So. 102; Lewis *v.* Watson, 98

signed thereto by another in his absence, where he subsequently adopts such signature as his own.[42]

b. Of Grantee. Where a deed by which property is conveyed to the grantee, and which purports to be *inter partes*, is accepted by him the fact that it is signed and sealed by the grantor only will not render it void for want of mutuality, but it will be construed as the deed of both parties.[43]

c. Of Witnesses. A person who is unable to write may, by making his proper mark so as to identify himself with the transaction, become a competent attesting witness.[44] And the fact that a deed is not subscribed by the witness in the proper place may not invalidate the instrument, provided that it appears from the face of the deed that he subscribed it as an attesting witness.[45] And a difference in the middle initial of the name of the subscribing witness and that of the person by whom its execution is proved will be immaterial, where the one signing the instrument and the one proving it are identified as the same person.[46]

3. Seal[47]**— a. Necessity of.** At common law a seal is essential to the validity and operative effect of a deed of conveyance,[48] although in some states the

Ala. 479, 13 So. 570, 39 Am. St. Rep. 82, 22 L. R. A. 297.

California.— Jansen *v.* McCahill, 22 Cal. 563, 83 Am. Dec. 84.

Indiana.— Nye *v.* Lowry, 82 Ind. 316.

Kentucky.— Middlesboro Waterworks *v.* Neal, 105 Ky. 586, 49 S. W. 428, 20 Ky. L. Rep. 1403.

Maine.— Lovejoy *v.* Richardson, 68 Me. 386; Bird *v.* Decker, 64 Me. 550; Frost *v.* Deering, 21 Me. 156.

Massachusetts.— Gardner *v.* Gardner, 5 Cush. 483, 52 Am. Dec. 740.

Minnesota.— Conlan *v.* Grace, 36 Minn. 276, 30 N. W. 880. *Compare* Shillock *v.* Gilbert, 23 Minn. 386.

Nebraska.— McMurtry *v.* Brown, 6 Nebr. 368.

New Jersey.— Mutual Ben. L. Ins. Co. *v.* Brown, 30 N. J. Eq. 193.

Ohio.— Lore *v.* Truman, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250.

Pennsylvania.— Pierce *v.* Hakes, 23 Pa. St. 231.

Texas.— Willis *v.* Lewis, 28 Tex. 185.

See 16 Cent. Dig. tit. "Deeds," § 90.

Holding the hand of a grantor for guidance in making the signature does not invalidate it. Harris *v.* Harris, 59 Cal. 620; Kyte *v.* Kyte, 8 Kulp (Pa.) 1. See also Lore *v.* Truman, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250. But see Abee *v.* Bargas, (Tex. Civ. App. 1901) 65 S. W. 489, where it was held that under the particular circumstances of the case the signing was in effect a forgery, the person whose hand was held being in a dying condition, unconscious, and unable to raise his hand.

Signature includes mark, even though the mark is not between the given name and the surname. Hence if otherwise sufficiently proved a deed reciting that "I, J. R., sign my hand to it X here," is sufficiently signed. Horton *v.* Murden, 117 Ga. 72, 43 S. E. 786.

42. Clough *v.* Clough, 73 Me. 487, 40 Am. Rep. 386; Holbrook *v.* Chamberlin, 116 Mass. 155, 17 Am. Rep. 146; Bartlett *v.* Drake, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101; McIntyre *v.* Park, 11 Gray (Mass.) 102, 71 Am. Dec. 690; Lyman *v.* Smith, 4 Lack. Leg. N. 207.

An authorization to sign may bind a person, although he is absent. Reinhart *v.* Miller, 22 Ga. 402, 68 Am. Dec. 506. It has been held, however, that the authority should be by an instrument under the hand of the principal and duly acknowledged. McMurtry *v.* Brown, 6 Nebr. 368. *Compare* Bird *v.* Decker, 64 Me. 550.

Although without his knowledge a person's signature is affixed by another, it may be adopted as his own. O'Donnell *v.* Kelliher, 62 Ill. App. 641; Nye *v.* Lowry, 82 Ind. 316. See Davis *v.* Bowman, (Tenn. Ch. App. 1898), 46 S. W. 1039.

43. Finley *v.* Simpson, 22 N. J. L. 311, 53 Am. Dec. 252; Woodruff *v.* Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35, 13 Am. Rep. 556; Caraway *v.* Caraway, 7 Coldw. (Tenn.) 245. *Compare* Jackson *v.* Florence, 16 Johns. (N. Y.) 47.

Where a grantee accepts a deed and enters into possession, he agrees to do what is stipulated in the deed that he should do, although he did not sign the deed. Silver Springs, etc., R. Co. *v.* Van Ness, (Fla. 1903) 34 So. 884.

44. Brown *v.* McCormick, 28 Mich. 215; Devereux *v.* McMahon, 102 N. C. 284, 9 S. E. 635; Tatom *v.* White, 95 N. C. 453. *Compare* Harrison *v.* Simons, 55 Ala. 510.

Where a deed was so signed by one of the attesting witnesses and the name of the other was written by the grantor it was held to be invalid to pass title. Stewart *v.* Beard, 69 Ala. 470.

45. Webster *v.* Coon, 31 Wis. 72.

46. Page *v.* Arnim, 29 Tex. 53.

47. See, generally, Seals.

48. *Arkansas.*— Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374.

Florida.— Hart *v.* Bostwick, 14 Fla. 162.

Kentucky.— Taylor *v.* Morton, 5 Dana 365.

Maine.—McLaughlin *v.* Randall, 66 Me. 226.

Maryland.— Colvin *v.* Warford, 20 Md. 357.

Michigan.—Jerome *v.* Ortman, 66 Mich. 668, 33 N. W. 759.

Mississippi.— Robinson *v.* Noel, 49 Miss.

requirement that a seal be affixed has been dispensed with by the express provisions of statute.[49]

b. Sufficiency of. It is not the substance impressed which authenticates a deed but the seal itself which may be stamped upon wax, wafer, or other tenacious substance,[50] or upon the paper.[51] A device may also be sufficient as a seal.[52] And the word "seal" affixed to an instrument may be a sufficient device by way of seal to constitute it a deed,[53] as may a scroll annexed to the signature.[54] A seal may be sufficient, although it is not on a line with the signature of the grantor,

253; Alexander *v.* Polk, 39 Miss. 737; Davis *v.* Brandon, 1 How. 154.

Missouri.— Walker *v.* Keile, 8 Mo. 301.

New Hampshire.— Underwood *v.* Campbell, 14 N. H. 393.

New York.— Morss *v.* Salisbury, 48 N. Y. 636; Paige *v.* People, 3 Abb. Dec. 439; Jackson *v.* Wood, 12 Johns. 73. But see Wadsworth *v.* Wendell, 5 Johns. Ch. 224.

North Carolina.— Hinsdale *v.* Thornton, 74 N. C. 167.

South Carolina.— Jones *v.* Crawford, 1 McMull. 373; Cline *v.* Black, 4 McCord 431.

See 16 Cent. Dig. tit. "Deeds," § 99.

An agreement for the sale of trees with the right to enter and remove them has been held a contract for the sale of an interest in lands requiring a seal. Kingsley *v.* Holbrook, 45 N. H. 313, 86 Am. Dec. 173.

A building considered as personal estate may be transferred by a deed without a seal. Curtiss *v.* Hoyt, 19 Conn. 154, 48 Am. Dec. 149.

An indorsement of transfer on a deed comes within the rule. Fitzhugh *v.* Croghan, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139.

Effect of want of seal.— Although a deed may be defective in law for want of a seal, yet an equitable interest or title is thereby conferred on the grantee.

California.— Owen *v.* Frink, 24 Cal. 171.

Maine.— Jewell *v.* Harding, 72 Me. 124.

Mississippi.— McCaleb *v.* Pradat, 25 Miss. 257.

New Hampshire.— Underwood *v.* Campbell, 14 N. H. 393.

New York.— Todd *v.* Eighmie, 4 N. Y. App. Div. 9, 38 N. Y. Suppl. 304; Grandin *v.* Hernandez, 29 Hun 399.

Tennessee.— Brinkley *v.* Bethel, 9 Heisk. 786.

Texas.— Frost *v.* Wolf, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761.

England.— National Provincial Bank *v.* Jackson, 33 Ch. D. 1, 55 L. T. Rep. N. S. 458, 34 Wkly. Rep. 597; *Re* Balkis Consol. Co., 58 L. T. Rep. N. S. 300, 36 Wkly. Rep. 392; Wright *v.* Wakeford, 17 Ves. 454.

See 16 Cent. Dig. tit. "Deeds," § 99.

49. *Alabama.*— Tatum *v.* Tatum, 81 Ala. 388, 1 So. 195.

Iowa.— Pierson *v.* Armstrong, 1 Iowa 282, 63 Am. Dec. 440.

Michigan.— Jerome *v.* Ortman, 66 Mich. 668, 33 N. W. 759.

Mississippi.— Gibbs *v.* McGuire, 70 Miss. 646, 12 So. 829.

Missouri.— Harris *v.* Sconce, 66 Mo. App. 345.

Texas.— Tom *v.* Sayers, 64 Tex. 339.

Utah.— Murray *v.* Beal, 23 Utah 548, 65 Pac. 726.

United States.— Fitzpatrick *v.* Graham, 122 Fed. 401, 58 C. C. A. 619, construing N. Y. Laws (1896), p. 593, c. 547.

Operation of statute.— Such a statute has been held not to relate back so as to validate a conveyance executed while a seal was required (Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13), although the instrument was recorded after the statute was enacted (Switzer *v.* Knapps, 10 Iowa 72, 74 Am. Dec. 375).

Although executory contracts in writing, without seals, may, by statute, be given the effect of deeds yet a seal is necessary to make a conveyance operate as a deed. Shortridge *v.* Catlett, 1 A. K. Marsh. (Ky.) 587.

50. Tasker *v.* Bartlett, 5 Cush. (Mass.) 359; Roberts *v.* Pillow, 20 Fed. Cas. No. 11,909, Hempst. 624; Foster *v.* Geddes, 14 U. C. Q. B. 239.

Wax without an impression is not sufficient. Perry *v.* Price, 1 Mo. 645.

51. Pillow *v.* Roberts, 12 Ark. 822.

A deed merely marked with the end of a poker has been held not a sealed instrument. Clement *v.* Donaldson, 9 U. C. Q. B. 299.

52. Hamilton *v.* Dennis, 12 Grant Ch. (U. C.) 325, where the weaving of a ribbon through slits cut in the deed was held a seal, the signatures being affixed opposite the points where the ribbon appeared on the face of the instrument.

53. Cochran *v.* Stewart, 57 Minn. 499, 59 N. W. 543; Cook *v.* Cooper, 59 S. C. 560, 38 S. E. 218; Whitley *v.* Davis, 1 Swan (Tenn.) 333.

54. Lore *v.* Truman, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250; Cosner *v.* McCrum, 40 W. Va. 339, 21 S. E. 739; *Re* Bell, 1 Ont. 125. But see Nagle *v.* Kilts, Taylor (U. C.) 269.

A seal made with the flourish of a pen is sufficient without any subscribing witness. Long *v.* Ramsay, 1 Serg. & R. (Pa.) 72.

To make a scroll a seal it should be recognized as such in the body of the instrument (Cromwell *v.* Tate, 7 Leigh (Va.) 301, 30 Am. Dec. 506. But see Smith *v.* Henning, 10 W. Va. 596) or it should be apparent from the instrument that such was the intention (Bohannon *v.* Hough, Walk. (Miss.) 46; Burton *v.* Leroy, 4 Fed. Cas. No. 2,217, 5 Sawy. 510. *Compare* McDonald *v.* Bear River, etc., Water, etc., Co., 13 Cal. 220). Where, however, the scroll was not recognized the instrument would be construed as a deed where the grantor had acknowledged the same in court as his deed for the purpose of

where it is apparent from the terms of the instrument that it is his seal.[55] Again it may be sufficient to constitute an instrument a deed that a seal is affixed thereto, although the affixing of the same is not mentioned therein.[56] But a mere recital in an instrument that it is sealed, no seal or scroll, however, being affixed thereto, is not sufficient.[57]

c. Use of Same Seal by Different Parties. It is not essential to the validity of a deed that there should be as many seals or scrolls as there are parties, for two or more parties may adopt the same seal or scroll.[58]

4. Attestation — a. In General. The attestation of a deed is no part of its execution, but only an appointed means of preserving its existence,[59] and to enable the opposite party to inquire into the circumstances of the sealing and delivery.[60] Accordingly attestation of a deed is not essential at common law to a transfer of title thereunder.[61] If, however, a statute prescribes that a deed shall be attested in a certain manner this requirement should be complied with.[62] And a defective

having it recorded. Ashwell *v.* Ayres, 4 Gratt. (Va.) 283.

55. Harrell *v.* Butler, 92 N. C. 20.

56. Wing *v.* Chase, 35 Me. 260; Burton *v.* Leroy, 4 Fed. Cas. No. 2,217, 5 Sawy. 510. But see Bohannon *v.* Hough, Walk. (Miss.) 461.

57. Deming *v.* Bullitt, 1 Blackf. (Ind.) 241; McPherson *v.* Reese, 58 Miss. 749; Mitchell *v.* Parham, Harp. (S. C.) 3.

58. *Missouri.*— Lunsford *v.* La Motte Lead Co., 54 Mo. 426.

New Hampshire.— Pequawkett Bridge *v.* Mathes, 7 N. H. 230, 26 Am. Dec. 737.

Tennessee.— Lambden *v.* Sharp, 9 Humphr. 224.

West Virginia.— Norvell *v.* Walker, 9 W. Va. 447.

Wisconsin.— Yale *v.* Flanders, 4 Wis. 96.

See 16 Cent. Dig. tit. "Deeds," § 101.

59. Goodenough *v.* Warren, 10 Fed. Cas. No. 5,534, 5 Sawy. 494.

The signing and sealing is what constitutes an instrument a deed. Dobbin *v.* Cordiner, 41 Minn. 165, 42 N. W. 870, 16 Am. St. Rep. 683, 4 L. R. A. 333; Conlan *v.* Grace, 36 Minn. 276, 30 N. W. 880; Morton *v.* Leland, 27 Minn. 35, 6 N. W. 378.

60. Markley *v.* Swartzlander, 8 Watts & S. (Pa.) 172.

Proof by a witness that the person acknowledging a deed confirming a prior one was the individual whose name was affixed to the prior deed is held to be all that is necessary. Crockett *v.* Campbell, 2 Humphr. (Tenn.) 411. And where a deed is executed by one person for and by the verbal authority of another it is immaterial whether the witnesses to the deed knew of such authority. Reinhart *v.* Miller, 22 Ga. 402, 68 Am. Dec. 506.

61. *Arkansas.*— Jackson *v.* Allen, 30 Ark. 110; Cocke *v.* Brogan, 5 Ark. 693.

Georgia.— Howard *v.* Russell, 104 Ga. 230, 30 S. E. 802.

Illinois.— Dundy *v.* Chambers, 23 Ill. 369.

Kentucky.— Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429, 19 Am. Dec. 139.

Massachusetts.— Dole *v.* Thurlow, 12 Metc. 157.

Michigan.— Carpenter *v.* Carpenter, 126 Mich. 217, 85 N. W. 576; Price *v.* Haynes, 37 Mich. 487.

Nebraska.—Pearson *v.* Davis, 41 Nebr. 608, 59 N. W. 885.

New Hampshire.— Forsaith *v.* Clark, 21 N. H. 409.

New Jersey.— State *v.* Harrison, 39 N. J. L. 51.

New York.— Wood *v.* Chapin, 13 N. Y. 509, 67 Am. Dec. 62.

North Carolina.— Ingram *v.* Hall, 2 N. C. 193.

Pennsylvania.— Long *v.* Ramsay, 1 Serg. & R. 72.

Texas.— Meuley *v.* Zeigler, 23 Tex. 88; Coryell *v.* Holmes, 2 Tex. Unrep. Cas. 665.

Wisconsin.— Leinenkugel *v.* Kehl, 73 Wis. 238, 40 N. W. 683; Quinney *v.* Denney, 18 Wis. 485.

See 16 Cent. Dig. tit. "Deeds," 104.

62. *Alabama.*— Branch *v.* Smith, 114 Ala. 463, 21 So. 423; Wilson *v.* Glenn, 62 Ala. 28.

Louisiana.— Spanier *v.* De Voe, 52 La. Ann. 581, 27 So. 174.

Michigan.— Crane *v.* Reeder, 21 Mich. 24, 4 Am. Rep. 430.

New Hampshire.— Barker *v.* Bean, 25 N. H. 412; Rundlett *v.* Hodgman, 16 N. H. 239; Underwood *v.* Campbell, 14 N. H. 393.

New York.— Nellis *v.* Munson, 108 N. Y. 453, 15 N. E. 739 [*reversing* 24 Hun 575]; Roggen *v.* Avery, 63 Barb. 65 [*affirmed* in 65 N. Y. 592].

Ohio.— Courcier *v.* Graham, 1 Ohio 330.

Wisconsin.— Harrass *v.* Edwards, 94 Wis. 459, 69 N. W. 69.

See 16 Cent. Dig. tit. "Deeds," § 104.

Ala. Code (1876), § 2146, by which it was provided that where deeds were recorded attestation was unnecessary, has been construed as applying to those deeds which were signed by the grantor by his mark only. Sikes *v.* Shows, 74 Ala. 382. See also Bickley *v.* Keenan, 60 Ala. 293.

Failure to attest an instrument, purporting to be a deed, in the manner required by law, causes it to operate merely as an agreement to convey. Eureka Lumber Co. *v.* Brown, 103 Ala. 140, 15 So. 518. See also Godfroy *v.* Disbrow, Walk. (Mich.) 260. But see Johnson *v.* Jones, 87 Ga. 85, 13 S. E. 261,

attestation as to one of several grantors is not aided by a proper attestation as to the others.[63]

b. Competency of Witnesses. Where a statute provides that a deed shall be attested by a certain number of competent witnesses such statute will be construed as requiring an attestation by witnesses who are competent at the time.[64] It has, however, been held that in case a deed is attested by an incompetent witness, either through mistake or fraud, the defect may be supplied by a court of equity.[65]

c. Number of Witnesses. If it is provided by statute that a deed of land shall be executed in the presence of two or more witnesses it is essential to the validity of such an instrument that it be attested in the manner prescribed.[66]

where it is held to be legal as between the parties and those claiming under them as volunteers.

Sufficiency of recital in attestation clause. — A recital in such a clause that the deed was signed and sealed, but omitting to state that it was delivered, has been held not to render the deed invalid where there has been a proper delivery of the same. Eaton *v.* Freeman, 63 Ga. 535; Bradley Fertilizer Co. *v.* Pace, 80 Fed. 862, 26 C. C. A. 198. But see Doe *v.* Turnbull, 16 N. Brunsw. 74.

The omission of the date in a certificate of attestation of the execution of a deed has been held immaterial. McKenzie *v.* Lamont, 11 Nova Scotia 517.

Where the attestation clause is written is immaterial, provided it appears that it was the intention of the witness to attest the maker's signature. Gress Lumber Co. *v.* Georgia Pine Shingle Co., 105 Ga. 847, 32 S. E. 632.

63. Hall *v.* Redson, 10 Mich. 21, where it was held that when a man and his wife executed a deed which was attested by two witnesses, who, however, signed themselves as witnesses to the signature of the wife, there was not a sufficient attestation of the husband's signature, the husband and wife having signed in different places.

An attestation, "sealed and delivered" in the presence of the subscribing witnesses, has been held sufficient. Fosdick *v.* Risk, 15 Ohio 84, 45 Am. Dec. 562.

64. Winsted Sav. Bank, etc., Assoc. *v.* Spencer, 26 Conn. 195; Child *v.* Baker, 24 Nebr. 188, 38 N. W. 725. But see Frink *v.* Pond, 46 N. H. 125.

Who are competent. — A grantee is not a competent attesting witness (Croft *v.* Thornton, 125 Ala. 391, 28 So. 84; Coleman *v.* State, 79 Ala. 49), nor a co-grantor (Townsend *v.* Downer, 27 Vt. 119), nor a stockholder of a private pecuniary corporation of the execution of a deed to the corporation (Winsted Sav. Bank, etc., Assoc. *v.* Spencer, 26 Conn. 195. *Compare* Canandargua Academy *v.* McKechnie, 19 Hun (N. Y.) 62; Read *v.* Toledo Loan Co., 23 Ohio Cir. Ct. 25), nor a husband of a deed to the wife (Cairrell *v.* Higgs, 1 Tex. Unrep. Cas. 56; Johnston *v.* Slater, 11 Gratt. (Va.) 321. *Compare* Hardin *v.* Sparks, 70 Tex. 429, 7 S. W. 769), nor a wife of her husband's deed (Carter *v.* Champion, 8 Conn. 549, 21 Am. Dec. 695; Corbett *v.* Norcross, 35 N. H. 99; Chattanooga Third Nat. Bank *v.* O'Brien, 94 Tenn. 38, 28 S. W. 293). And a person's competency is not affected by a statute providing that "in all civil actions . . . no person shall be incompetent to testify . . . because of the disabilities of coverture." Chattanooga Third Nat. Bank *v.* O'Brien, 94 Tenn. 38, 41, 28 S. W. 293. Where, however, the husband executes the deed as administrator, it has been held that the wife may be a competent witness. Carter *v.* Jackson, 58 N. H. 156. And where a witness is competent at the time of execution, the validity of his attestation will not be affected by the fact that he subsequently acquires an interest in the note given for the purchase-money. Carter *v.* Corley, 23 Ala. 612.

In Georgia an ordinary may officially attest a deed in a county other than that of his residence, where it is provided by statute that a judge of a court of record may so act. Gress Lumber Co. *v.* Coody, 99 Ga. 775, 27 S. E. 169.

65. Smith *v.* Chapman, 4 Conn. 344.

66. *Connecticut.*—Merwin *v.* Camp, 3 Conn. 35.

Georgia.— Reinhart *v.* Miller, 22 Ga. 402, 68 Am. Dec. 506.

Louisiana.— Rowson *v.* Barbe, 51 La. Ann. 347, 25 So. 139; Langley *v.* Burrows, 15 La. Ann. 392.

Michigan.— *Compare* King *v.* Carpenter, 37 Mich. 363; Dougherty *v.* Randall, 3 Mich. 581.

Minnesota.— Meighen *v.* Strong, 6 Minn. 177, 80 Am. Dec. 441.

New Hampshire.— Salvage *v.* Haydock, 68 N. H. 484, 44 Atl. 696; Cram *v.* Ingalls, 18 N. H. 613; Stone *v.* Ashley, 13 N. H. 38; French *v.* French, 3 N. H. 234; Thompson *v.* Bennet, Smith 327.

Ohio.— Patterson *v.* Pease, 5 Ohio 190; Coureier *v.* Graham, 1 Ohio 330.

Rhode Island.— Kenyon *v.* Segar, 14 R. I. 490.

South Carolina.— Jones *v.* Crawford, 1 McMull. 373; Craig *v.* Pinson, Cheves 272.

Vermont.— Day *v.* Adams, 42 Vt. 510.

See 16 Cent. Dig. tit. "Deeds," § 107.

A deed may be entitled to record, although there are not two witnesses to each signature, as is contemplated by the laws in force at the time, and is held to constitute a notice to subsequent purchasers when recorded. Carson *v.* Thompson, 10 Wash. 295, 38 Pac. 1116.

One witness only may be sufficient if so provided by law. Kentucky Bank *v.* Jones,

But, although a deed may by reason of defective attestation fail to pass a legal title, yet it may operate to vest an equitable title in the grantee.[67]

d. Necessity of Request by Grantor. While a statute providing that a deed shall be proved by attesting witnesses imports that they must sign at the request of the grantor,[68] yet an attestation may be sufficient where persons, although not expressly requested by the grantor, write their names as witnesses in the presence and with the knowledge of both grantor and grantee and the deed is delivered to and accepted by the latter.[69] A person has no right, however, to make himself a subscribing witness in the absence of any request or knowledge on the part of the grantor, and after he has refused to acknowledge the deed.[70]

e. Presence of Witness. It is not necessary that the parties to a deed sign the same in the presence of the attesting witnesses, it being a sufficient execution if the former acknowledge the instrument in the presence of the latter.[71] Proof of execution, however, is insufficient where it does not appear that the grantor either signed or acknowledged the deed in the presence of the witnesses.[72]

5. Revenue Stamps — a. In General. A stamp is not essential to the validity of a deed delivered after the repeal of a stamp act, although the instrument was executed before such repeal.[73] And where a deed was made within the Confederate lines during the Civil war it was held not to be void for want of a stamp required by the United States laws.[74] Again the fact that a Mexican title document was written on unstamped paper is not fatal to its validity.[75]

b. Amount of. Where the amount of stamps required by the act is proportioned to the amount of the consideration money, the act will be complied with by affixing stamps according to the sum named in the deed, although the real consideration is such sum in gold which is worth more than the legal tender notes.[76]

c. Failure to Affix. The affixing of a revenue stamp to a deed is not essential to the validity of such an instrument.[77]

59 Ala. 123; Genter *v.* Morrison, 31 Barb. (N. Y.) 155. *Compare* Shirley *v.* Fearne, 33 Miss. 653, 69 Am. Dec. 375.

A second witness may be added after a deed is recorded, when done in the presence of the parties, and the deed will be valid as between them or as against others subsequently claiming under the same grantor with notice. Brown *v.* Eastman, 16 N. H. 588.

67. Caperton *v.* Hall, 83 Ala. 171, 3 So. 234; McLouth *v.* Rathbone, 19 Ohio 21; Vattier *v.* Findley, 1 Ohio Dec. (Reprint) 58, 1 West. L. J. 398.

Good as between the parties.— Lowe *v.* Allen, 68 Ga. 225; Fulton *v.* Priddy, 123 Mich. 298, 82 N. W. 65, 81 Am. St. Rep. 201.

It is evidence of an agreement to execute a valid deed. Vermont Min., etc., Co. *v.* Windham County Bank, 44 Vt. 489. *Compare* Milligan *v.* Dickson, 17 Fed. Cas. No. 9,603, Pet. C. C. 433.

68. Tate *v.* Lawrence, 11 Heisk. (Tenn.) 503.

69. Clements *v.* Pearce, 63 Ala. 284.

70. Pritchard *v.* Palmer, 88 Hun (N. Y.) 412, 34 N. Y. Suppl. 787, 2 N. Y. Annot. Cas. 259.

71. Mulloy *v.* Ingalls, 4 Nebr. 115; Jackson *v.* Phillips, 9 Cow. (N. Y.) 94.

It is unnecessary for subscribing witnesses to sign in the presence of each other and of the grantor. Little *v.* White, 29 S. C. 170, 7 S. E. 72. But see Dolin *v.* Gardner, 15 Ala. 758.

72. Poole *v.* Jackson, 66 Tex. 380, 1 S. W. 75.

73. Burton *v.* Shotwell, 13 Bush (Ky.) 271.

A deed was properly stamped as an agreement, where it was given merely to correct a prior conveyance which was not subject to stamp duty, and was not subject to the *ad valorem* stamp duty as for land sold under the act of congress of July 1, 1862. Greve *v.* Coffin, 14 Minn. 345, 100 Am. Dec. 229.

Under a ruling of the secretary of the treasury that a conveyance without consideration does not require a stamp it is unnecessary to affix one to a conveyance based on a consideration of natural love and affection. Mercer *v.* Mercer, 29 Iowa 557.

74. Susong *v.* Williams, 1 Heisk. (Tenn.) 625.

75. Sheirburn *v.* Hunter, 21 Fed. Cas. No. 12,744, 3 Woods 281.

76. Hall *v.* Jordan, 19 Wall. (U. S.) 271, 22 L. ed. 47. *Compare* Frazer *v.* Robinson, 42 Miss. 121; U. S. *v.* Griswold, 8 Fed. 556, 7 Sawy. 311.

77. *Colorado.*— Trowbridge *v.* Addoms, 23 Colo. 518, 48 Pac. 535.

Maryland.— Carson *v.* Phelps, 40 Md. 73.

Michigan.— Taft *v.* Simpson, 125 Mich. 206, 84 N. W. 77.

New Jersey.— See Platt *v.* McCloug, (Ch. 1901), 49 Atl. 1125.

New York.— Moore *v.* Moore, 47 N. Y. 467, 7 Am. Rep. 466; Dady *v.* O'Rourke, 61 N. Y.

d. Time of Affixing. The want of a stamp in a deed has been held to be properly supplied where it was subsequently affixed thereto and the penalty prescribed by the act of congress was paid.[78]

e. Canceling of. The validity of a conveyance on which a stamp is not canceled is not affected by an act imposing a penalty for failure to cancel a stamp placed on such an instrument.[79]

H. Delivery[80]— **1. Necessity and Sufficiency of in General — a. Delivery Necessary.** It is a general rule that it is essential to the validity of a deed that there should be a delivery of the instrument.[81] Where, however, it is expressly declared by statute that a deed recorded within the time prescribed shall be

App. Div. 529, 70 N. Y. Suppl. 694; Cagger *v.* Lansing, 57 Barb. 421.

Pennsylvania.— Tripp *v.* Bishop, 56 Pa. St. 424.

Texas.— See Carothers *v.* Covington, (Civ. App. 1894) 27 S. W. 1040.

United States.— Dowell *v.* Applegate, 8 Fed. 698, 7 Sawy. 239; Kinney *v.* Consolidated Virginia Min. Co., 14 Fed. Cas. No. 7,827, 4 Sawy. 382.

See 16 Cent. Dig. tit. "Deeds," § 113.

An intention to evade the revenue law is necessary to render a deed void for failure to affix the stamps required. Carson *v.* Phelps, 40 Md. 73; Cagger *v.* Lansing, 57 Barb. (N. Y.) 421; Dowell *v.* Applegate, 8 Fed. 698, 7 Sawy. 239; U. S. *v.* Griswold, 8 Fed. 556, 7 Sawy. 311.

The act rendering the record void where the deed was not stamped was held not to affect the validity of the instrument (Dowell *v.* Applegate, 7 Fed. 881, 7 Sawy. 232), or to affect a record thereof under state laws (Moore *v.* Quirk, 105 Mass. 49, 7 Am. Rep. 499).

78. Carson *v.* Phelps, 40 Md. 73; Lereh *v.* Snyder, 112 Pa. St. 161, 4 Atl. 336.

79. Dowell *v.* Applegate, 7 Fed. 88, 7 Sawy. 232.

80. **Presumption of delivery** see *infra*, V, A, 7.

Proof of delivery see *infra*, V, B, 2; V, C, 2.

81. *Alabama.*—Williams *v.* Armstrong, 130 Ala. 389, 30 So. 553; Frisbie *v.* McCarty, 1 Stew. & P. 56.

California.— Lewis *v.* Burns, 122 Cal. 358, 55 Pac. 132; Fitch *v.* Bunch, 30 Cal. 208.

Colorado.—Rittmaster *v.* Brisbane, 19 Colo. 371, 35 Pac. 736.

Delaware.— Doe *v.* Beeson, 2 Houst. 246; Pennel *v.* Weyant, 2 Harr. 501.

Georgia.— Chambers *v.* Wesley, 113 Ga. 343, 38 S. E. 848; Stallings *v.* Newton, 110 Ga. 875, 36 S. E. 227; Maddox *v.* Gray, 75 Ga. 452; Black *v.* Thornton, 31 Ga. 641; Oliver *v.* Stone, 24 Ga. 63.

Illinois.— Hollenbeek *v.* Hollenbeck, 185 Ill. 101, 57 N. E. 36; Pratt *v.* Griffin, 184 Ill. 514, 56 N. E. 819; Robinson *v.* Robinson, 116 Ill. 250, 5 N. E. 118; Dickerson *v.* Merriman, 100 Ill. 342; Ferguson *v.* Miles, 8 Ill. 358, 44 Am. Dec. 702; Doe *v.* Herbert, 1 Ill. 354, 12 Am. Dec. 192.

Indiana.— Pennsylvania Mortg. Trust Co. *v.* Moore, 150 Ind. 465, 50 N. E. 72; Dearmond *v.* Dearmond, 10 Ind. 191.

Kansas.— Nay *v.* Mograin, 24 Kan. 75.

Kentucky.—Speed *v.* Brooks, 7 J. J. Marsh. 119; Hughes *v.* Easten, 4 J. J. Marsh. 572, 20 Am. Dec. 230; Ford *v.* Gregory, 10 B. Mon. 175.

Maine.— Egery *v.* Woodard, 56 Me. 45; Jackson *v.* Sheldon, 22 Me. 569.

Maryland.— Stewart *v.* Redditt, 3 Md. 67; Clarke *v.* Ray, 1 Harr. & J. 318.

Massachusetts.— Maynard *v.* Maynard, 10 Mass. 456, 6 Am. Dec. 146; Hatch *v.* Hatch, 9 Mass. 307, 6 Am. Dec. 67; Fairbanks *v.* Metcalf, 8 Mass. 230; Fay *v.* Richardson, 7 Pick. 91.

Michigan.— Bisard *v.* Sparks, (1903) 95 N. W. 728; Lyon *v.* Lyon, 76 Mich. 610, 43 N. W. 586; Thatcher *v.* St. Andrew's Church, 37 Mich. 264.

Mississippi.— Jelks *v.* Barrett, 52 Miss. 315; Johnson *v.* Brook, 31 Miss. 17, 66 Am. Dec. 547; Armstrong *v.* Stovall, 26 Miss. 275.

New Jersey.— Black *v.* Shreve, 13 N. J. Eq. 455; Commercial Bank *v.* Reckless, 5 N. J. Eq. 430; Crawford *v.* Bertholf, 1 N. J. Eq. 458.

New York.— Cussack *v.* Tweedy, 126 N. Y. 81, 26 N. E. 1033 [*affirming* 56 Hun 617, 11 N. Y. Suppl. 16]; Church *v.* Gilman, 15 Wend. 656, 30 Am. Dec. 82; Jackson *v.* Leek, 12 Wend. 105; Jackson *v.* Richards, 6 Cow. 617; Jackson *v.* Phipps, 12 Johns. 418; Jackson *v.* Dunlap, 1 Johns. Cas. 114, 1 Am. Dec. 100; Souverbye *v.* Arden, 1 Johns. Ch. 240.

North Carolina.— Kirk *v.* Turner, 16 N. C. 14; Morrow *v.* Williams, 14 N. C. 263; Ward *v.* Ward, 3 N. C. 226.

Ohio.— Hammell *v.* Hammell, 19 Ohio 17.

Pennsylvania.— Duraind's Appeal, 116 Pa. St. 93, 8 Atl. 922; Clauer *v.* Clauer, 22 Pa. Super. Ct. 395.

South Carolina.— Coln *v.* Coln, 24 S. C. 596; Dawson *v.* Dawson, Rice Eq. 243.

Tennessee.— Wilson *v.* Winters, 108 Tenn. 398, 67 S. W. 800; Alexander *v.* Bland, Cooke 431.

Texas.— Koppelmann *v.* Koppelmann, 94 Tex. 40, 57 S. W. 570.

Vermont.— Paddock *v.* Potter, 67 Vt. 360, 31 Atl. 784; Dwinell *v.* Bliss, 58 Vt. 353, 5 Atl. 317; Stiles *v.* Brown, 16 Vt. 563.

West Virginia.— Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 213.

Wisconsin.— Curry *v.* Colburn, 99 Wis. 319, 74 N. W. 778, 67 Am. St. Rep. 860; Flannigan *v.* Goggins, 71 Wis. 28, 36 N. W. 846; Eiden *v.* Eiden, 41 Wis. 460.

operative and have binding effect from the time of its date, delivery is dispensed with.[82]

b. Sufficiency — (i) *In General.* A sufficient delivery takes place where a magistrate or notary who has drawn up the deed hands over the same to the grantee in the grantor's presence.[83] And a delivery by an attorney who has drawn up the deed may be sufficient.[84] Again, in the absence of evidence to the contrary, a deed will be held to have been signed and delivered where it was duly acknowledged.[85]

(ii) *Delivery to Minor.* The minority of a person to whom a deed is delivered does not of itself render the delivery ineffectual.[86]

(iii) *Deposit in Post-Office.* Depositing a deed directed to the grantee in the post-office has been declared to be a sufficient delivery.[87]

c. Intention as Affecting. The question of the delivery of a deed is generally one of intention of the parties, and it is essential to a valid delivery that there should be some act or declaration from which an intention to deliver may be inferred.[88] A formal delivery, however, is not essential;[89] nor are express words necessary.[90] Nor is a manual delivery of the instrument to the grantee required,[91] it being sufficient if it is apparent either from the words or acts of the grantor that it was his intention to treat the deed as his and to make a delivery of the same.[92]

United States.— Younge *v.* Guilbeau, 3 Wall. 636, 18 L. ed. 262; Carr *v.* Hoxie, 5 Fed. Cas. No. 2,438, 5 Mason 60.

See 16 Cent. Dig. tit. "Deeds," § 116.

If the maker dies before the deed is delivered the deed is void. Pennsylvania Mortg. Trust Co. *v.* Moore, 150 Ind. 465, 50 N. E. 72.

82. Betts *v.* Union Bank, 1 Harr. & G. (Md.) 175, 18 Am. Dec. 283.

83. Hubbard *v.* Cox, 76 Tex. 239, 13 S. W. 170; Bogie *v.* Bogie, 35 Wis. 659.

84. Sturtevant *v.* Sturtevant, 116 Ill. 340, 6 N. E. 428.

85. St. Louis *v.* Wiggins Ferry Co., 88 Mo. 615. *Compare* Turner *v.* Carpenter, 83 Mo. 333.

86. McNear *v.* Williamson, 166 Mo. 358, 66 S. W. 160.

87. McKinney *v.* Rhoads, 5 Watts (Pa.) 343.

88. *Georgia.*— Rutledge *v.* Montgomery, 30 Ga. 899.

Illinois.— Jordan *v.* Davis, 108 Ill. 336; Stiles *v.* Probst, 69 Ill. 382.

Indiana.— Burkholder *v.* Casad, 47 Ind. 418; Berry *v.* Anderson, 22 Ind. 36.

Iowa.— Steel *v.* Miller, 40 Iowa 402.

Maine.— Woodman *v.* Coolbroth, 7 Me. 181.

Minnesota.— Kammrath *v.* Kidd, 89 Minn. 380, 95 N. W. 213.

Mississippi.— Kane *v.* Mackin, 9 Sm. & M. 387.

New Jersey.— Woodward *v.* Woodward, 8 N. J. Eq. 779; Crawford *v.* Bertholf, 1 N. J. Eq. 458.

New York.— Ford *v.* James, 2 Abb. Dec. 159, 4 Keyes 300.

Pennsylvania.— Dayton *v.* Newman, 19 Pa. St. 194.

South Carolina.— Carrigan *v.* Byrd, 23 S. C. 89.

Vermont.— Dwinell *v.* Bliss, 58 Vt. 353, 5 Atl. 317.

See 16 Cent. Dig. tit. "Deeds," § 118.

Delivery without the knowledge or consent of the grantor is ineffectual to pass title. Fitzgerald *v.* Goff, 99 Ind. 28; Henry *v.* Carson, 96 Ind. 412; Tisher *v.* Beckwith, 30 Wis. 55, 11 Am. Rep. 546.

89. McCoy *v.* Hill, 2 Litt. (Ky.) 372.

90. Doe *v.* Beeson, 2 Houst. (Del.) 246; Warren *v.* Swett, 31 N. H. 332.

91. *Alabama.*— McLure *v.* Colclough, 17 Ala. 89.

Illinois.— Walker *v.* Walker, 42 Ill. 311, 89 Am. Dec. 445; Rivard *v.* Walker, 39 Ill. 413.

Indiana.— Mallett *v.* Page, 8 Ind. 364.

Iowa.— Newton *v.* Bealer, 41 Iowa 334.

Kansas.— Kelsa *v.* Graves, 64 Kan. 777, 68 Pac. 607.

Kentucky.— Shoptaw *v.* Ridgway, 60 S. W. 723, 22 Ky. L. Rep. 1495.

Maryland.— Stewart *v.* Redditt, 3 Md. 67; Byers *v.* McClanahan, 6 Gill & J. 250.

Michigan.— Thatcher *v.* St. Andrew's Church, 37 Mich. 264.

Minnesota.— Stevens *v.* Hatch, 6 Minn. 64.

Mississippi.— Young *v.* Elgin, (1900) 27 So. 595.

New Jersey.— Ruckman *v.* Ruckman, 32 N. J. Eq. 259; Crawford *v.* Bertholf, 1 N. J. Eq. 458.

New York.— Goodrich *v.* Walker, 1 Johns. Cas. 250.

Ohio.— Dukes *v.* Spangler, 35 Ohio St. 119; Lore *v.* Truman, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250.

Pennsylvania.— Planing Co *v.* Paxson, 3 Walk. 97.

Tennessee.— Farrar *v.* Bridges, 5 Humphr. 411, 42 Am. Dec. 439.

United States.— Ruckman *v.* Ruckman, 6 Fed. 225.

See 16 Cent. Dig. tit. "Deeds," § 118.

92. *Delaware.*— Smith *v.* May, 3 Pennew. 233, 50 Atl. 59; Doe *v.* Beeson, 2 Houst. 246.

Illinois.— Phelan *v.* Hyland, 197 Ill. 395, 64 N. E. 360; Benneson *v.* Aiken, 102 Ill. 284, 40 Am. Rep. 592; Jummel *v.* Mann, 80 Ill.

d. Retention of Control or Possession by Grantor[93]—(i) *In General.* It is a general rule subject to certain exceptions herein given that a delivery of a deed to be valid must be such as deprives the grantor of the possession[94] and of the control of the instrument.[95] It has, however, been held that where a deed was intended to be considered as delivered it will not, as between the grantor and the grantee, be invalid for want of delivery, because of the fact that it remains in

App. 288; Carter *v.* Carter, 77 Ill. App. 559; Brooks *v.* People, 15 Ill. App. 570.

Indiana.— Burkholder *v.* Casad, 47 Ind. 418; Mallett *v.* Page, 8 Ind. 364.

Kentucky.— Shoptaw *v.* Ridgway, 60 S. W. 723, 22 Ky. L. Rep. 1495.

Minnesota.— Conlan *v.* Grace, 36 Minn. 276, 30 N. W. 880; Stevens *v.* Hatch, 6 Minn. 64.

See 16 Cent. Dig. tit. "Deeds," § 118.

From subsequent admissions, conduct, and circumstances an intent may be inferred. Nichol *v.* Davidson County, 3 Tenn. Ch. 547.

Signing and acknowledging a deed without reservation and passing the same out of the grantor's control and possession amount to a delivery. Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788. See also Adams *v.* Baker, 50 W. Va. 249, 40 S. E. 356.

93. Presumptions arising from possession by grantor see *infra*, V, A, 7, e.

94. *Alabama.*— Bernheim *v.* Horton, 103 Ala. 380, 15 So. 822.

Georgia.— Jenkins *v.* Southern R. Co., 109 Ga. 35, 34 S. E. 355; O'Neal *v.* Brown, 67 Ga. 707.

Illinois.— Lundy *v.* Mason, 174 Ill. 505, 51 N. E. 614; McElroy *v.* Hiner, 133 Ill. 156, 24 N. E. 435; Price *v.* Hudson, 125 Ill. 284, 17 N. E. 817; Cline *v.* Jones, 111 Ill. 563; Durand *v.* Weightman, 108 Ill. 489; Byars *v.* Spencer, 101 Ill. 429, 40 Am. Rep. 212.

Iowa.— Guernsey *v.* Black Diamond Coal, etc., Co., 99 Iowa 471, 68 N. W. 777; Farmers', etc., Bank *v.* Haney, 87 Iowa 101, 54 N. W. 61; Miller *v.* Murfield, 79 Iowa 64, 44 N. W. 540; Woolcut *v.* Lerdell, 78 Iowa 668, 43 N. W. 609.

Kansas.— Lawn *v.* Donavan, 2 Kan. App. 404, 42 Pac. 744.

Maine.— Patterson *v.* Snell, 67 Me. 559; Chadwick *v.* Webber, 3 Me. 141, 14 Am. Dec. 222.

Massachusetts.—Parker *v.* Parker, 1 Gray 409; Mills *v.* Gore, 20 Pick. 28.

Mississippi.— Hall *v.* Barnett, 71 Miss. 37, 14 So. 732; Davis *v.* Williams, 57 Miss. 843; Davis *v.* Lumpkin, 57 Miss. 506.

New York.— Fisher *v.* Hall, 41 N. Y. 416; Wainwright *v.* Low, 57 Hun 386, 10 N. Y. Suppl. 888 [*affirmed* in 132 N. Y. 313, 30 N. E. 747]; Cusack *v.* Tweedy, 56 Hun 617, 11 N. Y. Suppl. 16; Stubing *v.* Stubing, 5 N. Y. Suppl. 767; Stilwell *v.* Hubbard, 20 Wend. 44; Jackson *v.* Dunlap, 1 Johns. Cas. 114, 1 Am. Dec. 100.

North Carolina.— Ward *v.* Ward, 3 N. C. 226.

Ohio.— Clay *v.* Cline, 18 Ohio Cir. Ct. 89.

Oregon.— Fain *v.* Smith, 14 Oreg. 82, 12 Pac. 365, 58 Am. Rep. 281.

Pennsylvania.— Duraind's Appeal, 116 Pa. St. 93, 8 Atl. 922; Critchfield *v.* Critchfield, 24 Pa. St. 100.

South Carolina.— Wood *v.* Ingraham, 3 Strobh. Eq. 105, 51 Am. Dec. 671.

Tennessee.— Cazassa *v.* Cazassa, 92 Tenn. 573, 22 S. W. 560, 36 Am. St. Rep. 112, 20 L. R. A. 178; Blackmore *v.* Crutcher, (Ch. App. 1898) 46 S. W. 310.

West Virginia.— Gaines *v.* Keener, 48 W. Va. 56, 35 S. E. 856; Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 213.

England.— See Gudgen *v.* Besset, 6 E. & B. 986, 3 Jur. N. S. 212, 26 L. J. Q. B. 36, 88 E. C. L. 986.

See 16 Cent. Dig. tit. "Deeds," § 120.

95. *Illinois.*— Morris *v.* Caudle, 178 Ill. 1, 52 N. E. 1036, 69 Am. St. Rep. 282, 44 L. R. A. 489; Hawes *v.* Hawes, 177 Ill. 409, 53 N. E. 78; Hayes *v.* Boylan, 141 Ill. 400, 30 N. E. 1041, 33 Am. St. Rep. 326.

Maryland.— Duer *v.* James, 42 Md. 492.

Michigan.— Bisard *v.* Sparks, (1903) 95 N. W. 728; Reason *v.* Jones, 119 Mich. 672, 78 N. W. 899.

Mississippi.— Hall *v.* Waddill, 78 Miss. 16, 27 So. 936, 28 So. 831.

Missouri.— Mudd *v.* Dillon, 166 Mo. 110, 65 S. W. 973.

New Hampshire.—Cook *v.* Brown, 34 N. H. 460.

New Jersey.— Commercial Bank *v.* Reckless, 5 N. J. Eq. 430.

Pennsylvania.— Cameron *v.* Gray, 200 Pa. St. 566, 52 Atl. 132.

Tennessee.— Brevard *v.* Neely, 2 Sneed 164.

Washington.— Atwood *v.* Atwood, 15 Wash. 285, 46 Pac. 240.

West Virginia.— Gaines *v.* Keener, 48 W. Va. 56, 35 S. E. 856; Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 213.

See 16 Cent. Dig. tit. "Deeds," § 119.

Illustrations.— This rule has been applied where a deed intended as a testamentary disposition of his property was retained in the grantor's possession (Patterson *v.* Snell, 67 Me. 559; Stilwell *v.* Hubbard, 20 Wend. (N. Y.) 44); where it was found in the same envelope with the grantor's will (Miller *v.* Murfield, 79 Iowa 64, 44 N. W. 540); where it was placed in a trunk to which the grantor had access (Chadwick *v.* Webber, 3 Me. 141, 14 Am. Dec. 222; Hall *v.* Barnett, 71 Miss. 37, 14 So. 732; Duraind's Appeal, 116 Pa. St. 93, 8 Atl. 922); where it was deposited in a box with other papers of the grantor in a bank (Walls *v.* Ritter, 180 Ill. 616, 54 N. E. 565; Davis *v.* Williams, 57 Miss. 843); where it was put in a sealed envelope and deposited in a bank by the grantor in his name (Stout *v.* Stout, 28 Ind. App. 502, 63 N. E. 250); and where it was placed in a drawer in which other papers of the grantor, together with

the grantor's possession.[96] Likewise there may be a sufficient delivery where the grantor by his acts or words expresses an intention to deliver the instrument and there is nothing to qualify the delivery.[97]

(II) *Return of Deed by Grantee.* The fact that after a deed has been delivered by the grantor to the grantee the latter returns it to the former merely for the performance of some act in connection therewith does not negative the previous delivery or operate as a surrender of the title thereby acquired.[98]

e. Possession by Grantee.[99] It does not necessarily follow from the fact that the grantee has possession of the deed that there has been a delivery of the instrument, for it may have come into his hands without any intent on the part of the grantor to make a delivery.[1] A delivery, however, by the recording officer, after it has been recorded, under the direction of the grantor is sufficient.[2] And there may be a good delivery where the grantee takes possession of the instrument in the presence, and without objection on the part, of the grantor,[3] or where it was left on the grantee's table by the grantor.[4] And the presumption of delivery arising from the possession of a deed by the grantee, into whose hands it has been placed without condition, is not overcome by statements made by the grantor, some time before the execution of the same, to the effect that he

the will, were kept (Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 213).

96. Bunnell *v.* Bunnell, 64 S. W. 420, 23 Ky. L. Rep. 800; Wall *v.* Wall, 30 Miss. 91, 64 Am. Dec. 147; Farrar *v.* Bridges, 5 Humphr. (Tenn.) 411, 42 Am. Dec. 439.

Where the grantor merely acts as a depositary for the grantee there is a delivery. Gray *v.* Ward, (Tenn. Ch. App. 1898) 52 S. W. 1028. See Payne *v.* Hallgarth, 33 Oreg. 420, 54 Pac. 162.

97. *Georgia.*— Rushin *v.* Shields, 11 Ga. 636, 56 Am. Dec. 436.

Kentucky.— Hudson *v.* Redford, 67 S. W. 35, 23 Ky. L. Rep. 2347.

Minnesota.— Stevens *v.* Hatch, 6 Minn. 64.

Pennsylvania.— Miller *v.* Eshleman, 43 Leg. Int. 499.

South Carolina.— Harris *v.* Saunders, 2 Strobh. Eq. 370 note.

Tennessee.— Ledgerwood *v.* Gault, 2 Lea 643.

England.— Xenos *v.* Wickham, L. R. 2 H. L. 296, 36 L. J. C. P. 313, 16 L. T. Rep. N. S. 800, 16 Wkly. Rep. 38; Hall *v.* Palmer, 3 Hare 532, 8 Jur. 459, 13 L. J. Ch. 352, 25 Eng. Ch. 532. See also Hope *v.* Harman, 11 Jur. 1097; Evans *v.* Gray, L. R. 9 Ir. 539.

See 16 Cent. Dig. tit. "Deeds," § 120.

98. Delivery is complete, although a deed is returned to have the signature of the wife of one of the grantors attached and a misdescription corrected (Hargrave *v.* Melbourne, 86 Ala. 270, 5 So. 285), to obtain a wife's relinquishment of dower (Brooks *v.* Isbell, 22 Ark. 488), to have the deed recorded (Austin *v.* Fendall, 2 MacArthur (D. C.) 362; Otis *v.* Spencer, 102 Ill. 622, 40 Am. Rep. 617), to have it acknowledged (Towery *v.* Henderson, 60 Tex. 291; Rootes *v.* Holliday, 6 Munf. (Va.) 251), or where it is returned for safekeeping (Hall *v.* Dobbin, 119 Mich. 106, 77 N. W. 641; *In re* Nicholls, 190 Pa. St. 308, 42 Atl. 692; Turner *v.* Warren, 160 Pa. St. 333, 28 Atl. 781; Hart *v.* Rust, 46 Tex. 556; Smith *v.* James, 22 Tex. Civ. App. 154, 54 S. W. 41; Brown *v.* Brown, 4 Fed. Cas. No. 1,994, 1 Woodb. & M. 325). And where the vendor took back the deed before registration to secure the payment of the price, it was held that title passed under the original delivery to the vendee if the deed was afterward registered. Clark *v.* Arnold, 3 N. C. 287.

Placing with other papers both of the grantor and the grantee, after delivery to the latter, coupled with the fact that it could not be found until after the death of the grantor, when it was discovered among other papers of both parties, does not affect the prior delivery. Reed *v.* Smith, 125 Cal. 491, 58 Pac. 139.

99. Presumptions arising from possession by grantee see *infra*, V, A, 7, f.

1. There is no delivery where the grantee takes possession of the deed as agent of the grantor for a special purpose (Dietz *v.* Farish, 44 N. Y. Super. Ct. 190), where it is delivered for the purpose of examination (Comer *v.* Baldwin, 16 Minn. 172; Graves *v.* Dudley, 20 N. Y. 76; Curry *v.* Colburn, 99 Wis. 319, 74 N. W. 778, 67 Am. St. Rep. 860. See Gould *v.* Wise, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323; Lee *v.* Richmond, 90 Iowa 695, 57 N. W. 613), where he takes possession of it without the consent of the grantor (Lundy *v.* Mason, 174 Ill. 505, 51 N. E. 614; Major *v.* Todd, 84 Mich. 85, 47 N. W. 841), or where it is procured by force or fraud (Sauter *v.* Dollman, 46 Minn. 504, 49 N. W. 258).

When estopped to deny delivery.— Where the deed was deposited in a safe-deposit box to which both parties had access, and the grantee abstracted the instrument and used it to procure a loan on the property, the grantor was held estopped to deny delivery. Carusi *v.* Savary, 6 App. Cas. (D. C.) 330.

2. Kemp *v.* Walker, 16 Ohio 118.

3. Williams *v.* Sullivan, 10 Rich. Eq. (S. C.) 217.

4. McLennan *v.* McDonnell, 78 Cal. 273, 20 Pac. 566.

intended making a deed to the grantee which was to be returned and destroyed upon the happening of a certain contingency.[5]

f. Conditional Delivery. A deed cannot be delivered as an escrow to the grantee,[6] and a delivery which purports to be such will operate as an absolute one.[7] This rule, however, applies only to those deeds which are upon their face complete contracts requiring nothing but delivery to make them perfect, and does not apply to those which upon their face import that something besides delivery is necessary to be done in order to make them complete.[8]

g. Time of Delivery.[9] It is generally essential to the validity of a deed that it should be delivered during the lifetime of the grantor.[10] But the validity of a deed cannot be objected to on the ground that it was not delivered until after it was recorded.[11] Nor can the creditor of a grantor object on the ground that a deed was not delivered until some time after it was executed, where it was taken

5. Rohr *v.* Alexander, 57 Kan. 381, 46 Pac. 699.

6. *Arkansas.*— Campbell *v.* Jones, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783.

Georgia.— Jordan *v.* Polloek, 14 Ga. 145.

Mississippi.— Graves *v.* Tueker, 10 Sm. & M. 9.

New York.— Lawton *v.* Sager, 11 Barb. 349.

Oregon.— Gaston *v.* Portland, 16 Oreg. 255, 19 Pae. 127.

United States.— Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486.

England.— *Compare* Johnson *v.* Baker, 4 B. & Ald. 440, 23 Rev. Rep. 338, 6 E. C. L. 551.

Canada.— Haggarty *v.* O'Leary, 11 N. Brunsw. 360.

See 16 Cent. Dig. tit. "Deeds," § 124; and, generally, Escrows.

7. *Illinois.*— Baker *v.* Baker, 159 Ill. 394, 42 N. E. 867; Stevenson *v.* Crapnell, 114 Ill. 19, 28 N. E. 379; MeCann *v.* Atherton, 106 Ill. 31; Bryan *v.* Wash, 7 Ill. 557.

Indiana.— Foley *v.* Cowgill, 5 Blaekf. 18, 32 Am. Dee. 49.

Michigan.— Dawson *v.* Hall, 2 Mich. 390.

New York.— Braman *v.* Bingham, 26 N. Y. 483; Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dee. 330; Arnold *v.* Patrick, 6 Paige 310.

North Carolina.—Gibson *v.* Partee, 19 N. C. 530.

Virginia.—Miller *v.* Fleteher, 27 Gratt. 403, 21 Am. Rep. 356; Hicks *v.* Goode, 12 Leigh 479, 37 Am. Dee. 677.

Washington.— Riehmond *v.* Morford, 4 Wash. 337, 30 Pae. 241, 31 Pae. 513.

Wisconsin.— Hinchliff *v.* Hinman, 18 Wis. 130.

See 16 Cent. Dig. tit. "Deeds," § 124.

Delivery to an agent or attorney of the grantee is absolute. Parrish *v.* Steadham, 102 Ala. 615, 15 So. 354; Dunean *v.* Pope, 47 Ga. 445; Day *v.* Lacasse, 85 Me. 242, 27 Atl. 124; Hubbard *v.* Greeley, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511. But see Ashford *v.* Prewitt, 102 Ala. 264, 14 So. 663, 48 Am. St. Rep. 37. A delivery, however, to an agent of the grantee to be held while the latter considers whether he shall accept it or not has been held not to be a valid delivery. Ford *v.* James, 2 Abb. Dec. (N. Y.) 159, 4 Keyes (N. Y.) 300. But see Rountree *v.* Smith, 152 Ill. 493, 38 N. E. 680; Newlin *v.* Beard, 6 W. Va. 110.

8. Hicks *v.* Goode, 12 Leigh (Va.) 479, 37 Am. Dee. 677. See also Hargrave *v.* Melbourne, 86 Ala. 270, 5 So. 285.

9. **Presumption of time of delivery** see *infra*, V, A, 7, c.

10. *Arkansas.*— Miller *v.* Physiek, 24 Ark. 244.

Delaware.— Doe *v.* Beeson, 2 Houst. 246.

Illinois.— Provart *v.* Harris, 150 Ill. 40, 36 N. E. 958; Wiggins *v.* Lusk, 12 Ill. 132; Brooks *v.* People, 15 Ill. App. 570.

Iowa.— Otto *v.* Doty, 61 Iowa 23, 15 N. W. 578.

Kentucky.— Colyer *v.* Hyden, 94 Ky. 180, 21 S. W. 868, 15 Ky. L. Rep. 101.

Michigan.— Taft *v.* Taft, 59 Mich. 185, 26 N. W. 426, 60 Am. Rep. 291.

Mississippi.— Weisinger *v.* Cocke, 67 Miss. 511, 7 So. 495, 19 Am. St. Rep. 320.

North Carolina.— Baldwin *v.* Maultsby, 27 N. C. 505.

Pennsylvania.— Shoenberger *v.* Haekman, 37 Pa. St. 87.

Texas.— Naugher *v.* Patterson, 9 Tex. Civ. App. 168, 28 S. W. 582.

West Virginia.— Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 213.

See 16 Cent. Dig. tit. "Deeds," § 123.

An exception to the rule has been held to exist where a deed is delivered to a third person with instructions to deliver the same to the grantee, to whom the deed is not given, however, until after the grantor's death (Colyer *v.* Hyden, 94 Ky. 180, 21 S. W. 868, 15 Ky. L. Rep. 101; Sneathen *v.* Sneathen, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 326), and where one of several tenants in eommon, by whom a deed of land, for whieh the consideration has been fully paid, has been executed, dies, and the instrument is delivered by the other tenant or one to whom it has been intrusted for that purpose (Holt's Appeal, 98 Pa. St. 257). And a delivery of a deed has been held binding upon the heir of the grantor where with the consent of and under an agreement with the former a deed delivered as an escrow is after the grantor's death delivered to the grantee. Keirsted *v.* Avery, 4 Paige (N. Y.) 9.

11. Parker *v.* Hill, 8 Metc. (Mass.) 447.

by the grantee for a valuable consideration, in satisfaction of a *bona fide* debt, and in ignorance of his indebtedness to others.[12]

h. Co-Grantors and Co-Grantees. Where a deed is delivered to one of two or more co-grantees it will operate as a delivery to all.[13] And a delivery by the husband of a deed, executed by him and his wife, may operate as a delivery by the wife also.[14] But a delivery by a wife of a joint deed of gift by her and her husband of a homestead, the title to which is in her, has been held not to affect his right in the homestead where it was intended that there should be no delivery until after the death of both and she acted without his knowledge or consent in making the delivery.[15] And a delivery is incomplete where made by some of the parties only to a deed, which shows on its face that it was intended to be jointly executed so that all should be bound by its covenants.[16]

i. Ratification. A delivery of a deed to a stranger will be good where the grantee ratifies it.[17] And although a delivery is not authorized by the grantor, yet he may by subsequent conduct or acts ratify the same.[18] So a deed not valid to pass title may become valid by redelivery.[19] It has, however, been held that where a deed was void for want of delivery it cannot be validated by a subsequent deed given for that purpose.[20]

j. Questions For Jury. It is ordinarily a question of fact for the jury to determine whether there has been a delivery of a deed.[21]

2. Delivery to Third Person — a. General Rule. It is not necessary that a delivery of a deed should be made to the grantee himself, but it will be sufficient if it is delivered to a third person for the use of the grantee.[22] Such a delivery,

12. Young *v.* Stearns, 3 Ill. App. 498.

13. Eshleman *v.* Henrietta Vineyard Co., 102 Cal. 199, 36 Pac. 579; Rightor *v.* Kohn, 16 La. 501; Minor *v.* Powers, (Tex. Civ. App. 1893) 24 S. W. 710. But see Baxter *v.* Baxter, 44 N. C. 341; Hannah *v.* Swarner, 8 Watts (Pa.) 9, 34 Am. Dec. 442.

A deed to a wife with the remainder over to the sons passes title on delivery to the wife. Boswell *v.* Boswell, 45 S. W. 454, 20 Ky. L. Rep. 118. And a deed conveying land for life to a married woman, the property thereafter to go to her children, or in case there are none, the husband to have the use thereof during his life, is sufficiently delivered as to the children and husband by a delivery to the wife. Lambert *v.* McClure, 12 Tex. Civ. App. 577, 34 S. W. 973.

14. Somers *v.* Pumphrey, 24 Ind. 231.

15. Meeks *v.* Stillwell, 54 Ohio St. 541, 44 N. E. 267. *Compare* Cannon *v.* Cannon, 26 N. J. Eq. 316.

16. Arthur *v.* Anderson, 9 S. C. 234. *Compare* Overman *v.* Kerr, 17 Iowa 485.

17. Morrison *v.* Kelly, 22 Ill. 610, 74 Am. Dec. 169.

18. McNulty *v.* McNulty, 47 Kan. 208, 27 Pac. 819, where it was held that a delivery was ratified where the grantor recognized the grantee's title for three years by acting as his agent in respect to the management of the property. See also Pittman *v.* Sofley, 64 Ill. 155.

A grantor cannot show that a delivery was unauthorized where it appears from the evidence that he ratified the transaction. Harkness *v.* Cleaves, 113 Iowa 140, 84 N. W. 1033.

19. Shackleford *v.* Smith, 5 Dana (Ky.) 232.

A subsequent acknowledgment and leaving of the deed with the grantee will be an equivalent to a redelivery. Osterhout *v.* Shoemaker, 3 Hill (N. Y.) 513.

20. Barr *v.* Schroeder, 32 Cal. 609.

21. *California.*— Bensley *v.* Atwill, 12 Cal. 231; Hastings *v.* Vaughn, 5 Cal. 315.

Minnesota.— Kammrath *v.* Kidd, 89 Minn. 380, 95 N. W. 213.

Missouri.— Gilmore *v.* Morris, 13 Mo. App. 114.

New Hampshire.— Hurlburt *v.* Wheeler, 40 N. H. 73.

New Jersey.— Farlee *v.* Farlee, 21 N. J. L. 279.

New York.— Crain *v.* Wright, 36 Hun 74 [*affirmed* in 114 N. Y. 307, 21 N. E. 401]; Genter *v.* Morrison, 31 Barb. 155.

Pennsylvania.— Stoney *v.* Winterhalter, (1887) 11 Atl. 611; Fisher *v.* Kean, 1 Watts 278.

South Carolina.— Shaw *v.* Cunningham, 16 S. C. 631.

Texas.— Johnston *v.* Johnston, (Civ. App. 1902) 67 S. W. 123.

Vermont.— Lindsay *v.* Lindsay, 11 Vt. 621.

See 16 Cent. Dig. tit. "Deeds," § 127.

The court may withdraw the issue where the proof as to delivery is such as to repel a presumption of any intention to deliver. Carnes *v.* Platt, 1 Sweeny (N. Y.) 140.

22. *Alabama.*—Fitzpatrick *v.* Brigman, 133 Ala. 242, 31 So. 940; Tennessee Coal, etc., R. Co. *v.* Wheeler, 125 Ala. 538, 28 So. 38.

Arkansas.—Eastham *v.* Powell, 51 Ark. 530, 11 S. W. 823.

Illinois.— Clark *v.* Clark, 183 Ill. 448, 56 N. E. 82, 75 Am. St. Rep. 115; Latimer *v.* Latimer, 174 Ill. 418, 51 N. E. 548; Rodemeier *v.* Brown, 169 Ill. 347, 48 N. E. 468, 61 Am. St. Rep. 176; Miller *v.* Meers, 155 Ill.

however, will not be effectual unless it is made in such a way that the grantor parts with all control over the instrument.[23]

b. Assent of Grantee. A delivery to a third person for the use of the grantee may be sufficient, although there had been no authority given to such person to receive the deed,[24] where the grantee subsequently assents thereto.[25] Such assent will be presumed [26] until the grantee dissents;[27] in which case there is no delivery so as to pass title.[28]

c. Retention by, or Delivery to, Scrivener. The retention by, or the delivery to, the scrivener of a deed may operate as a delivery to the grantee.[29] But where the scrivener who has possession of the deed is directed by the grantor not to give

284, 40 N. E. 577; Redden *v.* Miller, 95 Ill. 336; Crocker *v.* Lowenthal, 83 Ill. 579; Rawson *v.* Fox, 65 Ill. 200; Thompson *v.* Candor, 60 Ill. 244; Morrison *v.* Kelly, 22 Ill. 610, 74 Am. Dec. 169.

Indiana.— Nye *v.* Lowry, 82 Ind. 316; Burkholder *v.* Casad, 47 Ind. 418.

Iowa.— Hall *v.* Cardell, 111 Iowa 206, 82 N. W. 503.

Kansas.— Wuester *v.* Folin, 60 Kan. 334, 56 Pac. 490.

Kentucky.— Inlow *v.* Com., 6 T. B. Mon. 72.

Maine.— Hatch *v.* Bates, 54 Me. 136.

Maryland.— Duer *v.* James, 42 Md. 492.

Massachusetts.— Hatch *v.* Hatch, 9 Mass. 307, 6 Am. Dec. 67.

Minnesota.—Barnard *v.* Thurston, 86 Minn. 343, 90 N. W. 574; Crowley *v.* C. N. Nelson Lumber Co., 66 Minn. 400, 69 N. W. 321.

Mississippi.— Kane *v.* Doe, 9 Sm. & M. 387.

Missouri.—Hamilton *v.* Armstrong, 120 Mo. 597, 25 S. W. 545; White *v.* Pollock, 117 Mo. 467, 22 S. W. 1077, 38 Am. St. Rep. 671; Williams *v.* Latham, 113 Mo. 165, 20 S. W. 99; Standiford *v.* Standiford, 97 Mo. 231, 10 S. W. 836, 3 L. R. A. 299.

New Hampshire.— Peavey *v.* Tilton, 18 N. H. 151, 45 Am. Dec. 365; Buffum *v.* Green, 5 N. H. 71, 20 Am. Dec. 562; Canning *v.* Pinkham, 1 N. H. 353.

New Jersey.— Jones *v.* Swayze, 42 N. J. L. 279.

New York.— Fisher *v.* Hall, 41 N. Y. 416; Brown *v.* Austen, 35 Barb. 341; Roosevelt *v.* Carow, 6 Barb. 190; Church *v.* Gilman, 15 Wend. 656, 30 Am. Dec. 82; Souverbye *v.* Arden, 1 Johns. Ch. 240.

North Carolina.— Gaskill *v.* King, 34 N. C. 211; Morrow *v.* Alexander, 24 N. C. 388.

Ohio.— Mitchell *v.* Ryan, 3 Ohio St. 377.

Pennsylvania.— Eckman *v.* Eckman, 55 Pa. St. 269; Thompson *v.* Lloyd, 49 Pa. St. 127.

Tennessee.— Thompson *v.* Jones, 1 Head 574.

England.— Doe *v.* Knight, 5 B. & C. 671, 8 D. & R. 348, 4 L. J. K. B. O. S. 161, 29 Rev. Rep. 355, 11 E. C. L. 632.

See 16 Cent. Dig. tit. "Deeds," § 130.

Delivery to a father of a deed conveying property to an infant child is good. Parker *v.* Salmons, 101 Ga. 160, 28 S. E. 681, 65 Am. St. Rep. 291. See also Chapin *v.* Nott, 203 Ill. 341, 67 N. E. 833.

23. *California.*— Fitch *v.* Bunch, 30 Cal. 208.

Connecticut.— Porter *v.* Woodhouse, 59 Conn. 568, 22 Atl. 299, 21 Am. St. Rep. 131, 13 L. R. A. 64; Alsop *v.* Swathel, 7 Conn. 500.

Delaware.— Doe *v.* Beeson, 2 Houst. 246.

Illinois.— Barrows *v.* Barrows, 138 Ill. 649, 28 N. E. 983.

Minnesota.— Kammrath *v.* Kidd, 89 Minn. 380, 95 N. W. 213.

Missouri.— Abbe *v.* Justus, 60 Mo. App. 300; Vanstone *v.* Goodwin, 42 Mo. App. 39; Ells *v.* Missouri Pac. R. Co., 40 Mo. App. 165.

New Hampshire.— Baker *v.* Haskell, 47 N. H. 479, 93 Am. Dec. 455; Johnson *v.* Farley, 45 N. H. 505.

North Carolina.— Bailey *v.* Bailey, 52 N. C. 44.

Pennsylvania.— Eckman *v.* Eckman, 55 Pa. St. 269.

Rhode Island.— Johnson *v.* Johnson, 24 R. I. 571, 54 Atl. 378.

See 16 Cent. Dig. tit. "Deeds," § 134.

There is no delivery to the grantee where a deed is given to a third person for safekeeping (Barlow *v.* Hinton, 1 A. K. Marsh. (Ky.) 97), or to procure an acknowledgment (Johnson *v.* Brook, 31 Miss. 17, 66 Am. Dec. 547; Donnelly *v.* Rafferty, 172 Pa. St. 587, 33 Atl. 754); or where a deed is given to a third person without any instruction or authority to deliver it to the grantee (Fitzpatrick *v.* Brigman, 130 Ala. 450, 30 So. 500; Cannon *v.* Cannon, 26 N. J. Eq. 316; Elsey *v.* Metcalf, 1 Den. (N. Y.) 323; Perkins *v.* Thompson, 123 N. C. 175, 31 S. E. 387; Carr *v.* Hoxie, 5 Fed. Cas. No. 2,438, 5 Mason 60).

24. Bryan *v.* Wash, 7 Ill. 557; Ward *v.* Small, 90 Ky. 198, 13 S. W. 1070, 12 Ky. L. Rep. 58; Mather *v.* Corliss, 103 Mass. 568; Everett *v.* Everett, 48 N. Y. 218; Verplank *v.* Sterry, 12 Johns. (N. Y.) 536, 7 Am. Dec. 348; Montreal Cong. Nunnery *v.* McNamara, 3 Barb. Ch. (N. Y.) 375, 49 Am. Dec. 184.

25. Haenni *v.* Bleisch, 146 Ill. 262, 34 N. E. 153; Bennett *v.* Waller, 23 Ill. 97; Turner *v.* Whidden, 22 Me. 121; Marsh *v.* Austin, 1 Allen (Mass.) 235; Wesson *v.* Stephens, 37 N. C. 557.

Express assent is not necessary. Tibbals *v.* Jacobs, 31 Conn. 428; Merrills *v.* Swift, 18 Conn. 257, 46 Am. Dec. 315.

26. Doe *v.* Beeson, 2 Houst. (Del.) 246.

27. Hallock *v.* Bush, 2 Root (Conn.) 26, 1 Am. Dec. 60; Tate *v.* Tate, 21 N. C. 22.

28. Carnes *v.* Platt, 7 Abb. Pr. N. S. (N. Y.) 42, 38 How. Pr. (N. Y.) 100. See also Day *v.* Griffith, 15 Iowa 104.

29. *Alabama.*— Burt *v.* Cassety, 12 Ala. 734.

the instrument to any one, there is no delivery to the grantee, and it is immaterial that he did deliver the instrument to the latter.[30] And the question of whether there has been a delivery may depend upon whether the scrivener acts as agent of the grantee or the grantor.[31] Again where a deed is executed in blank and given to an attorney merely to fill up there is no delivery of the instrument to the grantee where the former writes an acknowledgment thereon and delivers it.[32]

d. Conditional Delivery. Where a deed is given to a third person to hold until the performance of some act by the grantee or the happening of some contingency it does not operate as a delivery to the grantee.[33]

e. Delivery to Agent of Grantee. A delivery of a deed to a person having authority to receive the same in behalf of the grantee will be a sufficient delivery.[34]

f. Loss or Destruction of Deed After Delivery. The loss of a deed while in the possession of a third party to whom it has been delivered for the use of the grantee will not operate to defeat the delivery to the latter.[35] Nor can the title of a grantee under such a delivery be affected by a destruction of the deed while in the hands of a third party or before it is given to the grantee.[36]

g. Questions For Jury. It is a question for the jury to determine whether a grantor intended, in leaving the deed with his attorney, to deliver such deed to the grantee.[37]

3. Delivery For Record and Recording — a. In General. The recording of a deed is *prima facie* evidence of a delivery to, and acceptance by, the grantee,[38]

Delaware.— Jamison *v.* Craven, 4 Del. Ch. 311.

Indiana.— Fewell *v.* Kessler, 30 Ind. 195.

Kansas.— Bierer *v.* Fretz, 32 Kan. 329, 4 Pac. 284.

Minnesota.—Barnard *v.* Thurston, 86 Minn. 343, 90 N. W. 574.

New York.— Reed *v.* Marble, 10 Paige 409.

Vermont.— Orr *v.* Clark, 62 Vt. 136, 19 Atl. 929.

See 16 Cent. Dig. tit. "Deeds," § 132.

30. Bettinger *v.* Van Alstine, 79 Hun (N. Y.) 517, 29 N. Y. Suppl. 904.

31. Swank *v.* Swank, 37 Oreg. 439, 61 Pac. 846; Healy *v.* Seward, 5 Wash. 319, 31 Pac. 874. See also Carnes *v.* Platt, 6 Rob. (N. Y.) 270.

32. Hammerslough *v.* Cheatham, 84 Mo. 13.

33. Soward *v.* Moss, 59 Nebr. 71, 80 N. W. 268; Stockwell *v.* Williams, 68 N. H. 75, 41 Atl. 973; Tarlton *v.* Griggs, 131 N. C. 216, 42 S. E. 591; Cogswell *v.* O'Connor, 13 Nova Scotia 513.

Express words are not necessary in order to have a delivery operate as an escrow, for it may be inferred from circumstances attending the execution. Bowker *v.* Burdekin, 12 L. J. Exch. 329, 11 M. & W. 128; Nash *v.* Flynn, 6 Ir. Eq. 565, 1 J. & L. 162; Keator *v.* Scovil, 5 N. Brunsw. 647.

34. *Maine.*— Turner *v.* Whidden, 22 Me. 121.

Minnesota.— Miller *v.* Irish Catholic Colonization Assoc., 36 Minn. 357, 31 N. W. 215.

Nebraska.— Sowards *v.* Moss, 58 Nebr. 119, 78 N. W. 373.

North Carolina.— Green *v.* Kornegay, 49 N. C. 66, 67 Am. Dec. 261.

Ohio.— Cincinnati, etc., R. Co. *v.* Iliff, 13 Ohio St. 235.

Pennsylvania.— Stinger *v.* Com., 26 Pa. St. 422; Blight *v.* Schenck, 10 Pa. St. 285, 51 Am. Dec. 478; Read *v.* Robinson, 6 Watts & S. 329.

South Carolina.— Guess *v.* South Bound R. Co., 40 S. C. 450, 19 S. E. 68.

Vermont.— Pratt *v.* Holman, 16 Vt. 530.

See 16 Cent. Dig. tit. "Deeds," § 131.

Illustrations.—Delivery to the grantee's attorney is sufficient (Hubbard *v.* Greeley, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511), and delivery to the grantor's solicitor for delivery to the grantee has been held to operate as a technical delivery (Hammond *v.* Hunt, 11 Fed. Cas. No. 6,003, 4 Ban. & A. 111). Again delivery to an officer of a corporation may be delivery to the corporation itself. Southern L. Ins., etc., Co. *v.* Cole, 4 Fla. 359.

A deed to a purchaser at a sheriff's sale may be delivered to a third person appointed to receive it. Scott *v.* McNutt, 2 Nova Scotia Dec. 118.

Rejection by the grantee revests title in the grantor. Read *v.* Robinson, 6 Watts & S. (Pa.) 329.

35. Henricksen *v.* Hodgen, 67 Ill. 179; McCormick *v.* McCormick, 71 Iowa 379, 33 N. W. 648; Appleman *v.* Appleman, 140 Mo. 309, 41 S. W. 794, 62 Am. St. Rep. 732.

If the delivery to a third person is not of such a character as to make it an absolute one to the grantee, and the grantor subsequently obtains possession of and destroys the instrument, the grantee can claim no title thereunder. Patterson *v.* Underwood, 29 Ind. 607; Burk *v.* Sproat, 96 Mich. 404, 55 N. W. 985; Mudd *v.* Dillon, 166 Mo. 110, 65 S. W. 973.

36. Douglas *v.* West, 140 Ill. 455, 31 N. E. 403; Chambers *v.* Stewart, 3 Ohio S. & C. Pl. Dec. 522, 2 Ohio N. P. 287.

37. Fitzpatrick *v.* Brigman, 133 Ala. 242, 31 So. 940.

38. *Arkansas.*— See Kerr *v.* Birnie, 25 Ark. 225.

Florida.— Ellis *v.* Clark, 39 Fla. 714, 23 So. 410.

and may, when coupled with other circumstances showing an intention to deliver the instrument to him, operate as an absolute delivery.[39] And the delivery of a deed for record may likewise so operate where such an intention is shown.[40]

Georgia.— Stallings *v.* Newton, 110 Ga. 875, 36 S. E. 227.

Kansas.— Neel *v.* Neel, (Sup. 1902) 69 Pac. 162.

Kentucky.— Lay *v.* Lay, 66 S. W. 371, 23 Ky. L. Rep. 1817.

Maine.— *Compare* Patterson *v.* Snell, 67 Me. 559.

Missouri.— Burke *v.* Adams, 80 Mo. 504, 50 Am. Rep. 510.

Nebraska.— Gustin *v.* Michelson, 55 Nebr. 22, 75 N. W. 153.

New York.— Sweetland *v.* Buell, 164 N. Y. 541, 58 N. E. 663, 79 Am. St. Rep. 676.

North Carolina.— Ellington *v.* Currie, 40 N. C. 21.

South Carolina.— McGee *v.* Wells, 52 S. C. 472, 30 S. E. 602.

Tennessee.— Thomason *v.* Hays, (Ch. App. 1901) 62 S. W. 336; Cumberland Land Co. *v.* Daniel, (Ch. App. 1899) 52 S. W. 446.

Washington.— *Compare* Kellogg *v.* Cook, 18 Wash. 516, 52 Pac. 233.

See 16 Cent. Dig. tit. "Deeds," § 136.

Mere recording is not conclusive evidence of a delivery. Juvenal *v.* Jackson, 14 Pa. St. 519; Heintz *v.* O'Donnell, 17 Tex. Civ. App. 21, 42 S. W. 797.

Although a prima facie case of executors and delivery does not exist because of a defective certificate of acknowledgment, yet the jury may consider the fact that the instrument has been recorded in determining the question whether it was delivered. Heintz *v.* O'Donnell, 17 Tex. Civ. App. 21, 42 S. W. 797.

39. *Alabama.*—Alexander *v.* Alexander, 71 Ala. 295.

Connecticut.— Moore *v.* Giles, 49 Conn. 570. See also Jones *v.* Jones, 6 Conn. 111, 16 Am. Dec. 35.

Illinois.— Brady *v.* Huber, 197 Ill. 291, 64 N. E. 264; La Fleure *v.* Seivert, 98 Ill. App. 234.

Kansas.— Kelsa *v.* Graves, 64 Kan. 777, 68 Pac. 607.

Michigan.—Holmes *v.* McDonald, 119 Mich. 563, 78 N. W. 647, 75 Am. St. Rep. 430; Fenton *v.* Miller, 94 Mich. 204, 53 N. W. 957.

Nebraska.— Issitt *v.* Dewey, 47 Nebr. 196, 66 N. W. 288.

New Hampshire.— Boody *v.* Davis, 20 N. H. 140, 51 Am. Dec. 210.

New York.— Port Jervis Nat. Bank *v.* Bonnell, 46 N. Y. App. Div. 302, 61 N. Y. Suppl. 521 [*affirming* 26 Misc. 541, 57 N. Y. Suppl. 486].

North Carolina.— Snider *v.* Lackenour, 37 N. C. 360, 38 Am. Dec. 685.

Pennsylvania.— Lyman *v.* Smith, 4 Lack. Leg. N. 207.

Texas.— Ford *v.* Boone, (Civ. App. 1903) 75 S. W. 353.

Washington.— Bjmerland *v.* Eley, 15 Wash. 101, 45 Pac. 730.

See 16 Cent. Dig. tit. "Deeds," § 137.

If no intention to deliver exists the recording of a deed will not operate as a delivery.

Delaware.— Jones *v.* Bush, 4 Harr. 1.

Florida.— Ellis *v.* Clark, 39 Fla. 714, 23 So. 410.

Massachusetts.— Hastings *v.* Merriam, 117 Mass. 245. See also Barnes *v.* Barnes, 161 Mass. 381, 37 N. E. 379.

Michigan.— Hogadone *v.* Grange Mut. F. Ins. Co., (1903) 94 N. W. 1045.

North Dakota.— McManus *v.* Commow, 10 N. D. 340, 87 N. W. 8.

Tennessee.— Watson *v.* Ryan, 3 Tenn. Ch. 40.

Texas.— Koppelmann *v.* Koppelmann, 94 Tex. 40, 57 S. W. 570.

See 16 Cent. Dig. tit. "Deeds," § 137.

It is essential that the deed should come from the grantor or someone claiming under or through him. Barr *v.* Schroeder, 32 Cal. 609. See also Barns *v.* Barns, 113 Iowa 435, 85 N. W. 629; Blackman *v.* Schierman, 21 Tex. Civ. App. 517, 51 S. W. 886.

40. *Alabama.*— Gulf Red Cedar Lumber Co. *v.* O'Neal, 131 Ala. 117, 30 So. 466; Lewis *v.* Watson, 98 Ala. 479, 13 So. 570, 39 Am. St. Rep. 82, 22 L. R. A. 297; Alexander *v.* Alexander, 71 Ala. 295.

Colorado.— *Compare* Knox *v.* Clark, 15 Colo. App. 356, 62 Pac. 334.

Illinois.—Young *v.* Stearns, 3 Ill. App. 498.

Indiana.— McNeely *v.* Rucker, 6 Blackf. 391.

Iowa.— Luckhart *v.* Luckhart, 120 Iowa 248, 94 N. W. 461; Adams *v.* Ryan, 61 Iowa 733, 17 N. W. 159.

Kentucky.— Martin *v.* Bates, 50 S. W. 38, 20 Ky. L. Rep. 1798.

Massachusetts.— Shaw *v.* Hayward, 7 Cush. 170.

New Jersey.— Commercial Bank *v.* Reckless, 5 N. J. Eq. 430.

North Carolina.— Robbins *v.* Rascoe, 120 N. C. 79, 26 S. E. 807, 58 Am. St. Rep. 774, 38 L. R. A. 238; Phillips *v.* Houston, 50 N. C. 302.

Ohio.— Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

Texas.— Herring *v.* Mason, (Civ. App. 1897) 43 S. W. 797.

Wisconsin.— Cooper *v.* Jackson, 4 Wis. 537.

United States.— Bulkley *v.* Buffington, 4 Fed. Cas. No. 2,117, 5 McLean 457.

See 16 Cent. Dig. tit. "Deeds," § 136.

Neglect of the recorder to mark the time of delivery does not defeat the delivery. Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

There is no delivery where it is merely left with the register with instructions from the grantor not to record it until further notice (Tuberville *v.* Fowler, 101 Tenn. 88, 46 S. W. 577), or where it was left with the justice who took the acknowledgment and forwarded

b. Knowledge or Assent of Grantee. The fact that a person has executed and recorded a deed, where it is done without the knowledge or assent of the grantee, will not of itself operate as a delivery to the latter.[41] Nor will the mere delivery of such an instrument for the purpose of having it recorded, if done without the knowledge of the grantee, constitute a delivery to him.[42]

c. Retention by Grantor of Possession. The mere recording of a deed which the grantor thereafter retains in his possession does not, in the absence of other circumstances showing an intention by such act to deliver the instrument to the grantee, operate as a delivery to him.[43]

4. Deed to Take Effect After Grantor's Death — a. In General. A deed executed by the grantor with the intention of having it take effect after his death, but which he retains in his possession or control, will be ineffectual to pass title for want of delivery.[44]

b. Delivery to Third Person to Hold Till Grantor's Death. The delivery of a deed by the grantor to a third person to be held by him and delivered to the grantee upon the grantor's death will operate as a valid delivery, where there is no reservation on the part of the latter of any control over the instrument.[45] If,

by him for record, but was recalled by the grantor before it was recorded (O'Connor *v.* O'Connor, 100 Iowa 476, 69 N. W. 676).

41. *Illinois.*— Sullivan *v.* Eddy, 154 Ill. 199, 40 N. E. 482.

Iowa.— Deere *v.* Nelson, 73 Iowa 186, 34 N. W. 809; Moody *v.* Dryden, 72 Iowa 461, 34 N. W. 210.

Massachusetts.— Maynard *v.* Maynard, 10 Mass. 456, 6 Am. Dec. 146.

Minnesota.— Babbitt *v.* Bennett, 68 Minn. 260, 71 N. W. 22.

New Hampshire.—Hayes *v.* Davis, 18 N. H. 600.

North Carolina.— *Compare* Snider *v.* Lackenour, 37 N. C. 360, 38 Am. Dec. 685.

See 16 Cent. Dig. tit. "Deeds," § 138.

Subsequent assent by the grantee is equivalent to actual delivery to him. Hedge *v.* Drew, 12 Pick. (Mass.) 141, 22 Am. Dec. 416; Com. *v.* Selden, 5 Munf. (Va.) 160.

Where infant grantees have knowledge of the execution and record and are put in possession of some of the land conveyed there is sufficient proof of delivery. Horn *v.* Broyles, (Tenn. Ch. App. 1900) 62 S. W. 297.

42. *Alabama.*— *Compare* Burt *v.* Cassety, 12 Ala. 734.

Illinois.— Wiggins *v.* Lusk, 12 Ill. 132.

Kentucky.— Alexander *v.* De Kermel, 81 Ky. 345.

Massachusetts.— Samson *v.* Thornton, 3 Metc. 275, 37 Am. Dec. 135.

Missouri.— Cravens *v.* Rossiter, 116 Mo. 338, 22 S. W. 736, 38 Am. St. Rep. 606.

New Hampshire.— Barns *v.* Hatch, 3 N. H. 304, 14 Am. Dec. 369.

Vermont.— *Compare* Ferris *v.* Mosher, 27 Vt. 218, 65 Am. Dec. 192.

See 16 Cent. Dig. tit. "Deeds," § 138.

A deed deposited and refused by the grantee does not pass title and a sheriff's sale of such property as that of the grantee passes nothing. McClain *v.* French, 2 T. B. Mon. (Ky.) 147.

43. *Illinois.*— Weber *v.* Christen, 121 Ill. 91, 11 N. E. 893, 2 Am. St. Rep. 68; Stiles *v.* Probst, 69 Ill. 382.

Iowa.— Hutton *v.* Smith, 88 Iowa 238, 55 N. W. 326.

Maine.— McGraw *v.* McGraw, 79 Me. 257, 9 Atl. 846.

Massachusetts.— Hawkes *v.* Pike, 105 Mass. 560, 7 Am. Rep. 554.

Michigan.— Stevens *v.* Castel, 63 Mich. 111, 29 N. W. 828.

Texas.— Culmore *v.* Genove, (Civ. App. 1893) 24 S. W. 83.

Vermont.— Elmore *v.* Marks, 39 Vt. 538.

See 16 Cent. Dig. tit. "Deeds," § 139.

44. *Illinois.*— Walter *v.* Way, 170 Ill. 96, 48 N. E. 421.

Indiana.— Osborne *v.* Eslinger, 155 Ind. 351, 58 N. E. 439, 80 Am. St. Rep. 240; Fifer *v.* Rachels, 27 Ind. App. 654, 62 N. E. 68.

Kansas.— Stone *v.* French, 37 Kan. 145, 14 Pac. 530, 1 Am. St. Rep. 237.

South Dakota.— Van Dyke *v.* Grigsby, 11 S. D. 30, 75 N. W. 274.

Tennessee.— Taylor *v.* Taylor, 2 Humphr. 597.

See 16 Cent. Dig. tit. "Deeds," § 141.

Where deeds executed by a married woman to her husband, not to be delivered until her death, with intent to convey the title to him in the event of her dying first, are taken, without her knowledge and consent, from her possession during an illness, from which she recovers, and are recorded, they are not delivered, and the title remains in her. Gardiner *v.* Gardiner, (Mich. 1903) 95 N. W. 973.

45. *California.*—Ruiz *v.* Dow, 113 Cal. 490, 45 Pac. 867; Wittenbrock *v.* Cass, 110 Cal. 1, 42 Pac. 300.

Colorado.— Marvin *v.* Stimpson, 23 Colo. 174, 46 Pac. 673.

Connecticut.— Stewart *v.* Stewart, 5 Conn. 317.

Delaware.— Doe *v.* Beeson, 2 Houst. 246.

Illinois.— Shea *v.* Murphy, 164 Ill. 614, 45 N. E. 1021, 56 Am. St. Rep. 215; Baker *v.* Baker, 159 Ill. 394, 42 N. E. 867.

Indiana.— St. Clair *v.* Marquell, (Sup. 1903) 67 N. E. 693; Stout *v.* Rayl, 146 Ind. 379, 45 N. E. 515; Dinwiddie *v.* Smith, 141

however, a power to recall the deed is reserved by the grantor there is no effectual delivery and the deed cannot take effect.[46]

5. ACCEPTANCE — a. Necessity of. It is essential to the validity of a deed that there should be an acceptance of the instrument by the grantee.[47] But delivery

Ind. 318, 40 N. E. 748; Squires *v.* Summers, 85 Ind. 252.

Iowa.— Lippold *v.* Lippold, 112 Iowa 134, 83 N. W. 809, 84 Am. St. Rep. 331.

Kentucky.— Haydon *v.* Easter, 24 S. W. 626, 15 Ky. L. Rep. 597.

Michigan.— Meech *v.* Wilder, 130 Mich. 29, 89 N. W. 556; Jenkinson *v.* Brooks, 119 Mich. 108, 77 N. W. 640; Latham *v.* Udell, 38 Mich. 238.

New Jersey.— Schlicher *v.* Keeler, 61 N. J. Eq. 394, 48 Atl. 393.

New York.— Ranken *v.* Donovan, 166 N. Y. 626, 60 N. E. 1119 [*affirming* 46 N. Y. App. Div. 225, 61 N. Y. Suppl. 542]; Campbell *v.* Morgan, 68 Hun 490, 22 N. Y. Suppl. 1001; Diefendorf *v.* Diefendorf, 56 Hun 639, 8 N. Y. Suppl. 617; Goodell *v.* Pierce, 2 Hill 659; Ruggles *v.* Lawson, 13 Johns. 285, 7 Am. Dec. 375.

North Dakota.— Arnegaard *v.* Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258.

Ohio.— Wright *v.* Worden, 8 Ohio S. & C. Pl. Dec. 1, 7 Ohio N. P. 122.

Oregon.— Hoffmire *v.* Martin, 29 Oreg. 240, 45 Pac. 754.

Pennsylvania.— Stephens *v.* Huss, 54 Pa. St. 20; Levengood *v.* Bailey, 1 Woodw. 275.

Texas.— Griffis *v.* Payne, (Sup. 1898) 47 S. W. 973; Studebaker Bros. Mfg. Co. *v.* Hunt, (Civ. App. 1896) 38 S. W. 1134.

Vermont.— *Compare* Ladd *v.* Ladd, 14 Vt. 185.

United States.— McCalla *v.* Bane, 45 Fed. 828.

England.— Doe *v.* Bennett, 8 C. & P. 124, 34 E. C. L. 645.

See 16 Cent. Dig. tit. "Deeds," § 140.

Delivery before the grantor's death to the grantee by the person to whom the deed is intrusted, although in breach of the trust, is declared to be a good delivery. Wallace *v.* Harris, 32 Mich. 380.

The grantor cannot recall the deed or alter its provisions. Bury *v.* Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186.

Where the grantee dies prior to the grantor's death, the latter cannot maintain a bill to set aside the deed in the absence of proof of mistake in the execution. Stone *v.* Dewall, 77 Ill. 475.

46. *California.*—Kenney *v.* Parks, 125 Cal. 146, 57 Pac. 772.

Illinois.— Wilson *v.* Wilson, 158 Ill. 567, 41 N. E. 1007, 49 Am. St. Rep. 176; Stinson *v.* Anderson, 96 Ill. 373.

Iowa.— *Compare* Lippold *v.* Lippold, 112 Iowa 134, 83 N. W. 809, 84 Am. St. Rep. 331.

Maine.— Brown *v.* Brown, 66 Me. 316.

Michigan.— Pennington *v.* Pennington, 75 Mich. 600, 42 N. W. 985.

New Hampshire.— Cook *v.* Brown, 34 N. H. 460.

New York.— Jacobs *v.* Alexander, 19 Barb. 243.

North Carolina.— Roe *v.* Lovick, 43 N. C. 88.

Ohio.— Williams *v.* Schatz, 42 Ohio St. 47.

Tennessee.— Davis *v.* Cross, 14 Lea 637, 52 Am. Rep. 177.

Wisconsin.—Williams *v.* Daubner, 103 Wis. 521, 79 N. W. 748, 74 Am. St. Rep. 902; Prutsman *v.* Baker, 30 Wis. 644, 11 Am. Rep. 592.

See 16 Cent. Dig. tit. "Deeds," § 141.

Where one ill and expecting to die delivers a voluntary deed to a third person, to be delivered by him to the donee in case of the donor's death, it has been held that no vested interest passes thereby, and that if the deed is wrongfully obtained possession of and recorded after the danger of death is passed it will not be effectual to pass title. Boyle *v.* Boyle, 6 Mo. App. 594. *Compare* Jacobs *v.* Alexander, 19 Barb. (N. Y.) 243.

47. *Colorado.*— Rittmaster *v.* Brisbane, 19 Colo. 371, 35 Pac. 736.

Georgia.—Stallings *v.* Newton, 110 Ga. 875, 36 S. E. 227; Hilson *v.* Beardsley, 97 Ga. 399, 24 S. E. 134.

Illinois.— Moore *v.* Flynn, 135 Ill. 74, 25 N. E. 844; Doe *v.* Herbert, 1 Ill. 354, 12 Am. Dec. 192; Houfes *v.* Schultze, 2 Ill. App. 196.

Indiana.— Bremmerman *v.* Jennings, 101 Ind. 253; Woodbury *v.* Fisher, 20 Ind. 387, 83 Am. Dec. 325.

Kentucky.— Com. *v.* Jackson, 10 Bush 424.

Maine.— Dwinal *v.* Holmes, 33 Me. 172.

Maryland.—Leppoe *v.* National Union Bank, 32 Md. 136; Owens *v.* Miller, 29 Md. 144.

Massachusetts.— Meigs *v.* Dexter, 172 Mass. 217, 52 N. E. 75; Loring *v.* Hildreth, 170 Mass. 328, 49 N. E. 652, 64 Am. St. Rep. 301, 40 L. R. A. 127.

Minnesota.— Comer *v.* Baldwin, 16 Minn. 172.

Mississippi.— Kearny *v.* Jeffries, 48 Miss. 343; McGehee *v.* White, 31 Miss. 41.

Missouri.— Wells *v.* Hobson, 91 Mo. App. 379.

New Hampshire.— Corbett *v.* Noreross, 35 N. H. 99.

New York.— Day *v.* Mooney, 4 Hun 134, 6 Thomps. & C. 382; Foster *v.* Beardsley Scythe Co., 47 Barb. 505; Stephens *v.* Buffalo, etc., R. Co., 20 Barb. 332; Jackson *v.* Bodle, 20 Johns. 184.

South Carolina.— Walker *v.* Frazier, 2 Rich. Eq. 99.

Vermont.— Denton *v.* Perry, 5 Vt. 382.

See 16 Cent. Dig. tit. "Deeds," § 142.

Acceptance may be presumed of a deed which is beneficial to the grantee. Arrington *v.* Arrington, 122 Ala. 510, 26 So. 152; Issitt *v.* Dewey, 47 Nebr. 196, 66 N. W. 288; Edlich *v.* Gminder, 65 N. Y. App. Div. 496, 72 N. Y. Suppl. 885; Port Jervis Nat. Bank *v.* Bonnell, 26 Misc. (N. Y.) 541, 57 N. Y. Suppl. 486; Lore *v.* Truman, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250.

of a deed implies its acceptance by the grantee, in the absence of fraud, artifice, or imposition.[48]

b. Where Delivered to Third Person. A delivery of a deed to a third person for the grantee's use will operate as a good delivery to the grantee where it is assented to or ratified by him.[49]

c. Where Delivered For Record or Recorded. The recording of a deed will not of itself constitute a delivery to the grantee in the absence of an acceptance by him of the instrument;[50] but if subsequently accepted the deed will be valid.[51] The same rule applies to the delivery of a deed for record.[52]

d. Mode and Sufficiency of. An acceptance of a deed need not be by formal or express words to that effect, but may be by acts, conduct, or words of the parties showing an intention to accept.[53] So there may be an acceptance by the retention of the deed by the grantee;[54] by an assertion of title by him;[55] by his conveyance of the property;[56] by acts of ownership generally in respect to the property;[57] or by bringing a suit on the deed.[58] And, although a deed does not actually pass from grantor to grantee, yet if there are words showing delivery and acceptance this may be sufficient.[59] But an acceptance after the death of the grantor is ineffectual to pass title.[60]

e. Effect of. A grantor is bound by a deed which has been delivered and accepted, although it was to have been signed by the grantee in order to bind the latter to the performance of certain stipulations therein.[61] And where a grantee accepts a deed delivered to a stranger for the former's benefit the acceptance relates back to the time of the original delivery, provided no rights of third persons are involved.[62] Again a grantee who has accepted a deed on the understanding that it is to be subsequently executed by the grantor's wife cannot be heard to say, on its execution by her, that he never accepted it.[63] And it has

Acceptance by a husband of a deed to the wife of land for which he has paid has been held an acceptance by the wife. Jones *v.* Hightower, 107 Ky. 5, 52 S. W. 826, 21 Ky. L. Rep. 576.

48. Davenport *v.* Whisler, 46 Iowa 287.

49. Morrison *v.* Kelly, 22 Ill. 610, 74 Am. Dec. 169; Stewart *v.* Weed, 11 Ind. 92; Ells *v.* Missouri Pac. R. Co., 40 Mo. App. 165; McPherson *v.* Featherstone, 37 Wis. 632.

50. Loring *v.* Hildreth, 170 Mass. 328, 49 N. E. 652, 64 Am. St. Rep. 301, 40 L. R. A. 127; Russ *v.* Stratton, 11 Misc. (N. Y.) 565, 32 N. Y. Suppl. 767.

51. Harrison *v.* Phillips Academy, 12 Mass. 456.

52. Derry Bank *v.* Webster, 44 N. H. 264; Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637, holding that delivery for record is sufficient, where the grantees before the execution of the deed agreed to accept it.

53. Kingsbury *v.* Burnside, 58 Ill. 310, 11 Am. Rep. 67; Brownlow *v.* Wollard, 61 Mo. App. 124; Diehl *v.* Fowler, 10 Tex. Civ. App. 558, 30 S. W. 1086; Brown *v.* Grant, 116 U. S. 207, 6 S. Ct. 357, 29 L. ed. 598.

54. Hochstein *v.* Berghauser, 123 Cal. 681, 56 Pac. 547; Townsend *v.* Ward, 27 Conn. 610; Balch *v.* Young, 23 La. Ann. 272. See also Feely *v.* Hoover, 130 Pa. St. 107, 18 Atl. 611.

55. Stout *v.* Dunning, 72 Ind. 343; Taylor *v.* McClure, 28 Ind. 39.

Where a life-tenant conveys to the remainder-men, who institute partition, based on a present right to the property, and later sue for its possession, such conduct amounts to an acceptance of the life-tenant's conveyance. Whitaker *v.* Whitaker, 175 Mo. 1, 74 S. W. 1029.

56. Kinney *v.* Wells, 59 Ill. App. 271; Williams *v.* Smith, 60 S. W. 940, 22 Ky. L. Rep. 1439.

57. *Illinois.*— Shepley *v.* Leidig, 189 Ill. 197, 59 N. E. 579; Williams *v.* Williams, 148 Ill. 426, 36 N. E. 104.

Indiana.— Horner *v.* Lowe, 159 Ind. 406, 64 N. E. 218.

Kentucky.— Ward *v.* Small, 90 Ky. 198, 13 S. W. 1070, 12 Ky. L. Rep. 58; Harris *v.* Shirley, 3 J. J. Marsh. 22; Shoptaw *v.* Ridgway, 60 S. W. 723, 22 Ky. L. Rep. 1495.

New York.—Taylor *v.* Smith, 61 N. Y. App. Div. 623, 71 N. Y. Suppl. 160.

Wisconsin.—Niland *v.* Murphy, 73 Wis. 326, 41 N. W. 335.

See 16 Cent. Dig. tit. "Deeds," § 144.

58. Guard *v.* Bradley, 7 Ind. 600; Montreal Cong. Nunnery *v.* McNamara, 3 Barb. Ch. (N. Y.) 375, 49 Am. Dec. 184; St. Germain *v.* Birtz Dit Desmarteau, 10 Quebec Super. Ct. 185.

59. Waddell *v.* Hewitt, 36 N. C. 475.

60. Kermel *v.* Alexander, 4 Ky. L. Rep. 142.

61. Thompson *v.* Marshall, 36 Ala. 504, 76 Am. Dec. 328.

62. Arnegaard *v.* Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258.

63. Dikeman *v.* Arnold, 78 Mich. 455, 44 N. W. 407.

been held that a refusal of one of several grantees to assent to the conveyance does not operate to vest the whole property in the others, but that his share remains in the grantor.[64]

6. OPERATION AND EFFECT — a. In General. A deed becomes operative from the time of delivery to the grantee, and its operation cannot be affected by proof of any agreement in conflict with the plain terms of the instrument.[65] But the rights of third parties acquired before actual delivery to the grantee cannot be prejudiced by giving effect to an instrument transferring property even though recorded.[66]

b. On Grantor. A grantor cannot by any act subsequent to the delivery of his deed invalidate, alter, or affect the instrument.[67]

c. On Grantee. The title of the grantee becomes perfect upon delivery to, and acceptance by, him of the deed.[68]

d. On Delivery of Property. The execution and delivery of a deed by which the title and right of possession is transferred to the grantee is generally regarded as equivalent to livery of seizin and to give possession of the property conveyed.[69]

I. Amendment or Correction of Deed by Subsequent Instrument. Where there is no fraud and the rights of third parties have not intervened, and equity could have reformed the deed, it may be amended by a subsequent instrument so as to effectuate the intention of the parties.[70] This general rule applies to a mistake in the description,[71] and to a deed executed and antedated to replace

64. Treadwell *v.* Bulkley, 4 Day (Conn.) 395, 4 Am. Dec. 225.

65. Black *v.* Shreve, 13 N. J. Eq. 455; Cincinnati, etc., R. Co. *v.* Iliff, 13 Ohio St. 235. See also Kammrath *v.* Kidd, 89 Minn. 380, 95 N. W. 213; Stephens *v.* Beatty, 27 Ont. 75.

A deed becomes an executed contract when signed and delivered. Watkins *v.* Nugen, 118 Ga. 375, 45 S. E. 262.

Delivery to await a complete execution by another party may be made without authorizing the conclusive inference that the delivery gives effect to the instrument. Brackett *v.* Barney, 28 N. Y. 333.

The estate is transferred by delivery of the deed and no subsequent act can defeat it. Parsons *v.* Parsons, 45 Mo. 265.

The legal effect is not changed by the facts that the transaction had for one of its objects the saving of expense and the trouble of administering the grantor's estate and that the grantee, who was the former's wife, placed the deed, after delivery to her, where both she and her husband had access to it. Le Saulnier *v.* Loew, 53 Wis. 207, 10 N. W. 145.

66. Barnes *v.* Cox, 58 Nebr. 675, 79 N. W. 550.

67. Doe *v.* Beeson, 2 Houst. (Del.) 246; Stone *v.* King, 7 R. I. 358, 84 Am. Dec. 557.

If a deed is altered by consent of the parties, after delivery, by the grantor's wife executing the same, and is then delivered, this will be regarded as the delivery of a new deed which will take effect from the date of such delivery. Stiles *v.* Probst, 69 Ill. 382.

68. Jones *v.* Hightower, 107 Ky. 5, 52 S. W. 826, 21 Ky. L. Rep. 576.

By such acceptance he becomes bound by the stipulations, recitals, conditions, and limitations therein contained. Foster *v.* Atwater, 42 Conn. 244; Elting *v.* Clinton Mills Co., 36 Conn. 296; Warren *v.* Jacksonville, 15 Ill. 236, 58 Am. Dec. 610; Spalding *v.* Hallenbeck, 30 Barb. (N. Y.) 292.

69. *Alabama.*— Jenkins *v.* McConico, 26 Ala. 213; Trippe *v.* John, 15 Ala. 117; Bliss *v.* Smith, 1 Ala. 273.

Connecticut.—Hillhouse *v.* Dunning, 7 Conn. 139.

Kentucky.— Roberts *v.* McGraw, 11 Bush 26.

Maryland.— Matthews *v.* Ward, 10 Gill & J. 443.

Massachusetts.— Farwell *v.* Rogers, 99 Mass. 33; Comings *v.* Little, 24 Pick. 266; Higbee *v.* Rice, 5 Mass. 344, 4 Am. Dec. 63.

Ohio.— Borland *v.* Marshall, 2 Ohio St. 308; Holt *v.* Hemphill, 3 Ohio 232.

Texas.— Whitehead *v.* Foley, 28 Tex. 268.

United States.— Bayard *v.* Colefax, 2 Fed. Cas. No. 1,130, 4 Wash. 38.

Canada.— Simpson *v.* Foote, 3 Nova Scotia 240.

See 16 Cent. Dig. tit. "Deeds," § 148.

But see Gore *v.* Dickinson, 98 Ala. 363, 11 So. 743, 39 Am. St. Rep. 67 (where it appeared that the grantor remained in possession and the deed was not delivered); Breeding *v.* Taylor, 13 B. Mon. (Ky.) 477 (where there was no transfer of title but only an alleged transfer of possession); Fairley *v.* Fairley, 34 Miss. 18 (where the deed in question was in consideration of "natural love and affection" alone).

70. Kemper, etc., Dry-Goods Co. *v.* George A. Kennard Grocer Co., 68 Mo. App. 290.

71. Greve *v.* Coffin, 14 Minn. 345, 100 Am. Dec. 229.

Whether there was in fact any mistake, to correct which a new deed was made, is for the jury in an action of ejectment for land omitted under the first deed and taken possession of by a stranger. Hopkins *v.* Paxton, 4 Dana (Ky.) 36.

a destroyed instrument, even though done without the grantee's knowledge.[72] In such case the grantee may be compelled to receive the new deed;[73] and the subsequent deed will operate as a confirmation[74] or as a deed of bargain and sale.[75] Nor is a new consideration necessary as against the vendor.[76] Such new deed may, however, constitute a single instrument and operate as a destruction of the original conveyance by consent.[77] But a subsequent deed will not operate as a confirmation of a deed which is void for uncertainty,[78] or for want of delivery, or through mistake in reciting the grantee's name.[79] And as against third parties an alleged defective deed can only be cured by a bill in equity, and not by a confirmation, assuming to relate back to the original deed.[80] If, however, a corrected deed is made pursuant to a decree, and no new rights are thereby affected, it will relate back to the date of the first conveyance.[81]

J. Validity[82] — **1. Capacity and Assent of Parties in General — a. Mental Impairment of Grantor** — (i) *In General.* A deed may be void by reason of mental incapacity on the part of the grantor.[83] In order, however, to render a deed void on this ground it should appear that the grantor was laboring under such a degree of mental infirmity as to make him incapable of understanding the nature of the act,[84] the test being not merely that the grantor's mental powers were impaired but whether he had sufficient capacity to understand in a reasonable manner the nature and effect of the act which he was doing.[85] In determining the question whether a deed is void because of the mental incapacity of the

72. Marsh *v.* Austin, 1 Allen (Mass.) 235.

73. Leslie *v.* Slusher, 15 Ind. 166.

Consent of the grantee's heirs is necessary to make a deed effective, where it is given by the grantor, after the grantee's death, to correct the original deed, even though there had been a mutual mistake in the description of the land. Bartlett *v.* Brown, 121 Mo. 353, 25 S. W. 1108.

74. Greve *v.* Coffin, 14 Minn. 345, 100 Am. Dec. 229.

75. Fauntleroy *v.* Dunn, 3 B. Mon. (Ky.) 594.

76. Park *v.* Cheek, 2 Head (Tenn.) 451.

77. St. Joseph *v.* Baker, 86 Mo. App. 310.

78. Blessing *v.* House, 3 Gill & J. (Md.) 290.

79. Barr *v.* Schroeder, 32 Cal. 609.

80. Johnston *v.* Jones, 1 Black (U. S.) 209, 17 L. ed. 117.

81. Pittsburgh, etc., R. Co. *v.* Beck, 152 Ind. 421, 53 N. E. 439.

82. Burden of showing invalidity see *infra*, VII, A, 9, a, (II).

83. *California.*— Maggini *v.* Pezzoni, 76 Cal. 631, 18 Pac. 687.

Colorado.— Elder *v.* Schumacher, 18 Colo. 433, 33 Pac. 175.

Delaware.— Doe *v.* Prettyman, 1 Houst. 334; Jones *v.* Thompson, 5 Del. Ch. 374.

Illinois.— Beasley *v.* Beasley, 180 Ill. 163, 54 N. E. 187.

Indiana.— Brown *v.* Freed, 43 Ind. 253; Harbison *v.* Lemon, 3 Blackf. 51, 23 Am. Dec. 376.

Iowa.— Seerley *v.* Sater, 68 Iowa 375, 27 N. W. 262.

Nebraska.— Hay *v.* Miller, 48 Nebr. 156, 66 N. W. 1115; Dewey *v.* Allgire, 37 Nebr. 6, 55 N. W. 276, 40 Am. St. Rep. 468.

Tennessee.— Gass *v.* Mason, 4 Sneed 497.

See 16 Cent. Dig. tit. "Deeds," § 149.

84. *Delaware.*— Doe *v.* Beeson, 2 Houst. 246.

Indiana.— *Compare* Wray *v.* Wray, 32 Ind. 126.

Kentucky.— Lassiter *v.* Lassiter, 63 S. W. 477, 23 Ky. L. Rep. 481.

Michigan.— Williams *v.* Williams, (1903) 94 N. W. 370.

Missouri.— Cutts *v.* Young, 147 Mo. 587, 49 S. W. 548.

New Jersey.— Eaton *v.* Eaton, 37 N. J. L. 108, 18 Am. Rep. 716.

New York.— Hoey *v.* Hoey, 53 N. Y. App. Div. 208, 65 N. Y. Suppl. 778.

United States.— Edwards *v.* Davenport, 20 Fed. 756, 4 McCrary 54.

See 16 Cent. Dig. tit. "Deeds," § 151.

85. *California.*—Falk *v.* Wittram, 120 Cal. 479, 52 Pac. 707, 65 Am. St. Rep. 184.

Illinois.— Ring *v.* Lawless, 190 Ill. 520, 60 N. E. 881; Guild *v.* Hull, 127 Ill. 523, 20 N. E. 665.

Michigan.— Hayman *v.* Wakeham, (1903) 94 N. W. 1062.

New Jersey.— Eaton *v.* Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Blakeley *v.* Blakeley, 33 N. J. Eq. 502.

Ohio.— Kime *v.* Addlesperger, 24 Ohio Cir. Ct. 397; Lore *v.* Truman, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250.

Utah.— Stringfellow *v.* Hanson, 25 Utah 480, 71 Pac. 1052.

Vermont.— Stewart *v.* Flint, 59 Vt. 144, 8 Atl. 801.

United States.— Sawyer *v.* White, 122 Fed. 223, 58 C. C. A. 587; Mann *v.* Keene Guaranty Sav. Bank, 86 Fed. 51, 29 C. C. A. 547; Bowdoin College *v.* Merritt, 75 Fed. 480.

See 16 Cent. Dig. tit. "Deeds," § 151.

Mere imbecility or weakness of mind will not, in the absence of fraud or undue influence, render a deed void.

Alabama.— Harrison *v.* Harrison, 126 Ala. 323, 28 So. 586.

Illinois.— Kimball *v.* Cuddy, 117 Ill. 213, 7 N. E. 589; Pickerell *v.* Morse, 97 Ill. 220.

grantor his mental ability at the time of the execution controls, and if he possessed sufficient capacity at that time the deed will be valid.[86]

(II) *Where Coupled With Inadequacy of Consideration.* Where there is an inadequacy of consideration coupled with mental impairment of the grantor the deed will be void and the conveyance may be set aside.[87]

(III) *Monomania or Delusion.* If a monomania or delusion take such a hold of a person's mind that he cannot act upon the subject sensibly he is on that subject mentally unsound, and a deed induced or affected thereby will be void.[88]

b. Old Age of Grantor. A deed will not, in the absence of undue influence or fraud,[89] or want of capacity to understand the nature of the act,[90] be void merely because of the old age of the grantor at the time of execution,[91] even though his mind was somewhat impaired,[92] or he was a person of eccentricities or peculiarities,[93] or was enfeebled from bodily infirmities,[94] where it appears that he

Indiana.— Somers *v.* Pumphrey, 24 Ind. 231.

Iowa.— Marmon *v.* Marmon, 47 Iowa 121.

Maine.— Hovey *v.* Hobson, 55 Me. 256.

Nebraska.— Tichy *v.* Simicek, (1903) 95 N. W. 629; Hay *v.* Miller, 48 Nebr. 156, 66 N. W. 1115; Dewey *v.* Allgire, 37 Nebr. 6, 55 N. W. 276, 40 Am. St. Rep. 468; Mulloy *v.* Ingalls, 4 Nebr. 115.

New York.— Osterhout *v.* Shoemaker, 3 Den. 37 note; Odell *v.* Buck, 21 Wend. 142; Jackson *v.* King, 4 Cow. 207, 15 Am. Dec. 354.

Ohio.— Kime *v.* Addlesperger, 24 Ohio Cir. Ct. 397; Zeltner *v.* Bodman German Protestant Widows' Home, 1 Ohio S. & C. Pl. Dec. 306.

Vermont.— Stewart *v.* Flint, 59 Vt. 144, 8 Atl. 801.

86. *Georgia.*— Maddox *v.* Simmons, 31 Ga. 512.

Indiana.— Raymond *v.* Wathen, 142 Ind. 367, 41 N. E. 815.

Kentucky.— Speers *v.* Sewell, 4 Bush 239; Richardson *v.* Hunt, 5 Ky. L. Rep. 928.

Maryland.— Worthington *v.* Worthington, (1890) 20 Atl. 911.

Michigan.— Ramsdell *v.* Ramsdell, 128 Mich. 110, 87 N. W. 81.

New Jersey.—Davsen *v.* White, 42 N. J. Eq. 569, 7 Atl. 682.

New York.— Brown *v.* Miles, 61 Hun 453, 16 N. Y. Suppl. 251; Jones *v.* Jones, 17 N. Y. Suppl. 905.

Ohio.— Lore *v.* Truman, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250.

Oregon.— Swank *v.* Swank, 37 Oreg. 439, 61 Pac. 846; Carnagie *v.* Diven, 31 Oreg. 366, 49 Pac. 891.

Pennsylvania.— Ekin *v.* McCracken, 32 Leg. Int. 405.

Vermont.— Day *v.* Seely, 17 Vt. 542.

Virginia.— Beverage *v.* Ralston, 98 Va. 625, 37 S. E. 283.

West Virginia.— Farnsworth *v.* Woffsinger, 46 W. Va. 410, 33 S. E. 246; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788.

See 16 Cent. Dig. tit. "Deeds," § 161.

Mental condition before and after the execution may be considered in determining the grantor's condition of mind at the time. Anderson *v.* Crammer, 11 W. Va. 562.

87. *Illinois.*— Hardy *v.* Dyas, 203 Ill. 211, 67 N. E. 852.

Iowa.— Perkins *v.* Scott, 23 Iowa 237.

Kentucky.— Howard *v.* Howard, 87 Ky. 616, 9 S. W. 411, 10 Ky. L. Rep. 478, 1 L. R. A. 610.

New York.— Valentine *v.* Lunt, 51 Hun 544, 3 N. Y. Suppl. 906.

Texas.— McFaddin *v.* Vincent, 21 Tex. 47.

Vermont.— Holden *v.* Crawford, 1 Aik. 390, 15 Am. Dec. 700.

See 16 Cent. Dig. tit. "Deeds," § 154.

The value of the consideration is immaterial where a conveyance is obtained from an unconscious person. Winkler *v.* Winkler, (Tex. Civ. App. 1894) 26 S. W. 893.

88. Riggs *v.* American Tract Soc., 95 N. Y. 503; Alston *v.* Boyd, 6 Humphr. (Tenn.) 504. See also Leonardson *v.* Hulin, 64 Mich. 1, 31 N. W. 26.

If not so affected or influenced the instrument will be valid. Burgess *v.* Pollock, 53 Iowa 273, 5 N. W. 179, 36 Am. Rep. 218; Jones *v.* Hughes, 15 Abb. N. Cas. (N. Y.) 141; Ekin *v.* McCracken, 32 Leg. Int. (Pa.) 405. See also Schneitter *v.* Carman, 98 Iowa 276, 67 N. W. 249; Lewis *v.* Arbuckle, 85 Iowa 335, 52 N. W. 237, 16 L. R. A. 677.

89. Stone *v.* Wilbern, 83 Ill. 105; Wiley *v.* Ewalt, 66 Ill. 26; Reeves *v.* Gantt, 8 Rich. Eq. (S. C.) 13; Greer *v.* Greer, 9 Gratt. (Va.) 330.

90. Weller *v.* Weller, 112 N. Y. 655, 19 N. E. 433 [*affirming* 44 Hun 172].

91. Carnagie *v.* Diven, 31 Oreg. 366, 49 Pac. 891; Stringfellow *v.* Hanson, 25 Utah 480, 71 Pac. 1052; Jarrett *v.* Jarrett, 11 W. Va. 584.

92. Shea *v.* Murphy, 164 Ill. 614, 45 N. E. 1021, 56 Am. St. Rep. 215; Burt *v.* Quisenberry, 132 Ill. 385, 24 N. E. 622; Nichols *v.* King, 68 S. W. 133, 1114, 24 Ky. L. Rep. 124; Buckey *v.* Buckey, 38 W. Va. 168, 18 S. E. 383; Tate *v.* Holmes, 76 Fed. 664, 22 C. C. A. 466.

93. Pellizzarro *v.* Reppert, 83 Iowa 497, 50 N. W. 19; Sibley *v.* Somers, 62 N. J. Eq. 595, 50 Atl. 321; Lore *v.* Truman, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788.

94. Argo *v.* Coffin, 142 Ill. 368, 32 N. E. 679, 34 Am. St. Rep. 86; McKissock *v.* Groom,

fully comprehended the nature and effect of his acts.[95] But where by reason of old age the grantor's mind has at the time the deed is executed become so impaired that he does not possess the proper comprehension of the transaction the deed will be void.[96]

c. Sickness of Grantor. A deed will be void where the grantor's mental capacity was so affected at the time of the execution by him of the instrument, by reason of sickness or bodily ailments, as to render him incapable of comprehending the nature of the transaction.[97]

d. Intoxication of Grantor. The mere fact that the grantor was intoxicated at the time he executed a deed is not a ground for avoiding the instrument where it does not appear that the intoxication was procured by the grantee to influence its execution,[98] or that any unfair advantage was taken of his condition,[99] unless he was incapable of understanding the transaction,[1] at the time of execution,[2] in

148 Mo. 459, 50 S. W. 115; Paine *v.* Aldrich, 14 N. Y. Suppl. 538 [*affirmed* in 133 N. Y. 544, 30 N. E. 725]; Ford *v.* Jones, 22 Wash. 111, 60 Pac. 48. See also Bowdoin College *v.* Merritt, 75 Fed. 480.

95. *Georgia.*— Richardson *v.* Adams, 110 Ga. 425, 35 S. E. 648.

Illinois.— Shea *v.* Murphy, 164 Ill. 614, 45 N. E. 1021, 56 Am. St. Rep. 215; Argo *v.* Coffin, 142 Ill. 368, 32 N. E. 679, 34 Am. St. Rep. 86; Burt *v.* Quisenberry, 132 Ill. 385, 24 N. E. 622; Lindsey *v.* Lindsey, 50 Ill. 79, 99 Am. Dec. 489. See also Yoakum *v.* Yoakum, 77 Ill. 85.

Iowa.— Chidester *v.* Turnbull, 117 Iowa 168, 90 N. W. 583.

Kentucky.— Jones *v.* Evans, 7 Dana 96.

Missouri.— McKissock *v.* Groom, 148 Mo. 459, 50 S. W. 115.

Ohio.— Kime *v.* Addlesperger, 24 Ohio Cir. Ct. 397.

Virginia.— Greer *v.* Greer, 9 Gratt. 330.

Washington.— Ford *v.* Jones, 22 Wash. 111, 60 Pac. 48.

West Virginia.— Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788.

See 16 Cent. Dig. tit. "Deeds," § 153.

96. *Iowa.*— Sedgwick *v.* Jack, 111 Iowa 745, 82 N. W. 1027; Galt *v.* Provan, 108 Iowa 561, 79 N. W. 357; Bruguier *v.* Pepin, 106 Iowa 432, 76 N. W. 808.

Kentucky.— Thompson *v.* Thompson, 39 S. W. 822, 19 Ky. L. Rep. 241.

Michigan.— Thomas *v.* Crawford, 118 Mich. 253, 76 N. W. 394.

Nebraska.— Cole *v.* Cole, 21 Nebr. 84, 31 N. W. 493.

New Jersey.— Hainwell *v.* Hyatt, 39 N. J. Eq. 174, 44 Atl. 953.

New York.— See Lansing *v.* Russell, 13 Barb. 510.

Pennsylvania.— Hoeh *v.* Hoeh, 197 Pa. St. 387, 47 Atl. 351.

South Carolina.— Wille *v.* Wille, 57 S. C. 413, 35 S. E. 804; Banker *v.* Hendricks, 24 S. C. 1; Parris *v.* Cobb, 5 Rich. Eq. 450.

Texas.—Ellis *v.* Mathews, 19 Tex. 390, 70 Am. Dec. 353.

See 16 Cent. Dig. tit. "Deeds," § 153.

97. McElwain *v.* Russell, 12 S. W. 777, 11 Ky. L. Rep. 649; Hepler *v.* Hosack, 197 Pa. St. 631, 47 Atl. 847; Turner *v.* Union Nat. Bank, 10 Utah 77, 37 Pac. 95; Turner *v.* Utah Title Ins., etc., Co., 10 Utah 61, 37 Pac. 91; Lenhard *v.* Lenhard, 59 Wis. 60, 17 N. W. 877.

The mental capacity must be affected by bodily ailments to such an extent as to unfit the person from attending to ordinary business or comprehending the ordinary relation of his affairs, or his duty to society, in order to set aside a conveyance on this ground. Bowdoin College *v.* Merritt, 75 Fed. 480.

That a person is too sick to care is no ground for setting aside a conveyance, in a suit for this purpose by the grantor, where the conveyance was without consideration and for the purpose of defrauding creditors. Barnes *v.* Gill, 21 Ill. App. 129.

98. Harbison *v.* Lemon, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376.

The deed may be avoided where the intoxication was procured by the grantee. Woods *v.* Pindall, Wright (Ohio) 507.

99. Belcher *v.* Belcher, 10 Yerg. (Tenn.) 121.

If unfair advantage is taken the deed may be set aside. O'Conner *v.* Rempt, 29 N. J. Eq. 156; Crane *v.* Conklin, 1 N. J. Eq. 346, 22 Am. Dec. 519.

1. *Illinois.*— Shackelton *v.* Sebree, 86 Ill. 616.

Nebraska.— Johnson *v.* Phifer, 6 Nebr. 401.

New York.—Van Wyck *v.* Brasher, 81 N. Y. 260.

North Carolina.— Green *v.* Thompson, 37 N. C. 365.

Tennessee.— Morris *v.* Nixon, 7 Humphr. 579.

See 16 Cent. Dig. tit. "Deeds," § 155.

To avoid a deed it is essential that there should exist an incapacity to contract and an equitable right to be relieved. Jones *v.* Calkin, 16 N. Brunsw. 356.

2. Johnson *v.* Rockwell, 12 Ind. 76; Coombe *v.* Carthew, 59 N. J. Eq. 638, 43 Atl. 1057; Dixon *v.* Dixon, 22 N. J. Eq. 91; Ritter's Appeal, 59 Pa. St. 9; Ralston *v.* Turpin, 25 Fed. 7.

A deed made in a sober interval by a habitual drunkard may be good. Ritter's Appeal, 59 Pa. St. 9; Ralston *v.* Turpin, 25 Fed. 7. See also Williams *v.* Williams, (Mich. 1903) 94 N. W. 370.

which case it may be avoided.[3] But so long as a grantor acquiesces in a deed executed by him while intoxicated it cannot be impeached by third persons on this ground.[4]

e. Deaf and Dumb Grantor. Want of capacity to execute a deed is not predicable upon the mere fact that a person has been deaf and dumb from his nativity.[5]

f. Forged Deeds. No title passes by a deed which is forged, as against one who did not participate in, or who had no knowledge of, the forgery.[6]

2. Mistake[7] — a. In General. Where a deed is executed under a mistake as to the rights of the parties a court of equity will set it aside.[8] But if a deed has been entered into in good faith by the parties thereto it will not be set aside because of a mistake of fact, where each party possessed equal information or equal means of acquiring the same.[9]

b. As to Property Conveyed — (i) *Identity of.* A court of equity may grant relief in the case of a misdescription of the property conveyed by rectifying the error.[10] It has, however, been held that equity will not interfere except between the original parties or those claiming under them in privity.[11] And the grantor and those claiming under him are estopped in a court of law from asserting that one tract of land was by mistake conveyed by the deed instead of another, the instrument being clear and definite upon its face.[12]

(ii) *Amount of.* A deed may be annulled and the sale rescinded where there appears to have been a mutual mistake as to the amount of property conveyed.[13] But where the fact is equally unknown to both parties or where each

3. *Alabama.*— Donelson *v.* Posey, 13 Ala. 752.

Delaware.— Dulany *v.* Green, 4 Harr. 285.

New Jersey.— Warnock *v.* Campbell, 25 N. J. Eq. 485; Hutchinson *v.* Tindall, 3 N. J. Eq. 357.

North Carolina.—McCraw *v.* Davis, 37 N. C. 618.

Pennsylvania.— Wilson *v.* Bigger, 7 Watts & S. 111.

South Carolina.— Wade *v.* Colvert, 2 Mill 27, 12 Am. Dec. 652.

Virginia.— Samuel *v.* Marshall, 3 Leigh 567.

See 16 Cent. Dig. tit. "Deeds," § 155.

4. Eaton *v.* Perry, 29 Mo. 96.

5. Brown *v.* Brown, 3 Conn. 299, 8 Am. Dec. 187.

6. Reck *v.* Clapp, 98 Pa. St. 581.

A deed which purports to be executed by a husband and wife, and which was in fact executed by the husband but the wife's signature was forged, may be effective as the husband's deed. Murphy *v.* Reynaud, 2 Tex. Civ. App. 470, 21 S. W. 991. See also Scott *v.* Gallagher, 11 Serg. & R. (Pa.) 347.

7. Mistake as ground for cancellation see Cancellation of Instruments, 6 Cyc. 286.

8. Hearst *v.* Pujol, 44 Cal. 230; Gillespie *v.* Moon, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559; Toland *v.* Corey, 6 Utah 392, 24 Pac. 190. See also Powell *v.* Plant, (Miss. 1898) 23 So. 399; Slocum *v.* Marshall, 22 Fed. Cas. No. 12,953, 2 Wash. 397.

9. Juzan *v.* Toulmen, 9 Ala. 662, 44 Am. Dec. 448; Raab *v.* Raab, 64 S. W. 624, 23 Ky. L. Rep. 971; Warner *v.* Daniels, 29 Fed. Cas. No. 17,181, 1 Woodb. & M. 90. See also Custard *v.* Custard, 25 Tex. Suppl. 49.

Ignorance of fact is no ground for setting aside such an instrument (Abbott *v.* Dermott, 34 Ga. 227), nor a mistake in a computation of interest on bonds forming the consideration thereof (McElfatrick *v.* Hicks, 21 Pa. St. 402).

A mistake must be a mutual one or induced by fraud in order to obtain relief in equity. A petition to set aside a deed which merely alleges a mistake on the part of one of the parties does not state a cause of action. Benn *v.* Pritchett, 163 Mo. 560, 63 S. W. 1103. But see Werner *v.* Rawson, 89 Ga. 619, 15 S. E. 813, where it is held that while a court of equity will not reform a deed unless the mistake is a mutual one, yet it may rescind a deed in the case of a mistake of fact material to one party only.

10. King *v.* Keith, 1 N. Brunsw. Eq. 538; Peart *v.* Peart, 6 Nova Scotia 73.

It is essential to the validity of a contract that there should be a meeting of minds, and this rule applies to deeds, so that if a deed is executed under a mutual mistake of fact as to the identity of the property conveyed it will be set aside. Barfield *v.* Price, 40 Cal. 535; Barth *v.* Deuel, 11 Colo. 494, 19 Pac. 471; Blair *v.* McDonnell, 5 N. J. Eq. 327. See also Baxter *v.* Tanner, 35 W. Va. 60, 12 S. E. 1094.

11. White *v.* Kingsbury, 77 Tex. 610, 14 S. W. 201.

12. Bell *v.* Morse, 6 N. H. 205.

13. Babcock *v.* Day, 104 Pa. St. 4; May *v.* San Antonio, etc., Town Site Co., 83 Tex. 502, 18 S. W. 959; Ladd *v.* Pleasants, 39 Tex. 415. *Compare* Holmes *v.* Bramel, 12 S. W. 262, 11 Ky. L. Rep. 411.

A deed of so many acres "or more" may, although it appears that a slight excess of the

has equal information in respect thereto or where it is doubtful that they have acted in good faith equity will not interfere.[14]

(III) *Value of.* A material mistake of fact as to the value of the property conveyed may be a ground for setting a conveyance aside.[15]

c. As to Title or Interest of Grantor. A deed may be set aside where there has been a mutual mistake as to the title or interest of the grantor in the property conveyed.[16]

d. As to Contents or Provisions of Deed. Where a voluntary conveyance is executed by a person, and by reason of a material mistake therein the instrument is not that which the grantor intended to execute, it may be set aside by a court of equity.[17] So relief in equity may be granted where a conveyance in fee has been obtained either by fraud or mistake, from one who believed he was executing a conveyance for life.[18] But where a trust deed accomplishes in a general way the objects which seem to have been desired, and there is no evidence that the instructions of the grantor were not followed, a bill to set the instrument aside, on the ground that it did not conform to the grantor's directions, will be dismissed.[19] Nor is it sufficient ground to set aside a deed that it is ineffectual to convey title as to part of the lands described therein, the grantee having accepted such deed, but neglected to examine it.[20] And it is not conclusive that the wife's name was inserted in a deed as grantee by mistake from the mere fact that her husband paid most of the purchase-money.[21]

e. Signing in Ignorance of Contents. A party cannot avoid a deed executed by him on the ground that he signed the same in ignorance of its contents, where

number named was contemplated, be set aside where it appears that the number of acres is so greatly in excess of that named as to have materially affected the contract, unless it appears that the hazard or gain or loss was intentional and entered into the contract. O'Connell *v.* Duke, 29 Tex. 299, 94 Am. Dec. 282. See also Read *v.* Cramer, 2 N. J. Eq. 277, 34 Am. Dec. 204.

A slight clerical error as to the number of acres conveyed will not be a ground for annulling a deed, where it appears that such error is corrected by reference to another deed in which the boundaries are correctly described. Brown *v.* Holyoke, 53 Me. 9. Nor will an alleged mistake in the representation as to the boundaries of the land conveyed be a ground for rescinding the sale, where the price was reduced by the grantor in order to settle a dispute as to its boundaries. McCormick *v.* Jones, 22 S. W. 881, 15 Ky. L. Rep. 215.

Where land is sold in gross, a court of equity will not in the absence of fraud allow an abatement for a deficiency, or compensation for an excess, but may set aside the deed where the deficiency or excess is the result of a mutual mistake. Hansford *v.* Chesapeake Coal Co., 22 W. Va. 70.

14. McCobb *v.* Richardson, 24 Me. 82, 41 Am. Dec. 374.

Where mistake is unilateral it is held that equity will not interfere, as where the terms were clear to grantee and understood by him to express the agreement and the grantor had sufficient means of understanding it. May *v.* San Antonio, etc., Town Site Co., 83 Tex. 502, 18 S. W. 959.

15. Montgomery County *v.* American Emigrant Co., 47 Iowa 91. See also Cowles *v.* Barber, 74 Iowa 71, 36 N. W. 897.

16. Walker *v.* Dunlop, 5 Hayw. (Tenn.) 271, 9 Am. Dec. 787; Irick *v.* Fulton, 3 Gratt. (Va.) 193. See also Mason *v.* Pelletier, 82 N. C. 40.

But there can be no relief in equity where land is sold without a warranty under a mistaken belief of title in the grantor, the real fact being equally unknown to both parties and each having equal means of information, and there being no fraud. Botsford *v.* Wilson, 75 Ill. 132. *Compare Re* Tyrell, 64 J. P. 665, 82 L. T. Rep. N. S. 675.

17. Fenton *v.* Fenton, 8 Blackf. (Ind.) 446; Gruing *v.* Richards, 23 Iowa 288; Collins *v.* Collins, 63 N. J. Eq. 602, 52 Atl. 1115. *Compare* Loviolette *v.* Butler, 124 Mich. 580, 83 N. W. 598.

Omission of revocation clause may be ground for setting aside a voluntary deed. Grant *v.* Baird, 61 N. J. Eq. 389, 49 Atl. 150; Houghton *v.* Houghton, 34 Hun (N. Y.) 212. But see Valter *v.* Blavka, 195 Ill. 610, 63 N. E. 499.

18. Summers *v.* Coleman, 80 Mo. 488.

But where a party deeded a life-estate only instead of a fee simple as was intended, a person claiming under the grantee, after the latter's death has only a right in equity to have the grantor converted into a trustee and decreed to execute a deed in fee. Henley *v.* Wilson, 77 N. C. 216.

19. Byrne *v.* Gunning, 75 Md. 30, 23 Atl. 1.

20. Jaeger *v.* Whitsett, 3 Colo. 105.

A deed which is absolute, but is intended only as a security for a loan, will not be set aside because it is made to the president of the bank and not to the bank as it should have been made. Dotterer *v.* Freeman, 88 Ga. 479, 14 S. E. 863.

21. Bader *v.* Dyer, 106 Iowa 715, 77 N. W. 469, 68 Am. St. Rep. 332.

this is due to his own carelessness or negligence.[22] And one who is illiterate and unable to read cannot avoid a deed on this ground where he did not require that it be read to him.[23]

f. Mistake of Law. It is a general rule that a court of equity will not grant relief against a deed on the ground merely of a mistake of law[24] in the absence of fraud, imposition, or undue influence.[25] But where a mistake was induced and encouraged by the grantee and the grantor parted with his property for an inadequate consideration relief may be obtained.[26] And a court of equity may grant relief in the case of a deed which is executed to carry out an agreement and by reason of mistake as to its legal effect fails to conform to or effectuate such agreement.[27]

3. Fraud,[28] Misrepresentations, and Concealment — a. In General. Fraud vitiates all contracts and a deed procured by such means will be set aside.[29] The

22. *Alabama.*— Tomlinson *v.* Watkins, 77 Ala. 399; Dawson *v.* Burrus, 73 Ala. 111.

Iowa.— Van Sickles *v.* Town, 53 Iowa 259, 5 N. W. 148; McHenry *v.* Day, 13 Iowa 445, 81 Am. Dec. 438.

Maine.— Eldridge *v.* Dexter, etc., R. Co., 88 Me. 191, 33 Atl. 974.

New York.— Witthaus *v.* Schack, 57 How. Pr. 310; Jackson *v.* Croy, 12 Johns. 427.

South Carolina.— Picton *v.* Graham, 2 Desauss. 592.

Texas.— Gibson *v.* Brown, (Civ. App. 1893) 24 S. W. 574.

See 16 Cent. Dig. tit. "Deeds," § 162.

23. Hallenbeck *v.* Dewitt, 2 Johns. (N. Y.) 404; Providence Tp. *v.* Kesler, 67 N. C. 443; Boardman *v.* Keystone Standard Watch Case Co., 8 Lanc. L. Rev. 25.

Deed by one not understanding English. — A trust deed executed by a woman, who did not understand English, and by her husband for the benefit of his mother, may be set aside, the instrument not being properly explained. Schaper *v.* Schaper, 84 Ill. 603.

Where one who was deaf and unable to read or write signed a deed without knowing its contents, but relied upon his wife, with whom he had contracted, to transfer a certain estate in his land to her, and she took advantage of his infirmity and illiteracy and had a different deed drawn up, it was held that the grantor was not guilty of negligence in so signing. Carbine *v.* McCoy, 85 Ga. 185, 11 S. E. 651.

24. *Georgia.*— Fergerson *v.* Fergerson, Ga. Dec. 135.

Iowa.— Pierson *v.* Armstrong, 1 Iowa 282, 63 Am. Dec. 440.

Virginia.— Osburn *v.* Throckmorton, 90 Va. 311, 18 S. E. 285.

Wisconsin.— Kyes *v.* Merrill Furniture Co., 92 Wis. 52, 65 N. W. 735.

United States.—Hamblin *v.* Bishop, 41 Fed. 74.

See 16 Cent. Dig. tit. "Deeds," § 164.

Ignorance of dower right in property conveyed has been held not sufficient ground to set aside a deed. Hudson *v.* Conway, 9 Lea (Tenn.) 410.

Mistake as to the legal effect of a deed is no ground for relief. Gerald *v.* Elley, 45 Iowa 322; Neel *v.* Neel, 26 S. W. 805, 16 Ky. L. Rep. 193; Dupre *v.* Thompson, 4 Barb. (N. Y.) 279. But see Kerr *v.* Couper, 5 Del. Ch. 507 (where it is held that a voluntary conveyance in trust for the benefit of the grantor and his heirs may be set aside in a friendly suit brought for that purpose); Komegay *v.* Everett, 99 N. C. 30, 5 S. E. 418 (holding that in case of a mutual mistake of law a court of equity may correct it).

25. Stover *v.* Poole, 67 Me. 217; Wetmore *v.* Holsman, 14 Abb. Pr. (N. Y.) 311, 23 How. Pr. (N. Y.) 202.

26. Boles *v.* Hunt, 77 Ind. 355.

27. Sparks *v.* Pittman, 51 Miss. 511.

28. **Misrepresentations and fraud as ground for cancellation** see Cancellation of Instruments, 6 Cyc. 286.

29. *Alabama.*— Johnson *v.* Cook, 73 Ala. 537.

Arkansas.— Crabtree *v.* Bradbury, (1890) 13 S. W. 935; Strawn *v.* Norris, 21 Ark. 80.

California.— Still *v.* Saunders, 8 Cal. 281.

Illinois.— Castle *v.* Kemp, 124 Ill. 307, 16 N. E. 255.

Indiana.— Carver *v.* Carver, 97 Ind. 497.

Iowa.— McMichael *v.* Johns, 38 Iowa 696.

Kentucky.— Combs *v.* Davidson, 74 S. W. 261, 24 Ky. L. Rep. 2528.

Maine.— Woodman *v.* Freeman, 25 Me. 531.

Maryland.— Goodwin *v.* White, 59 Md. 503.

Massachusetts.— Wall *v.* Hickey, 112 Mass. 171.

Michigan.— Berry *v.* Whitney, 40 Mich. 65.

Minnesota.— Farr *v.* Dunsmore, 36 Minn. 437, 31 N. W. 858; Miller *v.* Sawbridge, 29 Minn. 442, 13 N. W. 671.

Missouri.— Turner *v.* Turner, 44 Mo. 535.

New Jersey.— Obert *v.* Hammel, 18 N. J. L. 73; Armstrong *v.* Armstrong, 19 N. J. Eq. 357.

New York.— Jones *v.* Jones, 40 Misc. 360, 82 N. Y. Suppl. 325; Brice *v.* Brice, 5 Barb. 533; Hall *v.* Perkins, 3 Wend. 626.

Oregon.— Parrish *v.* Parrish, 33 Oreg. 486, 54 Pac. 352; Langell *v.* Langell, 17 Oreg. 220, 20 Pac. 286.

Pennsylvania.— Mortland *v.* Mortland, 151 Pa. St. 593, 25 Atl. 150.

Tennessee.— Stephens *v.* Osbourne, 107 Tenn. 572, 64 S. W. 902, 89 Am. St. Rep. 957; McAdoo *v.* Sublett, 1 Humphr. 105.

Texas.— Moreland *v.* Atchison, 19 Tex. 303.

Virginia.— Shepherd *v.* Henderson, 3 Gratt. 367.

only fraud, however, which can be pleaded at law is that which goes to the execution of the deed.[30] So a deed cannot be set aside on the ground of fraud in procuring the same in the absence of proof of acts or representations of the grantees or of their agents which were deceptive and false.[31] Again such relief will not be granted unless the party seeking it was injured by the representations.[32] Applying these principles, fraudulent misrepresentation or concealment of material facts in respect to the title to the property conveyed,[33] its situation,[34] character,[35] quantity,[36] or value, whether the act is that of the grantor[37] or the

Washington.— Jones *v.* Steelman, 22 Wash. 636, 61 Pac. 764.

West Virginia.— O'Connor *v.* O'Connor, 45 W. Va. 354, 32 S. E. 276.

United States.— Blackburn *v.* Wooding, 56 Fed. 545, 6 C. C. A. 6 [*reversing* 49 Fed. 902].

See 16 Cent. Dig. tit. "Deeds," § 165.

Antedating a deed for the purpose of overreaching an execution is not such fraud as will render the instrument void where it would have been valid if correctly dated. Patterson *v.* Bodenhamer, 31 N. C. 96.

Recording a deed by fraudulent means will be a good ground for setting it aside. Rising *v.* Gibbs, (Cal. 1892) 30 Pac. 589; Ritter *v.* Ritter, 42 Mich. 108, 3 N. W. 284.

30. Mordecai *v.* Tankersley, 1 Ala. 100; Chesterman *v.* Gardner, 5 Johns. Ch. (N. Y.) 30, 9 Am. Dec. 265.

Fraud in respect to the consideration will not invalidate the instrument. Friedman *v.* Schwabacher, 69 Ill. App. 117; Rogers *v.* Colt, 21 N. J. L. 704; Belden *v.* Davies, 2 Hall (N. Y.) 466; Slocum *v.* Despard, 8 Wend. (N. Y.) 615; Jackson *v.* Hills, 8 Cow. (N. Y.) 290; Gwynn *v.* Hodge, 49 N. C. 168; Nicholls *v.* Holmes, 46 N. C. 360; Gant *v.* Hunsucker, 34 N. C. 254, 55 Am. Dec. 408; Canoy *v.* Troutman, 29 N. C. 155.

Fraud subsequent to, or independent of, transaction.— A deed cannot be avoided by reason of fraud subsequent to or independent of the transaction in which it was given. Gutierrez *v.* Brinkerhoff, (Cal. 1883) 1 Pac. 482; Grindrod *v.* Wolf, 38 Kan. 292, 16 Pac. 691; Chesterman *v.* Gardner, 5 Johns. Ch. (N. Y.) 30, 9 Am. Dec. 265; Fulton *v.* Loftis, 63 N. C. 393.

31. Larrabee *v.* Larrabee, 34 Me. 477.

The right to relief will not be affected by the fact that the words used in furtherance of the fraudulent purpose were not directly addressed to the person whom it was intended to defraud, provided the necessary elements exist which would otherwise authorize the court to act. Brown *v.* Brown, 62 Kan. 666, 64 Pac. 599.

Where some of the representations made were true and others false, if the latter are sufficient to set aside the sale and it appears that they might and did influence the vendor in the disposition of the land, the sale may be canceled. Stackpole *v.* Hancock, 40 Fla. 362, 24 So. 914, 45 L. R. A. 814.

32. Jones *v.* Foster, 175 Ill. 459, 51 N. E. 862; Simmons *v.* Hill, 77 Iowa 378, 42 N. W. 325. See also Brehm *v.* Gushal, 31 Misc. (N. Y.) 112, 64 N. Y. Suppl. 927.

33. *Arkansas.*— Gammill *v.* Johnson, 47 Ark. 335, 1 S. W. 610.

Illinois.—McCormick *v.* Miller, 102 Ill. 208, 40 Am. Rep. 577.

Indiana.— Robinson *v.* Reinhart, 137 Ind. 674, 36 N. E. 519.

Kansas.— Curtis *v.* Stilson, 38 Kan. 302, 16 Pac. 678.

Kentucky.— Kennedy *v.* Johnson, 2 Bibb 12, 4 Am. Dec. 666.

Massachusetts.— Motherway *v.* Wall, 168 Mass. 333, 47 N. E. 135.

Minnesota.— Tretheway *v.* Hulett, 52 Minn. 448, 54 N. W. 486.

Missouri.— Bailey *v.* Sinock, 61 Mo. 213.

Vermont.— Williams *v.* Mattocks, 3 Vt. 189.

See 16 Cent. Dig. tit. "Deeds," § 177.

Concealment of fact as to title.— Where one who holds under a trust deed, which owing to a defect therein conveys only a life-estate, sells the land to another by a deed purporting to carry the fee, and conceals the fact of this defect, the deed will be set aside. Alston *v.* Maxwell, 16 N. C. 18.

If representations are honestly made by the grantor and no means to inspire confidence in the title are used or to induce the purchase, the price paid cannot be recovered back by the grantee on failure of the title. Botsford *v.* Wilson, 75 Ill. 132. *Compare* Cochran *v.* Pascault, 54 Md. 1.

34. Pendarvis *v.* Gray, 41 Tex. 326; Tyler *v.* Black, 13 How. (U. S.) 230, 14 L. ed. 124.

35. Keller *v.* Feldman, 70 Hun (N. Y.) 377, 24 N. Y. Suppl. 179.

36. Armour *v.* Lose, 33 Ala. 317; Upshaw *v.* Debow, 7 Bush (Ky.) 442.

Where parties agree to an abatement of price on account of an unknown deficit from the estimated quantity, an allegation of fraud is not sustained. Hofman *v.* Keane, 54 Fed. 986.

Words "more or less" in a conveyance when referring to the amount of land conveyed do not preclude the court from rectifying mistakes or fraud. McCoun *v.* Delany, 3 Bibb (Ky.) 46, 6 Am. Dec. 635; Shipp *v.* Swann, 2 Bibb (Ky.) 82. *Compare* Lovell *v.* Chilton, 2 W. Va. 410.

37. *Illinois.*— Booth *v.* Smith, 117 Ill. 370, 7 N. E. 610 [*affirming* 18 Ill. App. 266].

Maine.— Bradley *v.* Chase, 22 Me. 511.

Missouri.— Morley *v.* Harrah, 167 Mo. 74, 66 S. W. 942.

New Jersey.— Perkins *v.* Partridge, 30 N. J. Eq. 82.

Virginia.— Wilson *v.* Carpenter, 91 Va. 183, 21 S. E. 243, 50 Am. St. Rep. 824.

United States.— Mudsill Min. Co. *v.* Watrous, 61 Fed. 163, 9 C. C. A. 415.

grantee,[38] may be ground for setting aside a deed. Again misrepresentation or concealment of facts inducing a hasty transfer of the property may be sufficient.[39]

b. Character of Misrepresentations. In order to avoid a deed on the ground of misrepresentations it is essential that they should be material,[40] and relied upon by the grantor.[41] And if both parties had equal knowledge or means of information as to the particular fact or facts claimed to have been misrepresented equity will not interfere.[42]

See 16 Cent. Dig. tit. "Deeds," § 179.

If the representation was not an inducement to the purchase, it will not be sufficient to authorize a rescission. Winston *v.* Gwathmey, 8 B. Mon. (Ky.) 19.

38. *Iowa.*— Ormsby *v.* Budd, 72 Iowa 80, 33 N. W. 457.

Kentucky.— Havlin *v.* Reed, 5 S. W. 554, 9 Ky. L. Rep. 552.

Minnesota.— *Compare* Crowley *v.* C. N. Nelson Lumber Co., 66 Minn. 400, 69 N. W. 321.

Nebraska.— Morgan *v.* Dinges, 23 Nebr. 271, 36 N. W. 544, 8 Am. St. Rep. 121.

New Jersey.— Peet *v.* De Arnaud, 47 N. J. Eq. 502, 21 Atl. 118 [*affirmed* in 49 N. J. Eq. 346, 25 Atl. 964].

Washington.— Stack *v.* Nolte, 29 Wash. 118, 69 Pac. 753.

United States.— Copeland *v.* Burtis, 6 Fed. Cas. No. 3,208.

See 16 Cent. Dig. tit. "Deeds," § 179.

Concealment of discovery of mineral deposits may be a sufficient ground for setting aside a deed. Gruber *v.* Baker, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302; Smith *v.* Beatty, 37 N. C. 456, 40 Am. Dec. 435; Hanley *v.* Sweeny, 109 Fed. 712, 48 C. C. A. 612; Daniel *v.* Brown, 33 Fed. 849. But the fact that a valuable mineral deposit is discovered soon after the purchase is not ground for rescission, where it does not appear that the grantee knew the fact before purchase. Bean *v.* Valle, 2 Mo. 126. *Compare* Burt *v.* Mason, 97 Mich. 127, 56 N. W. 365. So concealment of the fact of the discovery of phosphate has been held sufficient. Stackpole *v.* Hancoek, 40 Fla. 362, 24 So. 914, 45 L. R. A. 814. The same is true of the discovery of a salt spring and the concealment of the fact by the grantee. Bowman *v.* Bates, 2 Bibb (Ky.) 47, 4 Am. Dec. 677.

39. **Inducing hasty transfer of property.**— In this class of cases are included misrepresentations creating a fear of arrest (Wood *v.* Lambert, 85 Iowa 580, 52 N. W. 515); physical injury (Kuelkamp *v.* Hidding, 31 Wis. 503. See Williams *v.* Williams, 63 Md. 371); that the property is subject to the collection of certain debts of the grantor's husband (Ladd *v.* Rice, 57 N. H. 374; Boyd *v.* De La Montagnie, 1 Hun (N. Y.) 696, 4 Thomps. & C. (N. Y.) 149, 47 How. Pr. (N. Y.) 433), or brother (Ramey *v.* Allison, 64 Tex. 697); or that there is danger of loss through litigation pending or about to be commenced (Kleeman *v.* Peltzer, 17 Nebr. 381, 22 N. W. 793); or that the property will be taken on judgment, advantage being taken of the grantor's ignorance (Wooley *v.* Drew, 49 Mich. 290, 13 N. W. 594); or that some pecuniary loss is about to fall on the grantee, who is a weak and illiterate old man (Davis *v.* McNalley, 5 Sneed (Tenn.) 583, 73 Am. Dec. 159); or that the grantor's divorced wife is going to try to obtain more dowry (Day *v.* Lown, 51 Iowa 364, 1 N. W. 786); or that if the grantor should marry again she will lose all interest in the property (West *v.* West, 9 Tex. Civ. App. 475, 29 S. W. 242); or that the execution of the deed could be compelled (Knox *v.* Earbee, (Tex. Civ. App. 1896) 35 S. W. 186); or that deeds to the grantor of the property were not good and that unless a quitclaim is given by him he will be driven from home (Rothenbarger *v.* Rothenbarger, 111 Mo. 1, 19 S. W. 932).

40. Larimer County Land Imp. Co. *v.* Cowan, 5 Colo. 320; Warren *v.* Ritchie, 128 Mo. 311, 30 S. W. 1023; Smith *v.* Dye, 88 Mo. 581 [*affirming* 15 Mo. App. 585]; Beckley *v.* Riverside Land Co., (Va. 1895) 23 S. E. 778.

A misrepresentation as to matters of collateral inducement is not ground for relief. Noel *v.* Horton, 50 Iowa 687.

41. *Illinois.*—Young *v.* Young, 113 Ill. 430.

Iowa.— Stout *v.* Merrill, 35 Iowa 47.

Missouri.— Smith *v.* Dye, 88 Mo. 581 [*affirming* 15 Mo. App. 585].

Tennessee.— Maney *v.* Porter, 3 Humphr. 347.

Texas.— Calhoun *v.* Quinn, (Civ. App. 1892) 21 S. W. 705.

Virginia.— Beckley *v.* Riverside Land Co., (1895) 23 S. E. 778.

West Virginia.— Pennybacker *v.* Laidley, 33 W. Va. 624, 11 S. E. 39.

See 16 Cent. Dig. tit. "Deeds," § 167.

Statements after the making and execution of a contract of sale are not ground for rescission. Maney *v.* Porter, 3 Humphr. (Tenn.) 347.

42. *California.*— Funded Debt *v.* Younger, 29 Cal. 172.

Colorado.— Wier *v.* Johns, 14 Colo. 493, 24 Pac. 262.

Illinois.— Miller *v.* Craig, 36 Ill. 109.

Kansas.— Patterson *v.* Galusha, 53 Kan. 367, 36 Pac. 737.

Maine.— Carlton *v.* Rockport Ice Co., 78 Me. 49, 2 Atl. 676; McCobb *v.* Richardson, 24 Me. 82, 41 Am. Dec. 374.

Michigan.— Parsons *v.* Detroit, etc., R. Co., 122 Mich. 462, 81 N. W. 343; Walker *v.* Casgrain, 101 Mich. 604, 60 N. W. 291.

Texas.— Adams *v.* Pardue, (Civ. App. 1896) 36 S. W. 1015.

Virginia.— Simmons *v.* Palmer, 93 Va. 389, 25 S. E. 6; Beckley *v.* Riverside Land Co., (1895) 23 S. E. 778.

c. Suppressio Veri. Whenever *suppressio veri* or *suggestio falsi* occurs, and more especially both together, they afford sufficient ground to set aside any release or conveyance.[43]

d. Intention as Affecting. If a material misrepresentation is made, upon the faith of which a party relies and acts, it will be ground for setting a deed aside without regard to whether the party making such representation knew it to be true or false.[44]

e. Mental Weakness and Old Age. Mental weakness on the part of the grantor, where coupled with fraud or fraudulent misrepresentation on the part of the grantee, is a sufficient ground for setting aside the instrument.[45] It is not necessary that such weakness amount to an entire incompetency to contract, provided it appears that it was taken advantage of to procure a conveyance by fraud.[46]

United States.— Hoyt *v.* Hanbury, 128 U. S. 584, 9 S. Ct. 176, 32 L. ed. 565. But see Tuthill *v.* Babcock, 24 Fed. Cas. No. 14,275, 2 Woodb. & M. 298.

See 16 Cent. Dig. tit. "Deeds," § 167.

This rule applies where ample opportunity to examine the property is afforded the parties (Miller *v.* Craig, 36 Ill. 109); where the grantee assisted in the survey and could easily have ascertained the number of acres (Wier *v.* Johns, 14 Colo. 493, 24 Pac. 262); where the vendee relied on the statements of one who negotiated the purchase for him (Walker *v.* Casgrain, 101 Mich. 604, 60 N. W. 291); where the grantee fraudulently represented that the property had been sold for taxes, that the title was worthless, and that there were no buildings on the land, and the true value of the land could have been discovered by the grantor by inquiry or inspection (Carlton *v.* Rockport Ice Co., 78 Me. 49, 2 Atl. 676); and where one had full opportunity to examine the goods in exchange for which he conveyed the land (Adams *v.* Pardue, (Tex. Civ. App. 1896) 36 S. W. 1015).

The rule that if one has not used means at his hands to learn the truth he cannot have relief has been held of no avail to a defendant where plaintiff was at a disadvantage in the transaction (Stack *v.* Nolte, 29 Wash. 188, 69 Pac. 753) or where the grantor lived in a distant state and had no immediate means of learning the truth (Matlack *v.* Shaffer, 51 Kan. 208, 32 Pac. 890, 37 Am. St. Rep. 270).

43. Smith *v.* Richards, 13 Pet. (U. S.) 26, 10 L. ed. 42. See also Ruffner *v.* Ridley, 81 Ky. 165; Torrey *v.* Buck, 2 N. J. Eq. 366.

Mere passive silence has been distinguished from active concealment, it having been held that the former, without fraudulent purpose and in the absence of some confidential and fiduciary relation, is no ground for setting aside a deed. Pennybacker *v.* Laidley, 33 W. Va. 624, 11 S. E. 39. *Compare* Stevens *v.* New York, 46 N. Y. Super. Ct. 274; Talbott *v.* Manard, 106 Tenn. 60, 59 S. W. 340.

44. Harding *v.* Randall, 15 Me. 332; James *v.* Steere, 16 R. I. 367, 16 Atl. 143, 2 L. R. A. 164; Billings *v.* Aspen Min., etc., Co., 51 Fed. 338, 2 C. C. A. 252; Warner *v.* Daniels, 29 Fed. Cas. No. 17,181, 1 Woodb. & M. 90. But see Jones *v.* Foster, 175 Ill. 459, 51 N. E. 862; Doyle *v.* Knapp, 4 Ill. 334; Shanks *v.* Whitney, 66 Vt. 405, 29 Atl. 367.

A mere intention by the grantor to make a different deed is not fraud which will render a deed void unless he was deceived by the grantee. Swisher *v.* Williams, Wright (Ohio) 754.

If a misrepresentation is made in good faith and no material injury has been done, the deed will not be set aside. Jones *v.* Foster, 175 Ill. 459, 51 N. E. 862. See also Brehm *v.* Gushal, 31 Misc. (N. Y.) 112, 64 N. Y. Suppl. 927.

45. *Iowa.*— Oakey *v.* Ritchie, 69 Iowa 69, 28 N. W. 448.

Kansas.— McCoy *v.* Whitehouse, 30 Kan. 433, 1 Pac. 799.

Kentucky.— Wilson *v.* Oldham, 12 B. Mon. 55; Cruise *v.* Christopher, 5 Dana 181.

Michigan.— Leonardson *v.* Hulin, 64 Mich. 1, 31 N. W. 26.

New Jersey.— Coffey *v.* Sullivan, (Err. & App. 1901) 49 Atl. 520; Mead *v.* Coombs, 26 N. J. Eq. 173.

New York.— Rosevear *v.* Sullivan, 47 N. Y. App. Div. 421, 62 N. Y. Suppl. 447.

Pennsylvania.— Bugbee's Appeal, 110 Pa. St. 331, 1 Atl. 273.

Rhode Island.— Anthony *v.* Hutchins, 10 R. I. 165.

South Carolina.— Rutherford *v.* Ruff, 4 Desauss. 350; Bunch *v.* Hurst, 3 Desauss. 273, 5 Am. Dec. 551.

Tennessee.— Good *v.* Floyd, (Ch. App. 1898) 48 S. W. 687.

Virginia.— Samuel *v.* Marshall, 3 Leigh 567.

See 16 Cent. Dig. tit. "Deeds," § 175; and *supra*, III, J, 1, b.

A deed will not be set aside merely because of the old age and infirmity of the grantor as a result of which he was liable to be a victim of fraud, where there is no proof of fraud in connection with the conveyance. Walton *v.* Northington, 5 Sneed (Tenn.) 282. See also Knobb *v.* Lindsay, 5 Ohio 468.

Mere susceptibility to fraudulent influences will not render a deed void in the absence of fraud inducing its execution. Paine *v.* Roberts, 82 N. C. 451.

46. Bennett *v.* Bennett, (Nebr. 1902) 91 N. W. 409.

f. Of One of Several Grantees. Fraud of one of several grantees in a deed whereby the instrument is procured will render it void as to the others, although without the privity of the latter.[47]

g. Of Persons Occupying Confidential Relations to Grantor. Where one occupying a confidential relation to another takes advantage of this relation and by fraud, fraudulent misrepresentation, or concealment procures the execution of a deed by the latter the instrument may be set aside.[48] This is true in the case of a deed so procured by the confidential adviser of the grantor in business affairs;[49] or by his agent,[50] attorney,[51] physician,[52] or priest.[53] And this principle also applies where the execution of a deed has been so procured by the husband,[54] the wife,[55] the parent,[56] the child,[57] the brother,[58] the brother-in-law,[59] the son-in-law,[60] the stepfather,[61] the uncle,[62] or the nephew[63] of the grantor. A deed is not,

47. Whelan *v.* Whelan, 3 Cow. (N. Y.) 537.

48. **This rule has been applied** where the grantor was old and infirm both in body and mind, and the grantor agreed to reconvey the property to the wife of the grantor, but instead conveyed it to one of the latter's heirs (White *v.* White, 89 Ill. 460); where the grantor was old, infirm, and ignorant and entirely under the grantee's influence, in whom he placed implicit confidence, which was abused by the grantee (Lyons *v.* Van Riper, 26 N. J. Eq. 337); where the grantors, who were enfeebled by age and ill health, were induced by one who had obtained their confidence to execute a deed to him, and the deed which was drawn up by the latter did not contain a certain covenant agreed upon (Sweet *v.* Bean, 67 Barb. (N. Y.) 91); where the grantor was by his habits of intoxication nearly incapacitated for transacting business, and the grantee had by intimate association with him and by furnishing him liquor acquired his confidence (Cruise *v.* Christopher, 5 Dana (Ky.) 181); where material facts were concealed (Emmons *v.* Moore, 85 Ill. 304); and where there was an inadequate consideration (James *v.* Langdon, 7 B. Mon. (Ky.) 193; Kroenung *v.* Goehri, 112 Mo. 641, 20 S. W. 661).

49. Kyle *v.* Pardue, 95 Ala. 579, 10 So. 103.

50. Thomas *v.* Whitney, 186 Ill. 225, 57 N. E. 808 [*affirming* 83 Ill. App. 247]; Morriso *v.* Philliber, 30 Mo. 145; Shute *v.* Johnson, 25 Oreg. 59, 34 Pac. 965.

51. Tuttle *v.* Green, (Ariz. 1897) 48 Pac. 1009; Beedle *v.* Crane, 91 Mich. 429, 51 N. W. 1070; McGinn *v.* Tobey, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 848; Appleby *v.* Frost, 3 Ohio S. & C. Pl. Dec. 441, 2 Ohio N. P. 178; Barron *v.* Willis, [1900] 2 Ch. 121, 69 L. J. Ch. 532, 82 L. T. Rep. N. S. 729, 48 Wkly. Rep. 579.

52. Hunter *v.* Owen, 9 S. W. 717, 10 S. W. 376, 10 Ky. L. Rep. 651; Wager *v.* Reid, 3 Thomps. & C. (N. Y.) 332.

53. Finegan *v.* Theisen, 92 Mich. 173, 52 N. W. 619.

54. Menne *v.* Menne, 25 S. W. 592, 15 Ky. L. Rep. 774; Loewenberg *v.* Glover, 19 Wash. 544, 53 Pac. 839.

55. Byrd *v.* Byrd, 95 Tenn. 364, 32 S. W. 198, 49 Am. St. Rep. 932. *Compare* Edwards *v.* Edwards, 170 Pa. St. 212, 32 Atl. 580, where it is held that a deed from a man to a woman, where they have been living together in the mistaken belief that they are man and wife, and which was for the consideration of love and affection and acquiesced in for twenty years, will not be set aside for fraud.

56. Rider *v.* Kelso, 53 Iowa 367, 5 N. W. 509; Baldock *v.* Johnson, 14 Oreg. 542, 13 Pac. 434.

57. *Kentucky.*—Scott *v.* Scott, 3 B. Mon. 2.

Maryland.— Keller *v.* Gill, 92 Md. 190, 48 Atl. 69; Highberger *v.* Stiffler, 21 Md. 338, 83 Am. Dec. 593.

Michigan.— Smith *v.* Smith, 90 Mich. 97, 51 N. W. 361; Nolan *v.* Nolan, 78 Mich. 17, 43 N. W. 1078; McDaniel *v.* McCoy, 68 Mich. 332, 36 N. W. 84.

Nevada.— Dalton *v.* Dalton, 14 Nev. 419.

New Jersey.— Mulock *v.* Mulock, 31 N. J. Eq. 594.

New York.— Whelan *v.* Whelan, 3 Cow. 537.

Tennessee.— Parrott *v.* Parrott, 1 Heisk. 681.

Wisconsin.— Giles *v.* Hodge, 74 Wis. 360, 43 N. W. 163.

See 16 Cent. Dig. tit. "Deeds," § 174.

Facts insufficient to show fraud see Kennedy *v.* Kennedy, 194 Ill. 346, 62 N. E. 797; Chidester *v.* Turnbull, 117 Iowa 168, 90 N. W. 583; Marking *v.* Marking, 106 Wis. 292, 82 N. W. 133.

In the absence of fraud or undue influence, a deed from an aged man and his wife to an adopted son in consideration of life support, will not be set aside at the instance of the wife after the husband's death. Gardner *v.* Lightfoot, 71 Iowa 577, 32 N. W. 510. See also Le Gendre *v.* Byrnes, 48 N. J. Eq. 308, 23 Atl. 581.

58. Holliway *v.* Holliway, 77 Mo. 392; Jones *v.* Jones, 120 N. Y. 589, 24 N. E. 1016; Kelley *v.* Radakin, 24 R. I. 101, 52 Atl. 678.

59. Harper *v.* Kissick, 52 Iowa 733, 3 N. W. 449.

60. McHarry *v.* Irvin, 85 Ky. 322, 3 S. W. 374, 4 S. W. 800, 9 Ky. L. Rep. 245.

61. Givan *v.* Masterson, 152 Ind. 127, 51 N. E. 237.

62. Chambers *v.* Chambers, 139 Ind. 111, 38 N. E. 334.

63. Kelly *v.* McGuire, 15 Ark. 555.

however, *prima facie* procured by fraud from the fact that the parties are near relatives.[64] Nor does friendship between the parties create such a presumption, although it may be considered in connection with other facts and circumstances in determining whether the instrument was induced by fraud.[65]

h. Of Third Person. An action to rescind a deed will not be sustained merely because of fraudulent representations by a third party who did not act under the authority of defendants,[66] and in which they neither participated nor had notice.[67] If, however, the grantee is a party to the fraud the deed may be set aside.[68]

i. As to Future Events or Actions. The violation of a parol contemporaneous agreement inconsistent with the terms of a deed will be no ground for setting the instrument aside where no trick or device to deceive or mislead the grantor into executing the same has been shown.[69] It has, however, been held that where there is an intent to create a belief that it was as a fact the intention to do a certain act and the representation in respect thereto was understood as asserting that fact a charge of fraud may be based thereon,[70] unless it appears that the consideration for the deed was valuable and adequate.[71] And where a person standing in a fiduciary or confidential relation to another procures a deed from the latter, there being either an inadequate or an entire want of consideration, the grantee promising to perform some act, his failure to perform the act will be a constructive fraud,[72] and a deed so procured may be set aside, the confidence of the party having been abused.[73]

j. Representations of Opinion or Law. An expression of opinion, in the absence of any other facts or circumstances showing fraud, although made to induce the execution of a deed, will be no ground for cancellation.[74] Nor will a misrepresentation as to the legal effect of a deed amount to fraud of which a court of equity will take cognizance.[75]

64. Goar *v.* Thompson, 19 Tex. Civ. App. 330, 47 S. W. 61.

65. Wells *v.* Houston, (Tex. Civ. App. 1902) 69 S. W. 183.

66. Fisher *v.* Boody, 9 Fed. Cas. No. 4,814, 1 Curt. 206.

67. *Alabama.*— Dent *v.* Long, 90 Ala. 172, 7 So. 640.

Georgia.— Campbell *v.* Murray, 62 Ga. 86.

Iowa.— Wood *v.* Stedwell, 91 Iowa 224, 59 N. W. 28; McDonald *v.* Hardin, 55 Iowa 620, 8 N. W. 473; Crum *v.* Crum, 55 Iowa 188, 7 N. W. 499.

Tennessee.— Maney *v.* Morris, (Ch. App. 1900) 57 S. W. 442.

Texas.— Banks *v.* Martin, (1892) 18 S. W. 964. But see De Perez *v.* De Everett, 73 Tex. 431, 11 S. W. 388.

See 16 Cent. Dig. tit. "Deeds," § 172.

If executed in good faith and no improper use is contemplated by the parties a deed will not be set aside as fraudulent because third parties have made an improper use of the instrument. Smith *v.* Espy, 9 N. J. Eq. 160.

When deed may be set aside.— A deed executed by a married woman to a creditor of her husband on the latter's false representation that if such conveyance were made the creditor would advance sufficient money to save him from financial ruin may be set aside, although the creditor did not participate in the fraud (Sistare *v.* Heckscher, 15 N. Y. Suppl. 737 [*affirmed* in 18 N. Y. Suppl. 475]), as may also a conveyance purporting to be in consideration of love and affection for the grantees, who are children of the grantor's husband by a former marriage, where by misrepresentation on the part of the husband the wife was induced to make the conveyance (Trippe *v.* Trippe, 29 Ala. 637).

68. Taaffe *v.* Kelley, 110 Mo. 127, 19 S. W. 539. See also Quimby *v.* Clock, 44 N. Y. App. Div. 616, 60 N. Y. Suppl. 253.

69. Dyar *v.* Walton, 79 Ga. 466, 7 S. E. 220.

Failure to perform promises has been held no ground for cancellation. Haenni *v.* Bleisch, 146 Ill. 262, 34 N. E. 153; Farrar *v.* Bridges, 3 Humphr. (Tenn.) 566. But see Watts *v.* Bonner, 66 Miss. 629, 6 So. 187.

70. Ablitz *v.* Minneapolis, etc., R. Co., 40 Minn. 476, 42 N. W. 394. See also Atlanta, etc., R. Co. *v.* Hodnett, 36 Ga. 669; Williams *v.* Kerr, 152 Pa. St. 560, 25 Atl. 618.

71. State *v.* Blize, 37 Oreg. 404, 61 Pac. 735.

72. Alaniz *v.* Casenave, 91 Cal. 41, 27 Pac. 521. *Compare* Ilgenfritz *v.* Ilgenfritz, 116 Mo. 429, 22 S. W. 786.

73. Mott *v.* Mott, 49 N. J. Eq. 192, 22 Atl. 997.

74. Gardner *v.* Knight, 124 Ala. 273, 27 So. 298; Blanks *v.* Clark, 68 Ark. 98, 56 S. W. 1063; Winget *v.* Quincy Bldg., etc., Assoc., 128 Ill. 37, 21 N. E. 12; Bowman *v.* Bates, 2 Bibb (Ky.) 47, 4 Am. Dec. 677; Belz *v.* Keller, 1 S. W. 420, 8 Ky. L. Rep. 256.

75. Smither *v.* Calvert, 44 Ind. 242; Abbott *v.* Treat, 78 Me. 121, 3 Atl. 44.

Although mere ignorance of law is generally no ground for avoiding a deed, yet if it is coupled with other elements going to mis-

k. Rights of Grantee as Against Creditors of Grantor. A deed which is executed for a valuable and adequate consideration, the grantee having no knowledge of any fraudulent intent on the part of the grantor, will be upheld against the creditors of the grantor, however fraudulent his purpose.[76]

4. Duress — a. In General. A deed will be void in equity where given under duress.[77] A deed, however, is not necessarily void because given under restraint, but it must appear that the restraint was illegal.[78]

b. Of Wife by Husband. A deed executed by a wife under the coercive influence of her husband will be void.[79] Duress, however, must be clearly proved.[80] And, although a deed may have been executed by a wife under coercion, yet she may be bound thereby where there are subsequent acts on her part showing acquiescence therein.[81] Again a grantee cannot, in the absence of any fraud, inadequacy of price, or notice on his part be held responsible for intimidation by the husband of the grantor.[82]

c. Duress of Goods. Duress of goods of the grantor may be sufficient to render the deed void.[83]

d. Threats. A threat may constitute duress.[84] But in order to avoid a deed on the ground of duress *per minas* the threat should be such as to strike with fear a person of common firmness and constancy of mind.[85]

e. Suits or Threats to Sue. A threat to sue on a good cause of action does not constitute such duress as will avoid a deed.[86]

representation and is taken advantage of by a party a court of equity may grant relief. Moreland *v.* Atchison, 19 Tex. 303.

76. Previtt *v.* Wilson, 103 U. S. 22, 26 L. ed. 360. See also Burdsall *v.* Waggoner, 4 Colo. 256.

77. Brown *v.* Peck, 2 Wis. 261. See also Van Dyke *v.* Wood, 60 N. Y. App. Div. 208, 70 N. Y. Suppl. 324.

A deed given in obedience to a valid decree of court which has never been questioned is not given under duress. Eldridge *v.* School Trustees, 111 Ill. 576.

Discharge of actual indebtedness.— A deed is not absolutely void, although given under duress, where it was made to discharge an actual indebtedness it being at the most only voidable. Carter *v.* Couch, 84 Fed. 735, 28 C. C. A. 520.

78. *In re* Pinson, 11 Rich. Eq. (S. C.) 110.

79. Vicknair *v.* Troselair, 45 La. Ann. 373, 12 So. 486; Pulliam *v.* Pulliam, Freem. (Miss.) 348.

Duress in such a case sufficient to avoid a deed may consist of abusive treatment (Willetts *v.* Willetts, 104 Ill. 122), of threats of personal violence (Fisk *v.* Stubbs, 30 Ala. 335), of threats of separation from and refusal to support her (Tapley *v.* Tapley, 10 Minn. 448, 88 Am. Dec. 76. See also Kocourek *v.* Marak, 54 Tex. 201, 38 Am. Rep. 623), or of threats that he will take her children away and that she will never see them again (Kellogg *v.* Kellogg, 21 Colo. 181, 40 Pac. 358).

80. Freeman *v.* Wilson, 51 Miss. 329.

81. Morrow *v.* Goudchaux, 41 La. Ann. 711, 6 So. 563.

82. Fightmaster *v.* Levi, 17 S. W. 195, 13 Ky. L. Rep. 412. See also Hughie *v.* Hammett, 105 Ga. 368, 31 S. E. 109.

83. Benn *v.* Pritchett, 163 Mo. 560, 63 S. W. 1103.

But a deed of trust between husband and wife will not be set aside on this ground by reason of the husband of the grantor holding property which she asserts is hers and of which she desired to recover as much as possible where it appears that she has acquiesced in the deed for several years and her testimony that the conveyance was a fraud on her is contradicted. Chase *v.* Phillips, 153 Mass. 17, 26 N. E. 136.

84. Harshaw *v.* Dobson, 67 N. C. 203, where it was held that a threat of a judge to send a person to jail if he did not accept Confederate money in payment, and execute the conveyance, constituted such duress as rendered the deed void.

85. Barrett *v.* French, 1 Conn. 354, 6 Am. Dec. 241.

Where a grantor is weak-minded a deed by him may be void, although the threats and menaces fall short of legal duress. Parmentier *v.* Pater, 13 Oreg. 121, 9 Pac. 59.

86. Harris *v.* Tyson, 24 Pa. St. 347, 64 Am. Dec. 661. But see Dolliver *v.* Dolliver, 94 Cal. 642, 30 Pac. 4, holding that a deed may be rescinded on this ground where it was executed in fear of the effect a suit for divorce brought by the husband would have on the standing of the wife, the suit having been instituted for the purpose of forcing the wife, who was suffering from nervous prostation, to execute the same and for no other reason.

Buying a mortgage and threatening to foreclose the same unless part of the land is sold at a certain price to such purchaser does not constitute duress. Martin *v.* New Rochelle Water Co., 162 N. Y. 599, 57 N. E. 1117 [*affirming* 11 N. Y. App. Div. 177, 42 N. Y. Suppl. 893].

The vexation and annoyance over proceedings for the appointment of a conservator for the grantor of a trust deed executed to avoid

f. Violence or Threat Thereof. A threat to inflict some physical injury upon a person if a deed is not executed may be sufficient to avoid a deed executed in fear thereof.[87]

g. Imprisonment, Criminal Prosecution, or Threat Thereof. The restraint must be unlawful to constitute duress by imprisonment.[88] And a deed executed under pressure of a threat of lawful arrest of a person justly amenable to criminal prosecution is not executed under duress.[89] But a conveyance of land made by a wife under the influence of threats of a criminal prosecution against her husband if she refuse to do so may be avoided by her where the grantee received the deed with actual knowledge of such threats, although taking no active part therein.[90]

5. Undue Influence and Confidential Relations — a. In General. A deed will be void where procured by undue influence.[91] The undue influence, however, must be such as to overbear the will of the grantor to the extent of preventing voluntary action on his part,[92] fair argument and persuasion alone not amounting

such appointment do not amount to duress sufficient to avoid the deed, unless it appears that a state of insanity has been produced thereby. Brower *v.* Callender, 105 Ill. 88.

87. Pride *v.* Baker, (Tenn. Ch. App. 1901) 64 S. W. 329. See also Muller *v.* Buyek, 12 Mont. 354, 30 Pac. 386, where a deed was held void where executed, by a woman to a man with whom she had been living for several years, under fear of maltreatment and that he would leave her.

Threats made a considerable time prior to the execution of a deed do not amount to such duress as will avoid the instrument, the grantor in the meantime having had disinterested advice. Rendleman *v.* Rendleman, 156 Ill. 568, 41 N. E. 223.

The execution of a deed under duress is not shown by the fact that the grantor had been severely whipped by a mob and driven from the county, it appearing that the grantee was not in any way implicated in the outrage and that he paid the price asked. Talley *v.* Robinson, 22 Gratt. (Va.) 888.

88. Crowell *v.* Gleason, 10 Me. 325.

89. Gregor *v.* Hyde, 62 Fed. 107, 10 C. C. A. 290.

90. Merchant *v.* Cook, 21 D. C. 145. See also Leflore County *v.* Allen, 80 Miss. 298, 31 So. 815. But *compare* Gohegan *v.* Leach, 24 Iowa 509, where it was ordered that a deed, induced by the fear of prosecution of herself and husband for embezzlements from his employer, the proceeds of which had been expended in improving their homestead, although not the free and voluntary act of the wife, be confirmed upon the employer paying her the value of the premises less the amount due him, or that at her election it be set aside upon paying him the amount due, including his outlay on the premises since the conveyance.

An agreement not to prosecute a husband for embezzlement of the funds of a bank if the wife will execute a deed, followed by the advice and urging of her husband and brother, who did not represent the bank, that she execute the same, is held not to amount to duress, although the consideration might have been the compounding of a felony. Compton *v.* Bunker Hill Bank, 96 Ill. 301, 36 Am. Rep. 147.

A deed may be canceled where executed by a wife to procure the release of her husband from a criminal prosecution which has been commenced against him on a false charge and for the purpose of inducing her to execute the deed, it being also represented to her that he committed the offense. Treadwell *v.* Torbert, 122 Ala. 297, 25 So. 216. Again, although a husband may be guilty of the offense charged yet a deed, executed by the wife, induced by threats to arrest and imprison him, will be void. Heaton *v.* Norton County State Bank, 5 Kan. App. 498, 47 Pac. 576.

There is no duress in the case of a threat by a man to his wife that unless she executes an instrument he will be arrested for embezzlement and will commit suicide. Girty *v.* Standard Oil Co., 1 N. Y. App. Div. 224, 37 N. Y. Suppl. 369.

91. Davis *v.* Culver, 13 How. Pr. (N. Y.) 62; Wessell *v.* Rathjohn, 89 N. C. 377, 45 Am. Rep. 696. See also Hammell *v.* Hyatt, 59 N. J. Eq. 174, 44 Atl. 953.

Each case depends largely on the circumstances surrounding it. Knox *v.* Singmaster, 75 Iowa 64, 39 N. W. 183; Bowen *v.* Hughes, 5 Wash. 442, 32 Pac. 98.

A deed will not be set aside on this ground where it does not appear that the execution thereof was ever requested by the grantee, who had no knowledge of its execution until afterward. Wilcoxson *v.* Wilcoxson, 165 Ill. 454, 46 N. E. 369.

92. *Alabama.*— Adair *v.* Craig, 135 Ala. 332, 33 So. 902.

Delaware.— Doe *v.* Beeson, 2 Houst. 246.

Illinois.— Shea *v.* Murphy, 164 Ill. 614, 45 N. E. 1021, 56 Am. St. Rep. 215.

Iowa.— Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158. See also Beith *v.* Beith, 76 Iowa 601, 41 N. W. 371.

Maine.— Jordan *v.* Stevens, 51 Me. 78, 81 Am. Dec. 556.

Massachusetts.— Howe *v.* Howe, 99 Mass. 88.

Nebraska.— Munson *v.* Carter, 19 Nebr. 293, 27 N. W. 208.

New York.— Davis *v.* Culver, 13 How. Pr. 62.

Virginia.— Orr *v.* Pennington, 93 Va. 268, 24 S. E. 928.

West Virginia.— Erwin *v.* Hedrick, 52

to undue influence.[93] So personal solicitation by a child for a conveyance, especially where the other children have received similar deeds,[94] or mere improper influence will not be sufficient where they do not amount to fraud.[95] Again it must appear that the undue influence was exercised at the time the act referred to was done.[96]

b. Mental Weakness of Grantor. If there is reason to believe that influence has been acquired over a person of weak mind the transaction will be carefully scrutinized in equity.[97] And wherever, as a result of age, sickness, or other cause, there is a great weakness of mind, not amounting to total incapacity, in a person executing a conveyance, and it appears that there was either no consideration therefor or a grossly inadequate one, the conveyance may be set aside by a court of equity upon a proper and seasonable application made either by the injured party or his representatives or heirs.[98] But the mere fact that a person is weak-

W. Va. 537, 44 S. E. 165; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788.

United States.— Sawyer *v.* White, 122 Fed. 223, 58 C. C. A. 587; Bowdoin College *v.* Merritt, 75 Fed. 480.

See 16 Cent. Dig. tit. "Deeds," § 190.

Illustrations.— The proper exercise of an influence fairly and honestly acquired does not constitute undue influence, although the deed would not have been executed but for the exercise of such influence where it appears that it was the result of the grantor's own convictions. Sturtevant *v.* Sturtevant, 116 Ill. 340, 6 N. E. 428. So a conveyance will not be vitiated by the mere fact that the grantor reposed confidence in the grantee who had acquired influence over the former by reason of acts of kindness and attention, such facts by themselves not constituting fraud or undue influence in law. Hale *v.* Cole, 31 W. Va. 576, 8 S. E. 516.

93. Taylor *v.* Taylor, 41 N. C. 26, 51 Am. Dec. 413; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788; Bowdoin College *v.* Merritt, 75 Fed. 480.

94. Hummel *v.* Kistner, 182 Pa. St. 216, 37 Atl. 815.

95. Corbit *v.* Smith, 7 Iowa 60, 71 Am. Dec. 431. See also Harshaw *v.* McCombs, 63 N. C. 75.

Where it is sought to set aside a deed on the ground that the property was obtained for an inadequate price owing to the exercise of such an influence on the grantor it has been decided that to justify such action the consideration must be grossly inadequate. Baldwin *v.* Dunton, 40 Ill. 188.

96. Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158.

97. Bennett *v.* Bennett, (Nebr. 1902) 91 N. W. 409.

98. *Arkansas.*— Hightower *v.* Nuber, 26 Ark. 604.

California.— Moore *v.* Moore, 81 Cal. 195, 22 Pac. 589, 874.

Illinois.— Ross *v.* Payson, 160 Ill. 349, 43 N. E. 399; Sands *v.* Sands, 112 Ill. 225.

Indiana.— Wray *v.* Wray, 32 Ind. 126.

Iowa.— Fitch *v.* Reiser, 79 Iowa 34, 44 N. W. 214; Norton *v.* Norton, 74 Iowa 161, 37 N. W. 129.

Kansas.— Stevens *v.* Stevens, 10 Kan. App. 259, 62 Pac. 714.

Maryland.— Cherbonnier *v.* Evitts, 56 Md. 276; Todd *v.* Grove, 33 Md. 188; Long *v.* Long, 9 Md. 348; Brogden *v.* Walker, 2 Harr. & J. 285.

Michigan.—Goodrich *v.* Shaw, 72 Mich. 109, 40 N. W. 187; Raynett *v.* Baluss, 54 Mich. 469, 20 N. W. 533; Thorn *v.* Thorn, 51 Mich. 167, 16 N. W. 324.

Minnesota.— Graham *v.* Burch, 44 Minn. 33, 46 N. W. 148.

Missouri.— Dingman *v.* Romine, 141 Mo. 466, 42 S. W. 1087; Martin *v.* Baker, 135 Mo. 495, 36 S. W. 369; Yosti *v.* Laughran, 49 Mo. 594; Freeland *v.* Eldridge, 19 Mo. 325.

Nebraska.—Munson *v.* Carter, 19 Nebr. 293, 27 N. W. 208.

New Jersey.—Lovett *v.* Taylor, 54 N. J. Eq. 311, 34 Atl. 896.

New York.—Aldridge *v.* Aldridge, 120 N. Y. 614, 24 N. E. 1022; Brice *v.* Brice, 5 Barb. 533; Nielson *v.* Lafflin, 21 N. Y. Suppl. 731.

North Carolina.— Riley *v.* Hall, 119 N. C. 406, 26 S. E. 47; Hartly *v.* Estis, 62 N. C. 167; Futrill *v.* Futrill, 59 N. C. 337; Oldham *v.* Oldham, 58 N. C. 89; Amis *v.* Satterfield, 40 N. C. 173; Buffalow *v.* Buffalow, 22 N. C. 241.

Ohio.— Baugh *v.* Buckles, 1 Ohio Cir. Dec. 607.

Pennsylvania.— Miskey's Appeal, 107 Pa. St. 611.

South Carolina.— Gaston *v.* Bennett, 30 S. C. 467, 9 S. E. 515.

Texas.— Gibson *v.* Fifer, 21 Tex. 260.

Virginia.— Jones *v.* McGruder, 87 Va. 360, 12 S. E. 792.

Washington.— Kennedy *v.* Currie, 3 Wash. 442, 28 Pac. 1028.

Wisconsin.— Kelly *v.* Smith, 73 Wis. 191, 41 N. W. 69.

United States.— Allore *v.* Jewell, 94 U. S. 506, 24 L. ed. 260; German Sav., etc., Soc. *v.* De Lashmutt, 83 Fed. 33; Harding *v.* Wheaton, 11 Fed. Cas. No. 6,051, 2 Mason 378.

See 16 Cent. Dig. tit. "Deeds," § 198.

Consideration of support, although sufficient in some cases to sustain a deed where there is no evidence of undue influence

minded, provided there is not an entire want of capacity, will not avoid a deed by him to one in whom he had great confidence, where it appears that it was executed without solicitation and that the grantor was in no way unduly influenced.[99]

e. Last Sickness of Grantor. Undue influence will not be presumed from the mere fact that a deed was executed by the grantor while in his last sickness.[1] But where the grantor's will power has become weakened from severe or long continued sickness and he is unable to resist importunities and influences brought to bear, so that the conveyance is not his free and voluntary act, it will be void as executed under undue influence.[2]

d. Influence by Third Person. Where a deed is procured by undue influence it may be set aside without regard to whether the influence was exercised by the grantee or a third person, where no valuable consideration has been paid therefor.[3]

e. Influence Obtained by Immoral Conduct. A deed may be set aside where it is procured as the result of an influence obtained by the use of unlawful means or immoral conduct.[4]

f. Particular Confidential Relations. It is not a sufficient ground to set aside a deed that there existed at the time of its execution a mutual confidence in business relations and a general friendship justified by the past relations of the parties, where it does not appear that the consideration was inadequate,[5] or that there was undue influence over, or want of capacity on the part of, the grantor.[6] Nor does the mere fact that the grantee was the medical adviser of the grantor

(Looby *v.* Redmond, 66 Conn. 444, 34 Atl. 102; Dailey *v.* Kastell, 56 Wis. 444, 14 N. W. 635. See Montgomery *v.* Clark, (Tenn. Ch. App. 1898) 46 S. W. 466) yet may, in connection with other circumstances, be such evidence of undue influence as to justify setting aside the deed (Johnson *v.* Stonestreet, 66 S. W. 621, 23 Ky. L. Rep. 2102; Talbott *v.* Bedford, 53 S. W. 294, 21 Ky. L. Rep. 897; Brice *v.* Brice, 5 Barb. (N. Y.) 533; Kennedy *v.* Currie, 3 Wash. 442, 28 Pac. 1028), as where no provision therefor has been made (Lanfair *v.* Thompson, 112 Ga. 487, 37 S. E. 717. See James *v.* Groff, 157 Mo. 402, 57 S. W. 1081).

99. Looby *v.* Redmond, 66 Conn. 444, 34 Atl. 102. See also Nutting *v.* Pell, 11 N. Y. App. Div. 55, 42 N. Y. Suppl. 987; Dailey *v.* Kastell, 56 Wis. 444, 14 N. W. 635.

1. Baxter *v.* Bailey, 8 B. Mon. (Ky.) 336; Duffey *v.* Sutherland, 17 S. W. 332, 13 Ky. L. Rep. 447; Gunther *v.* Gunther, 69 Md. 560, 16 Atl. 219; Johnson *v.* Rose, 50 Mich. 334, 15 N. W. 497; Hamilton *v.* Armstrong, (Mo. 1892) 20 S. W. 1054.

2. *Illinois.*— Elmstedt *v.* Nicholson, 186 Ill. 580, 58 N. E. 381.

Kansas.—Paddock *v.* Pulsifer, 43 Kan. 718, 23 Pac. 1049.

Maryland.— Frush *v.* Green, 86 Md. 494, 39 Atl. 863.

New Jersey.— Collins *v.* Collins, 45 N. J. Eq. 813, 15 Atl. 849, 18 Atl. 860.

New York.— Dooley *v.* Holden, 53 N. Y. App. Div. 625, 65 N. Y. Suppl. 713.

Wisconsin.—Shawvan *v.* Shawvan, 110 Wis. 590, 86 N. W. 165; Diseh *v.* Timm, 101 Wis. 179, 77 N. W. 196.

See 16 Cent. Dig. tit. "Deeds," § 197.

A determination formed some time prior to that of execution may be considered where a deed was executed during the grantor's last sickness and shortly before his death, but such determination will not be sufficient to sustain the deed if he was not competent at the time of execution. Duffey *v.* Sutherland, 17 S. W. 332, 13 Ky. L. Rep. 447.

3. Graham *v.* Bureh, 44 Minn. 33, 46 N. W. 148; Ranken *v.* Patton, 65 Mo. 378. See also Miller *v.* Simonds, 5 Mo. App. 33 [*affirmed* in 72 Mo. 669].

4. Leighton *v.* Orr, 44 Iowa 679.

This is true in the case of a deed procured by the exercise of an influence obtained by unlawful cohabitation. Leighton *v.* Orr, 44 Iowa 679; Bivins *v.* Jarnigan, 3 Baxt. (Tenn.) 282.

5. Smith *v.* Curtis, 19 Fla. 786. See also Doggett *v.* Lane, 12 Mo. 215, where it was held that a deed to a family physician would not be set aside, the consideration being adequate.

That the grantee had influence over the grantor by reason of the affection of the latter for the former is not of itself sufficient to justify such action. Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452, 19 Am. St. Rep. 158.

Although want of independent advice may be a ground for setting aside a deed to an attorney, agent, or trustee, in those cases where the parties are seeking to obtain some advantage for themselves, yet if the deed is one not for their benefit or at their solicitation, but in trust for a benevolent or charitable use it will be sufficient that the grantor had ample opportunity to obtain such advice, and fully comprehend the nature of the act, and that it was voluntary. Bowdoin College *v.* Merritt, 75 Fed. 480.

6. Ralston *v.* Turpin, 129 U. S. 663, 9 S. Ct. 420, 32 L. ed. 747.

at the time the deed was executed show undue influence.[7] And no trust or confidential relation between the parties is created by the relation of a boarder in the family of the grantee so as to affect the validity of a deed by the former to the latter.[8] But if a person occupying a confidential relation to another, whether as guardian, agent, or otherwise, avails himself of his information and exercises his influence, acquired by virtue of such relation, to procure a conveyance from the other without an adequate consideration it may be set aside.[9] So equitable relief may be obtained where a deed has been procured under such circumstances by a spiritual adviser,[10] attorney or solicitor,[11] or one who possesses the confidence of the grantor by reason of their business relations,[12] such as agent and confidential adviser.[13]

g. Deeds to Relatives — (i) *In General.* The influence which a grantee may have exercised over a grantor by reason of their being relatives does not of itself invalidate a deed;[14] and in such a case where a voluntary conveyance is understandingly made by the grantor it may be sustained,[15] although at the time he was in a weak physical condition.[16] Nor will a deed which the grantor knowingly and intentionally executed be set aside merely because of such influence as the grantee may have had over him by reason of the partiality or special affection[17] of

7. Kellogg *v.* Peddicord, 181 Ill. 22, 54 N. E. 623.

8. Real Estate Title Ins., etc., Co. *v.* Maguire, 17 Montg. Co. Rep. (Pa.) 25.

9. Michael *v.* Michael, 39 N. C. 349. See also Holland *v.* John, 60 N. J. Eq. 435, 46 Atl. 172; Smith *v.* Firth, 53 N. Y. App. Div. 369, 65 N. Y. Suppl. 1096.

10. Ross *v.* Conway, 92 Cal. 632, 28 Pac. 785; Caspair *v.* New Jerusalem First German Church, 82 Mo. 649; Church of Jesus Christ, etc. *v.* Watson, 25 Utah 45, 69 Pac. 531.

A conveyance by an aged and illiterate woman to her pastor, on whom she leaned for counsel and care, and who also induced the making of a will in his favor, will be presumed to be fraudulent. McClellan *v.* Grant, 83 N. Y. App. Div. 599, 82 N. Y. Suppl. 208.

11. Alwood *v.* Mansfield, 59 Ill. 496; Hoppin *v.* Tobey, 9 R. I. 42; Bayliss *v.* Williams, 6 Coldw. (Tenn.) 440. But see Wendell *v.* Van Rensselaer, 1 Johns. Ch. (N. Y.) 344, where it is held that, although the consideration for a deed to an attorney or scrivener by his client may be inadequate, the instrument will not be set aside for undue influence where there is no evidence as to want of capacity in the grantor or of fraud or imposition by the grantee.

12. Gay *v.* Witherspoon, 16 S. W. 96, 13 Ky. L. Rep. 20; Chase *v.* Hubbard, 153 Mass. 91, 26 N. E. 433; Barnes *v.* Brown, 32 Mich. 146; Armstrong *v.* Logan, 115 Mo. 465, 22 S. W. 384. See also Platt *v.* Platt, 2 Thomps. & C. (N. Y.) 25, where it is held that in the case of a conveyance by one partner to another of his interest in the business under circumstances from which the exercise of influence over the grantor's mind may be implied, the grantee has the burden of showing the righteousness of the transaction.

13. German Sav., etc., Soc. *v.* De Lashmutt, 83 Fed. 33.

14. Millican *v.* Millican, 24 Tex. 426.

15. *California.*— Creswell *v.* Welchman, 95 Cal. 359, 30 Pac. 553.

Illinois.— Dickerson *v.* Evans, 84 Ill. 451.

Minnesota.— O'Neil *v.* O'Neil, 30 Minn. 33, 14 N. W. 59.

Missouri.— Likins *v.* Likins, 122 Mo. 279, 27 S. W. 531; Moore *v.* Moore, 67 Mo. 192; Bowles *v.* Wathan, 54 Mo. 261.

New Jersey.— Leddel *v.* Starr, 20 N. J. Eq. 274.

United States.— McCalla *v.* Bane, 45 Fed. 828.

See 16 Cent. Dig. tit. "Deeds," § 191.

The mere fact that the grantor is old and that the deed is a voluntary one to a daughter with whom the former has lived for several years on very affectionate terms is not sufficient ground for setting it aside, in the absence of proof of incapacity, fraud, or undue influence. Le Gendre *v.* Goodridge, 46 N. J. Eq. 419, 19 Atl. 543.

16. Whitten *v.* McFall, 122 Ala. 619, 26 So. 131; Carty *v.* Connolly, 91 Cal. 15, 27 Pac. 599; McKinney *v.* Hensley, 74 Mo. 326.

Evidence of the age and infirmity of a grantor and the relationship between him and the grantee does not present a case of undue influence. Crowe *v.* Peters, 63 Mo. 429. See also Martin *v.* Winton, (Tenn. Ch. App. 1901) 62 S. W. 180.

17. *Illinois.*— Francis *v.* Wilkinson, 147 Ill. 370, 35 N. E. 150.

Kentucky.— Sullivan *v.* Hodgkin, 12 S. W. 773, 11 Ky. L. Rep. 642.

Michigan.—See Schuffert *v.* Grote, 88 Mich. 650, 50 N. W. 657, 26 Am. St. Rep. 316.

Missouri.— McKissock *v.* Groom, 148 Mo. 459, 50 S. W. 115.

New York.— Callery *v.* Miller, 1 N. Y. Suppl. 88.

United States.— Mackall *v.* Mackall, 135 U. S. 167, 10 S. Ct. 705, 34 L. ed. 84.

See 16 Cent. Dig. tit. "Deeds," § 192.

Deeds to children generally see Latimer *v.* Latimer, 174 Ill. 418, 51 N. E. 548; Hemstreet *v.* Wheeler, 100 Iowa 282, 69 N. W. 518; Reinerth *v.* Rhody, 52 La. Ann. 2029, 28 So. 277; Britton *v.* Britton, 23 Pa. Co. Ct. 89.

the latter for the former, as in the case of a favorite child or nephew,[18] or the devotion and affection of a grantor for a brother,[19] unless it appears that there has been an abuse of the confidence reposed.[20] Nor will arguments addressed by a child to a parent or appeals to the latter's conviction of right-doing constitute undue influence;[21] nor the fact that a parent executes a deed with reluctance and after repeated urging, he being in full possession of his faculties;[22] nor an inequality in the division of the grantor's property among his children.[23] But if a party takes advantage of the confidence which another has reposed in him and of his influence over such person, and by deception or improper influence induces him to part with his property without an adequate consideration, relief may be obtained in equity.[24]

(II) *To Parent or Person In Loco Parentis.* Where a deed, founded on no real, or a grossly inadequate, consideration, is executed in favor of a parent who by misrepresentation or other abuse of the confidence or affection of the grantor for him has procured its execution, it may be canceled in equity.[25] And

It is no objection that there was want of independent advice in the case of a deed to a child who had supported the parent for years, or the absence of a power of revocation in such a case. Carney *v.* Carney, 196 Pa. St. 34, 46 Atl. 264.

18. Eakle *v.* Reynolds, 54 Md. 305; Coombe *v.* Carthew, 59 N. J. Eq. 638, 43 Atl. 1057.

19. Wise *v.* Swartzwelder, 54 Md. 292. See also Maney *v.* Morris, (Tenn. Ch. App. 1900) 57 S. W. 442.

20. Hemphill *v.* Holford, 88 Mich. 293, 50 N. W. 300; Comstock *v.* Comstock, 57 Barb. (N. Y.) 453; June *v.* Willis, 30 Fed. 11. But see Barnard *v.* Gantz, 140 N. Y. 249, 35 N. E. 430.

21. Hammond *v.* Welton, 106 Mich. 244, 64 N. W. 25.

22. Hamilton *v.* Smith, 57 Iowa 15, 10 N. W. 276, 42 Am. Rep. 39.

23. Francis *v.* Wilkinson, 147 Ill. 370, 35 N. E. 150; Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158; Chambers *v.* Brady, 100 Iowa 622, 69 N. W. 1015; McKissock *v.* Groom, 148 Mo. 459, 50 S. W. 115; Rowland *v.* Sullivan, 4 Desauss. (S. C.) 518. See also Wessell *v.* Rathjohn, 89 N. C. 377, 45 Am. Rep. 696.

Inequality in distribution by deed among children may, however, be considered as a circumstance tending to establish undue influence. Salisbury *v.* Aldrich, 118 Ill. 199, 8 N. E. 777.

24. Harkness *v.* Fraser, 12 Fla. 336. See also Hartnett *v.* Hartnett, 42 Nebr. 23, 60 N. W. 362.

A deed may be set aside where so procured (Frizzell *v.* Reed, 77 Ga. 724; Thornton *v.* Ogden, 32 N. J. Eq. 723; Case *v.* Case, 49 Hun (N. Y.) 83, 1 N. Y. Suppl. 714), as in the case of a deed to a son (Forrestel *v.* Forrestel, 110 Iowa 614, 81 N. W. 797; Disbrow *v.* Disbrow, 164 N. Y. 564, 58 N. E. 1086 [*affirming* 31 N. Y. App. Div. 624, 52 N. Y. Suppl. 471]), stepson (Hart *v.* Hart, 57 N. J. Eq. 543, 42 Atl. 153), daughter (Brummond *v.* Krause, 8 N. D. 573, 80 N. W. 686), sister (Odell *v.* Moss, 130 Cal. 352, 62 Pac. 555) or brother (Neuhauser *v.* Schrepfer, 30 Pittsb. Leg. J. N. S. 399).

Want of independent advice.— A deed procured from a mother of advanced age by her son for whom she had great affection, which was not intended to take effect until her death, may be set aside where it contained no power of revocation or reservation of a life-estate and was executed by her without any independent advice as to the effect thereof. Martling *v.* Martling, 47 N. J. Eq. 122, 20 Atl. 41.

Where expectation of future support is the only consideration shown for a deed to a sister, it has been held that, in view of the grantor's capacity having been somewhat affected and of the relationship of the parties, and the fact that the grantor has parted with his property on an understanding, unenforceable under a code provision, that an agreement not to be performed within a year shall be invalid unless in writing, the conveyance should be set aside as secured by fraud and undue influence. Odell *v.* Moss, 130 Cal. 352, 62 Pac. 555.

25. *Arkansas.*— Million *v.* Taylor, 38 Ark. 428.

California.— Brown *v.* Burbank, 64 Cal. 99, 27 Pac. 940.

Illinois.— Sayles *v.* Christie, 187 Ill. 420, 58 N. E. 480.

Iowa.— Davis *v.* Dunne, 46 Iowa 684.

Michigan.— Peek *v.* Peek, 101 Mich. 304, 59 N. W. 604.

New York.— Bergen *v.* Udall, 31 Barb. 9; Powers *v.* Powers, 48 How. Pr. 389.

United States.— Taylor *v.* Taylor, 8 How. 183, 12 L. ed. 1040. *Compare* Jenkins *v.* Pye, 12 Pet. 241, 9 L. ed. 1070.

See 16 Cent. Dig. tit. "Deeds," § 194.

Although the grantor is a participant in a parent's fraudulent design to thereby induce a sister to make a like conveyance, the deed may be rescinded. Peek *v.* Peek, 101 Mich. 304, 59 N. W. 604.

Want of independent advice is an element to be considered in this connection. Ashton *v.* Thompson, 32 Minn. 25, 18 N. W. 918; Miller *v.* Simonds, 72 Mo. 669; Gibbs *v.* New York L. Ins., etc., Co., 14 Abb. N. Cas. (N. Y.) 1; Davis *v.* Strange, 86 Va. 793, 11 S. E. 406, 8 L. R. A. 261.

this rule applies in the case of a deed to one standing *in loco parentis*.[26] Direct proof that undue influence was used is unnecessary where its exercise may be inferred.[27]

(III) *To Husband or Wife.* If a deed to a husband or wife has been procured by undue influence it may be set aside.[28] A deed, however, to a husband or wife will be sustained where it appears that the transaction was entirely consistent with honesty and good faith and that no advantage was taken of the grantor,[29] who was of sound mind and capable of contracting,[30] and acted understandingly in making it.[31]

6. Illegality — a. In General. A deed is void where founded on an illegal consideration, as in the case of a conveyance given to procure future cohabitation.[32] So a conveyance by a married man induced by the fraudulent representations of the grantee that she would marry him on his securing a divorce and that the conveyance was necessary to stop her children's opposition will be set aside.[33] And a conveyance is held to be founded upon a valid consideration, where given in satisfaction of illegal claims taken up by the grantee at the request of the grantor.[34]

b. Collusive Divorce. Although an agreement for divorce is collusive, yet a conveyance executed by a father to his children for their support in pursuance of an agreement to that effect entered into in connection with the proceedings will not be rendered invalid.[35]

26. Clutter *v.* Clutter, (Ky. 1887) 4 S. W. 182; Goodwin *v.* White, 59 Md. 503; Case *v.* Case, 26 Mich. 484.

27. Sears *v.* Shafer, 6 N. Y. 268 [*affirming* 1 Barb. 408].

28. Harden *v.* Darwin, 77 Ala. 472; Boswell *v.* Boswell, 45 S. W. 454, 20 Ky. L. Rep. 118; Wilson *v.* Bull, 10 Ohio 250.

A deed to an intended husband has been set aside where he testified that he had no affection for her and refused to marry her unless the deed was executed, and she was possessed of an infatuation for him which might compel her to give him all her estate free from conditions, and she did not consult friends and had no legal advice. Shaw *v.* Shaw, 9 N. Y. Suppl. 897.

Where the wife by false representations induced her husband, whose mind was affected, to convey his property to her the conveyance may be set aside. Lins *v.* Lenhardt, 127 Mo. 271, 29 S. W. 1025.

29. *California.*— McDougall *v.* McDougall, 135 Cal. 316, 67 Pac. 778.

Florida.— Waterman *v.* Higgins, 28 Fla. 660, 10 So. 97.

Kentucky.— Kennedy *v.* Ten Broeck, 11 Bush 241.

Michigan.— Hodges *v.* Cook, 93 Mich. 577, 53 N. W. 823.

Missouri.— Allen *v.* Drake, 109 Mo. 626, 19 S. W. 41; Hollocher *v.* Hollocher, 62 Mo. 267.

United States.— De Wolf *v.* Hays, 125 U. S. 614, 8 S. Ct. 990, 31 L. ed. 818.

See 16 Cent. Dig. tit. "Deeds," § 193.

Illustrations.— Undue influence by a husband is not shown by a conveyance to him by his wife pursuant to an agreement that he should devise his estate to her so that the survivor should have the whole. Jones *v.* Gorham, 90 Ky. 622, 14 S. W. 599, 29 Am. St. Rep. 423, 10 L. R. A. 223. Nor is fraud or undue oppression shown by the fact that a husband, on learning that his wife had committed adultery, entered into an agreement of separation with her, and as an element of the agreement she conveyed certain land to a trustee for him. Sparks *v.* Sparks, 94 N. C. 527. So a threat of the wife that she will leave her husband, who is intemperate and ignorant, if he does not deed his property to her, where it also appears that he had been afraid to do so lest she should turn him out of doors, is not sufficient to show that a deed in trust for himself and her was executed under undue influence or duress. Donahoe *v.* Chicago Cricket Club, 177 Ill. 351, 52 N. E. 351.

30. Wood *v.* Wood, 103 Mo. 17, 15 S. W. 288.

31. Cruger *v.* Cruger, 5 Barb. (N. Y.) 225; Aldrich *v.* Aldrich, 14 N. Y. St. 516.

32. Watkins *v.* Nugen, 118 Ga. 375, 45 S. E. 260; Watkins *v.* Nugen, 118 Ga. 372, 45 S. E. 262; Sherman *v.* Barrett, 1 McMull. (S. C.) 147. See, generally, Contracts, 9 Cyc. 516.

But a deed will not be canceled merely because of the fact that the grantor is living in illicit or adulterous intercourse with the grantee. Stowell *v.* Spencer, 190 Ill. 453, 60 N. E. 800; Cusack *v.* White, 2 Mill (S. C.) 279, 12 Am. Dec. 669. *Compare* Shipman *v.* Furniss, 69 Ala. 555, 44 Am. Rep. 528. So a conveyance will not be set aside at the suit of the grantor where it was fully executed and was not in itself either illegal or fraudulent, although made for the purpose of assisting in the perpetration of a fraud by the grantee. Walton *v.* Blackman, (Tenn. Ch. App. 1896) 36 S. W. 195.

33. Douthitt *v.* Applegate, 33 Kan. 395, 6 Pac. 575, 52 Am. Rep. 533.

34. Butler *v.* Myer, 17 Ind. 77.

35. McCarthy *v.* McCarthy, 36 Conn. 177.

c. Compounding Felony. The fact that the consideration of a deed is an agreement to compound a felony is held not to invalidate the instrument.[36]

7. Effect of Invalidity — a. In General. A deed is voidable only and not absolutely void by reason of the fact that the grantor was *non compos mentis* at the time of its execution,[37] the conveyance being made before an inquisition and finding of lunacy.[38] So a deed procured by fraud is voidable only;[39] and the same is true of a deed procured under duress.[40] Where a deed is voidable merely it may be disaffirmed either by entry on the land, by a written notice of disaffirmance, by a subsequent conveyance, or by any other act equally declaratory of such an intention.[41]

b. Bona Fide Purchaser. In those jurisdictions where the rule prevails that a deed procured by fraud is only voidable, a subsequent *bona fide* purchaser for a valuable consideration without notice is not affected by such fraud.[42] But where the deed is regarded as absolutely void it is held that even such a purchaser can obtain no title.[43] And no title can be obtained even by an innocent party under a deed which is forged.[44]

c. Partial Invalidity. A deed which is void in part because of fraud will be void as to the whole.[45]

8. Ratification of Voidable Deed — a. In General. Where a deed is void it cannot be ratified by subsequent acts or declarations of the grantor.[46] But a deed which is voidable merely for temporary want of capacity may be ratified when capacity has been restored.[47] And voidable deeds generally may be ratified by a

36. Worcester *v.* Eaton, 11 Mass. 368; Moore *v.* Adams, 8 Ohio 372, 32 Am. Dec. 723; Smith *v.* Smith, 5 Lea (Tenn.) 250. But see Southern Express Co. *v.* Duffey, 48 Ga. 358.

37. Somers *v.* Pumphrey, 24 Ind. 231; Evans *v.* Horan, 52 Md. 602. See also Warfield *v.* Warfield, 76 Iowa 633, 41 N. W. 383, where it is held that in such a case the deed may be set aside where the title still remains in the grantee and the parties can be placed *in statu quo* as to the consideration paid.

Subsequent grantee may avoid. Cates *v.* Woodson, 2 Dana (Ky.) 452.

38. Freed *v.* Brown, 55 Ind. 310; Eaton *v.* Eaton, 37 N. J. L. 108, 18 Am. Rep. 716. *Compare* Farley *v.* Farley, 6 Oreg. 105, 25 Am. Rep. 504.

39. *Illinois.*— Hewitt *v.* Clark, 91 Ill. 605.

Indiana.— Somers *v.* Pumphrey, 24 Ind. 231.

Massachusetts.— Bassett *v.* Brown, 105 Mass. 551.

New Hampshire.— Gage *v.* Gage, 29 N. H. 533.

North Carolina.— Clary *v.* Clary, 24 N. C. 78.

Tennessee.— Swan *v.* Castleman, 4 Baxt. 257.

Wisconsin.— Crocker *v.* Bellangee, 6 Wis. 645, 70 Am. Dec. 489.

See 16 Cent. Dig. tit. "Deeds," § 203.

Compare Swift *v.* Fitzhugh, 9 Port. (Ala.) 39; Barber *v.* Lyon, 15 Iowa 37; Jackson *v.* Summerville, 13 Pa. St. 359.

Title passes to grantee subject to grantor's right to defeat it. Hewitt *v.* Clark, 91 Ill. 605; Bassett *v.* Brown, 105 Mass. 551; Hone *v.* Woolsey, 2 Edw. (N. Y.) 289.

Where possession was not taken under a deed procured by fraud, it has been held not to operate such a disseizin as disabled the grantor from subsequently devising the estate so conveyed. Smithwick *v.* Jordan, 15 Mass. 113.

40. Commercial Nat. Bank *v.* Wheelock, 52 Ohio St. 534, 40 N. E. 636, 49 Am. St. Rep. 738; Swan *v.* Castleman, 4 Baxt. (Tenn.) 257. But see Swift *v.* Fitzhugh, 9 Port. (Ala.) 39.

41. Long *v.* Williams, 74 Ind. 115. But see Crocker *v.* Bellangee, 6 Wis. 645, 70 Am. Dec. 489.

42. Deputy *v.* Stapleford, 19 Cal. 302; Grant *v.* Bennett, 96 Ill. 513; Cook *v.* Moore, 39 Tex. 255; Crocker *v.* Bellangee, 6 Wis. 645, 70 Am. Dec. 489.

43. Taylor *v.* Davis, 72 Mo. 291.

44. Cole *v.* Long, 44 Ga. 579; De Wolf *v.* Hayden, 24 Ill. 525. And see Crawford *v.* Hoeft, 58 Mich. 1, 23 N. W. 27, 24 N. W. 645, 25 N. W. 567, 26 N. W. 870.

45. Kirby *v.* Ingersoll, Harr. (Mich.) 172; Goodhue *v.* Berrien, 2 Sandf. Ch. (N. Y.) 630; Young *v.* Pate, 4 Yerg. (Tenn.) 164. But see Wallace *v.* Silsby, 42 N. J. L. 1. And see McGuire *v.* Van Pelt, 55 Ala. 344, holding that where an entire tract of land embracing the homestead is conveyed by the husband alone the conveyance may, although void as to the homestead, be valid as to the other lands.

Where both realty and personalty are embraced in a deed the instrument may be valid as to the personalty, although invalid as to the realty. Thompson *v.* Marshall, 36 Ala. 504, 76 Am. Dec. 328.

46. Chess *v.* Chess, 1 Penr. & W. (Pa.) 32, 21 Am. Dec. 350.

47. English *v.* Young, 10 B. Mon. (Ky.) 141.

An intention to ratify, coupled with knowledge of the character of the deed and the fact that it is voidable, is essential to constitute acts of a grantor, after the removal

continued acquiescence in the conveyance for a considerable period of time,[48] whereby a party may be estopped from attacking the validity of the instrument;[49] by a reference to and confirmation of the deed in a valid will;[50] by the voluntary execution of another deed to the grantee to induce the purchase of personal property on the premises;[51] by an agreement with a subsequent grantee to relinquish all claim to the property conveyed;[52] by subsequent contracts in respect to the property;[53] or by acts, words, or conduct generally evidencing an intention to ratify.[54]

b. Effect of. A deed cannot be attacked on the ground that it was executed under undue influence where the grantor has, after removal for a considerable period of time from the operation of the alleged influence, ratified the instrument.[55]

9. Contesting Validity, Cancellation,[56] and Rescission — a. In General. If a deed is made by one seized in fee and having a perfect right to convey, other persons cannot question its efficacy in giving title to the grantee, except upon the ground that they are creditors of, or *bona fide* purchasers from, the grantor, or are holders under such purchasers or have authority from them.[57] And if the deed is a voluntary one, without consideration, it can only be avoided by someone having equities against it.[58] The defrauded party or someone claiming under him is the only person who can take advantage of the invalidity of a fraudulent conveyance.[59] Again one cannot have a deed set aside for duress who is not injured thereby.[60] Nor can the heir of the grantor impeach the adequacy of the consideration of the deed by the ancestor.[61]

b. Cancellation For Invalidity[62] — (i) *In General.* Where the presumption

of a disability existing at the time of execution, a ratification of the deed. Eaton *v.* Eaton, 37 N. J. L. 108, 18 Am. Rep. 716.

48. McCann *v.* Welch, 106 Wis. 142, 81 N. W. 996; Sullivan *v.* Sullivan, 23 Fed. Cas. No. 13,598, Brunn. Col. Cas. 642.

49. Talbott *v.* Manard, 106 Tenn. 60, 59 S. W. 340.

50. Burt *v.* Quisenberry, 132 Ill. 385, 24 N. E. 622.

51. Miller *v.* Minor Lumber Co., 98 Mich. 163, 57 N. W. 101, 39 Am. St. Rep. 524.

52. Wilcox *v.* Mann, 115 Iowa 91, 87 N. W. 748.

53. Oakley *v.* Shelley, 129 Ala. 467, 29 So. 385; Wells *v.* Houston, 23 Tex. Civ. App. 629, 57 S. W. 584.

54. Barry *v.* St. Joseph's Hospital, etc., (Cal. 1897) 48 Pac. 68; Tucker *v.* Allen, 16 Kan. 312. See also Sanderson *v.* Adams, (Mich. 1903) 94 N. W. 1063.

55. Keller *v.* Lamb, 202 Pa. St. 412, 51 Atl. 982.

But where a deed was executed during a period of insanity its subsequent ratification when the disability has been removed will not render it effectual against a prior deed executed while the grantor was sane and recorded before the subsequent deed was ratified, although after its formal execution. Bond *v.* Bond, 7 Allen (Mass.) 1.

56. As to cancellation of instruments generally see Cancellation of Instruments, 6 Cyc. 282.

57. Merrill *v.* Burbank, 23 Me. 538.

58. Ryan *v.* Brown, 18 Mich. 196, 100 Am. Dec. 154.

A son, who was sui juris when he joined in a conveyance by his father and mother, cannot be substituted in his mother's place after her death, and have the deed set aside as to her, she having enjoyed the benefits of the sale and it having been an advantageous one to her. Springfield *v.* Jackson, 11 Lea (Tenn.) 348.

Where a voluntary deed, absolute in form, is made by a grantor, who is mentally incapable of caring for himself, or of determining the proper mode of carrying out his intention, which was to convey only a life-estate to the grantee with remainder to a particular person, and his solicitor permitted him to make such a deed, he may sue to set aside such a conveyance for mistake, which right at his death descends to his heirs. Foth *v.* Ellenberger, (N. J. Ch. 1900) 47 Atl. 216.

59. Davidson *v.* Little, 22 Pa. St. 245, 60 Am. Dec. 81.

A court of equity will not set aside a fraudulent conveyance at the suit of a creditor, where the grantor has received no benefit therefrom and the title is still a matter of controversy and of litigation between such grantor and a claimant of the property. Sargent *v.* Salmond, 27 Me. 539.

Where the parties to a deed acquiesce, a third person cannot invalidate it by showing that it might if urged by one of them be considered a fraud or mistake. McCullough *v.* Wall, 4 Rich. (S. C.) 68, 53 Am. Dec. 715.

60. Rostein *v.* Park, 38 Oreg. 1, 62 Pac. 529.

Where one is entitled to have a deed set aside for duress, a person to whom he conveys as trustee for the benefit of his creditors may maintain the action. Van Dyke *v.* Wood, 60 N. Y. App. Div. 208, 70 N. Y. Suppl. 324.

61. Chiles *v.* Coleman, 2 A. K. Marsh. (Ky.) 296, 12 Am. Dec. 396.

62. For matters affecting validity see *supra*, III, J, 1-5.

of law arises that a deed is valid, and its invalidity can only be shown by extrinsic proof, as in the case of a forgery, an action will lie to compel the surrender and cancellation of the instrument.[63] But want or inadequacy of consideration by itself is no ground for setting aside a deed,[64] or a subsequent partial failure of consideration,[65] although it may be considered in connection with other circumstances.[66] And in an action to set aside a deed the grantor is not estopped by the fact that he had previously brought a suit for the price, where at the time he had no knowledge of facts entitling him to rescind.[67] An action to cancel a deed may, however, be barred by laches on the part of plaintiff.[68]

(II) *Failure of Title.* If a deed contains no covenants, the grantee cannot, in the absence of fraud or mistake of fact, recover back the consideration paid, because of the failure of title, although the deed accepted by the grantee is that of a third person, instead of that of the vendor, as had been previously stipulated.[69] But if there is a covenant of general warranty and there is a failure of title as to a material part of the land, so that the purchaser does not obtain the substantial inducement to his contract of purchase, a court of equity will cancel and annul such deed upon the prayer of the purchaser and place the parties *in statu quo*.[70] A mere or slight defect of title, however, is not a ground of rescission.[71] So the acceptance of a deed of an undivided interest with knowledge of such failure of title as exists precludes a rescission.[72] And although the purchaser who contracts for a good and perfect title has a right to insist upon the relinquishment of the potential rights of the wife of the vendor in the lands, yet if he accepts a deed without such relinquishment, he cannot on that account insist upon a cancellation.[73] If, however, there is a failure of title to the whole or at least to a very large portion of the land, and a clear case for relief is made out, rescission will be granted in case of an exchange of lands, the party whose title so failed being insolvent.[74] Again complainant is entitled to a cancellation of the contract of purchase and the deed, where by mistake land is conveyed to him by defendant, to a portion of which land the latter had no title.[75]

(III) *Conditions Precedent.* In order to rescind the parties must be placed as far as possible *in statu quo*, that is there must be a return or an offer to return the consideration,[76] or that which represents or evidences it, as in case of a con-

63. Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474 [*affirming* 16 Hun 594]. *Compare* Cooper *v.* Cooper, 17 N. C. 298.

64. Lee *v.* Lee, 2 Duv. (Ky.) 134; Doughty *v.* Miller, 50 N. J. Eq. 529, 25 Atl. 153. See also Robinson *v.* Schly, 6 Ga. 515.

Where consideration is an agreement to support the grantor, the fact that he dies soon after and the grantee obtains the property at a low figure is no ground for cancellation. Travis' Appeal, (Pa. 1887) 8 Atl. 601.

Where forbearance to urge a prosecution for perjury is the consideration for a conveyance it will not be set aside in equity. Moore *v.* Adams, 8 Ohio 372, 32 Am. Dec. 723.

65. Sprague *v.* Duel, 11 Paige (N. Y.) 480.

If a clause of forfeiture is inserted in a deed in case of a failure of consideration, the deed may be canceled. Goldsmith *v.* Goldsmith, 46 W. Va. 426, 33 S. E. 266.

66. Crane *v.* Conklin, 1 N. J. Eq. 346, 22 Am. Dec. 519. See also Patterson *v.* Johnson, 113 Ill. 559.

67. Mankin *v.* Mankin, 91 Iowa 406, 59 N. W. 292.

A grantee, holding under a deed from one who had fraudulently conveyed property of which he held the legal title for another, cannot set up in defense, by way of estoppel to an action by the real owner to set aside the deed, that the latter has commenced criminal proceedings against the fraudulent grantor. Taaffe *v.* Kelley, 110 Mo. 127, 19 S. W. 539.

68. Van Houten *v.* Van Winkle, 46 N. J. Eq. 380, 20 Atl. 34; Cockrill *v.* Cockrill, 92 Fed. 811, 34 C. C. A. 254. See also Lockridge *v.* Foster, 5 Ill. 569.

69. Slocum *v.* Bracy, 55 Minn. 249, 56 N. W. 826, 43 Am. St. Rep. 499.

70. Worthington *v.* Staunton, 16 W. Va. 208.

71. Cummins *v.* Boyle, 1 J. J. Marsh. (Ky.) 480; Miller *v.* Miller, 47 Minn. 546, 50 N. W. 612.

72. Handley *v.* Tebbetts, 16 S. W. 131, 17 S. W. 166, 13 Ky. L. Rep. 280.

73. Andrews *v.* Word, 17 B. Mon. (Ky.) 518.

Suppression by a husband of the fact that his wife is under age at the time of executing a conveyance is ground for setting aside a deed. Bryan *v.* Primm, 1 Ill. 59.

74. Lindsey *v.* Veasy, 62 Ala. 421.

75. Home Bldg., etc., Co. *v.* London, 98 Va. 152, 35 S. E. 362.

76. Gribben *v.* Maxwell, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233; Arnold *v.* Richmond

tract for payment, if unpaid,[77] or the title must be reconveyed.[78] If there is a reservation in the deed, inserted under the belief that it was legal and effectual to enable the grantor to sell such part of the property as should be necessary for his support, an application in chancery for relief and to have the conveyance set aside is premature until the exigency contemplated by the reservation has happened.[79]

(iv) *Operation and Effect.* A cancellation and return of the deed will not revest the title in the grantor.[80]

IV. Record and Registration.

A. Necessity. The recording of a deed is not essential to its validity as between the parties signatory thereto[81] or as against subsequent donees of the

Iron Works, 1 Gray (Mass.) 434; Thompson *v.* Cohen, 127 Mo. 215, 28 S. W. 984, 29 S. W. 885.

Offer to restore right of dower is not necessary to set aside a conveyance to a wife made by her husband under duress, as a condition to her releasing said dower right. Van Dyke *v.* Wood, 60 N. Y. App. Div. 208, 70 N. Y. Suppl. 324.

Where the return of a note and mortgage is not a condition precedent to the taking effect of a deed, and it appears that defendant owned the note and mortgage when the deed was executed, and there is no unreasonable delay in returning the papers, the deed will not be set aside. Snyder *v.* Nichols, 64 Kan. 886, 67 Pac. 886.

77. Arnold *v.* Richmond Iron Works, 1 Gray (Mass.) 434.

78. Robards *v.* Marley, 80 Ind. 185. See also Rosendale Protestant Reformed Dutch Church *v.* Bogardus, 5 Hun (N. Y.) 304.

Tender of quitclaim deed reciting nominal consideration and containing covenants against plaintiff's acts is a sufficient tender of reconveyance. Kiefer *v.* Rogers, 19 Minn. 22.

79. Coley *v.* Coley, 19 Conn. 114.

80. Scaffer *v.* Fithian, 17 Ind. 463; Blaney *v.* Hanks, 14 Iowa 400; Hatch *v.* Hatch, 9 Mass. 307, 6 Am. Dec. 67; Graysons *v.* Richards, 10 Leigh (Va.) 57.

Equity will not enforce the lien of a judgment rendered against the grantee after cancellation of the deed has been made in good faith by the parties, and with no intention to defraud creditors. Blaney *v.* Hanks, 14 Iowa 400.

Where an estate is vested by deed, its cancellation will not divest the estate. Morgan *v.* Elam, 4 Yerg. (Tenn.) 375.

81. *Alabama.*— Center *v.* Planters', etc., Bank, 22 Ala. 743; McCaskle *v.* Amarine, 12 Ala. 17.

Arkansas.— Russell *v.* Cady, 15 Ark. 540.

California.— Landers *v.* Bolton, 26 Cal. 393.

Colorado.— Hutchinson *v.* Hutchinson, 16 Colo. 349, 26 Pac. 814.

Connecticut.— French *v.* Gray, 2 Conn. 92; Smith *v.* Starkweather, 5 Day 207.

District of Columbia.— Fitzgerald *v.* Wynne, 1 App. Cas. 107.

Florida.— Christy *v.* Burch, 25 Fla. 942, 2 So. 258; Stewart *v.* Mathews, 19 Fla. 752.

Georgia.— Whittington *v.* Doe, 9 Ga. 23; Roe *v.* Doe, Dudley 168.

Illinois.— Doe *v.* Reed, 3 Ill. 371; Doe *v.* Miles, 3 Ill. 315; Adam *v.* Tolman, 77 Ill. App. 179.

Indiana.—See Stevenson *v.* Cloud, 5 Blackf. 92.

Iowa.— Davis *v.* Lutkiewiez, 72 Iowa 254, 33 N. W. 670; Clark *v.* Connor, 28 Iowa 311; Norton *v.* Williams, 9 Iowa 528.

Kentucky.— Newsom *v.* Kurtz, 86 Ky. 277, 5 S. W. 575, 9 Ky. L. Rep. 587; Dozier *v.* Barnett, 13 Bush 457; Hancock *v.* Beverly, 6 B. Mon. 531; Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429, 19 Am. Dec. 139; McClain *v.* Gregg, 2 A. K. Marsh. 454. But see Mummy *v.* Johnston, 3 A. K. Marsh. 220.

Maine.— Buck *v.* Babcock, 36 Me. 491; Clark *v.* Gellerson, 20 Me. 18.

Maryland.— Salmon *v.* Clagett, 3 Bland 125. But see Davidson *v.* Beatty, 3 Harr. & M. 594.

Michigan.— Smith *v.* Fiting, 37 Mich. 148.

Minnesota.— Morton *v.* Leland, 27 Minn. 35, 6 N. W. 378; Greenleaf *v.* Edes, 2 Minn. 264.

Mississippi.— Butler *v.* Hicks, 11 Sm. & M. 78; Thomas *v.* Grand Gulf Bank, 9 Sm. & M. 201; McAnulty *v.* Bingaman, 6 How. 382.

New Hampshire.— Stevens *v.* Morse, 47 N. H. 532; Newmarket Mfg. Co. *v.* Pendergast, 24 N. H. 54; Brown *v.* Manter, 22 N. H. 468; Whittemore *v.* Bean, 6 N. H. 47.

New York.— Moseley *v.* Moseley, 15 N. Y. 334; Wood *v.* Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Bedford *v.* Tupper, 30 Hun 174; Hall *v.* Nelson, 14 How. Pr. 32; Jackson *v.* West, 10 Johns. 466; Jackson *v.* Burgott, 10 Johns. 457, 6 Am. Dec. 349.

North Carolina.— Ray *v.* Wilcoxon, 107 N. C. 514, 12 S. E. 443; Austin *v.* King, 91 N. C. 286; Hancock *v.* Hovey, 1 N. C. 60. But see McMillan *v.* Edwards, 75 N. C. 81; State *v.* England, 29 N. C. 153.

Ohio.— Sidle *v.* Maxwell, 4 Ohio St. 236; Irvin *v.* Smith, 17 Ohio 226.

Oregon.— Moore *v.* Thomas, 1 Oreg. 201.

Pennsylvania.— George *v.* Morgan, 16 Pa. St. 95.

South Carolina.— Martin *v.* Quattlebam, 3 McCord 205; Cooper *v.* Day, 1 Rich. Eq. 26.

Tennessee.—Martin *v.* Pryor, 12 Heisk. 668; Wilkins *v.* May, 3 Head 173; Brevard *v.* Neely, 2 Sneed 164; Owen *v.* Owen, 5 Humphr.

grantor,[82] as against the grantor's assignees under a commission of bankruptcy,[83] as against the grantor's heirs,[84] as against a purchaser from the grantor's heir at law,[85] as against volunteers,[86] or as against purchasers, creditors, or parties generally with notice.[87] So the right of one who by *dolus malus* procures a transfer in the register will not prevail over that of an unregistered purchaser.[88] And where a subsequent duly recorded deed is void because infected with usury it will not prevail over a prior unrecorded deed.[89] And an unrecorded deed will prevail over a subsequent quitclaim deed with a covenant of special warranty which purports to convey only such interest as the grantor has.[90] Again where it is provided by law that a defeasance to a deed shall be executed and delivered by the grantee to the grantor to record, it has been decided that the duty rests on the grantor to record the deed.[91]

B. Effect as Between Parties. Upon the proper registration of a deed[92] which is absolute in form and duly executed the absolute title thereby passes and

352; Perry *v.* Clift, (Ch. App. 1899) 54 S. W. 121. But see Rogers *v.* Cawood, 1 Swan 142, 55 Am. Dec. 729; Russell *v.* Stinson, 3 Hayw. 1.

Texas.— Rodgers *v.* Burchard, 34 Tex. 441, 7 Am. Rep. 283; Portis *v.* Hill, 30 Tex. 529, 98 Am. Dec. 481; Watkins *v.* Edwards, 23 Tex. 443; Fletcher *v.* Ellison, 1 Tex. Unrep. Cas. 661.

Vermont.— Sowles *v.* Butler, 71 Vt. 271, 44 Atl. 355.

Virginia.— Withers *v.* Carter, 4 Gratt. 407, 50 Am. Dec. 78; Wade *v.* Greenwood, 2 Rob. 474, 40 Am. Dec. 759; Guerrant *v.* Anderson, 4 Rand. 208; Currie *v.* Donald, 2 Wash. 58; Turner *v.* Stip, 1 Wash. 319.

Wyoming.— Whalon *v.* North Platte Canal, etc., Co., (1903) 71 Pac. 995.

England.— Hodson *v.* Sharpe, 10 East 350, 10 Rev. Rep. 324; Jones *v.* Gibbons, 9 Ves. Jr. 407, 7 Rev. Rep. 247, 32 Eng. Reprint 659. See Willis *v.* Brown, 8 L. J. Ch. 321, 10 Sim. 127, 16 Eng. Ch. 127.

See 15 Cent. Dig. tit. "Deeds," § 217.

A deed may be valid, although not recorded, as between the parties (Levi *v.* Gardner, 53 S. C. 24, 30 S. E. 617; Kottman *v.* Ayer, 1 Strobh. (S. C.) 552), or against all persons except creditors and *bona fide* purchasers for value (Taylor *v.* McDonald, 2 Bibb (Ky.) 420).

An abandonment of title does not result from failure for several years of a grantee to record a deed. Bond *v.* Wilson, 129 N. C. 325, 40 S. E. 179.

The English statute of enrolments has been expressly declared to have never been in force in California (Chandler *v.* Chandler, 55 Cal. 267) or in Indiana (Givan *v.* Doe, 7 Blackf. (Ind.) 210).

82. Zunts *v.* Courcelle, 16 La. Ann. 96.

83. Jones *v.* Gibbons, 9 Ves. Jr. 407, 7 Rev. Rep. 247, 32 Eng. Reprint 659. But see Sumpter *v.* Cooper, 2 B. & Ad. 223, 9 L. J. K. B. O. S. 226, 22 E. C. L. 100.

84. Willett *v.* Andrews, 106 La. 319, 30 So. 883; Jackson *v.* Phillips, 9 Cow. (N. Y.) 94; Norton *v.* Spooner, N. Chipm. (Vt.) 74.

85. Hill *v.* Meeker, 24 Conn. 211. See also *Re* Weir, 58 L. T. Rep. N. S. 792.

86. Snodgrass *v.* Ricketts, 13 Cal. 359.

87. McRaven *v.* McGuire, 9 Sm. & M. (Miss.) 34; Greaves *v.* Tofield, 14 Ch. D. 563, 50 L. J. Ch. 118, 43 L. T. Rep. N. S. 100, 28 Wkly. Rep. 840; Bradley *v.* Riches, 9 Ch. D. 189, 47 L. J. Ch. 811, 38 L. T. Rep. N. S. 810, 26 Wkly. Rep. 810; Sheldon *v.* Cox, 2 Eden 224, 28 Eng. Reprint 884; Willis *v.* Brown, 8 L. J. Ch. 321, 10 Sim. 127, 16 Eng. Ch. 127.

An assignee of an equitable mortgage, which his assignor took with notice of a prior equitable mortgage, takes no better title than his assignor had. Ford *v.* White, 16 Beav. 120.

Actual notice must be clearly proven. Wyatt *v.* Barwell, 19 Ves. Jr. 435, 13 Rev. Rep. 236. *Compare* Chadwick *v.* Turner, L. R. 1 Ch. 310, 12 Jur. N. S. 239, 35 L. J. Ch. 349, 14 L. T. Rep. N. S. 86, 14 Wkly. Rep. 491; Jolland *v.* Stainbridge, 3 Ves. Jr. 478, 4 Rev. Rep. 64, 30 Eng. Reprint 1114.

Duty to make inquiry.— No duty is imposed on a purchaser or mortgagee to make inquiries with a view to discovering unregistered instruments. Lee *v.* Clutton, 46 L. J. Ch. 48, 35 L. T. Rep. N. S. 84, 24 Wkly. Rep. 942. *Compare* Credland *v.* Potter, L. R. 10 Ch. 8, 44 L. J. Ch. 169, 31 L. T. Rep. N. S. 522, 23 Wkly. Rep. 366.

Notice between the time of the execution of a deed and the time of recording will not operate so as to give a prior unregistered deed priority. Essex *v.* Baugh, 6 Jur. 1030, 11 L. J. Ch. 374, 1 Y. & Coll. 620. See Elsey *v.* Lutyens, 8 Hare 159, 32 Eng. Ch. 159.

88. Crowly *v.* Bergtheil, [1899] A. C. 374, 68 L. J. P. C. 81, 80 L. T. Rep. N. S. 428.

89. White *v.* Interstate Bldg., etc., Assoc., 106 Ga. 146, 32 S. E. 26.

90. Virginia, etc., Coal, etc., Co. *v.* Fields, 94 Va. 102, 26 S. E. 426.

91. *In re* Kalbfell, 27 Pittsb. Leg. J. N. S. 211.

92. A deed obtains no validity where it is recorded without authority of law (Kerns *v.* Swope, 2 Watts (Pa.) 75), or where it is recorded but has not been accepted by the grantee (Pierce *v.* White, 10 Ohio Dec. (Reprint) 552, 22 Cinc. L. Bul. 98).

Forged mortgage.— Nothing passes to a mortgagee by the execution and recording of a forged mortgage by an heir at law except

the instrument relates back to the date of its execution ;[93] and where a deed is first recorded by the grantor and subsequently delivered to the grantee the latter takes the deed and its registration with the same effect thenceforward as if recorded by him at the date of delivery.[94] No other title which the grantee possesses independent of the deed is relinquished by him by recording the deed.[95] And it has been decided that the registration of the title papers of the vendor is no notice to the purchaser of the condition of the vendor's title.[96]

C. Instruments Entitled to Record. The question as to what instruments are entitled to record must as a general rule depend in each case upon the express provisions of law in respect thereto ;[97] and resort thereto must also be had in determining whether a deed is sufficient in its form and requisites to entitle it to record.[98] Again if certain conditions precedent are imposed by statute as

the beneficial interest of the latter under the will. *In re* Cooper, 20 Ch. D. 611, 51 L. J. Ch. 862, 47 L. T. Rep. N. S. 89, 30 Wkly. Rep. 648 [*affirming* 51 L. J. Ch. 149, 45 L. T. Rep. N. S. 532, 30 Wkly. Rep. 148].

Recording a deed in the wrong book will not defeat the right of the grantee thereunder as a person "claiming title." Conklin *v.* Hinds, 16 Minn. 457.

The effect of a deed to which field-notes were to be attached will not be lessened as a recorded instrument by the fact that they were added after the deed was recorded. Nye *v.* Moody, 70 Tex. 434, 8 S. W. 606.

93. Bond *v.* Wilson, 129 N. C. 325, 40 S. E. 179.

Operation as feoffment at common law.— A deed will when registered be as effectual to pass title as a feoffment at common law with livery of seizin, where it is provided by code or statute that a deed shall, when registered, have the same effect to pass title as if there had been livery of seizin. Ivey *v.* Granberry, 66 N. C. 223.

94. Jones *v.* Roberts, 65 Me. 273.

95. McIlvaine *v.* McIlvaine, 6 Serg. & R. (Pa.) 559.

96. Topp *v.* White, 12 Heisk. (Tenn.) 165.

97. *Georgia.*— Eaton *v.* Freeman, 58 Ga. 129, deed executed in another state.

Kentucky.— Blight *v.* Banks, 6 T. B. Mon. 192, 17 Am. Dec. 136 (deed executed in another state) ; Bowman *v.* Bartlet, 3 A. K. Marsh. 86 (deed made by agent).

Mississippi.—Hughes *v.* Wilkinson, 37 Miss. 482 (power of attorney) ; Moss *v.* Davidson, 1 Sm. & M. 112 (marriage settlement).

Ohio.— Sheehan *v.* Davis, 17 Ohio St. 571, deeds of a corporation.

Pennsylvania.— Brotherton *v.* Livingston, 3 Watts & S. 334, all contracts concerning land.

See 16 Cent. Dig. tit. "Deeds," § 218.

Admission of deed to registration where there is no subscribing witness was allowed under N. C. Acts (1872), c. 28, on proof of the handwriting of the maker or if the subscribing witness is dead on proof of his handwriting. Black *v.* Justice, 86 N. C. 504.

Conveyance of a possessory interest need not be recorded. See Clark *v.* Gellerson, 20 Me. 18.

Conveyance of estate or interest in land.— A written instrument executed and attested as a deed, which conveys real and personal property, the grantor reserving to himself a power of sale, is within a statute providing for the recording of such a conveyance (Gainesville First Nat. Bank *v.* Cody, 93 Ga. 127, 19 S. E. 831) ; as is also an instrument acknowledging the non-payment of the purchase-price of real estate and giving the vendor the right of possession till it is paid (Melross *v.* Scott, 18 Ind. 250) ; a deed conveying a railroad right of way (Davis *v.* Titusville, etc., R. Co., 114 Pa. St. 308, 6 Atl. 736) ; and a sealed agreement by a first mortgagee with the second mortgagee to waive his prior lien (Clason *v.* Shepherd, 6 Wis. 369).

Release to an elevated railroad of all causes of action for the construction and operation of an elevated railroad in a street on which the land abuts need not be recorded as against a subsequent grantee of the lot. Ward *v.* Metropolitan El. R. Co., 82 Hun (N. Y.) 545, 31 N. Y. Suppl. 527 [*affirmed* in 152 N. Y. 39, 46 N. E. 319].

Statutes referring to legal title only do not require the registration of bonds or other evidences of an equitable title. Com. *v.* Sims, 3 Metc. (Ky.) 391.

In Nova Scotia it has been determined that a deed creating an easement should be registered under the Nova Scotia Registry Act. Ross *v.* Hunter, 7 Can. Supreme Ct. 289.

98. Isham *v.* Bennington Iron Co., 19 Vt. 230. And see Durrence *v.* Northern Nat. Bank, 117 Ga. 385, 43 S. E. 726; Brannon *v.* Brannon, 2 Disn. (Ohio) 224, 3 Wkly. L. Gaz. 257; Alabama Marble, etc., Co. *v.* Chattanooga Marble, etc., Co., (Tenn. Ch. App. 1896) 37 S. W. 1004; Riviere *v.* Wilkens, 31 Tex. Civ. App. 454, 72 S. W. 608.

Recording of a copy is not authorized. Lund *v.* Rice, 9 Minn. 230; Lewis *v.* Baird, 15 Fed. Cas. No. 8,316, 3 McLean 56.

Necessity of subscribing witnesses.— Belk *v.* Meagher, 3 Mont. 65 (no subscribing witness required) ; Coryell *v.* Holmes, 2 Tex. Unrep. Cas. 665 (one subscribing witness sufficient) ; State *v.* Cowhick, 9 Wyo. 93, 60 Pac. 265 (must be subscribing witness to deed executed in another state).

Signatures of subscribing witnesses may be proved and instrument entitled to record. Vasquez *v.* Texas Loan Agency, (Tex. Civ. App. 1898) 45 S. W. 942. *Compare* Middles-

a prerequisite to the registration of a deed, there should be a compliance therewith.[99]

D. Constitutional and Statutory Provisions — 1. In General. Registry acts of a state have been declared to be remedial, and it has been decided that they should be liberally and beneficially construed,[1] and that they do not operate extraterritorially.[2] And an act which provides that all deeds shall be good and valid where witnessed by two or more persons and recorded will not by implication be construed as declaring that all deeds not so witnessed and recorded shall be void.[3]

2. Curative Acts. Defects in the acknowledgment and registration of deeds may be remedied by curative or enabling acts.[4] And a statute of this character should be liberally construed.[5]

3. Remedy to Compel Registration. Where a complete remedy to compel the recording of deeds and other instruments in the possession of an adverse party in

boro Waterworks *v.* Neal, 105 Ky. 586, 49 S. W. 428, 20 Ky. L. Rep. 1403.

The omission of the christian names of the grantees or mortgagees will not render the instrument insufficient for record where all are identified and when to the surname a circumstance is added which belongs to the individual intended to be named and to no other person, the certainty of description being complete and the requirements of the statute complied with. Bernstein *v.* Hobelman, 70 Md. 29, 16 Atl. 374.

Variance in dates.— The registry of a deed will not be avoided by a variance between the date, as it appears in the deed certified by the justices and in their certificate, where the identity of the deed certified and that recorded is sufficiently ascertained by other parts of the certificate and the annexation thereof to the deed. Horsley *v.* Garth, 2 Gratt. (Va.) 471, 44 Am. Dec. 393.

99. Payment of a tax must be made where the law provides that "no deed shall be held to be legally lodged for record until the tax shall be paid thereon." Martin *v.* Bates, 50 S. W. 38, 20 Ky. L. Rep. 1798. But where the law does not provide that the tax shall be paid before a deed is recorded, although the clerk is not bound to receive it, yet if he permits it to be deposited without payment he is bound to record it. Bussing *v.* Crain, 8 B. Mon. (Ky.) 593. Where it is a misdemeanor for a notary to take any acknowledgment to a conveyance unless taxes thereon of all descriptions have been paid, and it is expressly declared that whatever is done in contravention of law shall be void, an acknowledgment of a conveyance of lands on which taxes were not paid and the registration thereof will be void. Chadwick *v.* Gulf States Land, etc., Co., 74 Fed. 616, 20 C. C. A. 563. So where taxes are delinquent a county auditor has no authority under Minn. Gen. St. (1894) § 1624, to indorse on the deed over his official signature, "Taxes paid and transfer entered," so as to entitle the deed to record. State *v.* Weld, 66 Minn. 219, 68 N. W. 1068.

1. Fort *v.* Burch, 6 Barb. (N. Y.) 60; Butler *v.* Dunagan, 19 Tex. 559.

Retroactive effect.— Acts requiring deeds to be recorded have no retroactive effect. Palmer *v.* Cross, 1 Sm. & M. (Miss.) 48; Jackson *v.* Chamberlain, 8 Wend. (N. Y.) 620. But see Hopping *v.* Burnam, 2 Greene (Iowa) 39.

The rule of the Spanish law by which a verbal sale of immovable property was valid was not rendered nugatory in Missouri by the act of Oct. 1, 1804, which required the recording of all deeds. Allen *v.* Moss, 27 Mo. 354.

2. Hundley *v.* Mount, 8 Sm. & M. (Miss.) 387.

3. Downs *v.* Yonge, 17 Ga. 295. But where by legislative act registration has been substituted for livery of seizin it has been decided that the legal estate will not pass to the grantee unless a deed has been registered. Patton *v.* Reily, 18 Fed. Cas. No. 10,838, Brunn. Col. Cas. 180, Cooke (Tenn.) 119. *Compare* Hogan *v.* Strayhorn, 65 N. C. 279. So the legal title will not be vested in the grantee until a deed is registered, where it is provided by statute that no conveyance of land shall be good and available in law unless registered. Vinson *v.* Huddleston, Cooke (Tenn.) 254. See Hanington *v.* McFadden, 2 N. Brunsw. 153.

In Louisiana a grantee is not exempted from seeing that his conveyance is registered by an act which requires notaries to cause all instruments to be registered which are passed before them and which by law ought to be registered. Crear *v.* Sowles, 2 La. Ann. 597.

4. Elliott *v.* Pearce, 20 Ark. 508; Brown *v.* Cady, 11 Mich. 535; Hastings German-American Bank *v.* White, 38 Minn. 471, 38 N. W. 361; Bledsoe *v.* Wiley, 7 Humphr. (Tenn.) 507; Rainey *v.* Gordon, 6 Humphr. (Tenn.) 345.

Further as to curative acts see Acknowledgments, 1 Cyc. 609; Constitutional Law, 8 Cyc. 1023 *et seq.*

5. Butler *v.* Dunagan, 19 Tex. 559.

Where, however, a statute provided for the registration of copies of registered deeds and was intended only as a temporary act to be limited to then existing registrations, it should not be extended so as to permit of the registration of copies of subsequently registered deeds. Rogers *v.* Campbell, 6 Humphr. (Tenn.) 540. And where the recording of a deed executed outside the state was not au-

interest is provided by statute it has been decided that such remedy is exclusive and that a suit will not lie in equity to compel such recording.[6]

E. Place — 1. In General. A deed may be properly recorded in the county in which the land lies.[7] But where the grantees live in different counties it has been held that a registration of the deed in a county where only one resides is insufficient under a statute which provides that a deed of land may be registered in the county in which the proprietor resides.[8] Again the division by statute of a county into two court districts and the establishment in the second district of district clerk's offices will not operate to allow a recording of deeds in the latter district, where the prior law in respect to the recording of deeds in such county is neither expressly nor by implication repealed by such statute.[9]

2. Property in Two or More Counties. In the absence of a regulating statute[10] it has been determined that a deed of land located partly in two or more counties should be recorded in each county.[11]

3. Creation of New County. A deed is properly recorded in the county in which the land lies, and the fact that a statute provides that a conveyance of land shall be so registered does not require that a deed once properly recorded shall, where the land lies in another county as a result of a subsequent change of boundaries, be again recorded in the county in which it may happen to lie as a result of such change.[12] And where a new county has not been organized but remains attached to another county a deed of land which lies in the new county is properly recorded in the county to which it is attached.[13]

F. Time. A great lapse of time between the execution of a deed and the recording of the same without any explanatory circumstances may exhibit such a gross irregularity as to show that it was not a properly recorded deed.[14] And

thorized prior to a certain act admitting such deeds to record it has been decided that records of such deeds before the law was passed were not thereby legalized. Townsend *v.* Downer, 27 Vt. 119.

6. Ayers *v.* Ayers, 8 Pa. Dist. 734.

7. Whitaker *v.* Blair, 3 J. J. Marsh. (Ky.) 236; Garrison *v.* Haydon, 1 J. J. Marsh. (Ky.) 222, 19 Am. Dec. 70; Hawley *v.* Bullock, 29 Tex. 216. But see Taylor *v.* Bush, 5 T. B. Mon. (Ky.) 84, holding that where a husband and wife acknowledge a deed in the county of their residence, but which is not the county in which the land lies, the deed should be recorded in the former county.

In Virginia it is decided in an early case that the clerk of a county or corporation has no authority to admit to record a deed which does not convey land lying in his county or corporation. Pollard *v.* Lively, 2 Gratt. 216.

8. Watson *v.* Dobbins, 29 Fed. Cas. No. 17,281, Brunn. Col. Cas. 233, Cooke (Tenn.) 359.

9. Deaton *v.* Burchart, 59 Miss. 144.

10. Under the statute in some states such a deed may be recorded in either county. Conn *v.* Manifee, 2 A. K. Marsh. (Ky.) 396, 12 Am. Dec. 417; Wilt *v.* Cutler, 38 Mich. 189; Perry *v.* Clift, (Tenn. Ch. App. 1899) 54 S. W. 121; Hancock *v.* Tram Lumber Co., 65 Tex. 225; Mattfeld *v.* Huntington, 17 Tex. Civ. App. 716, 43 S. W. 53.

11. *Georgia.*— Kennedy *v.* Harden, 92 Ga. 230, 18 S. E. 542.

Minnesota.—Van Meter *v.* Knight, 32 Minn. 205, 20 N. W. 142.

Mississippi.— Harper *v.* Tapley, 35 Miss. 506.

Pennsylvania.— Oberholtzer's Appeal, 124 Pa. St. 583, 17 Atl. 143, 144. But see Scott *v.* Leather, 3 Yeates 184.

Virginia.— Horsley *v.* Garth, 2 Gratt. 471, 44 Am. Dec. 393.

United States.— Ludlow *v.* Clinton Line R. Co., 15 Fed. Cas. No. 8,600, 1 Flipp. 25. But see McKeen *v.* Delancy, 5 Cranch 22, 3 L. ed. 25 [*affirming* 7 Fed. Cas. No. 3,750, 1 Wash. 525]; Simms *v.* Read, 22 Fed. Cas. No. 12,870, 1 Brunn. Col. Cas. 219, Cooke (Tenn.) 345.

See 16 Cent. Dig. tit. "Deeds," § 223. But see Jackson *v.* Rice, 3 Wend. (N. Y.) 180, 20 Am. Dec. 683.

12. *California.*— Green *v.* Green, 103 Cal. 108, 37 Pac. 188.

Georgia.— Whiddon *v.* Williams Lumber Co., 98 Ga. 700, 25 S. E. 770.

Louisiana.— Chambers *v.* Haney, 45 La. Ann. 447, 12 So. 621; Hayden *v.* Nutt, 4 La. Ann. 65.

Minnesota.— Koerper *v.* St. Paul, etc., R. Co., 40 Minn. 132, 41 N. W. 656.

Missouri.— Smith *v.* Madison, 67 Mo. 694.

Texas.— Frizzell *v.* Johnson, 30 Tex. 31; McKissick *v.* Colquhoun, 18 Tex. 148.

Vermont.— Brown *v.* Edson, 23 Vt. 435.

See 16 Cent. Dig. tit. "Deeds," § 224.

13. Smith *v.* Anderson, 33 Minn. 25, 21 N. W. 841; Hill *v.* Sanders, 4 Rich. (S. C.) 521, 55 Am. Dec. 696; Baker *v.* Beck, 74 Tex. 562, 12 S. W. 229; Lumpkin *v.* Muncey, 66 Tex. 311, 17 S. W. 732. *Compare* Meagher *v.* Drury, (Iowa 1892) 53 N. W. 313 [*reversed* in 89 Iowa 366, 56 N. W. 531].

14. Longworth *v.* Close, 15 Fed. Cas. No. 8,489, 1 McLean 282, where the deed was executed in 1809 but not recorded until 1835.

where the statute expressly declares that a deed shall be recorded within a certain time there should be a compliance therewith.[15] So if a deed of a subsequent purchaser is not recorded within the time prescribed by statute he cannot take advantage of the failure of a prior purchaser to record his deed in compliance with the statute, but if the latter first records his deed he will have the better title.[16] Again the registry book is the best evidence of the date when a deed was registered.[17]

G. Sufficiency. The registration or recording of a deed will not be rendered inoperative by reason of slight and immaterial mistakes therein.[18] And if a deed

15. *Indiana.*— Doe *v.* Hall, 2 Ind. 556, 54 Am. Dec. 460.

Kentucky.— Edwards *v.* Hanna, 5 J. J. Marsh. 18; Taylor *v.* Shields, 5 Litt. 295; Winlock *v.* Hardy, 4 Litt. 272. And see Applegate *v.* Gracy, 2 Dana 215.

North Carolina.—Benzien *v.* Lenoir, 5 N. C. 194.

Pennsylvania.— Hultz *v.* Ackley, 63 Pa. St. 142.

Tennessee.— Evans *v.* Wells, 7 Humphr. 559.

England.— Chadwick *v.* Turner, 34 Beav. 634, 34 L. J. Ch. 356 [*affirmed* in L. R. 1 Ch. 310, 12 Jur. N. S. 239, 35 L. J. Ch. 349, 14 L. T. Rep. N. S. 86, 14 Wkly. Rep. 491].

See 16 Cent. Dig. tit. "Deeds," § 225.

A deposit for record may be sufficient if made before the expiration of the time, although the deed is not recorded until after the time has expired. Dubose *v.* Young, 10 Ala. 365; McGregor *v.* Hall, 3 Stew. & P. (Ala.) 397; Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 177; Harrold *v.* Simonds, 9 Mo. 326; Hughes *v.* Powers, 99 Tenn. 480, 42 S. W. 1. But see Moore *v.* Collins, 15 N. C. 384. And where a deed was delivered for record by the grantee's agent who without authority subsequently directed its return it was decided that its operation as a recorded instrument was not affected by such act. Parrish *v.* Mahany, 10 S. D. 276, 73 N. W. 97, 66 Am. St. Rep. 715.

A subsequent conveyance may take priority when recorded over a prior unrecorded deed, in the absence of any notice of the latter. White *v.* Interstate Bldg., etc., Assoc., 106 Ga. 146, 32 S. E. 26; Wise *v.* Mitchell, 100 Ga. 614, 28 S. E. 382.

A statute that a deed noted for registration shall be considered as registered at the time it is so noted is held not to apply where the deed is noted but with instructions not to record until further notice. Turberville *v.* Fowler, 101 Tenn. 88, 46 S. W. 577.

Authentication of a clerk to a deed lodged for record after the time prescribed is no evidence of its execution. William *v.* Wilson, 4 Dana (Ky.) 507. *Compare* Ross *v.* Clore, 3 Dana (Ky.) 189.

In computing the time the day of the date of the deed should be excluded and the word "month" construed as meaning a calendar month. Pyle *v.* Maulding, 7 J. J. Marsh. (Ky.) 202.

16. Draper *v.* Bryson, 17 Mo. 71, 57 Am. Dec. 257.

17. Doe *v.* Falls, 10 N. Brunsw. 540.

Where deeds of different dates were registered on the same day and hour it has been decided that the numbers placed upon such deeds in registering them were to be regarded as indicating which was first registered. Neve *v.* Pennell, 2 Hem. & M. 170, 33 L. J. Ch. 19, 9 L. T. Rep. N. S. 285, 11 Wkly. Rep. 986.

The time and even the hour at which a deed is delivered to the proper officer for registration may be shown by parol evidence. Cook *v.* Hall, 6 Ill. 575; Metts *v.* Bright, 20 N. C. 311, 30 Am. Dec. 683.

18. Hughes *v.* Debnam, 53 N. C. 127.

An omission to copy seals of the parties (Smith *v.* Dall, 13 Cal. 510) or of public officials (Hadden *v.* Larned, 87 Ga. 634, 13 S. E. 806; Griffin *v.* Sheffield, 38 Miss. 359, 77 Am. Dec. 646; Thorn *v.* Mayer, 12 Misc. (N. Y.) 487, 33 N. Y. Suppl. 664) will not be material.

An omission of the name of one of the grantors will not vitiate. Garrard *v.* Davis, 53 Mo. 322.

Clerical mistakes in transcribing do not make the record ineffectual. Sis *v.* Boarman, 11 App. Cas. (D. C.) 116; Wyatt *v.* Barwell, 19 Ves. Jr. 435, 13 Rev. Rep. 236.

Discrepancy in the dates of a deed and the certificates of a clerk of record, evidently due to a clerical error, will be disregarded, when the certificate is otherwise sufficient. Durrence *v.* Northern Nat. Bank, 117 Ga. 385, 43 S. E. 726.

Entry of times when deed was recorded.— A provision requiring such entry has been held directory merely where there is no question of rights dependent on priority of record. Thorn *v.* Mayer, 12 Misc. (N. Y.) 487, 33 N. Y. Suppl. 664.

That a portion of the record is printed instead of written does not render the record defective. Maxwell *v.* Hartmann, 50 Wis. 660, 8 N. W. 103.

The index is not an essential part of the record (Chatham *v.* Bradford, 50 Ga. 327, 15 Am. Rep. 692), and an omission to index the name of a grantor is not a material error (Hodgson *v.* Lovell, 25 Iowa 97, 95 Am. Dec. 775; McHenry *v.* Stockwell, 2 Del. Co. (Pa.) 57).

Transcribing into the wrong book by either the recorder or his clerk will not vitiate. Durrence *v.* Northern Nat. Bank, 117 Ga. 385, 43 S. E. 726; Clader *v.* Thomas, 89 Pa. St. 343. See also Conklin *v.* Hinds, 16 Minn. 457.

is incorrectly recorded the party claiming under it is not concluded thereby, but may introduce in evidence the original deed, or if lost, parol evidence of its contents.[19] But a deed, although actually transcribed on the record, is not recorded where there has been no proper proof of its execution as required by law.[20] And a court cannot make a valid registry of a deed in any other manner than that prescribed by statute.[21] Again where a deed is delivered to the clerk of one district of a county or to his deputy without instructions this is *prima facie* a delivery for record in such district.[22] And where a deed has been properly recorded the title of the grantee is not affected by the destruction of the record of the deed.[23]

V. CONSTRUCTION AND OPERATION.

A. General Rules of Construction — 1. Application to Deeds in General — a. What Law Governs. The law of the state where the land is situated governs the construction of a deed.[24] It is decided, however, that the law of the place of execution controls,[25] and determines the construction of a deed containing a covenant of seizin[26] or a covenant of warranty,[27] or whether the terms used in a

Two deeds on one piece of paper.— Where two deeds were so drawn and registered at the same time but only one certificate of registry and one number were indorsed it has been decided that the fact that both deeds were registered may be proved by the registry book. Doe *v.* McCulley, 8 N. Brunsw. 194.

Use of "ditto marks" may be sufficient to indicate the date of the receipt of a deed for record. Hughes *v.* Powers, 99 Tenn. 480, 42 S. W. 1.

19. Gaston *v.* Merriam, 33 Minn. 271, 22 N. W. 614.

20. Keech *v.* Enriquez, 28 Fla. 597, 10 So. 91. See Reg. *v.* Middlesex, 1 E. & E. 322, 5 Jur. N. S. 98, 28 L. J. Q. B. 77, 7 Wkly. Rep. 64, 102 E. C. L. 322; Doe *v.* Rideout, 8 N. Brunsw. 502.

Re-registration and its effect.— Where a statute requires that the judge of the court before whose clerk an acknowledgment was made shall certify to the official character of that clerk and a registration is ineffectual because of the want of such certification, a re-registration with the proper certificate will take effect as to the grantor's creditors from the date such amended deed is noted for registration and does not relate back. Citizens' Bank *v.* McCarty, 99 Tenn. 469, 42 S. W. 4. *Compare* Bernhardt *v.* Brown, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725.

Where it is provided by statute that a register's copy of a deed from his books shall be received in evidence, although it shall "not appear by such copy that the probate had been registered with the original deed" such a copy is not thereby admissible in the absence of proof by other evidence that such probate has been registered. McIver *v.* Robertson, 3 Yerg. (Tenn.) 84.

21. Caldwell *v.* Head, 17 Mo. 561.

22. Beaver *v.* Frick Co., 53 Ark. 18, 13 S. W. 134.

23. Addis *v.* Graham, 88 Mo. 197.

24. *Georgia.*— Brown *v.* Ransey, 74 Ga. 210.

Indiana.— Fisher *v.* Parry, 68 Ind. 465.

Louisiana.— Cassidy's Succession, 40 La. Ann. 827, 5 So. 292; Larenden's Succession, 39 La. Ann. 952, 3 So. 219.

Nebraska.— Riley *v.* Borroughs, 41 Nebr. 296, 59 N. W. 929.

Vermont.— Tillotson *v.* Pritchard, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95.

See 16 Cent. Dig. tit. "Deeds," § 229.

Especially is this true where it is apparent that such law was in the mind of the grantor. Brown *v.* Ransey, 74 Ga. 210.

A deed is also prima facie executed according to such law, although the law of the place of actual execution may be shown to establish its validity. Freeman *v.* Crout, 1 Wyo. 361.

Where the interpretation of a deed of trust is necessary to determine the rights and liabilities of parties, in an action for accounting for rents and profits thereunder of lands in the District of Columbia, regard should be had to the laws of Maryland in force in the District of Columbia. Talbott *v.* Chester, 2 Chest. Co. Rep. (Pa.) 57.

25. Crosby *v.* Davis, 2 Pa. L. J. Rep. 403, 4 Pa. L. J. 193, holding that the meaning of the language of a deed where it is executed and is to operate should be assigned to it.

A grant from the Mexican government to "heirs" of a decedent, made in 1827, can inure only to such persons as were heirs according to the civil law which was in force in Mexico at that time. McGahan *v.* Baylor, 32 Tex. 789.

Law in force at time of execution governs. Frame *v.* Humphreys, 164 Mo. 336, 64 S. W. 116.

Where an instrument was executed in a common-law state in the form of a mortgage, part of the property being situated there, it will be presumed that a mortgage was intended, but it will not include property in another state, although embraced in the deed. Bernard *v.* Scott, 12 La. Ann. 489.

But an intention that a deed should take effect in a state other than that of its execution will govern its construction. Tillman *v.* Mosely, 14 La. Ann. 710.

26. Jackson *v.* Greene, 112 Ind. 341, 14 N. E. 89.

27. Craig *v.* Donovan, 63 Ind. 513.

A covenant of warranty in a deed convey-

deed import a covenant of seizin,[28] or a covenant of warranty running with the land conveyed.[29]

b. Special Statutory Provisions. A special statutory provision, from which a deed derives all its validity, will be construed into and with the deed.[30]

c. Intention of Parties in General — (i) *Statement of Rule.* The object in construing a deed is to ascertain the intention of the parties[31] and especially that of the grantor;[32] and it is well settled that deeds must be construed so as to effectuate if possible the intention of the parties[33] or of the grantor,[34] unless

ing lands in the Connecticut Susquehanna Purchase, in the state of Pennsylvania, made by a citizen of Pennsylvania to a citizen of New York, is binding on the party making it, notwithstanding the laws of Pennsylvania prohibit the entry of a claimant under such title. Phelps *v.* Decker, 10 Mass. 267.

28. Bethell *v.* Bethell, 54 Ind. 428, 23 Am. Rep. 650.

29. Worley *v.* Hineman, 6 Ind. App. 240, 33 N. E. 260.

30. Abbott *v.* Chase, 75 Me. 83.

31. Ferrill *v.* Cleveland, 6 Ky. L. Rep. 512; Davis *v.* Hardin, 1 Ky. L. Rep. 165; Heingley *v.* Harris, 1 Ky. L. Rep. 55; Long *v.* Wagoner, 47 Mo. 178; Biddle *v.* Vandeventer, 26 Mo. 500; Wolfe *v.* Scarborough, 2 Ohio St. 361.

The great object of construction is to determine the intention of the parties from the language used in connection with the subject-matter. Baulos *v.* Ash, 19 Ill. 187.

32. Hamner *v.* Smith, 22 Ala. 433.

33. *Connecticut.*— Goodyear *v.* Shanahan, 43 Conn. 204.

Illinois.— Batavia Mfg. Co. *v.* Newton Wagon Co., 91 Ill. 230.

Kansas.— Hale *v.* Docking, 6 Kan. App. 283, 51 Pac. 798 [*affirmed* in 60 Kan. 856, 55 Pac. 1100].

Maine.— Proctor *v.* Maine Cent. R. Co., 96 Me. 458, 52 Atl. 933; Pike *v.* Monroe, 36 Me. 309, 58 Am. Dec. 751; Lincoln *v.* Wilder, 29 Me. 169.

Maryland.— Peyton *v.* Ayres, 2 Md. Ch. 64.

Mississippi.— Williams *v.* Claiborne, Sm. & M. Ch. 355.

Missouri.— Jennings *v.* Brizeadine, 44 Mo. 332; Biddle *v.* Vandeventer, 26 Mo. 500.

New Hampshire.—Winnipisseogee Lake Cotton, etc., Mfg. Co. *v.* Perley, 46 N. H. 83.

New Jersey.— Huyler *v.* Atwood, 26 N. J. Eq. 504 [*affirmed* in 28 N. J. Eq. 275]; Morris Canal, etc., Co. *v.* Matthiesen, 17 N. J. Eq. 385.

New York.— Harriot *v.* Harriot, 25 N. Y. App. Div. 245, 49 N. Y. Suppl. 447; Richards *v.* North West Protestant Dutch Church, 20 How. Pr. 317.

North Carolina.— Barnes *v.* Haybarger, 53 N. C. 76.

Ohio.— Wolfe *v.* Scarborough, 2 Ohio St. 361.

Oregon.— Hahn *v.* Baker Lodge No. 47, 21 Oreg. 30, 27 Pac. 166, 28 Am. St. Rep. 723, 13 L. R. A. 158.

Pennsylvania.— Watters *v.* Bredin, 70 Pa. St. 235; Davis *v.* Martin, 8 Pa. Super. Ct. 133; Snowden *v.* Cavenaugh, 10 Kulp 1; Mergenthaler's Appeal, 15 Wkly. Notes Cas. 441; Crosby *v.* Davis, 2 Pa. L. J. Rep. 403, 4 Pa. L. J. 193.

Vermont.— Mills *v.* Catlin, 22 Vt. 98.

Virginia.— Perkins *v.* Dickinson, 3 Gratt. 335.

West Virginia.— Gibney *v.* Fitzsimmons, 45 W. Va. 334, 32 S. E. 189.

United States.— Thomas *v.* Hatch, 23 Fed. Cas. No. 13,899, 3 Sumn. 170.

England.— Goodtitle *v.* Bailey, Cowp. 597; Cholmondeley *v.* Clinton, 2 Jac. & W. 1, 22 Rev. Rep. 84; Sidebotham *v.* Knott, 26 L. T. Rep. N. S. 720, 20 Wkly. Rep. 415. See Solly *v.* Forbes, 2 B. & B. 38, 4 Moore C. P. 448, 22 Rev. Rep. 641, 6 E. C. L. 27.

See 16 Cent. Dig. tit. "Deeds," § 231.

Rule applies, although the deed be inartificially drawn. Nixon *v.* Carco, 28 Miss. 414. See French *v.* Brewer, 9 Fed. Cas. No. 5,096, 3 Wall. Jr. 346.

Deeds for pews, vaults, or houses are within the rule. Richards *v.* North West Protestant Dutch Church, 20 How. Pr. (N. Y.) 317.

Generality of words in a release will be restrained by parties' intention. Upton *v.* Upton, 1 Dowl. P. C. 400. See also London, etc., R. Co. *v.* Blackmore, L. R. 4 H. L. 610, 39 L. J. Ch. 713, 23 L. T. Rep. N. S. 504, 19 Wkly. Rep. 305; Lyall *v.* Edwards, 6 H. & N. 337, 30 L. J. Exch. 193.

Grants of rooms or apartments in a building are within the rule. Hahn *v.* Baker Lodge No. 47, 21 Oreg. 30, 27 Pac. 166, 28 Am. St. Rep. 723, 13 L. R. A. 158.

If intention cannot be effectuated in one form it must be in another, if by law it may. Goodtitle *v.* Bailey, Cowp. 597. And see Richardson *v.* Palmer, 38 N. C. 212.

Matter not intended by one party to be included, although taken into account by the other, will be excluded. Hopper *v.* Smyser, 90 Md. 363, 45 Atl. 206.

Release of land is not construed according to intention of parties, but being a common-law conveyance is construed according to its terms. Ackerman *v.* Vreeland, 14 N. J. Eq. 23.

Secret unexpressed intention will not be permitted to vary the deed or change its meaning where the language used leaves no room for doubt. Hoyt *v.* Ketcham, 54 Conn. 60, 5 Atl. 606.

34. Hamner *v.* Smith, 22 Ala. 433; Lincoln *v.* Wilder, 29 Me. 169; Bruensmann *v.* Carroll, 52 Mo. 313; Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340.

inconsistent with settled rules of law[35] or of some principle of law,[36] or in violation thereof,[37] or in violation of some rule of property,[38] or there are expressions in the deed which positively forbid it[39] or render it impossible.[40]

(II) *Rule Applied.* In ascertaining whether the parties thereto intended that an instrument should operate as a conveyance or a license,[41] as a conveyance subject to a lien for the purchase-price,[42] as a conveyance with a reservation of a life-interest and not a conditional sale,[43] as a deed or a mere condition conveying an interest after the time fixed for performance,[44] as a deed or an acknowledgment of an equitable title,[45] as a deed or a power of attorney,[46] as a deed or a testamentary disposition of land,[47] as a deed or merely an equitable right to have a deed executed upon the title being cleared,[48] as a grant or a deed of partition,[49] as a deed or an executory contract,[50] the existence or non-existence of the requi-

35. Williams *v.* Claiborne, Sm. & M. Ch. (Miss.) 355; Harriot *v.* Harriot, 25 N. Y. App. Div. 245, 49 N. Y. Suppl. 447. See also Biddle *v.* Vandeventer, 26 Mo. 500.

Must be as near the intention as the rules of law will admit. Crosby *v.* Davis, 2 Pa. L. J. Rep. 430, 4 Pa. L. J. 193. And see Goodtitle *v.* Bailey, Cowp. 597.

The state of the law at the date of the deed may be considered in determining the meaning and operation of its words. Hamlen *v.* Keith, 171 Mass. 77, 50 N. E. 462.

36. Pentland *v.* Stokes, 2 Ball & B. 73.

37. Hamner *v.* Smith, 22 Ala. 433; Pike *v.* Munroe, 36 Me. 309, 58 Am. Dec. 751. Even though the law prevents its being carried into effect, the clearly expressed intention of the parties will stand. Deering *v.* Long Wharf, 25 Me. 51.

38. Gibney *v.* Fitzsimmons, 45 W. Va. 334, 32 S. E. 189.

39. Peyton *v.* Ayres, 2 Md. Ch. 64; Bryan *v.* Spires, 3 Brewst. (Pa.) 580, 1 Leg. Gaz. (Pa.) 191.

40. Wolfe *v.* Scarborough, 2 Ohio St. 361.

41. When a conveyance and not a license. — Bracken *v.* Rushville, etc., Gravel Road Co., 27 Ind. 346; Steinbach *v.* Stewart, 11 Wall. (U. S.) 566, 20 L. ed. 56.

When license not exclusive not a grant.— Newby *v.* Harrison, 1 Johns. & H. 393, 4 L. T. Rep. N. S. 397, 9 Wkly. Rep. 849 [*affirmed* in 4 L. T. Rep. N. S. 424].

42. Williams *v.* Smith, 60 S. W. 940, 22 Ky. L. Rep. 1439.

43. Sibley *v.* Somers, 62 N. J. Eq. 595, 50 Atl. 321.

44. Dunaway *v.* Day, 163 Mo. 415, 63 S. W. 731.

45. Weinrich *v.* Wolf, 24 W. Va. 299.

46. Burrow *v.* Terre Haute, etc., R. Co., 107 Ind. 432, 8 N. E. 167.

47. Kelley *v.* Shimer, 152 Ind. 290, 53 N. E. 233; Billings *v.* Warren, 21 Tex. Civ. App. 77, 50 S. W. 625; Jeffries *v.* Alexander, 8 H. L. Cas. 594, 7 Jur. N. S. 221, 31 L. J. Ch. 9, 2 L. T. Rep. N. S. 768. See Benham *v.* Newell, 24 L. J. Ch. 424, 3 Wkly. Rep. 333.

48. Cooper *v.* Mayfield, (Tex. Civ. App. 1900) 57 S. W. 48 [*affirmed* in 94 Tex. 107, 58 S. W. 827].

49. Den *v.* Camp, 19 N. J. L. 148.

50. What constitutes a present conveyance and not an executory contract.— An instrument in the form of a general warranty deed is not converted into a contract for a deed by words binding the grantors to convey "at some time as soon as said deed could be made." Rust *v.* Goff, 94 Mo. 511, 7 S. W. 418. And a deed, signed, sealed, acknowledged, delivered, and recorded, is an executed contract, although the agreement for services, which constituted part of the consideration, is a continuing contract during the lives of the grantor and his wife. Perry *v.* Scott, 51 Pa. St. 119. So the fact that the consideration is to be paid in the future does not prevent an agreement for the sale of land from constituting an executed conveyance passing present title. Bortz *v.* Bortz, 48 Pa. St. 382, 86 Am. Dec. 603. And where possession is taken under "articles of agreement" to convey, and the operative words are those of present grant, and there is neither by expression nor implication any agreement or necessity of future assurance, the instrument is a present conveyance of title. Garver *v.* McNulty, 39 Pa. St. 473. Again the intention should be clearly manifest to make an instrument an executory contract, by a covenant of further assurance. Ogden *v.* Brown, 33 Pa. St. 247. And a conveyance of "one-sixth part of the said tract, or so much thereof as may be recovered in this suit" is a present conveyance and not executory. Gray *v.* Packer, 4 Watts & S. (Pa.) 17. So an instrument which contains all the requisites of a conveyance of land will be none the less such a deed because it partakes of the nature of a contract of sale. American Emigrant Co. *v.* Clark, 62 Iowa 182, 17 N. W. 483; Williams *v.* Paine, 169 U. S. 55, 18 S. Ct. 279, 42 L. ed. 658. And if a deed conveys an entire interest, and an added stipulation obligating the grantors to make a full and *bona fide* title, the latter clause does not make the instrument a mere executory agreement to convey a title. McCoy *v.* Pease, 17 Tex. Civ. App. 303, 42 S. W. 659. There is also an absolute conveyance of an equal undivided interest in lands where apt words of conveyance are used, based upon a consideration expressed and the land is described, although there is a proviso "that said league of land shall be divided equally, according to quality and quantity, . . . as soon as possible" (Henderson *v.* Beaton, 1 Tex. Unrep. Cas. 17, 22); and a title is conveyed under words of bargain and sale with a further

site formalities, the use or non-use of apt and proper words of conveyance, the use or non-use or the lack of necessity for the use of expressions of future or further assurance, the scope and subject-matter of the instrument, coupled with the object or purpose evidently to be accomplished, as manifested or deducible by a reasonable interpretation of the instrument itself in its entirety, or as aided by contemporaneous agreements which are properly within the rules of construc-

promise to make another conveyance when the patent to the land issues (Owen *v.* New York, etc., Land Co., 11 Tex. Civ. App. 284, 32 S. W. 189). Again a deed in the usual form of a deed of bargain and sale is a conveyance executed, even though the grantor covenants "to make a patent" which can only mean to obtain one and deliver it. Willis *v.* Bucher, 30 Fed. Cas. No. 17,769, 3 Wash. 369.

What constitutes an executory contract and not a present conveyance.— Where the entire instrument and a contemporaneous agreement show that a title bond was intended, there is no conveyance *in præsenti* (Chapman *v.* Glassell, 13 Ala. 50, 48 Am. Dec. 41); and only such a bond or agreement to convey exists where such intent is evidenced by construing all the provisions of the instrument together (Kelly *v.* Dooling, 23 Ark. 582). So where an "instrument in writing" refers to a certain agreement, on performance of which a general warranty deed was to be made, there is not a present conveyance. Ellis *v.* Jeans, 7 Cal. 409. A deed defective in some formal requisite is also in equity an executory contract for sale. Dickinson *v.* Glenney, 27 Conn. 104. And an agreement in consideration of intended marriage relating to payment of moneys to a trustee and for conveyance will be executory until such payment. Imlay *v.* Huntington, 20 Conn. 146. So a bond to convey upon payment of a fixed sum within a certain time and a lease for that time do not vest title in the obligee of the bond. Daua *v.* Petersham, 107 Mass. 598. The rule further applies in determining that an instrument is not of a testamentary character, nor a deed, but merely an executory agreement to give property for maintenance. Dreisbach *v.* Serfass, 126 Pa. St. 32, 17 Atl. 513, 3 L. R. A. 836. Again, words of present assurance, "doth and hath by these presents granted, bargained, sold, and for ever quit claim," etc., do not make an instrument other than an executory contract, where it contains no words of inheritance, is without formal acknowledgment, and no present consideration is given, but only one to be performed in future. Stewart *v.* Lang, 37 Pa. St. 201, 78 Am. Dec. 414. So an instrument under seal, signed and acknowledged by one of the parties, and which "grants, bargains, and sells in consideration of" a specified sum "all estate real and personal received from his father," and which also agrees to execute a more perfect instrument "to-morrow at G," etc., does not pass title (Dawson *v.* McGill, 4 Whart. (Pa.) 230); and an instrument is a bond for a title, which, although it is signed and sealed, specifies a consideration and bargains and sells a designated part of the land, yet the maker binds himself, his heirs or assigns, to give "a deed in fee simple as soon as I or they can do it according to law" (Wallace *v.* Wilcox, 27 Tex. 60). So, even though the purchase-money is paid, only an executory obligation exists and no title is vested by an instrument in the form of a deed, which, although recorded, identifies no particular tract, but contemplates the surveying off and designation of the boundaries as soon as practicable, and the execution of another deed is necessary, upon request, the sale to be made good or damages to be paid on default. Glasscock *v.* Nelson, 26 Tex. 150. Merely a bond for a title also exists, where the grantor, although reciting that he has "sold and delivered" certain acres out of an unpatented survey, yet there is no *habendum, reddendum,* or warranty, and the maker binds himself to give a good warranty deed (Peterson *v.* McCauley, (Tex. Civ. App. 1894) 25 S. W. 826); and where two instruments are executed, one subsequent to the other, the latter being evidently the fulfilment of the first, such first instrument will be held merely an executory contract, where the transactions show that it was so intended (Mineral Development Co. *v.* James, 97 Va. 403, 34 S. E. 37).

A mere proviso, after the premises, relating to the adjustment of boundaries so as to cover a deficiency or exclude an excess of land, is, when it is sufficiently certain, an actual conveyance of a deficiency. Richards *v.* Mercer, 1 Leigh (Va.) 125.

A writing granting a right of access to a well forever, and which does not indicate that the parties contemplate any further assurance, and which is signed and sealed, is a present grant of a right to use the well. Warren *v.* Syme, 7 W. Va. 474.

A purported conveyance not by deed may operate as an agreement, where it stipulates not to disturb the party intended to have the premises. Rex *v.* Ridgwell, 6 B. & C. 665, 9 D. & R. 678, 5 L. J. M. C. O. S. 67, 13 E. C. L. 300. If, however, the conveyance is upon a condition precedent, the performance thereof determines the passing of the title. Atherton *v.* Johnson, 2 N. H. 31.

Indorsement on land-office certificate is an agreement to convey, where it states that the holder has sold "the within described land" to another. Sayward *v.* Gardner, 5 Wash. 247, 31 Pac. 761, 33 Pac. 389.

Instrument is a deed absolutely, as well as a bond for a title, which states that one party has granted, bargained, and sold all his interest in certain land, and it contains no covenant for title at a future time, and also binds the grantor in a penalty to remain within the jurisdiction where the land is situate for a

tion, are ordinarily the determinating factors. Attending circumstances should, however, be also considered where the intention, as gathered from the instrument, is doubtful; and particular words and phrases are not the test, as against the intention, in determining whether an informal agreement is a conveyance of land or merely an agreement.[51]

d. Construction in Favor of Validity. An instrument intended to operate as a deed should so operate if not legally impossible for it to do so.[52]

e. Liberal Construction. Subject to the rule just stated, that the intention of the parties should be effectuated, a liberal construction is given to inartificial deeds, that is, to deeds inartificially and unteehnically drawn.[53]

f. Entire Instrument to Be Considered — (i) *General Rule.* The intent must primarily be gathered from a fair consideration of the entire instrument and the language employed therein,[54] and should be consistent with the terms of the deed,[55] including its scope and the subjeet-matter.[56]

(ii) *Expressed Meaning Plain.* If the expressed meaning is plain on the faee of the instrument it will eontrol.[57]

time necessary to obtain a complete government title to the land. Walker *v.* Myers, 36 Tex. 203.

51. Kenrick *v.* Smick, 7 Watts & S. (Pa.) 41.

Although words of absolute transfer are used, a deed will be construed as an instrument to convey, if such is the intention of the parties, as shown by taking the whole instrument together and the circumstances under which it was executed. Sherman *v.* Dill, 4 Yeates (Pa.) 295, 2 Am. Dec. 408; Neave *v.* Jenkins, 2 Yeates (Pa.) 107; Stouffer *v.* Coleman, 1 Yeates (Pa.) 393.

52. Horn *v.* Gartman, 1 Fla. 63.

Effectuating intention of parties see *supra*, V, A, 1, c.

This rule applies even though the instrument is indefinite and admits of two constructions. Cano *v.* Aldridge, 27 Ind. 294; Morriso *v.* Coghill, Ky. Dec. 322; Anderson *v.* Baughman, 7 Mich. 69, 74 Am. Dec. 699; Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637. The construction is favored which tends to unite the seizin with the apparent title of record. Farnum *v.* Peterson, 111 Mass. 148.

If a deed or any portion of it cannot operate in one form, it shall operate in that which by law will effectuate the intention of the parties. Richardson *v.* Palmer, 38 N. H. 212. And see Goodtitle *v.* Bailey, Cowp. 597.

The owner will be presumed to convey a part which he could honestly convey rather than the moiety which he held under a resulting trust for another where such owner of the legal title sells an undivided half of lands. Codar *v.* Huling, 27 Pa. St. 84.

53. Campbell *v.* Gilbert, 57 Ala. 569; Hamner *v.* Smith, 22 Ala. 433; Nixon *v.* Carco, 28 Miss. 414; French *v.* Brewer, 9 Fed. Cas. No. 5,096, 3 Wall. Jr. 346.

54. *Alabama.*— Hamner *v.* Smith, 22 Ala. 433.

California.— Brannan *v.* Mesick, 10 Cal. 95.

Illinois.— McCoy *v.* Fahrney, (1899) 55 N. E. 61.

Kentucky.— Ferrill *v.* Cleveland, 6 Ky. L. Rep. 512; Davis *v.* Hardin, 1 Ky. L. Rep. 165; Heingley *v.* Harris, 1 Ky. L. Rep. 55.

Maine.— Proctor *v.* Maine Cent. R. Co., 96 Me. 458, 52 Atl. 933.

Mississippi.— Goosey *v.* Goosey, 48 Miss. 210; Williams *v.* Claiborne, 7 Sm. & M. 355.

New York.— Harriot *v.* Harriot, 25 N. Y. App. Div. 245, 49 N. Y. Suppl. 447; Richards *v.* New York North West Protestant Dutch Church, 20 How. Pr. 317.

Texas.— Chew *v.* Zweib, (Civ. App. 1902) 69 S. W. 207.

Vermont.— Collins *v.* Lavelle, 44 Vt. 230; Mills *v.* Catlin, 22 Vt. 98.

United States.— Speed *v.* St. Louis, etc., R. Co., 86 Fed. 235, 30 C. C. A. 1.

England.— Solly *v.* Forbes, 2 B. & B. 38, 4 Moore C. P. 448, 22 Rev. Rep. 641, 6 E. C. L. 27.

See 16 Cent. Dig. tit. "Deeds," § 236.

Intention is to be deduced from conveyance, as in the case of any other contract. Long *v.* Wagoner, 47 Mo. 178. Intention is that manifested by instrument itself. Morris Canal, etc., Co. *v.* Matthiesen, 17 N. J. Eq. 385.

Rule especially applies where a deed is inartificially drawn. French *v.* Brewer, 9 Fed. Cas. No. 5,496, 3 Wall. Jr. 346.

The force of the language used by the grantor and the intention of the parties deducible therefrom control. Thomas *v.* Hatch, 23 Fed. Cas. No. 13,899, 3 Sumn. 170.

The terms of the deed should guide in interpreting the obligations imposed. Langevin *v.* Morrissette, 19 Rev. Lég. 476.

55. Perkins *v.* Dickinson, 3 Gratt. (Va.) 335.

56. Winnipisseogee Lake Cotton, etc., Mfg. Co. *v.* Perley, 46 N. H. 83; Richards *v.* New York North West Protestant Dutch Church, 20 How. Pr. (N. Y.) 317; Hahn *v.* Baker Lodge No. 47, 21 Oreg. 30, 27 Pac. 166, 28 Am. St. Rep. 723, 13 L. R. A. 158.

Purposes for which the deed was executed limit the private signification of general expressions in so far as such purposes are evidenced by the instrument itself. Houston *v.* Barry, 5 Ir. Eq. 294.

57. And this is true even though the words used frustrate the grant (Jennings *v.* Brizeadine, 44 Mo. 332), or there are doubtful pro-

(III) *Effect Given to Every Part.* This last stated rule should also be applied so as to give effect and meaning to every part of the deed,[58] each clause being considered separately and being governed by the intent deducible from the entire instrument,[59] and separate parts being viewed in the light of other parts,[60] if the same can be done consistently with the rules of law.[61]

(IV) *Written and Printed Parts.* The written and printed parts of a deed are equally binding,[62] but if they are inconsistent the former will control the latter.[63]

(V) *Punctuation.* To solve an ambiguity not created thereby the punctuation may be considered,[64] or it may be resorted to to settle the meaning after all other means fail;[65] but it will not be permitted to affect the construction as against the apparent intent.[66]

(VI) *Clauses and Words in General* — (A) *Some Meaning to Be Given.* Some meaning should be given to every clause, word,[67] and expression,[68] if it can reasonably be done,[69] and it is not inconsistent with the general intent of the whole instrument,[70] so that the deed may operate, if by law it may, according to the intention of the parties.[71]

(B) *Reasonable, Usual, and Grammatical Sense.* The construction must be reasonable and agreeable to common understanding,[72] and words must receive that interpretation given them by the common usage of mankind, having in view the circumstances of their use and the context;[73] that is, unless the words employed

visions (Barnes *v.* Haybarger, 53 N. C. 76), and even though a particular expression may be inconsistent with the general intent a court of equity will give effect to the latter (Arundell *v.* Arundell, Coop. t. Brough. 139, 2 L. J. Ch. 77, 1 Myl. & K. 316, 7 Eng. Ch. 316).

58. *Missouri.*—Gibson *v.* Bogy, 28 Mo. 478.
New Hampshire.— Richardson *v.* Palmer, 38 N. H. 212.
Pennsylvania.— Lehigh Coal, etc., Co. *v.* Gluck, 5 Pa. Co. Ct. 662.
Texas.— Chew *v.* Zweib, (Civ. App. 1902) 69 S. W. 207.
Vermont.— Collins *v.* Lavelle, 44 Vt. 230.
If words are added to the latter part of a deed for the sake of greater certainty they may be resorted to to explain preceding parts which are not entirely clear. Wallace *v.* Crow, (Tex. Sup. 1886) 1 S. W. 372.
Where its covenants can be ascertained from an examination of the whole instrument, a deed is not void for uncertainty, although some single covenant standing alone may be of doubtful meaning. Gregg *v.* Macey, 10 Mo. 385.

59. *Florida.*— Adams *v.* Higgins, 23 Fla. 13, 1 So. 321.
Kentucky.— Morriso *v.* Coghill, Ky. Dec. 322.
Maine.— Nobleboro *v.* Clark, 68 Me. 86, 28 Am. Rep. 22; Jameson *v.* Balmer, 20 Me. 425.
Texas.— Johnston *v.* McDonnell, 37 Tex. 595.
United States.— Goodyear *v.* Cary, 10 Fed. Cas. No. 5,562, 4 Blatchf. 271.

60. McCoy *v.* Fahrney, 182 Ill. 60, 55 N. E. 61; Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 240.
Words in the present tense, no matter how strong, will not pass estate if from other parts of the instrument the intention appears to be otherwise. Davis *v.* Martin, 8 Pa. Super. Ct. 133.

61. Alexander *v.* Burnet, 5 Rich. (S. C.) 189.

62. Wallwork *v.* Derby, 40 Ill. 527.

63. Loveless *v.* Thomas, 152 Ill. 479, 38 N. E. 907; McNear *v.* McComber, 18 Iowa 12; Reed *v.* Hatch, 55 N. H. 327.

64. Olivet *v.* Whitworth, 82 Md. 258, 33 Atl. 723.

65. Ewing *v.* Burnet, 11 Pet. (U. S.) 41, 9 L. ed. 624.

66. Bunn *v.* Wells, 94 N. C. 67.

67. Churchill *v.* Reamer, 8 Bush (Ky.) 256; Jacoby *v.* Nichols, 62 S. W. 734, 23 Ky. L. Rep. 205; Proctor *v.* Maine Cent. R. Co., 96 Me. 458, 52 Atl. 933; Patching *v.* Gubbins, 2 Eq. Rep. 71, 17 Jur. 1113, 1 Kay 1, 23 L. J. Ch. 45, 2 Wkly. Rep. 2.
But a clause inoperative in law need not be given an equitable effect. Gladstone *v.* Birley, 2 Meriv. 401, 3 M. & S. 205, 15 Rev. Rep. 465.

68. Barclay *v.* Howell, 1 Fed. Cas. No. 975.

69. Barclay *v.* Howell, 1 Fed. Cas. No. 975.

70. Churchill *v.* Reamer, 8 Bush (Ky.) 256.

71. Richardson *v.* Palmer, 38 N. H. 212.
If a clause is capable of two meanings it must if possible be construed in consonance with the general spirit and objects of the whole instrument. Heard *v.* Garrett, 34 Miss. 152.
Repeated words in the same instrument are given one meaning, in the absence of a manifestly clear intention to the contrary. Ridgeway *v.* Munkittrick, 1 Dr. & War. 34.

72. Crosby *v.* Davis, 2 Pa. L. J. Rep. 403, 4 Pa. L. J. 193.

73. Lord *v.* Sydney, 33 L. T. Rep. N. S. 1, 12 Moore P. C. 473, 7 Wkly. Rep. 267, 14 Eng. Reprint 991.

are technical,[74] they must be construed in their plain, natural,[75] grammatical,[76] established, definite,[77] usual,[78] obvious and ordinary meaning, in the absence of ambiguity,[79] where a rational exposition can be given consistent with fair interpretation of the language employed; for, although an absurd clause, which is distinct, obvious, and express, must prevail, yet a literal interpretation will be abandoned where it leads to a capricious and irrational result, if such rational exposition can be followed.[80]

(c) *Verbal Arrangement, Informalities, Inaccuracies, and Technicalities* — (1) In General. Verbal arrangement may in certain cases be disregarded;[81] nor should informality, in a deed of bargain and sale,[82] or inaccuracy of language be allowed to defeat the manifest intent.[83] Although technically accurate terms must be considered,[84] yet technical rules of construction yield to the manifest intention of the parties,[85] as does the correct technical sense of descriptive words;[86] and technical words of limitation may be so qualified by the context as to make them conform to the grantor's intention.[87]

(2) Supplying Omissions. The rule is that the court cannot by supplying and interpolating words, even though they may be pertinent and necessary, make an instrument for the parties which they themselves have failed to make.[88]

74. Bradshaw *v.* Bradbury, 64 Mo. 334.

Context may qualify technical words of limitation, so as to make them conform to the grantor's intention. Criswell *v.* Grumbling, 107 Pa. St. 408.

Whenever a technical word is apparently used by the grantor to express an idea different from its technical signification, the intention will be effectuated by the construction. California Cent. Pac. R. Co. *v.* Beal, 47 Cal. 151.

75. Buchanan *v.* Andrew, L. R. 2 H. L. Sc. 286; Quebec *v.* North Shore R. Co., 27 Can. Supreme Ct. 102.

76. Clements *v.* Henry, 10 Ir. Ch. 79. *Compare* Jackson *v.* Topping, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515; Doe *v.* Carew, 2 Q. B. 317, 1 G. & D. 640, 6 Jur. 457, 11 L. J. Q. B. 5, 42 E. C. L. 692; Osborn's Case, 10 Coke 130*a*; Wright *v.* Kemp, 3 T. R. 470, 1 Rev. Rep. 748; Thompson *v.* Thompson, Ir. 6 Eq. 113; Coke Litt. 23*b*.

77. Boston *v.* Richardson, 13 Allen (Mass.) 146.

78. Bradshaw *v.* Bradbury, 64 Mo. 334.

79. Buchanan *v.* Andrew, L. R. 2 H. L. Sc. 286; Clements *v.* Henry, 10 Ir. Ch. 79.

80. Laird *v.* Tobin, 1 Molloy 543.

Too much regard should not be had to the nature and proper definition and acceptance of words and sentences to pervert the simple intention of the parties. Wolverton *v.* Haupt, 2 Lane. Bar (Pa.) 194.

There is also this exception that a grammatical construction shall not control the intention of an instrument. Hancock *v.* Watson, 18 Cal. 137; Jackson *v.* Topping, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515. See also cases cited *supra*, note 76.

81. Bruensmann *v.* Carroll, 52 Mo. 313; Huyler *v.* Atwood, 26 N. J. Eq. 504 [*affirmed* in 28 N. J. Eq. 275].

82. Royster *v.* Royster, 61 N. C. 226. See Dickinson *v.* Glenney, 27 Conn. 104; American Emigrant Co. *v.* Clark, 62 Iowa 182, 17 N. W. 483.

83. Jacoby *v.* Nichols, 62 S. W. 734, 23 Ky. L. Rep. 205.

Insertion of right for wrong words.— If it is apparent that a wrong word has been inserted by clerical error the instrument may be read as though the right word were in its place. Sprague *v.* Edwards, 48 Cal. 239; Fairchild *v.* Lynch, 42 N. Y. Super. Ct. 265. But see Hagler *v.* Simpson, 44 N. C. 384.

84. Speed *v.* St. Louis, etc., R. Co., 86 Fed. 235, 30 C. C. A. 1.

85. *Indiana.*— German Mut. Ins. Co. *v.* Grim, 32 Ind. 249, 2 Am. Rep. 341.

Kentucky.— Davis *v.* Hardin, 1 Ky. L. Rep. 165.

Maryland.— Moody *v.* Hall, 61 Md. 517.

Massachusetts.— Frost *v.* Spaulding, 19 Pick. 445, 31 Am. Dec. 150; Litchfield *v.* Cudworth, 15 Pick. 23; Pray *v.* Pierce, 7 Mass. 381, 5 Am. Dec. 59; Marshall *v.* Fisk, 6 Mass. 24, 4 Am. Dec. 76; Wallis *v.* Wallis, 4 Mass. 135, 3 Am. Dec. 210; Bridge *v.* Wellington, 1 Mass. 219.

New Hampshire.— Chamberlain *v.* Crane, 1 N. H. 64.

North Carolina.— Robertson *v.* Dunn, 6 N. C. 133, 5 Am. Dec. 525.

Pennsylvania.—Cumberland Bldg., etc., Assoc. *v.* Aramingo M. E. Church, 13 Phila. 171.

South Carolina.— Barrett *v.* Barrett, 4 Desauss. 447.

Texas.— Smith *v.* Brown, 66 Tex. 543, 1 S. W. 573.

Vermont.— Collins *v.* Lavelle, 44 Vt. 230.

See 16 Cent. Dig. tit. "Deeds," § 249 *et seq.*

Technical words of legal import must yield to plain intent. Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340.

86. Cholmondeley *v.* Clinton, 2 Jac. & W. 1, 22 Rev. Rep. 84.

87. Mergenthaler's Appeal, 15 Wkly. Notes Cas. (Pa.) 441.

Perfect limitation is not controlled by intention, otherwise as to imperfect limitation. Cholmondeley *v.* Clinton, 2 Jac. & W. 1, 22 Rev. Rep. 84.

88. Cadell *v.* Allen, 99 N. C. 542, 6 S. E. 399.

An exception to or qualification of this

(3) Spelling. Inaccuracies in spelling will be deemed immaterial,[89] or will be corrected so that the construction may be in accord with the obvious intent.[90]

(4). Transposition of Words. While words cannot be transposed merely to give efficacy to a deed, nor a provision relative to one subject be taken therefrom and applied to another subject in order to give a different meaning to the instrument,[91] nor words of a clause be transposed unless inconsistent with, absurd, or repugnant to the rest of the deed;[92] nevertheless, if what was intended clearly appears from an examination of the entire instrument, and apt and proper words are used to effectuate such intention, the instrument will not be defeated merely because of verbal arrangement or position, but the words may be transposed and read in their proper places in order to give them effect and thus carry out the clear intent and purpose even though badly expressed.[93]

(D) *Restraint of General Words.* Where words are contradictory those which are more general will be restrained by those more specific and particular.[94] So if words are general, and not express and precise, they will be restrained according to the subject-matter or person to which they relate,[95] and generally the express mention of one thing in a grant implies the exclusion of another.[96]

g. Extrinsic Circumstances. For the purpose of enabling it to ascertain the intention of the parties and to construe the deed,[97] but not in a manner inconsistent with the words used so as to add to or detract from or alter the intent,[98] the court will place itself as nearly as possible in the position of the parties when the instrument was executed,[99] and will consider the origin and sources of its deri-

rule may, however, exist in certain cases, as where there has clearly been an inadvertent omission of a necessary word as a complement. Seamnon *v.* Sawyer, 4 Me. 429. It is also declared that the court in order to give effect to the intention as gathered from the language within the four corners of a deed may supply anything necessarily to be inferred from the terms used. Gwyn *v.* Neath Canal Nav. Co., L. R. 3 Exch. 209, 37 L. J. Exch. 122, 18 L. T. Rep. N. S. 688, 16 Wkly. Rep. 1209, per Kelly, C. B.

89. Watters *v.* Bredin, 70 Pa. St. 235.

90. Huntington *v.* Lyman, 138 Mass. 205.

91. Kea *v.* Robeson, 40 N. C. 373.

92. Clements *v.* Henry, 10 Ir. Ch. 79.

93. Bruensmann *v.* Carroll, 52 Mo. 313; Hicks *v.* Bullock, 96 N. C. 164, 1 S. E. 629; Kea *v.* Robeson, 40 N. C. 373; Parkhurst *v.* Smith, Willes 327; Long *v.* Anderson, 30 U. C. C. P. 516.

The law will also construe that part of a deed to precede which ought to take precedence, in whatever part of the instrument it may in fact be. Doe *v.* Porter, 3 Ark. 18, 36 Am. Dec. 448.

94. *Alabama.*— Carter *v.* Chevalier, 108 Ala. 563, 19 So. 789.

Georgia.— Holmes *v.* Martin, 10 Ga. 503.

Indiana.— Gano *v.* Aldridge, 27 Ind. 294.

Maine.— Brunswick Sav. Inst. *v.* Crossman, 76 Me. 577.

Massachusetts.— Dawes *v.* Prentice, 16 Pick. 435; Smith *v.* Strong, 14 Pick. 128.

Missouri.— Guffey *v.* O'Reiley, 88 Mo. 418, 57 Am. Rep. 424.

New Hampshire.— Barnard *v.* Martin, 5 N. H. 536.

Vermont.— Wheelock *v.* Moulton, 15 Vt. 519.

England.—See Hesse *v.* Stevenson, 3 B. & P. 565; Iggulden *v.* May, 2 B. & P. N. R. 449, 7 East 237, 3 Smith K. B. 269, 9 Ves. Jr. 325, 8 Rev. Rep. 623, 32 Eng. Reprint 628; Robinson *v.* Ommannezy, 23 Ch. D. 285, 52 L. J. Ch. 440, 49 L. T. Rep. N. S. 19, 31 Wkly. Rep. 525; Gale *v.* Reed, 8 East 80, 9 Rev. Rep. 376; Thompson *v.* Thompson, Ir. 6 Eq. 113.

See 16 Cent. Dig. tit. "Deeds," § 238.

Control of subsequent by earlier clauses or words see *infra*, IV, A, 4, d.

Reference to recitals to aid construction see *infra*, IV, A, 4, g.

General words are not restrained by restrictive words which do not clearly indicate the intention and designate the grant. Field *v.* Husten, 21 Me. 69.

Natural meaning of general words is not restrained by other words unless the intention to do so is clear and manifest. Holliday *v.* People, 10 Ill. 214.

95. Verba generalia restringunter ad habilitatem rei vel personam is the maxim applicable. Bacon Max. Reg. 10. And see Peardon *v.* Underhill, 16 Q. B. 120, 15 Jur. 465, 20 L. J. Q. B. 133, 71 E. C. L. 120; Moore *v.* Rawlins, 6 C. B. N. S. 289, 5 Jur. N. S. 941, 28 L. J. C. P. 247, 95 E. C. L. 289.

96. Expressio unius est exclusio alterius is the maxim applicable. Coke Litt. 210*a*, 183*b*. And see Pray *v.* Great Falls Mfg. Co., 38 N. H. 442.

97. Baird *v.* Fortune, 7 Jur. N. S. 926, 5 L. T. Rep. N. S. 2, 4 Macq. H. L. 127, 10 Wkly. Rep. 2.

98. Atty.-Gen. *v.* Drummond, 1 C. & L. 210, 2 C. & L. 98, 1 Dr. & War. 353, 3 Dr. & War. 162; Baird *v.* Fortune, 7 Jur. N. S. 926, 5 L. T. Rep. N. S. 2, 4 Macq. H. L. 127, 10 Wkly. Rep. 2.

99. Walsh *v.* Hill, 38 Cal. 481; Baird *v.* Fortune, 7 Jur. N. S. 926, 5 L. T. Rep. N. S. 2, 4 Macq. H. L. 127, 10 Wkly. Rep. 2.

vation,[1] all the attendant surrounding circumstances or the existing state of facts, the situation of the parties and of the property or the condition or state of things granted at the time, the state of the country,[2] and generally all sources of inquiry naturally suggested by the description,[3] or which may have acted upon the minds of the parties, are open to inquiry within the limits of the rules relating to parol evidence in such cases.[4]

h. Construction by Parties. Where a deed is of doubtful meaning, or the language used is ambiguous, the construction given by the parties themselves, as elucidated by their conduct or admissions, will be deemed the true one, unless the contrary be shown.[5] So where all the parties have acted upon a particular con-

1. Abbott *v.* Abbott, 53 Me. 356.

2. *California.*— Grennan *v.* McGregor, 78 Cal. 258, 20 Pac. 559; Sprague *v.* Edwards, 48 Cal. 259; Stanley *v.* Green, 12 Cal. 148; Brannan *v.* Mesick, 10 Cal. 95.

Colorado.— Daum *v.* Conley, 27 Colo. 56, 59 Pac. 753.

Connecticut.— Goodyear *v.* Shanahan, 43 Conn. 204; Strong *v.* Benediet, 5 Conn. 210.

Illinois.— Louisville, etc., R. Co. *v.* Koelle, 104 Ill. 455; Batavia Mfg. Co. *v.* Newton Wagon Co., 91 Ill. 230; Hadden *v.* Shoutz, 15 Ill. 581; Doyle *v.* Teas, 5 Ill. 202.

Kentucky.— Davis *v.* Hardin, 1 Ky. L. Rep. 165.

Maine.— Proetor *v.* Maine Cent. R. Co., 96 Me. 458, 52 Atl. 933; Abbott *v.* Abbott, 53 Me. 356; Bradford *v.* Cressey, 45 Me. 9.

Massachusetts.— Coogan *v.* Burling Mills, 124 Mass. 390; Adams *v.* Frothingham, 3 Mass. 352, 3 Am. Dec. 151.

New Hampshire.— Winnipisseogee Lake Cotton, etc., Mfg. Co. *v.* Perley, 46 N. H. 83; Lane *v.* Thompson, 43 N. H. 320; Richardson *v.* Palmer, 38 N. H. 212.

New York.— Chouteau *v.* Suydam, 21 N. Y. 179; French *v.* Carhart, 1 N. Y. 96, How. App. Cas. 40 [*reversing* 1 Lalor 17, 2 N. Y. Leg. Obs. 367].

Pennsylvania.— Cox *v.* Freedley, 33 Pa. St. 124, 75 Am. Dec. 584; Snowden *v.* Cavenaugh, 10 Kulp 1.

South Carolina.— Collins *v.* Lemasters, 2 Bailey 141.

Washington.— Sengfelder *v.* Hill, 21 Wash. 371, 58 Pac. 250.

England.— Roe *v.* Siddons, 22 Q. B. D. 224, 53 J. P. 246, 60 L. T. Rep. N. S. 345, 37 Wkly. Rep. 228; Atty.-Gen. *v.* Drummond, 1 C. & L. 210, 2 C. & L. 98, 1 Dr. & War. 353, 3 Dr. & War. 162; Baird *v.* Fortune, 7 Jur. N. S. 926, 5 L. T. Rep. N. S. 2, 4 Maeq. H. L. 127, 10 Wkly. Rep. 2; Sidebotham *v.* Knott, 26 L. T. Rep. N. S. 700, 20 Wkly. Rep. 415.

See 16 Cent. Dig. tit. "Deeds," § 239.

Facts outside of a deed not inconsistent with its terms may have a powerful effect in aid of the construction. Foy *v.* Neal, 2 Strobh. (S. C.) 156.

Language may be modified or effect given to particular provisions by the state of things at the time upon which the deed is to operate. Salisbury *v.* Andrews, 19 Pick. (Mass.) 250.

Theories deduced from a presumed inadequacy of price, or a comparison of the business talents of the vendor and vendee, even if properly in evidence, cannot defeat the plain and ordinary meaning of the language employed. Delogny *v.* David, 12 La. Ann. 30.

Matter which is res inter alios acta is irrelevant. Hammond *v.* Abbott, 166 Mass. 517, 44 N. E. 620.

In absence of fraud or mistake the intention must be ascertained from the instrument itself. Clarkson *v.* Allison, 5 Ky. L. Rep. 58.

If the intent be clearly expressed and the language be unambiguous and plain, the court will not consider extrinsic surrounding facts or circumstances. New York L. Ins., etc., Co. *v.* Hoyt, 161 N. Y. 1, 55 N. E. 299 [*affirming* 31 N. Y. App. Div. 84, 52 N. Y. Suppl. 819]; Muldoon *v.* Deline, 135 N. Y. 150, 31 N. E. 1091 [*affirming* 16 N. Y. Suppl. 953]; Means *v.* Shippensburg Presb. Church, 3 Watts & S. (Pa.) 303.

3. Sengfelder *v.* Hill, 21 Wash. 371, 58 Pac. 250.

The relation of the parties may be considered. Davis *v.* Hardin, 1 Ky. L. Rep. 165.

4. Atty.-Gen. *v.* Drummond, 1 C. & L. 210, 2 C. & L. 98, 1 Dr. & War. 353, 3 Dr. & War. 162.

Parol or extrinsic evidence affecting deeds see EVIDENCE. See also Miller *v.* Travers, 8 Bing. 244, 1 Moore & S. 342, 21 E. C. L. 524; Atty.-Gen. *v.* Drummond, 1 C. & L. 210, 2 C. & L. 98, 1 Dr. & War. 353, 3 Dr. & War. 162; Collison *v.* Curling, 9 Cl. & F. 88, 6 Jur. 673, 8 Eng. Reprint 349; Colpoys *v.* Colpoys, Jac. 451, 4 Eng. Ch. 451; Baird *v.* Fortune, 7 Jur. N. S. 926, 5 L. T. Rep. N. S. 2, 4 Maeq. H. L. 127, 10 Wkly. Rep. 2; Kean *v.* Drope, 35 U. C. Q. B. 415; Burgess *v.* Denison, 16 U. C. Q. B. 457. *Compare* Bradley *v.* Washington, etc., Steam Packet Co., 13 Pet. (U. S.) 89, 10 L. ed. 72; Bradford *v.* Romney, 30 Beav. 431, 6 L. T. Rep. N. S. 208; Palmer *v.* Newell, 20 Beav. 32, 8 De G. M. & G. 74, 2 Jur. N. S. 268, 25 L. J. Ch. 461, 4 Wkly. Rep. 346.

5. *California.*— Mulford *v.* Le Franc, 26 Cal. 88.

Indiana.— Pea *v.* Pea, 35 Ind. 387.

Kentucky.— Kamer *v.* Bryant, 103 Ky. 723, 46 S. W. 14, 20 Ky. L. Rep. 340. And see Huff *v.* Miniard, 73 S. W. 1036, 24 Ky. L. Rep. 2272.

Maine.— Bradford *v.* Cressey, 45 Me. 9.

Massachusetts.— Dakin *v.* Savage, 172 Mass. 23, 51 N. E. 186; Stone *v.* Clark, 1 Metc. 378, 35 Am. Dec. 370.

struction, such construction should be followed unless it is forbidden by some positive rule of law.[6]

i. Strict Construction Against Grantor. In case of ambiguity in a deed, or where it admits of two constructions, it will be construed most strongly against the grantor, or most favorably to the grantee.[7] This rule is subservient to the

New Hampshire.—Winnipisseogee Lake Cotton, etc., Mfg. Co. *v.* Perley, 46 N. H. 83.

New York.— French *v.* Carhart, 1 N. Y. 96; Livingston *v.* Ten Broeck, 16 Johns. 15, 8 Am. Dec. 287.

West Virginia.— Gibney *v.* Fitzsimmons, 45 W. Va. 334, 32 S. E. 189.

England.— See Atty.-Gen. *v.* Drummond, 1 C. & L. 210, 2 C. & L. 98, 1 Dr. & War. 353, 3 Dr. & War. 162.

See 16 Cent. Dig. tit. "Deeds," § 233.

Rule applies to acts of a grantee as showing the extent of estate conveyed, as in case of a grant of a life-estate and a quitclaim to heirs of the ancestor who conveyed the same (Farnam *v.* Thompkins, 171 Ill. 519, 49 N. E. 568); to a practical construction, given by the interested parties, which is consistent with the terms of the deed (Neff *v.* Pennsylvania R. Co., 202 Pa. St. 371, 51 Atl. 1038); where the acts are those of the parties legally and equitably interested (Dakin *v.* Savage, 172 Mass. 23, 51 N. E. 186); where the construction is evidenced by a second deed (Ringrose *v.* Ringrose, 170 Pa. St. 593, 33 Atl. 129. See McCartney *v.* McCartney, (Tex. Civ. App. 1899) 53 S. W. 388 [*reversed* in 93 Tex. 359, 55 S. W. 310]. But *compare* Ranken *v.* Donovan, 166 N. Y. 626, 60 N. E. 1119 [*affirming* 46 N. Y. App. Div. 225, 61 N. Y. Suppl. 542]) or agreement (Stautzenberger *v.* Stautzenberger, (Tex. Sup. 1891) 17 S. W. 1046); to usage of the parties under an ancient deed with equivocal words (Livingston *v.* Ten Broeck, 16 Johns. (N. Y.) 14, 8 Am. Dec. 287; Wheelock *v.* Moulton, 15 Vt. 519); to acts and declarations as to the nature and use of the property (Pea *v.* Pea, 35 Ind. 387); to a case of a particular use of the property for many years without objection (Kamer *v.* Bryant, 103 Ky. 723, 46 S. W. 14, 20 Ky. L. Rep. 340); to a construction put upon the deed for many years (Creed *v.* Henkel, 18 Ohio Cir. Ct. 883); and resort may also be had, where the terms are equivocal, to evidence of the declarations and claims of right of the party under the deed and those from whom he claims title, and even though such evidence is received where the terms are not equivocal, it is not error where no use is made of it except as a guide for the court (Adams *v.* Warner, 23 Vt. 395).

Although events transpiring subsequent to the execution of the deed are not ordinarily to be considered in construing the instrument, yet the rule does not apply to expected acts of confirmation of a survey. Piper *v.* True, 26 Cal. 606

Belief of parties as to the effect of a deed cannot add to or diminish its legal import and operation. Furbush *v.* Goodwin, 25 N. H. 425.

If the language is unambiguous, plain, intelligible, and certain, such acts and declarations of the parties cannot be resorted to for aid in construction.

Alabama.— Dunn *v.* Mobile Bank, 2 Ala. 152.

Connecticut.— Botsford *v.* Wallace, 69 Conn. 263, 37 Atl. 902.

Indiana.— Newpoint Lodge No. 255 F. & A. M. *v.* Newpoint School Town, 138 Ind. 141, 37 N. E. 650.

Kentucky.— Fisher *v.* Hall, 63 S. W. 287, 23 Ky. L. Rep. 405.

Maine.— Mitchell *v.* Smith, 67 Me. 338.

See 16 Cent. Dig. tit. "Deeds," § 233.

Only where the language is indefinite or ambiguous will the parties' acts be received in aid of construction. Hill *v.* Priestly, 52 N. Y. 635.

Party not bound by his own construction.— Hutchins *v.* Dixon, 11 Md. 29.

Possession or acts of occupancy, without controversy, or coupled with acquiescence by the other party, constitute evidence of weight and effect. Jacoby *v.* Nichols, 62 S. W. 734, 23 Ky. L. Rep. 205; Kingsland *v.* New York, 45 Hun (N. Y.) 198, 9 N. Y. St. 768 [*affirmed* in 110 N. Y. 569, 18 N. E. 435]; Quebec *v.* North Shore R. Co., 27 Can. Supreme Ct. 102. See Murray *v.* Weston, 23 N. Y. App. Div. 623, 51 N. Y. Suppl. 1006, where a substantially like rule was applied to restrictions in a deed.

While subsequent acts or communications may not be evidence to determine meaning, yet they may evidence existing facts material to construction. Monroe *v.* Taylor, 8 Hare 51, 32 Eng. Ch. 51 [*affirmed* in 21 L. J. Ch. 525, 3 Macn. & G. 713, 49 Eng. Ch. 548].

6. Dakin *v.* Savage, 172 Mass. 23, 51 N. E. 186.

7. *California.*— Salmon *v.* Wilson, 41 Cal. 595.

Colorado.— Brown *v.* State, 5 Colo. 496.

Connecticut.— Bushnell *v.* Salisbury Ore Bed, 31 Conn. 150.

Illinois.— Alton *v.* Illinois Transp. Co., 12 Ill. 38, 52 Am. Dec. 479; Middleton *v.* Pritchard, 4 Ill. 510, 38 Am. Dec. 112; Chicago, etc., R. Co. *v.* Hogan, 105 Ill. App. 136.

Iowa.— Marshall *v.* McLean, 3 Greene 363.

Kentucky.— Gross *v.* Houchin, 6 Ky. L. Rep. 442.

Maine.— Winslow *v.* Patten, 34 Me. 25.

Massachusetts.— Ashley *v.* Pease, 18 Pick. 268; Watson *v.* Boylston, 5 Mass. 411; Adams *v.* Frothingham, 3 Mass. 352, 3 Am. Dec. 151.

New Hampshire.— Clough *v.* Bowman, 15 N. H. 504; Cocheco Mfg. Co. *v.* Whittier, 10 N. H. 305.

New Jersey.— Dunn *v.* English, 23 N. J. L. 126.

ascertained intention of the parties,[8] and is to be modified by the rule requiring effect to be given every word so far as possible;[9] nor is it to be applied or invoked until all other rules of construction fail.[10] It is also declared to be of doubtful propriety,[11] its value seriously affected,[12] and it has even been said that it has no application at the present time.[13]

j. Province of Court and Jury. It is the duty of the court to construe deeds and determine their legal effect,[14] where there is no such ambiguity as requires parol proof and submission to the jury.[15] The interpretation may, however,

New York.— Jackson *v.* Hudson, 3 Johns. 375, 3 Am. Dec. 500.

Pennsylvania.— Beeson *v.* Patterson, 36 Pa. St. 24.

South Carolina.— Foy *v.* Neal, 2 Strobh. 156; Peay *v.* Briggs, 2 Mill 98, 12 Am. Dec. 656.

Vermont.— Mills *v.* Catlin, 22 Vt. 98.

England.— Vincent *v.* Spicer, 22 Beav. 380, 2 Jur. N. S. 654, 25 L. J. Ch. 589, 4 Wkly. Rep. 667. See also Taylor *v.* Liverpool, etc., Steam Co., L. R. 9 Q. B. 546, 2 Aspin. 275, 43 L. J. Q. B. 205, 30 L. T. Rep. N. S. 714, 22 Wkly. Rep. 752; Bullen *v.* Denning, 5 B. & C. 842, 8 D. & R. 657, 4 L. J. K. B. O. S. 314, 29 Rev. Rep. 431, 11 E. C. L. 705; Doe *v.* Dixon, 9 East 15, 9 Rev. Rep. 501; Doe *v.* Williams, 1 H. Bl. 25, 2 Rev. Rep. 703.

See 16 Cent. Dig. tit. "Deeds," § 235.

Indentures as well as deeds poll are within the rule. Biddle *v.* Vandeventer, 26 Mo. 509.

If the grantor's intention cannot be ascertained, the deed should be construed in favor of the grantee. Lincoln *v.* Wilder, 29 Me. 169.

Where wrong results, the construction is against the party using the words. Rodger *v.* Comptoir D'Escompte de Paris, L. R. 2 P. C. 393, 38 L. J. P. C. 30, 21 L. T. Rep. N. S. 33, 5 Moore P. C. N. S. 538, 17 Wkly. Rep. 468, 16 Eng. Reprint 618.

8. Altman *v.* McBride, 4 Strobh. (S. C.) 208.

9. Patching *v.* Gubbins, 2 Eq. Rep. 7, 17 Jur. 1113, 1 Kay 1, 23 L. J. Ch. 45, 2 Wkly. Rep. 2.

10. Swan *v.* Morehouse, 6 D. C. 225; Biddle *v.* Vandeventer, 26 Mo. 500. See Lindus *v.* Melrose, 3 H. & N. 177, 4 Jur. N. S. 488, 27 L. J. Exch. 326, 6 Wkly. Rep. 441.

11. Swan *v.* Morehouse, 6 D. C. 225.

12. Hogg's Appeal, 22 Pa. St. 479.

13. Taylor *v.* St. Helens Corp., 6 Ch. D. 264, 46 L. J. Ch. 857, 37 L. T. Rep. N. S. 253, 25 Wkly. Rep. 885; Quebec *v.* North Shore R. Co., 27 Can. Supreme Ct. 102, interpretation in favor of vendors and against vendee.

14. *Connecticut.*— Merwin *v.* Morris, 71 Conn. 555, 42 Atl. 855.

Illinois.— Trotier *v.* St. Louis, etc., R. Co., 180 Ill. 471, 54 N. E. 487.

Kentucky.— Venable *v.* McDonald, 4 Dana 336; Miller *v.* Shackleford, 4 Dana 264; Sook *v.* Knowles, 1 Bibb 283.

Maryland.— Cook *v.* Carroll, 6 Md. 104.

Massachusetts.—Snow *v.* Orleans, 126 Mass. 453.

Missouri.— Whittelsey *v.* Kellogg, 28 Mo. 404.

Montana.—McGuigan *v.* Hennessy, 24 Mont. 202, 61 Pac. 1.

New Hampshire.— Dean *v.* Erskine, 18 N. H. 81.

New York.— Frier *v.* Jackson, 8 Johns. 495.

Pennsylvania.— Cox *v.* Freedley, 33 Pa. St. 124, 75 Am. Dec. 584; Vincent *v.* Huff, 8 Serg. & R. 381.

South Carolina.— Holmes *v.* Weinheimer, 66 S. C. 18, 44 S. E. 82.

Tennessee.— Memphis *v.* Waite, 102 Tenn. 274, 52 S. W. 161.

Texas.— Gardner *v.* Stell, 34 Tex. 561.

Virginia.— New River Mineral Co. *v.* Painter, 100 Va. 507, 42 S. E. 300.

West Virginia.— Snooks *v.* Wingfield, 52 W. Va. 441, 44 S. E. 277.

United States.— Brown *v.* Huger, 21 How. 305, 16 L. ed. 125; Reed *v.* Merrimac River Locks, etc., 8 How. 274, 12 L. ed. 1077.

Rule applies: When deed is offered in evidence (Bernstein *v.* Humes, 60 Ala. 582, 31 Am. Rep. 52); when intention of grantor is to be gathered from deed itself (McCutchen *v.* McCutchen, 9 Port. (Ala.) 650); to the legal sufficiency of the execution of certain conveyances offered in evidence (Stark *v.* Barrett, 15 Cal. 361); to determination of materiality and force of each and all the facts contained in the instrument (Cook *v.* Carroll, 6 Md. 104); and to the construction of the deed so far as the intention of the parties can be deduced therefrom (Reed *v.* Merrimac River Locks, etc., 8 How. (U. S.) 274, 12 L. ed. 1077).

15. McGuigan *v.* Hennessy, 24 Mont. 202, 61 Pac. 1; Cox *v.* Freedley, 33 Pa. St. 124, 75 Am. Dec. 584. See also Whittelsey *v.* Kellogg, 28 Mo. 404; Dean *v.* Erskine, 18 N. H. 81; Vincent *v.* Huff, 8 Serg. & R. (Pa.) 381; Gardner *v.* Stell, 34 Tex. 561; Brown *v.* Huger, 21 How. (U. S.) 305, 16 L. ed. 125.

Where an ambiguity arises out of collateral matter not in the deed, the explanation of the ambiguity is a question to be determined by the jury from the weight of the evidence. Rook *v.* Greenewald, 22 Pa. Super. Ct. 641.

Where more than one inference can be drawn from the language of a deed, and the inferences are dependent on certain facts in controversy, the effect of the deed is for the jury. Glover *v.* Gasque, 67 S. C. 18, 45 S. E. 113.

Whether a deed was to take effect on the day of its delivery, or on the day of its date, is a question for the jury, in determining whether the growing crops pass to the grantee. Kammrath *v.* Kidd, 89 Minn. 380, 95 N. W. 213.

depend upon the sense in which the words are used and upon facts *aliunde* and so become a mixed question of law and fact,[16] or there may be such a latent ambiguity, or such a necessity for the determination and application of extrinsic facts, or surrounding circumstances, or subsequent matters of legal admissibility, as that the question will become one for the consideration of the jury[17] subject to instructions by the court.[18]

2. RECITALS[19]— a. In General — (I) *As Evidence.* It is variously decided that the recitals in a deed as between the parties constitute evidence of the facts stated;[20] that they may be evidence against the grantee without operating as an estoppel,[21] or evidence generally without being conclusive of the facts;[22] or obligatory as full proof of an authentic act;[23] that they may be sufficient proof,[24] or be taken as *prima facie* true,[25] or raise a presumption of the truth as stated;[26] and it is also held that they are not evidence of the facts stated.[27]

(II) *Conclusiveness as Against Parties.* It is the general rule that all parties to a deed are bound by the recitals in it legitimately appertaining to the subject-matter. It applies not only to the parties immediately but to those claim-

16. East Hampton *v.* Vail, 151 N. Y. 463, 45 N. E. 1030 [*affirming* 71 Hun 94, 24 N. Y. Suppl. 583].

17. Thus where matter at issue is to be determined on extrinsic evidence as to the limits and boundaries of land (Humes *v.* Bernstein, 72 Ala. 546); where the *quo animo* of possession is material (Mims *v.* Sturdevant, 16 Ala. 154); where parol evidence is introduced to show the subject-matter (Carroll *v.* Miner, 1 Pa. Super. Ct. 439); where the doubt in the application of the descriptive portion to external objects arises from latent ambiguity (Reed *v.* Merrimac River Locks, etc., 8 How. (U. S.) 274, 12 L. ed. 1077); where parol evidence is given to remove a latent ambiguity (Symmes *v.* Brown, 13 Ind. 318); where the question is whether one is the grantee named (Halladay *v.* Gass, 51 N. Y. App. Div. 539, 64 N. Y. Suppl. 825); where the legal effect deducible from the terms of the deed, or from matters subsequent, showing the sense of the parties, may include or exclude the premises in controversy (Frier *v.* Jackson, 8 Johns. (N. Y.) 495); and where facts important to the construction are in dispute (Preston *v.* Robinson, 24 Vt. 583) the questions are for the jury.

18. Morse *v.* Weymouth, 28 Vt. 824; Preston *v.* Robinson, 24 Vt. 583.

19. Reference to recitals to aid construction see *infra*, V, A, 4, g.

20. Demeyer *v.* Legg, 18 Barb. (N. Y.) 14; Stoever *v.* Whitman, 6 Binn. (Pa.) 416.

Recital as to other deed not produced.— It is no objection to the admission of a later deed that it was given to supply a defect in a prior deed, where plaintiff is shown to be the sole heir thereunder; and the recital does not detract from the force of the later deed where, if a prior deed was valid, plaintiff had title through it, and if not, then the later deed transferred it. Boyce *v.* Stambaugh, 34 Mich. 348.

Where there are misrecitals the fact may be shown. Roe *v.* McNeill, 14 U. C. C. P. 424.

Words "has executed unto" import both a making and a delivery. Bagley *v.* McMickle, 9 Cal. 430.

21. Champlain, etc., R. Co. *v.* Valentine, 19 Barb. (N. Y.) 484.

22. Stoever *v.* Whitman, 6 Binn. (Pa.) 416; Bulley *v.* Bulley, L. R. 9 Ch. 739, 44 L. J. Ch. 79, 30 L. T. Rep. N. S. 848, 22 Wkly. Rep. 779; Neale *v.* Winter, 9 U. C. C. P. 394.

That an order for partition was made at a certain term is not conclusive by reason of a recital to that effect see Glover *v.* Ruffin, 6 Ohio 255.

23. Kerwin *v.* Hibernia Ins. Co., 28 La. Ann. 312.

24. Harman *v.* Stearns, 95 Va. 58, 27 S. E. 601; Edwards *v.* Brown, 1 Cromp. & J. 307, 9 L. J. Exch. O. S. 84, 1 Tyrw. 182, 3 Y. & J. 423; Hutchinson *v.* Collier, 27 U. C. C. P. 249; Nesbitt *v.* Rice, 14 U. C. C. P. 409.

25. Williamson *v.* Mayer, 117 Ala. 253, 23 So. 3.

26. Mumford *v.* Wardwell, 6 Wall. (U. S.) 423, 18 L. ed. 756.

27. Thus it has been held that recitals are not evidence of the contents of a deed (Kelly *v.* Power, 2 Ball & B. 236); nor of the existence of a release so as to bind the vendee, of land covered thereby, to pay the purchase-money (Smith *v.* Webster, 2 Watts (Pa.) 478); nor that the land had before been granted (Crump *v.* Thompson, 31 N. C. 491); nor as to the ownership and boundaries of land against one claiming a right of way over adjoining lands (Pettingill *v.* Porter, 8 Allen (Mass.) 1, 85 Am. Dec. 671); nor as to heirship (Ross *v.* Loomis, 64 Iowa 432, 20 N. W. 749; Costello *v.* Burke, 63 Iowa 361, 19 N. W. 247; Jones *v.* Sherman, 56 Miss. 559; Watson *v.* Gregg, 10 Watts (Pa.) 289, 36 Am. Dec. 176; Hovey *v.* Long, 33 N. Brunsw. 462); nor that one is a widow and heir (Soukup *v.* Union Invest. Co., 84 Iowa 448, 51 N. W. 167, 35 Am. St. Rep. 317); and a recital that the grantor is a corporation does not prove its corporate existence as against one claiming through another source of title (Sonoma County Water Co. *v.* Lynch, 50 Cal. 503).

Recital in unregistered instruments cannot affect title. Rutledge *v.* McLean, 12 U. C. Q. B. 205.

ing under them, to privies in blood, in estate, and in law.[28] But it is determined that recitals work no estoppel against the grantee where they are immaterial[29] or are in a deed poll.[30] And although one who has entered under a deed, but who did not execute it, is not concluded by a recital therein,[31] yet it is decided that the execution does not determine who are concluded or estopped, but the test is the intention, gathered from construing the instrument, and whether or not all have intended the statement to be true, or it is the statement of one party only.[32]

(iii) *Effect as to Third Persons.* The above general rule is limited in its operation to the persons therein specified, and it does not include strangers or third parties or those not claiming under the deed.[33]

28. Robbins *v.* McMillan, 26 Miss. 434; Fisk *v.* Flores, 43 Tex. 340. See also Carver *v.* Astor, 4 Pet. (U. S.) 1, 7 L. ed. 761; Bowman *v.* Taylor, 2 A. & E. 278, 4 L. J. K. B. 58, 4 N. & M. 264, 29 E. C. L. 142, and cases cited *infra*, note 33.

Although denied in an answer by defendant who claimed through a party who executed the deed, a recital may be taken to be true. Whatman *v.* Gibson, 2 Jur. 273, 7 L. J. Ch. 160, 9 Sim. 196.

Grantor is not bound by recitals of fact. Mehaffy *v.* Dobbs, 9 Watts (Pa.) 363.

Recital of an agreement in a deed is equivalent to an agreement made by the deed. Commonwealth Bank *v.* Vance, 4 Litt. (Ky.) 168.

Recital that land had become the property of D does not conclude the grantor as to the fee, and if there is a further recital that D's estate had been divested by the grantor's entry after breach of condition, one claiming under D, but not under the deed, is not estopped to deny its recital by having availed himself of the first as evidence of D's estate. Stoever *v.* Whitman, 6 Binn. (Pa.) 416.

Where some recitals are for and others against the grantor, the deed must be taken *in toto* or rejected, since the recitals cannot be changed to render them consistent. Barbour *v.* Watts, 2 A. K. Marsh. (Ky.) 290.

So the grantor in a deed poll and all who claim under the deed have been decided to be bound by its recitals, although they are not precluded from showing that the deed is defective and void. Blake *v.* Tucker, 12 Vt. 39.

29. Champlain, etc., R. Co. *v.* Valentine, 19 Barb. (N. Y.) 484.

30. Champlain, etc., R. Co. *v.* Valentine, 19 Barb. (N. Y.) 484; Minaker *v.* Ash, 10 U. C. C. P. 363.

31. Tull *v.* Owen, 4 Jur. 503, 9 L. J. Exch. Eq. 33, 4 Y. & Coll. 192.

Grantee's assent must appear in some way to the contract, it not being sufficient to insert a clause in the deed that the grantee assumes encumbrance. Boisot *v.* Chandler, 82 Ill. App. 261.

32. Stronghill *v.* Buck, 14 Q. B. 781, 14 Jur. 741, 19 L. J. Q. B. 209, 68 E. C. L. 781.

There are also other exceptions to or qualifications of the general rule. Thus a party to a deed is not estopped by recitals in anterior deeds, although the title is derived through them (Doe *v.* Shelton, 3 A. & E. 265, 1 Harr. & W. 287, 4 L. J. K. B. 167, 4 N. & M. 857, 30 E. C. L. 137. But see Lawlor *v.* Murchison, 4 Grant Ch. (U. C.) 284, as to erroneous recital in prior deed), unless the recital is also contained in the subsequent deed (Gwyn *v.* North Canal Nav. Co., L. R. 3 Exch. 209, 37 L. J. Exch. 122, 18 L. T. Rep. N. S. 688, 16 Wkly. Rep. 1209. See Thompson *v.* Bennett, 22 U. C. C. P. 393. *Compare* Farr *v.* Sheriffe, 4 Hare 512, 10 Jur. 630, 15 L. J. Ch. 89, 30 Eng. Ch. 512). Again no strict estoppel exists, under a deed of settlement, in favor of the transferee of a mortgage which is not within the scope of the settlement (Williams *v.* Pinckney, 67 L. J. Ch. 34, 77 L. T. Rep. N. S. 700 [*affirming* 66 L. J. Ch. 551]); nor does a recital that a deed issued to a certain person control as to the identity of the grantee (Billings *v.* Kankakee Coal Co., 67 Ill. 489). And a recital contrary to fact, introduced by mistake of fact, does not estop a party in equity to controvert the same. Brooke *v.* Haymes, L. R. 6 Eq. 25. Nor is there an estoppel against a party or grantee, where the action is wholly collateral to the deed. *Ex p.* Morgan, 2 Ch. D. 72, 45 L. J. Bankr. 36, 34 L. T. Rep. N. S. 329, 24 Wkly. Rep. 414; Minaker *v.* Ash, 10 U. C. C. P. 363.

33. Alexander *v.* Campbell, 74 Mo. 142; Gaylord *v.* Respass, 92 N. C. 553; Kearney *v.* Fagan, 2 Del. Co. (Pa.) 462; Polson *v.* Ingram, 22 S. C. 541.

Rule as to third parties applies to recitals of authority of persons making the deed (Mordecai *v.* Beal, 8 Port. (Ala.) 529); to one claiming under title wholly independent of parties or privies (Lamar *v.* Turner, 48 Ga. 329); to recitals in a deed placed on record (Stumpf *v.* Osterhage, 94 Ill. 115); to an adversary claimant (Smith *v.* Shackleford, 9 Dana (Ky.) 452); to a vendor's deed as against judgment creditors (Buchanan *v.* Kimes, 2 Baxt. (Tenn.) 275); to a recital that the grantees are the only heirs, as against other heirs (Mariposa Land, etc., Co. *v.* Silliman, (Tex. Civ. App. 1895) 32 S. W. 843. See also Dixon *v.* Monroe, 112 Ga. 158, 37 S. E. 180); and to a recital that deed was made in pursuance of a contract of sale of the premises with a person of whom the grantee was assignee, and as such entitled to the conveyance, and such recital does not operate as constructive notice, so as to require a mortgagee in good faith to examine the contract or assignment for **latent defects in the title or latent equities**

b. Of Consideration — (i) *In General.* A consideration for a deed is implied[34] from the words "sold," etc., in the recital,[35] and a bargain and sale deed is good, although it does not express that the consideration money has been paid.[36] A deed is also valid in law, whether the consideration has been actually paid or not, where there is a recital of its payment.[37] Nor does a false statement of the consideration operate as a nullification.[38]

(ii) *As Evidence.* The recital of a consideration is *prima facie* proof[39] of the payment of a valuable one;[40] and if the consideration is expressed in dollars that amount will be presumed to be the agreed value of the property and the actual consideration until rebutted by evidence.[41] In the absence of evidence to the contrary the expressed consideration will be held to be the true and only one.[42] The ownership of the money paid may also be evidenced by the recital.[43] The recital of the consideration is, however, only *prima facie* evidence.[44] So

of the assignor (Acer *v.* Westcott, 46 N. Y. 384. 7 Am. Rep. 355 [*reversing* 1 Lans. 193]).

Recitals in an ancient deed do not conclude a stranger unless some part of the premises has been held under the deed. Schermerhorn *v.* Negus, 2 Hill (N. Y.) 335. See Deery *v.* Cray, 5 Wall. (U. S.) 795, 18 L. ed. 653.

Where, however, a purchaser at a sheriff's sale obtains a certificate and assigns it to secure a loan and the assignee procures the deed in which the assignment was copied, to himself from the sheriff, and sells the land, the vendee takes it with notice of recitals in the assignment, and of the assignor's equity of redemption. Wagner *v.* Winter, 122 Ind. 57, 23 N. E. 754.

34. Brown *v.* Chambersburg Bank, 3 Pa. St. 187.

35. Reaves *v.* Ore Knob Copper Co., 74 N. C. 593.

36. Brocket *v.* Foscue, 8 N. C. 64.

37. Winans *v.* Peebles, 31 Barb. (N. Y.) 371.

Quitclaim deed is not invalidated because the nominal consideration in its recital is not actually paid. Nathans *v.* Arkwright, 66 Ga. 179.

Recital of payment for services shows a sufficient intention to pass the title. Howe *v.* Warnack, 4 Bibb (Ky.) 234.

Recital of payment to a third person does not constitute any objection to the deed. Holley *v.* Curtis, 3 How. (Miss.) 230.

38. Stewart's Appeal, 98 Pa. St. 377.

False allegation of payment of consideration does not entail nullity. McAvoy *v.* Huot, 1 Quebec 97.

False statement of the consideration of a contract on which a conveyance is based is only a ground of reformation of the conveyance. Harrison *v.* Guest, 8 H. L. Cas. 481.

39. Leggat *v.* Leggat, 13 Mont. 190, 33 Pac. 5; Brown *v.* Chambersburg Bank, 3 Pa. St. 187.

40. *Alabama.*— Saunders *v.* Hendrix, 5 Ala. 224.

Kansas.— Ruth *v.* Ford, 9 Kan. 17.

Maine.— Bassett *v.* Bassett, 55 Me. 127.

Maryland.— Higdon *v.* Thomas, 1 Harr. & G. 139.

Minnesota.— McKusick *v.* Washington County Com'rs, 16 Minn. 151.

New York.—Todd *v.* Eighmie, 4 N. Y. App. Div. 9, 38 N. Y. Suppl. 304; McBurney *v.* Cutler, 18 Barb. 203; Van Bokkelen *v.* Taylor, 4 Thomps. & C. 422.

Oregon.— Stark *v.* Olney, 3 Oreg. 88.

Pennsylvania.— Wilt *v.* Franklin, 1 Binn. 502, 2 Am. Dec. 474; Hartley *v.* McAnulty, 4 Yeates 95, 2 Am. Dec. 396.

Tennessee.— Cocke *v.* Trotter, 10 Yerg. 213.

United States.— Patrick *v.* Leach, 2 Fed. 120, 1 McCrary 250.

See 16 Cent. Dig. tit. "Deeds," § 260.

Recital of amounts as bearing interest from anterior dates imports payment at the date of the deed of the sums specified, with interest to that time. Ricketts *v.* Lambert, 3 Bush (Ky.) 670.

That a price is paid as a consideration for a transfer is implied from a recital that the grantor has sold to the grantee certain premises. De Merle *v.* Mathews, 26 Cal. 455.

Where a money consideration and personal services are expressed, the former in a deed and the latter in a contemporaneous agreement which is part of the deed, the law presumes that money and personal services are the true consideration. Vaugine *v.* Taylor, 18 Ark. 65.

Where the deed expresses a valuable consideration, the relations of the parties and entry raise no presumption that the land was intended as a gift. Deloach *v.* Turner, 7 Rich. (S. C.) 143, deed from father-in-law to son-in-law.

41. Clements *v.* Landrum, 26 Ga. 401.

If only the word "dollars" is left in a deed of bargain and sale, the separate amounts written therein having been erased, there is no consideration to support it. Catlin Coal Co. *v.* Lloyd, 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216.

If the consideration is "—— dollars" the deed is not for that reason inadmissible in evidence. Jewell *v.* Walker, 109 Ga. 241, 34 S. E. 337.

42. Haywood *v.* Moore, 2 Humphr. (Tenn.) 584.

43. Stall *v.* Fulton, 30 N. J. L. 430, deed to wife and statement that money belonged to her.

44. *Illinois.*— Ayres *v.* McConnel, 15 Ill. 230.

while the acknowledgment of payment or of the receipt of the consideration or purchase-money is *prima facie* proof of such fact,[45] it is only *prima facie* evidence,[46] and is open to explanation and may be disproved[47] by clear and convincing evidence.[48] And it is also decided that an acknowledgment by the bargainor in a deed that he has received the consideration money is a bar in a court of law to any action for the recovery thereof.[49]

(III) *Effect as to Third Persons.* The recital of a consideration is not *prima facie* evidence of payment, where the deed is attacked as fraudulent as against creditors of the grantor.[50] Nor, it is decided, is the acknowledgment of a receipt in a deed of payment any evidence thereof as against strangers to the instrument.[51]

3. Construing Instruments Together and Merger of Previous Agreements — a. Rules as to Separate or Different Instruments. In order to determine what was intended by a deed, separate or different instruments may be construed together, where they are executed at the same time or simultaneously, and relate to the

Iowa.— Trayer *v.* Reeder, 45 Iowa 272; Lawton *v.* Buckingham, 15 Iowa 22.

Kentucky.— Hutchinson *v.* Sinclair, 7 T. B. Mon. 291.

Michigan.— Mowrey *v.* Vandling, 9 Mich. 39.

Missouri.— Hogel *v.* Lindell, 10 Mo. 483; Bridges *v.* Russell, 30 Mo. App. 258.

New Hampshire.— Pritchard *v.* Brown, 4 N. H. 397, 17 Am. Dec. 431.

North Carolina.— Medley *v.* Mask, 39 N. C. 339.

Pennsylvania.— Watson *v.* Blaine, 12 Serg. & R. 131, 14 Am. Dec. 669; Weigley *v.* Weir, 7 Serg. & R. 309.

Rhode Island.— Hedley *v.* Briggs, 2 R. I. 489.

South Carolina.— Daniels *v.* Moses, 12 S. C. 130.

Tennessee.— Bayliss *v.* Williams, 6 Coldw. 440.

Texas.— Sachse *v.* Loeb, (Civ. App. 1902) 69 S. W. 460.

Wisconsin.— Reynolds *v.* Vilas, 8 Wis. 471, 76 Am. Dec. 238.

United States.— Mills *v.* Dow, 133 U. S. 423, 10 S. Ct. 413, 33 L. ed. 717.

See 16 Cent. Dig. tit. "Deeds," § 260.

Parol evidence as to consideration see Evidence.

A deed is conclusive only so far as the consideration expressed is necessary to support the conveyance. McCrea *v.* Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103.

Recital that a lien is retained till the payment of the purchase-money does not show that it was not paid when the land was bought. Arnold *v.* Harris, (Tenn. Ch. App. 1898) 52 S. W. 715.

Where the conveyance of other land to the grantor is the consideration recited the presumption does not arise that such land was conveyed to the grantor, but the recital is merely evidence of the fact. Smith *v.* Dunman, 9 Tex. Civ. App. 319, 29 S. W. 432.

45. Lacustrine Fertilizer Co. *v.* Lake Guano, etc., Fertilizer Co., 82 N. Y. 476 [*affirming* 19 Hun 47]; Wood *v.* Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Dooper *v.* Noelke, 5 Daly (N. Y.) 413.

Acknowledgment and acquittance is proof that money was paid for and on account of the property conveyed. Farmer *v.* Barnes, 56 N. C. 109.

As between grantees under prior and subsequent deeds of the same premises and of the same grantor the recital of a receipt of a valuable consideration in the latter deed is not evidence of the fact. Galland *v.* Jackman, 26 Cal. 79, 85 Am. Dec. 172.

"Paid to us annually to our satisfaction" may mean future payments and not past. Gage *v.* Hoyt, 58 Vt. 536, 3 Atl. 318.

Prior or simultaneous payment is not shown by a recital that "said sum" has "this day" been "advanced and paid." Mills *v.* Dow, 133 U. S. 423, 10 S. Ct. 413, 33 L. ed. 717.

Recitals by attorney in fact of an incompetent person are *prima facie* proof of the payment of the consideration. Williams *v.* Sapieha, (Tex. Civ. App. 1900) 59 S. W. 947.

Words "value received" import a consideration sufficient to raise a use. Jackson *v.* Alexander, 3 Johns. (N. Y.) 484, 3 Am. Dec. 517.

But such recital is not prima facie evidence where the expressed consideration is the maintenance of the grantor for life. Maker *v.* Maker, 74 Me. 104. Nor is such acknowledgment evidence on the rescission of the deed that the grantor was to return the consideration to the grantee. Farmer *v.* Barnes, 56 N. C. 109.

46. Gordon *v.* Gordon, 1 Metc. (Ky.) 285; Morris *v.* Daniels, 35 Ohio St. 406; Depew *v.* Clark, 1 Phila. (Pa.) 432.

47. Hebbard *v.* Haughian, 70 N. Y. 54; Stackpole *v.* Robbins, 47 Barb. (N. Y.) 212 [*affirmed* in 48 N. Y. 665]; Whitbeck *v.* Whitbeck, 9 Cow. (N. Y.) 266, 18 Am. Dec. 503.

48. Stearns *v.* Stearns, 23 N. J. Eq. 167; Herbert *v.* Scofield, 9 N. J. Eq. 492.

49. Kimball *v.* Walker, 30 Ill. 482; Hudson *v.* Critcher, 53 N. C. 485; Mendenhall *v.* Parish, 53 N. C. 105, 78 Am. Dec. 269; Brockett *v.* Foscue, 8 N. C. 64. See Pennsylvania Salt Mfg. Co. *v.* Neel, 54 Pa. St. 9.

50. Whitaker *v.* Garnett, 3 Bush (Ky.) 402; Bolton *v.* Jacks, 6 Rob. (N. Y.) 166.

51. Lloyd *v.* Lynch, 28 Pa. St. 419, 70 Am. Dec. 137; Depew *v.* Clark, 1 Phila. (Pa.) 432; Simmons Creek Coal Co. *v.* Doran, 142

same subject-matter and are between the same parties,[52] or are parts of the same transaction;[53] where a deed is made to correct a mistake and supply an omission in a previous deed between the same parties;[54] where a separate instrument contains a declaration of the grantor's objects and purposes;[55] where a deed has been executed in compliance with a bond previously given by the parties for a deed;[56] where one instrument is attached to, and made a part of, the other;[57] and where there is an incorporation by reference to other instruments,[58] records

U. S. 417, 12 S. Ct. 239, 35 L. ed. 1063. But see *contra*, Jackson *v.* McChesney, 7 Cow. (N. Y.) 360, 17 Am. Dec. 521.

No evidence as against prior unrecorded deed see Morris *v.* Daniels, 35 Ohio St. 406.

Not evidence of payment of value against the owner of a prior equity see Lakin *v.* Sierra Buttes Gold Min. Co., 25 Fed. 337.

52. Cloyes *v.* Sweetser, 4 Cush. (Mass.) 403; Rexford *v.* Marquis, 7 Lans. (N. Y.) 249; Raymond *v.* Wheeler, 9 Cow. (N. Y.) 295; Jackson *v.* Dunsbagh, 1 Johns. Cas. (N. Y.) 91; Howell *v.* Howell, 29 N. C. 491, 47 Am. Dec. 335; Kruse *v.* Prindle, 8 Oreg. 158.

Rule applies to an absolute bill of sale of chattels and a bond executed contemporaneously (Prater *v.* Darby, 24 Ala. 496); to a warranty deed, in consideration of maintenance, and a mortgage (Richter *v.* Richter, 111 Ind. 456, 12 N. E. 698); to a deed in trust and reconveyance to a wife (Early *v.* Douglass, 110 Ky. 813, 62 S. W. 860, 23 Ky. L. Rep. 298); to a conveyance and condition of defeasance between joint purchasers (Honore *v.* Hutchings, 8 Bush (Ky.) 687); to partition deeds mutually given of parts of premises, before held in common (Mitchell *v.* Smith, 67 Me. 338); to two deeds, one conveying one parcel with an easement in another parcel and the other conveying the latter parcel but reserving the easement (Knight *v.* Dyer, 57 Me. 174, 99 Am. Dec. 765); to a quitclaim deed, in connection with a trust deed constituting a settlement with power of revocation (Miller *v.* Lullman, 11 Mo. App. 419 [*affirmed* in 81 Mo. 311]); to a deed and bond for performance (Hills *v.* Miller, 3 Paige (N. Y.) 254, 24 Am. Dec. 218); to deeds of an executor and devisees to the same parties, and one contained exceptions and the other did not (Anderson *v.* Harvey, 10 Gratt. (Va.) 386); and to a conveyance and deed to secure the payment of purchase-money (George *v.* Cooper, 15 W. Va. 666).

Doctrine of relation applies where several acts are concurrent in making a conveyance, and they will all be treated as having taken place at the time when the original act was done. Welch *v.* Dutton, 79 Ill. 465.

General purpose of the whole, where instruments are construed together, apparent therefrom, will control the apparent purpose of one. Ford *v.* Belmont, 7 Rob. (N. Y.) 97.

When not relating to the same subject-matter two instruments are not to be construed together. Allen *v.* Parker, 27 Me. 531.

53. *Alabama.*— Robbins *v.* Webb, 68 Ala. 393.

Illinois.— Torrence *v.* Shedd, 112 Ill. 466.

Indiana.— Leach *v.* Rains, 149 Ind. 152, 48 N. E. 858; Amos *v.* Amos, 117 Ind. 19, 19 N. E. 539.

Kansas.— Harrison *v.* Andrews, 18 Kan. 535.

Maine.— Gammon *v.* Freeman, 31 Me. 243.

Michigan.— Johnson *v.* Moore, 28 Mich. 3.

Ohio.— White *v.* Brocaw, 14 Ohio St. 339.

England.— Whitbread *v.* Smith, 3 De G. M. & G. 727, 2 Eq. Rep. 377, 18 Jur. 475, 23 L. J. Ch. 611, 2 Wkly. Rep. 177, 52 Eng. Ch. 567.

See 16 Cent. Dig. tit. "Deeds," § 261 *et seq.*

Deeds dated on consecutive days may form part of one transaction. Ford *v.* Stuart, 15 Beav. 493, 21 L. J. Ch. 514. See Benham *v.* Newell, 24 L. J. Ch. 424, 3 Wkly. Rep. 333.

Whether deeds are part of the same transaction is determined by the surrounding circumstances and not by express reference merely. Harman *v.* Richards, 10 Hare 81, 22 L. J. Ch. 1066, 44 Eng. Ch. 78.

54. King *v.* Norfolk, etc., R. Co., 90 Va. 210, 17 S. E. 868.

Receipt for a deed contained an agreement that errors of calculation or the like in the deed might be corrected, and it was decided that it was designed to cover only miscalculations as to the amount of liens mentioned in the deed, and not to remedy an important omission in it. Wager *v.* Chew, 15 Pa. St. 323.

55. Ford *v.* Belmont, 7 Rob. (N. Y.) 97; Norton *v.* Perkins, 67 Vt. 203, 31 Atl. 148.

56. Stuyvesant *v.* Western Mortg., etc., Co., 22 Colo. 28, 43 Pac. 144.

57. Threadgill *v.* Bickerstaff, 7 Tex. Civ. App. 406, 26 S. W. 739.

58. Jordan *v.* Jordan, 65 Ala. 301; Watson *v.* Boylston, 5 Mass. 411; Hoyatt *v.* Phifer, 15 N. C. 273; Matter of North of England Joint Stock Banking Co., 1 De G. M. & G. 576, 16 Jur. 435, 22 L. J. Ch. 194, 50 Eng. Ch. 444.

Contract and deed should be construed together when the deed recites that the contract is to be made a part thereof, and provides that it shall conform in all respects to the contract. Chapman *v.* Lee, 47 Ala. 143.

If the deed is not so incorporated by reference the instruments will not be construed together (Miller *v.* Scolfield, 12 Conn. 335), especially where the statute requires such reference to a defeasance (Kingsley *v.* Holbrook, 45 N. H. 313, 86 Am. Dec. 173). But see Robbins *v.* Webb, 68 Ala. 393, where the instruments are parts of the same transaction.

Recital that a deed was executed "per

thereof,[59] and to orders or judgments;[60] but it has been determined that this is not necessarily so.[61]

b. Indorsements or Memoranda. An indorsement or memorandum upon the deed should, when so made as to constitute a part thereof, be read into the body of the deed and construed with the same in its entirety in ascertaining the parties' intention.[62] It is decided, however, that indorsements on the back of a deed are no part thereof,[63] and that a memorandum on the back of a transfer of title to a third party is not evidence of title without proof of execution and delivery.[64]

c. Merger of Previous Agreements. As a general rule a deed made in full execution of a contract of sale of land merges the provisions of the contract therein, and this rule extends to and includes all prior negotiations and agreements leading up to the execution of the deed,[65] all prior purposes, stipula-

agreement" does not incorporate the agreement so that covenants therein contained will run with the land. Close *v.* Burlington, etc., R. Co., 64 Iowa 149, 19 N. W. 886.

Reference to schedules, maps, plans, and inventories see *Ex p.* Jardine, L. R. 10 Ch. 332, 44 L. J. Bankr. 58, 32 L. T. Rep. N. S. 681, 23 Wkly. Rep. 736; Barton *v.* Dawes, 10 C. B. 261, 19 L. J. C. P. 302, 70 E. C. L. 261; Micklethwait *v.* Newlay Bridge Co., 33 Ch. D. 133, 51 J. P. 132, 55 L. T. Rep. N. S. 336; Weeks *v.* Maillardet, 14 East 568; Manning *v.* Fitzgerald, 1 F. & F. 633; Willis *v.* Watney, 51 L. J. Ch. 181, 45 L. T. Rep. N. S. 739, 30 Wkly. Rep. 424; Hutchinson *v.* Morritt, 3 Y. & Coll. 547; McEachren *v.* Ferguson, 5 N. Brunsw. 242; Fullerton *v.* Brundige, 20 Nova Scotia 182, 8 Can. L. T. 378.

59. Farrar *v.* Fessenden, 39 N. H. 268; Clough *v.* Bowman, 15 N. H. 504.

Terms of a deed cannot be restricted or extended by evidence of other deeds on record, but not referred to in it. Butler *v.* Gale, 27 Vt. 739.

60. Hacker *v.* Hoover, 66 S. W. 382, 23 Ky. L. Rep. 1848 (order of court); Craft *v.* Germany, 34 Miss. 118 (order of court).

Agreed construction approved by the court should be determined by the language of the deed rather than by decree. King *v.* Rea, 56 Ind. 1.

61. Terms of the referring and referred to instrument may be so distinct and variant as that the latter does not determine the character of the former. Jordan *v.* Jordan, 65 Ala. 301. That express reference is not conclusive test see Harman *v.* Richards, 10 Hare 81, 22 L. J. Ch. 1066, 44 Eng. Ch. 78.

62. Rule applies: To covenant of warranty made at the same time with the original deed and indorsed thereon (Coster *v.* Monroe Mfg. Co., 2 N. J. Eq. 467); to a memorandum qualifying the terms of the deed and written thereon at the grantor's request before execution (Doniphan *v.* Paxton, 19 Mo. 288); to an indorsement written at the time of the sealing and delivery but after the parties have signed (Lyburn *v.* Warrington, 1 Stark. 162, 2 E. C. L. 69); where the indorsement is affirmatively shown to have been upon it at the time it was executed (Emerson *v.* Murray, 4 N. H. 171, 17 Am. Dec. 407); to a memorandum operating as an admission and bringing the maker within the terms of a recital (Doe *v.* Stone, 3 C. B. 176, 10 Jur. 480, 15 L. J. C. P. 234, 54 E. C. L. 176); to an indorsement on the back of a deed by the grantee transferring chattels, witnessed and coupled with delivery (Tutt *v.* Morgan, 18 Tex. Civ. App. 627, 42 S. W. 578, 46 S. W. 122); to a bill of sale of premises, executed by the vendor by her attorney in fact and indorsed on the back by the vendor herself transferring all her title (Noyes *v.* French Lumbering Co., 80 Minn. 397, 83 N. W. 385); to an indorsement on the back of the deed of an assignment (Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13; Ala. Code, § 2694); to an assignment duly signed and acknowledged (Harlowe *v.* Hudgins, 84 Tex. 107, 19 S. W. 364, 31 Am. St. Rep. 21); to an agreement indorsed, signed, sealed, acknowledged, and recorded (Baldwin *v.* Jenkins, 23 Miss. 206); and to an indorsement on an agent's own deed, stating that the premises were sold under power of attorney and that he executed it only under such power, which indorsement was signed as attorney for the owner (Gerdes *v.* Moody, 41 Cal. 335).

Rule does not apply where the indorsement was made subsequently to the execution. Williams *v.* Handley, 3 Bibb (Ky.) 10.

Indorsement which is too vague, uncertain, and informal conveys no title. Turner *v.* Moore, 1 Brev. (S. C.) 236.

63. Allen *v.* Allen, 48 Minn. 462, 51 N. W. 473. See also cases cited *supra*, note 62.

64. Harrell *v.* Culpepper, 47 Ga. 635.

Assignment on back passing only equitable title at the most see Dupont *v.* Wertheman, 10 Cal. 354.

In equity an indorsement of transfer is enforceable, although it gives no legal title. Porter *v.* Read, 19 Me. 363. See Bentley *v.* Deforest, 2 Ohio 221, 15 Am. Dec. 546.

65. *Alabama.*—Carter *v.* Beck, 40 Ala. 599.

California.— Bryan *v.* Swain, 56 Cal. 616; Peabody *v.* Phelps, 9 Cal. 213.

District of Columbia.— Sawyer *v.* Weaver, 2 MacArthur 1.

Illinois.— Douglas *v.* Union Mut. L. Ins. Co., 127 Ill. 101, 20 N. E. 51.

Indiana.— Carr *v.* Hays, 110 Ind. 408, 11 N. E. 25; Coleman *v.* Hart, 25 Ind. 256; Beasley *v.* Phillips, 20 Ind. App. 182, 50 N. E. 488.

Iowa.— Davenport *v.* Whisler, 46 Iowa 287.

Kentucky.— Lynch *v.* Sanders, 9 Dana 59; Sharp *v.* Carlile, 5 Dana 487.

Maryland.— West Boundary Real Estate

tions,[66] and oral agreements,[67] all collateral promises,[68] including promises made contemporaneously with the execution of the deed.[69] A deed is not, however, always a merger of the articles of agreement, etc.;[70] nor are a ven-

Co. *v.* Bayles, 80 Md. 495, 31 Atl. 442; Worthington *v.* Bullitt, 6 Md. 172.

Massachusetts.— Atty.-Gen. *v.* Whitney, 137 Mass. 450.

Michigan.— Martin *v.* Hamlin, 18 Mich. 354, 100 Am. Dec. 181.

Minnesota.— Slocum *v.* Bracy, 55 Minn. 249, 56 N. W. 826, 43 Am. St. Rep. 499; Griswold *v.* Eastman, 51 Minn. 189, 53 N. W. 542; Donlon *v.* Evans, 40 Minn. 501, 42 N. W. 472; Fritz *v.* McGill, 31 Minn. 536, 18 N. W. 753.

New Hampshire.— Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575; Bullen *v.* Runnels, 2 N. H. 255, 9 Am. Dec. 55.

New Jersey.— Davis *v.* Clark, 47 N. J. L. 338, 1 Atl. 239; Long *v.* Hartwell, 34 N. J. L. 116.

New York.— Disbrow *v.* Harris, 122 N. Y. 362, 25 N. E. 356 [*reversing* 55 N. Y. Super. Ct. 433, 14 N. Y. St. 723]; Gerhardt *v.* Sparling, 49 Hun 1, 1 N. Y. Suppl. 486; Carr *v.* Roach, 2 Duer 20; Houghtaling *v.* Lewis, 10 Johns. 297; Howes *v.* Barker, 3 Johns. 506, 3 Am. Dec. 526.

Ohio.— Roberts *v.* Elmore, 3 Ohio Dec. (Reprint) 208, 4 Wkly. L. Gaz. 393.

Pennsylvania.— Harbold *v.* Kuster, 44 Pa. St. 392; Shontz *v.* Brown, 27 Pa. St. 123; Jones *v.* Wood, 16 Pa. St. 25; Colvin *v.* Schell, 1 Grant 226; Cronister *v.* Cronister, 1 Watts & S. 442; Creigh *v.* Beelin, 1 Watts & S. 83; Haggarty *v.* Fagan, 2 Penr. & W. 533; McKennan *v.* Doughman, 1 Penr. & W. 417; Seitzinger *v.* Weaver, 1 Rawle 377; Crotzer *v.* Russel, 9 Serg. & R. 78; Thomas *v.* Henderson, 4 Kulp 390; *In re* Pittston Road, 4 Kulp 305.

South Carolina.— St. Phillips Church *v.* Zion Presb. Church, 23 S. C. 297.

United States.— Van Ness *v.* Washington, 4 Pet. 232, 7 L. ed. 842.

England.— Leggott *v.* Barrett, 15 Ch. D. 306, 51 L. J. Ch. 90, 43 L. T. Rep. N. S. 641, 28 Wkly. Rep. 962.

See 16 Cent. Dig. tit. "Deeds," § 266.

Deed is a complete relinquishment of conflicting reservations in any prior executory contract relative thereto. Horner *v.* Lowe, 159 Ind. 406, 64 N. E. 218; Clifton *v.* Jackson Iron Co., 74 Mich. 183, 41 N. W. 891, 16 Am. St. Rep. 621.

Deed with full covenants estops the grantor, as against the grantee, from showing that the sale was by parol agreement subject to reservation or encumbrance. Wickersham *v.* Orr, 9 Iowa 253, 74 Am. Dec. 348.

66. Williams *v.* Hathaway, 19 Pick. (Mass.) 387.

67. Waldron *v.* Toledo, etc., R. Co., 55 Mich. 420, 21 N. W. 870; Folsom *v.* Great Falls Mfg. Co., 9 N. H. 355; Pasley *v.* English, 5 Gratt. (Va.) 141.

68. Share *v.* Anderson, 7 Serg. & R. (Pa.) 43, 10 Am. Dec. 421.

69. Hunt *v.* Amidon, 4 Hill (N. Y.) 345, 40 Am. Dec. 283.

70. Selden *v.* Williams, 9 Watts (Pa.) 9. See also Wille *v.* Ellis, 22 Tex. Civ. App. 462, 54 S. W. 922.

Deed is not a merger: Where the written negotiations provide for the doing or not doing of an act necessary to the proposed use of the land, and the same is not inserted specifically in the deed, so as to be enforceable in equity (Shelby *v.* Chicago, etc., R. Co., 143 Ill. 385, 32 N. E. 438 [*affirming* 42 Ill. App. 339]); where there is a deed, and also a second one between the same parties for the same estate (Kenrick *v.* Smick, 7 Watts & S. (Pa.) 41); where the contract of the vendor is to give immediate possession (Williams *v.* Frybarger, 9 Ind. App. 558, 37 N. E. 302); where there are incidental covenants (Colvin *v.* Schell, 1 Grant (Pa.) 226); where the agreement was as to matter not consummated by the deed, of a different nature and collateral to it (Harbold *v.* Kuster, 44 Pa. St. 392); where the vendor by oral agreement assumes obligations collateral to the conveyance of title (Stewart *v.* Trimble, 15 Pa. Super. Ct. 513); where the sale was by parol agreement, subject to a reservation or encumbrance, in which case as between the grantee and a third party claiming the benefit of the encumbrance the claimant may show parol agreement creating the same and notice thereof to the grantee (Wickersham *v.* Orr, 9 Iowa 253, 74 Am. Dec. 348); where there is an oral contract for an exchange of lands, and one of the parties agrees to satisfy and discharge the mortgage on his lands (Bennett *v.* Abrams, 41 Barb. (N. Y.) 619); where the contract is to convey land and also to sell the buildings at a price to be thereafter adjusted (Laflin *v.* Howe, 112 Ill. 253); where there is a recorded contract for the sale of land and also of coal beneath the surface of an adjoining tract by an equitable owner (Lulay *v.* Barnes, 172 Pa. St. 331, 34 Atl. 52); where the covenant is to indemnify the vendee against all costs, charges, damages, etc., and the vendee retains possession of the contract and it is not contained in the deed (Cox *v.* Henry, 32 Pa. St. 18); where the grantee absolutely agreed to assume and pay the taxes (Sage *v.* Truslow, 88 N. Y. 240, 14 N. Y. Wkly. Dig. 77 [*affirming* 11 N. Y. Wkly. Dig. 211]); where the agreement is to refund the purchase-money if the title fails, and the deed contains no warranty of title (Close *v.* Zell, 141 Pa. St. 390, 21 Atl. 770, 23 Am. St. Rep. 296); where there is a guaranty of title, and a subsequent conveyance contains only a special warranty (Drinker *v.* Byers, 2 Penr. & W. (Pa.) 528); where the promise by the lessor who conveyed to the lessee is to indemnify the latter for the improvements if the title failed (Richardson *v.* Gosser, 26 Pa. St. 335); where the contract provides for the increase

dor's[71] or a purchaser's covenants necessarily merged or discharged;[72] and a parol agreement may be suspended by the subsequently executed instrument.[73] The question of merger has also been declared to be one of construction, to be gathered from a consideration of the entire contents of the instruments,[74] and the agreement upon which the deed is founded may be admissible or referred to to explain an uncertainty[75] or ambiguity in the latter.[76] But one claiming under other representations and agreements than those embodied in the deed must make out his case by clear and certain proofs.[77] Again the general rule is subject to the further limitation, qualification, or exception that there has been no fraud or relievable mistake,[78] no misconception of the deed by either party,[79] and no intent to the contrary.[80]

4. Repugnant or Conflicting Parts — a. Intention of Parties.[81] The strictness of the ancient rule as to repugnancy in deeds is much relaxed,[82] so that in this as in other cases of construction if clauses or parts are conflicting or repugnant the intention is gathered from the whole instrument[83] instead of from particular clauses,[84] and if it is the clear intent of the grantor that apparently inconsistent provisions shall all stand it will be given that effect if possible.[85] Again a clause should not be construed as repugnant to the grant and therefore void so as to defeat the manifest intention of the parties.[86]

b. Consistency Between Parts. In case of repugnancy all the parts of a deed should be made to harmonize if practicable upon a construction of the whole instrument.[87] If both parts of a deed may well stand together consistently with

or rebate of the purchase-money in proportion to any excess or deficiency in the quantity of land (Witbeck *v.* Waine, 16 N. Y. 532); where the deed is of one tract, and the grantor under an executory contract agreed to convey two tracts (Brown *v.* Moorhead, 8 Serg. & R. (Pa.) 569); and where there is a prior parol warranty of the quality of the land so as to preclude a recovery of damages for breach (Saville *v.* Chalmers, 76 Iowa 325, 41 N. W. 30).

71. Brennan *v.* Schellhamer, 13 N. Y. Suppl. 558.

72. Reid *v.* Sycks, 27 Ohio St. 285.

73. Worthington *v.* Bullitt, 6 Md. 172.

74. Atwood *v.* Norton, 27 Barb. (N. Y.) 638.

Agreement is not to be regarded if the deed be so expressed as that a reasonable construction can be given it, and when so given, it does not plainly appear to be at variance with such agreement. Hogan *v.* Delaware Ins. Co., 12 Fed. Cas. No. 6,582, 1 Wash. 419.

75. Helmholz *v.* Everingham, 24 Wis. 266.

76. Hogan *v.* Delaware Ins. Co., 12 Fed. Cas. No. 6,582, 1 Wash. 419.

77. Berresford *v.* Price, 3 Ohio Dec. (Reprint) 293.

78. *Indiana.*— Horner *v.* Lowe, 159 Ind. 406, 64 N. E. 218.

Michigan.— Martin *v.* Hamlin, 18 Mich. 354, 100 Am. Dec. 181.

Minnesota.—Griswold *v.* Eastman, 51 Minn. 189, 53 N. W. 542.

New York.— Disbrow *v.* Harris, 122 N. Y. 362, 25 N. E. 356 [*reversing* 55 N. Y. Super. Ct. 433, 14 N. Y. St. 723].

Pennsylvania.— Thomas *v.* Henderson, 4 Kulp 390.

See 16 Cent. Dig. tit. "Deeds," § 266.

79. Crotzer *v.* Russel, 9 Serg. & R. (Pa.) 78; *In re* Pittston Road, 4 Kulp (Pa.) 305.

80. Thomas *v.* Henderson, 4 Kulp (Pa.) 390.

If such was the intention one agreement may merge another. Kenrick *v.* Smick, 7 Watts & S. (Pa.) 41.

81. Intention of the parties generally see *supra*, V, A, 1, c.

82. McWilliams *v.* Ramsay, 23 Ala. 813.

83. McWilliams *v.* Ramsay, 23 Ala. 813; Pico *v.* Coleman, 47 Cal. 65; Jameson *v.* Balmer, 20 Me. 425.

84. McWilliams *v.* Ramsay, 23 Ala. 813.

85. Coleman *v.* Beach, 97 N. Y. 545; Tucker *v.* Meeks, 2 Sweeny (N. Y.) 736 [*affirmed* in 52 N. Y. 638].

If the language is susceptible of different constructions that will be adopted which will support and give effect to the instrument, and if it is necessary words of inferior import and questionable meaning will be disregarded. Baulos *v.* Ash, 19 Ill. 187.

86. Faivre *v.* Daley, 93 Cal. 664, 29 Pac. 256; Squire *v.* Ford, 9 Hare 47, 57, 15 Jur. 619, 20 L. J. Ch. 308, 41 Eng. Ch. 47.

87. Spurrier *v.* Parker, 16 B. Mon. (Ky.) 274.

Different descriptions will be reconciled if possible (Proctor *v.* Pool, 15 N. C. 370), and the granting part may control a recital as to the estate granted (Dunbar *v.* Aldrich, 79 Miss. 698, 31 So. 341).

Express words of a deed cannot be limited by language of the certificate. Garrett *v.* Weinberg, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70.

Particular expressions will be referred to the particular subject-matter so that full and complete force may be given to the whole. Grubb *v.* Grubb, 9 Lanc. Bar (Pa.) 109.

the rules of law, they will be construed to have that effect rather than be held repugnant.[88]

c. Rejection of Inconsistent Parts or Words. Generally whatever is inconsistent with the real intention of the parties as ascertained from the language of the whole instrument may be rejected as superfluous,[89] as false or mistaken,[90] or repugnant, provided no rule of law be violated thereby,[91] so as to give effect to the deed according to the intent.[92] But although words may be rejected which are repugnant to other parts of the deed and to the general intention of the parties,[93] nevertheless no word is to be rejected, unless there cannot be given a rational construction to the instrument with the words as they are found.[94]

d. Control of Subsequent by Earlier Clauses or Words. If two clauses are so repugnant that they cannot stand the first will be sustained and the latter rejected;[95] and this rule applies where such subsequent clause would defeat the grant; but it does not prevail where there is room for construction,[96] where reconcilement is possible,[97] or where the inconsistency between clauses is so great as to avoid the deed for uncertainty,[98] nor will the rule be extended to a case of repugnancy between parts of the same clause.[99] Again subsequent words of doubtful import will not be so construed as to contradict preceding words.[1]

e. Habendum and Prior Parts. The *habendum* may limit, restrain, lessen, enlarge, explain, vary, or qualify, but not totally contradict or be repugnant to

88. Corbin *v.* Healy, 20 Pick. (Mass.) 514. Thus a provision in accordance with a rule of law is not limited by a proviso in conflict with the law so as to defeat the deed. Noyes *v.* Guy, 2 Indian Terr. 205, 48 S. W. 1056. So an exception which is not repugnant to the grant will be valid under a deed of general warranty. Hale *v.* Docking, 6 Kan. App. 283, 51 Pac. 798 [*affirmed* in (Sup. 1899) 55 Pac. 1100].

89. Gwyn *v.* Neath Canal Nav. Co., L. R. 3 Exch. 209, 215, 37 L. J. Exch. 122, 18 L. T. Rep. N. S. 688, 16 Wkly. Rep. 1209, per Kelly, C. B. See also Presbrey *v.* Presbrey, 13 Allen (Mass.) 281; Eastman *v.* Knight, 35 N. H. 551.

90. Emerson *v.* White, 29 N. H. 482.

91. Tucker *v.* Meeks, 2 Sweeny (N. Y.) 736 [*affirmed* in 52 N. Y. 638]. See also Durand *v.* Higgins, (Kan. Sup. 1903) 72 Pac. 567.

92. State *v.* Trask, 6 Vt. 355, 27 Am. Dec. 554.

Stipulations, reservations, or conditions in a deed which are inconsistent with and tend to depreciate or destroy the estate or interest created are void. Riddle *v.* Charlestown, 43 W. Va. 796, 28 S. E. 831.

Where initials are erroneously given in one part and are correctly inserted in another part, the court will reject the former. Kansas City, etc., R. Co. *v.* Smith, 156 Mo. 608, 57 S. W. 555.

93. Gibson *v.* Bogy, 28 Mo. 478.

94. Churchill *v.* Reamer, 8 Bush (Ky.) 256.

One recital cannot be used to establish a fact and another recital which explains and nullifies the first be rejected. Perry *v.* Clift, (Tenn. Ch. App. 1899) 54 S. W. 121.

The rejection of an entire clause is proper only in case of unavoidable necessity. Alton *v.* Illinois Transp. Co., 12 Ill. 38, 52 Am. Dec. 479.

95. *Alabama.*— Webb *v.* Webb, 29 Ala. 588; Petty *v.* Boothe, 19 Ala. 633; Gould *v.* Womack, 2 Ala. 83.

Arkansas.— Tubbs *v.* Gatewood, 26 Ark. 128; Doe *v.* Porter, 3 Ark. 18, 36 Am. Dec. 448.

California.— Havens *v.* Dale, 18 Cal. 359.

Georgia.— Daniel *v.* Veal, 32 Ga. 589.

Massachusetts.— Cutler *v.* Tufts, 3 Pick. 272.

North Carolina.— Blackwell *v.* Blackwell, 124 N. C. 269, 32 S. E. 676.

England.— See Matter of Royal Liver Friendly Soc., L. R. 5 Exch. 78, 39 L. J. Exch. 37, 21 L. T. Rep. N. S. 721, 18 Wkly. Rep. 349; Walker *v.* Giles, 6 C. B. 662, 13 Jur. 588, 18 L. J. C. P. 323, 60 E. C. L. 662.

See 16 Cent. Dig. tit. "Deeds," § 269.

Restraint of general words see *supra*, V, A, 1, f, (VI), (D).

Recital in preamble may be controlled by granting clause. Miller *v.* Tunica County, 67 Miss. 651, 7 So. 429.

Whatever is expressly granted cannot be diminished by subsequent restrictions; but general or doubtful clauses precedent may be explained by subsequent words and clauses, not repugnant or contradictory to the express grant. Pike *v.* Munroe, 36 Me. 309, 58 Am. Dec. 751.

Where there is inconsistency between dates in the body of a deed and at the foot, the latter prevails, where the former was one year before the latter. Morrison *v.* Caldwell, 5 T. B. Mon. (Ky.) 426, 17 Am. Dec. 84.

96. Tucker *v.* Meeks, 2 Sweeny (N. Y.) 736 [*affirmed* in 52 N. Y. 638].

97. Waterman *v.* Andrews, 14 R. I. 589. See Havens *v.* Dale, 18 Cal. 359.

98. Daniel *v.* Veal, 32 Ga. 589.

99. Zittle *v.* Weller, 63 Md. 190.

1. Petty *v.* Boothe, 19 Ala. 633.

Doubtful words inserted after words of a

the estate granted in the premises;[2] and if the *habendum* is repugnant to the grant the former will be controlled by the manifest intent and terms of the latter, where the purpose thereof can be clearly ascertained from the premises, and the premises contain proper words of limitation.[3] Repugnant words must also yield to the purpose of the grant when the latter is clearly ascertainable from the premises of the deed, although such words stand first in the grant.[4]

f. Granting, Habendum, and Subsequent Clauses. The covenants cannot control the premises, although they may be important and sometimes decisive, and may appropriately be considered[5] by the court when a question arises as to

grant will not qualify a conveyance. *Ex p.* Durfee, 14 R. I. 47.

2. 2 Blackstone Comm. 298. See also Hafner *v.* Irwin, 20 N. C. 433, 34 Am. Dec. 390; Mowry *v.* Bradley, 11 R. I. 370, declaring that the *habendum* may be rejected when irreconcilably in conflict, etc.

Components of rule.— The *habendum* limits the certainty of the estate (Berry *v.* Billings, 44 Me. 416, 69 Am. Dec. 107); restrains, limits, or enlarges the estate in the granting clause (Barnett *v.* Barnett, 104 Cal. 298, 37 Pac. 1049); or it may enlarge or diminish the grant when so worded as to show a clear intention so to do (Corbin *v.* Healy, 20 Pick. (Mass.) 514; Sumner *v.* Williams, 8 Mass. 162, 5 Am. Dec. 83; Wolverton *v.* Haupt, 3 Walk. (Pa.) 46); or operate as a limitation, although the granting clause is not made subject thereto (Chicago Lumbering Co. *v.* Powell, 120 Mich. 51, 78 N. W. 1022); or limit and confine the words of the grant, to ascertain the commencement and duration of the estate (Mitchell *v.* Wilson, 17 Fed. Cas. No. 9,672, 5 Cranch C. C. 242); or enlarge, qualify, expound, or vary the estate (Moss *v.* Sheldon, 3 Watts & S. (Pa.) 160; Lehigh Coal, etc., Co. *v.* Gluck, 5 Pa. Co. Ct. 662; Haupt *v.* Wolverton, 2 Chest. Co. Rep. (Pa.) 398); may explain, limit, or qualify the premises, but may not contradict (Halifax Cong. Soc. *v.* Stark, 34 Vt. 243); may often qualify the premises but may not contradict the estate granted (Edwards *v.* Beall, 75 Ind. 401); and any limitation in said *habendum*, designed to abridge or lessen the estate in favor of a party not named in the premises, will be treated as repugnant and inoperative (Adams *v.* Dunklee, 19 Vt. 382).

Nothing in the habendum should be construed to extend the meaning of terms used in the premises, or that part which precedes the *habendum*, at least if the language employed can be reconciled with the body of the deed. Smith *v.* Pollard, 19 Vt. 272.

Rule that the habendum cannot divest the estate in fee does not apply where the former vests the grantee with a life-estate and the granting clause conveys and warrants the described land without pretending to define the nature and character of the estate granted, nor in such case is there any repugnancy. Welch *v.* Welch, 183 Ill. 257, 55 N. E. 694.

3. *California.*—Eldridge *v.* See Yuh Co., 17 Cal. 44.

Illinois.— Riggin *v.* Love, 72 Ill. 553.

Kentucky.— Ballard *v.* Louisville, etc., R. Co., 5 S. W. 484, 8 Ky. L. Rep. 523.

Maryland.— Foreman *v.* Baltimore Presb. Assoc., (1894) 30 Atl. 1114; Budd *v.* Brooke, 3 Gill 198, 43 Am. Dec. 321.

Missouri.— Donnan *v.* Intelligencer Printing, etc., Co., 70 Mo. 168; Major *v.* Bukley, 51 Mo. 227.

South Carolina.— Ingram *v.* Porter, 4 McCord 198.

Vermont.— Flagg *v.* Eames, 40 Vt. 16, 94 Am. Dec. 363.

See 16 Cent. Dig. tit. "Deeds," § 269.

General words in the habendum cannot control special words of limitation in the grant or premises. Hunter *v.* Patterson, 142 Mo. 310, 44 S. W. 250.

Habendum should control if the provisions of the deed are inconsistent, some indicating a power of absolute disposal, which only can be had by the holder of the fee, and others creating a remainder, which supposes a life-estate. Green *v.* Sutton, 50 Mo. 186.

Habendum will be controlled by the granting clause (Farquharson *v.* Eichelberger, 15 Md. 63. See Ratcliffe *v.* Marrs, 87 Ky. 26, 7 S. W. 395, 8 S. W. 876, 10 Ky. L. Rep. 134; Winter *v.* Gorsuch, 51 Md. 180; Hafner *v.* Irwin, 20 N. C. 570, 34 Am. Dec. 390); or by the preamble and premises, if conflicting or inconsistent, especially when in itself inconsistent (Caulk *v.* Fox, 13 Fla. 148).

When they are repugnant it is decided that the *habendum* controls the granting clause. Baskett *v.* Sellars, 93 Ky. 2, 19 S. W. 9, 13 Ky. L. Rep. 909; Bodine *v.* Arthur, 91 Ky. 53, 14 S. W. 904, 12 Ky. L. Rep. 650, 34 Am. St. Rep. 162; Singleton *v.* Crittenden County School Dist. No. 34, 10 S. W. 793, 10 Ky. L. Rep. 851. See McLeod *v.* Tarrant, 39 S. C. 271, 17 S. E. 773, 20 L. R. A. 846.

4. Goldsmith *v.* Goldsmith, 46 W. Va. 426, 33 S. E. 266.

If, however, the granting clause mentions no estate, the *habendum* then becomes efficient to declare the intention, and will rebut any implication which would otherwise arise through the omission in this respect in the granting clause. Riggin *v.* Love, 72 Ill. 553.

5. Deering *v.* Long Wharf, 25 Me. 51.

Covenants generally can only extend to the estate granted, and there must be something very peculiar in their terms to warrant such a construction of them as to enlarge the estate granted in the premises. Corbin *v.* Healy, 20 Pick. (Mass.) 514. See Mills *v.* Catlin, 22 Vt. 98.

Where a life-estate only is mentioned in the premises and the *habendum*, it cannot be enlarged into a fee either by a warranty in

what is granted for the purpose of aiding the construction to be given to the instrument.[6]

g. Reference to Recitals to Aid Construction. The granting portion of a deed passing all the estate cannot be diminished by a mere recital in the description;[7] nor can a general recital control the plain words of the granting part,[8] although general terms in a grant may be limited and restrained by a recital stating the object of the grant.[9] A recital in the premises may also be referred to in ascertaining the motives and reasons upon which the deed is founded.[10] Again immaterial and irrelevant recitals in an appointment and conveyance, if not repugnant, inconsistent, or illegal, cannot have the effect to render nugatory the provisions which are material and pertinent.[11]

5. Construction as to Parties — a. In General. That one party is a natural person and the other a corporation gives no signification whatever to the legal merits.[12]

b. Grantors. In determining who is intended as grantor, or whether a deed is executed in a representative or official capacity or not, resort may be had to those parts of the instrument describing the party and also to the manner of signing, sealing, acknowledgment, certification, and attestation, to proof of identity where necessary, to the purpose and intent of the grant and of the parties,[13] and to

fee or by a covenant for quiet enjoyment to the grantor and his heirs. Snell *v.* Young, 25 N. C. 379.

6. Mills *v.* Catlin, 22 Vt. 98.

Technical words it is decided, however, in the granting and *habendum* clauses importing a fee, must yield to a clause, following the covenant of general warranty, limiting the interest of the grantor to a life-estate. Atkins *v.* Baker, 112 Ky. 877, 66 S. W. 1023, 23 Ky. L. Rep. 2224.

7. Tate *v.* Clement, 176 Pa. St. 550, 35 Atl. 214.

8. Huntington *v.* Havens, 5 Johns. Ch. (N. Y.) 23.

9. Woods *v.* Nashua Mfg. Co., 5 N. H. 467.

Restraint of general words by particular clauses, etc., see *supra*, V, A, 1, f, (VI), (D).

General words may be restrained by a particular recital which follows them, when such recital is used by way of limitation or restriction. Parker *v.* Murch, 64 Me. 54; Moore *v.* Griffin, 22 Me. 350.

10. Williams *v.* Claiborne, 7 Sm. & M. (Miss.) 488.

Only to determine intent are recitals useful. State Treasurers *v.* Lang, 2 Bailey (S. C.) 430.

11. Augustus *v.* Graves, 9 Barb. (N. Y.) 595.

12. Blanchard *v.* Detroit, etc., R. Co., 31 Mich. 43, 18 Am. Rep. 142.

13. See cases cited *infra*, this note.

Attorneys and agents.— A conveyance by an attorney as such, who had a power coupled with an interest "either in the land or the proceeds of a sale thereof," passes complete title as showing an election to take in the proceeds of the sale (Little *v.* Weatherford, 63 Tex. 638); and a deed which appears on its face to have been executed in the name of the owner of the land, and for her by her attorney in fact, although not in approved form, is her deed and not an independent deed of the attorney in fact (Donovan *v.* Welch, 11 N. D. 113, 90 N. W. 262). Substantially the same conclusion was reached in Bigelow *v.* Livingston, 28 Minn. 57, 9 N. W. 31. If a deed appears to be the personal one of the grantor, his signing "agent" after his signature and seal is superfluous and does not show that the title was vested in any other than the grantor (Fisher *v.* Cid Copper Min. Co., 94 N. C. 397); and one may by a conveyance as agent pass as completely as if in his own name whatever title in law or equity he may have which his creditors could subject to the payment of their claims (Whitehead *v.* Cramer, 9 La. Ann. 216).

Deed is that of a person purporting to act as an agent where it is made by him and he is so named as the grantor, and it contains personal covenants of warranty on his part and is signed and sealed by him in his own name. Snow *v.* Orleans, 126 Mass. 453.

Identity.— It will be presumed that the grantor acquired a new name by marriage without proof of identity (Dowdy *v.* McArthur, 94 Ga. 577, 21 S. E. 148); and even in case of a variance between the names in the body of the deed and the signatures, the identity of the persons will be presumed until rebutted, where the deed has been properly acknowledged (Lyon *v.* Kain, 36 Ill. 362). Again the certificate of acknowledgment may remove the doubt and establish identity, where such doubt is raised by a middle initial being added to or omitted from a name. Blomberg *v.* Montgomery, 69 Minn. 149, 72 N. W. 56.

If names are not in the body or the granting clause, but appear in the subscription, the interest of such parties is not conveyed where there is nothing in the deed to indicate their intention to become grantors. Johnson *v.* Goff, 116 Ala. 648, 22 So. 995.

Parties are individually bound where they sign and seal deeds with their own name and seals, even though described as a collective

other referred-to instruments.[14] A deed made by commissioners may also pass a testator's inchoate title, it being a legal one, where the commissioners' authority is derived from a competent court.[15]

c. Grantees — (i) *Intention.*[16] The intention of the parties is material in determining who are the grantees.[17] But the grantor cannot, in the absence of fraud or mistake, aver that he intended to convey to a person other than the grantee named in the deed.[18]

(ii) *Extrinsic Evidence.*[19] A resort to extrinsic facts and circumstances may become necessary, and is proper, in order to ascertain the individual intended, where the description is merely imperfect and capable of different applications; but a distinction is declared to exist between such a case and one where the description is inherently uncertain and indeterminate, for in this latter instance extrinsic evidence is inadmissible to make the conveyance effectual in favor of any particular person.[20]

body, but not as a corporate one. Cullen *v.* Nickerson, 10 U. C. C. P. 549.

Representative or official capacity.— Rule applies to a deed of individuals in their official capacity as county commissioners (Bestor *v.* Powell, 7 Ill. 119); to a deed by school trustees where the intention clearly was to convey the land and to do so as trustees and officers of the corporation, even though only the equitable title passed (Hemstreet *v.* Burdick, 90 Ill. 444); to a deed by "A. B., Executor," and signed by him in the same form (Babcock *v.* Collins, 60 Minn. 73, 61 N. W. 1020, 51 Am. St. Rep. 503); to a conveyance in the form of deed from a grantor individually except that to his signature he adds the word "administrator"; and such conveyance will be admissible as an administrator's deed, when it appears everywhere in the record that the grantor was the administrator of the estate to which the land belonged, and on the face of the conveyance that the land was conveyed as land of the estate by him as administrator (Cohea *v.* Johnson, 69 Miss. 46, 13 So. 40); and to a deed executed by one in his own name, but showing that he acted as attorney for another, provided he had authority to make a proper deed (Rogers *v.* Frost, 14 Tex. 267).

Where husband and wife are named at the commencement of a deed as party of the first part and afterward the parties of the first part are named as grantors, the instrument is the deed of both husband and wife. Thornton *v.* National Exch. Bank, 71 Mo. 221. And where in a deed by a husband and wife she joins with him in the words of conveyaneing, acknowledges the joint receipt of the purchase-money, and joins in the covenant of warranty, the presumption therefrom, if any, is that the title was a joint one, and not that she joined merely to release her dower and homestead. McKenzie *v.* Houston, 130 N. C. 566, 41 S. E. 780.

14. Fontaine *v.* Dunlap, 82 Ky. 321.

15. Shackleford *v.* Miller, 9 Dana (Ky.) 273.

16. Intention of the parties generally see *supra*, V, A, 1, c.

17. Johnstone *v.* Taliaferro, 107 Ga. 6, 32 S. E. 931, 45 L. R. A. 95; Huie *v.* McDaniel, 105 Ga. 319, 31 S. E. 189; Bodine *v.* Mattingly, 91 Ky. 53, 14 S. W. 904, 12 Ky. L. Rep. 650, 34 Am. St. Rep. 162; Wilkerson *v.* Schoonmaker, 77 Tex. 615, 14 S. W. 223, 19 Am. St. Rep. 803; Diener *v.* Schley, 5 Wis. 483. But see Cairns *v.* Hay, 21 N. J. L. 174. Nor should the jury be charged that the grantor's intention is immaterial. Diener *v.* Schley, 5 Wis. 528.

But grammar or clerical error will neither vitiate a deed nor change the plain intent as to what grantees are intended, especially where to give force to such erroneous expressions would render the deed meaningless. Jennings *v.* Webb, 8 App. Cas. (D. C.) 43; Ray *v.* Crouch, 10 Mo. App. 321.

Different instruments may be construed together to ascertain the evident intent of the vendor as to the identity of the grantee. McDuffie *v.* Clark, 1 N. Y. Suppl. 462, 9 N. Y. Suppl. 826.

Where the title may pass to either one of two parties of the same name, and the grantor is indifferent, the will of the person with whom he negotiates and who pays the consideration ought to control, and the title pass according to his intention. Diener *v.* Schley, 5 Wis. 483.

18. Gray *v.* Stockton, 8 Minn. 529.

19. Extrinsic circumstances generally see *supra*, V, A, 1, g.

20. Morse *v.* Carpenter, 19 Vt. 613. See Means *v.* Shippensburg Presb. Church, 3 Watts & S. (Pa.) 303. *Compare* Staak *v.* Sigelkow, 12 Wis. 234, where a deed was to Louis S, and no person of that name was known to exist, but the circumstances clearly showed that the intended grantee was Arnold S, who had possession of the deed, and it was held that the title passed to Arnold S.

Conveyance to party in possession by an attorney in fact in his own name, where the consideration was paid to and received by his principal, may be made effective by a statute quieting title. Williams *v.* Paine, 160 U. S. 55, 18 S. Ct. 279, 42 L. ed. 658.

Deed to married woman, by maiden name, may be shown by other evidence to have been intended for her. Wilkerson *v.* Schoonmaker, 77 Tex. 615, 14 S. W. 223, 19 Am. St. Rep. 803.

Where there is a person, and only one person, in existence who fully answers the

(III) *Omission of Names, or Insertion of Additional or Different Names.* The grantee may be ascertained from other parts of the deed where no party is named in the granting part, and it is also decided that no one can take an immediate and present estate who is not named as a grantee in the premises or granting part provided any one is there named.[21] If the grantor intends the *habendum* to operate as an *addendum* or proviso to the conveyancing clause it will control where an additional name is inserted in the former clause.[22] But where the whole estate is granted to one person in the premises and limited to another in the *habendum* the latter is repugnant and void.[23]

(IV) *Child or Children, Issue or Heirs.*[24] "Children" may mean legitimate children,[25] also grandchildren.[26] Nor is an unborn child, although shortly expected, or a child born after execution but before delivery of a deed to a named person and his brothers and sisters embraced therein, even though before the birth there are no brothers or sisters.[27] And a limitation to lawful issue of certain persons, and to the grantor's brothers in case of the grantee's death leaving no issue, includes issue and children living at the death of the grantee.[28] Again, where there is nothing indicating that "children" is used in the sense of "heirs" it will not be so construed;[29] and in determining whether heirs are included, the premises, granting, and *habendum* clauses will be construed where they are at variance.[30]

description, there is no ambiguity, nothing to explain by evidence and no room for construction; and the rule *falsa demonstratio non nocet* applies, and the court cannot reject the portion of the description as to the residence of such person and apply the description to a person in another state. Barton *v.* Babcock, 28 Wis. 192.

21. Adams *v.* Dunklee, 19 Vt. 382.

A person who is not a party to a deed cannot take anything by it, unless by way of remainder. Hornbeck *v.* Westbrook, 9 Johns. (N. Y.) 73. And if a deed absolute as to the grantor, made for the use of the grantee, is delivered to a third person, the fact that the third person paid the purchase-money raises no presumption that he had the beneficial interest, it appearing that the grantee was his married daughter, and that the conveyance was made to her by his direction. Stewart *v.* Weed, 11 Ind. 92.

In a deed of exchange which recited that a husband and wife deeded to R, and that R deeded his land, but wholly omitted to name a grantee, the husband and wife will take jointly. Lagoria *v.* Dozier, 91 Va. 492, 22 S. E. 239.

22. Bodine *v.* Arthur, 91 Ky. 53, 14 S. W. 904, 12 Ky. L. Rep. 650. 34 Am. St. Rep. 162. See Baskett *v.* Sellars, 93 Ky. 2, 19 S. W. 9, 13 Ky. L. Rep. 909; Hardie *v.* Andrews, 13 N. Y. Civ. Proc. 413; Boyertown Nat. Bank *v.* Hartman, 147 Pa. St. 558, 23 Atl. 842, 30 Am. St. Rep. 759 [*following* Ott *v.* Oyer, 106 Pa. St. 6]; McLeod *v.* Tarrant, 39 S. C. 271, 17 S. E. 773, 20 L. R. A. 846.

23. Hafner *v.* Irwin, 20 N. C. 570, 34 Am. Dec. 390.

24. Definition of "children," "issue," and "heir" see Children; Heir; Issue.

25. Hall *v.* Cressey, 92 Me. 514, 43 Atl. 118.

An illegitimate child is not included, unless it plainly appears that the grantor intended that such child should take. Johnstone *v.* Taliaferro, 107 Ga. 6, 32 S. E. 931, 45 L. R. A. 95.

If a daughter by a prior marriage is to be "made equal" with children thereafter to be born, it is decided that the word "children" is a word of limitation and not of purchase. Wolford *v.* Morgenthal, 91 Pa. St. 30.

If the grant is to a daughter, "her heirs and assigns," and under the *habendum* the daughter and her two children, naming them, are "made equal as heirs" the daughter and the other two will take in common. Huie *v.* McDaniel, 105 Ga. 319, 31 S. E. 189.

26. Harrington *v.* Gibson, 60 S. W. 915, 22 Ky. L. Rep. 1486.

27. Morris *v.* Candle, 178 Ill. 9, 52 N. E. 1036, 69 Am. St. Rep. 282, 44 L. R. A. 489.

28. Folk *v.* Varn, 9 Rich. Eq. (S. C.) 303.

29. Baskett *v.* Sellars, 93 Ky. 2, 19 S. W. 9, 13 Ky. L. Rep. 909.

"Heir or heirs" does not refer to children, but includes all the heirs of such children as the law appointed to succeed to their estates, where a husband's deed to his wife provided that the property should on her death go to their children then living, equally, "and, in the case of death of any such children, then to their heir or heirs." Hochstein *v.* Berghauser, 123 Cal. 681, 56 Pac. 547.

No title will vest in children of a grantee where "heirs" is a word of inheritance and not of purchase, and the conveyance is to the grantees "and heirs forever," providing that one of said grantees has no power of alienation. Scott *v.* Noel, 45 S. W. 517, 20 Ky. L. Rep. 188.

"Heirs" is used in the sense of "children" where the deed is to one and her "minor heirs." Seymour *v.* Bowles, 172 Ill. 521, 50 N. E. 122.

30. Hardie *v.* Andrews, 13 N. Y. Civ. Proc. 413. *Compare* Baulos *v.* Ash, 19 Ill. 187.

(v) *Designation of a Class.* A designation of a class may include a single party of that class[31] or the individuals composing it.[32]

(vi) *Designation of Partners.* If the firm-name is given and it consists of the surnames of the several partners it will vest the legal title in them,[33] and generally if members of a partnership are designated with sufficient certainty under a firm-name they will take, but a general or an abbreviated term such as "company," "Co." or "Bro." is held to be insufficient.[34]

(vii) *Corporations.* Misnomer of a corporation in a grant does not destroy or defeat it.[35] It is sufficient if the name be expressed in sense and substance, although not in the precise words.[36]

(viii) *Unincorporated Associations.* It is determined that a conveyance to an unincorporated association which goes into possession under the deed passes a title which vests in the company subsequently incorporated.[37]

(ix) *Particular Persons and Associates.* A grant to a certain named person and associates vests an estate only in the person named[38] in the absence of anything to show that there existed at any time any associates of his in the title, that he was connected with any person or persons therein, or that there was any limitation of his power to convey or any purpose for inserting or referring to associates.[39]

Heirs are entitled even though there is a variance in the ancestor's name, where his identity is clearly proven. Leland *v.* Eckert, 81 Tex. 226, 16 S. W. 897.

Question of identity is not raised by a difference of one letter in the spelling of the ancestor's name in certificates of land introduced by heirs to show title, but which did not change the pronunciation of said name. Lemberg *v.* Cabaniss, 75 Tex. 228, 12 S. W. 844.

31. "Orphans" includes single orphan. Averit *v.* Alleam, 23 Ga. 382.

32. "Inhabitants" includes individual inhabitants. Foster *v.* Lane, 30 N. H. 305.

33. Cole *v.* Mettee, 65 Ark. 503, 47 S. W. 407, 67 Am. St. Rep. 945.

Estate vesting in trustees and not in partners see Mowry *v.* Bradley, 11 R. I. 370.

34. Thus "P. H. & Son" sufficiently designates the son (Hoffman *v.* Porter, 12 Fed. Cas. No. 6,577, 2 Brock. 156); and where the designation is "A. B. & Company," A and B who are well-known members will take, and although the other partners could not take as grantees under the general term "company," A and B could hold in trust for themselves and associates (Beaman *v.* Whitney, 20 Me. 413). So when the deed is to T. Barnett & Bro., the entire legal estate is vested in T, subject to an equitable suit by the brother to reform the deed by naming him as grantee on proof of identity, but in the meantime T could convey a good legal title. Barnett *v.* Lachman, 12 Nev. 361. Again a deed to certain designated partners "& Co." only transfers the legal title to those named and not to the partners constituting the "Co." (Gossett *v.* Kent, 19 Ark. 602; Winter *v.* Stock, 29 Cal. 407, 89 Am. Dec. 57; Arthur *v.* Weston, 22 Mo. 378) and a deed by the partners named will pass a valid title (Winter *v.* Stock, 29 Cal. 407, 89 Am. Dec. 57).

Unincorporated associations taking as copartners see *infra*, V, A, 5, c, (VIII).

35. The grant itself will be examined to ascertain the true name, and it may be averred and proved that the corporation was intended, and all the circumstances surrounding its execution may be considered. The courts have also in such cases been liberal in correcting inaccuracies and misnomers, so as not to frustrate the object, if identity is manifest. Church of Christ *v.* Hammond Christian Church, 193 Ill. 144, 61 N. E. 1119. Where the grant was to a religious society, executed to the trustees. See Preachers' Aid Soc. *v.* England, 106 Ill. 125 (no other corporation for like purposes was shown to exist); Cairns *v.* Hay, 21 N. J. L. 174 (holding that a deed made by mistake to a party well named will not be construed in a court of law to inure to another party); Van Schaick *v.* Lese, 31 Misc. (N. Y.) 610, 66 N. Y. Suppl. 64.

36. Cairns *v.* Hay, 21 N. J. L. 174.

37. Clifton Heights Land Co. *v.* Randell, 82 Iowa 89, 47 N. W. 905. *Compare* Stuart *v.* Easton, 170 U. S. 383, 18 S. Ct. 650, 42 L. ed. 1078.

A deed in trust to an unincorporated association which is therefore a mere copartnership, the copartners being all natural persons whose identity is fixed and ascertained by the agreement itself, is not void for want of capacity of the beneficiaries, even if the trust thereby created is such as to be executed by the statute of uses. In such case if the grantees take the land they take it in trust for their firm composed of ascertained partners. Hart *v.* Seymour, 147 Ill. 598, 35 N. E. 246. But see Robie *v.* Sedgwick, 35 Barb. (N. Y.) 319.

38. Ennis *v.* Brown, 1 N. Y. App. Div. 22, 36 N. Y. Suppl. 737; Jackson *v.* Hoyt, 2 Johns. Cas. (N. Y.) 327.

39. Ennis *v.* Brown, 1 N. Y. App. Div. 22, 36 N. Y. Suppl. 737.

Such person can convey good title even though he holds for himself and as trustee for others. Ennis *v.* Brown, 1 N. Y. App. Div. 22, 36 N. Y. Suppl. 737.

(x) *Representative or Official Capacity.* Words designating the representative or official capacity of the grantee may be only *descriptio personæ* and will be construed accordingly, unless it can be inferred to the contrary from the instrument,[40] especially where there is an absence of all proof tending to show the existence of a trust estate and there is none created by the deed.[41] But such words may not be descriptive merely and the grantee may take the title, not in his individual capacity, but in the capacity designated.[42] The word "trustees" may, however, be also regarded as mere surplusage except as a *descriptio personarum.*[43] Generally, however, in determining whether the grantee takes individually, or as administrator or trustee, the court will also consider the phraseology of the deed and the application or non-application of statutes,[44] or the absence of a statute or of words preventing the vesting of the legal interest,[45] or the absence of all circumstances showing that something was to be done by the trustee,[46] or it will read the entire deed according to its terms and in the light of surrounding and recited facts,[47] or in connection with the trustee's declarations or

40. It seems to be well settled that where the name of any person is followed simply by his title or name of office without any other statement that he is acting in the capacity indicated by the words which follow his name, such words are merely *descriptio personæ*, and the person is bound or charged individually only as the case may be. This rule applies to conveyances and the title vests in the grantee individually and not as trustee for the person or corporation indicated by the words which follow the name, and unless it can be inferred from the instrument that they are acting or take title officially, the words will be held to be inserted by way of description and will not affect their rights as grantees. Pfeiffer *v.* Rheinfrank, 2 N. Y. App. Div. 574, 37 N. Y. Suppl. 1076, per Rumsey, J. See Barrett *v.* Cochran, 11 S. C. 29, declaring that in that case "trustee" appended to name might be regarded as mere *descriptio personæ.*

Rule applies to an "administrator" (Innerarity *v.* Kennedy, 2 Stew. (Ala.) 156; Jackson *v.* Roberts, 95 Ky. 410, 25 S. W. 879, 15 Ky. L. Rep. 831; Richardson *v.* McLemore, 60 Miss. 315), to trustees (Cairns *v.* Hay, 21 N. J. L. 174; Kanenbley *v.* Volkenberg, 70 N. Y. App. Div. 97, 75 N. Y. Suppl. 8; Towar *v.* Hale, 46 Barb. (N. Y.) 361; Van Schaick *v.* Lese, 31 Misc. (N. Y.) 610, 66 N. Y. Suppl. 64), to a deed in trust to an incorporated association (Hart *v.* Seymour, 147 Ill. 598, 35 N. E. 246), and to a "guardian" (Hannen *v.* Ewait, 18 Pa. St. 9).

41. Kanenbley *v.* Volkenberg, 70 N. Y. App. Div. 97, 75 N. Y. Suppl. 8.

42. Johnson *v.* Calnan, 19 Colo. 168, 34 Pac. 905, 41 Am. St. Rep. 224. See Brown *v.* Combs, 29 N. J. L. 36, where the deed was to B, trustee, etc., and the court said that whether these words of addition, trustee, etc., were meant to express a trust or were merely descriptive of the person of the grantee, they imported no grant to the beneficiary, it being clear upon the face of the deed that the grant was to B and not to him in trust.

43. Hart *v.* Seymour, 147 Ill. 598, 35 N. E. 246. Again, if the addition of the word "trustee" should be regarded as sufficient to create a trust, it would be no evidence of the previous existence of a trust, especially where the words used imply that no such estate was held by the trustee. Barrett *v.* Cochran, 11 S. C. 29.

If there is no person in existence with authority or capacity to take as beneficiaries, under a deed to persons as trustees, the title may be vested in them individually. Robie *v.* Sedgwick, 35 Barb. (N. Y.) 319.

44. Within this rule a conveyance to an administrator "in trust for the absolute use and benefit of the estate and those interested therein" does not make him a mere naked and dry trustee, nor are the heirs vested with such a title as will enable them to maintain ejectment against a purchaser at a sale by the administrator *de bonis non* under order of the probate court. Pittman *v.* Corniff, 52 Ala. 83 [*following* You *v.* Flinn, 34 Ala. 409].

45. Deed to M, administrator, and his successors and assigns forever, no express trust appearing, and the grant being coupled with no restrictions, vests the legal interest in M as the only grantee capable of taking, and he can convey the legal title unless restrained by statute, and the legal holder or trustee is the only one that can pass title. Such a case differs from that of a naked trustee for the use of another. Little *v.* Lesia, 5 Mich. 119.

46. Rule applies where there was a deed of land in fee to one of the solicitors of a state by name and the recital was that he bought for the state and there was an absence of all circumstances such as something to be done by the trustee and the like sufficient to retain the title in the trustee the legal title will be vested in the state. Lamars *v.* Simpson, 1 Rich. Eq. (S. C.) 71, 42 Am. Dec. 345.

47. A deed in trust to a certain person should not be construed as primarily a deed for the purpose of dedication of a highway where there is nothing in it, whether read according to its terms or in connection with the surrounding facts, to show such dedication, and where the deed, read in the light of surrounding and recited facts, is a deed in fee in certain lands which had already been dedicated. Guthrie *v.* New Haven, 31 Conn. 308.

admissions,[48] or the fact that his signature is as an individual,[49] or of the beneficiary's acts controverting a trust,[50] or it will apply the rules of construction as to ascertaining the intention, reconciling repugnant parts if possible so as to support the instrument, and will give effect to technical words, having in view also the relative force and effect of the *habendum* and other clauses and rejecting the *habendum* or reconciling it with other clauses according to the law.[51] But a trust is not annexed in favor of the wife, nor can it grow out of a recital of the inducement to the making of a deed, where the title is directly transmitted, and upon a consideration received from the husband to him alone.[52] A grantee of lands may, however, by the same conveyance, take an undivided portion in his own right and another portion as trustee.[53]

(xi) *Questions For Court or Jury.* Although the court should decide who holds title where it rests upon the legal effect of the deed,[54] yet the court may instruct the jury that the legal title vests in a certain person or not, and leave it to them to decide as a fact who is entitled, where the identity of such person is in issue.[55]

B. Property Conveyed — 1. Mode of Determining in General — a. Intent of Parties. The intention of the parties as apparent in a deed should generally control in determining the property conveyed thereby.[56] But if the intent is

48. If named trustee acknowledges the trust and that he holds the title for another's benefit, and such beneficiary actually exists, even though unnamed in the deed, this is sufficient, and a judgment and levy against such trustee individually are a lien only on his personal interest in the property. Boardman *v.* Willard, 73 Iowa 20, 34 N. W. 487.

49. Kanenbley *v.* Volkenberg, 70 N. Y. App. Div. 97, 75 N. Y. Suppl. 8.

50. Combs *v.* Brown, 29 N. J. L. 36.

51. Kanenbley *v.* Volkenberg, 70 N. Y. App. Div. 97, 75 N. Y. Suppl. 8.

Illustrations.—The descriptive words "heirs of her body" cannot control the force of the words in the granting part of the deed "unto the said party of the second part, her heirs and assigns." The latter words determine to whom the land is conveyed and import the transfer to such party of a fee-simple estate, nor can peculiar language of the *habendum* destroy the effect of those words and make another the grantee, and where such *habendum* and the description provides that the party of the "second part" holds through one as her "trustee and agent," they do not control the construction of the deed in this respect, and no estate being conveyed to him he cannot hold for the use of another. Baulos *v.* Ash, 19 Ill. 187. If the deed names the grantees as "trustees of" a designated person, but no trust is created, and the *habendum* is to them, "their successors and assigns," this does not show that the conveyance was to them as trustees and not as individuals. Kanenbley *v.* Volkenberg, 70 N. Y. App. Div. 97, 75 N. Y. Suppl. 8. Again within the rule that the *habendum* may be rejected when clearly and irreconcilably repugnant to the premises, but that a construction should be adopted which renders both consistent, a legal estate may vest in trustees and not in partners named as tenants in common. Mowry *v.* Bradley, 11 R. I. 370. If a deed gives chattels to one to have and to hold forever, he takes the absolute title, even if the same are to remain in another's possession during life but without the right of disposition and without being subject to his creditors. Benton *v.* Pope, 5 Humphr. (Tenn.) 392.

52. Mosely *v.* Mosely, 87 N. C. 69.

53. Jackson *v.* Moore, 6 Cow. (N. Y.) 706.

54. Johnson *v.* Shively, 9 Oreg. 333.

55. Grecning *v.* Keel, 72 Tex. 207, 10 S. W. 255. See also Prentiss *v.* Blake, 34 Vt. 460.

Where names are spelled differently and are *idem sonans* the question of identity is one of fact (Galveston, etc., R. Co. *v.* Stealey, 66 Tex. 468, 1 S. W. 186), as a deed to father or son of the same name (McDuffie *v.* Clark, 39 Hun (N. Y.) 166).

Whether there is any such heir as the one designated is for the jury to determine. Finlay *v.* Humble, 1 A. K. Marsh. (Ky.) 293.

56. *Connecticut.*— Roberti *v.* Atwater, 43 Conn. 540.

Kentucky.— Trimble *v.* Ward, 14 B. Mon. 8.

Maine.— Abbott *v.* Abbott, 51 Me. 575.

Michigan.— Probett *v.* Jenkinson, 105 Mich. 475, 63 N. W. 648.

Missouri.— Presnell *v.* Headley, 141 Mo. 187, 43 S. W. 378.

Ohio.— McAfferty *v.* Conover, 7 Ohio St. 99, 70 Am. Dec. 57.

Pennsylvania.— McWilliam *v.* Martin, 12 Serg. & R. 269, 14 Am. Dec. 688.

Texas.— Robertson *v.* Mosson, 26 Tex. 248.

Vermont.— Morse *v.* Weymouth, 28 Vt. 824.

See 16 Cent. Dig. tit. "Deeds," § 311; and *supra*, V, A, 1, c.

Descriptions should be construed liberally according to the intent of the parties. Peck *v.* Mallams, 10 N. Y. 509.

Language used in a particular sense should be so construed as to accord with the intention of the parties. Treat *v.* Strickland, 23 Me. 234.

Where to give effect to the boundaries mentioned in a deed would be to defeat the evident intent of the parties they will not be

not apparent from the deed resort may be had to the general rules of construction.[57]

b. Construction Aided by Acts of Parties. Where the words used in the description in a deed are uncertain or ambiguous and the parties have by their acts given a practical construction thereto the construction so put upon the deed by them may be resorted to, to aid in ascertaining their intention.[58]

c. Entire Description Should Be Considered. The entire description in a deed should be considered in determining the identity of the land conveyed.[59] Clauses inserted in a deed should be regarded as inserted for a purpose and should be given a meaning that will aid the description. Every part of a deed ought if possible to take effect and every word to operate.[60]

d. Inconsistent Recitals. If recitals in a deed are inconsistent or repugnant the first recital does not necessarily prevail over the latter,[61] but the whole language of the deed is to be construed together in order that the true construction may be ascertained.[62] In such a case the court will look into the surrounding facts and will adopt that construction which is the most definite and certain and which will carry out the evident intention of the parties.[63] And if the land conveyed is sufficiently identified by certain parts of the description an impossible or senseless course should be disregarded, and the deed sustained.[64]

e. Ambiguous Description. Where the description of the property intended to be conveyed is ambiguous the identity of such property must be gathered from

allowed to control. U. S. *v.* Cameron, 3 Ariz. 100, 21 Pac. 177; Credle *v.* Hays, 88 N. C. 321.

57. Kimball *v.* Semple, 25 Cal. 440.

As to general rules of construction see *supra*, V, A.

In a suit between others than the original parties the calls in a deed if clear and unambiguous cannot be controlled by the intention of the parties. Pohlman *v.* Evangelical Lutheran Trinity Church, 60 Nebr. 364, 83 N. W. 201.

58. *Maine.*— Knowles *v.* Toothaker, 58 Me. 172; Esty *v.* Baker, 50 Me. 325, 79 Am. Dec. 616.

Michigan.— Monfort *v.* Stevens, 68 Mich. 61, 35 N. W. 827.

New Jersey.— Camden, etc., Land Co. *v.* Lippincott, 45 N. J. L. 405; Jackson *v.* Perrine, 35 N. J. L. 137.

New York.— Putzel *v.* Van Brunt, 40 N. Y. Super. Ct. 501.

Pennsylvania.— Province *v.* Crow, 70 Pa. St. 199.

Wisconsin.— Whitney *v.* Robinson, 53 Wis. 309, 10 N. W. 512.

United States.— Hamm *v.* San Francisco, 17 Fed. 119, 9 Sawy. 31.

See 16 Cent. Dig. tit. "Deeds," § 312; and *supra*, V, A, 1, h.

Where a lot was described as in the "southeast" corner of a tract, but it appeared from the evidence and the acts of the parties that the southeast corner of a large tract was intended, it was held proper to reject the word "southeast" from the description. Evans *v.* Greene, 21 Mo. 170.

59. *California.*— Pico *v.* Coleman, 47 Cal. 65.

Connecticut.— Nichols *v.* Turney, 15 Conn. 101.

Iowa.— Glenn *v.* Malony, 4 Iowa 314.

Maine.— Herrick *v.* Hopkins, 23 Me. 217.

Minnesota.— Lovejoy *v.* Gaskill, 30 Minn. 137, 14 N. W. 583.

Missouri.— Wolfe *v.* Dyer, 95 Mo. 545, 8 S. W. 551; Brown *v.* Gibson, 82 Mo. 529; Lakenan *v.* Hannibal, etc., R. Co., 36 Mo. App. 363.

New Hampshire.— Bell *v.* Woodward, 46 N. H. 315.

New Jersey.— Fuller *v.* Carr, 33 N. J. L. 157.

New York.— Case *v.* Dexter, 106 N. Y. 548, 13 N. E. 449; Higginbotham *v.* Stoddard, 9 Hun 1.

North Carolina.— Mayo *v.* Blount, 23 N. C. 283.

South Carolina.— Foy *v.* Neal, 2 Strobh. 156.

Virginia.— Byrd *v.* Ludlow, 77 Va. 483.

United States.— Blum *v.* Bowman, 66 Fed. 883, 14 C. C. A. 158.

See 16 Cent. Dig. tit. "Deeds," § 309.

60. Peoria, etc., R. Co. *v.* Tamplin, 156 Ill. 285, 40 N. E. 960; Burnett *v.* McCluey, 78 Mo. 676.

61. Rathbun *v.* Geer, 64 Conn. 421, 30 Atl. 60. But see Llewellyn *v.* Jersey, 12 L. J. Exch. 243, 11 M. & W. 183.

62. Peaslee *v.* Gee, 19 N. H. 273; Clough *v.* Bowman, 15 N. H. 504.

63. *California.*— Wade *v.* Deray, 50 Cal. 376.

New Hampshire.— Bell *v.* Sawyer, 32 N. H. 72.

North Carolina.—Miller *v.* Cherry, 56 N. C. 24.

Oregon.— Raymond *v.* Coffey, 5 Oreg. 132.

Texas.— Hitchler *v.* Boyles, 21 Tex. Civ. App. 230, 51 S. W. 648.

Canada.—Doe *v.* McGarrigle, 14 N. Brunsw. 254.

See 16 Cent. Dig. tit. "Deeds," § 315.

64. Brose *v.* Boise City R., etc., Co., 5 Ida. 694, 51 Pac. 753.

the intention of the parties as shown by the instrument itself and the accompanying circumstances such as those surrounding and connected with the parties and the land at the time.[65] Words may if necessary be qualified by intendment and particular clauses and provisions qualified, transferred, or rejected in order to ascertain the intention.[66]

f. Construing Other Instruments With Deed. Another instrument may in some cases be construed with a deed as a part of the same transaction for the purpose of determining the identity of the property conveyed.[67] And a recorded plat of lots may be construed with a deed in order to determine the dimensions of the property,[68] or a town plan may be referred to.[69]

g. As Between Parties. The description of the property conveyed by a deed should be construed against the grantor and in the manner most beneficial to the grantee.[70]

h. Reference to Facts Existing When Instrument Was Made. In order to ascertain the intention of the parties in respect to the property conveyed reference may be had to the state of facts as they existed when the instrument was made and to which the parties may be presumed to have had reference.[71]

2. Property Included in Description — a. In General. Where land is referred

65. *Illinois.*— Clark *v.* Powers, 45 Ill. 283.
Indiana.— Hunt *v.* Francis, 5 Ind. 302.
Iowa.— Scholte *v.* Rosiers, 4 Iowa 328.
New York.— Jackson *v.* Van Antwerp, 8 Cow. 273.
Pennsylvania.— Hughes *v.* Westmoreland Coal Co., 104 Pa. St. 207.
South Carolina.— Scate *v.* Henderson, 44 S. C. 548, 22 S. E. 724.
Canada.— Nolan *v.* Fox, 15 U. C. C. P. 565.
See 16 Cent. Dig. tit. "Deeds," § 334.

66. Case *v.* Dexter, 106 N. Y. 548, 13 N. E. 449.
A construction which is consistent with all the terms of the description should be given rather than one consistent with some of those terms. Lovejoy *v.* Gaskill, 30 Minn. 137, 14 N. W. 583.

67. Thus a lease has been so construed (Cloyes *v.* Sweetser, 4 Cush. (Mass.) 403; Wildman *v.* Taylor, 29 Fed. Cas. No. 17,654, 4 Ben. 42. But see Armstrong *v.* Du Bois, 90 N. Y. 95), another deed (Pulliam *v.* Bennett, 55 Cal. 368; Moore *v.* Fletcher, 16 Me. 63, 33 Am. Dec. 633), or an agreement executed contemporaneously with the deed and containing a reservation of certain rights to the grantor (Carro *v.* Tucker, 2 Tex. App. Civ. Cas. § 454).

68. Crane *v.* Buckles, 1 Ohio N. P. 51.

69. Birmingham *v.* Anderson, 48 Pa. St. 253.
A map referred to in a deed for a more specific description of the property conveyed becomes a portion of the deed and should be considered with it in construing the same. Penry *v.* Richards, 52 Cal. 672.

70. *California.*— Muller *v.* Boggs, 25 Cal. 175; Vance *v.* Fore, 24 Cal. 435.
Connecticut.— Marshall *v.* Miles, 8 Conn. 369.
Illinois.— Lake Erie, etc., R. Co. *v.* Whitham, 155 Ill. 514, 40 N. E. 1014, 46 Am. St. Rep. 355, 28 L. R. A. 612.
Maine.— Esty *v.* Baker, 50 Me. 325, 79 Am. Dec. 616.
Maryland.— Carroll *v.* Norwood, 5 Harr. & J. 155; Helmes *v.* Howard, 2 Harr. & M. 57; Hawkins *v.* Hanson, 1 Harr. & M. 523.
New York.— Clute *v.* New York Cent. R. Co., 120 N. Y. 267, 24 N. E. 317.
Virginia.— Carrington *v.* Goddin, 13 Gratt. 587.
Canada.— Hyatt *v.* Mills, 20 Ont. 351.
See 16 Cent. Dig. tit. "Deeds," § 313; and *supra*, V, A, 1, i.
Of two descriptions the one most beneficial to the grantee should be taken. Piper *v.* True, 36 Cal. 606; Hall *v.* Gittings, 2 Harr. & J. (Md.) 112.
The grantee may select descriptions most favorable where there are two or more. Sharp *v.* Thompson, 100 Ill. 447, 39 Am. Rep. 61; Armstrong *v.* Mudd, 10 B. Mon. (Ky.) 144, 50 Am. Dec. 545; Winter *v.* White, 70 Md. 305, 17 Atl. 84; Colter *v.* Mann, 18 Minn. 96. But see Barthel *v.* Scotten, 24 Can. Supreme Ct. 367.

71. *Connecticut.*— Wooster *v.* Butler, 13 Conn. 309.
Iowa.— Hoffman *v.* Hoffman, 81 Iowa 292, 46 N. W. 1106; Waldin *v.* Smith, 76 Iowa 652, 39 N. W. 82.
Maine.— Treat *v.* Strickland, 23 Me. 234.
Michigan.— Hoffman *v.* Port Huron, 102 Mich. 417, 60 N. W. 831.
New Hampshire.— Elliott *v.* Gilchrist, 64 N. H. 260, 9 Atl. 382; Dunklee *v.* Wilton R. Co., 24 N. H. 489.
New York.—*Compare* Van Wyck *v.* Wright, 18 Wend. 157.
North Carolina.— McAlister *v.* Holton, 51 N. C. 331.
Oregon.—Lovejoy *v.* Willamette Falls Electric Co., 21 Oreg. 181, 51 Pac. 197.
Wisconsin.— Whitney *v.* Robinson, 53 Wis. 309, 10 N. W. 512.
See 16 Cent. Dig. tit. "Deeds," § 314.
A conveyance of all the interest and title of the grantor may cover a greater interest than he in fact supposed that he owned. Thomas *v.* Chicago, 55 Ill. 403; Watson *v.* Priest, 9 Mo. App. 263. *Compare* Anderson *v.* Nesbit, 2 Rawle (Pa.) 114.

to in a deed as bounding the land conveyed the former land becomes a monument which will control distances.[72] And where a patent or grant conveys a tract of land by metes and bounds, the land under water, which is within the bounds of the grant as described, will pass.[73] Again where two parcels of land are of the same description and the grantor had title to but one parcel, a deed using the common description will be construed as applying to the parcel in which he had an interest.[74]

b. Land on Side of Street or Bank of River. A conveyance of land bounded by a street will carry the fee to the center of the street, where such fee is in the grantor unless a contrary intention is shown.[75] So a deed of several blocks of land which are separated by streets as laid out by the grantor will convey the title to such streets the same as if they had been expressly mentioned.[76] Again it has been determined that where property is conveyed as bounded by a river it will be presumed that the parties intended the bed of the river *ad medium filum* to pass by the conveyance.[77]

c. Description Including Several Particulars — (i) *In General.* Where several particulars are included in the description in a deed, and they are all necessary to ascertain the identity of the land conveyed, such a construction should be given as will satisfy each particular;[78] and only such land will pass as is consistent with every particular.[79] If, however, the identity of the property may be sufficiently determined from the description thereof, including several particulars, the estate may pass, although it does not agree with some of the par-

72. Bryant *v.* Maine Cent. R. Co., 79 Me. 312, 9 Atl. 736. See also Powers *v.* Orville Bank, 136 Cal. 486, 69 Pac. 151; Mellon *v.* Hammond, 17 Mo. 191.

73. Rogers *v.* Jones, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493.

74. Huffman *v.* Eastham, 19 Tex. Civ. App. 227, 47 S. W. 35.

75. *Alabama.*— Moore *v.* Johnston, 87 Ala. 220, 6 So. 50.

Connecticut.— Gear *v.* Barnum, 37 Conn. 229.

New Jersey.— Humphreys *v.* Eastlack, 63 N. J. Eq. 136, 51 Atl. 775.

New York.—*In re* New York, 73 N. Y. App. Div. 394, 77 N. Y. Suppl. 31; Potter *v.* Boyce, 73 N. Y. App. Div. 383, 77 N. Y. Suppl. 24; Wise *v.* Curry, 35 Misc. 634, 72 N. Y. Suppl. 165. But see Deering *v.* Reilly, 167 N. Y. 184, 60 N. E. 447.

Texas.—Bond *v.* Texas, etc., R. Co., 15 Tex. Civ. App. 281, 39 S. W. 978.

England.—Berridge *v.* Ward, 10 C. B. N. S. 400, 7 Jur. N. S. 876, 30 L. J. C. P. 218, 100 E. C. L. 400.

See 16 Cent. Dig. tit. "Deeds," § 316.

Presumption that a moiety of the highway passes may be rebutted by words of the description showing such was not the intention. Pryor *v.* Petre, [1894] 2 Ch. 11, 63 L. J. Ch. 531, 70 L. T. Rep. N. S. 331, 7 Reports 424, 42 Wkly. Rep. 435 [*distinguishing* Berridge *v.* Ward, 10 C. B. N. S. 400, 7 Jur. N. S. 876, 30 L. J. C. P. 218, 100 E. C. L. 400].

Where an intended highway has not been dedicated to the public at the time of the conveyance the presumption that the owner of the land which abuts thereon also owns the soil to the middle of the highway does not apply. Lehigh *v.* Jack, 5 Ex. D. 264, 49 L. J. Exch. 220, 28 Wkly. Rep. 452.

76. Emerson *v.* Bedford, 21 Tex. Civ. App. 262, 51 S. W. 889.

A deed of land, bounding on a street laid out by the grantor, together with all his right, title, and interest in such street will pass the entire length of the street and not merely what is in front of the land conveyed. Holt *v.* Somerville, 121 Mass. 574. But *compare* Bullard *v.* New York, etc., R. Co., 178 Mass. 570, 60 N. E. 380.

77. Tilbury *v.* Silva, 45 Ch. D. 98, 62 L. T. Rep. N. S. 254; Micklethwait *v.* Newlay Bridge Co., 33 Ch. D. 133, 51 J. P. 132, 55 L. T. Rep. N. S. 336; Kains *v.* Turville, 32 U. C. Q. B. 17. See also Head *v.* Chesbrough, 13 Ohio Cir. Ct. 354, 7 Ohio Cir. Dec. 176.

This rule applies in case either of freehold, copyhold, or leasehold. Tilbury *v.* Silva, 45 Ch. D. 98, 62 L. T. Rep. N. S. 254.

Presumption may be rebutted by circumstances which show such was not the intention. Devonshire *v.* Pattinson, 20 Q. B. D. 263, 52 J. P. 276, 57 L. J. Q. B. 189, 58 L. T. Rep. N. S. 392; Micklethwait *v.* Newlay Bridge Co., 33 Ch. D. 133, 51 J. P. 132, 55 L. T. Rep. N. S. 336.

The rule does not apply in case of a canal. Chamber Colliery Co. *v.* Rochdale Canal Co., [1895] A. C. 564, 64 L. J. Q. B. 645, 73 L. T. Rep. N. S. 258, 11 Reports 264.

78. Law *v.* Hempstead, 10 Conn. 23.

79. *Illinois.*— St. Louis Bridge Co. *v.* Curtis, 103 Ill. 410.

Iowa.— Glenn *v.* Malony, 4 Iowa 314.

Massachusetts.— Worthington *v.* Hylyer, 4 Mass. 196.

New York.— Finlay *v.* Cook, 54 Barb. 9; Jackson *v.* Clark, 7 Johns. 217.

North Carolina.— Reddick *v.* Leggat, 7 N. C. 539.

Texas.— Cromwell *v.* Holliday, 34 Tex. 463.

tieulars in the deseription;[80] and a deseription by name may control in determining the identity of the property.[81] Again a general deseription may be affirmed or restricted by a partieular one, and where there is both a general and a partieular description set forth in a deed the latter will, in ease of any repugnanee, eontrol.[82]

(11) *Description of Property as Occupied.* A description of the property as oecupied by the grantor may eontrol other words in the description in determining the identity of the property eonveyed.[83] But a particular description will prevail over an inaeeurate deseription of occupation.[84]

d. Rejection of False or Erroneous Deseription. A deed should be eonstrued if possible so as to earry out the intention of the parties and give effect to it as a eonveyanee, and where by the rejection of a false and impossible part of a description whieh is repugnant to the general intention of the instrument a perfeet deseription will remain, the false part should be rejected and effeet given to the deed.[85] So if any partieular of a deseription is manifestly erroneous it may

See 16 Cent. Dig. tit. "Deeds," § 319.

80. Clark *v.* Beloff, 71 Conn. 237, 41 Atl. 801; Stark *v.* Spalding, 39 S. W. 234, 19 Ky. L. Rep. 181; Maryland Constr. Co. *v.* Keifer, 90 Md. 529, 45 Atl. 197; Worthington *v.* Hylyer, 4 Mass. 196. See also McCune *v.* Hull, 24 Mo. 570.

81. Griffiths *v.* Penson, 9 Jur. N. S. 385, 8 L. T. Rep. N. S. 84, 11 Wkly. Rep. 313; Stiles *v.* Keiver, 10 N. Brunsw. 285. See also *infra*, V, B, 2, h.

A deed "of all the following portions of the said homestead farm," this reeital being followed by a description of a tract not included in such homestead farm, will not pass such tract. Whitney *v.* Biekford, 69 N. H. 527, 45 Atl. 412.

82. *Alabama.*— Carter *v.* Chevalier, 108 Ala. 563, 19 So. 798; Guilmartin *v.* Wood, 76 Ala. 204; Sikes *v.* Shows, 74 Ala. 382.

California.—Castro *v.* Tennent, 44 Cal. 253.

Connecticut.—Benedict *v.* Gaylord, 11 Conn. 332, 29 Am. Dec. 299.

Illinois.— St. Louis Bridge Co. *v.* Curtis, 103 Ill. 410.

Maine.— Lincoln *v.* Wilder, 29 Me. 169.

Maryland.— Jay *v.* Michael, 82 Md. 1, 33 Atl. 322; Beall *v.* Bayard, 5 Harr. & J. 127.

Massachusetts.— Smith *v.* Strong, 14 Pick. 128.

Missouri.— Johnson County *v.* Wood, 84 Mo. 489; Hannibal, etc., R. Co. *v.* Green, 68 Mo. 169.

New Hampshire.— Driscoll *v.* Green, 59 N. H. 101; Nutting *v.* Herbert, 35 N. H. 120; Woodman *v.* Lane, 7 N. H. 241; Barnard *v.* Martin, 5 N. H. 536.

New York.— Ousby *v.* Jones, 73 N. Y. 621.

North Carolina.— Carter *v.* White, 101 N. C. 30, 7 S. E. 473.

Ohio.— Chambers *v.* Forsythe, 1 Ohio Cir. Ct. 282.

United States.— Prentiee *v.* Stearns, 113 U. S. 435, 5 S. Ct. 547, 28 L. ed. 1059; Prentice *v.* Duluth Storage, etc., Co., 58 Fed. 437, 7 C. C. A. 293; Prentice *v.* Northern Pac. R. Co., 43 Fed. 270.

See 16 Cent. Dig. tit. "Deeds," § 319.

A clear general description will prevail over subsequent expressions of doubtful import. Ela *v.* Card, 2 N. H. 175, 9 Am. Dec. 46.

Particular description may abridge but not enlarge the general description. Reddick *v.* Leggat, 7 N. C. 539.

Where property is described as the whole of a certain tract the fact that the courses and distances by which the property is described do not include the whole tract will not prevent it from passing. Keith *v.* Reynolds, 3 Me. 393.

83. Stewart *v.* Davis, 63 Me. 539; Chesley *v.* Holmes, 40 Me. 536; Abbott *v.* Pike, 33 Me. 204; Hastings *v.* Hastings, 110 Mass. 280; Warren *v.* Cogswell, 10 Gray (Mass.) 76; Dyne *v.* Nutley, 14 C. B. 122, 2 C. L. R. 81, 78 E. C. L. 122; Doe *v.* Williams, 1 H. Bl. 25, 2 Rev. Rep. 703.

Where land is described as lately owned by another and now occupied by the grantor, land oecupied by the latter but not owned by the former will not pass. Marshall *v.* Pieree, 12 N. H. 127.

84. Doe *v.* Galloway, 5 B. & Ad. 43, 2 L. J. K. B. 182, 2 N. & M. 240, 27 E. C. L. 28. See also Stone *v.* Stone, 116 Mass. 279; Wilkinson *v.* Malin, 12 Cromp. & J. 636, 1 L. J. Exch. 234, 2 Tyrw. 544.

85. *California.*— Wilcoxson *v.* Sprague, 51 Cal. 640; Reed *v.* Spicer, 27 Cal. 57.

District of Columbia.— Shoemaker *v.* Chappell, 4 Mackey 413.

Illinois.— Halston *v.* Needles, 115 Ill. 461, 5 N. E. 530; Burns *v.* Miller, 110 Ill. 242; Kruse *v.* Wilson, 79 Ill. 233; Myers *v.* Ladd, 26 Ill. 415.

Indiana.— Gano *v.* Aldridge, 27 Ind. 294.

Iowa.— Glenn *v.* Malony, 4 Iowa 314.

Kentucky.— Cates *v.* Woodson, 2 Dana 452.

Louisiana.— Marshall *v.* Fogleman, 14 La. 151.

Maine.— Chandler *v.* Green, 69 Me. 350; Beal *v.* Gordon, 55 Me. 482; Abbott *v.* Abbott, 53 Me. 356; Vose *v.* Handy, 2 Me. 322, 11 Am. Dec. 101.

Massachusetts.— Bond *v.* Fay, 12 Allen 86; Doane *v.* Willcutt, 16 Gray 368; Sawyer *v.* Kendall, 10 Cush. 241.

Michigan.—Anderson *v.* Baughman, 7 Mich. 69, 74 Am. Dec. 692.

Missouri.— Cooley *v.* Warren, 53 Mo. 166; Jennings *v.* Brizeadine, 44 Mo. 332.

be rejected where the land may be sufficiently identified by that which remains.[86] But although an obvious error in a deed may be corrected so as to make the calls consistent with each other and the description perfect yet land cannot be thereby included in a description which the calls fairly construed do not include.[87]

e. Effect of General Clauses or Recitals Extending Grant. In determining the effect of a general clause or recital which may operate to extend a grant, such a construction should be given as will if possible carry into effect every part of the deed.[88] Where the construction, however, is doubtful, the instrument should be construed against the grantor.[89] And a particular description which is clear and explicit and is a complete identification of the property intended to be conveyed will not be varied or enlarged by a more general and less definite description, as in such a case the former will be considered as expressing the intent of the parties

New Hampshire.— Johnson *v.* Simpson, 36 N. H. 91; Harvey *v.* Mitchell, 31 N. H. 575; White *v.* Gay, 9 N. H. 126, 31 Am. Dec. 224.

New York.— Heller *v.* Cohen, 154 N. Y. 299, 48 N. E. 527; Robinson *v.* Kime, 70 N. Y. 147; Zink *v.* McManus, 49 Hun 583, 3 N. Y. Suppl. 487; Hansee *v.* Mead, 27 Hun 162, 2 N. Y. Civ. Proc. 175; Mason *v.* White, 11 Barb. 173; Loomis *v.* Jackson, 19 Johns. 449; Jackson *v.* Root, 18 Johns. 60.

North Carolina.— Scull *v.* Pruden, 92 N. C. 168; Mayo *v.* Blount, 23 N. C. 283; Belk *v.* Love, 18 N. C. 65; Sheppard *v.* Simpson, 12 N. C. 237.

Ohio.— C. S. & C. R. Co. *v.* Tuttle, 7 Ohio Cir. Dec. 63.

Texas.— Smith *v.* Chatham, 14 Tex. 322; McAllen *v.* Raphael, 11 Tex. Civ. App. 116, 32 S. W. 449.

United States.—Hamm *v.* San Francisco, 17 Fed. 119, 9 Sawy. 31.

England.— Cowen *v.* Truefitt, [1899] 2 Ch. 309, 68 L. J. Ch. 563, 81 L. T. Rep. N. S. 104, 47 Wkly. Rep. 661; Lambe *v.* Reaston, 1 Marsh. 25, 5 Taunt. 207, 1 E. C. L. 113; Huntsman *v.* Lynd, 30 U. C. C. P. 100.

Canada.— Barthel *v.* Scotten, 24 Can. Supreme Ct. 367; Wigle *v.* Stewart, 28 U. C. Q. B. 427; Fields *v.* Miller, 27 U. C. Q. B. 416; Hoover *v.* Sabourin, 21 Grant Ch. (U. C.) 333.

See 16 Cent. Dig. tit. "Deeds," § 325.

86. *Arkansas.*— Beardsley *v.* Nashville, 64 Ark. 240, 41 S. W. 853.

California.— Haley *v.* Amestoy, 44 Cal. 132.

Colorado.— Murray *v.* Hobson, 10 Colo. 66, 13 Pac. 921.

Illinois.— Montag *v.* Linn, 23 Ill. 551.

Maine.— Richardson *v.* Watts, 94 Me. 476, 48 Atl. 180; Purinton *v.* Sedgley, 4 Me. 283.

Massachusetts.— Aldrich *v.* Aldrich, 135 Mass. 153; Parks *v.* Loomis, 6 Gray 467; Thatcher *v.* Howland, 2 Metc. 41.

Missouri.— Prior *v.* Scott, 87 Mo. 303; Bradshaw *v.* Bradbury, 64 Mo. 334; Jamison *v.* Fopiano, 48 Mo. 194.

New Hampshire.— Lane *v.* Thompson, 43 N. H. 320; Tenny *v.* Beard, 5 N. H. 58.

New York.— Robinson *v.* Kime, 70 N. Y. 147; Phillips *v.* Ritter, 20 N. Y. App. Div. 34, 46 N. Y. Suppl. 547; Loomis *v.* Jackson, 19 Johns. 449; Jackson *v.* Clark, 7 Johns. 217.

North Carolina.— British, etc., Mortg. Co. *v.* Long, 113 N. C. 123, 18 S. E. 165; Credle *v.* Hays, 88 N. C. 321.

Ohio.— Cook *v.* Wesner, 1 Cinc. Super. Ct. 249.

Pennsylvania.— Airey *v.* Kunkle, 6 Pa. Dist. 1, 18 Pa. Co. Ct. 620; Holmes *v.* Mealy, 1 Phila. 339.

Rhode Island.— Waterman *v.* Andrews, 14 R. I. 589.

South Carolina.— Scates *v.* Henderson, 44 S. C. 548, 22 S. E. 724; Norwood *v.* Byrd, 1 Rich. 135, 42 Am. Dec. 406.

South Dakota.— Novotny *v.* Danforth, 9 S. D. 301, 68 N. W. 749.

Tennessee.— Gray *v.* Ward, (Ch. App. 1898) 52 S. W. 1028.

Texas.— Cartwright *v.* Trueblood, 90 Tex. 535, 39 S. W. 930; Arambula *v.* Sullivan, 80 Tex. 615, 16 S. W. 436; Missouri, etc., R. Co. *v.* Waco Bldg., etc., Assoc., (Civ. App. 1896) 37 S. W. 242; Blount *v.* Bleker, 13 Tex. Civ. App. 227, 35 S. W. 863.

Vermont.— Hull *v.* Fuller, 7 Vt. 100.

Virginia.— State Sav. Bank *v.* Stewart, 93 Va. 447, 25 S. E. 543; Wiseley *v.* Findlay, 3 Rand. 361, 15 Am. Dec. 712.

West Virginia.— Gibney *v.* Fitzsimmons, 45 W. Va. 334, 32 S. E. 189.

Wisconsin.— Thompson *v.* Jones, 4 Wis. 106.

United States.— Cornell *v.* Green, 88 Fed. 821; Swenson *v.* Mynair, 79 Fed. 608, 25 C. C. A. 126.

England.— Wilkinson *v.* Malin, 2 Cromp. & J. 636, 1 L. J. Exch. 234, 2 Tyrw. 544.

Canada.— Gillen *v.* Haynes, 33 U. C. Q. B. 516.

See 16 Cent. Dig. tit. "Deeds," § 325.

Words used by mistake may be read differently as "northeasterly" for "northwesterly" (Maryland Constr. Co. *v.* Kuper, 99 Md. 529, 45 Atl. 197); "southwest" for "northwest" (Heller *v.* Cohen, 9 N. Y. App. Div. 465, 41 N. Y. Suppl. 214), and "westwards" for "northwards" (Ferguson *v.* Freeman, 27 Grant Ch. (U. C.) 211).

87. Richardson *v.* Watts, 94 Me. 476, 48 Atl. 180.

88. Barker *v.* Butler, 3 Hayw. (Tenn.) 243. *Compare* Clark *v.* Glos, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223.

89. Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Black *v.* Grant, 50 Me. 364.

rather than the latter.[90] A particular description may, however, yield to a general description where the former is defective;[91] where the grant is made certain under the general description and is less than under the particular;[92] or where there is a clear intent to have the general control.[93] Again a reference to another deed may control over a particular description,[94] although such a reference may be construed as a help to trace title and not as enlarging the grant.[95]

f. Recitals in Habendum and Covenants. The covenants in a deed will not be so construed as to enlarge the grant where there is no ambiguity.[96] But the technical rule that the *habendum* clause cannot increase the gift cannot be allowed to prevail against the plain meaning of one of our early deeds.[97]

g. Reference to Other Instruments — (i) *In General.* By a proper reference in a deed to another instrument which contains a description of the property conveyed the latter instrument may in many cases be considered as incorporated in the former and the two may be construed together for the purpose of identifying the particular property intended to be conveyed by the deed. Such a rule has been affirmed in the case of a reference to another deed;[98] to a government

90. *Maine.*—Brunswick Sav. Inst. *v.* Crossman, 76 Me. 577; Carville *v.* Hutchins, 73 Me. 227; Hathorn *v.* Hinds, 69 Me. 326.

Massachusetts.— Tyler *v.* Hammond, 11 Pick. 193.

Texas.— Cullers *v.* Platt, 81 Tex. 258, 16 S. W. 1003.

Vermont.— Cummings *v.* Black, 65 Vt. 76, 25 Atl. 906; Spiller *v.* Scribner, 36 Vt. 245.

United States.— Prentice *v.* Northern Pac. R. Co., 154 U. S. 163, 14 S. Ct. 997, 38 L. ed. 947; Parker *v.* Kane, 22 How. 1, 16 L. ed. 286.

England.— Chapman *v.* Gatcombe, 2 Bing. N. Cas. 516, 5 L. J. C. P. 93, 2 Scott 738, 29 E. C. L. 642; Doe *v.* Meyrick, 2 Cromp. & J. 223, 1 L. J. Exch. 73, 2 Tyrw. 178; Worthington *v.* Gimson, 2 E. & E. 618, 6 Jur. N. S. 1053, 29 L. J. Q. B. 116, 105 E. C. L. 618; Donnysworth *v.* Blair, 1 Jur. 620, 1 Keen. 795, 6 L. J. Ch. 263.

Canada.— Doe *v.* Smith, 5 U. C. Q. B. 225.

See 16 Cent. Dig. tit. "Deeds," § 320.

General words apply to things ejusdem generis with those specifically mentioned. Lee *v.* Alexander, 8 App. Cas. 853; Matter of Wright, 15 Beav. 367; Crompton *v.* Jarratt, 30 Ch. D. 298, 54 L. J. Ch. 1109, 53 L. T. Rep. N. S. 603, 33 Wkly. Rep. 913. See also Donnysworth *v.* Blair, 1 Jur. 620, 1 Keen 795, 6 L. J. Ch. 263.

"Machinery belonging to mill" has been held not to pass looms which are used therein but which are not attached to the freehold. Hutchinson *v.* Kay, 23 Beav. 413, 3 Jur. N. S. 652, 26 L. J. Ch. 457, 5 Wkly. Rep. 341.

91. Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Jamieson *v.* McCollum, 18 U. C. Q. B. 445.

92. Cummings *v.* Browne, 61 Iowa 385, 16 N. W. 280.

93. Dodge *v.* Nichols, 5 Allen (Mass.) 548; Foss *v.* Crisp, 20 Pick. (Mass.) 121; Ragan *v.* McCoy, 26 Mo. 166; Pearce *v.* Burns, 22 Mo. 577; Derrick *v.* Jewett, 21 Mo. 444; Bates *v.* Bower, 17 Mo. 550; Lauchheimer *v.* Saunders, 27 Tex. Civ. App. 484, 65 S. W. 500.

94. Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Child *v.* Ficket, 4 Me. 471; Coogan *v.* Burling Mills, 124 Mass. 390; Newmarket Mfg. Co. *v.* Pendergast, 24 N. H. 54.

95. Brown *v.* Heard, 85 Me. 294, 27 Atl. 182.

96. Stinchfield *v.* Gerry, 64 Me. 200.

A deed generally passes only what is named in the granting clause. McCurdy *v.* Alpha Gold, etc., Min. Co., 3 Nev. 27. See also Moore *v.* Magrath, Cowp. 9; Richmond Cedar Works *v.* Kilby, 126 N. C. 33, 35 S. E. 186.

97. Watuppa Reservoir Co. *v.* Fall River, 154 Mass. 305, 28 N. E. 257, 13 L. R. A. 255.

An explanatory clause or habendum of a deed may, under the modern and liberal rules of interpretation, cause that to pass which could by no possibility be held to have been described in the granting clause, although before such effect is given thereto it should clearly appear from the instrument that such was the intention of the parties. McCurdy *v.* Alpha Gold, etc., Min. Co., 3 Nev. 27.

98. *California.*— Central Pac. R. Co. *v.* Beal, 47 Cal. 151; Vance *v.* Fore, 24 Cal. 435.

Connecticut.— Post Hill Imp. Co. *v.* Brandegee, 74 Conn. 338, 50 Atl. 874.

Indiana.— German Mut. Ins. Co. *v.* Grim, 32 Ind. 249, 2 Am. Rep. 341.

Iowa.— Nightingale *v.* Walker, 3 Greene 96.

Maine.— Getchell *v.* Whittemore, 72 Me. 393; Field *v.* Huston, 21 Me. 69; Jameson *v.* Balmer, 20 Me. 425.

Massachusetts.— Stone *v.* Stone, 179 Mass. 555, 61 N. E. 268; Weller *v.* Barber, 110 Mass. 44; Wilson *v.* Underhill, 108 Mass. 360; Cook *v.* Farrington, 10 Gray 70.

New Hampshire.— Newmarket Mfg. Co. *v.* Pendergast, 24 N. H. 54.

New York.— Putzel *v.* Van Brunt, 40 N. Y. Super. Ct. 501.

North Carolina.— Brown *v.* Rickard, 107 N. C. 639, 12 S. E. 570; Everitt *v.* Thomas, 23 N. C. 252.

Texas.—Jordan *v.* Young, (Civ. App. 1900) 56 S. W. 762.

Vermont.— Lippett *v.* Kelley, 46 Vt. 516.

See 16 Cent. Dig. tit. "Deeds," § 323.

patent;[99] to a Spanish concession;[1] to a judgment;[2] to an assignment of dower or other records in the office of the probate court;[3] to a vote conveying a parcel of common and undivided land to a parish;[4] or to a will.[5] But where a deed contains a particular description of the property the fact that it contains a statement that the granted premises are the same that were conveyed to the grantor by a certain deed does not render it conclusive that it was the intention of the grantor to convey all of the premises included in the latter deed.[6]

(II) *To Surveys, Maps, Plats, and Records Thereof.* Where a map, plan, or survey of the premises conveyed is referred to in a deed it is to be considered as a part of the latter instrument and is to be construed in connection therewith;[7] and the courses, distances, or other particulars which appear on such map, plan, or survey are as a general rule to be considered as the true description

Reference to deed conveying no estate.— Where a deed by one in possession refers to a deed to him which conveys no estate it will be construed as conveying all the title which the grantor has. Hall *v.* Leonard. 1 Pick. (Mass.) 27. *Compare* O'Connor *v.* Vineyard, (Tex. Sup. 1898) 44 S. W. 485.

99. Miller *v.* Topeka Land Co., 44 Kan. 354, 24 Pac. 420.

1. Harrison *v.* Page, 16 Mo. 182.

2. Blume *v.* Rice, (Tex. Civ. App. 1895) 32 S. W. 1056.

3. Pingry *v.* Watkins, 17 Vt. 379.

4. Goff *v.* Rehoboth, 12 Metc. (Mass.) 26.

5. Beatty *v.* Dozier, 34 S. W. 524, 17 Ky. L. Rep. 1275; Hoxie *v.* Lawrence, 117 Mass. 111; Izard *v.* Montgomery, 1 Nott & M. (S. C.) 581.

6. Smith *v.* Sweat, 90 Me. 528, 38 Atl. 554; Lovejoy *v.* Lovett, 124 Mass. 270; McCune *v.* Hull, 24 Mo. 570.

Where the property is particularly described in the deed such description will not be qualified by a subsequent clause which shows how the grantor came into possession. Winn *v.* Cabot, 18 Pick. (Mass.) 553; Whiting *v.* Dewey, 15 Pick. (Mass.) 428; Chaplin *v.* Srodes, 7 Watts (Pa.) 410; Morrow *v.* Willard, 30 Vt. 118.

7. *Alabama.*— Doe *v.* Cullum, 4 Ala. 576.

California.— Chapman *v.* Polack, 70 Cal. 487, 11 Pac. 764; Penry *v.* Richards, 52 Cal. 496; Powers *v.* Jackson, 50 Cal. 429; Seward *v.* Malotte, 15 Cal. 304.

Illinois.— Smith *v.* Young, 160 Ill. 163, 43 N. E. 486; Alton *v.* Illinois Transp. Co., 12 Ill. 38, 52 Am. Dec. 479.

Kentucky.— Cincinnati Southern R. Co. *v.* Hogan, 7 Ky. L. Rep. 820.

Maine.— Black *v.* Grant, 50 Me. 364; Palmer *v.* Dougherty, 33 Me. 502, 54 Am. Dec. 636; Lincoln *v.* Wilder, 29 Me. 169; Kennebec Purchase *v.* Tiffany, 1 Me. 219, 10 Am. Dec. 60.

Maryland.— Carroll *v.* Smith, 4 Harr. & J. 128; Buchanan *v.* Steuart, 3 Harr. & J. 329.

Massachusetts.— Walker *v.* Boynton, 120 Mass. 349; Blaney *v.* Rice, 20 Pick. 62, 32 Am. Dec. 204; Davis *v.* Rainsford, 17 Mass. 207.

Michigan.— Heffelman *v.* Otsego Water-Power Co., 78 Mich. 121, 43 N. W. 1096, 44 N. W. 1151.

Minnesota.— Nicolin *v.* Schneiderham, 37 Minn. 63, 33 N. W. 33.

Missouri.— St. Louis *v.* Missouri Pac. R. Co., 114 Mo. 13, 21 S. W. 202; Whitehead *v.* Ragan, 106 Mo. 231, 17 S. W. 307.

New York.— Cox *v.* James, 59 Barb. 144; Glover *v.* Shields, 32 Barb. 374; Herring *v.* Fisher, 3 Sandf. 344.

North Carolina.— Davidson *v.* Arledge, 97 N. C. 172, 2 S. E. 378.

Pennsylvania.— Schenley *v.* Pittsburgh, 104 Pa. St. 472; Meyers *v.* Robinson, 74 Pa. St. 269; Birmingham *v.* Anderson, 48 Pa. St. 253; Armstrong *v.* Boyd, 3 Penr. & W. 458.

Rhode Island.— Kenyon *v.* Nichols, 1 R. I. 411.

Texas.— League *v.* Scott, 25 Tex. Civ. App. 318, 61 S. W. 521.

Wisconsin.— Shufeldt *v.* Spaulding, 37 Wis. 662.

United States.— Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566; Noonan *v.* Braley, 2 Black 499, 17 L. ed. 278; Thomas *v.* Hatch, 23 Fed. Cas. No. 13,899, 3 Sumn. 170.

Canada.— Smith *v.* Millions, 15 Ont. 453.

See 16 Cent. Dig. tit. "Deeds," § 324.

Description of lot by number of such lot in a survey or plan is sufficient to make the survey a part of the deed (Dolde *v.* Vodicka, 49 Mo. 98; Richardson *v.* McKeesport, 18 Pa. Super. Ct. 199), and may control in determining the identity of the property conveyed (Baltimore Bldg., etc., Assoc. *v.* Bethel, 120 N. C. 344, 27 S. E. 29). And where a patent grants a lot by number or letter only a description used by the crown lands department in framing the patent is admissible in evidence for the purpose of determining the metes and bounds of such lot. Kenny *v.* Caldwell, 21 Ont. App. 110 [*affirmed* in 24 Can. Supreme Ct. 699]. But where there is a particular description by metes and bounds and the map number given conflicts therewith, the lot must be located according to the particular description. Hale *v.* Swift, 63 S. W. 288, 23 Ky. L. Rep. 497.

Effect of describing lot or block by number see King *v.* Sears, 91 Ga. 577, 18 S. E. 830; Jenkins *v.* Means, 59 Ga. 55; Brown *v.* Taber, 103 Iowa 1, 72 N. W. 416; Young *v.* Cosgrove, 83 Iowa 682, 49 N. W. 1040; Draper *v.* Monroe, 18 R. I. 398, 28 Atl. 340; West Portland Homestead Assoc. *v.* Lawnsdale, 19 Fed. 291, 9 Sawy. 120.

of the land conveyed.[8] And where a plat is referred to in a description in a deed it may be used to identify the land conveyed, although it does not conform to the statute.[9] So a reference to a plat "as recorded" refers to the original plat which was duly filed for record and not to an erroneous transcript therefrom.[10] And although a map in a deed is not expressly referred to therein it may be treated as a part of the description when it was evidently intended to be so treated.[11] But a plan only becomes a part of the deed where the grant is made according to such plan distinctly and certainly designated by the deed, and where a certain plan is so designated another plan cannot be referred to.[12]

h. Subsequent Description Limiting Prior One. A general description will not be limited by a particular one where the latter follows in the sense of reiteration or affirmation.[13] And where by the granting clause in a deed a certain lot and block in a town is designated as the property intended to be conveyed an intent to convey the whole lot will be presumed, although the description is followed by metes and bounds embracing an area less than the lot.[14] Such a rule has also been

8. *California.*— Sanchez *v.* Grace M. E. Church, 114 Cal. 295, 46 Pac. 2; Masterson *v.* Munroe, 105 Cal. 431, 38 Pac. 1106, 45 Am. St. Rep. 57; Powers *v.* Jackson, 50 Cal. 429; Mayo *v.* Mazeaux, 38 Cal. 442.

Iowa.— Brown *v.* Taber, 103 Iowa 1, 72 N. W. 416.

Kentucky.— Long *v.* Louisville, etc., R. Co, 51 S. W. 807, 21 Ky. L. Rep. 463.

Louisiana.— Whitney *v.* Saloy, 26 La. Ann. 40.

Maine.— Bussey *v.* Grant, 20 Me. 281; Heaton *v.* Hodges, 14 Me. 66, 30 Am. Dec. 731.

Maryland.— Buchanan *v.* Steuart, 3 Harr. & J. 329.

Michigan.— Bower *v.* Earl, 18 Mich. 367; Paddock *v.* Pardee, 1 Mich. 421.

New York.— Perrin *v.* New York Cent. R. Co., 40 Barb. 65. See Matter of East One Hundred and Thirty-Fifth St., 36 Misc. 427, 73 N. Y. Suppl. 727.

North Carolina.—Nash *v.* Wilmington, etc., R. Co., 67 N. C. 413.

South Carolina.— Evans *v.* Corley, 8 Rich. 315.

Texas.— Reed *v.* Phillips, (Civ. App. 1896) 33 S. W. 986; Gallow *v.* Van Wormer, (Civ. App. 1892) 21 S. W. 547.

Virginia.— Jones *v.* Carter, 4 Hen. & M. 184.

Canada.— Grasett *v.* Carter, 10 Can. Supreme Ct. 105. See also Stevens *v.* Buck, 43 U. C. Q. B. 1; O'Donnell *v.* Tiernan, 35 U. C. Q. B. 181.

See 16 Cent. Dig. tit. "Deeds," § 324.

Accretions to a lot bounded by a river as shown by a map referred to in a deed which describes the lot by number pass by such deed. De Long *v.* Olsen, 63 Nebr. 327, 88 N. W. 512.

An error in number of ranges, where property is described according to United States survey maps, is immaterial, the description being otherwise sufficient to identify the property. Willis *v.* Ruddock Cypress Co., 108 La. 255, 32 So. 386.

An inscription on a plat of the number of acres in a section and which is a mere estimate will not control so as to limit the amount of land conveyed, where the one half of the one-quarter section which the deed purported to convey was properly marked out on the plat and there were more acres in the section than designated. Wolfe *v.* Scarborough, 2 Ohio St. 361. *Compare* Llewellyn *v.* Jersey, 12 L. J. Exch. 243, 11 M. & W. 183.

Where a map is inaccurate the property may be identified by parol evidence. Cleveland *v.* Choate, 77 Cal. 73, 18 Pac. 875.

Where a reference to colored parts of a map is made for description of parcels conveyed, a yard, although not colored, may pass under the general word "yards." Willis *v.* Watney, 51 L. J. Ch. 181, 45 L. T. Rep. N. S. 739, 30 Wkly. Rep. 424. *Compare* Reilly *v.* Booth, 44 Ch. D. 12, 62 L. T. Rep. N. S. 378, 38 Wkly. Rep. 484.

9. Sanborn *v.* Mueller, 38 Minn. 27, 35 N. W. 636; Reed *v.* Lammel, 28 Minn. 306, 9 N. W. 858; Ferguson *v.* Winsor, 10 Ont. 13.

10. Siebert *v.* Rosser, 24 Minn. 155.

11. Murray *v.* Klinzing, 64 Conn. 78, 29 Atl. 244.

A plat referred to in a deed for a description of the premises conveyed cannot be referred to for the purpose of enlarging or diminishing the effect of the words of conveyance in a deed. Kenyon *v.* Nichols, 1 R. I. 411. And a plan referred to for the purpose of indicating the shape of the tract conveyed but not as indicating its location is not admissible for the purpose of identifying the land. Grand Trunk R. Co. *v.* Dyer, 49 Vt. 74. Again a survey and erection of monuments on land made with a view of subsequent conveyance is not admissible to vary a deed subsequently made which makes no reference to such survey. Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

12. Chesley *v.* Holmes, 40 Me. 536. See also Wellington *v.* Murdough, 41 Me. 281.

If a deed refers generally to a survey and only one survey is given in evidence the description will be considered as referring to that survey. Menkins *v.* Blumenthal, 19 Mo. 496.

13. Piper *v.* True, 36 Cal. 606; Barney *v.* Miller, 18 Iowa 460; Bott *v.* Burnell, 11 Mass. 163.

14. The additional clause will be considered as merely added for the purpose of giv-

affirmed where a deed grants an entire share under a decree of partition;[15] all of certain property;[16] a whole farm;[17] or land by name,[18] or by the number of a lot.[19] So where a description in a deed is a clear and complete one a reference to other deeds will not operate to restrict the same.[20]

i. **Recitals** — (i) *As to Locality.* Where a recital as to locality is not ambiguous when applied to facts on the ground and is sufficiently accurate to show what place was intended, and a construction may be adopted which will make good sense of the entry, effect should be given thereto.[21] But where the language of a deed is certain and the locality of the property fixed by recitals therein it should not be extended by implication.[22]

(ii) *As to Quantity.* Where a deed contains a particular description of the property conveyed it will not be controlled by a recital therein of the quantity,[23]

ing a more particular description. Rutherford *v.* Tracy, 48 Mo. 325, 8 Am. Rep. 104; Campbell *v.* Johnson, 44 Mo. 247; Jackson *v.* Barringer, 15 Johns. (N. Y.) 471; Brown *v.* Huger, 21 How. (U. S.) 305, 16 L. ed. 125; Lodge *v.* Lee, 6 Cranch (U. S.) 237, 3 L. ed. 210.

15. Marshall *v.* McLean, 3 Greene (Iowa) 363.

16. Friedman *v.* Nelson, 53 Cal. 589; Hobbs *v.* Payson, 85 Me. 498, 27 Atl. 519; Cook *v.* Wesner, 1 Cinc. Super. Ct. 249; Holmes *v.* Mealy, 1 Phila. (Pa.) 339.

17. Thorndike *v.* Richards, 13 Me. 430; Drinkwater *v.* Sawyer, 7 Me. 366.

18. Gitting *v.* Hall, 1 Harr. & J. (Md.) 14, 2 Am. Dec. 502; Portman *v.* Mill, 3 Jur. 356, 8 L. J. Ch. 161; Attrill *v.* Platt, 10 Can. Supreme Ct. 425. See Melvin *v.* Merrimack River Locks, etc., 5 Metc. (Mass.) 15, 38 Am. Dec. 384.

19. Kimball *v.* Schoff, 40 N. H. 190; Stiles *v.* Keiver, 10 N. Brunsw. 285.

20. Jones *v.* Webster Woolen Co., 85 Me. 210, 27 Atl. 105; Crosly *v.* Bradbury, 20 Me. 61; Daniels *v.* Citizens' Sav. Inst., 127 Mass. 534; Green Bay, etc., Canal Co. *v.* Hewitt, 55 Wis. 96, 12 N. W. 382, 42 Am. Rep. 701.

A deed referred to may restrict the description. Plummer *v.* Gould, 92 Mich. 1, 52 N. W. 146, 31 Am. St. Rep. 567; Flagg *v.* Bean, 25 N. H. 49. See also Witt *v.* St. Paul, etc., R. Co., 38 Minn. 122, 35 N. W. 862.

21. Bibb *v.* Pickett, Litt. Sel. Cas. (Ky.) 309.

22. King *v.* Little, 1 Cush. (Mass.) 436; Miller *v.* Mann, 55 Vt. 475.

A description of land as adjoining certain property cannot be construed as including such property. Patterson *v.* Lexington, etc., Turnpike Road Co., 62 S. W. 528, 23 Ky. L. Rep. 24. Adjoining certain tracts means the same as to say to go and run with the lines of such tracts. O'Dell *v.* Swaggerty, (Tenn. Ch. App. 1897) 42 S. W. 175.

Where a deed conveys property and land contiguous thereto and there is nothing in the instrument to show that the word "contiguous" was to be used in any other than its primary meaning, land separated from the main property by intervening lands of another and at a considerable distance therefrom will not be included, as the courts in construing contracts will not substitute another which the parties may have intended to, but did not in fact, make. Halston Salt, etc., Co. *v.* Campbell, 89 Va. 396, 16 S. E. 274. And where a deed describes property as near a place and there are two pieces to which it might refer, but that which is nearer comes more clearly within the description, the instrument will be construed as conveying the latter piece. Menkens *v.* Blumenthal, 27 Mo. 198.

23. *Alabama.*— Hess *v.* Cheney, 83 Ala. 251, 3 So. 791; Rogers *v.* Peebles, 72 Ala. 529; Wright *v.* Wright, 34 Ala. 194.

Arkansas.— Doe *v.* Porter, 3 Ark. 18, 36 Am. Dec. 448.

Connecticut.— Hodges *v.* Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87; Johnson *v.* Moor, 2 Root 252, 1 Am. Dec. 69.

Illinois.— Wadhams *v.* Swan, 109 Ill. 46.

Iowa.—Dashiel *v.* Harshman, 113 Iowa 283, 85 N. W. 85; Ufford *v.* Wilkins, 33 Iowa 110.

Kansas.—Armstrong *v.* Brownfield, 32 Kan. 116, 4 Pac. 185.

Kentucky.—Jennings *v.* Monk, 4 Metc. 103; Young *v.* Craig, 2 Bibb 270.

Maine.— Andrews *v.* Pearson, 68 Me. 19; Clark *v.* Scammon, 62 Me. 47; Brown *v.* Holyoke, 53 Me. 9; Pierce *v.* Faunce, 37 Me. 63.

Massachusetts.— Crafts *v.* Hibbard, 4 Metc. 438; Powell *v.* Clark, 5 Mass. 355, 4 Am. Dec. 67.

Missouri.— Ware *v.* Johnson, 66 Mo. 662; Campbell *v.* Johnson, 44 Mo. 247; Campbell *v.* Clark, 6 Mo. 219; Wood *v.* Murphy, 47 Mo. App. 539.

New Hampshire.— Perkins *v.* Webster, 2 N. H. 287.

New Jersey.— Andrews *v.* Rue, 34 N. J. L. 402; Fuller *v.* Carr, 33 N. J. L. 157.

New York.— Pettit *v.* Shepard, 32 N. Y. 97; Roat *v.* Puff, 3 Barb. 353; Hathaway *v.* Power, 6 Hill 453; Mann *v.* Pearson, 2 Johns. 37.

North Carolina.— Huntley *v.* Waddell, 34 N. C. 32; Powell *v.* Lyles, 5 N. C. 348; Rickets *v* Dickens, 5 N. C. 343, 4 Am. Dec. 555.

Pennsylvania.— Petts *v.* Gaw, 15 Pa. St. 218; Smith *v.* Oliver, 11 Serg. & R. 257; Dagne *v.* King, 1 Yeates 322.

South Carolina.— Dyson *v.* Leek, 2 Rich. 543; Gourdin *v.* Davis, 2 Rich. 481, 45 Am. Dec. 745; Bond *v.* Quattlebaum, 1 McCord 584, 10 Am. Dec. 702.

unless it clearly appears that it was the intention to convey only a definite quantity.[24] But such a recital may be resorted to for the purpose of making that certain which is uncertain,[25] as where the boundaries of the land conveyed are doubtful.[26]

j. Quantity of Interest Conveyed — (i) *In General.* Where a part interest in property is conveyed the intention of the parties should if possible be ascertained and given effect.[27] So where an intent is clear from the whole deed to convey the entire interest of the grantor the instrument should be so construed as to effectuate such intent.[28] Again in such cases the rules apply that where the description is of a doubtful character the instrument should be construed against the grantor;[29] that a general clause which is clear is not limited by subsequent words,[30] or by subsequent reference to other deeds;[31] and that a particular recital which is clear and explicit will not be enlarged by subsequent general words.[32] A clearly expressed intent, however, to make an exception or reservation in a deed will be given effect,[33] although if there is any uncertainty or ambiguity in

Tennessee.— Austin *v.* Richards, 7 Heisk. 663; Miller *v.* Bentley, 5 Sneed 671; Allison *v.* Allison, 1 Yerg. 16.

Texas.— Hunter *v.* Morse, 49 Tex. 219; Sellers *v.* Reed, 46 Tex. 377; Hateh *v.* Garza, 22 Tex. 176.

Vermont.— Wilder *v.* Davenport, 58 Vt. 642, 5 Atl. 753; White *v.* Miller, 22 Vt. 380; Beaeh *v.* Stearns, 1 Aik. 325.

United States.— Wakefield *v.* Ross, 28 Fed. Cas. No. 17,050, 5 Mason 16.

Canada.— Brady *v.* Sadler, 16 Ont. 49; *Re* Trent Valley Canal, 12 Ont. 153. See also Doyle *v.* McPhee, 24 Can. Supreme Ct. 65.

See 16 Cent. Dig. tit. "Deeds," § 322.

A description in a former deed which is referred to will control as to quantity conveyed. Newmarket Mfg. Co. *v.* Pendergast, 24 N. H. 54.

24. *Alabama.*— Lamar *v.* Minter, 13 Ala. 31.

Connecticut.— Nichols *v.* Turney, 15 Conn. 101.

Mississippi.— Carmichael *v.* Foley, 1 How. 591.

New York.— Pettit *v.* Shepard, 32 N. Y. 97; Moore *v.* Jackson, 4 Wend. 58.

South Carolina.— Dyson *v.* Leek, 2 Rich. 543.

Tennessee.— Hardwiek *v.* Beard, 10 Heisk. 659.

Texas.— Lipscomb *v.* Underwood, 7 Tex. Civ. App. 297, 27 S. W. 155.

See 16 Cent. Dig. tit. "Deeds," § 322.

25. Campbell *v.* Carruth, 32 Fla. 264, 13 So. 432; Davis *v.* Hess, 103 Mo. 31, 15 S. W. 324; Burnett *v.* McCluey, 78 Mo. 676; Baxter *v.* Wilson, 95 N. C. 137; Peay *v.* Briggs, 2 Nott & M. (S. C.) 184.

26. Pecare *v.* Chouteau, 13 Mo. 527; Reddick *v.* Leggat, 7 N. C. 539.

27. *Arkansas.*— Coeks *v.* Simmons, 55 Ark. 104, 17 S. W. 594, 29 Am. St. Rep. 28.

California.— Sepulveda *v.* Sepulveda, 77 Cal. 605, 20 Pac. 145.

Illinois.— Dean *v.* Shreve, 155 Ill. 650, 40 N. E. 294.

Massachusetts.— Whitman *v.* Whitman, 7 Mete. 268.

Pennsylvania.— Ballantine's Appeal, 67 Pa. St. 178.

See 16 Cent. Dig. tit. "Deeds," § 326.

Where an intention is clearly expressed to convey a particular interest too much stress should not be laid upon particular words or expressions which but for this might import a different purpose. Ingalls *v.* Newhall, 139 Mass. 268, 30 N. E. 96. See also Hines *v.* Robinson, 57 Me. 324, 99 Am. Dec. 772.

28. *Georgia.*— Johnson *v.* Girtman, 115 Ga. 794, 42 S. E. 96.

Mississippi.— Craft *v.* Germany, 34 Miss. 118.

New Jersey.— New Jersey Zinc Co. *v.* Boston Franklinite Co., 15 N. J. Eq. 418.

New York.— Veit *v.* Dill, 78 Hun 171, 28 N. Y. Suppl. 937.

South Carolina.— Moody *v.* Tedder, 16 S. C. 557.

Texas.— Michon *v.* Ayalla, 84 Tex. 685, 19 S. W. 878; Hateher *v.* Stipe, (Civ. App. 1898) 45 S. W. 329.

England.— Knapping *v.* Tomlinson, 18 Wkly. Rep. 684.

See 16 Cent. Dig. tit. "Deeds," § 326.

If intention to convey entire interest is clear, words in the nature of *falsa demonstratio* may be rejected. Preston *v.* Heiskell, 32 Gratt. (Va.) 48.

29. Hoyt *v.* Ketcham, 54 Conn. 60, 5 Atl. 606; Zittle *v.* Weller, 63 Md. 190; Stoekett *v.* Goodman, 47 Md. 54; Moran *v.* Somes, 154 Mass. 200, 28 N. E. 152. See also *supra*, V, A, 1, i.

Conveyance of an undivided half interest in land by one owning an undivided quarter interest has been construed as conveying all the grantor's interest and not an undivided half of the quarter interest, as the greater includes the less, and the undivided half necessarily includes the undivided quarter. Jordan *v.* Fay, 98 Cal. 264, 33 Pac. 95.

30. McLennan *v.* McDonnell, 78 Cal. 273, 20 Pac. 566.

31. Moran *v.* Somes, 154 Mass. 200, 28 N. E. 152.

32. Hayes *v.* Wetherbee, 60 Cal. 396; Jackson *v.* Stevens, 16 Johns. (N. Y.) 110. See also Mullineux *v.* Ellison, 8 L. T. Rep. N. S. 236.

33. *Iowa.*— Brown *v.* Lahart, 102 Iowa 746, 71 N. W. 355.

the language used the grantee should have the benefit of the doubt or the ambiguity.[34] Again where the grantor conveys all his "right, title and interest" and he holds title in trust for certain heirs, the deed will be construed as conveying only his actual interest and not his interest as indicated by the records.[35]

(II) *All of Property of Grantor.* The question as to what property passes by a deed may be controlled by a general clause conveying all of the grantor's property.[36] The construction of a description with such a clause therein is dependent upon the intention of the parties, and where it appears from the entire deed that it was the manifest intention to convey all of the property of the grantor a construction consistent therewith will be given.[37] In construing a clause of this character the rule applies that the language is to be construed against the grantor.[38]

(III) *After-Acquired Title or Property.* Where the language is clear and unambiguous and there is no intention apparent from the instrument to convey after-acquired property or title the deed will not be construed as a conveyance thereof.[39]

Kentucky.— Vallandingham *v.* Taylor, 64 S. W. 725, 23 Ky. L. Rep. 1059.

Michigan.— Patrick *v.* Kalamazoo Y. M. C. A., 120 Mich. 185, 79 N. W. 208.

New York.— India Wharf Brewing Co. *v.* Brooklyn Wharf, etc., Co., 59 N. Y. App. Div. 83, 69 N. Y. Suppl. 274.

Tennessee.—Kirk *v.* Burkholtz, 3 Tenn. Ch. 421.

Canada.— Hebner *v.* Williamson, 44 U. C. Q. B. 593.

An intention not to pass a reversion may be gathered by implication. Mullineux *v.* Ellison, 8 L. T. Rep. N. S. 236.

An exception repugnant to the grant and which takes away the spirit of it is void. Jordan *v.* Hallowell, 4 N. C. 605.

34. Winslow *v.* Patten, 34 Me. 25; Blackman *v.* Striker, 142 N. Y. 555, 37 N. E. 484; Pearson *v.* Mulholland, 17 Ont. 502.

35. Rogers *v.* Chase, 89 Iowa 468, 56 N. W. 537.

A deed by a trustee of the entire interest of the *cestui que trust* has been construed as conveying only the absolute interest and not a contingent interest. Hamilton *v.* Crosby, 32 Conn. 342.

36. Clifton Heights Land Co. *v.* Randell, 82 Iowa 89, 47 N. W. 905.

37. Marr *v.* Hobson, 22 Me. 321; Baird *v.* Campbell, 67 N. Y. App. Div. 104, 73 N. Y. Suppl. 617; Mundy *v.* Vawter, 3 Gratt. (Va.) 518; Philadelphia, etc., R. Co. *v.* Trimble, 10 Wall. (U. S.) 367, 19 L. ed. 948.

A general clause may operate to convey land which the grantor had previously attempted to convey by an invalid deed (Hamilton *v.* Doolittle, 37 Ill. 473); equitable as well as legal rights (Carter *v.* Harris, 4 Rand. (Va.) 199. See McFarland *v.* Baze, 24 Mo. 156. But see Jamaica Pond Aqueduct Corp. *v.* Chandler, 9 Allen (Mass.) 159); an estate in remainder (Brantly *v.* Kee, 58 N. C. 332; Wickersham's Appeal, (Pa. 1885) 1 Atl. 913); an interest held by virtue of relation of grantors as heirs (Young *v.* Coyle, 3 Pennyp. (Pa.) 284); lumber (Leavering *v.* Smith, 115 N. C. 385, 20 S. E. 446); and money (Fry *v.* Feamster, 36 W. Va. 454, 15 S. E. 253). And a conveyance of all the real estate in a certain county may pass real estate not included in the description of particular tracts. Borchard *v.* Eastwood, (Cal. 1901) 65 Pac. 1047; Marr *v.* Hobson, 22 Me. 321.

A general clause will not pass personal property given by the grantor to a third party prior to the conveyance (Norment *v.* Parks, 71 N. C. 227), an interest in land previously conveyed (Foster *v.* Harris, 10 Pa. St. 457); land conveyed by a deed ineffectual to pass the interest of one of the grantors (Drane *v.* Gregory, 3 B. Mon. (Ky.) 619), or leaseholds (Hopkinson *v.* Lusk, 34 Beav. 215, 10 Jur. N. S. 288, 10 L. T. Rep. N. S. 122, 12 Wkly. Rep. 392).

Intention that general clause shall not operate to include all property may be gathered from other words or clauses in the description. Vedder *v.* Saxton, 46 Barb. (N. Y.) 188; Williams *v.* Avent, 40 N. C. 47.

38. Marr *v.* Hobson, 22 Me. 321. See also *supra*, V, A, 1, i.

The recitals and general scope of a conveyance may operate as a restriction upon a general clause purporting to convey all of an estate. Williams *v.* Pinckney, 67 L. J. Ch. 34.

A deed or a mortgage which conveys all right or claim to land in a certain town which the grantor now has will not include a mere possibility of a reversion in the future, the grantor at the time having no right or claim to such land and the words in their natural import not being broad enough to include the same. Richardson *v.* Cambridge, 2 Allen (Mass.) 118, 79 Am. Dec. 767.

39. Lewis *v.* Shearer, 189 Ill. 184, 59 N. E. 580; Pond *v.* Minnesota Iron Co., 58 Fed. 448. See also Clamorgan *v.* Lane, 9 Mo. 446; Bayne *v.* Denny, 21 Tex. Civ. App. 435, 52 S. W. 983.

Illustrations.— Where the deed excepts a certain part to which the grantor has at the time no title, an after-acquired title to the excepted part will not pass. Grand Tower Min. Mfg., etc., Co. *v.* Gill, 111 Ill. 541. And a deed of all the estate "I now own, or may own at the time of my decease," to have effect immediately before the decease, has been

(iv) *Part of Fractional Section.* To identify land granted by United States patents resort may be had to the plat and field-notes of the government survey, as in the case of a deed of half of a fractional section.[40]

(v) *Description of Land as Part of Large Tract.* A conveyance of one half of a lot is to be construed as a conveyance of one half in quantity.[41] And where one who owns an undivided interest in a tract of land executes a deed which purports to convey all of his interest in and to a certain number of acres or part of such tract, it will operate as a conveyance, not of the part or quantity designated, but of an undivided interest therein.[42]

(vi) *Conveyance of Undivided Interest and Other Land.* Where a deed conveys a moiety or undivided part of a piece of land and then proceeds with a description of other land without express words showing an intention to convey all the latter described land, the words of limitation used in describing the first-mentioned parcel will be construed as also applying to the latter.[43]

k. Particular Words and Terms — (i) *In General.* Words or terms in a description of a deed should ordinarily be construed according to their general sense,[44] although a word is not in all cases to be so construed where a different

construed as conveying only the real estate owned by the grantor at the date of its execution which he continued to own when it took effect, and did not convey after-acquired realty. Libby *v.* Thornton, 64 Me. 479. So a conveyance of "all my interest and title that I have or may have" in certain land will not pass an interest subsequently inherited by the grantor. Wright *v.* Wright, 99 Ga. 324, 25 S. E. 673. See also Gardner *v.* Pace, 11 S. W. 779, 11 Ky. L. Rep. 216. And after-acquired property outside of the state has been held not to pass under a conveyance to the wife of all the husband's rights in the estate of his father. Gray *v.* Folwell, 57 N. J. Eq. 446, 41 Atl. 869.

40. Turner *v.* Union Pac. R. Co., 112 Mo. 542, 20 S. W. 673.

Although a meaningless word may be rejected, yet all the words of a deed should be given effect if possible, and where they can be so given effect the word "half" may be construed as meaning half in quantity without regard to the half as determined by the government survey. Kinsey *v.* Satterthwaite, 88 Ind. 342; Prentiss *v.* Brewer, 17 Wis. 635, 86 Am. Dec. 730. See also Jones *v.* Pashby, 62 Mich. 614, 29 N. W. 374; Owen *v.* Henderson, 16 Wash. 39, 47 Pac. 215, 58 Am. St. Rep. 17.

41. Dart *v.* Barbour, 32 Mich. 267.

Grantee becomes tenant in common with grantor. Schenk *v.* Evoy, 24 Cal. 104; Lick *v.* O'Donnell, 3 Cal. 59, 58 Am. Dec. 383.

42. Adams *v.* Hopkins, (Cal. 1902) 69 Pac. 228.

A conveyance of a certain number of acres in the corner of a tract of land should be construed as conveying the stated quantity in the form of a square. Smith *v.* Nelson, 110 Mo. 552, 19 S. W. 734; Jackson *v.* Vickory, 1 Wend. (N. Y.) 406, 19 Am. Dec. 522; Cunningham *v.* Harper, Wright (Ohio) 366; Walsh *v.* Ringer, 2 Ohio 327, 15 Am. Dec. 555; Dolan *v.* Trelevan, 31 Wis. 147. And a deed of a particular quantity of land on the side of a tract will include such quantity in the form of a parallelogram. Watson *v.* Crutcher, 56 Ark. 44, 19 S. W. 98; State *v.* King, 20 N. C. 661; Lewellen *v.* Gardner, 13 Rich. (S. C.) 242. See also Cobb *v.* Taylor, 133 Ind. 605, 32 N. E. 822, 33 N. E. 615; Morris *v.* Stuart, 1 Greene (Iowa) 375.

43. Hubbard *v.* Greeley, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511; Duncan *v.* Sylvester, 24 Me. 482, 41 Am. Dec. 400; Hapgood *v.* Whitman, 13 Mass. 464; Witt *v.* Harlan, 66 Tex. 660, 2 S. W. 41. *Compare* Hodges *v.* Thayer, 110 Mass. 286.

A deed conveying an undivided part of a tract of land and also an undivided half of another tract will be construed as showing an intention to convey the whole of the second-mentioned parcel. Child *v.* Wells, 13 Pick. (Mass.) 121.

44. *Alabama.*— Campbell *v.* Gilbert, 57 Ala. 569.

Connecticut.— Bishop *v.* Seeley, 18 Conn. 389.

Massachusetts.—Revere *v.* Leonard, 1 Mass. 91.

Michigan.— Purkiss *v.* Benson, 28 Mich. 538.

Missouri.— Burnam *v.* Banks, 45 Mo. 349.

New Hampshire.—Breck *v.* Young, 11 N. H. 485.

New Jersey.— New Jersey Zinc Co. *v.* New Jersey Franklinite Co., 13 N. J. Eq. 322.

Pennsylvania.— Deshong *v.* Deshong, 186 Pa. St. 227, 40 Atl. 402, 65 Am. St. Rep. 855; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Pass. R. Co., 6 Pa. Dist. 269.

Tennessee.—Hughes *v.* Woodard, (Ch. App. 1900) 63 S. W. 191.

England.— Anderson *v.* Anderson, [1895] 1 Q. B. 749, 64 L. J. Q. B. 457, 72 L. T. Rep. N. S. 313, 14 Reports 367, 43 Wkly. Rep. 322.

See 16 Cent. Dig. tit. "Deeds," § 331.

"A messuage" does not include a public burial-ground, although not excepted by deed. Southampton *v.* Post, 4 N. Y. Suppl. 75.

"Due north" and "due south" have been construed to mean north and south by magnet and not by meridian, where their meaning is not controlled by other words in the in-

sense is indicated by the context,[45] or in the light of the circumstances surrounding the execution of the deed,[46] or where a different meaning has been given by convention, in which case a construction in acccordance therewith should be given.[47]

(II) *More or Less.* Where land is described in a deed by sectional subdivisions or by metes and bounds the words "more or less" when used in connection with such description are construed as used for the purpose of proximately designating the quantity of land within such subdivision or boundaries and not as referring to the state of the title to such land.[48] Where, however, such words are used in connection with a description in which the number of acres conveyed is stated the recital of quantity is a matter of description;[49] and the use of the words "more or less" has been construed as meaning that the parties run the risk of gain or loss in respect to quantity.[50] Ordinarily, however, such words should be restricted to an allowance for slight or immaterial variations,[51] and cannot be construed to enlarge the boundaries mentioned in the deed.[52] Again these words will not control the quantity stated in the description when it appears that the grantee accepted the deed on the express representations of the grantor that they contained a certain number of acres.[53]

3. Appurtenances,[54] Incidents, and Rights Passing With Deed — a. Appurtenances in General. It is a general rule that upon the conveyance of property the law implies a grant of all the incidents rightfully belonging to it at the time of conveyance and which are essential to the full and perfect enjoyment of the property.[55]

strument. Archibald *v.* Morrison, 7 Nova Scotia 272.

"Outbuildings thereon" are construed as including a barn. Woodman *v.* Smith, 53 Me. 79.

"So called" as used in a deed means what the public generally says about the premises. Madden *v.* Tucker, 46 Me. 367.

45. Jones *v.* Pashby, 48 Mich. 634, 12 N. W. 884. See also Romie *v.* Casanova, 45 Cal. 131; Hext *v.* Jarrell, 3 Strobh. (S. C.) 11.

46. Wakeman *v.* Glover, 75 Conn. 23, 52 Atl. 622.

47. *California.*— Morrison *v.* Wilson, 30 Cal. 344.

Kentucky.— Craig *v.* Doran, Hard. 139.

Missouri.— Grandey *v.* Casey, 93 Mo. 595, 6 S. W. 376.

Rhode Island.— Dexter Lime-Rock Co. *v.* Dexter, 6 R. I. 353.

Vermont.— Pingrey *v.* Watkins, 15 Vt. 479.

See 16 Cent. Dig. tit. "Deeds," § 332.

The word "forty" as used in description of lands is construed in Florida as meaning the north or south half of a half of a quarter section. Lente *v.* Clarke, 22 Fla. 515, 1 So. 149.

48. Williamson *v.* Hall, 62 Mo. 405.

49. *Arkansas.*— Harrell *v.* Hill, 19 Ark. 102, 68 Am. Dec. 202.

Maine.— See Pierce *v.* Faunce, 37 Me. 63.

Maryland.— Hall *v.* Mayhew, 15 Md. 551.

Minnesota.— Austrian *v.* Dean, 23 Minn. 62.

Pennsylvania.— See Glen *v.* Glen, 4 Serg. & R. 488.

South Carolina.— Jones *v.* Bauskett, 2 Speers 68.

Texas.— Webb *v.* Brown, 2 Tex. Unrep. Cas. 36. See also Troy *v.* Ellis, 60 Tex. 630.

See 16 Cent. Dig. tit. "Deeds," § 333.

50. Frederick *v.* Youngblood, 19 Ala. 680, 54 Am. Dec. 209. See also Follis *v.* Porter, 11 Grant Ch. (U. C.) 442.

Effect of words "more or less" on recital of quantity.— The use of such words in the description of quantity import that quantity does not enter into the essence of the contract (Tyson *v.* Hardesty, 29 Md. 305); that the statement as to quantity is qualified thereby (Hurt *v.* Stall, 3 Md. Ch. 24); and that the recital of quantity is not conclusive in such case (Hodges *v.* Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87).

51. Hoffman *v.* Johnson, 1 Bland (Md.) 103; Triplett *v.* Allen, 26 Gratt. (Va.) 721, 21 Am. Rep. 320.

These words do not extend to a variation of one half (Lee *v.* Hester, 20 Ga. 588), one quarter (Smith *v.* Fly, 24 Tex. 345, 76 Am. Dec. 109), or one fifth (Gentry *v.* Hamilton, 38 N. C. 376).

52. Poague *v.* Allen, 3 J. J. Marsh. (Ky.) 421; Brady *v.* Hennion, 8 Bosw. (N. Y.) 528. See also Regan *v.* Hatch, (Tex. Sup. 1898) 45 S. W. 386.

Words "more or less" may be rejected where improperly inserted in a sheriff's deed. Nelles *v.* White, 29 Grant Ch. (U. C.) 338.

53. Moore *v.* Harmon, 142 Ind. 555, 41 N. E. 599.

54. For definition of appurtenance see 3 Cyc. 565.

55. Denver *v.* Clements, 3 Colo. 472; Dunklee *v.* Wilton R. Co., 24 N. H. 489; Simmons *v.* Cloonan, 81 N. Y. 557; Gorham *v.* Eastchester Electric Co., 29 N. Y. Suppl. 1094, 31 Abb. N. Cas. (N. Y.) 198; Rood *v.* New York, etc., R. Co., 18 Barb. (N. Y.) 80; Barclay *v.* Howell, 2 Fed. Cas. No. 975; U. S. *v.* Appleton, 24 Fed. Cas. No. 14,463, 1 Sumn. 492. See also Bell *v.* Bell, 7 Ohio S. & C. Pl. Dec. 516, 7 Ohio N. P. 150.

And a similar rule obtains in the case of property which is reserved or excepted in a deed.[56]

b. Land as an Appurtenance — (i) *In General.* Land does not as a general rule pass under a conveyance as an appurtenance to land.[57] It may so pass, however, where such appears to have been the intention of the parties.[58] And the word "appurtenances" may when construed in connection with the nature and subject of the thing granted be sufficient to pass title to land as an appurtenance thereto.[59]

(ii) *Land Underneath or Contiguous to Building.* A conveyance of a

Application of rule.— Running water will pass with a conveyance of land (Canham *v.* Fisk, 2 Cromp. & J. 126, 1 L. J. Exch. 61, 2 Tyrw. 155), or an easement in the nature of an agreement not to build on adjoining property (Hills *v.* Miller, 3 Paige (N. Y.) 254, 24 Am. Dec. 218), as may the use and enjoyment of an alley adjoining the property (Murphey *v.* Harker, 115 Ga. 77, 41 S. E. 585), the right of subjacent and adjacent support in a conveyance of land to a railway company for the purposes of the railroad (Caledonian R. Co. *v.* Sprat, 2 Jur. N. S. 623, 2 Macq. H. L. 449, 4 Wkly. Rep. 659), the grantor's interest in an irrigating ditch over the land for the construction of which he gave permission in consideration of the use of sufficient water to irrigate his land (Sloan *v.* Glancy, 19 Mont. 70, 47 Pac. 334), and the right to conduct water from springs on the grantor's land (Spencer *v.* Kilmer, 151 N. Y. 390, 45 N. E. 865). And pipes and meters put in by a realty company to make its lots available for residence purposes are appurtenant to the lots and pass to the purchasers thereof. Mulrooney *v.* O'Bear, 80 Mo. App. 471. So a sale of a gas plant carries the franchise to use the streets for mains and pipes which are a necessary appurtenance to the business of the company (Lawrence *v.* Hennessy, 165 Mo. 659, 65 S. W. 717); the right to use a switch track passes by a conveyance of a stone quarry (Kamer *v.* Bryant, 103 Ky. 723, 46 S. W. 14, 20 Ky. L. Rep. 340), a deed of fixtures on land conveys the right to operate them in the manner they had theretofore been operated (Dietz *v.* Mission Transfer Co., 95 Cal. 92, 30 Pac. 380), fixtures pass by the grant of a house (Hare *v.* Horton, 5 B. & Ad. 715, 3 L. J. K. B. 41, 2 N. & M. 428, 27 E. C. L. 302); and personalty may in some cases pass as an appurtenance (Merrill *v.* Wyman, 80 Me. 491, 15 Atl. 58; Farrar *v.* Stackpole, 6 Me. 154, 19 Am. Dec. 201); but not where wholly disconnected with the premises (Scheidt *v.* Belz, 4 Ill. App. 431. See also Ottumwa Woolen Mill Co. *v.* Hawley, 44 Iowa 57, 24 Am. Rep. 719). So a vault under a street is not such an appurtenance to the building as to pass by a mere conveyance of the latter. Coster *v.* Peters, 5 Rob. (N. Y.) 192. And a right not connected with the enjoyment or use of a lot cannot be annexed to the land so as to become an appurtenant thereto. Linthicum *v.* Ray, 9 Wall. (U. S.) 241, 19 L. ed. 657. Again the words together "with all ways, thereto belonging, or in anywise appertaining" will not pass a way not strictly appurtenant. Barlow *v.* Rhodes, 1 Cromp. & M. 439, 2 L. J. Exch. 91, 3 Tyrw. 280. So a spring of water which the owner of lands acquired by deed in adjoining lands does not pass by a conveyance of his lands which does not mention the spring or appurtenances, his estate in the spring being a fee and not an easement. Howard *v.* Britton, 67 N. H. 484, 41 Atl. 269. And an easement not in existence when a conveyance was made and which was not mentioned therein does not pass. Peters *v.* Worth, 164 Mo. 431, 64 S. W. 490.

"Appurtenances" as used in the habendum of a deed, where none are specified, convey nothing except what was legally appurtenant to the land in the grantor's hands. Swazey *v.* Brooks, 34 Vt. 451.

A right of way has been held not to pass where not required as a matter of necessity. Taft *v.* Emery, 174 Mass. 332, 54 N. E. 864.

56. Cox *v.* McClure, 71 Conn. 729, 43 Atl. 310; Dunklee *v.* Wilton R. Co., 24 N. H. 489.

57. *Arkansas.*— Hodgens *v.* Powell, (1889) 12 S. W. 574.

Colorado.— Evans *v.* Welch, 29 Colo. 355, 68 Pac. 776.

Florida.— Rivas *v.* Solary, 18 Fla. 122.

Illinois.— St. Louis Bridge Co. *v.* Curtis, 103 Ill. 410.

Massachusetts.— Ammidown *v.* Granite Bank, 8 Allen 285; Otis *v.* Smith, 9 Pick. 293.

New York.— Woodhull *v.* Rosenthal, 61 N. Y. 382.

North Carolina.— Helme *v.* Guy, 6 N. C. 341.

Pennsylvania.—Messer *v.* Rhodes, 3 Brewst. 180; Crawford *v.* Ness, 3 Walk. 57. But see Hill *v.* West, 4 Yeates 142.

Vermont.— Cole *v.* Haynes, 22 Vt. 588.

See 16 Cent. Dig. tit. "Deeds," § 337.

58. *In re* Private Road, 1 Ashm. (Pa.) 417.

59. Missouri Pac. R. Co. *v.* Maffitt, 94 Mo. 56, 6 S. W. 600 (holding that a conveyance of a line of railroad would pass a tract of land contiguous thereto); Ogden *v.* Jennings, 66 Barb. (N. Y.) 301 (holding that a conveyance of certain lands for "purpose of a school-house with the appurtenances" conveyed a strip of ground necessary for the purposes of a play-ground).

Accretions pass on a conveyance of a fractional quarter section. Gorton *v.* Rice, 153 Mo. 676, 55 S. W. 241.

building may operate to pass the land on which it stands,[60] and may also pass land contiguous or incident thereto necessary to the ordinary use and enjoyment of such building.[61] And a similar rule applies where there is an exception or reservation of a building in a deed.[62]

c. Buildings, Timber, Manure, and Property Severed From Realty. By the grant of a dwelling-house, a structure connected therewith in such a manner as to have all constitute but one building will also be conveyed.[63] So an embankment, ties, and rails which have been placed by a railroad on land belonging to it are a part thereof and will pass to its grantee.[64] And by a conveyance of land buildings which are located thereon pass,[65] as will also a fence,[66] although temporarily detached,[67] manure,[68] and all growing timber.[69] But it has been held

60. *California.*— Pottkamp *v.* Buss, (1892) 31 Pac. 1121; Sparks *v.* Hess, 15 Cal. 186.

Connecticut.— Dikeman *v.* Taylor, 24 Conn. 219.

Maine.— Hatch *v.* Brier, 71 Me. 542; Blake *v.* Clark, 1 Me. 436. But see Derby *v.* Jones, 27 Me. 357.

Massachusetts.— Webster *v.* Potter, 105 Mass. 414; Forbush *v.* Lombard, 13 Metc. 109; Cheshire *v.* Shutesbury, 7 Metc. 566.

Nevada.— Langworthy *v.* Coleman, 18 Nev. 440, 5 Pac. 65.

New Hampshire.—Davis *v.* Handy, 37 N. H. 65; Gibson *v.* Brockway, 8 N. H. 465, 31 Am. Dec. 200.

New York.— Ogden *v.* Jennings, 62 N. Y. 526.

North Carolina.—Wise *v.* Wheeler, 28 N. C. 196.

Texas.— Wade *v.* Odle, 21 Tex. Civ. App. 656, 54 S. W. 786.

Wisconsin.— Wilson *v.* Hunter, 14 Wis. 683, 80 Am. Dec. 795.

See 16 Cent. Dig. tit. "Deeds," § 338.

A portico which projects on the grantor's land either passes by the conveyance or the grantee has an easement therein. Fox *v.* Clarke, L. R. 9 Q. B. 565, 43 L. J. Q. B. 178, 30 L. T. Rep. N. S. 646, 22 Wkly. Rep. 744.

Where a building projects beyond the line or boundary mentioned in the description of the property conveyed, the entire land on which the building stands will pass. Dikeman *v.* Taylor, 24 Conn. 219; Chandler *v.* Lomady, 5 Ohio S. & C. Pl. Dec. 539; Wilson *v.* Hunter, 14 Wis. 683, 80 Am. Dec. 795. But see Warren *v.* Blake, 54 Me. 276, 89 Am. Dec. 748; Wilson *v.* Wightman, 36 N. Y. App. Div. 41, 55 N. Y. Suppl. 806; Griffiths *v.* Morrison, 36 Hun (N. Y.) 337 [*affirmed* in 106 N. Y. 165, 12 N. E. 580].

61. Pottkamp *v.* Buss, (Cal. 1892) 31 Pac. 1121; Marshall *v.* Niles, 8 Conn. 369; Snow *v.* Orleans, 126 Mass. 453; Ammidown *v.* Ball, 8 Allen (Mass.) 293.

A conveyance of a dwelling-house has been held to pass land in the rear thereof which had been used for a woodyard (Winchester *v.* Hees, 35 N. H. 43); and buildings belonging to the house, its curtilage, garden, orchard, and the close on which it is built (Marston *v.* Stickney, 58 N. H. 609. See also Bawden *v.* Hunt, 123 Mich. 295. 82 N. W. 52. But *compare* Ogden *v.* Jennings, 62 N. Y. 526). So adjoining land covered with buildings as well as vacant land may pass under a deed of a house described as occupied by the grantor, together with all the appurtenances thereto belonging "together with land under and adjoining said house as now used with it." Hammond *v.* Abbott, 166 Mass. 517, 44 N. E. 620.

A conveyance of a mill passes not only the land on which it stands but also so much as is necessary to the use thereof (Esty *v.* Baker, 48 Me. 495; Maddox *v.* Goddard, 15 Me. 218, 33 Am. Dec. 604; Forbush *v.* Lombard, 13 Metc. (Mass.) 109. But see Blake *v.* Clark, 6 Me. 436; Miller *v.* Miller, 15 Pick. (Mass.) 57); and in such a conveyance so much of the water privilege as is essential to the use of the mill passes (Gibson *v.* Brockway, 8 N. H. 465, 31 Am. Dec. 200; Dexter Sulphite Pulp, etc., Co. *v.* Frontenac Paper Co., 20 Misc. (N. Y.) 442, 46 N. Y. Suppl. 363).

62. Kimball *v.* Withington, 141 Mass. 376, 6 N. E. 759; Webster *v.* Potter, 105 Mass. 414; Allen *v.* Scott, 21 Pick. (Mass.) 25, 32 Am. Dec. 238. But see Sanborn *v.* Hoyt, 24 Me. 118.

63. Hilton *v.* Gilman, 17 Me. 263.

64. Van Husan *v.* Omaha Bridge, etc., Co., 118 Iowa 366, 92 N. W. 47.

65. Isham *v.* Morgan, 9 Conn. 374, 23 Am. Dec. 361; Frey *v.* Drahos, 6 Nebr. 1, 39 Am. Rep. 353; Meyer *v.* Betz, 3 Rob. (N. Y.) 172; Ritchmeyer *v.* Morse, 4 Abb. Dec. (N. Y.) 55, 3 Keyes (N. Y.) 349, 1 Transcr. App. (N. Y.) 355, 5 Abb. Pr. N. S. (N. Y.) 44, 37 How. Pr. (N. Y.) 388; Murphy *v.* Campbell, 4 Pa. St. 480.

66. Carro *v.* Tucker, 2 Tex. App. Civ. Cas. § 454.

67. Goodrich *v.* Jones, 2 Hill (N. Y.) 142.

Rails which constitute a fence (McLaughlin *v.* Johnson, 46 Ill. 163), or which are distributed for use in fencing will pass (Ripley *v.* Paige, 12 Vt. 353; Conklin *v.* Parsons, 2 Pinn. (Wis.) 264, 1 Chandl. (Wis.) 240).

68. Plumer *v.* Plumer, 30 N. H. 558; Conner *v.* Coffin, 22 N. H. 538; Kittredge *v.* Woods, 3 N. H. 503, 14 Am. Dec. 393; French *v.* Freeman, 43 Vt. 93; Wetherbee *v.* Ellison, 19 Vt. 379. But see Snow *v.* Perkins, 60 N. H. 493, 49 Am. Rep. 333; Proctor *v.* Gilson, 49 N. H. 62.

69. Cockrill *v.* Downey, 4 Kan. 426.

that timber which has been severed from the realty and is lying upon the ground,[70] movables, such as bricks in the kiln on a plantation,[71] and a stone severed from the realty unless severed for the purpose of being used upon the land[72] does not pass.

d. Rights of Action and Claims in General. An absolute warranty deed from the vendor in a land contract will operate as an assignment of all his rights in the land and will include a statutory remedy against persons holding land contrary to the covenants of executory contracts of purchase to the grantees, and in a proceeding by the grantee to enforce such remedy the deed is competent evidence.[73]

4. Questions For Court and Jury. Where, in an endeavor to ascertain the intention of the parties in respect to the property conveyed, extrinsic evidence is resorted to for the purpose of explaining the description, the question as to the identity of the property becomes one for the jury.[74] So where the description is uncertain or ambiguous it may be a question for the jury to determine what property was intended to be conveyed,[75] or what to be reserved.[76] And it is a matter of fact for the jury to determine whether particular land is or is not within the description in a deed,[77] or whether a particular survey was referred to.[78] But where there is a clear and unambiguous description in a deed the court will construe the terms used.[79]

C. Estates and Interests Created — 1. Particular Words to Create Particular Estates — a. Fee Simple[80] **— (i)** *Words of Inheritance or Perpetuity.* In the absence of a statute which renders the word "heirs" unneces-

70. Jenkins *v.* Lykes, 19 Fla. 148, 45 Am. Rep. 19; Crouch *v.* Smith, 1 Md. Ch. 401. But see Cockrill *v.* Downey, 4 Kan. 426; Brackett *v.* Goddard, 54 Me. 309.

71. East *v.* Ealer, 24 La. Ann. 129.

72. Noble *v.* Sylvester, 42 Vt. 146.

73. Vos *v.* Dykema, 26 Mich. 399.

A right of action to recover for damages sustained prior to a conveyance may well be deemed to remain in the grantor, the grantee possessing the right to recover for future encroachments. Corning *v.* Troy Iron, etc., Factory, 39 Barb. (N. Y.) 311.

Where a mortgagee orally agrees with the mortgagor to pay outstanding mortgages on the property and pays to the mortgagor the balance due on his mortgage, and the latter conveys the property to another, the conveyance to the grantee will not operate as an assignment of the mortgagor's interest in such agreement, as the purchaser cannot recover on the theory that the promise of the mortgagee to pay the mortgages was made for his benefit so as to give him a right of action. Miller *v.* Winchell, 70 N. Y. 437 [*affirming* 3 Thomps. & C. 795].

74. Lycoming Mut. Ins. Co. *v.* Sailer, 67 Pa. St. 108; Frisby *v.* Withers, 61 Tex. 134; Kingston *v.* Pickins, 46 Tex. 99; Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57; Reed *v.* Merrimac River Locks, etc., 8 How. (U. S.) 274, 12 L. ed. 1077.

75. *Missouri.*— Schultz *v.* Lindell, 40 Mo. 330.

North Carolina.— Den *v.* Chesnut, 20 N. C. 479.

Pennsylvania.— Cote's Appeal, 79 Pa. St. 235; Hetherington *v.* Clark, 30 Pa. St. 393.

South Carolina.— Birchfield *v.* Bonham, 2 Speers 62.

Texas.— Eliott *v.* Whitaker, 30 Tex. 411.

See 16 Cent. Dig. tit. "Deeds," § 342.

The identification of a lot described by number on a city map is a question of fact for the jury. Bryan *v.* Faucett, 65 N. C. 650.

Where the land lies or is located is a question for the jury (Partridge *v.* Russell, 2 N. Y. Suppl. 529; Hurley *v.* Morgan, 18 N. C. 425, 28 Am. Dec. 579; Coats *v.* Mathews, 2 Nott & M. (S. C.) 99); but where reference has been made to other deeds, it is held to be a question for the court (Kelso *v.* Stigar, 75 Md. 376, 24 Atl. 18).

76. Steigleder *v.* Marshall, 159 Pa. St. 77, 28 Atl. 240; Altman *v.* McBride, 4 Strobh. (S. C.) 208.

77. *Kentucky.*— Venable *v.* McDonald, 4 Dana 336; Layson *v.* Galloway, 4 Bibb 100.

New Hampshire.— Andrews *v.* Todd, 50 N. H. 565; Bell *v.* Woodward, 46 N. H. 315.

New York.— Ogden *v.* Jennings, 66 Barb. 301; Frier *v.* Jackson, 8 Johns. 495.

North Carolina.— Clark *v.* Wagoner, 70 N. C. 706.

Pennsylvania.— Naglee *v.* Ingersoll, 7 Pa. St. 185.

Texas.— Frisby *v.* Withers, 61 Tex. 134; Camley *v.* Stanfield, 10 Tex. 546, 60 Am. Dec. 219; Bohrer *v.* Chambers, (Civ. App. 1899) 49 S. W. 410.

Vermont.— Lippett *v.* Kelley, 46 Vt. 516.

West Virginia.— Snooks *v.* Wingfield, 52 W. Va. 441, 44 S. E. 277.

United States.— Reed *v.* Merrimac River Locks, etc., 8 How. 274, 12 L. ed. 1077.

England.— Lyle *v.* Richards, L. R. 1 H. L. 222, 35 L. J. Q. B. 214, 15 L. T. Rep. N. S. 1.

See 16 Cent. Dig. tit. "Deeds," § 342.

It is a question of law where there is no controversy as to the facts. Stevens *v.* Hollister, 18 Vt. 294, 46 Am. Dec. 154.

78. Abbott *v.* Abbott, 51 Me. 575.

79. Bond *v.* Fay, 12 Allen (Mass.) 86.

80. Fee-simple estate defined see Estates.

sary [81] it is generally held essential that a deed in order to convey a fee simple should be to the grantee and to his heirs.[82] And in those jurisdictions where words of inheritance are essential to a conveyance of a fee simple the omission of such words will render the conveyance one of an estate for life.[83] It has, however, been determined in a large number of decisions that the language of the whole instrument should be considered in order to discover the intent and that, where there is a clear intention to pass a fee simple, the deed will be construed so as to effectuate such intention, although the word "heirs," [84] or technical words of inheritance [85]

81. **Construction of statutes** see Patterson *v.* Moore, 15 Ark. 222; Palmer *v.* Cook, 159 Ill. 300, 42 N. E. 796, 50 Am. St. Rep. 165; Lehndorf *v.* Cope, 122 Ill. 317, 13 N. E. 505; Ewing *v.* Shannahan, 113 Mo. 188, 20 S. W. 1065; McCullock *v.* Holmes, 111 Mo. 445, 19 S. W. 1096; McKinney *v.* Stacks, 6 Heisk. (Tenn.) 284.

82. *Indiana.*— Nelson *v.* Davis, 35 Ind. 474.

Massachusetts.— Bean *v.* French, 140 Mass. 229, 3 N. E. 206; Buffum *v.* Hutchinson, 1 Allen 58.

Missouri.— Rector *v.* Waugh, 17 Mo. 13, 57 Am. Dec. 251; Leitensdorfer *v.* Delphy, 15 Mo. 160, 55 Am. Dec. 137; Hogan *v.* Welcker, 14 Mo. 177.

New York.— Jackson *v.* Davenport, 20 Johns. 537 [*affirming* 18 Johns. 295].

North Carolina.— Anderson *v.* Logan, 105 N. C. 266, 11 S. E. 361; Batchelor *v.* Whitaker, 88 N. C. 350; Roberts *v.* Forsythe, 14 N. C. 26.

Pennsylvania.— Lytle *v.* Lytle, 10 Watts 259. See Brink *v.* Michael, 31 Pa. St. 165.

South Carolina.— Dickert *v.* Dickert, 12 Rich. 396.

See 16 Cent. Dig. tit. "Deeds," § 346.

"Heirs" or other appropriate words of perpetuity must be used. Calmes *v.* Buck, 4 Bibb (Ky.) 453; Martin *v.* Long, 3 Mo. 391; Brown *v.* Hamilton First Nat. Bank, 44 Ohio St. 269, 6 N. E. 648; Defraunce *v.* Brooks, 8 Watts & S. (Pa.) 67.

In Indiana prior to May 6, 1853, words of inheritance were essential. Nicholson *v.* Caress, 59 Ind. 39.

Word "issue" does not supply want of word "heir." Jordan *v.* McClure, 85 Pa. St. 495.

Word "forever" does not always impart inheritable quantities. Dennis *v.* Wilson, 107 Mass. 591. See Humphrey *v.* Foster, 13 Gratt. (Va.) 653.

Rule does not apply to an exception or reservation (Engel *v.* Ayer, 85 Me. 448, 27 Atl. 352; Winthrop *v.* Fairbanks, 41 Me. 307; Emerson *v.* Mooney, 50 N. H. 315. But see Ashcroft *v.* Eastern R. Co., 126 Mass. 196, 30 Am. Rep. 672; Curtis *v.* Gardner, 13 Metc. (Mass.) 457); or to an easement appurtenant to other land of the grantor or of a right to take profit in the soil (Engel *v.* Ayer, 85 Me. 448, 27 Atl. 352).

Deed to "A and his heirs lawfully begotten in wedlock with B" vests property absolutely in A. Pooser *v.* Tyler, 1 McCord Eq. (S. C.) 18.

Warranty clause warranting title to the grantees and their executors does not create a fee. McMichael *v.* McMichael, 51 S. C. 555, 29 S. E. 403.

83. *Illinois.*— Edwardsville R. Co. *v.* Sawyer, 92 Ill. 377.

Indiana.— Nicholson *v.* Caress, 45 Ind. 479; Clearwater *v.* Rose, 1 Blackf. 137.

Maryland.— Hofsass *v.* Mann, 74 Md. 400, 22 Atl. 65.

Massachusetts.— King *v.* Barns, 13 Pick. 24.

New Jersey.— Trusdell *v.* Lehman, 47 N. J. Eq. 218, 20 Atl. 391; Kearney *v.* Macomb, 16 N. J. Eq. 189.

New York.— Young *v.* Marshall, Lalor 93.

North Carolina.— Stell *v.* Barham, 87 N. C. 62.

Pennsylvania.— Mattocks *v.* Brown, 103 Pa. St. 16; Newman's Appeal, 35 Pa. St. 339; Gray *v.* Packer, 4 Watts & S. 17; Vanhorn *v.* Harrison, 1 Dall. 137, 1 L. ed. 70, 1 Am. Dec. 229.

South Carolina.— McMichael *v.* McMichael, 51 S. C. 555, 29 S. E. 403; Jones *v.* Swearingen, 42 S. C. 58, 19 S. E. 947; Bradford *v.* Griffin, 40 S. C. 468, 19 S. E. 76; Jordan *v.* Neece, 36 S. C. 295, 15 S. E. 202, 31 Am. St. Rep. 869.

Tennessee.— Cromwell *v.* Winchester, 2 Head 389; Hunter *v.* Bryan, 5 Humphr. 47.

United States.— Foster *v.* Joice, 9 Fed. Cas. No. 4,974, 3 Wash. 498.

See 16 Cent. Dig. tit. "Deeds," § 351.

A life-estate only is created by the words "grant, bargain, and sell" (Gray *v.* Packer, 4 Watts & S. (Pa.) 17); by a deed to "A and after his death to the issue of his body" (Bradford *v.* Griffin, 40 S. C. 468, 19 S. E. 76); or by a deed to J M "and his generation, to endure as long as the waters of the Delaware should run" (Foster *v.* Joice, 9 Fed. Cas. No. 4,974, 3 Wash. 498).

84. *Indiana.*— Wickersham *v.* Bills, 8 Ind. 387.

Iowa.— Teany *v.* Mains, 113 Iowa 53, 84 N. W. 953.

Maryland.— Merritt *v.* Disney, 48 Md. 344.

New Jersey.— Ross *v.* Adams, 28 N. J. L. 160.

Vermont.— Coolidge *v.* Hoger, 43 Vt. 9, 5 Am. Rep. 256.

United States.— Charter Oak L. Ins. Co. *v.* Chatillion, 11 Fed. 818.

See 16 Cent. Dig. tit. "Deeds," § 346 *et seq.*

Intention of parties generally see *supra*, V, A, 1, c.

Whole instrument considered generally see *supra*, V, A, 1, f.

Where grantor's interest is an equitable one the word "heirs" is not necessary. Hayward *v.* Ormsbee, 11 Wis. 3.

85. Crossman *v.* Field, 119 Mass. 170; Tatum *v.* McLellan, 50 Miss. 1; State *v.* Mississippi River Bridge Co., 134 Mo. 321, 35

are omitted. Again it has been decided that words of inheritance are not essential to pass the absolute estate of a grantor in personal property,[86] or in a grant to the government.[87] And the fee will pass in a deed to a corporation, although the word "successors" is omitted.[88]

(II) *Words Giving Power of Disposition.* Where a deed confers upon the grantee an absolute power[89] of disposition of the property conveyed it will operate as a conveyance of the fee.[90] So an absolute estate will be vested in a grantee by a trust deed reserving a life-estate and then to such persons as the grantee may appoint or in default of such appointment by him then to him in fee.[91]

(III) *Location of Words of Inheritance.* Although words of inheritance are essential to the conveyance of a fee and they are not inserted in the granting clause of a deed, yet if the entire deed shows an intent to convey a fee and such words are inserted elsewhere they may be connected with the granting clause.[92]

S. W. 592; Johnson *v.* Gilbert, 13 Rich. Eq. (S. C.) 42.

Equity may decree a conveyance of fee according to the intention of the parties, although words of inheritance are omitted. Weller *v.* Rolason, 17 N. J. Eq. 13.

The word "assigns" is not essential. Grant *v.* Carpenter, 8 R. I. 36.

86. Benning *v.* Benning, 14 B. Mon. (Ky.) 585; Bailey *v.* Duncan, 4 T. B. Mon. (Ky.) 256; Murray *v.* Walker, 1 Strobh. Eq. (S. C.) 193.

87. Josephs *v.* U. S., 1 Ct. Cl. 197.

88. Halifax Cong. Soc. *v.* Stark, 34 Vt. 243.

Conveyance by the state of the occupancy and possession "forever" to a corporation passes the full ownership. *In re* Mechanics' Soc., 31 La. Ann. 627.

Omission of the words "successors and assigns" does not prevent fee from passing. Wilkes Barre *v.* Wyoming Historical, etc., Soc., 134 Pa. St. 616, 19 Atl. 809.

Where a corporation having a limited period of existence acquires only the right to use certain lands during the period of its existence it cannot convey the land in fee. Strong *v.* Brooklyn, 68 N. Y. 1.

89. If the power of disposition is limited or restricted it will only operate as a conveyance of a life-estate. Thompson *v.* Vance, 1 Metc. (Ky.) 669; Coleman *v.* Beach, 97 N. Y. 545. See Hume *v.* Randall, 65 Hun (N. Y.) 437, 20 N. Y. Suppl. 352.

Where a power to mortgage and sell if necessary is given to one to whom land is deeded to hold during her natural life, only a life-estate is held to be created. Holland *v.* Keyes, 24 R. I. 289, 52 Atl. 1094.

90. *Alabama.*— Wells *v.* American Mortg. Co., 109 Ala. 430, 20 So. 136; Booker *v.* Booker, 32 Ala. 473.

Kentucky.— Ray *v.* Spear, 65 S. W. 867, 23 Ky. L. Rep. 1338. But see Thompson *v.* Vance, 1 Metc. 669.

Missouri.— Green *v.* Sutton, 50 Mo. 186; Tremmel *v.* Kleiboldt, 6 Mo. App. 549.

New York.— Campbell *v.* Morgan, 68 Hun 490, 22 N. Y. Suppl. 1001.

Tennessee.— Brien *v.* Robinson, 102 Tenn. 157, 52 S. W. 802.

Sec 16 Cent. Dig. tit. "Deeds," § 348.

The fee passes in such a case, although the deed contains a clause providing that in case the grantee shall die without any child or children the land or the proceeds thereof shall revert to the grantor or his heirs (Ray *v.* Spear, 65 S. W. 867, 23 Ky. L. Rep. 1338), or although it contains a clause against liability for the debts of the grantee (Ricks *v.* Pope, 129 N. C. 52, 39 S. E. 638).

91. Brunson *v.* King, 2 Hill Eq. (S. C.) 483. *Compare* Berkeley Springs Bank *v.* Green, 45 W. Va. 168, 31 S. E. 260.

92. Staton *v.* Mullis, 92 N. C. 623. See Perry *v.* Pennsylvania R. Co., 55 N. J. L. 178, 26 Atl. 829, where it is decided that where a deed reserves the use of a wharf "to be improved and kept in repair at the joint expense of the said parties, their heirs and asigns," the right reserved must by implication have the same duration and transmissible quality as the obligation to improve and repair which is imposed on the heirs and assigns.

If inserted in the habendum only it may be suffieient. Pool *v.* Blakie, 53 Ill. 495; Havens *v.* Sea-Shore Land Co., 47 N. J. Eq. 365, 20 Atl. 497; Hanks *v.* Folsom, 11 Lea (Tenn.) 555. But see McMichael *v.* McMichael, 51 S. C. 555, 29 S. E. 403.

Use of such words in the warranty may convey fee. Saunders *v.* Saunders, 108 N. C. 327, 12 S. E. 909; Winborne *v.* Downing, 105 N. C. 20, 10 S. E. 888; Graybeal *v.* Davis, 95 N. C. 508; Bunn *v.* Wells, 94 N. C. 67; Waugh *v.* Miller, 75 N. C. 127. But see Patterson *v.* Moore, 15 Ark. 222.

Word "heirs" may be transposed. Tucker *v.* Williams, 117 N. C. 119, 23 S. E. 90.

Reference to other instruments containing words of inheritance may be sufficient to pass the fee. Wickersham *v.* Bills, 8 Ind. 387; Evans *v.* Brady, 79 Md. 142, 28 Atl. 1061.

An assignment indorsed on a deed of fee simple of all "right, title, claim, interest, property and demand whatsoever, in and to the within deed" will convey an estate in fee simple, the words of inheritance being supplied by the reference to "the within deed." Lemon *v.* Graham, 131 Pa. St. 447, 19 Atl. 48, 6 L. R. A. 663.

And a grantee will take an estate in fee where such an estate is given in the premises of the deed, although the word "heirs" is omitted in the *habendum*.[93]

b. Conditional Estates in General.[94] A contingency may be created by any expression or words which clearly import that the vesting or continuance of an estate depends on a certain or supposed contingency.[95] A qualified, base, or determinable fee is created by a deed of land to be used for a specified purpose with a provision that it shall revert to the grantor if such use is discontinued.[96] And a fee on condition subsequent may also be conveyed by a deed which provides that the land shall revert to the grantor unless used for purposes specified;[97] or that it shall revert upon the payment of a certain sum to the grantee,[98] if buildings are erected thereon in a specified manner,[99] or if the grantee shall die without children surviving.[1] Again a deed to one for life with remainder to another and the lawful heirs of her body with power of appointment in case she dies childless or unmarried is construed as creating in the one entitled to the remainder a conditional fee.[2]

c. Estates Tail.[3] In many states statutory provisions have been passed in regard to estates tail. So under some statutes a deed to a person and the heirs of the grantee's body which under the common law would create an estate in fee tail is construed as conveying to the grantee an estate for life,[4] and under others an estate in fee simple.[5]

93. Breitenbach *v.* Dungan, 5 Pa. L. J. Rep. 236. See Saunders *v.* Hanes, 44 N. Y. 353.

94. **Conditional estates classified and defined** see ESTATES.

Contingencies are not favored in law. Craig *v.* Wells, 11 N. Y. 315.

A deed of bargain and sale is, it is determined, adequate to vest an estate in fee in land in one person, and afterward, upon a contingency, to divest it out of him and vest it in another person, although the latter was not ascertained or in existence at the date of the deed, provided that such changing and revesting must take effect, if at all, within the time prescribed to prevent the creation of perpetuities. Ocheltree *v.* McClung, 7 W. Va. 232.

95. Craig *v.* Wells, 11 N. Y. 315.

The proper words are declared to be "while," "as long as," "until," and "during." Vanatta *v.* Brewer, 32 N. J. Eq. 268.

96. Farnsworth *v.* Perry, 83 Me. 447, 22 Atl. 373; Moulton *v.* Trafton, 64 Me. 218; Henderson Methodist Protestant Church *v.* Young, 130 N. C. 8, 40 S. E. 691. See Atlanta Consol. St. R. Co. *v.* Jackson, 108 Ga. 634, 34 S. E. 184; Green *v.* Gresham, 21 Tex. Civ. App. 601, 53 S. W. 382; Morton *v.* Thompson, 69 Vt. 432, 38 Atl. 88.

97. Van Schaick *v.* Lese, 31 Misc. (N. Y.) 610, 66 N. Y. Suppl. 64; Pierce *v.* Brown University, 21 R. I. 392, 43 Atl. 878. See Bouvier *v.* Baltimore, etc., R. Co., 65 N. J. L. 313, 47 Atl. 772. But see Knapp *v.* Crawford, 16 Wash. 524, 48 Pac. 261, where it is decided that a grant of the perpetual use of land as long as the premises are used for the purpose agreed on is merely a lease.

98. Martin *v.* Hafer, 124 Mich. 226, 82 N. W. 1053.

99. Clapp *v.* Wilder, 176 Mass. 332, 57 N. E. 692, 50 L. R. A. 120.

1. Davis *v.* Hollingsworth, 113 Ga. 210, 38 S. E. 827, 84 Am. St. Rep. 233; Trimble *v.* Shawhan, 101 Ky. 403, 41 S. W. 546, 19 Ky. L. Rep. 625; Calmes *v.* Jones, 63 S. W. 583, 23 Ky. L. Rep. 504. See Louisville Trust Co. *v.* Erdman, 58 S. W. 814, 22 Ky. L. Rep. 729; Lockridge *v.* McCommon, 90 Tex. 234, 38 S. W. 33.

2. Withers *v.* Jenkins, 14 S. C. 597.

3. **Estates tail defined** see ESTATES.

4. *Arkansas.*— Wilmans *v.* Robinson, 67 Ark. 517, 55 S. W. 950; Horsley *v.* Hilburn, 44 Ark. 458.

California.— Barnett *v.* Barnett, 104 Cal. 298, 37 Pac. 1049.

Illinois.— Spencer *v.* Spruell, 196 Ill. 119, 63 N. E. 621; Griswold *v.* Hicks, 132 Ill. 494, 24 N. E. 63, 22 Am. St. Rep. 549; Lehndorf *v.* Cope, 122 Ill. 317, 13 N. E. 505; Frazer *v.* Peoria County, 74 Ill. 282.

Kentucky.— Clay *v.* Chenault, 10 S. W. 650, 10 Ky. L. Rep. 779.

Massachusetts.— Sims *v.* Pierce, 157 Mass. 52, 31 N. E. 718.

Missouri.— Frame *v.* Humphreys, 164 Mo. 336, 64 S. W. 116; Hunter *v.* Patterson, 142 Mo. 310, 44 S. W. 250; Clarkson *v.* Clarkson, 125 Mo. 381, 28 S. W. 446; Reed *v.* Lane, 122 Mo. 311, 26 S. W. 957; Godman *v.* Simmons, 113 Mo. 122, 20 S. W. 972.

See 16 Cent. Dig. tit. "Deeds," § 358.

5. *Georgia.*— Durant *v.* Muller, 88 Ga. 251, 14 S. E. 612.

Indiana.—McIlhinny *v.* McIlhinny, 137 Ind. 411, 37 N. E. 147, 45 Am. St. Rep. 186, 24 L. R. A. 489; Chamberlain *v.* Runkle, 28 Ind. App. 599, 63 N. E. 486.

Kentucky.— Brann *v.* Elzey, 83 Ky. 440; Davis *v.* Davis, 65 S. W. 122, 23 Ky. L. Rep. 1132.

North Carolina.— Patterson *v.* Patterson, 2 N. C. 163.

Tennessee.— Kirk *v.* Furgerson, 6 Coldw. 479.

See 16 Cent. Dig. tit. "Deeds," § 358.

d. Life-Estates[6]—(i) *Words Creating.* Words of inheritance are only essential to create an estate greater than a life-estate.[7] A conveyance therefore by a tenant by curtesy initiate, without words of inheritance, which would give the grantee an estate for his life if the former were seized in fee, will confer an estate for the life of the grantor.[8] So the words "bargained and sold" are operative to pass an estate for life.[9] Again a conveyance of land to the grantor's wife for the life of the grantor "and at his death to revert and reinvest in fee simple to his heirs at law or devisees, should he leave a will," is construed as passing only a life-estate.[10] And where personal property is given to one and his issue or the heirs of his body with limitation over in the event of his dying without issue or heirs of his body, the first taker has an estate for life only.[11]

(ii) *Grant of Income or Usufruct.* A grant of an income in, or the beneficial use of, land will create an estate in the land itself.[12]

(iii) *Remainder Depending on Issue Surviving Grantee.* Where land is conveyed to a person and his heirs or if he dies without issue then to another, and he dies without issue, a warranty deed by him in his lifetime will only convey the estate which terminated at his death.[13] And under a statute in

An instrument conveying only a life-estate is held in California not within the application of a statute which provides that "every estate, which would be at common law adjudged to be a fee tail, is a fee simple." Barnett *v.* Barnett, 104 Cal. 298, 302, 37 Pac. 1049. See McIlhinny *v.* McIlhinny, 137 Ind. 411, 37 N. E. 147, 45 Am. St. Rep. 186, 24 L. R. A. 489.

6. Life-estate defined see ESTATES.

7. Ford *v.* Johnson, 41 Ohio St. 366; Bradford *v.* Griffin, 40 S. C. 468, 19 S. E. 76.

A life-estate may be created by a deed which provides that on the death of the grantee the property shall go to her children, but which contains no express covenants with respect to the grantee's heirs at law (Loring *v.* Eliot, 16 Gray (Mass.) 568), by a deed which recites that a certain person is to have his support off the land during his natural life (Myers *v.* Cullum, 152 Ind. 700, 51 N. E. 918), by a deed of a tract of land to one for the use and benefit of such person during his natural life and to his children and their heirs and assigns (Burnett *v.* Summerlin, 110 Ga. 349, 35 S. E. 655), by a deed to one to have and to hold during his natural life and then to be divided among specified persons in a certain proportion (Palmer Oil, etc., Co. *v.* Blodgett, 60 Kan. 712, 57 Pac. 947. See Simonton *v.* White, 93 Tex. 165, 53 S. W. 339, 77 Am. St. Rep. 824), by a deed of gift with the *habendum* "to have and to hold the property hereby conveyed to the only proper use and benefit of the said parties of the second part during their natural lives, and remainder in fee to their legal issue" (Jeffries *v.* Butler, 108 Ky. 531, 56 S. W. 979, 22 Ky. L. Rep. 226), by a conveyance of a life-estate to one and at his death the property to go to his heirs and assigns (German Nat. Bank *v.* Waring, 37 S. W. 64, 18 Ky. L. Rep. 438), or at his death to the children then living and the heirs of any who may be dead (Polk *v.* Gunther, 107 Tenn. 16, 64 S. W. 25), or at his death to his son and his heirs or assigns forever (Temple *v.* Wright, 93 Va. 338, 26 S. E. 844), or after his demise to a third party, his heirs and assigns (Bates *v.* Virolet, 33 N. Y. App. Div. 436, 53 N. Y. Suppl. 893). And see Clay *v.* Clay, 72 S. W. 810, 24 Ky. L. Rep. 2,016; Duckett *v.* Butler, 67 S. C. 130, 45 S. E. 137.

Even where it is provided by statute that if it be the intention of the grantor to pass any less estate than an estate of inheritance, it shall be so expressed in the deed, such an intention is sufficiently expressed by a proviso in a deed, after the granting clause, that the grantee shall take only a life-estate with remainder in fee to others, unless the remainder is one to which the rule in Shelley's case applies. Williams *v.* Hedrick, 96 Fed. 657, 37 C. C. A. 552.

8. Reaume *v.* Chambers, 22 Mo. 36.

9. Jackson *v.* Van Hoesen, 4 Cow. (N. Y.) 325.

10. Whayne *v.* Davis, 66 S. W. 827, 23 Ky. L. Rep. 2174.

11. Nix *v.* Ray, 5 Rich. (S. C.) 423.

12. Williams *v.* Owen, 116 Ind. 71, 18 N. E. 389; Gruber *v.* Lindenmeier, 42 Minn. 99, 43 N. W. 964; Wellington *v.* Janvrin, 60 N. H. 174; Currier *v.* Janvrin, 58 N. H. 374; Stancel *v.* Calvert, 60 N. C. 104.

A base fee may be so created. Jamaica Pond Aqueduct Corp. *v.* Chandler, 9 Allen (Mass.) 159.

13. Rake *v.* Lawshee, 24 N. J. L. 613.

The original grantee takes in the nature of a qualified fee. Smith *v.* Hankins, 27 Ohio St. 371.

A deed to one and if he dies without issue the land to revert to the grantor or his heirs, gives the grantee only a life-estate. Wilson *v.* Watkins, 48 S. C. 341, 26 S. E. 663; Morris *v.* Eddins, 18 Tex. Civ. App. 38, 44 S. W. 203.

A widow of such a grantee takes no estate either as heir or widow, on his death without issue, it being provided that in such a case the property is to go to the heirs of the grantor. Smith *v.* Hankins, 27 Ohio St. 371.

Where a deed of land in trust for the use of one and his children provides that the premises shall revert to other parties in case he dies leaving no children, and he is not married at the time, but subsequently mar-

Indiana[14] it has been decided that where one to whom, in consideration of love and affection, property has been conveyed for life with remainder to his children, dies without issue surviving him, the property will revert to the grantor as against the widow of the life-tenant.[15]

e. Remainder[16] and Reversions[17] — (i) *Who May Take Remainder.* One who is not technically a party to an indenture may take thereby an estate in remainder.[18]

(ii) *Vested Remainders.* Where a remainder is limited to take effect in possession, if ever, upon the determination of a particular estate and the latter estate is to determine by an event which must unavoidably happen by the efflux of time, the remainder will be vested in interest as soon as the remainder-man is *in esse* and ascertained, provided such remainder depends upon no other event or contingency and nothing but the death of the remainder-man before the determination of the particular estate will prevent the remainder from vesting in possession.[19] So a vested remainder exists where property is deeded to a person for life with remainder to another at the death of the one holding the life-interest,[20] as where property is conveyed to one for life with remainder to his children.[21]

ries and has children, it is held that after the marriage and birth of the children the uses are vested under the statute in South Carolina so that the grantee holds such lands during his natural life with remainder in fee simple vested in the children. Rawls *v.* Johns, 54 S. C. 394, 32 S. E. 451.

14. Ind. Rev. St. (1881) § 2473.

This statute is construed as relating to descent and distribution of the estate and not as reserving to the grantor an estate in reversion. Wingate *v.* James, 121 Ind. 69, 22 N. E. 735.

15. Amos *v.* Amos, 117 Ind. 37, 19 N. E. 543.

16. **Remainder defined** see ESTATES.

17. **Reversion defined** see ESTATES.

18. Phelps *v.* Phelps, 17 Md. 120.

19. Bennett *v.* Garlock, 10 Hun (N. Y.) 328. See also Chapin *v.* Nott, 203 Ill. 341, 67 N. E. 833; Blackburn *v.* Blackburn, 109 Tenn. 674, 73 S. W. 109; and cases cited *infra*, this and the following notes.

This is the rule of construction unless express words of the deed absolutely forbid such an interpretation. Gourley *v.* Woodbury, 42 Vt. 395.

A future estate is vested where there is a person in being who will take if the precedent estate then terminates (Sheridan *v.* House, 4 Abb. Dec. (N. Y.) 218, 4 Keyes (N. Y.) 569) or where a deed so limits a precedent estate that it necessarily terminates on the happening of an event which must happen (Com. *v.* Hackett, 102 Pa. St. 505).

The vested interest is subject to be divested where it is limited over to another in the event of the death of the first remainderman. Bennett *v.* Garlock, 10 Hun (N. Y.) 328.

Where a deed of gift is given subject to a lease and it is provided that at the termination of the lease possession shall be delivered to and vested in the grantee, the title is held to vest immediately subject to the lease. Lay *v.* Lay, 66 S. W. 371, 23 Ky. L. Rep. 1817.

20. *Alabama.*— Rutland *v.* Chesson, 98 Ala. 435, 13 So. 606.

Illinois.— Hobbie *v.* Ogden, 72 Ill. App. 242.

Indiana.— Chambers *v.* Chambers, 139 Ind. 111, 38 N. E. 334.

Kentucky.— Moore *v.* Offutt, 94 Ky. 568, 23 S. W. 656, 15 Ky. L. Rep. 376; Phillips *v.* Thomas Lumber Co., 94 Ky. 445, 22 S. W. 652, 15 Ky. L. Rep. 219, 42 Am. St. Rep. 367; White *v.* Clark County Nat. Bank, 59 S. W. 505, 22 Ky. L. Rep. 932.

Maryland.— Kemp *v.* Bradford, 61 Md. 330.

Michigan.— Hitchcock *v.* Simpkins, 99 Mich. 198, 58 N. W. 47.

North Carolina.— King *v.* Stokes, 125 N. C. 514, 34 S. E. 641.

Rhode Island.—Eldredge *v.* Greene, 17 R. I. 17, 19 Atl. 1085. And see Mudge *v.* Hammill, 21 R. I. 283, 43 Atl. 544, 79 Am. St. Rep. 802.

South Carolina.— Robinson *v.* Lowery, 52 S. C. 464, 30 S. E. 487; Gourdin *v.* Deas, 27 S. C. 479, 4 S. E. 64.

Vermont.— Gourley *v.* Woodbury, 42 Vt. 395.

See 16 Cent. Dig. tit. "Deeds," § 368 *et seq.*

But see Shepard *v.* Shepard, 2 Misc. (N. Y.) 556, 557, 24 N. Y. Suppl. 773, where it was decided that, where land was conveyed in trust for F for life and at her death the fee in the premises "to revert to and vest in the heirs at law of said [grantor] . . . and the trust and trusts hereby created to cease," the children of the grantor who were living when the deed was executed took a contingent remainder, which became vested on their surviving their father.

A remainder to another and his heirs after the death of the first remainder-man gives the former a vested remainder. Smith *v.* Black, 29 Ohio St. 488.

21. *Alabama.*— Smaw *v.* Young, 109 Ala. 528, 20 So. 370; Williams *v.* McConico, 36 Ala. 22.

Connecticut.— Bacon *v.* Taylor, Kirby 368.

(III) *Contingent Remainders.* It has been determined that an estate in the nature of a contingent[22] remainder is created where property is deeded: To one for life with remainder to his children who may survive him,[23] or to such of his

District of Columbia.— Phillips *v.* Ogle, 21 D. C. 199.

Florida.— Waterman *v.* Higgins, 28 Fla. 660, 10 So. 97.

Georgia.— Wilbur *v.* McNulty, 75 Ga. 458; Franke *v.* Berkner, 67 Ga. 264.

Illinois.— Voris *v.* Sloan, 68 Ill. 588.

Kentucky.— Ferguson *v.* Alcorn, 1 B. Mon. 160; Johnson *v.* Robertson, 45 S. W. 523, 20 Ky. L. Rep. 135.

Massachusetts.—Parker *v.* Converse, 5 Gray 336.

Michigan.— Lariverre *v.* Rains, 112 Mich. 276, 70 N. W. 583.

Missouri.— Tindall *v.* Tindall, 167 Mo. 218, 66 S. W. 1092; Waddell *v.* Waddell, 99 Mo. 338, 12 S. W. 349, 17 Am. St. Rep. 575; Wornmack *v.* Whitmore, 58 Mo. 448.

New Jersey.— Price *v.* Sisson, 13 N. J. Eq. 168.

New York.— Lewis *v.* Howe, 64 N. Y. App. Div. 572, 72 N. Y. Suppl. 851; Tregoning *v.* Tregoning, 60 Hun 584, 15 N. Y. Suppl. 171; Sheridan *v.* House, 4 Abb. Dec. 218, 4 Keyes 569; Wood *v.* Mather, 38 Barb. 473.

South Carolina.— Hunt *v.* Nolen, 46 S. C. 356, 24 S. E. 310; Gourdin *v.* Deas, 27 S. C. 479, 4 S. E. 64; Haynsworth *v.* Haynsworth, 12 Rich. Eq. 114.

Tennessee.— Balch *v.* Johnson, 106 Tenn. 249, 61 S. W. 289; Smith *v.* Thompson, 2 Swan 386.

Vermont.— Thompson *v.* Tryon, 66 Vt. 191, 28 Atl. 873; Gourley *v.* Woodbury, 51 Vt. 37.

West Virginia.— Diehl *v.* Cotts, 48 W. Va. 255, 37 S. E. 546.

United States.— *In re* Haslett, 116 Fed. 680.

See 16 Cent. Dig. tit. "Deeds," § 368 *et seq.*

As other children are born the interest is subject to be diminished.

Georgia.— Wilbur *v.* McNulty, 75 Ga. 458.

Illinois.— Voris *v.* Sloan, 68 Ill. 588.

Michigan.— Lariverre *v.* Rains, 112 Mich. 276, 70 N. W. 583.

Missouri.— Waddell *v.* Waddell, 99 Mo. 338, 12 S. W. 349, 17 Am. St. Rep. 575.

South Carolina.— Gourdin *v.* Deas, 27 S. C. 479, 4 S. E. 64.

See 16 Cent. Dig. tit. "Deeds," § 368 *et seq.*

Where there are no children the remainder is contingent until children are born (Coots *v.* Yewell, 95 Ky. 367, 25 S. W. 597, 26 S. W. 179, 16 Ky. L. Rep. 2); when it immediately vests (Amos *v.* Amos, 117 Ind. 19, 19 N. E. 539; Ross *v.* Adams, 28 N. J. L. 160).

A conveyance to one for the use, in trust, of his wife for life and on her decease to such child or children as she may have in life, creates no trust for the children of the life-tenant, but they take a legal estate as remainder-men. Overstreet *v.* Sullivan, 113 Ga. 891, 39 S. E. 431.

A deed not to go into effect until the death of the grantor and his wife, and which conveys property to two sons, their heirs and assigns forever, with a provision that if the son to whom only one third was deeded should die without children, his third should go to the other son, is held to give the former a vested remainder in fee simple, determinable on the contingency of his dying without children. Hall *v.* Cressey, 92 Me. 514, 43 Atl. 118.

A vested remainder in grantee's children is not created by a conveyance to him for life, remainder to be equally divided among any children he may leave and the living representatives of such as may be dead, but it is held that such remainder vested in a class to be determined at the grantee's death. Jackson *v.* Everett, (Tenn. Sup. 1894) 58 S. W. 340.

Death of life-tenant before death of grantor does not divest the remainder. Johnson *v.* Robertson, 45 S. W. 523, 20 Ky. L. Rep. 135.

22. A future estate is contingent while the person to whom it is limited is uncertain. Sheridan *v.* House, 4 Abb. Dec. (N. Y.) 218, 4 Keyes (N. Y.) 569.

It is not the uncertainty of actual enjoyment but the uncertainty of the right of enjoyment which makes a remainder contingent. Price *v.* Sisson, 13 N. J. Eq. 168.

23. *Alabama.*— McWilliams *v.* Ramsay, 23 Ala. 813.

Arkansas.— Hardage *v.* Stroope, 58 Ark. 303, 24 S. W. 490.

Florida.— Paul *v.* Frierson, 21 Fla. 529.

Illinois.— McCampbell *v.* Mason, 151 Ill. 500, 38 N. E. 672; Chapin *v.* Crow, 147 Ill. 219, 35 N. E. 536, 37 Am. St. Rep. 213; Temple *v.* Scott, 143 Ill. 290, 32 N. E. 366.

Kentucky.— White *v.* White, 86 Ky. 602, 7 S. W. 26, 9 Ky. L. Rep. 757.

Massachusetts.— Smith *v.* Rice, 130 Mass. 441.

Ohio.— Smith *v.* Block, 29 Ohio St. 488.

Rhode Island.— Bailey *v.* Hoppin, 12 R. I. 560.

South Carolina.— Hovey *v.* Hovey, 2 Desauss. 115; Bossard *v.* White, 9 Rich. Eq. 483.

United States.— Westbrooke *v.* Romeyn, 29 Fed. Cas. No. 17,428, 1 Baldw. 196.

See 16 Cent. Dig. tit. "Deeds," § 368 *et seq.*

A deed reserving a life-interest in the grantor, with remainder after the death of the grantor and the grantee to the grantee's children, but in default of such children then living or *in esse*, then to descend to designated persons, creates a contingent remainder in the children. Benson *v.* Edwards, (Tenn. Ch. App. 1901) 61 S. W. 1034.

An equitable estate for life is given to one to whom the rents and profits are to be paid during her life under a deed of land which creates a trust for that purpose and provides that at her death the property is to go to such children as shall survive her. Wood *v.* Mather, 38 Barb. (N. Y.) 473.

children as may reach a certain age;[24] to another in the event that the latter survives the person holding the life-interest;[25] to one in the event that the person having the life-interest dies leaving no children or representatives of children;[26] or to a trustee[27] to be held by him during the life of another to whom he is to pay the rents of the land and upon the death of such other person to sell the property and divide the proceeds equally among the children of the grantor.[28] So it has been decided that a contingent remainder is created by a deed to one for life with the remainder to the heirs of his body, since it could not be known who would answer this description until the death of the life-tenant.[29]

(iv) *Vested and Contingent Remainder in Same Property.* Although a covenant which creates a vested and contingent remainder in the same property is declared to be unusual, yet it is decided that there is no principle of law to prevent it.[30]

(v) *Presumption Against Creation of Cross Remainders.* It is only by express limitation that cross remainders in a deed can be given, as they can never be implied.[31]

(vi) *Division Per Stirpes.* Where it is provided in a deed that the remainder shall be divided *per stirpes*, the children of one of the immediate issue, still living, do not participate in the division;[32] and where one of two or

The estate vests in the surviving children immediately on the death of the person having the life-interest. Delony *v.* Delony, 24 Ark. 7.

The rule that the descendants of deceased children are not included where a remainder is limited to "surviving children" will yield where it is apparent from the language of the instrument that the descendants were intended to be included. Kemp *v.* Bradford, 61 Md. 330.

Where the remainder is to children living and to descendants of any children deceased at the time of the decease of the one having the life-interest, the children take the vested remainder. Smith *v.* West, 103 Ill. 332. *Compare* Jolly *v.* Hobbs, 80 Ala. 213.

24. Megowan *v.* Way, 1 Metc. (Ky.) 418; Risher *v.* Adams, 9 Rich. Eq. (S. C.) 247.

The remainder becomes vested on the child attaining the age specified (Hunter *v.* Hunter, 17 Barb. (N. Y.) 25. See Askew *v.* Nolan, 23 Ga. 509); where the right to control the management of the property during life and to order a sale at any time as the grantees become of age is reserved by the grantor, it being stipulated that the proceeds shall not be diverted from the interest of the grantees (Baldwin *v.* Baldwin, 76 Va. 345), or where there are several children and the property is to be divided on the youngest coming of age, the remainder will vest absolutely in the children when such child becomes of age (Doty *v.* Wray, 66 Ga. 153. *Compare* May *v.* Ritchie, 65 Ala. 602).

25. Peoria *v.* Darst, 101 Ill. 609; Starnes *v.* Hill, 112 N. C. 1, 16 S. E. 1011, 22 L. R. A. 598. See Hall *v.* La France Fire Engine Co., 158 N. Y. 570, 53 N. E. 513 [*affirming* 8 N. Y. App. Div. 616, 40 N. Y. Suppl. 1143]; Paget *v.* Melcher, 156 N. Y. 399, 51 N. E. 24.

26. Morse *v.* Proper, 82 Ga. 13, 8 S. E. 625. But see Williams *v.* Hedrick, 96 Fed. 657, 37 C. C. A. 552, where it was decided that where a life-estate was given to one who had no children at the time, with remainder to any children surviving him, and if none survived then to a nephew, the latter took a vested remainder, subject to be divested by the birth of children who survived the life-tenant.

Where land is to revert to the grantor and his heirs in case the grantee dies without children, and the grantor died, after the decease of the grantor, without any children, it is held that the land will vest in those who were heirs of the grantor at the decease of the grantee and not in those who were heirs at the grantor's decease. Exum *v.* Davie, 5 N. C. 475.

27. **Where property is conveyed in trust** during the life of a person with remainder in fee to another, and in case of the death of the latter without issue the property to revert to the grantor's child, the latter acquires no present interest in the land so long as the one to whom the remainder was given is alive. Long *v.* Timms, 107 Mo. 512, 17 S. W. 898. So where a conveyance, reserving a life-interest in the grantor, is made to a trustee for the use of any descendants living at the grantor's death or, in default of such, for the use of the grantor's heirs. Nunsen *v.* Lyon, 86 Md. 31, 39 Atl. 533.

28. Strode *v.* McCormick, 158 Ill. 142, 41 N. E. 1091, holding that the children's interest in such case is dependent on their surviving the one having the life-interest.

29. Sharman *v.* Jackson, 30 Ga. 224; Mudge *v.* Hammill, 21 R. I. 283, 43 Atl. 544, 79 Am. St. Rep. 802. See Zuver *v.* Lyons, 40 Iowa 510. But see Reed *v.* Fidelity Trust, etc., Co., 44 S. W. 957, 19 Ky. L. Rep. 1895 (where "heirs" is construed to mean children who take a vested remainder); Arnold *v.* Garth, 106 Fed. 13.

30. Aubuchon *v.* Bender, 44 Mo. 560.

31. Bohon *v.* Bohon, 78 Ky. 408.

32. Gourdin *v.* Deas, 27 S. C. 479, 4 S. E. 64.

more remainder-men dies, the children or heirs of such remainder-man will take *per stirpes*.[33]

(VII) *Reversions.* A reversion is held to apply to an estate which remains in the grantor and his heirs and to which the right of possession arises upon the determination by its own limitation of an outstanding particular estate, or an estate for life or years, and not to apply to a right to possession arising from a breach of condition.[34]

2. Construction of Particular Deeds — a. In General — (I) *Application of General Rules.* In determining the construction of clauses in a deed creating estates, the intention of the parties should be ascertained and be carried into effect if possible without violating any rule of law.[35] And the court will lean to a construction speedily vesting the estate.[36]

(II) *Validity of Particular Estates* — (A) *In General.* At common law there could not be a limitation of a fee after or upon an estate in fee.[37] But a remainder may be created in personal property after a life-estate by deed.[38] And a freehold estate in lands may be conveyed to commence *in futuro*, by a deed executed in consideration of mutual love and affection, without livery of seizin, where the grantor reserves to himself a life-estate in the premises.[39] So it has

33. Sharman *v.* Jackson, 30 Ga. 224. See Rotmanskey *v.* Heiss, 86 Md. 633, 39 Atl. 415; Clark *v.* Cox, 115 N. C. 93, 20 S. E. 176.

34. Phœnix *v.* Commissioners of Emigration, 12 How. Pr. (N. Y.) 1 [*affirming* 1 Abb. Pr. 466]. But see Pettit *v.* Stuttgart Normal Institute, 67 Ark. 430, 55 S. W. 485. And *compare* Lewis *v.* Lewis, 114 Iowa 399, 87 N. W. 280.

35. Kenworthy *v.* Tullis, 3 Ind. 96; Hayes *v.* Kershaw, 1 Sandf. Ch. (N. Y.) 258; Cobb *v.* Hines, 44 N. C. 343, 59 Am. Dec. 559; Kissom *v.* Nelson, 2 Heisk. (Tenn.) 4.

Acts done by the parties under the deed may aid in the construction. Lyles *v.* Lescher, 108 Ind. 382, 9 N. E. 365; Jacob Tome Institute *v.* Crothers, 87 Md. 569, 40 Atl. 261.

36. Heard *v.* Garrett, 34 Miss. 152.

37. Cook *v.* Walker, 21 Ga. 370, 68 Am. Dec. 461; Bryan *v.* Spires, 3 Brewst. (Pa.) 580; Allen *v.* Fogler, 6 Rich. (S. C.) 54.

In Minnesota the rule has been abolished that a freehold estate to commence *in futuro* cannot be created by deed without the intervention of a preeedent estate to support it. Sablesdowsky *v.* Arbuckle, 50 Minn. 475, 52 N. W. 920.

In North Carolina a fee may be limited upon a fee under the statute of uses in force. Smith *v.* Brisson, 90 N. C. 284.

A constitutional provision that property in lands shall be allodial and abolishing feudal tenures is not violated by a grant of land with the right to use forever for manufacturing purposes certain water power on payment of a certain fixed perpetual annual rent. Minneapolis Mill Co. *v.* Tiffany, 22 Minn. 463.

A deed not operative as a release because purporting to convey an estate *in futuro* may be construed as a covenant to stand seized. Roe *v.* Tranmer, 2 Ld. Ken. 239, Willes 682, 2 Wils. C. P. 785.

There is not a limitation of a fee on a fee, but an alternative limitation of two fees on a life-estate, by a deed granting land to one and the heirs of her body if she has issue, but in the event that she dies without issue, then the land to revert to certain named persons. Chapin *v.* Nott, 203 Ill. 341, 67 N. E. 833.

38. *Alabama.*— Varner *v.* Young, 56 Ala. 260; Price *v.* Price, 23 Ala. 609; Williamson *v.* Mason, 23 Ala. 488; Catterlin *v.* Hardy, 10 Ala. 511.

Florida.— Horn *v.* Gartman, 1 Fla. 63.

Georgia.— Broughton *v.* West, 8 Ga. 248; Robinson *v.* Schly, 6 Ga. 515.

Kentucky.— Keen *v.* Macey, 3 Bibb 39.

Mississippi.— Harris *v.* McLaran, 30 Miss. 533.

South Carolina.— Zimmerman *v.* Wolfe, 4 Rich. Eq. 329; Duke *v.* Dyches, 2 Strobh. Eq. 353.

See 16 Cent. Dig. tit. "Deeds," § 380.

But see Murphy *v.* Cook, 10 La. Ann. 572; Dail *v.* Jones, 85 N. C. 221; Gilbert *v.* Murdock, 3 N. C. 182; Ingram *v.* Porter, 4 McCord (S. C.) 198.

Chattels personal could not be given by deed to one and the heirs of his body and on failure of issue over to the heirs of the donor, under the early decisions in North Carolina (Morrow *v.* Williams, 14 N. C. 263; Sutton *v.* Hollowell, 13 N. C. 185) and in South Carolina (Crow *v.* Bell, 2 Brev. (S. C.) 140; Stockton *v.* Martin, 2 Bay (S. C.) 471). But a limitation over of personalty was held not void for remoteness in an early case in South Carolina where a gift was made by deed to several grantees with a limitation over to the survivors on the death of either without lawful issue. Hill *v.* Hill, Dudley Eq. (S. C.) 71.

39. Simmons *v.* Augustin, 3 Port. (Ala.) 69. See Savage *v.* Lee, 90 N. C. 320, 47 Am. Rep. 523.

In Indiana by statute a freehold estate may be created to commence at a future day. Adams *v.* Alexander, 159 Ind. 175, 64 N. E. 597.

In Maine the validity of a deed to take effect *in futuro* is declared to be well settled. Drown *v.* Smith, 52 Me. 141; Jordan *v.* Ste-

been determined that the statute of uses and trusts does not forbid future contingent limitations of real estate in favor of expected issue from a son or a daughter.[40] Again there may be a conveyance by the same deed of a reversionary estate in fee and a particular estate for life or years.[41]

(B) *Effect of Attempt to Create Invalid Future Estate.* In case of an invalid limitation over, the precedent estate will stand unaffected by the void limitation, the estate becoming vested in the first taker, according to the terms on which it was devised or granted.[42]

(III) *Estate in Trees and Timber.* A grant of the use of the timber on certain land will convey only an incorporeal right to use it and not the timber itself or the soil.[43] And a conveyance of standing timber with a stipulation that the grantee shall have the right for or until a certain time to enter and remove the same will operate as a sale of so much timber as the grantee may remove during the time designated.[44] But an estate in inheritance is created by a grant to one, his heirs and assigns, of all timber standing and growing in a close forever with the right at any time to enter and remove the same.[45]

(IV) *Conveyance of Portion of Building.* Under a grant of a certain room or portion of a building with no stipulation as to rebuilding in case of fire or other casualty, if the identity and existence of the room or portion is extinguished by the destruction of the building by fire, and there is nothing upon which the conveyance can operate the rights of the grantee will be terminated.[46]

vens, 51 Me. 78, 81 Am. Dec. 556. See Wyman *v.* Brown, 50 Me. 139.

At common law a precedent particular estate to support a freehold estate *in futuro* was necessary, the reason being that otherwise there could be no livery of seizin to support the same, and livery of seizin was necessary to create a freehold estate. Sabledowsky *v.* Arbuckle, 50 Minn. 475, 52 N. W. 920.

By a deed of bargain and sale operating under the statute of uses such an estate can be conveyed. Wyman *v.* Brown, 50 Me. 139. *Compare* Marden *v.* Chase, 32 Me. 329; Royster *v.* Royster, 61 N. C. 226. But it has been decided in New York that in the absence of any other less estate to support it the conveyance is inoperative as a bargain and sale. Jackson *v.* Delancey, 4 Cow. (N. Y.) 427.

40. Harrison *v.* Harrison, 36 N. Y. 543 [*affirming* 42 Barb. 162].

41. Pingrey *v.* Watkins, 15 Vt. 479.

42. Kron *v.* Kron, 195 Ill. 181, 62 N. E. 809; Stewart *v.* Stewart, 186 Ill. 60, 57 N. E. 885; North Adams First Universalist Soc. *v.* Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231; Printup *v.* Hill, 107 Fed. 789. And see Sabledowsky *v.* Arbuckle, 50 Minn. 475, 52 N. W. 920.

Invalidity of a contingent remainder does not affect the precedent estate granted. Tyson *v.* Tyson, 96 Wis. 59, 71 N. W. 94.

Absolute estate may vest in the first grantee. Vaughn *v.* Guy, 17 Mo. 429; Dowd *v.* Montgomery, 4 N. C. 198.

Statutes may control as to whether limitation is void and the effect thereof. Ewing *v.* Shropshire, 80 Ga. 374, 7 S. E. 554.

Under 4 & 5 Anne, c. 16, § 21, which declared that all warranties by any tenant for life should be void as against those in remainder or reversion, and that all collateral warranties of an ancestor who had no estate of inheritance in possession should be void as against the heir, a collateral warranty by a tenant by the curtesy is void against his heir. Russ *v.* Alpaugh, 118 Mass. 369, 19 Am. Rep. 464.

43. Clark *v.* Way, 11 Rich. (S. C.) 621.

44. Pease *v.* Gibson, 6 Me. 81; McIntyre *v.* Barnard, 1 Sandf. Ch. (N. Y.) 52. But see Hoit *v.* Stratton Mills, 54 N. H. 109, 20 Am. Rep. 119.

Grantee does not obtain the right of exclusive possession under such a conveyance. Reed *v.* Merrifield, 10 Metc. (Mass.) 155.

An interest in land is held to be conveyed by a deed with covenants of warranty which grants, bargains, and sells to the grantees, their heirs, executors, administrators, and assigns standing timber on land described by metes and bounds, with a provision as to removal within a certain time. White *v.* Foster, 102 Mass. 375.

45. Clap *v.* Draper, 4 Mass. 266, 3 Am. Dec. 215. See Goodyear *v.* Vosburgh, 57 Barb. (N. Y.) 243.

A deed conveying "a piece of timber on" a certain described lot containing a specified number of acres and then giving the metes and bounds and concluding with a covenant to warrant "said premises" has been construed as conveying a fee to the land and not merely transferring the timber, the words "piece of timber" being considered as descriptive not of the thing sold but of the land sold and conveyed. Godden *v.* Coonan, 107 Iowa 209, 77 N. W. 852.

46. Hahn *v.* Baker Lodge No. 47, 21 Oreg. 30, 27 Pac. 166, 28 Am. St. Rep. 723, 13 L. R. A. 158. See Leonard *v.* Read, (Tenn. Ch. App. 1895) 36 S. W. 581, where a similar grant was held to operate as a lease as long as the building existed.

Conveyance by a father to a son of an interest in a dwelling with a recital that the

b. Interest Created Dependent on Form of Conveyance — (i) *In General.* The general rule is that a deed will pass whatever interest or estate the grantor may have unless it shows an intention to convey a less estate.[47] And it has been held that a deed of bargain and sale will, without the aid of a statute of uses, transfer both the legal and equitable estates.[48] So it is decided that a general warranty deed conveys the right to retain the title to secure the unpaid purchase-money due from a prior recorded title bond purchaser of an undivided interest in such property and will operate as a transfer of such unpaid purchase-money to the grantee.[49] Again, although the words "legal representatives" are ordinarily understood to mean executors or administrators, yet such words may by their association with other words be construed to mean heirs at law.[50]

(ii) *Deed of Release*[51] *or Quitclaim* — (a) *In General.* Title to property may be as effectually transferred by a quitclaim deed as by a grant or bargain and sale;[52] and such a deed will convey whatever title or estate the grantor may have in the land at the time it is given.[53] But where quitclaim deeds were merely intended to effect a partition, the parties cannot use them against each

grantee shall have the privilege of a certain part thereof, so long as it shall stand, to his use, is held to convey a personal privilege which cannot be assigned to a stranger. Lord *v.* Lord, 12 Me. 88.

47. Osborn *v.* Weldon, 146 Mo. 185, 47 S. W. 936.

Conveyance of a part of the use of land will not convey the fee but only the use for the particular purpose. Tupper *v.* Ford, 73 Vt. 85, 50 Atl. 547.

Grant of water rights, reservoirs, and tail-race on mining land for the purpose of working ore is held to convey only a particular estate or incorporeal hereditament and not an exclusive dominion of any portion of the land so as to make the grantee a joint tenant, or tenant in common, with the grantor. Smith *v.* Cooley, 65 Cal. 46, 2 Pac. 880.

Where an instrument purports to convey an estate in severalty, where the grantor has in fact only an estate in joint tenancy, coparcenary, or in common, it will operate as a conveyance of the whole interest of the grantor in the premises purporting to be conveyed. White *v.* Sayre, 2 Ohio 110.

Where in a deed which describes the estate conveyed as "reversions and remainder," an intention is apparent to transmit whatever interest the grantor had in the lands, and the deed is ancient and there is no evidence that any particular estate ever existed, the deed will be construed as a conveyance of the fee, the grantor holding such interest at the time. Staffordville Gravel Co. *v.* Newell, 53 N. J. L. 412, 19 Atl. 209.

48. Borland *v.* Marshall, 2 Ohio St. 308. But *compare* Lorick *v.* McCreery, 20 S. C. 424, 425, holding that an instrument which recites that "For value received I hereby assign, set over and deliver . . . all my right, title and interest, as legatee" of a certain estate should be construed as a deed of bargain and sale, and being without words of limitation, as conveying only an estate for the life of the grantor who retains the fee.

If the intention is to prevail against strict rules of interpretation a deed may be construed as a feoffment, or as a bargain and sale, as will most effectually accomplish that intention. Ware *v.* Richardson, 3 Md. 505, 56 Am. Dec. 762.

49. Southern Bldg., etc., Assoc. *v.* Page, 46 W. Va. 302, 33 S. E. 336.

50. Ewing *v.* Carson, 130 Ind. 597, 29 N. E. 1061; Ewing *v.* Jones, 130 Ind. 247, 29 N. E. 1057, 15 L. R. A. 75.

51. A release of damages from the construction of a railroad, although the property of the releasor, and the occupation of such property does not operate as a conveyance to the company of any title in the land. Groh *v.* Eckert, 3 Brewst. (Pa.) 116.

52. *California.*—Packard *v.* Johnson, (1884) 4 Pac. 632.

Colorado.— Bradbury *v.* Davis, 5 Colo. 265.

Connecticut.— Platt *v.* Brown, 30 Conn. 336.

Illinois.— Fash *v.* Blake, 38 Ill. 363; Butterfield *v.* Smith, 11 Ill. 485; McConnel *v.* Reed, 5 Ill. 117, 38 Am. Dec. 124.

Kentucky.— Com. *v.* Manifee, 2 A. K. Marsh. 396, 12 Am. Dec. 417.

Michigan.— Hoffman *v.* Harrington, 28 Mich. 90; Thayer *v.* McGee, 20 Mich. 195.

North Carolina.— Bronson *v.* Paynter, 20 N. C. 527.

Ohio.— Hall *v.* Ashby, 9 Ohio 96, 34 Am. Dec. 424.

Oregon.— Dolph *v.* Barney, 5 Oreg. 191.

Tennessee.— See Campbell *v.* Campbell, 3 Head 325.

Virginia.— Mason *v.* Tuttle, 75 Va. 105.

See 16 Cent. Dig. tit. "Deeds," § 394.

"Remise, release, and forever quitclaim" are sufficient operative words of conveyance and not words of release merely. McAnaw *v.* Tiffin, 143 Mo. 667, 45 S. W. 656.

A quitclaim deed will prevail over a prior unrecorded deed of bargain and sale. Graff *v.* Middleton, 43 Cal. 341.

53. *Alabama.*— Smith *v.* Mobile Branch Bank, 21 Ala. 125.

California.— Spaulding *v.* Bradley, 79 Cal. 449, 22 Pac. 47; Carpentier *v.* Williamson, 25 Cal. 154.

Connecticut.— Bartholomew *v.* Muzzy, 61 Conn. 387, 23 Atl. 604, 29 Am. St. Rep. 206.

Illinois.— Prettyman *v.* Walston, 34 Ill. 175; Robinson *v.* Appleton, 22 Ill. App. 351.

other for another purpose, although the legal operation of the deeds may authorize it.[54] Again, although a deed of land from the state is not conclusive against a title from another source clearly traced and legally established, yet it cannot be overthrown by the production of a quitclaim deed of an earlier date from a third party, without evidence of title in the latter.[55]

(B) *Interest of Grantor at Time of Giving Deed Only Passes.* It has been determined that only such title or interest as the grantor possesses at the time of giving a quitclaim deed will pass thereby,[56] and an after-acquired title by the

Indiana.— Wagner *v.* Winter, 122 Ind. 57, 23 N. E. 754.

Louisiana.— Wills *v.* Auch, 8 La. Ann. 19.

Maine.— Johnson *v.* Leonards, 68 Me. 237.

Massachusetts.— Tuite *v.* Stevens, 98 Mass. 305.

Michigan.— Kitchell *v.* Mudgett, 37 Mich. 81. See Gage *v.* Sanborn, 106 Mich. 269, 64 N. W. 32.

Missouri.— Wilson *v.* Albert, 89 Mo. 537, 1 S. W. 209; Mann *v.* Best, 62 Mo. 491.

Nevada.— Brophy Min. Co. *v.* Brophy, etc., Gold, etc., Co., 15 Nev. 101.

New York.—Uihlein *v.* Matthews, 172 N. Y. 154, 64 N. E. 792; Lewis *v.* Howe, 64 N. Y. App. Div. 572, 72 N. Y. Suppl. 851.

Pennsylvania.— Saunders *v.* Gould, 134 Pa. St. 445, 19 Atl. 694.

Vermont.— Sowles *v.* Lewis, 75 Vt. 59, 52 Atl. 1073.

Washington.— McInerney *v.* Beck, 10 Wash. 515, 39 Pac. 130.

United States.—Winnipisiogee Paper Co. *v.* New Hampshire Land Co., 59 Fed. 542. See Dexter *v.* Harris, 7 Fed. Cas. No. 3,862, 2 Mason 531.

See 16 Cent. Dig. tit. "Deeds," § 394.

A quitclaim deed may have the effect of a primary conveyance (Staples *v.* Bradley, 23 Conn. 167, 60 Am. Dec. 630; Smith *v.* Pendell, 19 Conn. 107, 48 Am. Dec. 146), vesting in the grantee the title and interest of the grantor (Sherwood *v.* Barlow, 19 Conn. 471).

A quitclaim deed is as effectual to pass title of the grantor as a warranty deed. Grant *v.* Bennett, 96 Ill. 513; Hill *v.* Grant, (Tex. Civ. App. 1898) 44 S. W. 1016. See Bradbury *v.* Davis, 5 Colo. 265. So it is equally effectual to pass a title like that of a mortgage as it is to discharge an encumbrance. Thorndike *v.* Norris, 24 N. H. 454.

Contingent interests may pass by a quitclaim deed. Pond *v.* Bergh, 10 Paige (N. Y.) 140. But see Bailey *v.* Hoppin, 12 R. I. 560, where it was decided that a contingent remainder would not pass.

Covenants running with the land will pass unless there are words of restriction or limitation in the deed in respect thereto. Morgan *v.* Clayton, 61 Ill. 35; Brady *v.* Spurck, 27 Ill. 478.

Indefeasible estates are conveyed, although there is a recital in the deed that the grantee "will take care of and see that he [the grantor] is properly treated during his lifetime." McAnaw *v.* Tiffin, 143 Mo. 667, 45 S. W. 656.

Possession by a wife under a quitclaim deed purporting to convey the title as between the parties is held to be of itself evidence of an inheritable estate in her. Wolf *v.* Wolf, 67 Ill. 55.

Rent which has accrued previous to the giving of a quitclaim deed of the leased premises by the lessor to the lessee will not be released by such deed. Johnson *v.* Muzzy, 42 Vt. 708.

In Connecticut it has been decided that a subsequent quitclaim deed by a grantor to one claiming under his grantee conveys his reversion and right of entry for condition broken. Hoyt *v.* Ketcham, 54 Conn. 60, 5 Atl. 606.

At common law it has been held that such a deed did not operate as a conveyance, in a technical sense, unless the party taking such deed was in possession of the land, in which case it merely operated to enlarge his estate (Kerr *v.* Freeman, 33 Miss. 292), and that an ordinary quitclaim deed did not operate as a conveyance of an estate for life (Robards *v.* Marley, 80 Ind. 185).

54. Mower *v.* Hutchinson, 9 Vt. 242.

55. Cary *v.* Whitney, 48 Me. 516.

56. *California.*— San Francisco *v.* Lawton, 18 Cal. 465, 79 Am. Dec. 187.

Illinois.— Franklin *v.* Palmer, 50 Ill. 202; McConnel *v.* Reed, 5 Ill. 117, 38 Am. Dec. 124.

Kansas.— Young *v.* Clippinger, 14 Kan. 148. See Hentig *v.* Pipher, 58 Kan. 788, 51 Pac. 229.

Louisiana.— Benton *v.* Sentell, 50 La. Ann. 869, 24 So. 297.

Maine.— Nash *v.* Bean, 74 Me. 340; Coe *v.* Persons Unknown, 43 Me. 432.

Mississippi.— Smith *v.* Winston, 2 How. 601.

Nebraska.— Arlington Mill, etc., Co. *v.* Yates, 57 Nebr. 286, 77 N. W. 677.

New York.— Clark *v.* Durland, 35 N. Y. App. Div. 312, 55 N. Y. Suppl. 14.

Texas.— Fletcher *v.* Ellison, 1 Tex. Unrep. Cas. 661.

See 16 Cent. Dig. tit. "Deeds," § 398.

A deed of release of all claim and interest in a father's estate by one who dies before his father will not defeat the inheritance of the releaser's children from his father. Simpson *v.* Simpson, 16 Ill. App. 170.

A grantee cannot recover back purchase-money if title fails in the absence of fraud, as he takes the risk of the title. Botsford *v.* Wilson, 75 Ill. 132; Butman *v.* Hussey, 30 Me. 263.

A grantee with notice of a previous conveyance by the grantor obtains no title or interest in the property. Curtis *v.* Smith, 42 Iowa 665.

grantor will not as a general rule inure to the benefit of the grantee by such form of conveyance.[57]

(c) *By Life-Tenant Having Power to Sell Entire Estate.* A quitclaim deed executed in the ordinary form by one to whom a life-interest in land has been given, with power to sell the entire interest is held to convey only the life-estate.[58]

(d) *Where Particular Interest Is Specified.* A quitclaim deed of a particular interest in land will not operate as a conveyance of any other interest than that specified.[59]

A grantor who has no interest in the land cannot by a quitclaim deed thereof bind the grantee by stipulations that he shall be liable for a levy and encumbrances against the property conveyed, they being without consideration. Higman *v.* Stewart, 38 Mich. 513.

A prior deed which is void or voidable is not within the rule that a subsequent quitclaim deed does not affect title under a prior conveyance. Hamilton *v.* Doolittle, 37 Ill. 473. *Compare* McKusick *v.* Washington County Com'rs, 16 Minn. 151.

A quitclaim deed by a husband after a sale of the land on execution conveys only his right of redemption and not the wife's inchoate dower, although the latter be a nonresident of the state. Lynde *v.* Wakefield, 19 Mont. 23, 47 Pac. 5.

A quitclaim deed by one who is disseized will not convey his title to the premises. Wakefield *v.* Ross, 28 Fed. Cas. No. 17,050, 5 Mason 16.

If the deed contains words limiting the estate to such right and interest as the grantor may have, if any, at the time it is given, it will not convey lands which were previously conveyed by a valid unrecorded deed. Hamilton *v.* Doolittle, 37 Ill. 473. See McConnel *v.* Reed, 5 Ill. 117, 38 Am. Dec. 124; Nash *v.* Bean, 74 Me. 340.

One in possession without title who gives a quitclaim deed merely gives a possessory title. Jackson *v.* Hubble, 1 Cow. (N. Y.) 613. And such a deed by one without title in possession by the consent of the real owners does not affect the rights of the latter. Ocean Causeway *v.* Gilbert, 54 N. Y. App. Div. 118, 66 N. Y. Suppl. 401.

The land remains subject to equities attaching to it in the hands of the vendor. Mann *v.* Best, 62 Mo. 491; Arlington Mill, etc., Co. *v.* Yates, 57 Nebr. 286, 77 N. W. 677. See James *v.* Drake, 39 Tex. 143.

Where a mortgagee gives a quitclaim deed of the mortgaged premises before entry under or foreclosure of the mortgage, and not accompanied by an assignment of the mortgage debt or any portion of the same, it will not convey any title to the real estate. Lunt *v.* Lunt, 71 Me. 377.

57. *Alabama.*— Tillotson *v.* Doe, 5 Ala. 407, 39 Am. Dec. 330.

Arkansas.— Kountz *v.* Davis, 34 Ark. 590.

California.— Cadiz *v.* Majors, 33 Cal. 288; Morrison *v.* Wilson, 30 Cal. 344; Clark *v.* Baker, 14 Cal. 612, 76 Am. Dec. 449.

Illinois.— Torrence *v.* Shedd, 112 Ill. 466; Frink *v.* Darst, 14 Ill. 304, 58 Am. Dec. 575.

Indiana.— Bryan *v.* Uland, 101 Ind. 477, 1 N. E. 52.

Maine.— Harriman *v.* Gray, 49 Me. 537.

Massachusetts.— Wight *v.* Shaw, 5 Cush. 56; Quarles *v.* Quarles, 4 Mass. 680.

Minnesota.— Johnson *v.* Robinson, 20 Minn. 189; Gesner *v.* Burdell, 18 Minn. 497; Marshall *v.* Roberts, 18 Minn. 405, 10 Am. Rep. 201; Martin *v.* Brown, 4 Minn. 282.

Missouri.— Smith *v.* Washington, 88 Mo. 475; Kummel *v.* Benna, 70 Mo. 52; Butcher *v.* Rogers, 60 Mo. 138; Smith *v.* Washington, 11 Mo. App. 519.

Nebraska.— Pleasants *v.* Blodgett, 39 Nebr. 741, 58 N. W. 423, 42 Am. St. Rep. 624.

Nevada.— Harden *v.* Cullins, 8 Nev. 49.

New York.— Jackson *v.* Hubble, 1 Cow. 613.

Texas.— Carter *v.* Wise, 39 Tex. 273; Manwaring *v.* Terry, 39 Tex. 67.

Vermont.— Smith *v.* Pollard, 19 Vt. 272; Henry *v.* Bell, 5 Vt. 393.

Wisconsin.— Lain *v.* Shepardson, 23 Wis. 224.

United States.—Myers *v.* Reed, 17 Fed. 401, 9 Sawy. 132; Field *v.* Columbet, 9 Fed. Cas. No. 4,764, 4 Sawy. 523; Lamb *v.* Kamm, 14 Fed. Cas. No. 8,017, 1 Sawy. 238.

See 16 Cent. Dig. tit. "Deeds," § 398.

An after-acquired patent to land will not inure to the grantee's benefit. Tillotson *v.* Doe, 5 Ala. 407, 39 Am. Dec. 330; Harden *v.* Cullins, 8 Nev. 49. But see Crane *v.* Salmon, 41 Cal. 63.

An after-acquired title will pass, as where one conveys by quitclaim deed and covenants against a particular title which he afterward acquires, in which case such title will inure to the grantee's benefit (Blake *v.* Tucker, 12 Vt. 39); or where one, after he has become entitled to a sheriff's deed, sells and quitclaims all right, title, and interest in the land, as well in possession as in expectancy, the title of the grantor from the after-executed sheriff's deed in such case being held to pass (Edwardsville R. Co. *v.* Sawyer, 92 Ill. 377); or where a quitclaim deed of a residuary legatee which passes his interest as devisee in the granted premises would be otherwise inoperative (Wimberly *v.* Hurst, 33 Ill. 166, 83 Am. Dec. 295).

A distinction between a release of land and of the grantor's interest therein has been made, it being held that under the former an after-acquired title will inure to the grantee's benefit. Bennett *v.* Waller, 23 Ill. 97.

58. Towle *v.* Ewing, 23 Wis. 336, 99 Am. Dec. 179.

59. Burston *v.* Jackson, 9 Oreg. 275 (holding that a quitclaim deed by a wife of all right, claim, or possibility of dower in certain land will not convey her fee therein); Moody

(III) *Conveyance of All Right, Title, and Interest.* A conveyance of all of the grantor's right, title, and interest in and to certain described property will be construed as a conveyance of all of his estate in such property, and the whole estate will vest in the grantee.[60]

(IV) *Conveyance of Undivided Interests.* Where one deeds a certain number of acres out of, or a certain part of, a tract of land without any description of the land conveyed so that it can be identified the grantee takes an undivided interest in the land proportionate to the part conveyed,[61] and becomes by such deed a tenant in common.[62]

v. Butler, 63 Tex. 210 (holding that a quitclaim deed by one of all his interest in a community estate as his father's heir will not convey the interest inherited from his mother). And *compare* Kennedy *v.* Farley, 82 Hun (N. Y.) 227, 31 N. Y. Suppl. 274.

60. Porter *v.* Giltner, 12 S. W. 1069, 11 Ky L. Rep. 744; Litchfield *v.* Cudworth, 15 Pick. (Mass.) 23; Laughlin *v.* Tips, 8 Tex. Civ. App. 649, 28 S. W. 551; Balch *v.* Arnold, 9 Wyo. 17, 59 Pac. 434.

A statutory provision that a deed which purports to "convey and warrant" the premises described shall be effective "to transfer all the right, title, claim, and possession of the grantor" is construed as applying, only when an intent to convey a less estate is not actually expressed in the deed. Hart *v.* Gardner, 74 Miss. 153, 20 So. 877.

Operating only as quitclaim.— A deed, however, of all the grantor's "right, title, claim, and interest" with a recital therein that the grantor forever quitclaims all his claim and interest in the land described is to be construed as a quitclaim deed. Shepard *v.* Hunsacker, 1 Tex. Unrep. Cas. 578. And it has also been decided that where one who sells a tract of land sells also his "entire interest" in all improvements on adjacent public land, he only gives to the vendee a quitclaim deed of his interest in such improvements. McLeroy *v.* Duckworth, 13 La. Ann. 410.

61. *California.*— Cullen *v.* Sprigg, 83 Cal. 56, 23 Pac. 222; Hartman *v.* Reed, 50 Cal. 485.

Indiana.— Warthen *v.* Siefert, 139 Ind. 233, 38 N. E. 464.

Mississippi.— Hodge *v.* Bennett, 78 Miss. 868, 29 So. 766, 84 Am. St. Rep. 652.

Missouri.— Pipkin *v.* Allen, 29 Mo. 229.

Texas.— Linnartz *v.* McCulloch, (Civ. App. 1893) 27 S. W. 279; Slack *v.* Dawes, 3 Tex. Civ. App. 520, 22 S. W. 1053.

See 16 Cent. Dig. tit. "Deeds," § 388.

A deed by a tenant in common of a number of acres in common in a tract, which is less than his whole share, has been held to operate as a conveyance of a proportionate share, the whole number of acres in the tract being ascertained. Great Falls Co. *v.* Worster, 15 N. H. 412.

A deed reserving to the grantor the improvement of half of the premises with necessary wood for family use during his life and that of his wife will pass one moiety to the use of the grantee and his heirs and the other to the use of the grantor and his wife for their lives with remainder in fee to the grantee and his heirs. Emery *v.* Chase, 5 Me. 232.

If the grantee may elect, under the terms of the deed to him, out of what part of the tract he will take the part or quantity conveyed to him he thereby acquires an equity to such part or quantity to be designated by him, and until he has so designated he has no title to any specific tract. Dull *v.* Blum, 68 Tex. 299, 4 S. W. 489.

Where a conveyance is made to partners jointly of real estate upon which they, holding unequal interests, have foreclosed a mortgage and bid in the property, and their respective interests are not designated in the conveyance, it has been decided that a deed by the executor of the one holding the greater interest will pass the legal title to one-half the land and the equitable title to the additional interest held by the testator. Putnam *v.* Dobbins, 38 Ill. 394.

62. *California.*— Wallace *v.* Miller, 52 Cal. 655; Schenk *v.* Evoy, 24 Cal. 104; Lick *v.* O'Donnell, 3 Cal. 59, 58 Am. Dec. 383.

Massachusetts.— Small *v.* Jenkins, 16 Gray 155; Jewett *v.* Foster, 14 Gray 495; Gibbs *v.* Swift, 12 Cush. 393; Adams *v.* Frothingham, 3 Mass. 352, 3 Am. Dec. 15.

Mississippi.— Hodge *v.* Bennett, 78 Miss. 868, 29 So. 766, 84 Am. St. Rep. 652.

Missouri.— McCaul *v.* Kilpatrick, 46 Mo. 434.

Pennsylvania.— Bronson *v.* Lane, 91 Pa. St. 153.

Texas.— Dohoney *v.* Womack, 1 Tex. Civ. App. 354, 19 S. W. 883, 20 S. W. 950; Blackburn *v.* McDonald, 1 Tex. Unrep. Cas. 355.

Virginia.— Buchanan *v.* King, 22 Gratt. 414.

See 16 Cent. Dig. tit. "Deeds," § 388.

A tenancy in common is not created where the land can be identified. Wheeler *v.* Ladd, 40 Ark. 108; Bailey *v.* Knapp, 79 Me. 205, 9 Atl. 356; Smith *v.* Powers, 15 N. H. 546. See also Webster *v.* Atkinson, 4 N. H. 21; Clapp *v.* Beardsley, 1 Vt. 151.

Conveyance to one grantee of the western half and to another of the eastern half of a tract of land does not make them tenants in common, where by the deed to one of them the specific part conveyed to him can be located by finding the adjacent boundaries called for in the deed to him. Ricks *v.* Pope, 129 N. C. 52, 39 S. E. 638.

(v) *Conveyance in Form of Lease.* An instrument in the form of a lease may operate as a conveyance in fee.[63]

(vi) *Grant of Right of Occupancy.* A deed of gift to one with a provision that another shall have the right to occupy the premises and to receive the rents, issues, and profits of the land will give to the latter a legal title entitling him to possession.[64]

c. Interest Acquired Where Grantor Has Distinct Title or Interests — (i) *In General.* Where a grantor possesses distinct interests in the property described and there is nothing in the deed to indicate that his entire interest was not conveyed, but on the other hand an intention to convey whatever interest he had in the property may be gathered from the instrument, it should be construed in accordance with that intention.[65] Again the right of a grantee is declared to be co-extensive with that of the grantor,[66] and it is decided that where the latter under a will had a right in equity to contribution from his co-devisees for the value of the land devised to and granted by him, such equity passes to his grantee.[67] But a court cannot give to a deed a more extended operation than the legal import of the words authorize.[68]

(ii) *Deed Given in Representative or Official Capacity* — (a) *In General.* Generally speaking deeds executed by persons in their official or representative capacities will pass title to the property and bind those whom they represent in the same manner as if the deeds had been made, executed, and delivered by the latter.[69] And the legal estate of a trustee will not pass by a

63. Krider *v.* Lafferty, 1 Whart. (Pa.) 303. See Fritz *v.* Menges, 179 Pa. St. 122, 36 Atl. 213; Auman *v.* Auman, 21 Pa. St. 343.

A lease to continue "as long as wood grows or water runs" and containing a warranty will so operate. Stevens *v.* Dewing, 2 Vt. 411.

An estate in freehold but not of inheritance is created by an instrument purporting to be a lease to a man and his wife of land during their lives. Olcott *v.* Dunklee, 16 Vt. 478.

64. Brown *v.* Brown, 68 Ala. 114. But see Chappel *v.* Row, 9 Pa. St. 72 (holding that where in such a case possession of the land as a home and residence is given to another, the latter has no right to alienate the possession, and that upon his ceasing to occupy the land the grantor may recover possession); Olcott *v.* Dunklee, 16 Vt. 478 (holding that where land is conveyed to another, it being provided that the grantor shall retain possession and supply plaintiff with certain produce every year, the right of occupation by the grantor is only to be considered as an incident to the performance of his covenant to supply produce).

65. Duggins *v.* Craig, 22 S. W. 558, 15 Ky. L. Rep. 124; Miner's Appeal, 61 Pa. St. 283; Johnson *v.* Webster, 4 DeG. M. & G. 474, 3 Eq. Rep. 99, 1 Jur. N. S. 145, 24 L. J. Ch. 300, 3 Wkly. Rep. 84, 53 Eng. Ch. 371; Drew *v.* Norbury, 9 Ir. Eq. 171, 524, 3 J. & L. 267. See also Robinson *v.* Gould, 30 Iowa 185; Dodge *v.* Nichols, 5 Allen (Mass.) 548.

A mistake in reference to the mode of deriving title is immaterial where the words of the deed are broad enough to transfer such title no matter how it was derived. Kendall *v.* Stoker, 45 N. C. 207. *Compare* Lazarus *v.* Van Slyke, (Tex. Civ. App. 1897) 39 S. W. 123.

66. Where an interest in land and a power to sell exists in the same person who makes a conveyance proper to convey his interest and also to execute his power, the instrument will be construed as a conveyance of his interest and not as an execution of the power. Bell *v.* Twilight, 22 N. H. 500. See Dunning *v.* Vandusen, 47 Ind. 423, 17 Am. Rep. 709.

67. McClanahan *v.* Kennedy, 1 J. J. Marsh. (Ky.) 332.

68. Mayo *v.* Feaster, 2 McCord Eq. (S. C.) 137.

A deed of bargain and sale by a lessee who holds for a term of years is construed as conveying only the legal estate for such term, although he had an equitable title at the time to the reversion. Litle *v.* Ott, 15 Fed. Cas. No. 8,389, 3 Cranch C. C. 416.

A right, appurtenant to other land, which was derived by one of several grantors by a prior and independent title, to maintain a dam and reversion on the land granted, for the support of a mill on such other land, does not pass. Kendall *v.* Brown, 7 Gray (Mass.) 210.

69. See cases cited *infra*, this and succeeding notes.

A covenant of warranty in a deed by a commissioner in pursuance of a decree will bind the grantor and his heirs as effectually as his own deed. Doe *v.* Moore, 1 Dana (Ky.) 57.

A deed by one "as President" of all the estate of the party of the first part "and of his constituents" and signed by him "as President" will operate as a conveyance of both his own and the company's interest. Vilas *v.* Reynolds, 6 Wis. 214.

A deed executed by a person, as collector, of his own land, will pass the property to a *bona fide* purchaser, although sold as another's. Brown *v.* Wheeler, 1 Root (Conn.) 236.

deed which purports only to convey all the right, title, and interest of the *cestui que trust* therein.[70]

(B) *By Personal Representatives.*[71] The personal rights of the administrator to land of a decedent will not pass by a deed by him upon a sale of such land under order of a probate court,[72] such deed operating only to convey the interest of the decedent.[73] A conveyance, however, of land by one both as executrix and individually, with a warranty in both capacities, will pass both her individual and representative interest;[74] but if a conveyance is executed by her, as administratrix or executrix, of land, pursuant to a sale under order of court, it has been determined that she is not thereby precluded from claiming dower.[75]

d. Deed Purporting to Convey Estate Other Than Grantor Possesses — (1) *Validity and Effect in General.* A deed which purports to convey a greater estate than the grantor has will be void only as to the excess, and will be construed as a conveyance of that which it was in his power to convey.[76] And

A deed executed by one who enters into covenants in several distinct capacities, where he has authority so to do, will convey the estate of those he represents in the same manner as if a separate deed had been given by him in each capacity. Lithgow *v.* Kavenagh, 9 Mass. 161.

If a second mortgagee, who is also a co-assignee in bankruptcy, makes a quitclaim deed of the property to a third person, such third person takes only the rights of the second mortgagee, and the equity of redemption remains in the assignee in bankruptcy. Southwick *v.* Atlantic F., etc., Ins. Co., 133 Mass. 457.

70. Titcomb *v.* Currier, 4 Cush. (Mass.) 591. But *compare* Bayer *v.* Cocherill, 3 Kan. 282, holding that where one to whom lands were deeded as trustee for another executes a deed which he signs individually, and which in the body purports to be by him as trustee, whatever title, interest, or claim legal or equitable he has will pass thereby to his grantee. And see Faussett *v.* Carpenter, 2 Dow. & Cl. 232, 6 Eng. Reprint 715, 5 Bligh N. S. 75, 5 Eng. Reprint 241; and, generally, Trusts.

71. See, generally, Executors and Administrators.

72. **A deed, not authorized by the probate court,** where executed by an administrator who is sole heir of his intestate, although ineffectual to pass the legal title, may pass an equitable title which the administrator could not forfeit by giving a subsequent mortgage. Wilson *v.* Morrell, 5 Wash. 654, 32 Pac. 732.

73. Dickerson *v.* Campbell, 32 Mo. 544.

The title of the decedent as it exists is only sold by the administrator and a warranty by him would probably only bind him individually. Mellen *v.* Boarman, 13 Sm. & M. (Miss.) 100.

Where one who is both administrator and devisee executes a deed which fails to recite that it was executed by him in his representative capacity, such deed will vest in the grantee only the interest of the administrator as devisee. Cohea *v.* Hemingway, 71 Miss. 22, 14 So. 734, 42 Am. St. Rep. 449.

Qualifications of rule.— All the interest of the grantor has been held to pass where the only indication that he acted as executor is the signature "A, Executor for C, Deceased." Mills *v.* Herndon, 60 Tex. 353. And it has been decided that where a mortgagor who has been appointed executor of the mortgagee executes a deed of the mortgaged land, with covenants of warranty, the whole estate will pass to the grantee, discharged of all encumbrances. Ritchie *v.* Williams, 11 Mass. 50. So where a deed executed by one who has the legal title purports to convey the land, the grantor will be estopped to deny that the title passes, although he professes to execute the deed as administrator of one who possessed no title and of whose estate he has no legal administration. Brown *v.* Edson, 23 Vt. 435.

74. Churchill *v.* Bee, 66 Ga. 621. See Bauer *v.* Schmelcher, 5 N. Y. Suppl. 423; Henderson *v.* Lindley, 75 Tex. 185, 12 S. W. 979; O'Brien *v.* Brice, 21 W. Va. 704.

A deed by an executrix without authority, executed by her both as executrix and in her individual capacity, will pass her interest, although not that of other devisees. Morrison *v.* Bowman, 29 Cal. 337.

Description of grantor as executrix may be mere matter of description to identify the individual named and not as a limitation upon the estate conveyed. Norris *v.* Harris, 15 Cal. 226.

75. Short *v.* Galbreath, 128 Ill. 214, 21 N. E. 217; Wright *v.* De Groff, 14 Mich. 164; Sip *v.* Lawback, 17 N. J. L. 442; Shurtz *v.* Thomas, 8 Pa. St. 359. But see Magee *v.* Mellon, 23 Miss. 585.

76. *Connecticut.*— Law *v.* Hempstead, 10 Conn. 23; Martin *v.* Sterling, 1 Root 210.

New Hampshire.— Graves *v.* Amoskeag Mfg. Co., 44 N. H. 462.

North Carolina.— Judge *v.* Houston, 34 N. C. 108.

Tennessee.—Richards *v.* Ewing, 11 Humphr. 327.

Texas.— Stephens *v.* Hewett, 22 Tex. Civ. App. 303, 54 S. W. 301.

See 16 Cent. Dig. tit. "Deeds," § 408.

A deed by a life-tenant purporting to convey the fee will pass the life-estate.

Alabama.— Smith *v.* Cooper, 59 Ala. 494.

Massachusetts.— Hurd *v.* Cushing, 7 Pick. 169.

where the interest of a tenant in common in land is conveyed by a deed which purports to convey the entire interest therein, and a subsequent conveyance by metes and bounds of portions of such tract is made by that grantee to others by deeds purporting to convey the entire interest, it is decided that the latter will take proportionate shares of the individual interest of the original tenant in common.[77] But a conveyance by one who is only heir apparent to the property conveyed is held to pass no title.[78]

(II) *Conveyance of Contingent, Expectant, or Defeasible Estate.* One who is the owner of an expectant or contingent estate may by an absolute conveyance pass such interest to the grantee.[79] Again where the estate of the grantor is defeasible by his death without heirs of his body, his grantee will only be vested with a defeasible estate which is terminated by the death of the grantor without such heirs.[80]

3. Designation of Parties and Successors in Interest as Affecting Estate Created and Person Entitled Thereto — a. Application of Rule in Shelley's Case.[81] The rule in Shelley's case was brought to America as a part of the common law and was recognized and enforced by the judicial tribunals of the older states.[82]

Missouri.— Foote *v.* Sanders, 72 Mo. 616.

New Jersey.— Middleton *v.* Dougherty, 46 N. J. L. 350.

New York.— Jackson *v.* Maneius, 2 Wend. 357; Sinelair *v.* Jackson, 8 Cow. 543.

Pennsylvania.— Cresswell *v.* Grumbling, 15 Wkly. Notes Cas. 93.

Tennessee.— McCorry *v.* King, 3 Humphr. 267, 39 Am. Dec. 165.

See 16 Cent. Dig. tit. "Deeds," § 408.

If, however, the life-tenant is an heir of the reversioner it is decided that the grantee will take the fee. Wilson *v.* Watkins, 48 S. C. 341, 26 S. E. 663.

A deed by a lessee purporting to convey the fee will convey the leasehold interest. Mt. Washington Hotel Co. *v.* Marsh, 63 N. H. 230.

A deed by one who has by a prior deed conveyed the legal title in trust will convey only the equity of redemption until such prior deed is released. Southern Bldg., etc., Assoc. *v.* Page, 46 W. Va. 302, 33 S. E. 336.

A warranty in fee by one who has only a life-estate in the land conveyed, which by the terms of the deed to him is to go "to the heirs of his body" after his death, or if he dies without heirs then to another, will not bar or rebut the claim of an heir who took by purchase and not by descent. Moore *v.* Parker, 34 N. C. 123.

General words should be restricted to what the grantor has power to convey. Booth *v.* Alcock, L. R. 8 Ch. 663, 42 L. J. Ch. 557, 29 L. T. Rep. N. S. 231, 21 Wkly. Rep. 743.

Where a deed by mistake includes lands which are no part of the property actually purchased, the fact that the vendors have no title thereto does not furnish the vendee with any equity to have the contract rescinded. Butler *v.* Miller, 15 B. Mon. (Ky.) 617.

Where a joint deed is made by two grantors of a tract of land which is owned by one of them in severalty, the land will pass by the deed, if such appears to have been the intention of the parties. Vose *v.* Bradstreet, 27 Me. 156.

Where land is bought by a person subject to an encumbrance which he assumes to pay, his interest acquired being a conditional estate, no greater or different interest will pass by a conveyance thereof. Bacon *v.* Huntington, 14 Conn. 92.

A statute that under such a deed an after-acquired interest will inure to the benefit of the grantee does not apply in the case of a quitclaim deed, since the grantee under such a deed takes only the grantor's existing interest. Troxell *v.* Stevens, 57 Nebr. 329, 77 N. W. 781.

77. Garret *v.* Weinberg, 43 S. C. 36, 20 S. E. 756.

78. Davis *v.* Hayden, 9 Mass. 514.

79. Tooley *v.* Dibble, 2 Hill (N. Y.) 641; Forteseue *v.* Satterthwaite, 23 N. C. 566; Hale *v.* Hollon, 14 Tex. Civ. App. 96, 35 S. W. 843, 36 S. W. 288. *Compare* Hart *v.* Gregg, 32 Ohio St. 502, where it is decided that a conveyance by a son of expectancy in land owned by his father, and which would descend to him if his father should die intestate before him, cannot operate to defeat the grantor's title afterward acquired by descent, except by way of legal or equitable estoppel.

Assignment of possibilities and expectancies see Assignments, 4 Cyc. 15.

But an estate in expectancy is not created in a grantee by the use of the words "as well in possession as in expectancy" where a title in fee simple to an undivided interest was the only estate owned by the grantor. Fenton *v.* Miller, 108 Mich. 246, 65 N. W. 966.

80. Fenton *v.* Miller, 108 Mich. 246, 65 N. W. 966; Tomlinson *v.* Niekell, 24 W. Va. 148.

81. **Rule in Shelley's case** generally see Estates.

82. Turman *v.* White, 14 B. Mon. (Ky.) 560.

Decisions recognizing rule as in force see the following cases:

Indiana.— Fountain County Coal, etc., Co. *v.* Beekleheimer, 102 Ind. 76, 1 N. E. 202, 52 Am. Rep. 645.

Maryland.— Thomas *v.* Higgins, 47 Md. 439; Ware *v.* Richardson, 3 Md. 505, 56 Am. Dec. 762.

This rule is declared to apply alike to equitable and to legal estates.[83] But it has been decided that it operates simply upon the words of inheritance and does not affect the rules for determining the quantity of the estate conveyed, whether a fee simple or a fee tail.[84]

b. Meaning and Effect of Use of Word "Heirs" — (i) *In General.* The word "heirs" without explanatory or qualifying words is generally construed as a word of limitation, and a deed of property to a person specified and his heirs will be construed as conveying the fee to such person.[85] An exception exists,

Massachusetts.— Davis *v.* Hayden, 9 Mass. 514.

Missouri.— Muldrow *v.* White, 67 Mo. 470.

North Carolina.—Dawson *v.* Quinnerly, 118 N. C. 188, 24 S. E. 483.

Ohio.— Mack *v.* Champion, 11 Ohio Dec. (Reprint) 327, 26 Cinc. L. Bul. 113.

South Carolina.— Kennedy *v.* Colclough, 67 S. C. 118, 45 S. E. 139.

Tennessee.— Polk *v.* Faris, 9 Yerg. 209, 30 Am. Dec. 400.

See 16 Cent. Dig. tit. "Deeds," § 413.

Statutory provisions in regard to rule construed see the following cases:

Arkansas.— Hardage *v.* Stroop, 58 Ark. 303, 24 S. W. 490.

Missouri.— Tesson *v.* Newman, 62 Mo. 198.

North Carolina.— Starnes *v.* Hill, 112 N. C. 1, 16 S. E. 1011, 22 L. R. A. 598.

South Carolina.— Fields *v.* Watson, 23 S. C. 42.

Virginia.— Taylor *v.* Cleary, 29 Gratt. 448.

See 16 Cent. Dig. tit. "Deeds," § 413.

Where this rule applies to a deed creating a trust and the property is sold on application of the beneficiaries and the proceeds invested in other property which is conveyed to the trustee under the same conditions as the original trust deed contained, the rule will also apply to the new deed as though it had not been interrupted. Brown *v.* Wadsworth, 32 N. Y. App. Div. 423, 53 N. Y. Suppl. 215.

83. Brown *v.* Renshaw, 57 Md. 67; Croxall *v.* Sherrerd, 5 Wall. (U. S.) 268, 18 L. ed. 572.

A condition of the application of the rule is held to be that the estate for life and the subsequent limitation must be both of the same nature — that is both legal or both equitable. Crosby *v.* Davis, 2 Pa. L. J. Rep. 403, 4 Pa. L. J. 193. See Brown *v.* Wadsworth, 168 N. Y. 225, 61 N. E. 250.

84. Lehndorf *v.* Cope, 122 Ill. 317, 13 N. E. 505. *Compare* Stephenson *v.* Hagan, 15 B. Mon. (Ky.) 282.

As this rule operates to defeat the intention it should be confined to the cases literally within it. Crosby *v.* Davis, 2 Pa. L. J. Rep. 403, 4 Pa. L. J. 193. But the rule will prevail over the clearly expressed intention of the grantor. Davis *v.* Sturgeon, 198 Ill. 520, 64 N. E. 1016; Kirby *v.* Brownlee, 13 Ohio Cir. Ct. 86.

The rule enlarges the estate of the first taker only when his heirs general or the heirs of his body are the objects of the limitation and when they take by descent from him and not as purchasers under a deed. Williamson *v.* Mason, 23 Ala. 488. See Taylor *v.* Cleary, 29 Gratt. (Va.) 448.

85. *Alabama.*— Couch *v.* Anderson, 26 Ala. 676.

California.— Brenham *v.* Davidson, 51 Cal. 352.

Connecticut.— Macumber *v.* Bradley, 28 Conn. 445.

Georgia.— Varner *v.* Boynton, 46 Ga. 508.

Illinois.— Riggin *v.* Love, 72 Ill. 553.

Indiana.— Hull *v.* Beals, 23 Ind. 25.

Kentucky.— Lane *v.* Lane, 106 Ky. 530, 50 S. W. 857, 21 Ky. L. Rep. 9; Pritchard *v.* James, 93 Ky. 306, 20 S. W. 216, 14 Ky. L. Rep. 243; Chenault *v.* Chenault, 56 S. W. 728, 22 Ky. L. Rep. 122.

Maine.— Deering *v.* Long Wharf, 25 Me. 51.

Maryland.— Nevin *v.* Gillespie, 56 Md. 320.

Massachusetts.— Knowlden *v.* Leavitt, 121 Mass. 307.

Missouri.— Meicier *v.* Missouri River, etc., R. Co., 54 Mo. 506.

New Jersey.— Bruere *v.* Bruere, 35 N. J. Eq. 432.

North Carolina.— Tucker *v.* Williams, 117 N. C. 119, 23 S. E. 90; Cutlar *v.* Cutlar, 3 N. C. 154.

Pennsylvania.— Pratt *v.* McCawley, 20 Pa. St. 264; Charles' Appeal, 2 Pennyp. 164, 13 Wkly. Notes Cas. 89; Crosby *v.* Davis, 2 Pa. L. J. Rep. 403, 4 Pa. L. J. 193.

South Carolina.— Glenn *v.* Jamison, 48 S. C. 316, 26 S. E. 677.

United States.— Brown *v.* Schoonmaker, 4 Fed. Cas. No. 2,029.

See 16 Cent. Dig. tit. "Deeds," § 416.

In a deed to a daughter for life and then to the grantor's own right heirs in case of her death without children, it has been held that those "heirs" were to be ascertained at the donor's death and not at the donee's. Harris *v.* McLaran, 30 Miss. 533.

A deed to a grantee for life with remainder to husband and in case of his death before the death of his wife then to his heirs at law operates to create a life-estate in the wife, with remainder in the husband in fee. Riggin *v.* Love, 72 Ill. 553. See Pratt *v.* McCawley, 20 Pa. St. 264.

A marriage settlement of property upon a wife for life, the remainder to the husband for life, and the remainder to the heirs general of the husband has been construed as giving the husband a vested remainder in fee. Varner *v.* Boynton, 46 Ga. 508.

A quitclaim deed to grantors by grantees to whom a life-estate was granted with remainder to the heirs of one of the grantees

however, where a grantor annexes words of explanation to the word "heirs" indicating that he meant to use the term in a qualified sense, as *descriptio personarum* or as a particular designation of certain individuals, and that they and not the ancestor were to be the points or *termini* from which the succession to the estate were to emanate or take its start, in which case the word may be treated as a term of purchase and not of limitation.[86] So the word "heirs" may be construed as meaning children, where an intention to that effect is clearly shown by the instrument.[87] And "heirs" of the grantor and his wife may be construed to mean the issue of the grantor and his wife and not the heirs of each.[88]

(n) *Particular Limitation to Heirs*—(A) *In Grant to One For Life.* The rule that the word "heirs" is to be construed as a word of limitation applies in the case of a grant to one for life and then to his heirs, and the fee will vest in the first grantee,[89] except so far as the application of this rule may be modified

reinvests the entire estate in the grantors. Hull *v.* Beals, 23 Ind. 25. *Compare* Nevin *v.* Gillespie, 56 Md. 320.

The grant of a right to the use of land is in the nature of an easement or franchise, and the use of the word "heirs" in a grant of such a right to a person and his heirs will not convey the fee, althougn the enjoyment of such right may require the permanent and exclusive use of the land out of which it is granted. Munro *v.* Meech, 94 Mich. 596, 54 N. W. 290. Such a grant of a railroad right of way does not convey the fee. Jones *v.* Van Bochove, 103 Mich. 98, 61 N. W. 342. But see Ballard *v.* Louisville, etc., R. Co., 5 S. W. 484, 9 Ky. L. Rep. 523.

86. *Maryland.*—Ware *v.* Richardson, 3 Md. 505, 56 Am. Dec. 762.

New York.— Heath *v.* Hewitt, 49 Hun 12, 1 N. Y. Suppl. 492; Rivard *v.* Gisenhof, 35 Hun 247; Wood *v.* Taylor, 9 Misc. 640, 30 N. Y. Suppl. 433.

North Carolinaa.— Starnes *v.* Hill, 112 N. C. 1, 16 S. E. 1011, 22 L. R. A. 598.

Ohio.— Williams *v.* Mears, 2 Disn. 604, 4 Wkly. L. Gaz. 293.

Pennsylvania.— Warn *v.* Brown, 102 Pa. St. 347.

Vermont.— Thompson *v.* Carl, 51 Vt. 408.

See 16 Cent. Dig. tit. "Deeds," § 416 *et seq.*

A grant to one and "her heirs and assigns forever during her life" to have and to hold to the grantee and her heirs and assigns forever is held to convey only a life-estate to the grantee and her heirs. Moss *v.* Hunter, 5 Ky. L. Rep. 684. *Compare* Cook *v.* Sinnamon, 47 Ill. 214.

The grantor is not estopped by the word "heirs" from disputing that the conveyance passed an estate in fee. Jordan *v.* Neece, 36 S. C. 295, 15 S. E. 202, 31 Am. St. Rep. 869.

87. *Alabama.*— Findley *v.* Hill, 133 Ala. 229, 32 So. 497.

Indiana.— Tinder *v.* Tinder, 131 Ind. 381, 30 N. E. 1077.

Kentucky.— Tucker *v.* Tucker, 78 Ky. 503.

Missouri.— Cornelius *v.* Smith, 55 Mo. 528.

New York.— Heath *v.* Hewitt, 127 N. Y. 166, 27 N. E. 959, 24 Am. St. Rep. 438, 13 L. R. A. 46 [*affirming* 49 Hun 12, 1 N. Y. Suppl. 492].

Tennessee.— Read *v.* Fite, 8 Humphr. 328; Hickman *v.* Quinn, 6 Yerg. 96.

See 16 Cent. Dig. tit. "Deeds," § 417.

Where so construed it has been decided that the deed takes effect at once as a present gift (Grimes *v.* Orrand, 2 Heisk. (Tenn.) 298); and that the children take a beneficial interest during the life of the parent, with remainder at his death (Twelves *v.* Nevill, 39 Ala. 175); or again that they take a remainder in fee (See *v.* Derr, 57 Mich. 369, 24 N. W. 108); or are entitled to immediate possession as tenants in common (Brasington *v.* Hanson, 149 Pa. St. 289, 24 Atl. 344. See Henderson *v.* Sawyer, 99 Ga. 234, 25 S. E. 312).

"Heirs" will not be construed to mean children unless there is something from the clear expression of the instrument to show an intention to have it so construed. Whitaker *v.* Blair, 3 J. J. Marsh. (Ky.) 236.

"Heirs" in the habendum may be construed as children, where it is apparent from the entire deed that it was used in this sense. Lee *v.* Tucker, 56 Ga. 9; Varn *v.* Brown, 102 Pa. St. 347. See also Hamilton *v.* Pitcher, 53 Mo. 334.

"Bodily heirs" construed to mean children see Wikle *v.* McGraw, 91 Ala. 631, 8 So. 341.

"Joint heirs with her and myself" has been construed as intending to show what children of the wife take after her. Broliar *v.* Marquis, 80 Iowa 49, 45 N. W. 395.

88. Beedy *v.* Finney, 118 Iowa 276, 91 N. W. 1069. See Atherton *v.* Roche, 192 Ill. 252, 61 N. E. 357, 55 L. R. A. 591.

89. *Georgia.*— Wayne *v.* Lawrence, 58 Ga. 15.

Illinois.— Brislain *v.* Wilson, 63 Ill. 173.

Indiana.— Taney *v.* Fahnley, 126 Ind. 88, 25 N. E. 882.

Massachusetts.—Bullard *v.* Goffe, 20 Pick. 252.

North Carolina.— Edgerton *v.* Aycock, 123 N. C. 134, 31 S. E. 382; Nichols *v.* Gladden, 117 N. C. 497, 23 S. E. 459.

Ohio.— Continental Mut. L. Ins. Co. *v.* Skinner, 4 Ohio Cir. Ct. 526; Hess *v.* Lakin, 7 Ohio S. & C. Pl. Dec. 300; Jenkins *v.* Artz, 6 Ohio S. & C. Pl. Dec. 439.

Pennsylvania.— Huber *v.* Crosland, 140 Pa. St. 575, 21 Atl. 404; Carson *v.* Fuhs, 131 Pa. St. 256, 18 Atl. 1017; Auman *v.* Auman, 21 Pa. St. 343.

Texas.— Johnson *v.* Morton, 28 Tex. Civ. App. 296, 67 S. W. 790.

by qualifying or explanatory words,[90] or where by statute in such a case the first-named takes an estate for life.[91]

(B) *To Heirs of Grantee's Body* — (1) In General. The technical words "heirs of the body" of the grantor are presumed to be nsed technically unless the contrary appears on the face of the instrument.[92] And where such words or equivalent ones are nsed in a grant to one and such heirs they will be construed as words of limitation and will pass the fee to the first-named grantee,[93] unless it appears from the instrument that they were used as words of description to designate certain persons, in which case they will be construed as words of purchase and not of limitation.[94] In some cases, however, it has been decided that a fee-conditional estate in the first grantee is created by such a deed,[95] which becomes a fee absolute after issne are born.[96] Again deeds of this character have been constrned as creating estates tail,[97] which by statute in some states are converted

See 16 Cent. Dig. tit. "Deeds," § 419.

A conveyance in trust to pay the income to the wife during her life and to her husband for his life thereafter, and, after the death of both in trust for her heirs, has been held, upon the extinguishment of the husband's rights, to give the wife the right to dispose of the fee. Brown *v.* Wadsworth, 32 N. Y. App. Div. 423, 53 N. Y. Suppl. 215.

90. Ware *v.* Richardson, 3 Md. 505, 56 Am. Dec. 762; Dawson *v.* Quinnerly, 118 N. C. 188, 24 S. E. 483; McMullin *v.* Beatty, 56 Pa. St. 389; Smith *v.* Hastings, 29 Vt. 240.

A deed to one during his life and to his oldest male heir at the time of his decease, then living and his heirs and assigns forever conveys a life-estate to the first-named grantee and a remainder in fee simple to his oldest male heir living at his decease. Smith *v.* Collins, 17 R. I. 432, 22 Atl. 1018. See Ford *v.* Flint, 40 Vt. 382.

The rule in Shelley's case is excluded by the absence of the word "heir" in the limitation, as where a deed is to one during the term of her natural life to hold the lands to her own separate use and benefit, with trust after her death for the benefit of children born to her, and in case of her death without issue to such persons as would take an estate in fee simple from her. Handy *v.* McKim, 64 Md. 560, 4 Atl. 125.

91. Brown *v.* Ferrell, 83 Ky. 417; Read *v.* Fogg, 60 Me. 479; Tesson *v.* Newman, 62 Mo. 198; Moore *v.* Littel, 41 N. Y. 66; Sheridan *v.* House, 4 Abb. Dec. (N. Y.) 218.

92. Nye *v.* Lovitt, 92 Va. 710, 24 S. E. 345.

93. *Alabama.*—Bradford *v.* Howell, 42 Ala. 422; McCullough *v.* Cliddon, 33 Ala. 208; Simmons *v.* Augustin, 3 Port. 69.

Connecticut.— Chaffee *v.* Dodge, 2 Root 205.

Georgia.— Griffin *v.* Stewart, 101 Ga. 720, 29 S. E. 29; Whatley *v.* Barker, 79 Ga. 790, 4 S. E. 387.

Indiana.— Lane *v.* Utz, 130 Ind. 235, 29 N. E. 772; Tipton *v.* La Rose, 27 Ind. 484.

Kentucky.— True *v.* Nicholls, 2 Duv. 547; McGennis *v.* McGennis, 29 S. W. 333, 16 Ky. L. Rep. 598; Lanham *v.* Wilson, 22 S. W. 438, 15 Ky. L. Rep. 109.

Maryland.— Ware *v.* Richardson, 3 Md. 505, 56 Am. Dec. 762.

Mississippi.— McKenzie *v.* Jones, 39 Miss. 230.

New York.— Brant *v.* Gelston, 2 Johns. Cas. 384.

Tennessee.— Brown *v.* Brown, (Ch. App. 1897) 43 S. W. 126.

Texas.— Singletary *v.* Hill, 43 Tex. 588; Calder *v.* Davidson, (Civ. App. 1900) 59 S. W. 300; White *v.* Dedmon, (Civ. App. 1900) 57 S. W. 870.

See 16 Cent. Dig. tit. "Deeds," § 420.

Repetition of the expression "heirs of the body" does not show an intention to convey only a life-estate. Short *v.* Terry, 22 S. W. 841, 15 Ky. L. Rep. 241.

That the conveyance was intended as a gift or advancement does not affect the application of the rule in Shelley's case to a conveyance by a father to his daughter "and to the heirs of her body." Lane *v.* Utz, 130 Ind. 235, 29 N. E. 772.

Where a statute converts a conveyance to one and the "heirs of her body" into an estate in fee simple it cannot be affected by evidence *aliunde* of an intention to convey only a life-estate. Short *v.* Terry, 22 S. W. 841, 15 Ky. L. Rep. 241.

94. Williams *v.* Allen, 17 Ga. 81; Jarvis *v.* Quigley, 10 B. Mon. (Ky.) 104; Williams *v.* Beasly, 60 N. C. 102; Self *v.* Tune, 6 Munf. (Va.) 470. See Myers *v.* Anderson, 1 Strobh. Eq. (S. C.) 344, 47 Am. Dec. 537.

This rule applies to a deed to one and the heirs of her body by a certain specified person. Sullivan *v.* McLaughlin, 99 Ala. 60, 11 So. 447; Varner *v.* Young, 56 Ala. 260; Fletcher *v.* Tyler, 92 Ky. 145, 17 S. W. 282, 13 Ky. L. Rep. 421, 36 Am. St. Rep. 584; Fanning *v.* Doan, 128 Mo. 323, 30 S. W. 1032.

95. Archer *v.* Ellison, 28 S. C. 238, 5 S. E. 713; Warnock *v.* Wightman, 1 Brev. (S. C.) 331; Wright *v.* Herron, 5 Rich. Eq. (S. C.) 441; Izard *v.* Middleton, Bailey Eq. (S. C.) 228.

96. Pierson *v.* Lane, 60 Iowa 60, 14 N. W. 90; Miller *v.* Graham, 47 S. C. 288, 25 S. E. 165.

97. Steel *v.* Cook, 1 Metc. (Mass.) 281; Corbin *v.* Healy, 20 Pick. (Mass.) 514; Pollock *v.* Speidel, 17 Ohio St. 439; Haynes *v.* Bourn, 42 Vt. 686.

into a fee simple.[98] And by statute such a deed may be construed as giving a life-estate to the grantee with remainder in fee to the children.[99]

(2) In Grant to One For Life. A grant to one for life with limitation to the "heirs of his body" is construed as vesting a fee simple in the grantee,[1] although the use of other words in connection therewith may have the effect of creating a life-estate only,[2] with a valid remainder in such heirs.[3]

(c) *To Present Living Heirs.* The words "present heirs" are declared to be in the nature of *descriptio personarum* and therefore words of purchase,[4] or words of limitation or purchase as will best accord with the manifest intention of him who employs them.[5]

c. Limitation to "Children"[6] — (i) *In General.* The word "children" is not equivalent to the word "heirs" which is necessary to the conveyance of the fee,[7] and is ordinarily construed as a word of purchase,[8] unless such a construction is opposed to the apparent intent of the grantor.[9] And a deed to one and his children will be ordinarily construed as vesting the grantee with a life-estate,[10]

98. Slayton *v.* Blount, 93 Ala. 575, 9 So. 241; Johnson *v.* Johnson, 2 Metc. (Ky.) 331; Jones *v.* Mason, 53 S. W. 5, 21 Ky. L. Rep. 842; Ruby *v.* Ruby, 15 S. W. 659, 12 Ky. L. Rep. 879; Sudduth *v.* Sudduth, 60 Miss. 366; Dibrell *v.* Carlisle, 48 Miss. 691.

99. Garth *v.* Arnold, 115 Fed. 468, 53 C. C. A. 200.

Under the Illinois statute, which provides that where any person shall become seized in fee tail of any lands by a conveyance, such person shall take an estate for life and the remainder shall pass in fee absolute to the person to whom the estate would pass at common law, a conveyance of property to a husband and wife "and their bodily heirs forever" grants a remainder in fee to the bodily heirs of both of them and not the bodily heirs of either. Atherton *v.* Roche, 192 Ill. 252, 61 N. E. 357, 55 L. R. A. 591.

1. *Arkansas.*— Denson *v.* Thompson, 19 Ark. 66.

Florida.— Watts *v.* Clardy, 2 Fla. 369.

Indiana.— Waters *v.* Lyon, 141 Ind. 170, 40 N. E. 662; Andrews *v.* Spurlin, 35 Ind. 262.

Mississippi.— Hampton *v.* Rather, 30 Miss. 193.

North Carolina.— *Ex p.* McBee, 63 N. C. 332.

South Carolina.— Dott *v.* Cunnington, 1 Bay 453, 1 Am. Dec. 624.

See 16 Cent. Dig. tit. "Deeds," § 421.

2. *Arkansas.*— Hardage *v.* Stroope, 58 Ark. 303, 24 S. W. 490.

Georgia.— Dudley *v.* Porter, 16 Ga. 613.

New Hampshire.— Forest *v.* Jackson, 56 N. H. 357.

Pennsylvania.— Criswell *v.* Grumbling, 107 Pa. St. 408.

Tennessee.— Evans *v.* Wells, 7 Humphr. 559.

Vermont.— Blake *v.* Stone, 27 Vt. 475.

See 16 Cent. Dig. tit. "Deeds," § 421.

3. Evans *v.* Wells, 7 Humphr. (Tenn.) 559; Blake *v.* Stone, 27 Vt. 475.

Under the Alabama code such an estate is created. Wilson *v.* Alston, 122 Ala. 630, 25 So. 225.

4. Fountain County Coal, etc., Co. *v.* Beckleheimer, 102 Ind. 76, 1 N. E. 202, 52 Am. Rep. 645.

5. Ware *v.* Richardson, 3 Md. 505, 56 Am. Dec. 762.

Where land is conveyed to a woman "and her present heirs forever" the deed gives a life-estate to the woman and a vested remainder to her then living children. Foster *v.* Shreve, 6 Bush (Ky.) 519.

6. Children defined see Children, 7 Cyc. 123.

7. Nelson *v.* Davis, 35 Ind. 474.

In its ordinary sense the word "children" does not include grandchildren. McGuire *v.* Westmoreland, 36 Ala. 594.

8. Beacroft *v.* Strawn, 67 Ill. 28; McGinnis *v.* Banta, 4 Ky. L. Rep. 256; Latrobe *v.* Carter, 83 Md. 279, 34 Atl. 472; Kay *v.* Connor, 8 Humphr. (Tenn.) 624, 49 Am. Dec. 690. See Carrigan *v.* Drake, 36 S. C. 354, 15 S. E. 339.

"Children, issue of their or either of their bodies," are necessarily words of purchase. Melsheimer *v.* Gross, 58 Pa. St. 412.

9. McGinnis *v.* Banta, 4 Ky. L. Rep. 256. See Ware *v.* Richardson, 3 Md. 505, 56 Am. Dec. 762.

In a granting clause the word "children" may be construed as heirs. Rines *v.* Mansfield, 96 Mo. 394, 9 S. W. 798.

10. *Alabama.*— May *v.* Ritchie, 65 Ala. 602; Elmore *v.* Mustin, 28 Ala. 309.

Georgia.— Moreland *v.* Hunley, 37 Ga. 342.

Indiana.— Nelson *v.* Davis, 35 Ind. 474.

Kentucky.— Goodridge *v.* Goodridge, 91 Ky. 507, 16 S. W. 270, 13 Ky. L. Rep. 70; Bodine *v.* Arthur, 91 Ky. 53, 14 S. W. 904, 12 Ky. L. Rep. 650, 34 Am. St. Rep. 162; Davis *v.* Hardin, 80 Ky. 672; Rogers *v.* Payne, 14 B. Mon. 167; Smith *v.* Upton, 13 S. W. 721, 12 Ky. L. Rep. 27. But see Viley *v.* Frankfort, etc., R., 51 S. W. 173, 21 Ky. L. Rep. 255.

Missouri.— Kinney *v.* Mathews, 69 Mo. 520.

New Hampshire.— Fales *v.* Currier, 55 N. H. 392.

Pennsylvania.— Melsheimer *v.* Gross, 58 Pa. St. 412; Wager *v.* Wager, 1 Serg. & R. 374.

Tennessee.— Williams *v.* Williams, 16 Lea 164; Haywood *v.* Moore, 2 Humphr. 584.

with a remainder to the children.[11] In some cases, however, it has been determined that in a deed to a mother and her children the children *in esse* take jointly with her[12] or as tenants in common.[13]

(II) *In Grant to One For Life.* A deed conveying a life-estate to one and providing that the property shall upon the termination of such estate go to his children will operate as a conveyance of the life-estate to the first-named grantee[14] with vested remainder to the children.[15] It has, however, been decided that a deed to a person of property during his life and to children, naming them, their heirs and assigns, confers upon the children jointly with the first-named grantee a present and immediate right of property.[16]

(III) *Grant of Beneficial Interest to Children.* A deed of gift to a wife for the support of herself and children vests the fee in the wife and children.[17]

(IV) *Rights of After-Born Children.* Where property is conveyed to a certain person and his children it has been determined that no title will pass to after-born children.[18] But where a deed creates an estate for life with remainder over to the children, the remainder will vest in children already born subject to be opened at the birth of each succeeding child.[19]

See 16 Cent. Dig. tit. "Deeds," § 423.

11. *Alabama.*— Elmore *v.* Mustin, 28 Ala. 309.

Georgia.— Moreland *v.* Hunley, 37 Ga. 342.

Kentucky.— Goodridge *v.* Goodridge, 91 Ky. 507, 16 S. W. 270, 13 Ky. L. Rep. 70; Bodine *v.* Arthur, 91 Ky. 53, 14 S. W. 904, 12 Ky. L. Rep. 650, 34 Am. St. Rep. 162; Webb *v.* Holmes, 3 B. Mon. 404; Smith *v.* Upton, 13 S. W. 721, 12 Ky. L. Rep. 27.

Missouri.—Kinney *v.* Mathews, 69 Mo. 520.

New Hampshire.— Fales *v.* Currier, 55 N. H. 392.

Pennsylvania.—Wager *v.* Wager, 1 Serg. & R. 374.

See 16 Cent. Dig. tit. "Deeds," § 423.

12. Moore *v.* Lee, 105 Ala. 435, 17 So. 15; Gill *v.* Logan, 11 B. Mon. (Ky.) 231. See Bullock *v.* Caldwell, 81 Ky. 566; Norton *v.* Reed, (Tenn. Ch. App. 1897) 42 S. W. 688.

13. *Georgia.*— Chess-Carley Co. *v.* Purtell, 74 Ga. 467; Loyless *v.* Blackshear, 43 Ga. 327; Davis *v.* Hunter, 23 Ga. 172.

Massachusetts.— Chenery *v.* Stevens, 97 Mass. 77.

Mississippi.— Brabham *v.* Day, 75 Miss. 923, 23 So. 578.

Pennsylvania.— Shirlock *v.* Shirlock, 5 Pa. St. 367.

Tennessee.— Livingston *v.* Livingston, 16 Lea 448.

See 16 Cent. Dig. tit. "Deeds," § 423.

14. *Indiana.*— Burns *v.* Wessner, 134 Ind. 442, 34 N. E. 10; Nelson *v.* Davis, 35 Ind. 474; Sorden *v.* Gatewood, 1 Ind. 107.

Kentucky.— Barth *v.* Barth, 64 S. W. 993, 23 Ky. L. Rep. 1246; McGinnis *v.* Banta, 4 Ky. L. Rep. 256.

Maryland.— Handy *v.* McKim, 64 Md. 560, 4 Atl. 125; Hewitt's Appeal, 55 Md. 509.

New Jersey.— Adams *v.* Ross, 30 N. J. L. 505, 82 Am. Dec. 237.

Pennsylvania.— Tyler *v.* Moore, 42 Pa. St. 374.

South Carolina.— Jenkins *v.* Jenkins, 1 Mill 48; Raines *v.* Woodward, 4 Rich. Eq. 399.

See 16 Cent. Dig. tit. "Deeds," § 424.

15. Fletcher *v.* Horne, 75 Ga. 134; Jordan *v.* Gatewood, Smith (Ind.) 82; Barth *v.* Barth, 64 S. W. 993, 23 Ky. L. Rep. 1246; Adams *v.* Ross, 30 N. J. L. 505, 82 Am. Dec. 237.

16. Berry *v.* Hubbard, 30 Ala. 191.

17. Morris *v.* Davis, 75 Ga. 169, holding also that upon her death intestate, her husband surviving her, he will inherit an interest in her share, which he may convey to another.

Where property is conveyed to a woman "for the separate use and enjoyment of her and her family" it has been decided that the children will be entitled to a share or benefit so long as they remain at home constituting part of the family. McCall *v.* McCall, 1 Tenn. Ch. 504. See Allen *v.* Westbrook, 16 Lea (Tenn.) 251; Hix *v.* Gosling, 1 Lea (Tenn.) 560.

18. Varner *v.* Young, 56 Ala. 260; Faloon *v.* Simshauser, 130 Ill. 649, 22 N. E. 835; Glass *v.* Glass, 71 Ind. 392; King *v.* Rea, 56 Ind. 1; Heath *v.* Heath, 114 N. C. 547, 19 S. E. 155. But see Cessna *v.* Cessna, 4 Bush (Ky.) 516.

A child en ventre sa mere may take. Heath *v.* Heath, 114 N. C. 547, 19 S. E. 155.

A deed in consideration of love and affection was held to pass no title to after-born children. Stroman *v.* Rottenbury, 4 Desauss. (S. C.) 268. *Compare* Brink *v.* Michael, 31 Pa. St. 165.

Under a Michigan statute after-born children do not take by a deed conveying a life-estate to a person, to the children if her body, to her heirs and executors, and to the assigns of herself and her children. Downing *v.* Birney, 117 Mich. 675, 76 N. W. 125.

Where, however, the deed shows an intention that after-born children shall share with those already born, a child born after the delivery of the deed may take under it. Pierce *v.* Brooks, 52 Ga. 425; Mellichamp *v.* Mellichamp, 28 S. C. 125, 5 S. E. 333. But see Hall *v.* Thomas, 3 Strobh. (S. C.) 101.

19. Greer *v.* Boone, 5 B. Mon. (Ky.) 554; Graham *v.* Houghtalin, 30 N. J. L. 552;

d. Limitation to Issue of Grantee's Body. The word "issue" as used in a deed is ordinarily to be construed as a word of purchase and not of limitation.[20]

e. Conveyance to Grantee and His "Representatives." Although the term "legal representatives" in its commonly accepted sense means "administrator" or "executor," yet it may be construed as meaning "heirs," "descendants," or "next of kin," where it is apparent from the instrument that it was used in this sense.[21]

f. Reference to Statutes of Descent. Where a deed of gift to one contains a clause that should the grantee die without wife or child surviving him then the land shall pass according to the statutes of descent and distribution in force, it has been determined that his surviving brothers and sisters will in such a case take by purchase under the deed and not by descent or inheritance from him.[22]

g. Deed to Several Grantees — (i) *In General.* Where a deed is executed to two or more grantees without designating the proportions in which they will take, the law presumes them equally interested and they will hold in equal shares.[23] Such a deed is construed as creating a tenancy in common.[24] And it has been provided by statute in some states that such a construction shall be given[25] unless an estate by joint tenancy is either expressly given or it clearly appears from the instrument that it was intended to be created.[26] But a deed to

Adams *v.* Ross, 30 N. J. L. 505, 82 Am. Dec. 237; Hague *v.* Hague, 161 Pa. St. 643, 29 Atl. 261, 41 Am. St. Rep. 900; Coursey *v.* Davis, 46 Pa. St. 25, 84 Am. Dec. 519 [*overruling* Shirlock *v.* Shirlock, 5 Pa. St. 367].

20. McIlhinny *v.* McIlhinny, 137 Ind. 411, 37 N. E. 147, 45 Am. St. Rep. 186, 24 L. R. A. 489 [*modifying* King *v.* Rea, 56 Ind. 1, and *overruling* Fletcher *v.* Fletcher, 88 Ind. 418]; Thomas *v.* Higgins, 47 Md. 439; Price *v.* Sisson, 13 N. J. Eq. 168; Hancock *v.* Butler, 21 Tex. 804.

Intention of him who employs the word "issue" prevails. Ware *v.* Richardson, 3 Md. 505, 56 Am. Dec. 762.

A life-estate is given to one under a deed to him and to his lawful issue (Ford *v.* Johnson, 41 Ohio St. 366), or to him for support during his natural life and then to his issue (Markley *v.* Singletary, 11 Rich. Eq. (S. C.) 393).

An estate tail was held to be given to a husband by a deed to him and his wife of land during their lives; then to the issue of the husband, their heirs and assigns, and in default of issue by the husband, then to his right heirs, their heirs and assigns forever. Baughman *v.* Baughman, 2 Yeates (Pa.) 410.

The children take a vested remainder in fee simple. Tindall *v.* Tindall, 167 Mo. 218, 66 S. W. 1092.

Word "issue" is synonymous with "descendants." Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq. 475; Price *v.* Sisson, 13 N. J. Eq. 168.

21. Warnecke *v.* Lembea, 71 Ill. 91, 12 Am. Rep. 85; Ewing *v.* Shannahan, 113 Mo. 188, 20 S. W. 1065; Ringwalt *v.* Ringwalt, 4 Pennyp. (Pa.) 276. But see McLaurin *v.* Fairly, 59 N. C. 375; Hooks *v.* Lee, 42 N. C. 83.

22. Robinson *v.* Le Grand, 65 Ala. 111.

23. *Alabama.*—Long *v.* McDougald, 23 Ala. 413.

Connecticut.— Treadwell *v.* Bulkley, 4 Day 395, 4 Am. Dec. 225.

Kentucky.— Stamper *v.* Armstrong, 15 S. W. 513, 12 Ky. L. Rep. 810.

North Carolina.— Pickett *v.* Garrard, 131 N. C. 195, 42 S. E. 579.

Virginia.— Jarrett *v.* Johnson, 11 Gratt. 327.

See 16 Cent. Dig. tit. "Deeds," § 431.

24. Maxwell *v.* Higgins, 38 Nebr. 671, 57 N. W. 388; Galbraith *v.* Galbraith, 3 Serg. & R. (Pa.) 392; Duncan *v.* Forrer, 6 Binn. (Pa.) 193; Preston *v.* Robinson, 24 Vt. 583.

A deed to one and to another and his wife creates a tenancy in common and vests one moiety in the first named and the other moiety in the husband and wife. Johnson *v.* Hart, 6 Watts & S. (Pa.) 319, 40 Am. Dec. 565.

25. *Indiana.*— Case *v.* Owen, 139 Ind. 22, 38 N. E. 395, 47 Am. St. Rep. 253.

Maryland.— Craft *v.* Wilcox, 4 Gill 504.

Massachusetts.— Leonard *v.* Southworth, 164 Mass. 52, 41 N. E. 126.

Mississippi.— Hawkins *v.* Hawkins, 72 Miss. 749, 18 So. 479.

New Jersey.— Coudert *v.* Earl, 45 N. J. Eq. 654, 18 Atl. 220.

North Carolina.— Blair *v.* Osborne, 84 N. C. 417.

Vermont.— Lamb *v.* Clark, 29 Vt. 273.

Wisconsin.— Bennett *v.* Child, 19 Wis. 362, 88 Am. Dec. 692.

See 16 Cent. Dig. tit. "Deeds," § 431.

26. A joint tenancy may, however, be created by a deed to two or more persons by express words to that effect. Fladung *v.* Rose, 58 Md. 13.

An estate in joint tenancy is held to be created by a deed to A, B, and C, "doing business as A., B. & Co., their heirs and assigns." Lauffer *v.* Cavett, 87 Pa. St. 479.

An estate in joint tenancy is created within such a statute by the use of the words "joint tenants" in the appropriate places without the use of the negative, "and not an estate of tenancy in common" or its equivalent (Coudert *v.* Earl, 45 N. J. Eq. 654, 18 Atl.

a person and the heirs of her body conveying land to them, their heirs and assigns, is construed as creating a joint estate in the grantee and her children, where the creation of an estate tail is forbidden by statute.[27]

(n) *Estate to Survivor.* A deed of land to two persons may operate as a deed of an estate for life with remainder in fee to the survivor.[28] But where by statute the interests of deceased joint tenants do not go to the survivor, but are distributable among his or her heirs, and a life-interest only is conveyed to them, on the death of one of the grantees the joint tenancy is severed to the extent of his interest, which reverts to the grantor.[29]

h. Repugnant or Conflicting Terms Designating Parties.[30] All the language of a grant should be considered and effect given to it unless so repugnant or meaningless that it cannot be done, in which case the repugnant or meaningless portion may be rejected.[31] So the *habendum* cannot stand with the premises where so repugnant thereto as to be irreconcilable.[32] The *habendum* may, how-

220), and a deed to "L. R. & J. R. jointly" has been held to create such an estate (Case *v.* Owen, 139 Ind. 22, 38 N. E. 395, 47 Am. St. Rep. 253).

No intention to create a joint tenancy is shown by a deed to the grantor's sons, "to have and to hold against all claim or claims whatever and singular, the title, interest and claim in and unto" said sons. Nicholson *v.* Caress, 45 Ind. 479.

Such a statute does not apply to an estate granted to a husband and wife. Craft *v.* Wilcox, 4 Gill (Md.) 504; Hardenbergh *v.* Hardenbergh, 10 N. J. L. 42, 18 Am. Dec. 371; Bennett *v.* Child, 19 Wis. 362, 88 Am. Dec. 692.

27. Combs *v.* Eversole, 64 S. W. 524, 23 Ky. L. Rep. 932.

28. Such an estate is created by a deed providing that the property shall absolutely vest in the survivor (Bartholomew *v.* Muzzy, 61 Conn. 387, 23 Atl. 604, 29 Am. St. Rep. 206) by a deed to a man and his wife and "the survivor of them, in her or his own right" (Mittel *v.* Karl, 133 Ill. 65, 24 N. E. 553, 8 L. R. A. 655) by a deed by one to his wife, survivor to himself (McKee *v.* Marshall, 5 S. W. 415, 9 Ky. L. Rep. 461) or by a deed to two persons and to the survivor of them, his heirs and assigns (Ewing *v.* Savary, 3 Bibb (Ky.) 235; Schulz *v.* Brahl, 116 Mich. 603, 74 N. W. 1012. See Lewis *v.* Baldwin, 11 Ohio 352).

A deed to two grantees to hold during their joint lives and the life of the survivor and at the death of the survivor to their joint issue in fee simple gives an estate to the grantees for their joint lives and the life of the survivor, and the estate vests in the joint issue of the grantees in fee simple as purchasers. Stephenson *v.* Hagan, 15 B. Mon. (Ky.) 282. See Price *v.* Price, 5 Ala. 578.

Where limitations of the wife's estate in a deed to a husband and wife are all dependent on the wife surviving the husband, and he survives her, the next of kin of the wife cannot come in under the deed. McBride *v.* Williams, 57 N. C. 268. Where, however, property is conveyed to a man and his wife, their heirs and assigns, in consideration of a sum paid by them in her right to have and to hold to them in her right, her heirs and assigns to their use and behoof forever, and the wife dies leaving her husband and a son surviving it is decided that the husband takes a life-estate and the fee vests in the son. Breed *v.* Osborne, 113 Mass. 318. *Compare* Ambler's Estate, 12 Montg. Co. Rep. (Pa.) 117; Mendenhall *v.* Mower, 16 S. C. 303. And see Hardenbergh *v.* Hardenbergh, 10 N. J. L. 42, 18 Am. Dec. 371, where it is decided that a deed to a husband and wife and to his heirs and assigns vests a life-estate in the wife and a fee simple in the husband.

29. Varn *v.* Varn, 32 S. C. 77, 10 S. E. 829. See S. C. Gen. St. § 1851.

30. **Repugnancy** generally see *supra*, V, A, 4.

31. Cooper *v.* Cooper, 76 Ill. 57 (rejecting the words "heirs of the body of the wife"); Blair *v.* Muse, 83 Va. 238, 2 S. E. 31 (holding clause giving power to convey to one void as being repugnant to a fee conveyed to the other grantees).

A limitation to heirs general following a limitation to issue of the body will not prevent the word "issue" from operating to raise an estate tail. Zabriskie *v.* Wood, 23 N. J. Eq. 541.

Where it is the manifest intention to convey the land to one in his representative capacity as guardian, the use of the word "heirs" instead of "successors" in the printed part of the deed should not control or qualify the other parts of the instrument. Walker *v.* Colby Wringer Co., 14 Fed. 517.

Words "her heirs" in the habendum may be construed to mean "their heirs," where the clause grants the realty to one and her children "her heirs" and assigns, thus making the first-named grantee and her children tenants in common. Sease *v.* Sease, 64 S. C. 216, 41 S. E. 898.

32. Moore *v.* Waco, 85 Tex. 206, 20 S. W. 61, construing a deed conveying by its granting clause property to children in trust for the sole benefit of their mother, with the *habendum*, "in trust for her and themselves," meaning children named as trustees, as giving the mother a fee-simple estate.

Omission of word "heirs" in the habendum will not prevent the grantee taking an estate in fee, where such an estate is given in the

ever, be construed as explaining, qualifying, or limiting that which is stated in general terms in the premises.[33]

4. Repugnant and Conflicting Parts Designating Estate Created[34] — a. In General. The interest intended to be conveyed is generally to be determined from the granting clause, which will prevail over the introductory statement,[35] a subsequent provision,[36] the *habendum*,[37] or a warranty or covenant.[38]

b. Grant of Particular Estates as Controlling Subsequent Clauses or Limitations. Where by the granting clause in a deed an absolute fee simple conveyance is made, a subsequent clause showing an intention to grant a less estate will not as a general rule control,[39] although in some cases it has been determined that if there is a clear intention apparent from the whole instrument to grant a less

premises. Breitenbach *v.* Dungan, 5 Pa. L. J. Rep. 236.

The clauses are not irreconcilably repugnant where the conveyance is to one "and his children after him" with the *habendum* to such person "and his heirs forever." Martin *v.* Jones, 62 Ohio St. 519, 57 N. E. 238.

33. Carson *v.* McCaslin, 60 Ind. 334; Jackson *v.* Ireland, 3 Wend. (N. Y.) 99; Blair *v.* Osborne, 84 N. C. 417. See Wilson *v.* Terry, 130 Mich. 73, 89 N. W. 566.

34. **Repugnancy** generally see *supra*, V, A, 4.

35. Webb *v.* Webb. 29 Ala. 588.

36. Graves *v.* Trueblood, 96 N. C. 495, 1 S. E. 918, holding that an estate during coverture will not be enlarged by a power of appointment given to the grantee in case she survives her husband.

37. Express terms creating a life-estate will not be controlled by words of inheritance in the *habendum* (Hodges *v.* Fleetwood, 102 N. C. 122, 9 S. E. 640) or by the use of the words "shall descend" to (Doren *v.* Gillum, 136 Ind. 134, 35 N. E. 1101).

Where it is provided by statute that the granting clause and *habendum* of a deed must be reconciled if possible a deed will be construed as conveying a life-estate where the premises provide that the grantors "hereby grant, sell, and convey" certain land with a *habendum* to have and to hold for and during the term of his natural life and at his decease the same to descend to his children in equal shares, naming the children. Rupert *v.* Penner, 35 Nebr. 587, 53 N. W. 598, 17 L. R. A. 824.

38. Words of inheritance in a warranty or covenant will not enlarge a life-estate into an estate in fee. Register *v.* Rowell, 48 N. C. 312; Snell *v.* Young, 25 N. C. 379.

But while covenants should not be construed to enlarge the estate granted in the premises of the deed, yet they may be resorted to for the purpose of aiding the construction. Ross *v.* Adams, 28 N. J. L. 160; Mills *v.* Catlin, 22 Vt. 98.

Where an equitable interest is defined in the premises and the *habendum* covenants will not serve to give it the effect of a legal conveyance see Hastings *v.* Merriam, 117 Mass. 245.

39. *Illinois.*— Palmer *v.* Cook, 159 Ill. 300, 42 N. E. 796, 50 Am. St. Rep. 165; Fowler *v.* Black, 136 Ill. 363, 26 N. E. 596, 11 L. R. A. 670.

Indiana.— Marsh *v.* Morris, 133 Ind. 548, 33 N. E. 290.

Kentucky.— Ray *v.* Spears, 64 S. W. 413, 23 Ky. L. Rep. 814, 1338.

Maryland.— Winter *v.* Gorsuch, 51 Md. 180; Thomas *v.* Higgins, 47 Md. 439.

North Carolina.— Ricks *v.* Pope, 129 N. C. 52, 39 S. E. 638; Ward *v.* Ward, 1 N. C. 59.

Pennsylvania.— Karchner *v.* Hoy, 151 Pa. St. 383, 25 Atl. 20.

Rhode Island.— Littlefield *v.* Mott, 14 R. I. 288.

South Carolina.— Glenn *v.* Jamison, 48 S. C. 316, 26 S. E. 677.

See 16 Cent. Dig. tit. "Deeds," § 439.

Deed is not rendered a mere release or quitclaim by the addition of the clause "and all the estate, right, title, interest, and demand whatever of the grantor, either in law or equity of, in, and to the premises." Dennison *v.* Ely, 1 Barb. (N. Y.) 610.

Clause empowering a tenant in tail to sell following a limitation to heirs of the body may be rejected. Pearse *v.* Owens, 3 N. C. 234.

Clause stating the object and intention of making the deed will not control its effect as a conveyance of the fee. Seventh St. Colored M. E. Church *v.* Campbell, 48 La. Ann. 1543, 21 So. 184; Bodwell Granite Co. *v.* Lane, 83 Me. 168, 21 Atl. 829; Pawtuxet Baptist Soc. *v.* Johnson, 20 R. I. 551, 40 Atl. 417. See Stuart *v.* Easton City, 170 U. S. 383, 18 S. Ct. 650, 42 L. ed. 1078 [*affirming* 74 Fed. 854, 21 C. C. A. 146].

Habendum cannot restrict or limit where an absolute conveyance is made by granting clause. Winter *v.* Gorsuch, 51 Md. 180; Smith *v.* Smith, 71 Mich. 633, 40 N. W. 21; Robinson *v.* Payne, 58 Miss. 690; Wood *v.* Taylor, 9 Misc. (N. Y.) 640, 30 N. Y. Suppl. 433.

Provision for holding the land in trust for the grantee will not prevent title from vesting at once. Annis *v.* Wilson, 15 Colo. 236, 25 Pac. 304.

Reference to other instruments.— The alienating force of a deed will not be restricted by reference to an executory contract with a third party respecting the land, where such reference is for the purpose of more particularly describing the premises. Grant *v.* De Lamori, (Cal. 1887) 14 Pac. 314. But where immediately following the description by metes and bounds there is the clause "and

estate, the deed should be construed in accordance with that intention.[40] So it has been determined that no use for the benefit of the grantor is created by a conveyance granting an estate which vests at once but which reserves a life-estate to the grantor;[41] that where an absolute conveyance is made to a grantee a subsequent limitation over will be rejected as repugnant to the granting clause;[42] and that a limitation of the right to use may if repugnant to the grant be rejected.[43]

5. Conditions and Restrictions as Affecting Estate Created — a. In General. In the application of the general rule relating to the construction of conditions and restrictions[44] it has been decided that a deed with a clause therein in the

meaning hereby to convey to the said grantee the same premises and title as conveyed to me by" deed it is held that an equity of redemption only is conveyed, this being the same title conveyed to the grantor. Bates *v.* Foster, 59 Me. 157, 8 Am. Rep. 406.

Statements in certificate to a deed cannot limit the express words purporting to convey the fee. Garrett *v.* Weinberg, 48 S. C. 28, 26 S. E. 3.

The statutory meaning of the words "grant, bargain, and sell" is not restricted by the addition of the word "release" immediately after such words. Altringer *v.* Capeheart, 68 Mo. 441.

Where a sheriff makes a conveyance, upon an execution sale of real estate, of "all the right, title, and interest of" one thereto it has been decided that the words in the description "being a leasehold unexpired" do not limit the extent of the previous terms of conveyance or except out any interest conveyed thereby. Dodge *v.* Walley, 22 Cal. 224, 83 Am. Dec. 61.

Where a trust unlimited in time is declared in the granting clause with a qualification at the close of the description of the premises limiting the duration of the trust, the latter clause will be construed as a limitation of the general words first employed. Parker *v.* Murch, 64 Me. 54.

40. Caldwell *v.* Hammons, 40 Ga. 342; Henderson *v.* Mack, 82 Ky. 379, 6 Ky. L. Rep. 313; Higgins *v.* Wasgatt, 34 Me. 305; Bean *v.* Kenmuir, 86 Mo. 666; Hayden *v.* Stinson, 24 Mo. 182. So where words in a deed which if taken alone would convey a fee are followed by words showing an intention to create a life-estate, a construction in accordance with that intention may be given, where it is provided by statute that the first of two repugnant clauses shall prevail, but that the intention shall if possible be ascertained. Bray *v.* McGinty, 94 Ga. 192, 21 S. E. 284. See also Thurmond *v.* Thurmond, 88 Ga. 182, 14 S. E. 198. Again, although from the premises of a deed and the application of technical rules of construction, the instrument may be construed as creating a vested remainder in the grantor's children, yet if a contrary intention clearly appears from a consideration of the deed as a whole, including a power of disposition, which is inconsistent with the existence of such remainder, it has been determined that a construction in accordance with such intention should be given. Hardy *v.* Clarkson, 87 Mo. 171. And see Stockbridge *v.* Stockbridge, 99 Mass. 244.

A deed to one "his heirs and assigns subject to the limitations hereinafter expressed" will make by reference a limitation in the *habendum* a part of the premises. Tyler *v.* Moore, 42 Pa. St. 374. See Kisson *v.* Nelson, 2 Heisk. (Tenn.) 4.

Word "heirs" in the granting clause may be qualified by a clause at the conclusion of a deed which expressly declares the sense in which such word was used, and the deed construed as a conveyance of a life-estate with remainder in fee. Prior *v.* Quackenbush, 29 Ind. 475.

41. Craven *v.* Winter, 38 Iowa 471; Maguire *v.* Riggin, 44 Mo. 512. But see Bassett *v.* Budlong, 77 Mich. 338, 43 N. W. 984, 18 Am. St. Rep. 404.

42. *Maryland.*— Winter *v.* Gorsuch, 51 Md. 180.

Missouri.— Wilson *v.* Cockrill, 8 Mo. 1.

New York.— Mott *v.* Richtmyer, 57 N. Y. 49.

South Carolina.— *Ex p.* Yown, 17 S. C. 532; Edwards *v.* Edwards, 2 Strobh. Eq. 101.

Tennessee.— Polk *v.* Faris, 9 Yerg. 209, 30 Am. Dec. 400. But see Fogarty *v.* Stack, 86 Tenn. 610, 8 S. W. 846.

See 16 Cent. Dig. tit. "Deeds," § 439. But see McVay *v.* Ijams, 27 Ala. 238.

A limitation, although not in the granting part, is sufficient where it is provided by statute that every conveyance of real estate shall pass all the interest of the grantor unless a different intent appears by express terms or by necessary implication. Montgomery *v.* Sturdivant, 41 Cal. 290.

A limitation during widowhood in the *habendum* has been held to control over a granting clause giving a fee in a deed of settlement by a husband on his wife. Whitby *v.* Duffy, 135 Pa. St. 620, 19 Atl. 1065. See Wolverton *v.* Haupt, 2 Chest. Co. Rep. (Pa.) 573.

Where the code provides that a fee only passes in the absence of words of inheritance when no contrary intention appears either expressly or by implication, it is held that a life-estate passes to a grantee where the deed recites that the grantors "do according to their respective estates," rights, and interests therein grant, bargain, and sell to the grantee certain lands and all their estate therein "to have and to hold the same. . . . during the term of her natural life." Kelly *v.* Hill, (Md. 1893) 25 Atl. 919.

43. Jewett *v.* Jewett, 16 Barb. (N. Y.) 150.

44. **Conditions and restrictions** generally see *infra*, V, E.

nature of a condition may when construed with the other terms of the instrument operate as a conveyance of an estate with a conditional limitation annexed,[45] as where the fee passes subject to be defeated by a condition subsequent.[46] Or the condition or restriction may when construed with the other language employed in the deed be inoperative and an absolute title or estate will pass free from any conditional limitation.[47]

b. Provision For Determination on Default of Issue. A deed with a clause therein providing for a determination of the estate granted on default of issue will operate as a conveyance of the fee subject to be divested by such default.[48] And it has been decided that where a deed provides that on default of issue the property shall go to the heirs of the grantor an estate in reversion in the grantor is created.[49]

c. Restrictions and Declarations as to Use. A deed of land to a person so long as he shall use it for a specified purpose, but if he shall cease to so use it

45. Hatch *v.* Partridge, 35 N. H. 148; New York *v.* Stuyvesant, 17 N. Y. 34.

A provision for the payment of yearly interest on a certain sum by the grantee until he has complied with certain covenants conveys a conditional fee dependent on the yearly payment of such interest. Carter *v.* Doe, 21 Ala. 72.

When such an estate is created the grantor parts with his estate and when the contingent event happens the estate goes by act of law to the party named in the deed as the one to take it in that event. Bryan *v.* Spires, 1 Leg. Gaz. (Pa.) 191, 3 Brewst. (Pa.) 580.

46. Green *v.* Thomas, 11 Me. 318; Mutual Ben. L. Ins. Co. *v.* Grace Church, 53 N. J. Eq. 413, 32 Atl. 691; Towle *v.* Remsen, 70 N. Y. 303; Mott *v.* Richtmyer, 57 N. Y. 49; Branch *v.* Wesleyan Cemetery Assoc., 11 Ohio Cir. Ct. 185, 5 Ohio Cir. Dec. 326.

The nature of an estate which passed by deed with condition subsequent is a fee with all the qualities of transmission, and the condition has no effect to limit the title until it defeats it. Shattuck *v.* Hastings, 99 Mass. 23; Cincinnati *v.* Babb, 4 Ohio S. & C. Pl. Dec. 464, 29 Cinc. L. Bul. 284.

47. Cullen *v.* Sprigg, 83 Cal. 56, 23 Pac. 222; Noyes *v.* St. Louis, etc., R. Co., (Ill. 1889) 21 N. E. 487; Vallette *v.* Bennett, 69 Ill. 632.

An estate upon condition cannot be created by deed except when the terms of the grant will admit of no other reasonable interpretation. Cullen *v.* Sprigg, 83 Cal. 56, 23 Pac. 222.

A recital as to motive cannot control a plain expression and terms of a deed. Brown *v.* Carter, 111 N. C. 183, 15 S. E. 934.

Intention is to be ascertained and gathered from the language of the entire deed. Goodpaster *v.* Leathers, 123 Ind. 121, 23 N. E. 1090.

Provision for grantor's support.— In this connection courts have been frequently called upon to construe deeds, in which there is a provision that the grantee shall support the grantor during the life of the latter, which have been variously construed as conveying a life-estate to the grantee who takes a fee simple on the grantor's death (Paddock *v.* Wallace, 117 Mass. 99; Lashley *v.* Souder, (N. J. Ch. 1892) 24 Atl. 919) as passing the whole estate subject to the lien imposed in the deed for such support (Christman *v.* Christ, 4 Pennyp. (Pa.) 291), or as charging the land with the provision therefor in favor of the grantors an estate in such case being reserved in them (Ringrose *v.* Ringrose, 170 Pa. St. 593, 33 Atl. 129). But a provision of this character is construed as giving the grantor no legal estate subject to execution, it not appearing that he had ever entered for condition broken. Gunn *v.* Butler, 18 Pick. (Mass.) 248.

48. *Georgia.*— Greer *v.* Pate, 85 Ga. 552, 11 S. E. 869.

Kentucky.— Morris *v.* Shannon, 12 Bush 89; McKay *v.* Merrifield, 14 B. Mon. 322.

Missouri.— Farrar *v.* Christy, 24 Mo. 453.

North Carolina.— Respass *v.* Lanier, 43 N. C. 281. But see Peterson *v.* Ferrell, 127 N. C. 169, 37 S. E. 189.

Pennsylvania.— Westenberger *v.* Reist, 13 Pa. St. 504; Bryan *v.* Spires, 3 Brewst. 580.

South Carolina.— Bowman *v.* Lobe, 14 Rich. Eq. 271.

Virginia.— Elys *v.* Wynne, 22 Gratt. 224.

See 16 Cent. Dig. tit. "Deeds," § 449.

A fee simple absolute has been held to be conveyed where the limitation over is void. Outland *v.* Bowen, 115 Ind. 150, 17 N. E. 281, 7 Am. St. Rep. 420. See Wilson *v.* Cockrill, 8 Mo. 1.

An estate is saved if one child survives, where it is defeasible if the grantee dies without children living. Pierson *v.* Armstrong, 1 Iowa 282, 63 Am. Dec. 440.

A trust deed creating a life-estate with remainder to the life-tenant's children, and containing a provision that in case the life-tenant died without children the property shall go in fee to another, gives to the life-tenant no interest in the property capable of being conveyed by will or otherwise. Buck *v.* Lantz, 49 Md. 439.

In Mississippi a statute containing such a provision is construed as not authorizing new limitations on contingencies not warranted by the common law. Jordan *v.* Roach, 32 Miss. 481.

49. Pryor *v.* Castleman, 7 S. W. 892, 9 Ky. L. Rep. 967. See Hollingsworth *v.* McDonald, 2 Harr. & J. (Md.) 230, 3 Am. Dec. 545.

then to another, conveys a life-estate to the grantee on condition, remainder to such other.[50] Again a clause in a deed as to the use which shall be made of the land conveyed may operate as a conveyance of an easement and not of the fee,[51] as creating a trust,[52] or as giving the grantor a reversionary interest.[53] But a fee will pass by a deed containing a clause or recital which is merely declaratory of the use contemplated of the land where the other parts of the deed operate as a conveyance of the fee.[54]

d. Restrictions as to Alienation. Where an estate in fee simple is granted to a person by proper and sufficient words, a clause in the deed which is in restraint of alienation is void and will be rejected.[55]

6. Reservations and Exceptions as Affecting Estate Created — a. In General. The nature of an estate created may be dependent on an exception or reservation[56] in the deed, the construction and operation of which must be determined from the entire instrument, taking into consideration the object and purposes of such reservation and exception. So a fee may be granted by a deed reserving to the grantor some right or estate in the property,[57] and the estate conveyed may be

50. Rutty *v.* Tyler, 3 Day (Conn.) 470. See Thomas *v.* Thomas, 17 N. J. Eq. 356.

51. Allen *v.* Wabash, etc., R. Co., 84 Mo. 646; Richards *v.* North West Protestant Dutch Church, 20 How. Pr. (N. Y.) 317; Rogers *v.* Stoever, 24 Pa. St. 186; Robinson *v.* Missisquoi R. Co., 59 Vt. 426, 10 Atl. 522.

52. Neely *v.* Hoskins, 84 Me. 386, 24 Atl. 882, so holding where one owning the fee, but who had by reason of reservations and conditions in the conveyances to him only a right to use part of a building on the premiscs, conveyed the land on the condition that it should be forever for the use of a named church.

53. Scheetz *v.* Fitzwater, 5 Pa. St. 126. See McKelway *v.* Seymour, 29 N. J. L. 321.

54. *Illinois.*— Warren County *v.* Patterson, 56 Ill. 111.

Indiana.— Newpoint Lodge No. 255 F. & A. M. *v.* Newpoint School Town, 138 Ind. 141, 37 N. E. 650; Heaston *v.* Randolph County, 20 Ind. 398.

Massachusetts.— Barker *v.* Barrows, 138 Mass. 578.

New Hampshire.— Coburn *v.* Coxeter, 51 N. H. 158.

New Jersey.— Fitzgerald *v.* Faunce, 46 N. J. L. 536.

New York.— Abbott *v.* Curran, 98 N. Y. 665.

Oregon.— Coffin *v.* Portland, 16 Oreg. 77, 17 Pac. 589.

Vermont.— Beach *v.* Haynes, 12 Vt. 15.

United States.— Mahoning County Com'rs *v.* Young, 59 Fed. 96, 8 C. C. A. 27 [*reversing* 51 Fed. 585].

See 16 Cent. Dig. tit. "Deeds," § 450.

A clause as to use may operate as a condition subsequent, the fee passing by the deed. Vail *v.* Long Island R. Co., 106 N. Y. 283, 12 N. E. 607, 60 Am. Rep. 449.

A deed conveying land for "the sole purpose of a burying-ground" will pass an absolute estate in fee simple, where it does not appear that the consideration paid was less than the full value of the land or that the grantor had any interest in or reason for having the land used solely for such purposes. Rawson *v.* Upbridge School Dist. No. 5, 7 Allen (Mass.) 125, 83 Am. Dec. 670; Field *v.* Providence, 17 R. I. 803, 24 Atl. 143.

A limitation upon the manner in which the property is to be used is only imposed, and an estate upon condition either precedent or subsequent is not created by a conveyance of land in fee simple "for the erection of a school-house thereon and for no other purpose." Curtis *v.* Board of Education, 43 Kan. 138, 23 Pac. 98.

If there be no clause for forfeiture and reentry grant is not one upon condition. Packard *v.* Ames, 16 Gray (Mass.) 327.

In Pennsylvania, under the internal improvement acts of Feb. 25 and April 10, 1826, a grant to the state for the use of a canal is absolute in perpetuity. Craig *v.* Allegheny, 53 Pa. St. 477.

55. *Kentucky.*— Miller *v.* Denny, 99 Ky. 53, 34 S. W. 1079, 17 Ky. L. Rep. 1376.

Missouri.— English *v.* Beehle, 32 Mo. 186, 82 Am. Dec. 126; McDowell *v.* Brown, 21 Mo. 57.

North Carolina.— Pritchard *v.* Bailey, 113 N. C. 521, 18 S. E. 668; Munroe *v.* Hall, 97 N. C. 206, 1 S. E. 651.

Tennessee.— Lawrence *v.* Singleton, (Sup. 1875) 17 S. W. 265.

Texas.— Bouldin *v.* Miller, 87 Tex. 359, 28 S. W. 940.

See 16 Cent. Dig. tit. "Deeds," § 451.

56. Reservations and exceptions generally see *infra*, V, D.

Reservation of ground-rent.— And it has been decided that a legal estate is vested in a grantee by a conveyance which reserves a ground-rent to the grantor with a covenant to convey in fee-simple absolute on the payment of a certain sum. Sahl *v.* Wright, 6 Pa. St. 433.

57. A fee is granted by a deed which gives the grantor the right to appoint by will one whose consent shall be necessary to a conveyance by the grantee (Munger *v.* Swanson, 110 Ala. 414, 20 So. 88), or which conveys property subject to the right of the grantor to cut or remove timber therefrom during his lifetime (Behmyer *v.* Odell, 31 Ill. App.

subject to a life-estate,[58] or an estate in the nature of a qualified fee.[59] Or a tenancy in common may be created by a reservation in a deed[60] or by an exception.[61] Again a deed of bargain and sale may be employed to convey an estate and reserve or confer a power of appointment, on the execution of which the deed will vest the estate in the appointee.[62] But a reservation which is repugnant to the estate granted and an illegal restraint on the power of alienation is void, as where in a conveyance in fee there is a reservation of a preëmptive right of purchase by the grantor in every case of sale by the grantee and of a right to a portion of the purchase-money on each sale.[63] And a reservation of a right to devise by will, which is a right which the grantor may exercise or not at his pleasure, is not a special power in trust which equity will enforce.[64]

b. Deed Creating Future Estate, Reserving Life-Estate to Grantor. A present vested interest may be conveyed by deed to be enjoyed *in futuro*, the grantor retaining the intermediate estate.[65] Thus a deed of land with a reservation to the

350); or by a deed reserving the right to pasture (Wilson *v.* Peck, 39 Conn. 54; Bray *v.* Hussey, 83 Me. 329, 22 Atl. 220), reserving a power of revocation or reverter (Pollard *v.* Union Nat. Bank, 4 Mo. App. 408), reserving the "free and uninterrupted privilege of the hand pump in the aforesaid well, and of the said well and water, at all times" (Johnson *v.* Rayner, 6 Gray (Mass.) 107), or reserving a perpetual rent charge to the grantor, his heirs and assigns (Farley *v.* Craig, 11 N. J. L. 262. *Compare* Page *v.* Esty, 54 Me. 319), "saving, excepting and reserving . . . the family burying ground" describing the same, with rights of free ingress and egress (Blackman *v.* Striker, 21 N. Y. Suppl. 563, 29 Abb. N. Cas. (N. Y.) 467), reserving an easement (Gallupville Reformed Church *v.* Schoolcraft, 65 N. Y. 134), or reserving a right of life support by the grantees and the right to convey if the grantees fail to properly support the grantors (Blanchard *v.* Morey, 56 Vt. 170).

A deed reserving a lien on the land for the purchase-money does not vest an absolute title until the money is paid. Baker *v.* Ramey, 27 Tex. 52.

A deed reserving the right to prospect for coal and other minerals and to mine and remove the same does not convey a fee. Adams *v.* Reed, 11 Utah 480, 40 Pac. 720.

58. Deeds construed as reserving life-estate see the following cases:

Georgia.— Brookin *v.* Brookin, 34 Ga. 42.

North Carolina.— Hodges *v.* Spicer, 79 N. C. 223.

South Carolina.— De Millen *v.* McAlliley, 2 McMull. 499; Larey *v.* Beazley, 9 Rich. Eq. 119.

Tennessee.— Woodson *v.* Smith, 1 Head 276.

Vermont.— Keeler *v.* Wood, 30 Vt. 242.

See 16 Cent. Dig. tit. "Deeds," § 453 *et seq.*

A deed excepting the widow's third conveys the whole interest in the premises except such third. Crosby *v.* Montgomery, 38 Vt. 238.

A deed to one and a bond by the latter that he will let the grantor retain possession of the property during the grantor's life and the life of his wife may be construed together as reserving a life-estate. Strong *v.* Brewer, 17 Ala. 706.

A reservation to the grantor and "his representatives" of a right of passage over the land conveyed reserves only a life-easement, it not being equivalent to a reservation to him and to his heirs. Claflin *v.* Boston, etc., R. Co., 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638.

Donee is deprived of enjoyment of the property conveyed by a deed of gift reserving a life use to the donor and his wife, until after the death of both the donor and his wife. Murphy *v.* Merritt, 48 N. C. 37. See Woodson *v.* Smith, 1 Head (Tenn.) 276.

Where the grantor reserves a life-estate with power to dispose of the property a conveyance by him will pass a fee simple in the premises. Johnson *v.* Reeves, 48 How. Pr. (N. Y.) 505.

59. Moulton *v.* Trafton, 64 Me. 218, 219, so held where a deed excepted "a saw mill and shingle machine, and land enough around said mills for to carry on the lumbering business at said mills, . . . so long as said Trafton occupies said privilege with mills."

60. Wheeler *v.* Carpenter, 107 Pa. St. 271, where it is so held where a deed reserves "all the pine timber fit for sawing."

61. Gill *v.* Grand Tower Min., etc., Transp. Co., 92 Ill. 249 (deed excepting a certain number of acres); Payne *v.* Parker, 10 Me. 178, 25 Am. Dec. 221 (deed excepting reversion of the dower where no dower has been assigned by metes and bounds).

62. Ocheltree *v.* McClung, 7 W. Va. 232.

63. De Peyster *v.* Michael, 6 N. Y. 467, 57 Am. Dec. 470.

64. Towler *v.* Towler, 65 Hun (N. Y.) 457, 20 N. Y. Suppl. 342 [*affirmed* in 142 N. Y. 371, 36 N. E. 869].

The implication of a power to devise is held to be sustained by a reservation to the grantor, in case the grantee should "die intestate." Shoofstall *v.* Powell, 1 Grant (Pa.) 19.

65. Dawson *v.* Dawson, Rice Eq. (S. C.) 243. See Pledger *v.* David, 4 Desauss. (S. C.) 264. And it has been decided that a conveyance of land on condition of the grantor's enjoying the same during his life and the payment of an annuity by the grantee to the grantor during the same time with remainder in fee to the grantee is to be construed as a bargain and sale and is valid. Rogers

grantor of the use thereof during his natural life will give the grantor a life-estate in the premises,[66] with a vested remainder in fee to the grantee.[67] And a deed whereby a grantor conveys and covenants certain lands at his death will be construed as an estate in fee simple to take effect after a life-estate reserved in the grantor by implication.[68] So a father may make a valid deed of gift to his children to take effect after the death of himself and his wife and not until then.[69]

v. Eagle Fire Co., 9 Wend. (N. Y.) 611; Jackson *v.* Delancey, 4 Cow. (N. Y.) 427.

66. *Alabama.*—Planters' Bank *v.* Davis, 31 Ala. 626.

Georgia.— Rollins *v.* Davis, 96 Ga. 107, 23 S. E. 392.

Maine.— Achorn *v.* Jackson, 86 Me. 215, 29 Atl. 989.

North Carolina.— Hatch *v.* Thompson, 14 N. C. 411. But see Howell *v.* Howell, 29 N. C. 491, 47 Am. Dec. 335.

South Carolina.— Cribb *v.* Rogers, 12 S. C. 564, 32 Am. Rep. 511.

Vermont.— Colby *v.* Colby, 28 Vt. 10.

See 16 Cent. Dig. tit. "Deeds," § 454.

A deed of the unexpired term of a leasehold estate for a term of years, renewable forever, will not be rendered void by a reservation of the use during the grantor's life. Culbreth *v.* Smith, 69 Md. 450, 16 Atl. 112, 1 L. R. A. 538.

A grant of chattels with a reservation of a life-estate has been held to pass nothing. Lance *v.* Lance, 50 N. C. 413, 72 Am. Dec. 555.

A reservation of a right to a home gives no such possessory right in the premises to the grantor as can be the subject of a conveyance. Fisher *v.* Nelson, 8 Mo. App. 90.

No interest that can be reached by subsequent creditors is vested in a grantor by a reservation, in a settlement, of a bare maintenance to himself and his wife for life, it being also provided that his property shall not be liable for his debts afterward contracted. Johnston *v.* Zane, 11 Gratt. (Va.) 552.

Where a deed reserves a life-estate "from year to year" provided that "the right of the grantor aforesaid to said possession and use must be requested in writing before the first of March of each and every year from this date," it has been held that failure to give notice does not terminate the life-estate, but only the right of possession for any given year. Hurd *v.* Hurd, 64 Iowa 414, 417, 20 N. W. 740.

67. *Alabama.*— Planters' Bank *v.* Davis, 31 Ala. 626.

Connecticut.— See Bissell *v.* Grant, 35 Conn. 288.

Georgia.— Rollins *v.* Davis, 96 Ga. 107, 23 S. E. 392.

Maine.— Achorn *v.* Jackson, 86 Me. 215, 29 Atl. 989.

Massachusetts.—Brewer *v.* Hardy, 22 Pick. 376, 33 Am. Dec. 747.

Texas.—Bombarger *v.* Morrow, 61 Tex. 417.

See 16 Cent. Dig. tit. "Deeds," § 454.

An estate in fee commencing on the death of the grantor is conveyed where the life-estate is reserved to the grantor. Hurst *v.* Hurst, 7 W. Va. 289.

Grantee is vested with a fee conditional. Burnett *v.* Burnett, 17 S. C. 545.

Such a deed reduces the estate to possession on the death of the grantor. *In re* Wisner, 20 Mich. 442; McDaniel *v.* Johns, 45 Miss. 632. But see McCall *v.* White, 10 La. Ann. 577.

Fee passes immediately on condition subsequent. Howard *v.* Turner, 6 Me. 106.

68. Vinson *v.* Vinson, 4 Ill. App. 138. See Drown *v.* Smith, 52 Me. 141.

A grantor will be protected in possession during his life under a deed by him which he has caused to be delivered and which is to take effect at his death. Alsop *v.* Eckles, 81 Ill. 424.

The rules with regard to devises of property cannot be applied to a conveyance to take effect after the grantor's death, in the place of a disposition of his property by will, so as to make valid a limitation in the deed which would be valid in a devise but not in an ordinary deed. Macumber *v.* Bradley, 28 Conn. 445.

Where delivery is such that title does not immediately pass under a deed to take effect at the grantor's death and the delivery was in pursuance of an oral contract under which the grantees were to have the lands at the grantor's death the transaction is a nullity. Harman *v.* Harman, 70 Fed. 894, 17 C. C. A. 479.

Where livery of seizin is abolished a conveyance to take effect at the grantor's death is valid without any intermediate estate to support it. Shackleton *v.* Sebree, 86 Ill. 616.

69. *Connecticut.*— Graves *v.* Atwood, 52 Conn. 512, 52 Am. Rep. 610; Coley *v.* Coley, 19 Conn. 114; Fish *v.* Sawyer, 11 Conn. 545.

Kentucky.— Banks *v.* Marksberry, 3 Litt. 275.

Louisiana.— Holloman *v.* Holloman, 12 La. Ann. 607.

Maine.— Watson *v.* Cressey, 79 Me. 381, 10 Atl. 59.

Massachusetts.—See Steel *v.* Steel, 4 Allen 417.

Michigan.—Martin *v.* Cook, 102 Mich. 267, 60 N. W. 679.

New Hampshire.— Dennett *v.* Dennett, 40 N. H. 498.

North Carolina.— Duncan *v.* Self, 5 N. C. 466.

See 16 Cent. Dig. tit. "Deeds," § 454.

A conveyance for valuable consideration, conditioned that the grantor and his wife shall have the use and possession of the property for life may, it is decided, be construed as a conveyance with a condition subsequent

D. Reservations and Exceptions — 1. Definitions and Distinguishing Characteristics. A reservation is a clause in a deed whereby the grantor reserves some new thing to himself[70] out of that which he granted before.[71] It differs from an exception which is ever of part of the thing granted and of a thing *in*

that the grantee shall permit such use, or an agreement to convey the use after the grantor's death or a covenant to stand seized to the use of the grantor for life, then of his wife, and the remainder to the grantee, and may be enforced in equity. Sherman *v.* Dodge, 28 Vt. 26.

Grantor and his wife hold a life-estate by entirety under a deed by them reserving such estate to them and on the death of the husband the widow becomes sole tenant for life. Jones *v.* Potter, 89 N. C. 220. See Reynolds *v.* McFarland, 11 S. W. 202, 10 Ky. L. Rep. 932.

Extent and limits of rule.—A deed executed in trust for the grantor for life, with remainder to his appointees by will, or to his heirs if he makes no appointment, is held, as to the remainder limited to the heirs, to give an executed fee in the taker for life, under the rule in Shelley's case, subject to be divested by the exercise of the power of appointment. Brown *v.* Renshaw, 57 Md. 67. But a conveyance by a grantor of the real and personal estate which he may leave at his death with a reservation to himself of the free control and disposal of it during his lifetime will not have the effect of a present conveyance of the property, it referring expressly to what he may leave at his death and is void as a conveyance. Roth *v.* Michalis, 125 Ill. 325, 17 N. E. 809. And where a grantor conveyed property upon condition that the grantee outlive him with the *habendum* to her and her heirs subject to the condition aforesaid, and there is a reservation in the deed to the grantor of the full and complete control over the property during his life and the right to enjoy the rents, issues, and profits thereof, nothing passed by the deed in case the grantee dies before the grantor (Earle *v.* Dawes, 3 Md. Ch. 230), although upon the happening of the contingency named an estate in fee simple passes to the grantee (Abbott *v.* Holway, 72 Me. 298. *Compare* Du Bois' Appeal, 121 Pa. St. 368, 15 Atl. 641).

70. **Must be to the grantor and not to a stranger to the deed.**

California.— Butler *v.* Gosling, 130 Cal. 422, 62 Pac. 596.

Maine.— Hill *v.* Lord, 48 Me. 83; Hodge *v.* Boothy, 48 Me. 68; Moulton *v.* Faught, 41 Me. 298.

Maryland.— Herbert *v.* Pue, 72 Md. 307, 20 Atl. 182; Schaidt *v.* Blaul, 66 Md. 141, 6 Atl. 669.

New York.— Eysaman *v.* Eysaman, 24 Hun 430; Ives *v.* Van Auken, 34 Barb. 566; Stevens *v.* Adams, 1 Thomps. & C. 587. See also Hornbeck *v.* Sleight, 12 Johns. 199; Hornbeck *v.* Westbrook, 9 Johns. 73.

Rhode Island.— *Ex p.* Young, 11 R. I. 636.

Wisconsin.— Strasson *v.* Montgomery, 32 Wis. 52.

71. Sheppard Touchst. 80 [*quoted* in Bryan *v.* Bradley, 16 Conn. 474, 482; Randall *v.* Randall, 59 Me. 338, 340; Adams *v.* Morse, 51 Me. 497, 498; Herbert *v.* Pue, 72 Md. 307, 311, 20 Atl. 182; Schaidt *v.* Blaul, 66 Md. 141, 145, 6 Atl. 669; Goodrich *v.* Easton R. Co., 37 N. H. 149, 167; Craig *v.* Wells, 11 N. Y. 315, 321; Mount *v.* Hambley, 22 Misc. (N. Y.) 454, 50 N. Y. Suppl. 813; Wall *v.* Wall, 126 N. C. 405, 407, 35 S. E. 811; Whitaker *v.* Brown, 46 Pa. St. 197, 198; Rich *v.* Zeilsdorff, 22 Wis. 544, 547, 99 Am. Dec. 81; Washington Mills Emery Mfg. Co. *v.* Commercial F. Ins. Co., 13 Fed. 646, 649; Simpson *v.* Hartman, 27 U. C. Q. B. 460, 463].

Other definitions are: "That which issues from or is an incident of the thing granted and not a part of it." Marshall *v.* Trumbull, 28 Conn. 183, 73 Am. Dec. 667.

"Something newly created out of the granted premises." Hurd *v.* Curtis, 7 Metc. (Mass.) 94, 110; Manley *v.* Carl, 20 Ohio Cir. Ct. 161, 165.

"A clause in a deed whereby the grantor reserves some new thing to himself issuing out of the thing granted and not *in esse* before." 4 Kent Comm. 468 [*quoted* in Brown *v.* Anderson, 88 Ky. 577, 579, 11 S. W. 607, 10 Ky. L. Rep. 107].

"That part of a deed or other instrument which reserves a thing not *in esse* at the time of the grant, but newly created." Bouvier L. Dict. [*quoted* in Barnes *v.* Burt, 38 Conn. 541, 542].

"Something merely created or reserved out of the thing granted that was not in existence before." Winston *v.* Johnson, 42 Minn. 398, 401, 45 N. W. 958; Elliot *v.* Small, 35 Minn. 396, 397, 29 N. W. 158, 59 Am. Rep. 329.

"The creation of a right or interest which had no prior existence as such in a thing or part of a thing granted." Kister *v.* Reeser, 98 Pa. St. 1, 5, 42 Am. Rep. 608.

The withholding by the grantor of some right or privilege for his own use out of or in connection with the estate conveyed. Smith *v.* Cornell University, 21 Misc. (N. Y.) 220, 45 N. Y. Suppl. 640.

"A reservation is always of something taken back out of that which is clearly granted; while an exception is of some part of the estate not granted at all. A reservation is never of any part of the estate itself, but of something issuing out of it. . . . An exception, on the other hand, must be a portion of the thing granted, or described as granted, and can be of nothing else; and must also be of something which can be enjoyed separately from the thing granted." Craig *v.* Wells, 11 N. Y. 315, 321. See also Ives *v.* Van Auken, 34 Barb. (N. Y.) 566; Miller *v.* Lapham, 44 Vt. 416.

A clause is a reservation when it is of a

esse at the time.[72] The office of an exception is to take something out of the

right of way across a railroad (Knowlton *v.* New York, etc., R. Co., 72 Conn. 188, 44 Atl. 8); when it reserves to the grantor or "its successors or assigns, for a right of way or other railway purposes" a certain strip of land (Bendikson *v.* Great Northern R. Co., 80 Minn. 332, 83 N. W. 194); when in a deed to a railroad corporation it reserves "the right of passing and repassing and repairing my aqueduct logs forever, through a culvert six feet wide and rising in height to the superstructure of the railroad, to be built and kept in repair by said company" (Ashcroft *v.* Eastern R. Co., 126 Mass. 196, 30 Am. St. Rep. 672); when it reserves a privilege in the well on the premises for the adjoining lot of a third person (Ives *v.* Van Auken, 34 Barb. (N. Y.) 566); when it reserves the use of a well and the water therein is ample for both parties (Barnes *v.* Burt, 38 Conn. 541); when it is a right and privilege of taking water from a stream and the right and privilege of three watering places, even though the words "excepting and reserving" are used (Smith *v.* Cornell University, 21 Misc. (N. Y.) 220, 45 N. Y. Suppl. 640); when the deed recites that nothing is conveyed which the grantor had sold or did not possess (Harman *v.* Stearns, 95 Va. 58, 27 S. E. 601); when it reserves the right to cut timber within a time limited (Martin *v.* Gilson, 37 Wis. 360); and when it reserves unpaid damages awarded by railroad commissioners and selectmen for the laying of a railroad way (Richardson *v.* Palmer, 38 N. H. 212).

72. *Connecticut.*— Bryan *v.* Bradley, 16 Conn. 474.

Kentucky.— Brown *v.* Anderson, 88 Ky. 577, 11 S. W. 607, 10 Ky. L. Rep. 107.

Maine.— Wellman *v.* Churchill, 92 Me. 193, 42 Atl. 352; Engel *v.* Ayer, 85 Me. 448, 27 Atl. 352; Randall *v.* Randall, 59 Me. 338; Adams *v.* Morse, 51 Me. 497; State *v.* Wilson, 42 Me. 9; Winthrop *v.* Fairbanks, 41 Me. 307.

Maryland.— Herbert *v.* Pue, 72 Md. 307, 20 Atl. 182; Schaidt *v.* Blaul, 66 Md. 141, 6 Atl. 669.

Minnesota.— Elliot *v.* Small, 35 Minn. 396, 29 N. W. 158, 59 Am. Rep. 329.

Mississippi.— Moore *v.* Lord, 50 Miss. 229.

New Hampshire.—Cocheco Mfg. Co. *v.* Whittier, 10 N. H. 305.

New York.—Blackman *v.* Striker, 142 N. Y. 555, 37 N. E. 484; Craig *v.* Wells, 11 N. Y. 315; Mount *v.* Hambley, 22 Misc. 454, 50 N. Y. Suppl. 813.

North Carolina.— Wall *v.* Wall, 126 N. C. 405, 35 S. E. 811.

Pennsylvania.— Kister *v.* Reeser, 98 Pa. St. 1, 42 Am. Rep. 608; Whitaker *v.* Brown, 46 Pa. St. 197; McClintock *v.* Loveless, 5 Pa. Dist. 417.

Wisconsin.— Green Bay, etc., Canal Co. *v.* Hewitt, 66 Wis. 461, 29 N. W. 237; Rich *v.* Zeilsdorff, 22 Wis. 544, 99 Am. Dec. 81.

United States.—Brown *v.* Spillman, 45 Fed. 291; Washington Mills Emery Mfg. Co. *v.* Commercial F. Ins. Co., 13 Fed. 646.

England.— Coke Litt. 47*a*; Sheppard Touchst. 80.

Canada.— Simpson *v.* Hartman, 27 U. C. Q. B. 460.

Other definitions are: "An interest retained by a grantor out of the body of the thing granted." Marshall *v.* Trumbull, 28 Conn. 183, 73 Am. Dec. 667.

"A portion of the thing granted, or described as granted, and which would otherwise pass by the deed." Brown *v.* Allen, 43 Me. 590.

"The retaining of a part of the thing granted." Ewing *v.* Fertig, 24 Pa. Co. Ct. 301, 304.

"A clause in a deed which withdraws from its operation some part of the thing granted, and which would otherwise have passed to the grantee under the general description." Biles *v.* Tacoma, etc., R. Co., 5 Wash. 509, 511, 32 Pac. 211.

A clause is an exception when "reserving" the use of a way then in existence (State *v.* Wilson, 42 Me. 9); when reserving a right of way "as now used," there being a then existing right of way (Bridger *v.* Pierson, 45 N. Y. 601 [*reversing* 1 Lans. 481]); when "saving and excepting therefrom" fifteen feet square "as a way to" the grantor's cellar (Mount *v.* Hambley, 22 Misc. (N. Y.) 454, 50 N. Y. Suppl. 813); when "reserving to the owner of the estate and others adjoining . . . a right of passageway over the within granted premises as specified" in a former deed and the way existed (Wood *v.* Boyd, 145 Mass. 176, 13 N. E. 476); when "saving and excepting to my wife and myself, and our legitimate descendants, the use and privilege . . . [of certain premises] which we now enjoy and possess" (Jones *v.* De Lassus, 84 Mo. 541); when "reserving" the right of building a dam together with the right of flowage, and "also reserving" an acre of ground at the east end of the dam and the grantor owned both sides of the river (Smith *v.* Furbish, 68 N. H. 123, 44 Atl. 398, 47 L. R. A. 226); when "saving and reserving nevertheless, out of the several water lots and soil under water, . . . so much of the same as will be necessary to make" certain streets, which the grantee covenanted to make and maintain at his own expense, and that the same should remain public highways (Langdon *v.* New York, 6 Abb. N. Cas. (N. Y.) 314 [*affirmed* in 93 N. Y. 129]); when the exception is of the "good heart pine timber, suitable for mill timber" (Bond *v.* Cashie, etc., R., etc., Co., 127 N. C. 125, 37 S. E. 63); when "excepting the reservation" out of the grant, of certain fruit trees and the land on which they stand," "also, so much of the second growth of ash timber, as I shall need for my own personal use" (Randall *v.* Randall, 59 Me. 338); where a smaller tract is "reserved" out of two larger tracts, by metes and bounds (Watkins *v.* Tucker, 84

thing granted that would otherwise pass.[73] A reservation or exception must be something out of the estate granted.[74] The terms "reservation" and "exception" are often used interchangeably, and the technical meaning will give way to the manifest intent, even though the technical term to the contrary be used.[75]

2. CREATION AND NATURE — a. In General. To create a reservation apt words are necessary;[76] and neither an exception nor a reservation will be held to have been created, where apt words are not used therefor, and there appears to be no reason why apt words should not have been used if such was the intention of the parties.[77] So even the words "saving and reserving" will not except mines and minerals, where it is admitted that the deed must be construed as an exercise of the power of appointment, and the suggested reservation is to those exercising

Tex. 428, 19 S. W. 570); when four acres in a square farm is reserved out of a larger lot (Hay *v.* Storrs, Wright (Ohio) 711); when it reserves certain rooms in a house to a third party who owns them (Bartlett *v.* Barrows, 22 R. I. 642, 49 Atl. 31); when land on which there are two houses, one of which had been assigned as dower, is conveyed with one dwelling-house thereon "reserving" the house occupied by the widow (Kimball *v.* Withington, 141 Mass. 376, 6 N. E. 759); where the "grantor corporation excepts and reserves to itself all of the buildings," etc., "standing on the granted lands" (Washington Mills Emery Mfg. Co. *v.* Commercial F. Ins. Co., 13 Fed. 646); when "excepting and forever reserving the graveyard on the lands hereby conveyed at all times hereafter to enter thereon without hindrance or denial" (Mannerback *v.* Pennsylvania R. Co., 16 Pa. Super. Ct. 622); and when "saving and reserving nevertheless, for his own use the coal contained" in certain land "together with free ingress and egress, by wagon-road to haul coal therefrom as wanted" (Whitaker *v.* Brown, 46 Pa. St. 197). A reservation may also constitute an exception, if land referred to therein is located with sufficient certainty to show that an exception operates upon it. Consolidated Ice Co. *v.* New York, 53 N. Y. App. Div. 260, 65 N. Y. Suppl. 912.

73. Roberts *v.* Robertson, 53 Vt. 690, 38 Am. Rep. 710. See also Biles *v.* Tacoma, etc., R. Co., 5 Wash. 509, 32 Pac. 211.

74. Hill *v.* Cutting, 107 Mass. 596; Dyer *v.* Sanford, 9 Metc. (Mass.) 395, 43 Am. Dec. 399; Brown *v.* Spillman, 45 Fed. 291.

75. State *v.* Wilson, 42 Me. 9; Sloan *v.* Lawrence Furnace Co., 29 Ohio St. 568; Whitaker *v.* Brown, 46 Pa. St. 197.

In such cases where the intention is the controlling consideration the distinction of the common law between reservations and exceptions is not material. Coal Creek Min. Co. *v.* Heck, 15 Lea (Tenn.) 497.

76. Inchiquin *v.* Burnell, 3 Ridg. P. C. 418.

Apt words are necessary to convey separate interests. Kincaid *v.* McGowan, 88 Ky. 91, 4 S. W. 802, 9 Ky. L. Rep. 987, 13 L. R. A. 289.

77. Sutherland *v.* Heathcote, 65 L. T. Rep. N. S. 606 [*affirmed* in [1892] 1 Ch. 475, 61 L. J. Ch. 248, 66 L. T. Rep. N. S. 210].

Creation of reservation.— A covenant does not reserve a life-estate when it would thereby defeat the deed (Howell *v.* Howell, 29 N. C. 496), although a life-estate is reserved by an expression that the grantor "holds the life interest" (Hurst *v.* Hurst, 7 W. Va. 289). And where the granted tract is near to the lands of both grantor and grantee, and in the deed between the description and the *habendum* is inserted the words "the said land is to be common and unoccupied," they will take effect as a reservation. Gay *v.* Walker, 36 Me. 54, 58 Am. Dec. 734. But there is no reservation of rents by a covenant to defend against the lawful claims of all except "said lessees and assigns" (Gale *v.* Edwards, 52 Me. 363); nor is there any reservation of an outstanding title where the words neither expressly nor by fair interpretation recognize such title (Holman *v.* Holman, 66 Barb. (N. Y.) 215). And where the subject-matter of the claimed reservation does not exist there is no reservation of any estate. Pierce *v.* Gardner, 83 Pa. St. 211.

Creation of exception.— In case a dower interest is set off it may be excepted by the words "subject to" the widow's "dower which has been set off" (Meserve *v.* Meserve, 19 N. H. 240), and a recital that "all lands not heretofore sold" are included constitutes an exception (King *v.* Wells, 94 N. C. 344). So the following is a good exception: "Furthermore, this deed is not to interfere or in the least conflict with or include any part or parcel of one hundred and twenty acres heretofore deeded to [one of the grantors by the grantee]. . . . But the right to said [grantor] . . . as aforesaid holds good, and the one hundred and twenty acres is yet held and owned by . . . [said grantor] in and out of said one hundred and ninety acres." Cravens *v.* White, 73 Tex. 577, 11 S. W. 543, 15 Am. St. Rep. 803. But a stipulation in a deed by town trustees that the grantor "shall allow all people to pass and repass, to fish, fowl and hunt," etc., on the granted premises is not an exception. Parsons *v.* Miller, 15 Wend. (N. Y.) 561. And if a clause is evidently inserted merely for the purpose of identifying the land conveyed it is not an exception. Choate *v.* Johns, (Tex. Sup. 1890) 15 S. W. 106.

If the words "excepting and prohibiting" constitute but a naked prohibition they will be void. Craig *v.* Wells, 11 N. Y. 315.

such power who were not the legal owners of the fee in the land conveyed.[78] There are, however, many covenants which operate as a reservation, although they are not strictly and technically such. The true rule is said to be that where words taken according to their technical meaning do not create a legal reservation and are notwithstanding construed to amount to a reservation, it is always done with a view to advance the intent of the parties, but not to defeat or destroy it. And words not technically amounting to a reservation are not to be so construed, unless to effectuate a manifest intention.[79]

b. Implied Reservations. The law will not reserve anything out of a grant in favor of the grantor, except in a case of necessity.[80]

c. Severance of Estates. An owner may convey the surface estate in fee and reserve an estate in fee in minerals or any particular species of them, but this severance of each estate is subject to the laws of descent, of devise, and of conveyance.[81]

3. Validity — a. In General. An exception or reservation is void where there is nothing for either to operate upon, or where the grantor had no interest or estate in the thing excepted.[82]

b. Reservations. It is competent for the vendor to convey the fee to the vendee and reserve certain rights to himself, his heirs and assigns.[83] And a reservation may be valid where it is not prohibited by either the letter or the policy of the law.[84] A reservation may also be of a power and not of an estate, and therefore lawful.[85] But a reservation should not be contradictory,[86] repugnant to the grant,[87] incompatible with a gift,[88] as large or as broad as the grant itself,[89] or indefinite or uncertain.[90] Again a reservation "of all claim or right of action" against an elevated railroad for damages to the property conveyed by the road in the past, present, or future does not deprive a subsequent owner of the right to sue to recover damages suffered after he has acquired title.[91]

c. Exceptions. An exception is void which is of a thing or right which the grantor does not own;[92] or which is of an estate or interest which has never been in the grantor, although it is otherwise where the ownership thereof is in the

78. Sutherland *v.* Heathcote, 65 L. T. Rep. N. S. 606 [*affirmed* in [1892] 1 Ch. 475, 61 L. J. Ch. 248, 66 L. T. Rep. N. S. 210].

79. Inchiquin *v.* Burnell, 3 Ridg. P. C. 418.

80. Crossley *v.* Lightowler, L. R. 2 Ch. 478, 36 L. J. Ch. 584, 16 L. T. Rep. N. S. 438, 15 Wkly. Rep. 801.

Reservation of soil of road should be plainly expressed. Ball *v.* Ball, 1 Phila. (Pa.) 36, 4 Pa. L. J. Rep. 424.

81. Kincaid *v.* McGowan, 88 Ky. 91, 4 S. W. 802, 9 Ky. L. Rep. 987, 13 L. R. A. 289.

82. Manley *v.* Carl, 20 Ohio Cir. Ct. 161, 11 Ohio Cir. Dec. 1.

83. Holmes *v.* Martin, 10 Ga. 503.

84. Sadler *v.* Taylor, 49 W. Va. 104, 38 S. E. 583.

85. Varner *v.* Rice, 44 Ark. 236. See also Van Ohlen's Appeal, 70 Pa. St. 57.

A reservation of power of sale for the purpose of reinvestment on the same terms is not repugnant, under a deed giving a life-estate to the grantor and his wife during the life of the survivor of them and a vested remainder to others. Horn *v.* Broyles, (Tenn. Ch. App. 1900) 62 S. W. 297.

86. Strasson *v.* Montgomery, 32 Wis. 52.

87. Dennison *v.* Taylor, 15 Abb. N. Cas. (N. Y.) 439.

A reservation of a life-estate, with absolute control of the real estate, is not void for inconsistency, as it does not authorize the life-tenant to destroy the remainder-man's title by another conveyance. Haines *v.* Weirick, 155 Ind. 548, 58 N. E. 712, 80 Am. St. Rep. 251.

88. Banks *v.* Marksberry, 3 Litt. (Ky.) 275. See Young *v.* Young, 80 N. Y. 422, 36 Am. Rep. 634; Rosenburg *v.* Rosenburg, 40 Hun (N. Y.) 91; Irish *v.* Nutting, 47 Barb. (N. Y.) 370.

Reservation of right to revoke an absolute gift is void. Daniel *v.* Veal, 32 Ga. 589.

89. Foster *v.* Runk, 109 Pa. St. 291, 58 Am. Rep. 720; Shoenberger *v.* Lyon, 7 Watts & S. (Pa.) 184.

"All the slabs made at said mill" is not a valid reservation in the conveyance of a sawmill. Adams *v.* Morse, 51 Me. 497.

90. Reidinger *v.* Cleveland Iron Min. Co., 39 Mich. 50.

91. Shepard *v.* Manhattan R. Co., 169 N. Y. 160, 62 N. E. 151 [*affirming* 48 N. Y. App. Div. 452, 62 N. Y. Suppl. 977]. *Compare* Richardson *v.* Palmer, 38 N. H. 212; Western Union Tel. Co. *v.* Shepard, 169 N. Y. 170, 62 N. E. 154, 58 L. R. A. 115 [*reversing* 49 N. Y. App. Div. 345, 63 N. Y. Suppl. 435].

92. Moore *v.* Lord, 50 Miss. 229; Pollock *v.* Cronise, 12 How. Pr. (N. Y.) 363.

grantor.[93] Again an exception should not be repugnant to or inconsistent with the grant or it will be void.[94]

d. Power to Mortgage. A reservation of a power to mortgage is valid.[95]

4. Construction and Operation — a. In General. A reservation is to be construed more strictly than a grant.[96] The nature of the reservation is, however, very material.[97]

b. As Against Grantor. The rule applicable to deeds of construction against the grantor and in favor of the grantee[98] applies to reservations and exceptions expressed in a doubtful manner.[99]

c. As to Strangers. Although a reservation is ineffectual to create title in a stranger, it may when so intended operate as an exception to the grant.[1] Generally, however, all reservations, unless otherwise expressed, operate in favor of the grantor, but a grantor may by reservation preserve the rights of others in the premises, such as the lessees or tenants, or existing rights of third persons, provided such rights are at the time subsisting.[2] And a reservation may be made to the grantor when valuable rights are secured to him, although others may be benefited.[3]

d. Tenants in Common or Cotenants. Although a reservation is void where it is of the interest of a tenant in common in the mines in and upon the lands granted, in a conveyance by him of his estate,[4] yet cotenants may convey their shares to one or several, and a person owning an undivided interest in lands may except and reserve to himself that part of the oils, minerals, and gas which was his property, but he cannot except the entire thing or interest.[5]

93. Hill *v.* Cutting, 107 Mass. 596.

94. *Ex p.* Young, 11 R. I. 636.

As a construction which would make a deed wholly inoperative is not favored, such a rule will be adopted only as a matter of necessity and an exception is not void merely because it is inconsistent to some extent. Adams *v.* Warner, 23 Vt. 395.

95. Bouton *v.* Doty, 69 Conn. 531, 37 Atl. 1064.

96. St. Anthony Falls Water-Power Co. *v.* Minneapolis, 41 Minn. 270, 43 N. W. 56.

If a grantor states in his deed that he excepts a certain portion of land because he wants it for a particular purpose he cannot be held to have conveyed that which he has expressly excluded, because he devotes it to a different purpose. Consolidated Ice Co. *v.* New York, 53 N. Y. App. Div. 260, 65 N. Y. Suppl. 912.

97. Dygert *v.* Matthews, 11 Wend. (N. Y.) 35.

98. See *supra*, V, A, 1, i.

99. *Iowa.*—Wiley *v.* Sirdorus, 41 Iowa 224.

Kentucky.— Brown *v.* Darling, 52 S. W. 936, 21 Ky. L. Rep. 653.

Maine.— Wellman *v.* Churchill, 92 Me. 193, 42 Atl. 352; Foster *v.* Foss, 77 Me. 279.

Massachusetts.— Derby *v.* Hall, 2 Gray 236.

Michigan.— Bolio *v.* Marvin, 130 Mich. 82, 89 N. W. 563.

New York.— Duryea *v.* New York, 62 N. Y. 592; Consolidated Ice Co. *v.* New York, 53 N. Y. App. Div. 260, 65 N. Y. Suppl. 912; Ives *v.* Van Auken, 34 Barb. 566; Jackson *v.* Gardner, 8 Johns. 394; Jackson *v.* Hudson, 3 Johns. 375, 3 Am. Dec. 500.

Pennsylvania.— Klaer *v.* Ridgway, 86 Pa. St. 529; Ronnsley *v.* Jones, 2 Walk. 112; Ewing *v.* Fertig, 9 Pa. Dist. 756, 24 Pa. Co. Ct. 301; Ball *v.* Ball, 4 Pa. L. J. Rep. 424.

See 16 Cent. Dig. tit. "Deeds," § 455.

Construction is against the grantor under a deed of all property "except such as is allowed by law to poor debtors," and it covers all except such as was then under legal exemption. Massey *v.* Warren, 52 N. C. 143. And where covenants of warranty are followed by the clause "except all the wheat on the ground or land above described," the most favorable construction to the grantor could only indicate an exception of the wheat from the warranty, leaving the ownership in the grantee. Knapp *v.* Woolverton, 47 Mich. 292, 11 N. W. 164.

Rule as to construction of an exception against the grantor applies only where the words are doubtful or ambiguous (Carroll *v.* Granite Mfg. Co., 11 Md. 399), or only where by the ordinary rules of construction the intention is left in doubt, and the rule has no place where the language is sufficiently clear (Corey *v.* Edgewood Borough, 18 Pa. Super. Ct. 216).

1. Burchard *v.* Walther, 58 Nebr. 539, 78 N. W. 1061; Bartlett *v.* Barrows, 22 R. I. 642, 49 Atl. 31, holding that where a clause reserves rights which existed as against the grantor before his conveyance, it will have the effect of an exception limiting the preceding description of the property conveyed.

2. Shelby *v.* Chicago, etc., R. Co., 143 Ill. 385, 32 N. E. 438 [*affirming* 42 Ill. App. 339]; Illinois Cent. R. Co. *v.* Indiana, etc., R. Co., 85 Ill. 211.

3. Wall *v.* Wall, 126 N. C. 405, 35 S. E. 811.

4. Adams *v.* Briggs Iron Co., 7 Cush. (Mass.) 361.

5. Ewing *v.* Fertig, 9 Pa. Dist. 756, 24 Pa. Co. Ct. 301.

e. Intention. A reasonable construction should be given to a reservation or exception according to the intention of the parties, ascertained from the entire instrument. There should be considered, when necessary and proper, the force of the language used, the ordinary meaning of words, the meaning of specific words, the context, the recitals, the subject-matter, the object, purpose, and nature of the reservation or exception and the attendant facts and surrounding circumstances before the parties at the time of making the deed.[6] This rule is applicable to the construction of reservations or exceptions of property generally;[7] of trees, timber, and the like;[8] of plants;[9] of roads and streets;[10] of side-

6. *Illinois.*— Noble *v.* Illinois Cent. R. Co., 111 Ill. 437.

Iowa.— Wiley *v.* Sirdorus, 41 Iowa 224.

Maryland.— Carroll *v.* Granite Mfg. Co., 11 Md. 399.

New Hampshire.— Goodrich *v.* Eastern R. Co., 37 N. H. 149.

New York.— French *v.* Carhart, 1 N. Y. 96; Thompson *v.* Gregory, 4 Johns. 81, 4 Am. Dec. 255.

Pennsylvania.— Hartley *v.* Crawford, 81* Pa. St. 178; Corey *v.* Edgewood Borough, 18 Pa. Super. Ct. 216.

Rhode Island.— Fisk *v.* Brayman, 21 R. I. 195, 42 Atl. 878.

United States.— Thomas *v.* Hatch, 23 Fed. Cas. No. 13,899, 3 Sumn. 170.

See 16 Cent. Dig. tit. "Deeds," § 460.

Purpose of reservation or exception.— The intent is, however, limited to the purpose for which the property or right excepted or reserved is intended to be used and this includes the extent to which and by whom it can be fairly and legitimately enjoyed, especially so where it is apparent that the words were not used merely to identify the land excepted. Brown *v.* Anderson, 88 Ky. 577, 11 S. W. 607, 11 Ky. L. Rep. 107. So where the reservation contains an express mention of the purpose thereof, it will be limited and measured by the purpose so declared. Washburn *v.* Copeland, 116 Mass. 233. Again where the reservation is for a specific purpose, an appropriation to any other object by the grantors or their assigns is without right, for land cannot be used in any other manner or for any other purpose than in pursuance of the intent gathered from an exception where that is plain. Dygert *v.* Matthews, 11 Wend. (N. Y.) 35.

The word "part," in an exception of "a small part of the said piece," etc., has reference to quantity as less than the whole, and to several distinct pieces if necessary. Carroll *v.* Granite Mfg. Co., 11 Md. 399.

7. *Illinois.*— Grand Tower Min., etc., Co. *v.* Gill, 111 Ill. 541; Louk *v.* Woods, 15 Ill. 256.

Iowa.— Gaveny *v.* Hinton, 2 Greene 344.

Kentucky.— Bennett *v.* Caddell, 20 S. W. 274, 14 Ky. L. Rep. 353; Jones *v.* Motley, 13 S. W. 432, 11 Ky. L. Rep. 921.

Maine.— Haynes *v.* Jackson, 66 Me. 93; Penobscot Indians *v.* Veazie, 58 Me. 402.

Minnesota.—Babcock *v.* Latterner, 30 Minn. 417, 15 N. W. 689.

Missouri.— Hampton *v.* Helms, 81 Mo. 631.

New Hampshire.— Smith *v.* Furbish, 68 N. H. 123, 44 Atl. 398, 47 L. R. A. 226; Andrews *v.* Todd, 50 N. H. 565.

New York.— Starr *v.* Child, 5 Den. 599.

Rhode Island.— Tillinghast *v.* Fry, 1 R. I. 53.

Vermont.— Sawyer *v.* Coolidge, 34 Vt. 303; Putnam *v.* Smith, 4 Vt. 622.

United States.— Thomas *v.* Hatch, 23 Fed. Cas. No. 13,899, 3 Sumn. 170.

See 16 Cent. Dig. tit. "Deeds," § 461.

Property which has been conveyed.—Where there is a clause "excepting such parts thereof as have been conveyed," and there is an ambiguity, the intention, attendant circumstances, purpose, and objects of recitals, including those in other instruments, and the nature and quality of the estate conveyed to the ancestor will all be considered. Derby *v.* Hall, 2 Gray (Mass.) 236.

8. *Maine.*— Foster *v.* Foss, 77 Me. 279; Strout *v.* Harper, 72 Me. 270.

Massachusetts.— Hill *v.* Cutting, 107 Mass. 596; Cronin *v.* Richardson, 8 Allen 423.

New Hampshire.— Alcutt *v.* Iakin, 33 N. H. 507, 66 Am. Dec. 739.

North Carolina.— Whitted *v.* Smith, 47 N. C. 36.

Pennsylvania.— McClintock's Appeal, 71 Pa. St. 365.

See 16 Cent. Dig. tit. "Deeds," § 462.

A deed subject to "all existing timber contracts" is subject to all such contracts whether recorded or not. Chicago Lumbering Co. *v.* Powell, 120 Mich. 51, 78 N. W. 1022.

In determining what right or property is covered by the reservation or exception of timber, etc., in a deed, the then existing state or condition is ordinarily contemplated, dependent, however, upon the nature and purpose of the right reserved or excepted and the terms of the clause in question. Huron Land Co. *v.* Davison, 131 Mich. 86, 90 N. W. 1034; Putnam *v.* Tuttle, 10 Gray (Mass.) 48; Robinson *v.* Gee, 26 N. C. 186; Irvin *v.* Patchin, 164 Pa. St. 51, 30 Atl. 436; Andrews *v.* Wade, (Pa. 1886) 6 Atl. 48.

9. Ring *v.* Billings, 51 Ill. 475.

10. Bolio *v.* Marvin, 130 Mich. 82, 89 N. W. 563; Patrick *v.* Kalamazoo Y. M. C. A., 120 Mich. 185, 79 N. W. 208; Consolidated Ice Co. *v.* New York, 53 N. Y. App. Div. 260, 65 N. Y. Suppl. 912; Raynor *v.* Syracuse University, 35 Misc. (N. Y.) 83, 71 N. Y. Suppl. 293; New York *v.* Law, 6 N. Y. Suppl. 628 [*affirmed* in 125 N. Y. 380, 26 N. E. 471]; Umscheid *v.* Scholz, 84 Tex. 265, 16 S. W. 1065.

walks;[11] of rights, estates, or interests generally;[12] of a right of way;[13] of a life-estate;[14] of dower;[15] and of taxes.[16] It is not enough, however, that one should make out a possible intention favorable to his view, but he must show a reasonable certainty that the intention is such as he suggests.[17] Again the rule that the *habendum* clause is void when totally repugnant to the granting clause will not be so rigidly applied as to defeat the intention of the parties, when ascertained by looking at every part of the instrument, and this applies to a reservation or exception.[18]

f. Repugnancy. If the granting clause is of the grantor's whole estate in the premises and the exception following reserves a certain interest there is such a repugnancy as that the grantor is estopped to claim such interest.[19] But a reservation of the right to sell and reinvest the proceeds for the benefit of the grantees is not so repugnant as to prevent the grantor from conveying the entire estate to the survivor of the grantees.[20]

g. Property — (i) *Generally.* A construction which shows what is conveyed will be adopted in preference to one which leads to some indefinite, unascertained deduction.[21] So where separate buildings are commonly known by one designation which answers the description in the exception they will all be embraced therein.[22]

(ii) *General and Particular Description.* A reservation or exception is to be taken as part of the premises granted and not of lands not included in the general description.[23] And if to a general description is added a specification

11. Vincent *v.* Kalamazoo, 111 Mich. 230, 69 N. W. 501.

12. *Connecticut.*—Bouton *v.* Doty, 69 Conn. 531, 37 Atl. 1064.

Indiana.— Elkhart, etc., R. Co. *v.* Waldorf, 17 Ind. App. 29, 46 N. E. 88.

Maine.— Pingree *v.* Chapman, 68 Me. 17.

Massachusetts.— Washington Mills Emery Mfg. Co. *v.* Weymouth, etc., Mut. F. Ins. Co., 135 Mass. 503.

New York.—Jackson *v.* Lawrence, 11 Johns. 191.

Pennsylvania.— Suplee *v.* Hansell, 17 Pa. St. 384.

England.—Lee *v.* Stevenson, E. B. & E. 512, 4 Jur. N. S. 950, 27 L. J. Q. B. 263, 96 E. C. L. 512. See also Durham, etc., R. Co. *v.* Walker, 2 Q. B. 940, 2 G. & D. 326, 11 L. J. Exch. 442, 42 E. C. L. 987.

13. Heinzman *v.* Winona, etc., R. Co., 75 Minn. 253, 77 N. W. 956; Mills *v.* Chicago, etc., R. Co., 103 Wis. 192, 79 N. W. 245.

14. Hart *v.* Gardner, 74 Miss. 153, 20 So. 877.

15. Clark *v.* Cottrel, 42 N. Y. 527 [*reversing* 63 Barb. 335]; Duey *v.* Clemens, 1 Pa. St. 118.

16. Smith *v.* Abington Sav. Bank, 165 Mass. 285, 42 N. E. 1133.

17. Pannell *v.* Mill, 3 C. B. 625, 11 Jur. 109, 54 E. C. L. 625, 16 L. J. C. P. 91.

18. Singleton *v.* Trustees School Dist. No. 34, 10 S. W. 793, 10 Ky. L. Rep. 851.

If the language of a reservation is inconsistent with the parties' intention and their practical construction excludes the claim the reservation will fail. Newmarket Mfg. Co. *v.* Pendergast, 24 N. H. 54.

19. McDaniel *v.* Puckett, (Tex. Civ. App. 1902) 68 S. W. 1007.

Reservation of less estate.— Although a deed for a valuable consideration conveys land, to have and to hold all the right, title, and interest, to the grantee, and his heirs and assigns forever, the grantor may nevertheless reserve a less estate to himself and there is no such repugnancy as to make such reservation inoperative. McDougal *v.* Musgrave, 46 W. Va. 509, 33 S. E. 281.

In Kentucky the common-law rule that the *habendum* clause when totally repugnant to the granting clause is void does not apply to the mere description of the quantity or kind of property conveyed, but simply to the character and kind of estate or interest conveyed, and an express reservation in the *habendum* of a portion of the land included within the description will prevail over the granting clause containing no such reservation. Singleton *v.* Trustees School Dist. No. 34, 10 S. W. 793, 10 Ky. L. Rep. 851.

20. Horn *v.* Broyles, (Tenn. Ch. App. 1900) 62 S. W. 297.

21. Thomas *v.* Hatch, 23 Fed. Cas. No. 13,899, 3 Sumn. 170.

Where the excepting clause specifies certain objects as a common center, the law will fix boundaries by making such objects a common center from which the lines will be extended each way. Hodge *v.* Blanton, 1 Head (Tenn.) 560.

22. Carroll *v.* Granite Mfg. Co., 11 Md. 399.

If the exception is of a lot sold from the described premises and it is practically located and identified and there are other factors, such as recognition of title, the excepted tract will not pass by the deed containing such exception. Greenwich Second M. E. Church *v.* Humphrey, 21 N. Y. Suppl. 89 [*affirmed* in 142 N. Y. 137, 36 N. E. 812].

23. Starr *v.* Child, 5 Den. (N. Y.) 599.

of the precise thing intended, or it is shown that the thing answers to such specifications, the general designation will be construed in conformity therewith.[24]

(III) *Certainty and Uncertainty of Description.* An exception should describe the property with sufficient certainty. Uncertainty or vagueness of description renders a reservation void unless there is something in the exception, deed, or evidence whereby it can be made sufficiently certain.[25] Uncertainty of location can, however, in a proper case be cured by the grantor's election within a reasonable time, followed by acts *in pais*.[26]

(IV) *Lands Previously Conveyed.* A recital that land previously conveyed is reserved does not nullify the reservation, but should be considered as referring merely to the grantor's interest after exception of the tract specified, and it is an admission of the grantor which may be explained or rebutted.[27] But if an exception is of lots "heretofore sold" such lots will not pass, although they have not been sold, as the recital will be rejected.[28]

(V) *Timber, Trees, and the Like.* A reservation of timber is an interest in land if an immediate severance is not contemplated; otherwise the same is personalty.[29] But a reservation of all the wood then standing cannot operate upon an estate which had never been in the grantor.[30] Again a reservation of a cer-

24. Sawyer *v.* Coolidge, 34 Vt. 303.

Where a general description is followed by a clause stating the intention the latter prevails. Reynolds *v.* Gaertner, 117 Mich. 532, 76 N. W. 3.

25. *Alabama.*— Bromberg *v.* Smee, 130 Ala. 601, 30 So. 483.

Arkansas.— Mooney *v.* Cooledge, 30 Ark. 640.

California.— Truett *v.* Adams, 66 Cal. 218, 5 Pac. 96.

Georgia.— McAfee *v.* Arline, 83 Ga. 645, 10 S. E. 441.

Illinois.— Rockafeller *v.* Arlington, 91 Ill. 375; Ditman *v.* Clybourn, 4 Ill. App. 542.

Kentucky.— Northrup *v.* Blanton, 33 S. W. 83, 17 Ky. L. Rep. 964.

Maine.— Getchell *v.* Whittemore, 72 Me. 393.

New Hampshire.— Andrews *v.* Todd, 50 N. H. 565; Darling *v.* Crowell, 6 N. H. 421.

New York.—Johnson *v.* Zink, 52 Barb. 396; Dygert *v.* Matthews, 11 Wend. 35; Thompson *v.* Gregory, 4 Johns. 81, 4 Am. Dec. 255.

North Carolina.— Midgett *v.* Wharton, 102 N. C. 14, 8 S. E. 778; Justice *v.* Eddings, 75 N. C. 581; *Ex p.* Branch, 72 N. C. 106; Melton *v.* Monday, 64 N. C. 295; Waugh *v.* Richardson, 30 N. C. 470.

Ohio.— Manley *v.* Carl, 20 Ohio Cir. Ct. 161, 11 Ohio Cir. Dec. 1; Cook *v.* Wesner, 1 Cinc. Super. Ct. 249.

Pennsylvania.— Stambaugh *v.* Hollabaugh, 10 Serg. & R. 357.

Virginia.— Butcher *v.* Creel, 9 Gratt. 201.

United States.— Greenleaf *v.* Birth, 6 Pet. 302, 8 L. ed. 406; Norton *v.* Meader, 18 Fed. Cas. No. 10,351, 4 Sawy. 603 [*affirmed* in 11 Wall. 442, 20 L. ed. 184].

See 16 Cent. Dig. tit. "Deeds," § 459.

A deed is not void for uncertainty or repugnancy where it describes the land conveyed by courses and distances, and conveys no specific number of acres, and it excepts a swamp or marsh from the operation of the deed. Painter *v.* Pasadena Land, etc., Co., 91 Cal. 74, 27 Pac. 539. Nor is a reservation void for uncertainty which conveys a government subdivision, reserving thirty-two acres adjoining the town line, mortgaged to S, and seven acres reserved by the grantor on the east side of land described, but will be construed to extend along the whole side mentioned with width enough to give the requisite number of acres. Johnson *v.* Ashland Lumber Co., 47 Wis. 326, 2 N. W. 552.

26. Benn *v.* Hatcher, 81 Va. 25, 59 Am. Rep. 645.

Where the grantor has the right to elect where and how high a dam shall be and thus determine the amount of land to be flowed and the location of the property, the reservation of the right to build a dam or the right of flowage is sufficiently certain and not void for uncertainty. Smith *v.* Furbish, 68 N. H. 123, 44 Atl. 398, 47 L. R. A. 226.

27. Bartell *v.* Kelsey, (Tex. Civ. App. 1900) 59 S. W. 631.

28. Ambs *v.* Chicago, etc., R. Co., 44 Minn. 266, 46 N. W. 321; Hughes *v.* St. Clair Coal Co., 11 Wkly. Notes Cas. (Pa.) 115; Roberts *v.* Robertson, 53 Vt. 690, 38 Am. Rep. 710; Low *v.* Settle, 32 W. Va. 600, 9 S. E. 922. But see *In re* Stokely, 19 Pa. St. 476; Blossom *v.* Ferguson, 13 Wis. 75; Welch *v.* Ste. Genevieve, 29 Fed. Cas. No. 17,372, 1 Dill. 130.

A clause "excepting and reserving" all lands "heretofore conveyed" excepts all lands previously sold. Adams *v.* Hopkins, (Cal. 1902) 69 Pac. 228. But see Rice *v.* Willis, 87 Fed. 626, 31 C. C. A. 154.

An exception of a similar character out of the warranty does not necessarily, and as a matter of law, import that the grantor had previously conveyed the land excepted, or that the deed did not pass to the grantee a perfect legal title to all the land within the boundary described in the deed. Rollins *v.* Clark, 8 Dana (Ky.) 15.

29. McClintock's Appeal, 71 Pa. St. 365.

30. Hill *v.* Cutting, 107 Mass. 596.

tain description of timber trees continues the property in such trees in the grantor, while they remain, with the right in so much of the soil as is necessary to sustain them.[31]

(vi) *Streets.* The title of the fee of a street does not pass under a deed where it is expressly reserved by words equivalent to a reservation of all the grantor's title thereto.[32] A vendee is also bound by the provisions of his own deed where it expressly excludes any interest in the fee of streets. Nor can his rights be enlarged by reservations in his vendor's dedication of adjoining property for a public street, and a party holding under the grantee takes subject to the reservation.[33]

(vii) *Right of Way.* Under the early decisions a right of way could not in strictness be made the subject of an exception or reservation, it being neither parcel of nor issuing out of the thing granted.[34] An exception may, however, be of the fee of a right of way and not merely an exception of an easement.[35]

(viii) *Rights or Privileges.* A reservation in a deed of a right or privilege should be construed in the same way as a grant by the owner of the soil of a similar right or privilege.[36] So a conveyance excepting and reserving a certain liberty may operate not as a reservation properly so called but as a new grant of the liberty mentioned.[37] A reservation may also be inoperative until the exercise of the right reserved.[38] Again if a certain part of a tract is reserved, and the deed further recites that the grantor conveys all his right, etc., to any part of the

31. Goodwin *v.* Hubbard, 47 Me. 595; Howard *v.* Lincoln, 13 Me. 122. See also Putnam *v.* Tuttle, 10 Gray (Mass.) 48.

The character of the reservation may also carry the right of selection and determination of the fitness of the timber for the purpose designated. Wheeler *v.* Carpenter, 107 Pa. St. 271.

Where there is an exception of growing trees for lumber the title does not pass to the grantee, but remains in the grantor, and with it the right to enter upon the land and to cut and remove them, doing no unnecessary damage, which right he may sell to another or he may grant to another a verbal license to exercise it. Heflin *v.* Bingham, 56 Ala. 506, 28 Am. Rep. 776.

32. St. John *v.* Quitzow, 72 Ill. 334.

If a conveyance is per se a dedication of the use of a street as a street, the grantee has the right to its use as soon as the conveyance is made, and an easement is thereby attached to the land; and although there is a reservation which amounts to a covenant to permit an obstruction to remain there indefinitely, yet the right acquired under former deeds to have the obstruction removed is unimpaired. Taylor *v.* Hepper, 2 Hun (N. Y.) 646.

33. Brumit *v.* Virginia, etc., R. Co., 106 Tenn. 124, 60 S. W. 505.

If the exception is of a "street heretofore deeded" the words are descriptive only and it makes no difference if the street was ever deeded or ever a valid street, and if the ground can be identified the title will not pass by the deed. Rushton *v.* Hallett, 8 Utah 277, 30 Pac. 1014.

If the saving clause of a deed is limited to streets laid out it will be necessary to inquire whether there was a legal street in existence at the time of the grant. But where the reservation is of streets that might then or thereafter "be assigned, designated or laid out" it will cover the land reserved, where it was assigned and designated, if not laid out according to law; nor in such case is the reservation void for uncertainty, the boundaries having been thereby fixed with sufficient certainty to locate the street. Consolidated Ice Co. *v.* New York, 53 N. Y. App. Div. 260, 65 N. Y. Suppl. 912 [*affirmed* in 166 N. Y. 92, 59 N. E. 713].

34. Durham, etc., R. Co. *v.* Walker, 2 Q. B. 940, 2 G. & D. 326, 11 L. J. Exch. 442, 42 E. C. L. 987.

In Maine reservations or exceptions of "ways" are held to import only an easement and not the property in the soil. Wellman *v.* Churchill, 92 Me. 193, 42 Atl. 352.

35. Reynolds *v.* Gaertner, 117 Mich. 532, 76 N. W. 3.

A reservation of a strip of land for certain purposes will not be construed so as to permit the cutting off of an absolute right of unobstructed passage under the grant. Washburn *v.* Copeland, 116 Mass. 233.

36. French *v.* Carhart, 1 N. Y. 96.

37. Wickham *v.* Hawker, 10 L. J. Exch. 153, 7 M. & W. 63.

Reservation is only a regrant. Miller *v.* Casselberry, 47 Pa. St. 376.

Where the owner conveys lands, reserving the "liberty of working the coal" therein, he must be taken to have reserved the estate of coal with which he stands vested at the date of the conveyance, unless there are clear words in the deed qualifying that right of property. Hamilton *v.* Dunlop, 10 App. Cas. 813.

38. Provost *v.* Calter, 2 Wend. (N. Y.) 517.

Where a lease reserves all streams and the soil under them with the right to erect mills and mill-dams, and it then excepts and reserves the land which may be overflowed in

tract, such recital will be considered as referring merely to the grantor's interest remaining over the land excepted.[39]

(IX) *Life-Estate.* A life-estate may be created by an express reservation following a clause *habendum et tenendum* of all the right, title, and interest to the grantee, his heirs and assigns, forever.[40] And an owner of a certain interest in real and personal estate, reserved in trust for the life of an annuitant, may convey his interest subject to the annuity and all charges even though not all of them are specified.[41] A reservation may also be construed as a covenant to stand seized of the reversion to the use of another, the life-estate remaining in the grantor.[42]

(X) *Dower.* If land is conveyed excepting an interest in unassigned dower, the exception covers the fee in the land afterward assigned for dower.[43]

(XI) *Legal Encumbrances.* If the exception is of a legal encumbrance only the property passes.[44]

h. Implied Rights and Limitations. A reservation must be so construed as to give a practical right and not so as to render it worthless or unavailing.[45] A grant carries by implication as incidental thereto whatever is necessary to the reasonable enjoyment of the thing granted, and this applies to a reservation.[46] But the court will not import into a reservation of a right of way for a certain purpose a condition or covenant, or limit the purpose thereof contrary to the ascertained intent.[47]

i. Appurtenances and Reservations Running With Land. A fence will pass as an appurtenance without being specially named in the instrument of conveyance.[48] But a right will not be held to have been reserved as appurtenant[49] to

consequence of such dams, the reservation is inoperative until the grantor has exercised his right to erect mills and mill-dams and considered strictly as an exception the deed is void. Thompson *v.* Gregory, 4 Johns. (N. Y.) 81, 4 Am. Dec. 255.

39. Bartell *v.* Kelsey, (Tex. Civ. App. 1900) 59 S. W. 631.

40. McDougal *v.* Musgrave, 46 W. Va. 509, 33 S. E. 281.

41. Atlantic Trust Co. *v.* Holdsworth, 50 N. Y. App. Div. 623, 63 N. Y. Suppl. 756 [*affirmed* in 167 N. Y. 532, 60 N. E. 1106].

42. Hartman *v.* Fleming, 30 U. C. Q. B. 209; Simpson *v.* Hartman, 27 U. C. Q. B. 460.

43. Manley *v.* Carl, 20 Ohio Cir. Ct. 161, 11 Ohio Cir. Dec. 1.

44. Loomis *v.* Pingree, 43 Me. 299, holding that an exception of legal encumbrances only is created under a deed of all the grantor's right, title, and interest except two public lots and a tract under mortgage and the interest in the mortgaged lots passes and whatever right remained in the grantor in the public lots.

The clause "this conveyance is made subject to the incumbrance of said execution" is an exception of the encumbrance of the execution and not of the piece of land set off on such execution. Shears *v.* Dusenbury, 13 Gray (Mass.) 292.

45. Noble *v.* Illinois Cent. R. Co., 111 Ill. 437.

No power to sell property is given by a reservation of the grantor's right to control as guardian an estate for the benefit of the grantee. O'Connor *v.* Vineyard, (Tex. Civ. App. 1897) 43 S. W. 55.

46. Marshall *v.* Niles, 8 Conn. 369; St. Anthony Falls Water-Power Co. *v.* Minneapolis, 41 Minn. 270, 43 N. W. 56; Fisk *v.* Brayman, 21 R. I. 195, 42 Atl. 878. See also Carroll *v.* Granite Mfg. Co., 11 Md. 399; Dand *v.* Kingscote, 9 L. J. Exch. 279, 6 M. & W. 174, 2 R. & Can. Cas. 27; Goold *v.* Great Western Deep Coal Co., 12 L. T. Rep. N. S. 842.

A right or license to go upon premises and remove a water wheel and shafting may be given by implication where such property is reserved. Straw *v.* Straw, 70 Vt. 240, 39 Atl. 1095.

By the grant of a mill the land under the mill and adjacent thereto so far as necessary to its use and commonly used with it will pass by implication, and the same rule of construction will apply to an exception in a grant, but it should appear that the land adjacent was necessary for the use of the mill. Forbush *v.* Lombard, 13 Metc. (Mass.) 109.

Right to protection from spoliation is carried with a right reserved of interment and the consequent right of erecting mounds and monuments. Mitchell *v.* Thorne, 134 N. Y. 536, 32 N. E. 10, 30 Am. St. Rep. 699 [*affirming* 57 Hun 405, 10 N. Y. Suppl. 682, 25 Abb. N. Cas. 295].

47. Corey *v.* Edgewood, 18 Pa. Super. Ct. 216.

48. Ropps *v.* Barker, 4 Pick. (Mass.) 239.

49. Poole *v.* Dulaney, 19 Tex. Civ. App. 177, 46 S. W. 276, holding that a way not dedicated to public use and used as an approach to a lot not abutting thereon is not an appurtenance passing with the lot.

land of which it is a part, where it is a mere personal reservation or license in favor of the owner as for example the right to mow and cultivate a strip of land.[50]

j. Reservations of Use or Possession. It is competent for the grantor to reserve the possession of land to himself for a determinate or indefinite period.[51] This rule applies to a reservation of the use or of the possession or of support for life, and such reservation will save such incidents and rights, and be subject to such restrictions as the rules of construction applicable to the subject-matter and to the language employed in the particular case will warrant.[52] Again the use may be limited to a specific purpose,[53] to a certain locality,[54] or the right to possession may be a fluctuating one.[55] The right to "occupy" is also equivalent to the right to "possess," [56] and carries with it such implied incidents as are necessary to the proper and lawful exercise of the rights reserved,[57] or which are within the purpose and intent of the reservation.[58]

k. Termination, Loss, or Relinquishment. Although a reservation of a right limited in its duration will ordinarily remain in force for the period specified,[59] yet it must be exercised within the time designated or it will be waived,[60] especially where the privilege is purely personal and dies with the grantor.[61] So an exception may be limited to the joint lives of a husband and wife and to that of the survivor.[62] And a grant of a life-estate, with a reservation of possession for the purpose of performing certain covenants, will be terminated by a judgment in an action for breach of those covenants.[63] But a life-estate in a father, reserved in a conveyance to a son, is not terminated by the surrender without writing of the control of the premises to the son.[64] And if a certain building is reserved it means the then existing building and not one subsequently erected.[65] So if the character of the right, interest, or privilege and the terms of the reservation or exception are such as to operate, expressly or by construction, as a limitation upon the time within which such right, interest, or privilege must be

50. Pierce *v.* Keator, 9 Hun (N. Y.) 532 [*affirmed* in 70 N. Y. 419, 26 Am. Rep. 612]. See also Coke Litt. 121*b*.

A reservation of a right to cut timber in the way of improvements in the cultivation of the land passes to assigns and is not personal. Cathcart *v.* Bowman, 5 Pa. St. 317.

51. Mott *v.* Coddington, 1 Abb. Pr. N. S. (N. Y.) 290.

Reservation of the use of land to erect buildings cannot be construed so as to defeat a grant of a life-estate to a remainder-man. Pynchon *v.* Stearns, 11 Metc. (Mass.) 312, 45 Am. Dec. 210.

52. *Illinois.*— Stewart *v.* Wood, 48 Ill. App. 378.

Kansas.— Martin *v.* Martin, 30 Kan. 708, 2 Pac. 855.

Maine.— Richardson *v.* York, 14 Me. 216.

Massachusetts.— Jamaica Pond Aqueduct Corp. *v.* Chandler, 9 Allen 159; Bessom *v.* Freto, 13 Metc. 523.

Michigan.—Hardwick *v.* Laderoot, 39 Mich. 419.

New Hampshire.— Webster *v.* Webster, 33 N. H. 18, 66 Am. Dec. 705.

See 16 Cent. Dig. tit. "Deeds," § 466.

If the reservation does not amount to a technical life-estate the grantee will be entitled to the emblements. Waugh *v.* Waugh, 84 Pa. St. 350, 24 Am. Rep. 191.

53. Phillips Exeter Academy *v.* New Parish, 68 N. H. 10, 36 Atl. 548.

54. Galveston, etc., R. Co. *v.* Haas, 17 Tex. Civ. App. 309, 42 S. W. 658, holding that a right of the use of water for stock will be limited to that part of the land which includes the pasture in which it is stipulated that the stock be kept.

55. Swan *v.* Goff, 39 N. Y. App. Div. 95, 56 N. Y. Suppl. 690.

56. Lacy *v.* Green, 84 Pa. St. 514.

Right to "use and occupy" for a certain period does not mean a mere personal occupancy, but a general right of the grantor to occupy by himself or others. Cooney *v.* Hayes, 40 Vt. 478, 94 Am. Dec. 425.

57. Lacy *v.* Green, 84 Pa. St. 514.

58. Waldorf *v.* Elkhart, etc., R. Co., 13 Ind. App. 134, 41 N. E. 396.

59. Farnum *v.* Platt, 8 Pick. (Mass.) 339, 19 Am. Dec. 330.

60. House *v.* Palmer, 9 Ga. 497; Lucusterine Fertilizer Co. *v.* Stilwell, 52 How. Pr. (N. Y.) 152; Judevine *v.* Goodrich, 35 Vt. 19.

61. Shields *v.* Delo, 145 Pa. St. 393, 22 Atl. 701.

62. Sergeant *v.* Ford, 2 Watts & S. (Pa.) 122.

63. Adams *v.* Dunklee, 19 Vt. 382.

64. Colby *v.* Colby, 28 Vt. 10.

65. Marshall *v.* Niles, 8 Conn. 369.

If the reservation of a building implies its use for a certain purpose at the place where it stands this will govern the duration of the right reserved and the owners may make reasonable and needed repairs upon it from time to time. Benham *v.* Minor, 38 Conn. 252.

exercised it will be limited accordingly. This rule embraces a limitation to the grantor's life;[66] to a certain number of years;[67] to a given time;[68] to a reasonable time;[69] after notice;[70] or to a time dependent upon present or future conditions.[71] Again a specified period of time may be fixed precluding the exercise of the right before its expiration, or thereafter except upon conditions.[72]

E. Conditions and Restrictions — 1. Creation and Nature — a. In General. Apt and appropriate words must be used, or a right of reëntry be reserved, to create a condition in a grant.[73] Technical words are, however, unnecessary, to make a condition precedent or subsequent, if a clear intent on the part of the grantor or of the parties appears.[74] A condition may also be created by the *habendum*;[75] or, where there is nothing to the contrary in the instrument, by a writing duly executed on the back of the deed.[76] On the other hand the expression of a "condition" does not necessarily create one[77] when contrary to the intention of the parties.[78] And if land is deeded for a specific use or purpose,[79] or it is deeded in consideration of its use for a certain purpose, or in consideration of the doing of a certain act, and there is nothing to show that a condition was intended, none will be created, either precedent or subsequent.[80] But this rule

66. Bond *v.* Cashie, etc., R., etc., Co., 127 N. C. 125, 37 S. E. 63. But see Gregg *v.* Birdsall, 53 Barb. (N. Y.) 402, 35 How. Pr. (N. Y.) 345.

67. Pease *v.* Gibson, 6 Me. 81; Saltonstall *v.* Little, 90 Pa. St. 422, 35 Am. Rep. 683; Rich *v.* Zeilsdorff, 22 Wis. 544, 99 Am. Dec. 81.

68. Irons *v.* Webb, 41 N. J. L. 203, 32 Am. Rep. 193; Strasson *v.* Montgomery, 32 Wis. 52.

Order in an attachment suit to stay waste does not extend the time for removal, when it is expressly limited to a specified date, when such order is obtained without fraud, collusion, or combination with the grantee, and the grantor is entitled to the timber only if removed before the day mentioned. Monroe *v.* Bowen, 26 Mich. 523.

69. Morris *v.* Sanders, 43 S. W. 733, 19 Ky. L. Rep. 1433; Huron Land Co. *v.* Davison, 131 Mich. 86, 90 N. W. 1034; Hoit *v.* Stratton Mills, 54 N. H. 109, 20 Am. Rep. 119; Andrews *v.* Wade, (Pa. 1886) 6 Atl. 48; Union Tanning Co. *v.* Shug, 22 Pa. Co. Ct. 647.

70. Huron Land Co. *v.* Davison, 131 Mich. 86, 90 N. W. 1034; Gregg *v.* Birdsall, 53 Barb. (N. Y.) 402; Union Tanning Co. *v.* Shug, 22 Pa. Co. Ct. 647.

Reasonable notice to remove trees will not terminate a right or estate reserved in growing trees coupled with an interest in the soil sufficient to support the trees. Knotts *v.* Hydrick, 12 Rich. (S. C.) 314.

71. Ten Broeck *v.* Livingston, 1 Johns. Ch. (N. Y.) 357.

72. Perkins *v.* Stockwell, 131 Mass. 529.

73. Raley *v.* Umatilla County, 15 Oreg. 172, 13 Pac. 890, 3 Am. St. Rep. 142.

"If" is an apt word to create a condition precedent to an easement. Long *v.* Swindell, 77 N. C. 176.

74. Underhill *v.* Saratoga, etc., R. Co., 20 Barb. (N. Y.) 455; Graves *v.* Deterling, 3 N. Y. St. 128; Glocke *v.* Glocke, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458. But see Ecroyd *v.* Coggeshall, (R. I. 1898) 41 Atl. 260.

The words "provided, condition," etc., are unnecessary. Wolverton *v.* Haupt, 2 Chest. Co. Rep. (Pa.) 573.

75. Xander's Estate, 7 Pa. Co. Ct. 482.

76. Barker *v.* Cobb, 36 N. H. 344.

77. Ayling *v.* Kramer, 133 Mass. 12; Sohier *v.* Trinity Church, 109 Mass. 1; Baker *v.* Mott, 78 Hun (N. Y.) 141, 28 N. Y. Suppl. 968 [*affirmed* in 152 N. Y. 637, 46 N. E. 1144]; Portland *v.* Terwilliger, 16 Oreg. 465, 19 Pac. 90.

A clause "in consideration of the conditions," etc., does not constitute a condition, but may operate only as a description of the consideration. Laberee *v.* Carleton, 53 Me. 211.

An estate on condition is not created by a conveyance of land "on condition and in trust" to be always devoted to school purposes, without any condition as to reversion, nor, on discontinuance of the use, can the land be recovered by the grantors, as donors of a charity which has failed. Carroll County Academy *v.* Gallatin Academy, 104 Ky. 621, 47 S. W. 617, 20 Ky. L. Rep. 824.

The word "conditions" may be used in its generic sense to denote the predicament or status of the title, its then condition. Dunlap *v.* Mobley, 71 Ala. 102.

78. Post *v.* Weil, 115 N. Y. 361, 22 N. E. 145, 12 Am. St. Rep. 809, 5 L. R. A. 422 [*affirming* 1 N. Y. Suppl. 807].

79. Gadberry *v.* Sheppard, 27 Miss. 203; Wilkes-Barre *v.* Wyoming Historical, etc., Soc., 134 Pa. St. 616, 19 Atl. 809; Avery *v.* U. S., 101 Fed. 711, 44 C. C. A. 161.

Land deeded in trust for a public levee with no conditions expressed in the deed will not revert to the grantor when no longer used for such purpose. Coffin *v.* Portland, 16 Oreg. 77, 17 Pac. 580.

80. *Illinois.*— Adams *v.* Logan County, 11 Ill. 336.

Kansas.— Ruggles *v.* Clare, 45 Kan. 662, 26 Pac. 25.

does not apply in cases where the intent on the part of the parties to create a condition is deducible.[81]

b. Distinguishing Characteristics — (i) *In General.* There is a distinction between the creation of a condition and a direction to do a certain act;[82] and between a reservation and an executory covenant.[83] There is also a distinction between a condition that defeats an estate but requires a reëntry and a limitation which determines an estate *ipso facto* without entry.[84]

(ii) *Condition Precedent or Subsequent.* There are no technical or precise words to distinguish a condition precedent from a condition subsequent, as the same words may create either, according to the rules of construction and the intent of the party who creates it, or of the parties to the instrument.[85]

(iii) *Condition or Covenant.* Covenants and conditions may be created by the same words but forfeitures are not favored.[86] Courts are therefore more favorably inclined to holding that the language used constitutes a covenant rather than a condition which will forfeit the grant.[87] This rule is especially applicable

Kentucky.— Fuguay *v.* Hopkins Academy, 58 S. W. 814, 22 Ky. L. Rep. 744.

Massachusetts.— Episcopal City Mission *v.* Appleton, 117 Mass. 326.

Missouri.— Hand *v.* St. Louis, 158 Mo. 204, 59 S. W. 92.

United States.— Avery *v.* U. S., 104 Fed. 711, 44 C. C. A. 161.

See 16 Cent. Dig. tit. "Deeds," § 470.

81. Atty.-Gen. *v.* Merrimack Mfg. Co., 14 Gray (Mass.) 586; Hancock *v.* Carlton, 6 Gray (Mass.) 39.

82. Parsons *v.* Rhodes, 22 Hun (N. Y.) 80.

83. Hooper *v.* Hooper, 20 N. C. 287.

84. Smith *v.* Smith, 23 Wis. 176, 99 Am. Dec. 153. See also Bryan *v.* Spires, 3 Brewst. (Pa.) 580, 1 Leg. Gaz. (Pa.) 191.

85. *Arkansas.*— Sheppard *v.* Thomas, 26 Ark. 617.

Maine.— Robbins *v.* Gleason, 47 Me. 259.

New York.— Underhill *v.* Saratoga, etc., R. Co., 20 Barb. 455.

Wisconsin.— Glocke *v.* Glocke, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458; Rogan *v.* Walker, 1 Wis. 527.

United States.— Ward *v.* New England Screw Co., 29 Fed. Cas. No. 17,157, 1 Cliff. 565.

See 16 Cent. Dig. tit. "Deeds," § 469; and *infra*, V, E, 3, b, c.

Where the deed to two successive life-tenants is on condition that they shall not convey their interests, and shall occupy the premises during their lives, and they enter into possession, the conditions are subsequent and not precedent to the vesting of the estate. Lewis *v.* Lewis, 74 Conn. 603, 51 Atl. 854, 92 Am. St. Rep. 240.

86. Post *v.* Weil, 115 N. Y. 361, 22 N. E. 145, 12 Am. St. Rep. 809, 5 L. R. A. 422 [*affirming* 1 N. Y. Suppl. 807].

Conditions of defeasance of an estate granted are odious. Paschall *v.* Passmore, 15 Pa. St. 295. See also Bryan *v.* Spires, 3 Brewst. (Pa.) 580, 1 Leg. Gaz. (Pa.) 191.

87. *Alabama.*— Eylton Land Co. *v.* South, etc., Alabama R. Co., 100 Ala. 396, 14 So. 207.

California.— Behlow *v.* Southern Pac. R. Co., 130 Cal. 16, 62 Pac. 295.

Georgia.—Anthony *v.* Stephens, 46 Ga. 241; Thornton *v.* Trammell, 39 Ga. 202.

Illinois.— Board of Education *v.* Normal First Baptist Church, 63 Ill. 204.

Kentucky.— Carroll County Academy *v.* Gallatin Academy, 104 Ky. 621, 47 S. W. 617, 20 Ky. L. Rep. 824.

Missouri.— St. Louis *v.* Wiggins Ferry Co., 88 Mo. 615.

New Hampshire.— Hoyt *v.* Kimball, 49 N. H. 322.

New Jersey.— Woodruff *v.* Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380.

New York.— Post *v.* Weil, 115 N. Y. 361, 22 N. E. 145, 12 Am. St. Rep. 809, 5 L. R. A. 422 [*affirming* 1 N. Y. Suppl. 807]; Graves *v.* Deterling, 3 N. Y. St. 128 [*affirmed* in 120 N. Y. 447, 24 N. E. 655]; Countryman *v.* Deck, 13 Abb. N. Cas. 110.

Pennsylvania.— Paschall *v.* Passmore, 15 Pa. St. 295.

Texas.— Teague *v.* Teague, 22 Tex. Civ. App. 443, 54 S. W. 632.

Virginia.— Lowman *v.* Crawford, 99 Va. 688, 40 S. E. 17; King *v.* Norfolk, etc., R. Co., 99 Va. 625, 39 S. E. 701.

United States.— American Emigrant Co. *v.* Adams County, 100 U. S. 61, 25 L. ed. 563; Los Angeles University *v.* Swarth, 107 Fed. 798, 46 C. C. A. 647, 54 L. R. A. 262; Adams *v.* Valentine, 33 Fed. 1.

See 16 Cent. Dig. tit. "Deeds," § 471.

Agreement to maintain a fence between lands granted and those of the grantor is never construed as a condition but as a covenant. Hartung *v.* Witte, 59 Wis. 285, 18 N. W. 175. See also Hornback *v.* Cincinnati, etc., R. Co., 20 Ohio St. 81; Palmer *v.* Ryan, 63 Vt. 227, 22 Atl. 574.

Negative covenant and not condition is created by words "the premises hereby conveyed are not to be used for saloon or dramshop purposes." Star Brewery Co. *v.* Primas, 163 Ill. 652, 45 N. E. 145.

Restrictive conditions are never favored in law and if it be doubtful whether a clause in a deed imports a condition or a covenant, the latter construction will be adopted. Spaulding *v.* Woodward, 53 N. H. 573, 16 Am. Rep. 392.

where the words used are in the form of a covenant pure and simple, and there are no words of proviso, or condition, or provision for reëntry in the deed.[88] The rule will not, however, control, over the settled legal significance of the language employed, especially where the meaning is so plain as to leave no room for construction.[89] And if the language imports a condition merely, and there are no words importing an agreement, it is not enforceable as a covenant.[90] So where a condition subsequent is created by apt and appropriate words the language will not be construed as a restriction merely or as a personal covenant.[91]

(iv) *Condition, Reservation, or Restriction.* If a clause can only have effect by considering it as a condition subsequent it will be so construed and will not be held to be a reservation.[92] A stipulation will also be construed as a condition and not as a reservation, where the effect of construing it as the latter would make the reservation repugnant and the grant void.[93]

2. Validity of Conditions — a. Generally. A clause reserving the right of reëntry is not necessary to the validity of a condition.[94] So a condition may be valid which reserves a provisional right not repugnant to the grant, to take possession,[95] or which reserves the right or power to revoke the deed.[96] A deed may also provide for the maintenance of the grantor;[97] and a deed of gift may provide for after-born children.[98] But a condition in a common-law conveyance for the benefit of a stranger to the deed is void.[99] And a conveyance *in præsenti*, reserving the control to the grantor for life, and which is a shift to evade the statute of wills restraining the testamentary power of parents is void.[1] It has also been held that some estate on which the condition can take effect should remain in the

88. Graves *v.* Deterling, 3 N. Y. St. 128 [*affirmed* in 120 N. Y. 447, 24 N. E. 655].

Recital of agreement in a deed is equivalent to an agreement made by the deed. Commonwealth Bank *v.* Vance, 4 Litt. (Ky.) 168.

89. Adams *v.* Valentine, 33 Fed. 1.

Where the language of a deed is ambiguous, in determining whether a particular provision is a condition subsequent or a covenant, the entire instrument and the object of a grant will be looked to, to ascertain the real intent of the parties. Silver Springs, etc., R. Co. *v.* Van Ness, (Fla. 1903) 34 So. 884.

90. Sharon Iron Co. *v.* Erie, 41 Pa. St. 341. See also Woodruff *v.* Trenton Water Power Co., 10 N. J. Eq. 489.

91. Hoyt *v.* Ketcham, 54 Conn. 60, 5 Atl. 606.

92. Parsons *v.* Miller, 15 Wend. (N. Y.) 561.

If there is no intention to create a condition subsequent, and the contrary clearly appears and the legal effect of the proviso is to create a reservation or exception in favor of the grantor, it will be so construed. Baker *v.* Mott, 78 Hun (N. Y.) 141, 28 N. Y. Suppl. 968 [*affirmed* in 152 N. Y. 637, 46 N. E. 1144]. And where the intent is not to create a technical condition, the breach of which would work a forfeiture, but the purpose is only to regulate the mode in which the grantee may use and enjoy the land, the language will be held a restriction. Ayling *v.* Kramer, 133 Mass. 12.

A provision is a condition and not a restriction, where land is conveyed to a city for public improvement, conditioned that a certain strip should forever be and remain a public way. May *v.* Boston, 158 Mass. 21, 32 N. E. 902.

Provisions are mere restrictions and not conditions where one of several conveyances upon which the title depended stipulated that no building should be erected within ten feet of a certain street; another recited that it was on condition that no building should ever be erected within said distance of said street; and another that the premises were sold subject to the condition that no building should ever be erected thereon within ten feet of said street. Cassidy *v.* Mason, 171 Mass. 507, 50 N. E. 1027.

93. Slater *v.* Dudley, 18 Pick. (Mass.) 373.

94. Papst *v.* Hamilton, 133 Cal. 631, 66 Pac. 10; Gray *v.* Blanchard, 8 Pick. (Mass.) 284; Jackson *v.* Allen, 3 Cow. (N. Y.) 220.

95. Providence *v.* St. John's Lodge, 2 R. I. 46.

But if all the right to land passes by a covenant, a subsequent clause giving possession must be rejected, since a subsequent covenant to yield the land on the happening of a certain event cannot by implication extend the operation of the express covenant beyond its terms, the intent of which is to give up the title and interest in the land. Grimsley *v.* White, 3 Mo. 257.

96. Ricketts *v.* Louisville, etc., R. Co., 91 Ky. 221, 15 S. W. 182, 12 Ky. L. Rep. 863, 34 Am. St. Rep. 176, 11 L. R. A. 422.

97. Salms *v.* Martin, 63 N. C. 608; Bates *v.* Swiger, 40 W. Va. 420, 21 S. E. 874.

98. Arbuckle *v.* Haden, 7 J. J. Marsh. (Ky.) 94.

99. Kellam *v.* Kellam, 2 Patt. & H. (Va.) 357.

1. Epperson *v.* Mills, 19 Tex. 65.

grantor.[2] And where the statute so requires the condition should evince some intention of actual or pecuniary benefit to the grantor, otherwise it will be merely nominal and should be disregarded.[3] Again if a proviso is incomplete and meaningless it will be inoperative.[4] A proviso is also void which is inconsistent with or repugnant to the grant or title.[5] Again an abandonment in perpetuity to the vendees excludes the validity of a condition that they shall use the land under certain restrictions.[6]

b. Conditions Subsequent. Conditions subsequent are in general good whenever they are not impossible to be performed at the time, or made so afterward by the act of God or of the grantor; and when they are not contrary to law nor repugnant to the deed itself.[7]

c. Restraint or Derogation of Marriage. Conditions which are in restraint or derogation of marriage and which operate as a restriction thereon are void.[8]

d. Use of Property — (i) *Generally.* A deed may specify, limit, or restrict the use, occupation, or disposition of property,[9] or prohibit its use for a specified purpose.[10] But conditions or restrictions affecting the use or occupation of property should not be against public policy,[11] prohibit such use in conformity with the title conveyed,[12] or be void for remoteness as to the persons in whom the title shall vest upon breach of the limitation.[13]

(ii) *Intoxicating Liquors.* A deed may prohibit the use of property for the manufacture, keeping, or sale of intoxicating liquors.[14]

2. Alemany *v.* Daly, 36 Cal. 90.

3. Barrie *v.* Smith, 47 Mich. 130, 10 N. W. 168.

4. Abbott *v.* Pike, 33 Me. 204.

5. Teany *v.* Mains, 113 Iowa 53, 84 N. W. 953; Hill *v.* Priestly, 52 N. Y. 635; Brown *v.* Stuart, 12 U. C. Q. B. 510.

A condition is not repugnant to the nature of the estate but is valid which provides that a road corporation, grantee, should reasonably maintain its road. Cornelius *v.* Ivins, 26 N. J. L. 376. Nor is a condition repugnant to the grant on the ground that the inhabitants may destroy the beach, where such condition allows such inhabitants to take and carry away sand and gravel for use only in the town. Middleton *v.* Newport Hospital, 16 R. I. 319, 15 Atl. 800, 1 L. R. A. 191. And a condition is not repugnant to the grant because it prohibits the sale of intoxicating liquors on the premises. Cowell *v.* Colorado Springs Co., 100 U. S. 55, 25 L. ed. 547 [*affirming* 3 Colo. 82].

Subsequent restrictions are void when inconsistent with the import of previous limitations vesting an absolute estate in the first taker. Carradine *v.* Carradine, 33 Miss. 698.

6. Arnauld *v.* Delachaise, 4 La. Ann. 109.

7. Taylor *v.* Sutton, 15 Ga. 103, 60 Am. Dec. 682.

Condition subsequent impossible of performance is void. Stockton *v.* Weber, 98 Cal. 433, 33 Pac. 332.

Condition subsequent not repugnant to grant is valid. Tomlin *v.* Blunt, 31 Ill. App. 234.

8. Randall *v.* Marble, 69 Me. 310, 31 Am. Rep. 281; Munroe *v.* Hall, 97 N. C. 206, 1 S. E. 651.

Contracts in restraint of marriage see CONTRACTS, 9 Cyc. 518.

A proviso may be valid where its terms do not import such a restriction or restraint. Arthur *v.* Cole, 56 Md. 100, 40 Am. Rep. 409.

9. **The rule applies** to a deed of gift to a church conditioned that it is not to be sold or to be used for any other purpose than as a church for the benefit of a certain church (Grissom *v.* Hill, 17 Ark. 483); to a covenant that the grantee will not erect any structure obstructing the view of a person not a party to the deed (Gibert *v.* Peteler, 38 N. Y. 165, 97 Am. Dec. 785); to keeping open portions of land as public streets (Tinkham *v.* Erie R. Co., 53 Barb. (N. Y.) 393); to a condition that a sawmill and grist-mill doing business shall be kept on the premises (Sperry *v.* Pond, 5 Ohio 387, 24 Am. Dec. 296); and to a condition that a county court-house be erected within a certain time and kept on the land for a certain time (Pepin Co. *v.* Prindle, 61 Wis. 301, 21 N. W. 254).

10. Post *v.* Bernheimer, 31 Hun (N. Y.) 247; Post *v.* Weil, 8 Hun (N. Y.) 418.

11. St. Louis, etc., R. Co. *v.* Mathers, 71 Ill. 592, 22 Am. Rep. 122.

12. Craig *v.* Wells, 11 N. Y. 315.

13. North Adams First Universalist Soc. *v.* Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231.

14. *Connecticut.*—Collins Mfg. Co. *v.* Marcy, 25 Conn. 242.

Kansas.— O'Brien *v.* Wetherell, 14 Kan. 616.

Kentucky.— Hatcher *v.* Andrews, 5 Bush 561.

Michigan.— Chippewa Lumber Co. *v.* Tremper, 75 Mich. 36, 42 N. W. 532, 13 Am. St. Rep. 420, 4 L. R. A. 373; Watrous *v.* Allen, 57 Mich. 362, 24 N. W. 104, 58 Am. Rep. 363; Smith *v.* Barrie, 56 Mich. 314, 22 N. W. 816, 56 Am. Rep. 391.

Minnesota.— Sioux City, etc., R. Co. *v.* Davis, 49 Minn. 308, 51 N. W. 907; Sioux

e. Restraint of Alienation. If an estate is granted in fee, conditions or restrictions absolutely restraining alienation, when repugnant to the estate created, are void[15] and against public policy.[16] There may, however, be a restriction upon such power to a limited extent.[17] So a deed may be conditioned that a grantee shall not alienate for a particular time or to a particular person.[18] An exception may also exist as to the separate estate of married women.[19]

f. Effect of Invalidity. The deed is not vitiated or the grant defeated or an absolute estate divested by a void, inoperative, or illegal condition.[20]

3. Construction and Operation — a. Generally. Provisos, conditions, or restrictions cannot be extended beyond the clear meaning of the language used,[21] but will be strictly construed.[22] So restrictions are construed most strongly against the grantor.[23] The construction should also be conformable to the letter and

City, etc., R. Co. *v.* Singer, 49 Minn. 301, 51 N. W. 905, 32 Am. St. Rep. 554, 15 L. R. A. 751.

New York.— Plumb *v.* Tubbs, 41 N. Y. 442.

Pennsylvania.— Lehigh Coal, etc., Co. *v.* Cluck, 5 Pa. Co. Ct. 662.

Texas.— Fly *v.* Guinn, 2 Tex. Unrep. Cas. 300.

United States.—Cowell *v.* Colorado Springs Co., 100 U. S. 55, 25 L. ed. 547 [*affirming* 3 Colo. 82].

See 16 Cent. Dig. tit. "Deeds," § 480.

15. *California.*— Prey *v.* Stanley, 110 Cal. 423, 42 Pac. 908; Murray *v.* Green, 64 Cal. 363, 28 Pac. 118.

Indiana.— Langdon *v.* Ingram, 28 Ind. 360.

Iowa.— Case *v.* Dwire, 60 Iowa 442, 15 N. W. 265; McCleary *v.* Ellis, 54 Iowa 311, 6 N. W. 571, 37 Am. Rep. 205.

New York.—De Peyster *v.* Michael, 6 N. Y. 467, 57 Am. Dec. 470.

North Carolina.— Pritchard *v.* Bailey, 113 N. C. 521, 18 S. E. 668; Hardy *v.* Galloway, 111 N. C. 519, 15 S. E. 890, 32 Am. St. Rep. 828; Munroe *v.* Hall, 97 N. C. 206, 1 S. E. 651.

Ohio.— Jenkins *v.* Artz, 6 Ohio S. & C. Pl. Dec. 439.

Pennsylvania.— McWilliams *v.* Nisly, 2 Serg. & R. 507, 7 Am. Dec. 654.

Virginia.— Camp *v.* Cleary, 76 Va. 140.

See 16 Cent. Dig. tit. "Deeds," § 479.

Rule does not embrace conditions not repugnant to an estate granted, nor against public policy, nor as a perpetuity (Hunt *v.* Wright, 47 N. H. 396, 93 Am. Dec. 451); reasonable restrictions, as that the grantee shall not convey before complying with certain stipulations as to improvements (Grigg *v.* Landis, 21 N. J. Eq. 494); a conveyance to B and C, his wife, in undivided moieties, with a proviso that C should not encumber her part or sell without B's consent, and that she should have power to devise the same (Hicks *v.* Cochran, 4 Edw. (N. Y.) 107); a conveyance to B in fee, conditioned that B is not to sell during the grantor's natural life unless the grantor sells his land, and if B dies before the grantor B is to leave the land to his wife (McWilliams *v.* Nisly, 2 Serg. & R. (Pa.) 507, 7 Am. Dec. 654); and a provision creating a servitude and annexing it to another estate as an easement appurtenant, declaring that the grantee shall not dispose of the easement separately from the property to which it is annexed (Warren *v.* Syme, 7 W. Va. 474). And a constitutional provision prohibiting certain restraints on alienation reserved in any grant of land and abolishing feudal tenures does not embrace as a violation thereof a deed to a cemetery association that the grantee pay forty dollars for each lot sold as a burial-place and three dollars for each grave opening, no lot to be sold for less than eighty dollars, and on breach by the grantee of any covenants of the deed all lots without interment to revert to the grantor. Bennett *v.* Washington Cemetery, 11 N. Y. Suppl. 203, 24 Abb. N. Cas. (N. Y.) 459.

16. Pritchard *v.* Bailey, 113 N. C. 521, 18 S. E. 668.

17. Camp *v.* Cleary, 76 Va. 140.

18. Langdon *v.* Ingram, 28 Ind. 360; McWilliams *v.* Nisly, 2 Serg. & R. (Pa.) 507, 7 Am. Dec. 654; Wolverton *v.* Haupt, 2 Chest. Co. Rep. (Pa.) 573. See also Hill *v.* Hill, 43 Pa. St. 528. But *compare* Latimer *v.* Waddell, 119 N. C. 370, 26 S. E. 122.

Condition in a deed of gift that the grantee shall sell to certain person at a price named is valid. Rice *v.* Hall, 42 S. W. 99, 19 Ky. L. Rep. 814.

Conveyance by a grandfather to grandchildren to be held in common and "unsold" until the youngest child reaches the age of twenty-one, without any reservation or limitation over, does not prevent a probate sale for the children's benefit when necessary. Bouldin *v.* Miller, (Tex. Civ. App. 1894) 26 S. W. 133.

19. Camp *v.* Cleary, 76 Va. 140. See, generally, Husband and Wife.

20. St. Louis, etc., R. Co. *v.* Mathers, 71 Ill. 592, 22 Am. Rep. 122; Myers *v.* Daviess, 10 B. Mon. (Ky.) 394; Barksdale *v.* Elam, 30 Miss. 694.

21. Atlantic City *v.* Young, etc., Amusement Co., 63 N. J. Eq. 831, 53 Atl. 168 [*reversing* 62 N. J. Eq. 139, 147, 49 Atl. 822, 1135].

The right of a corporation to sell and convey is not affected by conditions in a deed to such corporation as to the distribution of the proceeds of the land when sold. McClintock *v.* Bourbon County Agricultural Soc., 49 S. W. 23, 20 Ky. L. Rep. 1246.

22. Hays *v.* St. Paul M. E. Church, 196 Ill. 633, 63 N. E. 1040.

23. Klaer *v.* Ridgway, 86 Pa. St. 529.

obvious intent of the grant, and if a proviso is nowhere stated to be a binding condition it will not be so held. If, however, there is only one construction which will give full effect to all the words of the instrument, it will be followed.[24] Again, conditions should not be totally repugnant to or in conflict with prior parts of the deed.[25] A prior condition may, however, be controlled by a later one where any other construction would be insensible.[26] And the intention of the parties may control conditional words,[27] even to the extent of affecting their ordinary meaning.[28] So all conditions and provisos should be taken together and construed *in pari materia*,[29] having in view the manifest intent of the instrument,[30] based upon all the clauses of the deed so as to harmonize the entire deed with the granting clause.[31] Again words of reservation or conditions in a conveyance *in præsenti* may operate respectively to the full extent of their terms and still be in consonance with each other.[32] Different instruments, contemporaneously executed, should be construed together, when necessary, and be treated as one;[33] although a recited agreement should not be so indefinite as to be unenforceable, nor should the condition therein be one which is merely collateral to the grant.[34] Again where the condition upon which the grantor predicates the reversion does not occur the estate will vest in fee.[35]

b. Conditions Precedent. Conditions precedent are such as must happen or be performed before an estate can vest or be discharged. They must be strictly, literally, and punctually performed.[36] The estate will vest, however, upon strict

24. Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735.

25. Canal Bridge *v.* Methodist Religious Soc., 13 Metc. (Mass.) 335.

There should be no repugnancy to the context. Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735.

26. Horner *v.* Dellinger, 18 Fed. 495.

27. Billings *v.* Warren, 21 Tex. Civ. App. 77, 50 S. W. 625, holding that if the intention is to convey a complete absolute title the deed will so operate even though the words "as trustee" or "in trust" are used at the grantee's instance.

28. Peters *v.* Balke, 170 Ill. 304, 48 N. E. 1012 [*affirming* 68 Ill. App. 587]. See also Clarke *v.* Colls, 9 H. L. Cas. 601; *In re* Sanders, L. R. 1 Eq. 675, 12 Jur. N. S. 351, 14 Wkly. Rep. 576.

29. Sheppard *v.* Thomas, 26 Ark. 617.

30. Wolverton *v.* Haupt, 2 Chest. Co. Rep. (Pa.) 573.

31. Dunlap *v.* Mobley, 71 Ala. 102.

But it will not be presumed or inferred by construction that parties intended to leave to implication from one part of a deed what is expressly granted in another part; and a provisional right reserved to the grantors to take possession becomes a condition of the grant and not void for repugnancy. Providence *v.* St. John's Lodge, 2 R. I. 46.

32. Hihn *v.* Peck, 30 Cal. 280.

33. Downing *v.* Rademacher, 133 Cal. 220, 65 Pac. 385, 85 Am. St. Rep. 160 [*modifying* (1900) 62 Pac. 1055]; Richter *v.* Richter, 111 Ind. 456, 12 N. E. 698 (warranty deed and mortgage); Van Horn *v.* Mercer, 29 Ind. App. 277, 64 N. E. 531; Ritchie *v.* Kansas, etc., R. Co., 55 Kan. 36, 39 Pac. 718 (general warranty deed and written contract).

If a subsequent deed releases and extinguishes the right of reverter and discloses no other intent, but general words in a former deed are transcribed which might or might not create a condition, such general words will not be construed to imply a condition. Mercer Academy *v.* Rusk, 8 W. Va. 373.

Where grantees take under the first article of a marriage contract and can convey a fee they will not be bound by limitations in another article of the contract relating to the purchase by the grantor of productive real estate for his daughter's support, even though he afterward conveyed to her other unproductive land with the same restrictions; productive property having also been conveyed under the second article. Kent *v.* Allen, 32 Mo. 87.

Where the only condition of a mortgage was the support of the mortgagee, it was held that it could not be limited by a contemporaneous agreement that the mortgagee should reside on the premises to be entitled to her support. Allen *v.* Parker, 27 Me. 531.

34. Howlett *v.* Howlett, 115 Mich. 75, 72 N. W. 1100.

35. Terrell *v.* Huff, 108 Ga. 655, 34 S. E. 345.

If a conveyance is made upon a condition expressed it must be conclusively presumed, in the absence of fraud, accident, or mistake, to be the only condition, and if that is kept the title cannot be assailed. Dunbar *v.* Stickler, 45 Iowa 384.

36. Vanhorne *v.* Dorrance, 2 Dall. (U. S.) 304, 1 L. ed. 391. See also Tennessee, etc., R. Co. *v.* East Alabama R. Co., 73 Ala. 426; Sheppard *v.* Thomas, 26 Ark. 617; Stockton *v.* Weber, 98 Cal. 433, 33 Pac. 332; Rollins *v.* Riley, 44 N. H. 9; Poirier *v.* Brulé, 20 Can. Supreme Ct. 97.

An easement on a condition precedent cannot be enjoyed until the condition is performed; the conveyance is only of a right to the easement on performance of the condition. Long *v.* Swindell, 77 N. C. 176. And

and punctual performance, where there are express words to that effect, or where it is the intention, deducible from the entire instrument, to create a condition precedent.[37] But the time or manner of payment of the purchase-money may be fixed without creating a condition precedent, or such a condition may be raised according to the intent relative to payment.[38]

c. Conditions Subsequent — (I) *Generally.* Conditions subsequent working a forfeiture of the estate conveyed should be strictly construed,[39] as such conditions are not favored in law,[40] and are to be taken most strongly against the grantor to prevent such forfeiture.[41] So an estate is not created on condition subsequent, unless the terms will admit of no other construction, where the deed by its terms expressly provides a lien in case of the grantee's default.[42]

(II) *Test of Conditions Subsequent* — (A) *Rules.* Conditions subsequent are raised only by apt and sufficient words, which must not only be such as of themselves import a condition, but they must be so connected with the grant in the deed as to qualify or restrain it.[43] In other words in order that a clause or

if all that is granted is an easement for a particular purpose, such as the right to locate and construct a railroad, and the language of the deed does not purport to convey a fee, condition or otherwise, no land whatever is conveyed until the act intended is performed. Lake Erie, etc., R. Co. *v.* Ziebarth, 6 Ind. App. 228, 33 N. E. 256.

If a deed of gift is conditional on release from a certain liability, release is a condition precedent, without performance of which title does not vest in the grantees. Lusk *v.* McNamer, 24 Miss. 58.

37. Brannan *v.* Mesick, 10 Cal. 95. See also Wilson *v.* Galt, 18 Ill. 431, where upon intention and surrounding circumstances, a condition was held a condition precedent.

Charge or lien may be raised as to the land under a provision for maintenance, and the deed will not become absolute until performance, where such is the intention. Childs *v.* Rue, 84 Minn. 323, 87 N. W. 918.

38. **Time when purchase-money is to be paid may be fixed** in the conveyance, but it does not make payment of the same a condition to be complied with before the title passes (McRae *v.* Stillwell, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513. See also Dunlap *v.* Mobley, 71 Ala. 102), where a lien is expressly reserved on the property (Sheppard *v.* Thomas, 26 Ark. 617). But if a lien is retained to secure payment, such lien reserved proclaims the nature of the contract for conveyance and announces the terms and conditions upon which the title, legal and equitable, is to become perfect, and until that stipulation is discharged and that condition fulfilled there is no absolute investiture of the title. Caldwell *v.* Fraim, 32 Tex. 310. And a deed giving full power of attorney to the grantees to take possession of, and in the grantees' name to sell property, the consideration for which is to be paid thereafter in instalments, and which conveyance covenants that if such payments shall be made the instrument shall take effect as a full and complete conveyance in fee, is a deed on condition precedent. Talbert *v.* Hopper, 42 Cal. 397.

39. *Illinois.*— Wilson *v.* Galt, 18 Ill. 431.

Indiana.— Van Horn *v.* Mercer, 29 Ind. App. 277, 64 N. E. 531.

Kansas.— Ritchie *v.* Kansas, etc., R. Co., 55 Kan. 36, 39 Pac. 718.

Massachusetts.— Merrifield *v.* Cobleigh, 4 Cush. 178.

Minnesota.— Chute *v.* Washburn, 44 Minn. 312, 46 N. W. 555.

Mississippi.— Gadberry *v.* Sheppard, 27 Miss. 203.

New Hampshire.— Hoyt *v.* Kimball, 49 N. H. 322; Emerson *v.* Simpson, 43 N. H. 475, 80 Am. Dec. 184, 82 Am. Dec. 168.

New Jersey.— Southard *v.* Central R. Co., 26 N. J. L. 13.

New York.— Ludlow *v.* New York, etc., R. Co., 12 Barb. 440.

See 16 Cent. Dig. tit. "Deeds," § 488.

Under a condition subsequent the estate vests immediately in the grantee, subject to be revested in the grantor by a non-performance of the condition. Rollins *v.* Riley, 44 N. H. 9. See also Ludlow *v.* New York, etc., R. Co., 12 Barb. (N. Y.) 440.

40. Brown *v.* State, 5 Colo. 496; Taylor *v.* Sutton, 15 Ga. 103, 60 Am. Dec. 682; Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638; Van Horn *v.* Mercer, 29 Ind. App. 277, 64 N. E. 531; Laberee *v.* Carleton, 53 Me. 211.

41. Van Horn *v.* Mercer, 29 Ind. App. 277, 64 N. E. 531; Hooper *v.* Cummings, 45 Me. 359.

42. Van Horn *v.* Mercer, 29 Ind. App. 277, 64 N. E. 531.

43. Laberee *v.* Carleton, 53 Me. 211.

Conditions subsequent exist where a city vacates an alley on condition that defendant will build on it in a certain time an opera-house of certain dimensions, although equity will not divest the title because the building is not of the required dimensions (Marshalltown *v.* Forney, 61 Iowa 578, 16 N. W. 740); where land is conveyed for use solely for a cotton press with a provision for reversion (Houston, etc., R. Co. *v.* Ennis-Culvert Compress Co., 23 Tex. Civ. App. 441, 56 S. W. 367); where a royal grant reserved a quit-rent in fee, requiring certain improvements to be made, and providing that for failure to clear, etc., and to pay rent the estate should determine (Sneed *v.* Ward, 5 Dana (Ky.) 187); where there is a grant of a township

proviso shall constitute a condition subsequent, the intention of the parties must be clearly expressed in some words importing that the estate is to depend upon a contingency provided for.[44] This intention must, however, be gathered from the entire instrument and the contract must be construed according to its terms, especially where there are express words used.[45] But these rules do not necessitate the use of express words to constitute a condition subsequent, nor need there be any express power in the writings to make reëntry for condition broken.[46] Again a condition subsequent is one operating on an estate already created and vested and rendering it liable to be defeated.[47] All that remains in the grantor is the possi-

on condition that the grantee settle a certain number of families thereon within a specified time (Chapman *v.* Pingree, 67 Me. 198); where the words are "providing they [the grantees] fence the land and keep it in repair" (Hooper *v.* Cummings, 45 Me. 359); where the reservation is for public use in a grant to the state (Porter *v.* Griswold, 6 Me. 430); where after the grantor's death the grantee is to pay a certain sum to a third person (Weinreich *v.* Weinreich, 18 Mo. App. 364); where the condition provides that a raceway be made in conformity with the act incorporating the grantor, otherwise to revert; also for the erection of a bridge across the raceway, for a convenient landing-place, for the erection and maintenance of a fence, and for the use of the raceway for watering cattle and to take ice therefrom (Woodruff *v.* Trenton Water-Power Co., 10 N. J. Eq. 489); where a deed by the trustees of a town stipulates that the grantee "shall allow all people to pass and repass, to fish, fowl and hunt," etc. (Parsons *v.* Miller, 15 Wend. (N. Y.) 561); where the condition was that the grant should be void in case it should at any time afterward appear that the grantee was not seized of an estate in fee simple of adjoining lands (Towle *v.* Smith, 2 Rob. (N. Y.) 489); where the condition is against the sale of spirituous liquors on the premises (Jeffery *v.* Graham, 61 Tex. 481); where words subsequent to the grant and description are expressive of a condition subsequent followed by the words "together with all and singular the hereditaments and appurtenances," etc., followed by the *habendum* (Lawe *v.* Hyde, 39 Wis. 345); or where the condition is that on failure to comply with the conditions of a certain bond the estate shall cease, etc., coupled with a provision for reëntry, etc. (Rogan *v.* Walker, 1 Wis. 527). But there is not a condition subsequent where a grant, for a consideration, is made to a trustee on trust that he "shall at all times permit all the white religious societies of christians and the members of such societies to use the land as a common burying ground and for no other purpose." Brown *v.* Caldwell, 23 W. Va. 187, 48 Am. Rep. 376. See also Methodist Protestant Church *v.* Laws, 7 Ohio Cir. Ct. 211.

Conditions subsequent will not be implied from the fact that the consideration for the deed was merely nominal, where it does not appear that the use of the property for the purpose specified in the deed was a matter specially advantageous to the grantor. Olcott *v.* Gabert, 86 Tex. 121, 23 S. W. 985.

44. Baker *v.* Mott, 78 Hun (N. Y.) 141, 28 N. Y. Suppl. 968 [*affirmed* in 152 N. Y. 637, 46 N. E. 1144].

45. Downing *v.* Rademacher, 133 Cal. 220, 65 Pac. 385, 85 Am. St. Rep. 160; Hihn *v.* Peck, 30 Cal. 280; Van Horn *v.* Mercer, 29 Ind. App. 277, 64 N. E. 531.

If from the nature of the acts to be performed by the grantee and the time required for their performance it is evidently the intention of the parties that the estate shall be held and enjoyed upon condition that the grantee perform the acts specified (Downing *v.* Rademacher, 133 Cal. 220, 65 Pac. 385, 85 Am. St. Rep. 160), or it is evident that the clauses in question were inserted with a view to defeat a title previously vested, on the happening of a certain contingency named in the deed, the estate is upon condition (Hihn *v.* Peck, 30 Cal. 280).

46. Glocke *v.* Glocke, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458. See also Thomas *v.* Record, 47 Me. 500, 74 Am. Dec. 500. But see Ecroyd *v.* Coggeshall, 21 R. I. 1, 41 Atl. 260, 79 Am. St. Rep. 741.

Where there are express words in a deed which of themselves make a condition subsequent, there is no use of a clause reserving a right of reëntry for breach thereof in order to enable the grantor to avail himself of a forfeiture. Adams *v.* Ore Knob Copper Co., 7 Fed. 634, 4 Hughes 589.

47. Brown *v.* State, 5 Colo. 496; Memphis, etc., R. Co. *v.* Neighbors, 51 Miss. 412.

In a conveyance upon a condition subsequent the estate vests immediately upon the execution and delivery of the deed and the condition has no effect to limit the title until it becomes operative to defeat it (Shattuck *v.* Hastings, 99 Mass. 23; Rollins *v.* Riley, 44 N. H. 9. See also Sheppard *v.* Thomas, 26 Ark. 617), that is, the vested estate is subject to be revested in the grantor by non-performance of the condition, and ordinarily the grantor must reënter after condition broken in order that the estate may revest in him (Rollins *v.* Riley, 44 N. H. 9).

If the conveyance does not depend upon the performance of the act the title will pass *in præsenti*. Cayton *v.* Walker, 10 Cal. 450. And where the grantee as part of the consideration is to pay a mortgage or assume the grantor's indebtedness thereunder, this is not a condition on the breach of which the title will revest in the grantor, but vests the title absolutely in the grantee and creates the relation of debtor as to the grantor's creditor. Martin *v.* Splivalo, 69 Cal. 611, 11 Pac. 484.

bility of reverter or right of entry on condition broken. The estate will remain defeasible until the condition be performed, destroyed, or barred by the statute of limitations, or by estoppel.[48] And if the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee performs the act after taking possession then the condition is subsequent.[49] Again a condition, the breach of which is good ground in equity for canceling the conveyance of which it is a part, will be held to be a condition subsequent, unless there is something in the instrument showing a contrary intent.[50]

(B) *Extent of Operation of Rules.* A condition subsequent may provide for the use and occupation of the property by the grantee, for maintenance, for an annuity, or other periodical payments;[51] for the payment of the grantor's debts or for saving him harmless therefrom;[52] for the use of the property for relig-

48. Memphis, etc., R. Co. *v.* Neighbors, 51 Miss. 412 [*citing* Warner *v.* Bennett, 31 Conn. 468; Guild *v.* Richards, 16 Gray (Mass.) 317; Nicoll *v.* New York, etc., R. Co., 12 N. Y. 121].

49. Underhill *v.* Saratoga, etc., R. Co., 20 Barb. (N. Y.) 455. See also Chute *v.* Washburn, 44 Minn. 312, 46 N. W. 555.

50. Blake *v.* Blake, 56 Wis. 392, 14 N. W. 173.

51. A condition subsequent may be one which provides for the use and occupation of the property, during life, by the grantors, or by the grantor (Suisun Bank *v.* Stark, 106 Cal. 202, 39 Pac. 531; Hefner *v.* Yount, 8 Blackf. (Ind.) 455; Sherman *v.* Dodge, 28 Vt. 26); or by his wife (Tallman *v.* Snow, 35 Me. 342); or for the maintenance during life of the grantors, or of the grantor (Richter *v.* Richter, 111 Ind. 456, 12 N. E. 698; Hefner *v.* Yount, 8 Blackf. (Ind.) 455; Thomas *v.* Record, 47 Me. 500, 74 Am. Dec. 500; Green *v.* Thomas, 11 Me. 318; Mott *v.* Richtmyer, 57 N. Y. 49; Jackson *v.* Topping, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515; Soper *v.* Guernsey, 71 Pa. St. 219; Shum *v.* Claghorn, 69 Vt. 45, 37 Atl. 236; Tracy *v.* Hutchins, 36 Vt. 225. But see Ayer *v.* Emery, 14 Allen (Mass.) 67; Campau *v.* Chene, 1 Mich. 400); or of his wife alone (Tanner *v.* Van Bibber, 2 Duv. (Ky.) 550); or of his minor children (Suisun Bank *v.* Stark, 106 Cal. 202, 39 Pac. 531); or for the payment of a periodical sum or an annuity (Suisun Bank *v.* Stark, 106 Cal. 202, 39 Pac. 531; Meyer *v.* Meyer, 40 Ill. App. 94; Drew *v.* Baldwin, 48 Wis. 529, 4 N. W. 576). And a grantor has a lien on land for an annuity rather than a right to claim a forfeiture for non-payment of the annuity, where the consideration of a deed is the payment of an annuity to the grantor during life. Gallaher *v.* Herbert, 117 Ill. 160, 7 N. E. 511. But a conveyance by parents to a son, reserving a life-estate, and stating that the son "is to pay the taxes on said land" and has to support the "grantors during their natural lifetime and at their death" such son "shall have possession" is not a deed on condition subsequent. Studdard *v.* Wells, 120 Mo. 25, 25 S. W. 201. Nor is a condition annexed to an estate by way of defeasance, where the consideration of the deed is certain profits and advantages, contained in a bond of even date, which provided that the bargainer was to be supported for life by the bargainee, to which was added a *nota bene* to the effect that the land was not to be sold or disposed of. Hart *v.* Dougherty, 51 N. C. 86. And a provision in a deed to a daughter of the grantor, in consideration of her agreement to support him, that she shall be prohibited from transferring the land does not apply after her father's death. City *v.* Wood, 15 Wkly. Notes Cas. (Pa.) 94. Again, where the condition was for the support of the grantors, and on the failure of the grantee to do so the deed to be void and the premises to revert, it was decided that the condition involved a forfeiture on failure of the grantee to perform, which was intended as security in the nature of a penalty for nonperformance. Spaulding *v.* Hallenbeck, 39 Barb. (N. Y.) 79.

52. Michigan State Bank *v.* Hammond, 1 Dougl. (Mich.) 527; Michigan State Bank *v.* Hastings, 1 Dougl. (Mich.) 224, 41 Am. Dec. 549; Jackson *v.* Topping, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515; Nash *v.* Le Clercq, 17 Fed. Cas. No. 10,021.

Under a provision that the grantee should pay all the grantor's debts, a debt payable in future will be considered as a debt due. Drum *v.* Painter, 27 Pa. St. 148. So if the condition is to pay a claim to a certain amount "should so much be due thereto" and such claim has on suit been scaled to a much less sum the amount to be paid is the reduced sum. Barley *v.* Layman, 79 Va. 518. Again where a father conveyed a farm to a son, reserving its control during the life of the grantor or his wife, and subject to the debts of either, and the father died and the widow became surety on certain of the son's debts to a considerable amount, such debts were held not to be within the deed. Merrifield *v.* Merrifield, 82 Ky. 526.

ious,[53] school or educational,[54] county or municipal,[55] or for railroad purposes;[56] and for use as a street or public way.[57]

d. Persons Entitled to Benefit of Condition or Breach. Non-performance of a condition can be taken advantage of only by the grantor or his heirs,[58] or by the

53. Board of Education *v.* Normal First Baptist Church, 63 Ill. 204. See also Branch *v.* Wesleyan Cemetery Assoc., 11 Ohio Cir. Ct. 185, 5 Ohio Cir. Dec. 326. But see Farnham *v.* Thompson, 34 Minn. 330, 26 N. W. 9, 57 Am. Rep. 59, holding that a condition subsequent is not created by the use, following the description, of the words "for the purpose of erecting a church thereon only." And see Strong *v.* Doty, 32 Wis. 381, holding that land does not revert, in the absence of a condition to that effect, where granted in trust for the purpose of erecting and maintaining a church thereon and it is so used for many years and then abandoned and sold for other uses.

Deed is in trust and not on condition where the premises and the *habendum* clearly show that it was in trust for a religious use. Baldwin *v.* Atwood, 23 Conn. 367.

Use created may become executed in a town for the religious purposes expressed. Orford Union Cong. Soc. *v.* West Cong. Soc., 55 N. H. 463.

54. Mead *v.* Ballard, 7 Wall. (U. S.) 290, 19 L. ed. 190. See also Papst *v.* Hamilton, 133 Cal. 631, 66 Pac. 10.

When no condition subsequent exists under grant for school or educational purposes see Higbee *v.* Rodeman, 129 Ind. 244, 28 N. E. 442; Heaston *v.* Randolph County, 20 Ind. 398; Faith *v.* Bowles, 86 Md. 13, 37 Atl. 711, 63 Am. St. Rep. 489; Raley *v.* Umatilla County, 15 Oreg. 172, 13 Pac. 890, 3 Am. St. Rep. 142. See also Hunter *v.* Murfee, 126 Ala. 123, 28 So. 7; Castleton *v.* Langdon, 19 Vt. 210.

55. Flaten *v.* Moorhead, 51 Minn. 518, 53 N. W. 807, 19 L. R. A. 195; Clarke *v.* Brookfield, 81 Mo. 503, 51 Am. Rep. 243; Adams *v.* Lindell, 5 Mo. App. 197 [*affirmed* in 72 Mo. 198]; Union College *v.* New York, 65 N. Y. App. Div. 553, 73 N. Y. Suppl. 51. But see Crow *v.* Jefferson County Sup'rs, 5 W. Va. 245.

When not a condition subsequent as to county or municipal use see Rawson *v.* Uxbridge School Dist. No. 5, 7 Allen (Mass.) 125, 83 Am. Dec. 670; Ecroyd *v.* Coggeshall, 21 R. I. 1, 41 Atl. 260, 79 Am. St. Rep. 741; Ward *v.* New England Screw Co., 29 Fed. Cas. No. 17,157, 1 Cliff. 565.

Grant is determinable upon the cessation of the necessity for which it was made, as where a proviso was that a strip of land adjoining a prison should remain forever unbuilt upon, so that prisoners might not escape, and the prison was removed. Seegel *v.* Lauer, 148 Pa. St. 236, 23 Atl. 996, 15 L. R. A. 547.

56. *Indiana.*— Cleveland, etc., R. Co. *v.* Coburn, 91 Ind. 557.

Iowa.— Brown *v.* Chicago, etc., R. Co., (1900) 82 N. W. 1003.

Minnesota.— Chute *v.* Washburn, 44 Minn. 312, 46 N. W. 555.

Missouri.— Baker *v.* Chicago, etc., R. Co., 57 Mo. 265.

New York.— Nicoll *v.* New York, etc., R. Co., 12 N. Y. 121; Underhill *v.* Saratoga, etc., R. Co., 20 Barb. 455.

Washington.— Mills *v.* Seattle, etc., R. Co., 10 Wash. 520, 39 Pac. 246; Reichenbach *v.* Washington Short Line R. Co., 10 Wash. 357, 38 Pac. 1126.

Wisconsin.—Horner *v.* Chicago, etc., R. Co., 38 Wis. 165.

See 16 Cent. Dig. tit. "Deeds," § 495.

When a conveyance is not on a condition subsequent as to use for railroad purposes see Noyes *v.* St. Louis, etc., R. Co., (Ill. 1889) 21 N. E. 487; Chapin *v.* Harris, 8 Allen (Mass.) 594; Roanoke Invest. Co. *v.* Kansas City, etc., R. Co., 108 Mo. 50, 17 S. W. 1000; Morrill *v.* Wabash, etc., R. Co., 96 Mo. 174, 9 S. W. 657; Stilwell *v.* St. Louis, etc., R. Co., 39 Mo. App. 221.

57. Vail *v.* Long Island R. Co., 106 N. Y. 283, 12 N. E. 607, 27 N. Y. Wkly. Dig. 65, 60 Am. Rep. 449; Towle *v.* Remsen, 70 N. Y. 303; Towle *v.* Palmer, 1 Rob. (N. Y.) 437, 1 Abb. Pr. N. S. (N. Y.) 81.

When condition subsequent does not exist as to use of street or public way see Kilpatrick *v.* Baltimore, 81 Md. 179, 31 Atl. 805, 48 Am. St. Rep. 509, 27 L. R. A. 643; Soukup *v.* Topka, 54 Minn. 66, 55 N. W. 824; Greene *v.* O'Connor, 18 R. I. 56, 25 Atl. 692, 19 L. R. A. 262.

Street can be used for ordinary purposes if not made unfit for travel, and even though the condition was that no building or other erection except a public monument should ever be erected on the land it can be used for putting in gas-pipes, water-mains, and sewer excavations. Rose *v.* Hawley, 45 Hun (N. Y.) 592 [*affirmed* in 118 N. Y. 502, 23 N. E. 904].

58. *Arkansas.*— Skipwith *v.* Martin, 50 Ark. 141, 6 S. W. 514.

California.— Buckelew *v.* Estell, 5 Cal. 108.

Connecticut.— Bowen *v.* Bowen, 18 Conn. 535; East Haven *v.* Hemingway, 7 Conn. 186.

Illinois.— Board of Education *v.* Normal First Baptist Church, 63 Ill. 204.

Indiana.—Higbee *v.* Rodeman, 129 Ind. 244, 28 N. E. 442.

Maine.— Thomas *v.* Record, 47 Me. 500, 74 Am. Dec. 500.

Massachusetts.—Gray *v.* Blanchard, 8 Pick. 284; Parker *v.* Nichols, 7 Pick. 111; King's Chapel *v.* Pelham, 9 Mass. 501. See also Hancock *v.* Carlton, 6 Gray 39.

Michigan.— Hayward *v.* Kinney, 84 Mich. 591, 48 N. W. 170.

Mississippi.— Winn *v.* Cole, Walk. 119.

New Hampshire.— Dewey *v.* Williams, 40 N. H. 222, 77 Am. Dec. 708.

New York.— Upington *v.* Corrigan, 79 Hun 488, 29 N. Y. Suppl. 1002 [*affirmed* in 151 N. Y. 143, 45 N. E. 359, 37 L. R. A. 794]; Pierce *v.* Keator, 9 Hun 532 [*affirmed* in 70

grantor and his legal representatives,[59] or his next of kin.[60] The benefit of a condition or breach cannot be availed of by a stranger;[61] by one who has no title;[62] by one who has no present right, legal or equitable, to the part reserved;[63] by a mere naked trespasser;[64] by an assignee who is a third person;[65] by descendants of the grantor where the words used constitute but a limitation of the grant;[66] by the vendor's heirs where the deed passes a title in fee;[67] by the heir of a *cestui que trust* or deceased beneficiary;[68] by one who is not living in the grantor's house and under his management as one of his "family," where the condition is to the "grantor and his family";[69] by one who does not sufficiently appear to be entitled to the benefit of the condition;[70] by a creditor;[71] by the owner of adjacent lands;[72] by the grantees of other lands from the original owner;[73] by a third person holding under a conveyance from the grantor;[74] or by a grantee of land of which the portion to which the condition attaches is a part.[75] Again only the state may be entitled to reënter.[76]

N. Y. 419, 26 Am. Rep. 612]. See also Jackson *v.* Topping, 1 Wend. 388, 19 Am. Dec. 515.

Ohio.— State *v.* Lake Shore, etc., R. Co., 2 Ohio S. & C. Pl. Dec. 300, 1 Ohio N. P. 292.

South Carolina.— Beaufort First Presb. Church *v.* Elliott, 65 S. C. 251, 43 S. E. 674.

Tennessee.— Ramsey *v.* Edgefield, etc., R. Co., 3 Tenn. Ch. 170.

Texas.—Henderson *v.* Beaton, 1 Tex. Unrep. Cas. 17.

See 16 Cent. Dig. tit. "Deeds," § 497.

Where church's absolute fee is subject only to defeat by reverting to the grantor, his heirs, etc., on breach of condition, if its use for the purpose designated is discontinued, and the condition is not broken till after the grantor's death, he would have no estate or interest at his death which would pass by will or inheritance to an heir not living at the time of the breach, and the property would only revert to the grantor's heirs at law living at the time the breach occurred. Henderson Methodist Protestant Church *v.* Young, 130 N. C. 8, 40 S. E. 691.

59. Bangor *v.* Warren, 34 Me. 324, 56 Am. Dec. 657.

Assigns of grantor.— McKissick *v.* Pickle, 16 Pa. St. 140.

Grantor is not entitled to recover after he assigns in insolvency. Stearns *v.* Harris, 8 Allen (Mass.) 597.

60. Reiff *v.* Reiff, 12 Montg. Co. Rep. (Pa.) 26.

61. *Georgia.*— Norris *v.* Milner, 20 Ga. 563.

Illinois.— Board of Education *v.* Normal First Baptist Church, 63 Ill. 204.

Indiana.— Boyer *v.* Tressler, 18 Ind. 260; Cross *v.* Carson, 8 Blackf. 138, 44 Am. Dec. 742.

Michigan.— Hayward *v.* Kinney, 84 Mich. 591, 48 N. W. 170.

Virginia.— Kellam *v.* Kellam, 2 Patt. & H. 357.

See 16 Cent. Dig. tit. "Deeds," § 499.

62. Holmes *v.* Fisher, 13 N. H. 9. See also Voorhees *v.* Amsterdam Presb. Church, 8 Barb. (N. Y.) 135.

63. Illinois Cent. R. Co. *v.* Indiana, etc., Cent. R. Co., 85 Ill. 211.

64. Buckelew *v.* Estell, 5 Cal. 108.

65. Pierce *v.* Keator, 9 Hun (N. Y.) 532. See also Underhill *v.* Saratoga, etc., R. Co., 20 Barb. (N. Y.) 455. But *compare* Verplanck *v.* Wright, 23 Wend. (N. Y.) 506.

66. Dodge *v.* Boston, etc., R. Corp., 154 Mass. 299, 28 N. E. 243, 13 L. R. A. 318.

67. Long *v.* Moore, 19 Tex. Civ. App. 363, 48 S. W. 43.

68. Welch *v.* Silliman, 2 Hill (N. Y.) 491.

69. Dodge *v.* Boston, etc., R. Corp., 154 Mass. 299, 28 N. E. 243, 13 L. R. A. 318.

70. Hays *v.* St. Paul M. E. Church, 196 Ill. 633, 63 N. E. 1040.

71. Cross *v.* Carson, 8 Blackf. (Ind.) 138, 44 Am. Dec. 742.

Entry by the grantor revests the estate against the grantee's creditor claiming under the levy of an execution, except there be collusion. Thomas *v.* Record, 47 Me. 500, 74 Am. Dec. 500.

Where recital was that land was conveyed subject to the payment of the balance of the purchase-money "for which a judgment has been entered in the name of C," and in the *habendum* it was declared to be subject to the payment of said sum "as aforesaid," it was held that C could maintain ejectment, either in his own name or in that of the grantor to his use, to enforce the payment of said sum. Kensinger *v.* Smith, 94 Pa. St. 384.

72. McElroy *v.* Morley, 40 Kan. 76, 19 Pac. 341; Hamlen *v.* Keith, 171 Mass. 77, 50 N. E. 462.

73. Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276.

74. Nicoll *v.* New York, etc., R. Co., 12 N. Y. 121.

75. Higbee *v.* Rodeman, 129 Ind. 244, 28 N. E. 442.

Purchaser of a part of land cannot maintain an action against another purchaser to restrain the latter from violating a condition imposed only for the original owner's benefit. Jewell *v.* Lee, 14 Allen (Mass.) 145, 92 Am. Dec. 744.

76. Towle *v.* Palmer, 1 Rob. (N. Y.) 437, 1 Abb. Pr. N. S. (N. Y.) 81.

Defendant in an action by the state to recover possession of land deeded it by a third person cannot insist on the state's forfeiture thereof because not used for the purpose re-

e. Persons Bound to Perform Condition. The agreements or conditions of a deed bind one who accepts the deed;[77] a purchaser from the grantor, with notice;[78] and any assignee or grantee of the grantee in whom the estate on condition is vested.[79] Again if a testator takes title charged with notice of and subject to a restriction those who succeed to his title cannot be heard to complain thereof.[80] But stipulations to be performed by the grantee are not obligatory unless he accepts the conveyance.[81] And if the conveyance to the grantee, of the original grantee, fails to mention the condition such subsequent grantee is not obligated.[82] Again where by force of a statute a fee vests in the remainder-man he takes the land discharged of the obligation of the condition imposed upon the life-tenant.[83] And if the grantor's obligation is limited to the immediate grantee's occupancy it ceases on determination of such occupancy.[84] It has also been held that a vendee is not affected by a condition by which his vendor held the land, as to a matter to be performed by the parties subsequent to its execution.[85] Nor is a grantee bound after he conveys the land to others where the condition is limited as to performance to the owners.[86]

f. Conditions Personal or Running With the Land — (i) *General Principles and Rules.* A condition subsequent is attached to the title and runs with it as against a subsequent grantee with actual or constructive notice.[87] Courts look to the purpose contemplated, and intention will prevail, if ascertainable and not in violation of law and equity.[88] The whole instrument as well as the particular clause relied on must also be considered.[89] A condition so intended will be annexed to the transferred estate, in form and substance, so as to burden it with the consequences of its violation, particularly where the condition is perfect in itself,[90] or where the language employed is an integral part of the deed itself limiting the extent and nature of the grant.[91] On the other hand if the language used shows personal obligations and no intent to create real servitudes it will be construed accordingly.[92] Again a compensation for an injury in the nature of a

stricted by the deed. State *v.* Lake Shore, etc., R. Co., 2 Ohio S. & C. Pl. Dec. 300, 1 Ohio N. P. 292.

77. Leach *v.* Rains, 149 Ind. 152, 48 N. E. 858; Agne *v.* Seitsinger, 85 Iowa 305, 52 N. W. 228. See also East Line, etc., R. Co. *v.* Garrett, 52 Tex. 133.

78. Downing *v.* Rademacher, 133 Cal. 220, 65 Pac. 385, 85 Am. St. Rep. 160; Whitney *v.* Union R. Co., 11 Gray (Mass.) 359, 71 Am. Dec. 715.

79. *California.*— Brannan *v.* Mesick, 10 Cal. 95.

Georgia.— Wilcoxon *v.* Harrison, 32 Ga. 480.

Kansas.— O'Brien *v.* Wetherell, 14 Kan. 616.

Massachusetts.— Whitney *v.* Union R. Co., 11 Gray 359, 71 Am. Dec. 715.

New Hampshire.— Patten *v.* Patten, 68 N. H. 603, 44 Atl. 696.

Tennessee.— Murdock *v.* Memphis, 7 Coldw. (Tenn.) 483.

Texas.— *Compare* Eddy *v.* Hinnant, 82 Tex. 354, 18 S. W. 562.

See 16 Cent. Dig. tit. "Deeds," § 501.

80. Zipp *v.* Barker, 55 N. Y. Suppl. 246 [*affirmed* in 40 N. Y. App. Div. 1, 59 N. Y. Suppl. 569].

81. Burch *v.* Burch, 52 Ind. 136.

82. Eddy *v.* Hinnant, 82 Tex. 354, 18 S. W. 562. But see Patten *v.* Patten, 68 N. H. 603, 44 Atl. 696.

83. Jarvis *v.* Davis, 99 N. C. 37, 5 S. E. 227.

84. Bosworth *v.* Pittsburgh, etc., R. Co., 1 Ohio Cir. Ct. 69, 1 Ohio Cir. Dec. 42.

85. Morrison *v.* Chandler, 44 Tex. 24.

86. Hickey *v.* Lake Shore, etc., R. Co., 51 Ohio St. 40, 36 N. E. 672, 46 Am. St. Rep. 545, 23 L. R. A. 395.

87. Quatman *v.* McCray, 128 Cal. 285, 60 Pac. 855.

Although there is no privity of contract there may be a privity of estate from which an implied contract arises to perform the conditions during the period of enjoyment. Kelly *v.* Nypano R. Co., 200 Pa. St. 229, 49 Atl. 779, 86 Am. St. Rep. 719.

88. Post *v.* Weil, 8 Hun (N. Y.) 418.

Such intention is sought in all the words and surrounding circumstances to determine the character of the condition or restrictive clause. Graves *v.* Deterling, 120 N. Y. 447, 24 N. E. 655; Post *v.* Weil, 115 N. Y. 361, 22 N. E. 145, 12 Am. St. Rep. 809, 5 L. R. A. 422.

In the absence of a different intent, a provision for the payment of money, as part of the consideration, by the grantee, within a fixed time, is merely a charge on the land. Weir *v.* Simmons, 55 Wis. 637, 13 N. W. 873.

89. Jackson *v.* Topping, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515.

90. Post *v.* Weil, 8 Hun (N. Y.) 418.

91. Foxcroft *v.* Mallett, 4 How. (U. S.) 353, 11 L. ed. 1008.

92. Sicotte *v.* Martin, 20 Quebec Super. Ct. 36. See also Spencer *v.* Spencer, 24 N. C. 96.

Obligation to maintain gates on a road

trespass cannot pass with the land as such damages are personal and do not run with the land.[93]

(II) *As to Heirs and Assigns Named or Not Named.* Where a condition as to the use of the land is a condition subsequent it runs with the land until broken and binds the grantee and his assigns,[94] especially where by a natural interpretation of the words used such condition is attached to the estate conveyed.[95] So where the condition is to erect a church it follows the estate, even though the heirs and assigns are not mentioned.[96]

(III) *Maintenance or Payment of Annuity.* Where such is the intention a provision for maintenance[97] or payment of an annuity will constitute a lien or charge upon the land.[98] So a condition for support is not a personal one and the grantee may alienate the estate and transfer the charge.[99] A distinction exists, however, between a condition which is intended as a lien or charge on the land itself and a mere contract for personal service; thus where the stipulation is the principal part of the contract it will become a personal charge on the grantee.[1] So where land is conveyed by deed poll with a reservation or provision that the grantee shall perform a certain service for the benefit of the grantor, and the grantee accepts the deed he is bound to perform the service; but the contract, whether express or implied, is a mere personal contract of the party liable and no lien is imposed upon the estate by way of security for performance.[2]

4. Performance or Breach — a. Generally. Words of a condition should not, in determining whether or not there is a performance or breach thereof, be given a meaning inconsistent with the manifest intention and purpose of the donor.[3]

laid out for the accommodation of individuals is personal merely to the applicant for a road and does not pass to the grantee of land owned by such applicant. Fellows *v.* Brown, 42 N. H. 364.

93. McFadden *v.* Johnson, 72 Pa. St. 335, 13 Am. Rep. 681.

94. O'Brien *v.* Wetherell, 14 Kan. 616.

95. Langley *v.* Chapin, 134 Mass. 82.

On a covenant for the grantor to enter for condition broken, his heir may avail himself of the covenant, although not expressly named. Jackson *v.* Topping, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515. But see Page *v.* Palmer, 48 N. H. 385.

96. Upington *v.* Corrigan, 151 N. Y. 143, 45 N. E. 359, 37 L. R. A. 794. See also Ashland *v.* Greiner, 58 Ohio St. 67, 50 N. E. 99. But see Erwin *v.* Hurd, 13 Abb. N. Cas. (N. Y.) 91.

The same rule applies to a prohibition of the use of the land for the manufacture or sale of intoxicating liquors. Odessa Imp., etc., Co. *v.* Dawson, 5 Tex. Civ. App. 487, 24 S. W. 576.

97. Goodpaster *v.* Leathers, 123 Ind. 121, 23 N. E. 1090; Ringrose *v.* Ringrose, 170 Pa. St. 503, 33 Atl. 129; Pownal *v.* Taylor, 10 Leigh (Va.) 172, 34 Am. Dec. 725.

A continuing lien may be charged on the premises for the maintenance of the grantors during their natural life, where the intention is clear, and in such case the lien will not be discharged by a judicial sale. Bonebrake *v.* Summers, 193 Pa. St. 22, 44 Atl. 330.

Charge is on land and not on personalty in the hands of the administrator, where the condition is maintenance. Laxton *v.* Tilly, 66 N. C. 327.

Lien for support need not be expressly reserved. McClure *v.* Cook, 39 W. Va. 579, 20 S. E. 612.

98. Rohn *v.* Odenwelder, 162 Pa. St. 346, 29 Atl. 899.

Lien of charge for an annuity extends to every part of the land and cannot be apportioned on a division of the land without the consent of the annuitant, and in the absence of any such agreement she can collect the interest due on the whole sum charged from the owner of any portion of the land. Blank *v.* Kline, 155 Pa. St. 613, 26 Atl. 692.

Purchaser at a sheriff's sale takes the land subject to the charge payable according to the terms of the deed which was of interest on a specific sum to the grantor and certain others. Dewalt's Appeal, 20 Pa. St. 236.

99. Wilson *v.* Wilson, 38 Me. 18, 61 Am. Dec. 227.

A person other than the grantee, unless it is stipulated to the contrary, may perform a condition to furnish support to the grantor during his life. Joslyn *v.* Parlin, 54 Vt. 670.

1. Taylor *v.* Lanier, 7 N. C. 98, 9 Am. Dec. 599.

A contract which forms the consideration of the deed that the grantee in addition to the rents and profits will support and maintain the grantor reserves no life-estate in the premises. An implied provision for the retention of the rents and profits is purely personal and does not affect the land. Cornell *v.* Maltby, 165 N. Y. 557, 59 N. E. 291 [*affirming* 56 N. Y. Suppl. 1105].

2. Norris *v.* Laberee, 58 Me. 260.

The condition being personal cannot be performed by another. Thomas *v.* Thomas, 24 Oreg. 251, 33 Pac. 565.

3. McCommon *v.* Lockridge, (Tex. Civ. App. 1896) 37 S. W. 161.

And a person insisting upon a forfeiture must bring himself clearly within the terms of the condition.[4]

b. Condition Precedent. Although performance of a condition precedent is a prerequisite to obtaining the title,[5] yet if a condition is construed as a covenant or as a condition precedent, substantial performance, *bona fide* according to the intention of the parties, having in view the surrounding circumstances, is sufficient.[6]

c. Grant to Woman For Life or Widowhood. A grant to a woman for life or widowhood is terminated by her marriage, as a deed, since the statute of uses, is not to be construed by the same rules of interpretation as applied before that time.[7]

d. Where One of Two Conditions Is Personal to Grantor. In case there are two conditions, one of which is personal to the grantor and is for his protection merely, and ceases to operate at his death, neglect or refusal to perform the one which remains after such death creates a forfeiture in favor of the heirs, but during the grantor's life both contingencies must happen to constitute a breach.[8]

e. Time For Performance — (i) *Conditions Precedent Generally.* Generally the time for performance of a condition precedent cannot be enlarged by parol so that an action can be maintained on the deed.[9] So where a condition of payment is precedent to the vesting of the estate, and time is made an essential part of the contract, no estate can vest or pass until there is a performance on the day named.[10]

(ii) *Where Grantor Has Received Substantial Benefits.* If property is deeded in consideration of its use for a particular purpose and it may fairly be presumed that the grantor has received substantial benefits from the conveyance in accordance with the purpose thereof, his property having been enhanced in value by the conveyance, there is such a substantial compliance, as that a discontinuance of the use many years thereafter will not constitute a forfeiture based on a failure of consideration.[11]

(iii) *Where Time Is Specified* — (a) *Generally.* If the time within which the act may be performed is specified in the instrument of conveyance it may be done at any time within that period.[12] And the land will be free from the con-

Where restrictions, conditions, or limitations are so carefully, clearly, and explicitly stated as to shut out all doubt of their import, they will as against general expressions constitute the superior controlling words in determining whether or not the act done constitutes a breach. Bailey *v.* Close, 37 Conn. 408.

4. Voris *v.* Renshaw, 49 Ill. 425.

5. Brannan *v.* Mesick, 10 Cal. 95.

A conditional release to be operative must be performed in accordance with the terms thereof. Douglass *v.* New York, etc., R. Co., Clarke (N. Y.) 174.

If the conditions are performed the deed will not be set aside. Ladu *v.* Ladu, 84 Mich. 469, 47 N. W. 1101.

A grantor is justified in disaffirming a contract to convey, where the deed is delivered in escrow on a condition precedent which is never fulfilled or waived. Hinman *v.* Booth, 21 Wend. (N. Y.) 267.

6. Wilson *v.* Galt, 18 Ill. 431.

7. Pearse *v.* Owens, 3 N. C. 234. See also Wolverton *v.* Haupt, 3 Walk. (Pa.) 46.

8. Jackson *v.* Topping, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515.

9. Porter *v.* Stewart, 2 Aik. (Vt.) 417.

10. Borst *v.* Simpson, 90 Ala. 373, 7 So. 814.

By the civil law a mere non-performance within a stipulated time does not *ipso facto* annul a contract, unless time is of the very essence of the contract. Holliday *v.* West, 6 Cal. 519.

If there is a failure to fulfil the agreement at the time agreed upon for performance the grantor's title remains as if the deed had never been executed. Brannan *v.* Mesick, 10 Cal. 95.

11. Sumner *v.* Darnell, 128 Ind. 38, 27 N. E. 162, 13 L. R. A. 173. See also Yancey *v.* Savannah, etc., R. Co., 101 Ala. 234, 13 So. 311.

If condition is made for the specific purpose of benefiting the grantor's property, no forfeiture, resulting after the benefit accrues, can be claimed. Maddox *v.* Adair, (Tex. Civ. App. 1901) 66 S. W. 811.

12. Thompson *v.* Lyon, 40 W. Va. 87, 20 S. E. 812.

The grantor has no interest until the time specified has expired where the condition provides for church and school uses and that on cessation for seven years the land shall revert. State *v.* School Dist. No. 1, 79 Mo. App. 103.

If a grant is upon condition of its acceptance within a time and upon the terms stated therein, it reverts to the grantor upon refusal to accept; and if there is an express relinquishment in writing, although a writing is

dition after a certain date where it appears that there is to be no reversion after such date.[13]

(B) *Acts Commenced in Furtherance of Condition.* If the act to be done within the condition has been carried on in good faith, it is sufficient, even though the thing to be done has not been fully completed within the time specified.[14] So performance commenced in good faith in furtherance of the act contemplated brings the principal thing to be done within the time limited.[15]

(C) *Where Conditional Acts Are Based on Doing of Other Acts.* If the conditional act is to be done within a certain time after the doing of a certain act by the grantor, such time does not commence to run until the grantor has done the act specified.[16]

(D) *Acts to Be Done Upon Grantor's Request.* The owner in fee, who has granted a portion of certain lands with certain rights and privileges in and to the remaining adjacent lands of the grantor if the grantee upon the grantor's request performs certain acts within a specified time, may without making such request grant the remaining lands to another.[17]

(IV) *Where Time Is Not Specified.* If a deed is silent as to the time of performance the law will imply that performance must be within a reasonable time.[18]

unnecessary, the date thereof may be of the time when the election is made, and it is immaterial whether it is dated at the time of its execution or not. Odell *v.* Cannon, 79 Ga. 515, 4 S. E. 558.

13. Los Angeles University *v.* Swarth, 107 Fed. 798, 46 C. C. A. 647, 54 L. R. A. 262.

There will be no forfeiture if the parties did not so intend, even though the time has lapsed. Gage *v.* Boscawen School-Dist. No. 7, 64 N. H. 232, 9 Atl. 387. Nor is a deed objectionable because of any possible remoteness in the time limited for its performance. Clarke *v.* Brookfield, 81 Mo. 503, 51 Am. Rep. 243.

14. Ellis *v.* Elkhart Car Works Co., 97 Ind. 247.

If the condition requires a permanent location of a building upon the land within a specified time, such condition is fulfilled if the permanent location is made with the intention that it should so remain, even though such buildings as are erected are destroyed by fire and thereafter erected on other land. Mead *v.* Ballard, 7 Wall. (U. S.) 290, 19 L. ed. 190.

15. Chute *v.* Washburn, 44 Minn. 312, 46 N. W. 55, holding that where land was donated to be used in connection with adjoining land for railroad terminal purposes, for shops, yards, and tracks, and the value, size, and capacity thereof, and to what extent the ground should be finally occupied, or the period of time within which the proposed terminal facilities should be fully completed were not specified, and there was no requirement that the road itself should be wholly or even partially constructed within three years from date, there was a compliance with a condition, for reconveyance for non-use within three years for the purposes specified, where the grantee had in fact and in good faith entered upon the land for such use and occupation as naturally preceded the use in contemplation, even though the shops, etc., and other terminal facilities were built after the three years.

Work commenced anywhere on the line of a consolidated railroad within the time specified is sufficient to prevent a reversion, where the words of the deed necessarily refer to such line. Lester *v.* Georgia, etc., R. Co., 90 Ga. 802, 17 S. E. 113.

16. Waldron *v.* Toledo, etc., R. Co., 55 Mich. 420, 21 N. W. 870. See also Warner *v.* Columbus, etc., R. Co., 39 Ohio St. 70, holding that where the language used and the circumstances under which the grant was made show that it was intended that the rights granted were to be exercised at a specific time, based upon the final doing of a certain act, such rights cannot thereafter be exercised.

Where the condition is for a continuous use for a certain period of time after the doing of a specified act the time limit commences when the specified act is done. Pepin Co. *v.* Prindle, 61 Wis. 301, 21 N. W. 254.

17. Furman *v.* New York, 10 N. Y. 567, holding that if the owner in fee of lands under water grants a specific portion thereof, with the right to wharfage in the grantee if the latter within a certain time, upon the request of the grantor, builds wharves, such grantor is not divested of title to such portion of the fee as was not conveyed to the first grantee, even though it has never requested the grantee to build such wharves, and may convey the same.

18. Union College *v.* New York, 65 N. Y. App. Div. 553, 73 N. Y. Suppl. 51, where a neglect for twenty-five years was held a breach in the absence of any reason for such inaction. See also Adams *v.* Ore Knob Copper Co., 7 Fed. 634, 4 Hughes 589, holding that in case the grantors derive no benefit in consideration of the grant, but only upon performance of the condition, it is the duty of the grantees to perform a condition subsequent in a reasonable time. But see Brown

(v) *Unreasonable Delay.* Where the performance is expressly to be within a reasonable time, the lapse of time may be such, coupled with the character of the act to be performed, that the court will take judicial notice that it is unreasonable, unless some sufficient explanation is given.[19] Again the period of non-performance may of itself be of so long duration as to constitute a breach.[20]

(vi) *Where Obligation Is Continuous.* If the obligation of the grantees is continuous and they fail to perform, or having commenced performance and discontinued and failed to resume in a reasonable time the estate will be forfeited by the breach or non-performance of the condition subsequent.[21]

f. Maintenance or Annuity — (i) *Generally.* In determining whether a stipulation for support has been broken the court will consider all the circumstances of the case, and the condition and situation of the parties;[22] or the jury may determine whether or not there has been a substantial compliance with the condition.[23] A substantial compliance is sufficient to prevent a forfeiture of a condition for support.[24]

(ii) *What Constitutes a Breach.* There is a breach of a condition for maintenance and support where there is an entire failure[25] or refusal to perform by the grantee,[26] or by his heirs;[27] where there is non-performance by the grantee;[28] where there is an abandonment of the contract by both parties;[29] or where there is an abandonment of the property by the grantee.[30] But the conveyance will not be set aside where the grantor leaves the premises without fault on the grantee's part and the latter is ready to perform.[31] Nor will there be a breach where the grantor refuses to live any longer with the grantee and fails to request the latter to furnish maintenance, or at least to give notice of need thereof.[32]

v. State, 5 Colo. 496, holding that if a deed is silent as to the time of performance of an act as a condition subsequent the court will not imply a condition as to reasonable time, and make to that extent a contract for the parties, but will hold that the grantor was willing to leave such time of commencement or completion of performance to the grantee.

If a deed is conditioned to remove a mortgage and no time is fixed by the parties, the condition must be performed in a reasonable time. Ross *v.* Tremain, 2 Metc. (Mass.) 495.

Where a prompt performance of a condition is necessary to give the grantor the whole benefit designed to be secured to him, or where immediate enjoyment constitutes the motive for the contract the grantee shall not have his lifetime for a performance but only a reasonable time. Hamilton *v.* Elliott, 5 Serg. & R. (Pa.) 375.

19. Upington *v.* Corrigan, 69 Hun (N. Y.) 320, 23 N. Y. Suppl. 451, where the period of non-performance was twenty-nine years and the condition was to erect a church building "within a reasonable time."

20. Hooper *v.* Cummings, 45 Me. 359, holding that there is a breach upon failure for fifty years to perform a condition to "fence the land and keep it in repair."

Non-user for forty years will not affect the grantee's rights in land conveyed to a railroad company, with a provision that the grantor should have the right to use any portion of the land not required by the grantee for railroad purposes, the grantor to yield possession when the land might be needed by the company. King *v.* Norfolk, etc., R. Co., 90 Va. 210, 17 S. E. 868.

21. Adams *v.* Ore Knob Copper Co., 7 Fed. 634, 4 Hughes 589.

22. Keltner *v.* Keltner, 6 B. Mon. (Ky.) 40.

23. Spaulding *v.* Hallenbeck, 39 Barb. (N. Y.) 79 [*affirmed* in 35 N. Y. 204].

24. Spaulding *v.* Hallenbeck, 39 Barb. (N. Y.) 79 [*affirmed* in 35 N. Y. 204].

25. Delong *v.* Delong, 56 Wis. 514, 14 N. W. 591.

26. Reeder *v.* Reeder, 89 Ky. 529, 12 S. W. 1063, 11 Ky. L. Rep. 731.

27. Cree *v.* Sherfy, 138 Ind. 354, 37 N. E. 787.

Where all the grantee's heirs except one did not "desire to carry out" the agreement, and that one was not of sufficient ability to perform, the conveyance was canceled. Bishop *v.* Aldrich, 48 Wis. 619, 4 N. W. 775.

28. Barker *v.* Cobb, 36 N. H. 344.

29. Jewell *v.* Reddington, 57 Iowa 92, 10 N. W. 306.

30. Blum *v.* Bush, 86 Mich. 206, 49 N. W. 142.

31. Scott *v.* Scott, 89 Wis. 93, 61 N. W. 286.

A breach does not exist where there was no agreement for support or maintenance, and no fraud, and the only provision was to secure a home, which was never denied the grantors, and the expectation of such care and attention as would follow from the sons living in the same house with them. Seymour *v.* Belding, 83 Ill. 222.

32. Lamb *v.* Clark, 29 Vt. 273. See also Woolcott *v.* Woolcott, (Mich. 1903) 95 N. W. 740, holding that in a suit to set aside certain deeds from a father to a son on condition that the latter would support the father during his natural life, and furnish him with necessaries, suitable clothing, etc., a quarrel between the father and son, which was provoked by the father, after which he left the

Again a condition for the payment of an annuity is not broken so long as the annuity is not in arrears.[33]

(III) *Personal Performance by Grantee.* The presumption is that personal performance of the obligation is required of the grantee, where an aged parent conveys his property to his son on condition of support for life, either by the payment of money or property in specific amounts, or for support generally.[34]

(IV) *Survivor of One of Two Grantors.* Where such is the intent the grantees will be obligated to support the survivor after the death of the other grantor.[35]

(V) *Breach as to Part of Conditions.* There is a breach where there is a failure by the grantee to comply with one of the essential parts of the condition.[36]

(VI) *Place of Furnishing Support.* If there is no express direction where or how the support should be furnished the person entitled to receive it is held to have a right to require it to be furnished at any place he may select, if it can be supplied there without needless or unreasonable expense.[37]

g. Use or Improvement of Property — (I) *Generally.* If land is merely granted for a particular use, without words of forfeiture or reëntry upon discontinuance, such discontinuance will not operate as a defeasance.[38] And a condition to keep a certain part of a building in reasonable repair, without a covenant to rebuild, has reference only to the existing building.[39]

(II) *Cessation or Abandonment of Use, Non-User, and Misuser.* It is a general rule that the estate of the grantee continues for so long as he continues to use the property for the purpose specified and the condition is violated when he ceases such use,[40] or abandons the purpose contemplated.[41] But cessation of use is

son's home at the instigation of his other children, was insufficient to work a forfeiture of the estate conveyed by the deeds.

33. Denham *v.* Walker, 93 Ga. 497, 21 S. E. 102.

If the consideration is the payment of an annuity there is no forfeiture by a failure to pay. Rainey *v.* Chambers, 56 Tex. 17. But see Thrall *v.* Spear, 63 Vt. 266, 22 Atl. 414.

34. Glocke *v.* Glocke, 113 Wis. 308, 89 N. W. 118, 57 L. R. A. 458.

35. Stehle *v.* Stehle, 39 N. Y. App. Div. 440, 57 N. Y. Suppl. 201.

36. Rowell *v.* Jewett, 69 Me. 293; Jackson *v.* Topping, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515.

A partial failure to perform need not necessarily operate to rescind the contract, but may lead to the enforcement of the executory part of it, if it can be done so as to substantially attain the objects of the contract. Keltner *v.* Keltner, 6 B. Mon. (Ky.) 40.

37. Hubbard *v.* Hubbard, 12 Allen (Mass.) 586. See also Mansfield *v.* Mansfield, 92 Mich. 112, 52 N. W. 290.

38. Watterson *v.* Ury, 5 Ohio Cir. Ct. 347.

A construction will be given strictly against the grantor to entitle the grantee to the beneficial enjoyment of the property granted. Duryea *v.* New York, 62 N. Y. 592 [*reversing* 2 Hun 293, 4 Thomps. & C. 512].

Where land was conveyed to a church with a provision that the grantee should not allow the property to be used for any other than church purposes, and that, if it should do so, the grantor might reënter, the fact that the grantee subsequently allowed the grantor to use a portion of the property inconsistently with the conditions cannot be set up by such grantor as a breach of the conditions justifying reëntry. Beaufort First Presb. Church *v.* Elliott, 65 S. C. 251, 43 S. E. 674.

39. Leonard *v.* Read, (Tenn. Ch. App. 1895) 36 S. W. 581.

40. Henderson *v.* Hunter, 59 Pa. St. 335.

If there is a continuous use for railroad purposes within the intent of the grant the deed will not be set aside for non-performance. Noyes *v.* St. Louis, etc., R. Co., (Ill. 1889) 21 N. E. 487.

The grantee's consent to occupancy for another purpose is necessary to constitute an abandonment of land used for several years for school purposes as conditioned. Barber *v.* School Trustees, 51 Ill. 396. See also Rowe *v.* Minneapolis, 49 Minn. 148, 51 N. W. 907.

41. Savannah, etc., R. Co. *v.* Atkinson, 94 Ga. 780, 21 S. E. 1010; Roanoke Invest. Co. *v.* Kansas City, etc., R. Co., 108 Mo. 50, 17 S. W. 1000; Howell *v.* Long Island R. Co., 37 Hun (N. Y.) 381; Guss *v.* West Chester R. Co., 1 Chest. Co. Rep. (Pa.) 363.

Illustrations.— Upon removal of a depot in violation of a condition for "the permanent location" thereof, the land reverts to the grantor. Indianapolis, etc., R. Co. *v.* Hood, 66 Ind. 580. But removal of a court-house to another site is not sufficient evidence of an intention to abandon the land or devote it to other than town and county purposes as conditioned to warrant a recovery for condition broken. Miller *v.* Tunica County, 67 Miss. 651, 7 So. 429; Poitevent *v.* Hancock County, 58 Miss. 810. But see Daniel *v.* Jacoway, Freem. (Miss.) 59. If, however, the removal of a county-seat is by vote of the people of the county, the land should be reconveyed by the county. Twiford *v.* Alamakee County, 4

impliedly at least distinguished from mere non-user. The latter does not constitute a forfeiture. Misuser may, however, so operate.[42]

(III) *Different or Inconsistent Use.* There is a breach when the premises are used for another and entirely different purpose than that specified or manifestly intended,[43] especially where such use is continuous for a long time, as distinguished from a mere temporary or occasional use.[44] There must, however, be an essential diversion, contrary to the terms of the grant and the intention of the grantor, to work a forfeiture.[45] A use which is not inconsistent with the purpose expressed or clearly intended does not constitute a breach.[46]

(IV) *Intentional Neglect or Wilful Disregard.* When maintenance or use is part of the condition, there must be such neglect to maintain as to indicate an intention not to comply, in order to constitute a breach of condition. It must be shown that the spirit and purpose of the condition have been wilfully disregarded by the grantee to establish such breach as will authorize a reëntry by the grantor.[47]

(V) *Suspension of Use.* Where the use is merely defined, a suspension of the use for a time does not *ipso facto* work a forfeiture.[48]

Greene (Iowa) 60. Again removal of church property to adjacent land, where the premises were still to be used for similar purposes, is not a breach. Carter *v.* Branson, 79 Ind. 14. But see Austin *v.* Cambridgeport Parish, 21 Pick. (Mass.) 215.

42. Pickle *v.* McKissick, 21 Pa. St. 232. *Compare* King *v.* Norfolk, etc., R. Co., 90 Va. 210, 17 S. E. 868.

43. Cornish *v.* Wiessman, 55 N. J. Eq. 610, 35 Atl. 408. But see Hunt *v.* Beeson, 18 Ind. 380.

The grant of a water privilege necessary for a fulling-mill is intended to prescribe the use of the water privilege as well as the quantity of water, and the use of the water for an oil-mill subsequently erected upon the site of the fulling-mill is unauthorized. Strong *v.* Benedict, 5 Conn. 210.

A "monument" is not a "building" within the meaning of a deed by the state to a city, conveying a square, and providing that no part of it shall be made use of "for erecting any sort of a building thereon." Cincinnati's Soc.'s Appeal, 154 Pa. St. 621, 26 Atl. 647, 20 L. R. A. 323.

44. Pickle *v.* McKissick, 21 Pa. St. 232.

Occasional occupation for other purposes does not work a forfeiture. Chapin *v.* Winchester School Dist. No. 2, 35 N. H. 445. So permitting the erection of a temporary structure for posting bills does not constitute a breach of condition for use for court-house purposes. Henry *v.* Etowah County, 77 Ala. 538. And a town may build for future needs and temporarily let unoccupied rooms or parts of the building for other than municipal purposes without being held to have broken a condition that the land shall not be used for any other purpose than as a place for a town-house. French *v.* Quincy, 3 Allen (Mass.) 9.

45. Broadway *v.* State, 8 Blackf. (Ind.) 290; Chapin *v.* Winchester School Dist. No. 2, 35 N. H. 445; Burkelow *v.* Maurer, 3 Rawle (Pa.) 482.

A condition that only a single tenement-house or store be erected is broken by the erection of a building containing several tenements, designed for the use of separate families. Gillis *v.* Bailey, 17 N. H. 18.

46. Howe *v.* Lowell, 171 Mass. 575, 51 N. E. 536; Southard *v.* New Jersey Cent. R. Co., 26 N. J. L. 13; Rose *v.* Hawley, 141 N. Y. 366, 36 N. E. 335 [*affirming* 23 N. Y. Suppl. 373].

Church purposes.— Although a lot remains uninclosed, but is used by persons attending services to hitch their horses on, such use is a church purpose within the intent of the deed. Bailey *v.* Wells, 82 Iowa 131, 47 N. W. 988. But a union of one religious society with another, contrary to the manifest intent of conditional use, violates the condition. Guild *v.* Richards, 16 Gray (Mass.) 309.

A deed for the purposes of a court-house and jail, etc., is not invalidated by the erection of a stable and a dwelling-house for the jailer (Jackson *v.* Pike, 9 Cow. (N. Y.) 69), nor by the erection of other buildings on the land and renting them to individuals, where the other conditions as to a court-house, jail, and judicial proceedings are observed (Bolling *v.* Petersburg, 8 Leigh (Va.) 224).

47. Bonniwell *v.* Madison, 107 Iowa 85, 77 N. W. 530.

An honest mistake of a few inches in a boundary line appropriated to building purposes is insufficient to work a forfeiture of condition against use for building purposes. Rose *v.* Hawley, 141 N. Y. 366, 36 N. E. 335 [*affirming* 23 N. Y. Suppl. 373].

Where failure to comply is not wilful, the grantee's title is not defeated under a condition to erect a building, and an express provision that substantial compliance should be deemed essential. Baker *v.* Oneonta W. C. T. U., 57 N. Y. App. Div. 290, 67 N. Y. Suppl. 949.

Where the grantee always intended to again use the land for school purposes and has not used it for anything else, a mere failure to keep a school does not work a forfeiture, the deed not plainly so declaring. Crane *v.* Hyde Park, 135 Mass. 147.

48. Buttery *v.* Rome, etc., R. Co., 14 N. Y. St. 131.

(vi) *Performance For a Time and Subsequent Discontinuance.* If the purposes for which the conditional grant was made are fulfilled by performance for some period of time, a discontinuance thereafter is not necessarily a breach.[49] A substantial compliance extending over a long period of time is sufficient.[50]

(vii) *Divisible Conditions.* There may be a forfeiture under one clause of a condition and the rights still be preserved as to the grantee, where he has fulfilled the requirements of another clause of such condition.[51]

(viii) *Breach as to One of Two Parcels of Land.* A breach of condition as to one of two parcels granted does not work a forfeiture of the other, where the condition as to the former has no application to the latter parcel, the condition relating thereto having been performed.[52]

(ix) *Placing Grantee In Statu Quo.* The fact that the grantee cannot be placed *in statu quo* is an important factor in determining the question of forfeiture.[53]

(x) *Distance As Essential Factor.* In determining whether or not there is a breach of the condition, distance as to location is an essential factor,[54] especially when expressly so stipulated.[55]

(xi) *Main and Incidental Purpose.* If one of the provisions is subordinate and incidental to the main object of the grant and there is a failure by non-performance as to the main object the incidental part also fails.[56]

(xii) *Application of Proceeds of Sale or of Profits to Use.* If the intention of the expressed condition is that the land itself be used for a specific purpose it precludes the sale of the land and the application of the proceeds to the same purpose.[57]

(xiii) *Sale or Conveyance as a Breach.* The intent of the parties, evi-

49. Maddox *v.* Adair, (Tex. Civ. App. 1901) 66 S. W. 811.

There is a performance and not a forfeiture where buildings are erected and the land used for the purpose "of depot grounds" for thirty-three years, although a new location is then selected and the land no longer used for the purpose specified. Jeffersonville, etc., R. Co. *v.* Barbour, 89 Ind. 375. Nor is there a breach or forfeiture where there is a donation of a lot in a platted town "for the purpose of erecting a tanyard on it" and after its use for that purpose for twenty-four years it is appropriated to another purpose. Hunt *v.* Beeson, 13 Ind. 380.

50. Higbee *v.* Rodeman, 129 Ind. 244, 28 N. E. 442.

Where the grant is upon consideration of the use of the land for a specific purpose and not upon a condition subsequent, and the use is discontinued only after the lapse of a long period of time, there is no breach. Sumner *v.* Darnell, 128 Ind. 38, 27 N. E. 162, 13 L. R. A. 173.

51. Halifax Cong. Soc. *v.* Stark, 34 Vt. 243.

52. Horner *v.* Chicago, etc., R. Co., 38 Wis. 165.

53. Stringer *v.* Keokuk, etc., R. Co., 59 Iowa 277, 13 N. W. 308, holding that a conveyance to a railroad company will not be set aside simply because the grantee failed to build a fence "before grading is done," where such grantee cannot be placed *in statu quo*. See also Bonniwell *v.* Madison, 107 Iowa 85, 77 N. W. 530.

54. Horner *v.* Chicago, etc., R. Co., 38 Wis. 165, holding that a failure to use for depot purposes, evidenced by the erection of a depot at a distance of eighty rods from the parcel, and separated from it by a mill-pond, is a substantial breach.

55. Taylor *v.* Cedar Rapids, etc., R. Co., 25 Iowa 371.

56. Com. *v.* Fisk, 8 Metc. (Mass.) 238, where the establishment of public buildings was the main object, and the incidental purpose was to maintain an open area around the buildings.

There cannot be a breach of essential parts of the condition constituting a consideration for the grant and the land be retained for use for other general purposes specified in such condition. Owensboro, etc., R. Co. *v.* Griffith, 92 Ky. 137, 17 S. W. 277, 13 Ky. L. Rep. 443, holding that where the erection of a depot was the consideration of a grant it cannot be removed and the grantee retain possession of the land for "other railroad purposes" specified.

57. Trustees *v.* Braner, 71 Ill. 546.

But a sale of land to pay off a mortgage on a lot thereafter acquired for a church edifice cannot be objected to by the grantor. *In re* United Presb. Church, 166 Pa. St. 43, 30 Atl. 1012. See also Blanc *v.* Alsbury, 63 Tex. 489, 51 Am. Rep. 666, where part of the land was sold to pay a debt incurred in the erection of a church, and it was held permissible.

Profits of the land may be indirectly applied to a purpose in furtherance of the use intended, although not strictly within the letter of the condition or use. Chapin *v.* Winchester School Dist. No. 2, 35 N. H. 445, holding that application of the profits of land to making and repairing a school-house

denced by the terms of the grant, may be such as to authorize a sale of the lands by the grantee, and the condition in case of sale will not be broken until the new grantee uses the premises for a purpose other than that specified.[58] Nor will a disposition of the land for other purposes made with the consent of the *cestui que trust* operate as a forfeiture.[59] So a forfeiture is not occasioned by the conveyance of land, by a minority of the grantee corporation, for another use, where the subsequent grantee never took possession, but reconveyed the premises to such corporation, and they were again used for the purpose contemplated and specified.[60] And a conveyance may be made under sanction of a state statute of a part of the premises.[61]

(XIV) *SALE OF INTOXICATING LIQUORS.* An unauthorized sale of intoxicating liquors by a third person, without the fault or negligence of the grantee, will not work a forfeiture of a condition prohibiting such sales on the premises granted, especially where the grantor has suffered no injury; but a public sale by a tenant, with the assent of the grantee, or with his knowledge and without reasonable diligence to prevent it, operates as a breach.[62]

h. Conditions Relating to Sale. If a provision as to the sale of property, dependent upon the payment of the purchase-price, is a condition precedent and it is not performed at the time specified the grantor's title does not pass.[63] An attempt to alien the land will also operate as a breach of an express condition not to do so and will vest the estate in the person to whom it is to revert upon a breach.[64] And where the intent of the condition requires performance in full to

does not work a forfeiture, although not strictly an application of the profits to teaching the arts of reading, writing, and arithmetic as conditioned.

58. Taylor *v.* Binford, 37 Ohio St. 262. See also Gage *v.* Boscawen School Dist. No. 7, 64 N. H. 232, 9 Atl. 387.

If the contract as to the use intended is merged in the deed, and the title thereunder becomes absolute in the grantee, there is no breach, even though the grantee afterward sells a part of the land. Scantlin *v.* Garvin, 46 Ind. 262.

Where a subsequent grantee, under a sale by legal process of a railroad franchise, carries out the purpose upon which the grant was conditioned, the grantor is not entitled to a reconveyance as for an abandonment, even though the land is conditioned to revert on abandonment. Harrison *v.* Lexington, etc., R. Co., 9 B. Mon. (Ky.) 470.

Where the terms of the grant are such that the grantor is precluded from inquiring into the validity of a conveyance by the grantee, no forfeiture is incurred by the new grantee as long as the latter fulfils the condition. Louisville, etc., R. Co. *v.* Covington, 2 Bush (Ky.) 526.

59. Baldwin *v.* Atwood, 23 Conn. 367.

60. Mills *v.* Evansville Seminary, 58 Wis. 135, 15 N. W. 133.

A breach of a condition, as to railroad use, is not occasioned by a transfer, under authority of an act of the legislature, to another company. Southard *v.* New Jersey Cent. R. Co., 26 N. J. L. 13.

Where the grantee corporation is dissolved by an act of the legislature and the grantee's conditional right is surrendered to another corporate body, which continues the public use on which the condition rests, the land will not revert. Tifft *v.* Buffalo, 82 N. Y. 204, where the grant was originally to a turnpike corporation for the purposes of a road, and the surrender was made to a city in which the road was situated and the latter maintained it as a public highway.

61. Alexandria, etc., R. Co. *v.* Chew, 27 Gratt. (Va.) 547, holding that where a turnpike corporation conveys, under state law, a part of a strip, granted for perpetual use as a public highway, the remainder of the strip being used for a road, no forfeiture is created.

62. Collins Mfg. Co. *v.* Marcy, 25 Conn. 242.

A lessee's sales of liquor during a portion of his occupation, without the participation, knowledge, or assent of the lessor, will not entitle the grantor to reënter as for a breach. Indian Orchard Canal Co. *v.* Sikes, 8 Gray (Mass.) 562.

Where no substantial injury is sustained by the grantor in consequence of such prohibited use such prohibition cannot be enforced. Barrie *v.* Smith, 47 Mich. 130, 10 N. W. 168.

Where the prohibition is limited, by a town being "legally" incorporated and the sanction of sales by a local election, sales made thereafter do not constitute a breach, even though made after a decree of dissolution of the township corporation on the ground that it embraced agricultural lands. Jones *v.* McLain, 16 Tex. Civ. App. 305, 41 S. W. 714.

63. Brannan *v.* Mesick, 10 Cal. 95.

64. Camp *v.* Cleary, 76 Va. 140. See also Grissom *v.* Hill, 17 Ark. 483.

Where the restraint is upon the conveyance of property within a limited period it will be presumed that it was intended to prevent the transfer in the ordinary manner and by the

the extent of the terms imposed it must be fulfilled.[65] But if the property is to revert if sold, a sale thereof for the grantee's debts under order of court is not a breach.[66]

i. Sufficiency of Performance — (i) *Generally.* A condition is satisfied if the acts necessary to performance are done within the terms of the grant or condition, having in view the purpose and character of the conditional act and the grantee's intent in performing the same.[67]

(ii) *What Satisfies Term "Children."* One child is within the meaning of the word "children" in the condition of a deed and satisfies the condition that the land should revert if the grantee should die without "children" living.[68]

j. Excuse For Non-Performance or Breach — (i) *Generally.* The grantor's acts may be such as to excuse performance within the time stipulated.[69] So a recognition of the grantee's title after the happening of the event on which the forfeiture is based is an important factor in determining whether there is a reversion under a covenant therefor.[70] Again the existence of war and conse-

usual and proper instruments employed for that purpose, and a bond for a deed will not produce that result nor operate as a breach of the condition. Voris *v.* Renshaw, 49 Ill. 425.

65. Frost *v.* Frost, 63 Me. 399, holding that if the intent is that the grantee of an undivided half of the property shall sell the whole estate or reconvey within a time specified, on being reimbursed for a proportionate part of the cost of improvements he will not be entitled to be reimbursed until he sells the whole estate.

An express provision that the property may be sold may nevertheless be dependent upon compliance with the terms of the conveyance or condition. Nelson *v.* Solomon, 112 Ga. 188, 37 S. E. 404.

66. Woodworth *v.* Payne, 74 N. Y. 196, 30 Am. Rep. 298.

67. Performance is sufficient when within the meaning of the grant as to time and place (Knight *v.* Alabama Midland R. Co., 101 Ala. 407, 13 So. 260); where there is a performance within the time specified of a condition to locate a navy-yard and a depot and appropriate the premises to that purpose (Murdock *v.* Memphis, 7 Coldw. (Tenn.) 483); where the character of a railroad station to be erected is not specified and a structure is erected which in its character and management was like most stations on the road (Caldwell *v.* East Broad Top R., etc., Co., 169 Pa. St. 99, 32 Atl. 85); where a railroad corporation, grantee, commenced work, became insolvent, thereafter sold its road to another company which located, constructed, and operated its road over the granted premises and in part over the original grantee's location and the road as so located was operated within the time specified and until the second company was consolidated with defendant (Morrill *v.* Wabash, etc., R. Co., 96 Mo. 174, 9 S. W. 657); and where there is an independent covenant and the preliminary conditions have been complied with in good faith and the deed made, even though the grantee afterward failed to complete performance (Hone *v.* Woodruff, 1 Minn. 418). And where the deed has been accepted and the act stipulated has been done the grantee is obligated. Miuor *v.* Deland, 18 Pick. (Mass.) 266.

Performance is not sufficient where the vendee was to discharge the vendor's floating debt by certain methods of payment and the vendee made a partial payment in that way by cash and bonds to one of the vendor's creditors and directors, with the approval of the vendor's president, and his consent that the creditor might appropriate the sum to his own use, the directors of the company taking no action (Tennessee, etc., R. Co. *v.* East Alabama R. Co., 73 Ala. 426); or where a bond was given to convey a certain interest in lands in consideration that a railroad be extended to a certain place within a certain time and the road was extended and afterward the deed was given reciting its execution in compliance with the bond (Northrup *v.* Mollett, 35 S. W. 268, 18 Ky. L. Rep. 89).

68. Pierson *v.* Armstrong, 1 Iowa 282, 63 Am. Dec. 440.

69. Smith *v.* American Crystal Monument Co., 29 Ind. App. 308, 62 N. E. 1013 (holding that if the grantor's acts prevent performance within the time stipulated the grantee's delay will not operate as a breach); Baker *v.* Oneonta W. C. T. U., 57 N. Y. App. Div. 290, 67 N. Y. Suppl. 949 (holding that where performance is commenced within the time specified but is prevented by the grantor's subsequent acts and unwarranted claims of title the grantee's title is not defeated).

The grantee, after non-performance, cannot set up the possession of the grantor as a refusal to put him in possession, thereby preventing performance, where the former did not desire possession, and in such case the grantor's possession will be presumed to be merely to enforce forfeiture. O'Brien *v.* Wagner, 94 Mo. 93, 7 S. W. 19, 4 Am. St. Rep. 362.

A wife's declarations and acts, without her husband's knowledge and consent, cannot affect his title and revest the estate in the grantor. Murphy *v.* Hubert, 16 Pa. St. 50.

70. Robinson *v.* Ingram, 126 N. C. 327, 35 S. E. 612, where the grantor lived a number of years after the breach, receiving the sup-

quent conditions preventing performance may constitute a valid excuse.[71] But outlays upon the estate by the conditional grantee, even though by way of consideration to relieve it from encumbrances, will not prevent a forfeiture for breach of the condition.[72] Nor is performance of a condition excused because the grantee is a municipal corporation, where such grantee's right to do the act is incidental to the powers expressly granted or essential to carry out the objects of the corporation.[73] Nor, where a deed of partition reserves a strip of land on either side of a street, with mutual covenants and conditions not to erect buildings thereon, is it any excuse for a breach that there were violations on the opposite side of the street.[74] So the minority of the heirs of the grantee does not excuse them from performance.[75]

(II) *Impossibility of Performance*—(A) *Generally.* A condition in a deed, whether precedent or subsequent, is not binding after the party imposing it has rendered its performance impossible or unnecessary.[76] And if before a reasonable time has elapsed within which to comply with the condition, the grantee has been prevented by an act of God from complying with the same no forfeiture takes place.[77]

(B) *Maintenance or Support.* The grantor's irritability, ill-temper, or unseemly conduct may be such as to render performance impossible, and in such case if the grantee has otherwise so performed his part of the conditions as to constitute a substantial compliance there is no forfeiture.[78] On the other hand there will be a breach of the condition and a forfeiture where the acts of the grantee, in essential matters and as distinguished from mere casual or unimportant omissions, are those of habitual, persistent unkindness, abuse, mistreatment or ill-treatment, unfilial and undutiful conduct or cold neglect, or even a failure to give a quiet, comfortable, and respectable home, or other acts rendering life intolerable, or otherwise making the purpose of the grant impossible of realization.[79]

port provided in the deed without any assertion of right for alleged violation of duty by the grantees.

71. Vicksburg, etc., R. Co. *v.* Ragsdale, 54 Miss. 200.

72. Rowell *v.* Jewett, 71 Me. 408.

73. Clarke *v.* Brookfield, 81 Mo. 503, 51 Am. Rep. 243.

It is no excuse that at the time of the conveyance the land was unimproved farm land, and that it could not therefore have been intended that a city hall should be erected thereon, under a condition so to do, until the land became adapted for that purpose, where it appears that it was marked by improvements which characterize city lots. Union College *v.* New York, 65 N. Y. App. Div. 553, 73 N. Y. Suppl. 51.

74. Zipp *v.* Barker, 55 N. Y. Suppl. 246.

75. Cross *v.* Carson, 8 Blackf. (Ind.) 138, 44 Am. Dec. 742.

76. Whitney *v.* Spencer, 4 Cow. (N. Y.) 39; Jones *v.* Chesapeake, etc., R. Co., 14 W. Va. 514; U. S. *v.* Arredondo, 6 Pet. (U. S.) 691, 8 L. ed. 547.

If one of two things in a condition becomes impossible it is no reason for not performing the other. Da Costa *v.* Davis, 1 B. & P. 242, 4 Rev. Rep. 795.

77. Union Pac. R. Co. *v.* Cook, 98 Fed. 281, 39 C. C. A. 86.

78. Leonard *v.* Smith, 80 Iowa 194, 45 N. W. 762.

An abandonment of a father at his bidding is not justified where the father is a childish old man and such abandonment amounts to a renunciation of the contract and authorizes the grantor to enter and treat the contract as at an end. Richter *v.* Richter, 111 Ind. 456, 12 N. E. 698.

79. The grantor's acts are a breach where his unkindness and ill-treatment compel his parents to leave and no accident, misfortune, or unseen event of any kind prevents performance (Oard *v.* Oard, 59 Ill. 46); where he wholly neglected to perform, and even abuses and ill-treats his parents (Frazier *v.* Miller, 16 Ill. 48); where there is unfilial and undutiful treatment of parents and cold neglect (Rowell *v.* Jewett, 69 Me. 293); where the grantee did not and could not give the grantor a quiet, comfortable, and respectable home (Humphrey *v.* West, 40 Mich. 597); where there is mistreatment of such a character as to render the grantor's life with the grantees intolerable (Alford *v.* Alford, 1 Tex. Civ. App. 245, 21 S. W. 283); and where the grantee renders the purpose impossible (Glocke *v.* Glocke, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458).

The grantee's acts are not a breach where there is only a temporary discomfort occasioned the grantor and seemingly good reasons are assigned at the time for such action. Sturtevant *v.* Sturtevant, 116 Ill. 340, 6 N. E. 428.

To be entitled to a nullifying effect the failure should have been essential and ha-

(c) *Prohibition or Operation of Law.* As a general rule no breach or forfeiture is occasioned by non-performance of a condition subsequent necessitated through prohibition or operation of law.[80]

k. Effect of Performance or Breach — (i) *Effect Generally of Performance.* If the condition has been complied with and the grantee's title perfected, the grantor is without any interest in the property, and cannot complain of its abandonment and the intrusion of a trespasser.[81]

(ii) *Effect Generally of Breach.* Where a fee simple is vested in the grantee on a condition subsequent it is subject to be defeated by a neglect or refusal to perform the condition.[82] And generally the non-performance or breach of such a condition entitles the grantor to claim a forfeiture or possession of the land, or the grant will be voidable, when such is the intent of the deed;[83] or the terms of the grant may be such as, upon a breach or neglect or refusal to perform, to give the grantor a right to reënter,[84] be reinvested with the title,[85] and to hold the land free of any right of the grantee therein.[86] In order, however, that the title shall revert, even though it is so stipulated, the act constituting the breach

bitual, or in some material respect inconsistent with the reasonable expectation and comfort of the grantor in view of his situation. A mere casual omission not very important or injurious should not be necessarily deemed a forfeiture. But a refusal by the grantee at any time to furnish board "at all" or "any longer" or any circumstance which would necessarily prevent the grantor from living comfortably in the condition contemplated might operate as a forfeiture. Cross *v.* Coleman, 6 Dana (Ky.) 446.

80. Cincinnati *v.* Babb, 4 Ohio S. & C. Pl. Dec. 464, 29 Cinc. L. Bul. 284. But *compare* State *v.* Blize, 37 Oreg. 404, 61 Pac. 735.

Non-user or cessation of use by prohibition or operation of law occasions no breach or forfeiture. This applies to a cemetery (Scovill *v.* McMahon, 62 Conn. 378, 26 Atl. 479, 36 Am. St. Rep. 350, 21 L. R. A. 58; Portland *v.* Terwilliger, 16 Oreg. 465, 19 Pac. 90; Mahoning County Com'rs *v.* Young, 59 Fed. 96, 8 C. C. A. 27 [*reversing* 51 Fed. 585]); to a discontinuance of use for a court-house, jail, etc. (Seebold *v.* Shitler, 34 Pa. St. 133. See also Harris *v.* Shaw, 13 Ill. 456); and to a sale under foreclosure of land conditioned for railroad use (Buttery *v.* Rome, etc., R. Co., 14 N. Y. St. 131).

Fire-escapes put on a building under police power are not a forfeiture for violation of condition against the erection of buildings. Fidelity Ins., etc., Co. *v.* Fridenberg, 175 Pa. St. 500, 34 Atl. 848, 52 Am. St. Rep. 851.

Land actually used as specified is liable to appropriation for public highways. Belfast Academy *v.* Salmond, 11 Me. 109.

81. Maddox *v.* Adair, (Tex. Civ. App. 1901) 66 S. W. 811.

82. Underhill *v.* Saratoga, etc., R. Co., 20 Barb. (N. Y.) 455.

Grantee cannot convey a title where he has never used the land for the purpose on which the grant was conditioned. Bennett *v.* Culver, 97 N. Y. 250.

But title passes and will not be divested by a failure to perform services, where such performance is the consideration of the deed. Washington *v.* Collins, 13 Mo. App. 1.

83. Thus whenever a breach of a condition subsequent, which runs with the land, is committed the grantor is at liberty to claim a forfeiture. O'Brien *v.* Wetterell, 14 Kan. 616. And if the act done is within the meaning of the express words upon the doing of which the estate is to revert the grantors will be entitled to possession. Lafayette, etc., Gravel Road Co. *v.* Vanclain, 92 Ind. 153. So an estate on condition subsequent may be divested by a subsequent deed to another where there is an express agreement to that effect. Byrne *v.* Marshall, 44 Ala. 355. And the estate is forfeited on a conveyance by the grantee to another with knowledge of an agreement which is in substance a condition subsequent. Wilson *v.* Wilson, 86 Ind. 472. So if the act to be performed is a part of the consideration and a bond is given for the performance the estate is forfeited by a failure to perform and constitutes a proper subject for the interference of chancery. Leach *v.* Leach, 4 Ind. 628, 58 Am. Dec. 642. And a deed containing a clause "provided always, and this deed is on the express condition" that a certain act be done, makes the deed voidable by the grantor on breach thereof. Hammond *v.* Port Royal, etc., R. Co., 15 S. C. 10. But non-performance alone does not divest the title of the grantee, although it entitles the grantor's heirs to maintain ejectment. O'Brien *v.* Wagner, 94 Mo. 93, 7 S. W. 19, 4 Am. St. Rep. 362.

84. Reed *v.* Hatch, 55 N. H. 327; Spaulding *v.* Hallenbeck, 39 Barb. (N. Y.) 79; Tracy *v.* Hutchins, 36 Vt. 225.

85. Ragsdale *v.* Vicksburg, etc., R. Co., 62 Miss. 480.

The same estate, be it large or small, may be recovered by the grantor upon forfeiture. Hershman *v.* Hershman, 63 Ind. 451. So the whole estate, legal and equitable, will revert, unless there is proof of such an agreement, or specific acts amounting to evidence of an agreement, on the part of the grantor or his heirs, as would entitle the grantee to a discharge of the condition. Dolan *v.* Baltimore, 4 Gill (Md.) 394.

86. Tracy *v.* Hutchins, 36 Vt. 225.

must be one within the terms of the condition.[87] The tender of an additional sum will, however, operate to discharge the condition where upon breach such payment may under the stipulation be made and an absolute title pass.[88]

(III) *Ipso Facto Determination of Estate.* A breach of a condition subsequent in a deed does not *ipso facto* operate to determine and revest the estate, but the same remains in the grantee subject to be defeated only by some sufficient act at the election of the grantor or his heirs.[89] So a provision that the title shall revert is not self-executing where the title passes absolutely by the deed, and the clause is only a covenant.[90] Again, where a purchase is made under color of lawful authority and at a time when the law was presumptively valid it must be regarded as having been lawfully made, and the fact that the law is subsequently declared unconstitutional, thereby preventing performance, does not *ipso facto* revest title in the grantor under a condition to that effect, the failure to perform merely making the deed voidable.[91]

(IV) *Effect of Breach as to Maintenance or Annuity.* An estate is forfeited upon non-performance of a condition subsequent for life support, even though the grantee be a *feme covert*;[92] and the legal title becomes revested upon breach by the grantee and lawful reëntry by the grantor.[93] Again upon failure of the grantee to perform a condition for the payment of an annuity and the doing of other acts the estate of the grantee fails and revests in the grantor to the extent of the interest granted and on his death passes to the persons entitled.[94]

5. Release or Waiver of Condition or of Forfeiture — a. Who May Release or Waive. Ordinarily the grantor alone can release the condition imposed by his deed.[95] And one who makes a grant of land on condition precedent may waive compliance therewith so long as he holds the reversion, but when the reversionary

The grantee ceases to have any interest in land where it reverts to the grantor upon the former's refusal to perform. Michigan State Bank *v.* Hammond, 1 Dougl. (Mich.) 527.

A corporation which has taken possession of land for private purposes under a grant therefor from the owner cannot after forfeiture defy the owner and continue to enjoy the property because it might successfully proceed in good faith to acquire it for a public purpose. Maginnis *v.* Knickerbocker Ice Co., 112 Wis. 385, 88 N. W. 300.

87. Razor *v.* Razor, 142 Ill. 375, 31 N. E. 678 [*affirming* 39 Ill. App. 527].

If land is deeded absolutely on payment of a certain amount, with a further stipulation that on the happening of a contingent event a further payment is to be made, the title vested by the former part of the agreement is not divested by the fact that the event does not happen. Cassell *v.* Carroll, 11 Wheat. (U. S.) 134, 6 L. ed. 438.

88. Board of Education *v.* Normal First Baptist Church, 63 Ill. 205.

89. *Connecticut.*—Lewis *v.* Lewis, 74 Conn. 630, 51 Atl. 854, 92 Am. St. Rep. 240.

Indiana.— Van Horn *v.* Mercer, 29 Ind. App. 277, 64 N. E. 531.

Kentucky.— Kenner *v.* American Contract Co., 9 Bush 202.

New York.— Ludlow *v.* New York, etc., R. Co., 12 Barb. 440.

Ohio.— Branch *v.* Wesleyan Cemetery Assoc., 11 Ohio Cir. Ct. 185, 5 Ohio Cir. Dec. 326.

See 16 Cent. Dig. tit. "Deeds," § 521.

The breach of conditions subsequent, which are not followed by a limitation over to a third person, do not *ipso facto* work a forfeiture of the freehold to which they are annexed, but only vests in the grantor or his heirs, who are in privity of blood with him, a right of action, which cannot be transferred to a stranger. Ruch *v.* Rock Island, 97 U. S. 693, 24 L. ed. 1101.

90. Robinson *v.* Ingram, 126 N. C. 327, 35 S. E. 612.

The grantor is not reinvested of the title without a conveyance on breach of the condition, even though it is provided that on failure to perform it should be lawful for the grantor or his heirs to take immediate possession. Vallette *v.* Bennett, 69 Ill. 632.

91. State *v.* Blize, 37 Oreg. 404, 61 Pac. 735.

92. Barker *v.* Cobb, 36 N. H. 344.

If a deed is in consideration of support of the grantors during life, the title vests and is not held in abeyance until performance of the promise nor divested by a breach thereof. Anderson *v.* Gaines, 156 Mo. 664, 57 S. W. 726.

93. Gilchrist *v.* Foxen, 94 Wis. 428, 70 N. W. 585.

94. Thrall *v.* Spear, 63 Vt. 266, 22 Atl. 414. But see Rainey *v.* Chambers, 56 Tex. 17.

95. Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186.

Where the grantor does not object, a third party cannot excuse a failure of duty on the ground of a possible violation of the condition. Butchers', etc., Stock-Yards Co. *v.* Louisville, etc., Co., 67 Fed. 35, 14 C. C. A. 290.

interest is conveyed, his right to waive such compliance ceases.[96] Again the grantee may waive a condition imposed for his benefit.[97]

b. When Implied as to Condition Precedent. A waiver of performance of a condition precedent is implied where the party entitled to performance prevents the fulfilment of the condition or absolutely refuses performance; but a mere assertion of inability or that the party will refuse is insufficient.[98]

c. By Agreement, Acts, or Inconsistent Conduct. If the terms of the deed so provide, there will be no reversion for non-performance of a condition after a certain time, and in such case on expiration of the time the estate will be freed from the condition.[99] A condition may also be waived or a forfeiture saved not only by express agreement,[1] but also by acts[2] showing an intention to continue the estate in the grantee,[3] or to voluntarily forego the benefits of the condition,[4] especially where the grantor's declarations, conduct, or failure to act, when he ought to act, have been at variance or inconsistent with his right to enforce a forfeiture[5] or have so continued for a long period of time.[6]

d. Mere Indulgence or Silent Acquiescence. No waiver is occasioned by a mere indulgence, mere silent acquiescence, or mere parol assent,[7] especially where

96. Doe *v.* Latimer, 2 Fla. 71.

Every right which the grantor might have to enforce a condition subsequent in a deed in fee reserving a right of reëntry is extinguished by any subsequent deed whereby he or his heirs undertake to assign, transfer, or grant the land or a reversion of it. Berenbroick *v.* St. Luke's Hospital, etc., 23 N. Y. App. Div. 339, 48 N. Y. Suppl. 363 [appeal *dismissed* in 155 N. Y. 655, 49 N. E. 1093]. See also Tinkham *v.* Erie R. Co., 53 Barb. (N. Y.) 393; Underhill *v.* Saratoga, etc., R. Co., 20 Barb. (N. Y.) 455; Branch *v.* Wesleyan Cemetery, 11 Ohio Dec. (Reprint) 809, 29 Cinc. L. Bul. 398.

97. Hendricks *v.* Edmiston, 15 Wash. 687, 47 Pac. 29.

While the grantor of lots may waive his own rights to enforce restrictions he cannot derogate from the equitable easement of some of the grantees to enforce restrictions which vested in them at the date of their deeds. Ivarson *v.* Mulvey, 171 Mass. 141, 60 N. E. 477.

98. Borst *v.* Simpson, 90 Ala. 373, 7 So. 814.

99. Los Angeles University *v.* Swarth, 107 Fed. 798, 46 C. C. A. 647, 54 L. R. A. 203.

1. Carbon Block Coal Co. *v.* Murphy, 101 Ind. 115; Sharon Iron Co. *v.* Erie, 41 Pa. St. 341. See also Frede *v.* Pflugradt, 85 Wis. 119, 55 N. W. 159.

Annuity, although payable in money, can be discharged by payment, otherwise by subsequent mutual stipulation and consent, and if the grantor after he has parted with the property agrees to take in lieu of the annuity stipulated the rents and profits and also in fact receives them, this constitutes a discharge of the annuity as to each year in which payment is received in this manner. Denham *v.* Walker, 93 Ga. 497, 21 S. E. 102.

An extension of time for performance granted after forfeiture discharges the former liability for non-performance of the original condition. Thompson *v.* Bright, 1 Cush. (Mass.) 420.

One of two conditions may be expressly dispensed with and waived. Sharon Iron Co. *v.* Erie, 41 Pa. St. 341.

Oral agreements subsequently made changing the terms of a condition is a waiver. Vicksburg, etc., R. Co. *v.* Ragsdale, 54 Miss. 200.

2. Carbon Block Coal Co. *v.* Murphy, 101 Ind. 115; Sharon Iron Co. *v.* Erie, 41 Pa. St. 341.

There is a waiver where there is a prohibition of sale of intoxicating liquors and the corporation grantor's sale manager and secretary himself engages in such sales on the premises. Chippewa Lumber Co. *v.* Tremper, 75 Mich. 36, 42 N. W. 532, 13 Am. St. Rep. 420, 4 L. R. A. 373.

3. Adams *v.* Ore Knob Copper Co., 7 Fed. 634, 4 Hughes 589.

4. Lewis *v.* Lewis, 74 Conn. 630, 51 Atl. 854, 92 Am. St. Rep. 240 (holding that the grantor's voluntarily leaving the premises and never returning constitutes a voluntary waiver of his rights and excuses technical performance of a condition for maintenance); Columbia First M. E. Church *v.* Old Columbia Public Ground Co., 103 Pa. St. 608 (holding that an abandonment of a privilege reserved for twenty-five years operates as a relinquishment thereof, especially where the words used do not create a condition).

5. Ludlow *v.* New York, etc., R. Co., 12 Barb. (N. Y.) 440; Maddox *v.* Adair, (Tex. Civ. App. 1901) 66 S. W. 811.

Declarations or expressions of satisfaction with performance operate as a waiver *pro tanto* of strict compliance up to the time of such declarations. Spaulding *v.* Hallenbeck, 39 Barb. (N. Y.) 79 [*affirmed* in 35 N. Y. 204]. See also Gleghorn *v.* Smith, 26 Tex. Civ. App. 187, 62 S. W. 1096.

6. Duryce *v.* New York, 96 N. Y. 477. See also Huntington *v.* Titus, 169 N. Y. 579, 61 N. E. 1135 [*affirming* 50 N. Y. App. Div. 468, 64 N. Y. Suppl. 58].

7. Carbon Block Coal Co. *v.* Murphy, 101 Ind. 115; Jackson *v.* Crysler, 1 Johns. Cas.

it does not appear that the grantee understood that there was a waiver, or that he relied thereon in proceeding to do the act claimed to operate as a forfeiture.[8]

e. By Acceptance of Performance. There is a waiver where there is an acceptance of performance after condition broken or after forfeiture,[9] or until the grantor has become revested of the estate by some proper act.[10]

f. Failure to Demand or Assert Right. A waiver may result from a failure to demand performance;[11] or to enter for condition broken;[12] or where the grantor, although he is entitled to a reasonable time after the breach to claim a forfeiture,[13] does not make such claim for several years;[14] or neglects for many years to bring an action to enforce the agreement;[15] or where, having an election so to do, he fails to claim a defeasance during his lifetime.[16] And if the grantor is in possession at the time of condition broken he waives the forfeiture if he makes no express claim to hold for condition broken.[17]

g. Effect of Waiver. After a forfeiture is once waived the grantor can never take advantage of it.[18] It has been held, however, that although the grantor

(N. Y.) 125; Maginnis *v.* Knickerbocker Ice Co., 112 Wis. 385, 88 N. W. 300 (holding that mere silence will not operate as a waiver, in case of an intentional breach of a condition, although the grantee incurs expense which would operate to his prejudice, if the grantor were thereafter permitted to insist on the forfeiture); Adams *v.* Ore Knob Copper Co., 7 Fed. 634, 4 Hughes 589.

There is no waiver where the grantor executed a deed subject to a mortgage to secure bonds for raising funds to erect buildings on the premises for a certain use and the grantor acquiesces for two years in the delay to execute the mortgage. Haslett Park Assoc. *v.* Haslett, 101 Mich. 315, 59 N. W. 601. Nor will a forfeiture be declared in equity for a technical failure to comply with a condition when for a number of years no objection is made. Hurto *v.* Grant, 90 Iowa 414, 57 N. W. 899.

But silence on one side and conduct in good faith relying thereon on the other, whereby such other will be damaged if the act relied on is not binding, constitutes a waiver, and the grantor will lose the benefit of a condition that the land revert on non-performance by conduct rendering it inequitable for him to insist on the forfeiture as stipulated. Maginnis *v.* Knickerbocker Ice Co., 112 Wis. 385, 88 N. W. 300.

8. Howe *v.* Lowell, 171 Mass. 575, 51 N. E. 536, holding that there is no waiver where the grantor does nothing actually to induce the grantee to do the act relied on as a forfeiture, even though he makes no objections thereto and subsequently deeds other land to the same grantee, incidentally recognizing the claimed right of the grantee, but it does not appear that the grantee understood that there was a waiver or relied thereon in proceeding to do the said act of forfeiture.

9. There is a waiver where the sum due on an annuity is accepted after forfeiture (Chalker *v.* Chalker, 1 Conn. 79, 6 Am. Dec. 206); where the grantor left the premises for a time because of an alleged breach but returned and accepted further support (Dunklee *v.* Hooper, 69 Vt. 65, 37 Atl. 225. See also Norton *v.* Perkins, 67 Vt. 203, 31 Atl. 148); and where the condition was not to sell any separate parcel without first offering it to the grantor and the latter accepts a mortgage from the grantee, containing a power of sale, and assigns the same (Wheeler *v.* Dunning, 33 Hun (N. Y.) 205). See also Grigg *v.* Landis, 21 N. J. Eq. 494.

There is no waiver where the condition is to cultivate land, render half the produce, and pay certain sums of money, etc., and after condition broken, the grantor orders the grantee to quit the premises but accepts the produce (Frost *v.* Butler, 7 Me. 225, 22 Am. Dec. 199); or by receiving, after forfeiture, the amount due on the note of a third person, passed to him as the consideration of the conveyance (Lawrence *v.* Gifford, 17 Pick. (Mass.) 366).

10. Chalker *v.* Chalker, 1 Conn. 79, 6 Am. Dec. 206.

A partial performance, accepted as such, operates to prevent setting aside a conveyance, especially where the parties cannot be placed *in statu quo*. Bonniwell *v.* Madison, 107 Iowa 85, 77 N. W. 530.

11. Risley *v.* McNiece, 71 Ind. 434; Buckmaster *v.* Needham, 22 Vt. 617.

But the grantors are not estopped by the failure to claim a breach or assert a right of reëntry at the expiration of a reasonable time for performance of the conditional act, even though the grantee has been deprived of its revenues between the expiration of such time and the commencement of suit, the grantor not being in fault for such loss. Union College *v.* New York, 65 N. Y. App. Div. 553, 73 N. Y. Suppl. 51.

12. Ludlow *v.* New York, etc., R. Co., 12 Barb. (N. Y.) 440.

13. Dunklee *v.* Hooper, 69 Vt. 65, 37 Atl. 225.

14. Jones *v.* McLain, 16 Tex. Civ. App. 305, 41 S. W. 714.

15. Huntington *v.* Titus, 50 N. Y. App. Div. 468, 64 N. Y. Suppl. 58 [*affirmed* in 169 N. Y. 579, 61 N. E. 1135].

16. Berryman *v.* Schumaker, 67 Tex. 312, 3 S. W. 46.

17. Willard *v.* Henry, 2 N. H. 120.

18. Chalker *v.* Chalker, 1 Conn. 79, 6 Am. Dec. 206.

A condition which is rightfully waived and

unjustifiably prevents performance by his acts the fee is not thereby vested unconditionally in the grantee, but the condition should be performed within a reasonable time thereafter.[19]

6. Enforcement of Forfeiture — a. Remedy in General. The grantor may be entitled only to a forfeiture of the estate;[20] or he may institute a proceeding to recover the thing granted;[21] or sue for partial failure of consideration;[22] or in assumpsit for non-performance by the grantee of the duties specified as the condition;[23] or have a writ of entry;[24] or bring an action for damages;[25] or of covenant;[26] or of ejectment;[27] or of trespass to try title.[28] And upon failure to perform a condition for maintenance the grantor may have the amount of his maintenance determined and declared a lien upon the premises and if not paid have the premises sold.[29] A recovery for breach of a condition may also be had even though the deed also recites a money consideration.[30] The necessity, however, of a court proceeding, as a prerequisite to a forfeiture, may depend upon whether there is a grant of the fee or of an easement.[31] But a condition which creates a charge on the annual rents and profits, but not on the land itself, cannot be enforced by a sale of the *corpus* of the property.[32]

b. Public Grant. In the case of a public grant the right of the government to repossess itself of the estate granted may be asserted through judicial proceedings, or by some legislative act showing an assertion of ownership on account of the breach of the condition upon which the original grant was made.[33]

c. Equitable Relief — (i) *In General.* A decree for specific performance is not a proper remedy for breach of a condition as to railroad use.[34] Nor will equity lend its aid to enforce a penalty or forfeiture and to divest an estate for breach of a condition subsequent.[35] But relief may be had in equity when the

extinguished is gone forever and cannot be revived. McWhorter *v.* Hetzell, 124 Ind. 129, 24 N. E. 743; Merrifield *v.* Cobleigh, 4 Cush. (Mass.) 178.

A waiver of past breaches of condition is not a waiver of all rights of future performance. Ritchie *v.* Kansas, etc., R. Co., 55 Kan. 36, 39 Pac. 718.

19. Baker *v.* Oneonta W. C. T. U., 57 N. Y. App. Div. 290, 67 N. Y. Suppl. 949.

20. Close *v.* Burlington, etc., R. Co., 64 Iowa 149, 19 N. W. 886.

21. Palmer *v.* Ft. Plain, etc., Plank Road Co., 11 N. Y. 376.

22. Berkley *v.* Union Pac. R. Co., 33 Fed. 794.

23. Harriman *v.* Park, 55 N. H. 471.

24. Frost *v.* Butler, 7 Me. 225, 22 Am. Dec. 199.

25. Stuyvesant *v.* New York, 11 Paige (N. Y.) 414. See also De Kay *v.* Bliss, 120 N. Y. 91, 24 N. E. 300. But see Close *v.* Burlington, etc., R. Co., 64 Iowa 149, 19 N. W. 886.

Reconveyance or damages in the alternative may be ordered. Gore *v.* Sumersall, 5 T. B. Mon. (Ky.) 505.

26. Dickey *v.* McCullough, 2 Watts & S. (Pa.) 88; Walker *v.* Renfro, 26 Tex. 142.

27. Moore *v.* Wingate, 53 Mo. 398; Gallupville Reformed Church *v.* Schoolcraft, 65 N. Y. 134; Ringrose *v.* Ringrose, 170 Pa. St. 593, 33 Atl. 129; Schnyder *v.* Orr, 149 Pa. St. 320, 24 Atl. 306; Soper *v.* Guernsey, 71 Pa. St. 219; Cook *v.* Trimble, 9 Watts (Pa.) 15; Bear *v.* Wisler, 7 Watts (Pa.) 144; Lehigh Coal, etc., Co. *v.* Gluck, 5 Pa. Co. Ct. 662; Guss *v.* West Chester R. Co., 1 Chest. Co. Rep. (Pa.) 363; Martin *v.* Ohio River R. Co., 37 W. Va. 349, 16 S. E. 589. But see Yancy *v.* Savannah, etc., R. Co., 101 Ala. 234, 13 So. 311; Hubbard *v.* Kansas City, etc., R. Co., 63 Mo. 68; Craven *v.* Bleakney, 9 Watts (Pa.) 19.

28. Alford *v.* Alford, 1 Tex. Civ. App. 245, 21 S. W. 283.

Where trespass does not lie see Young *v.* Clement, 81 Me. 512, 17 Atl. 707.

29. Stehle *v.* Stehle, 39 N. Y. App. Div. 440, 57 N. Y. Suppl. 201.

30. Bouvier *v.* Baltimore, etc., R. Co., 65 N. J. L. 313, 47 Atl. 772.

31. Lake Erie, etc., R. Co. *v.* Ziebarth, 6 Ind. App. 228, 33 N. E. 256.

32. Hitchcock *v.* Culver, 107 Ga. 184, 33 S. E. 35.

33. Schlesinger *v.* Kansas City, etc., R. Co., 152 U. S. 444, 14 S. Ct. 647, 38 L. ed. 507 [*affirming* 39 Fed. 741].

34. Close *v.* Burlington, etc., R. Co., 64 Iowa 149, 19 N. W. 886.

35. Smith *v.* Jewett, 40 N. H. 530. See also Chute *v.* Washburn, 44 Minn. 312, 46 N. W. 555; Vicksburg, etc., R. Co. *v.* Ragsdale, 54 Miss. 200.

Equity will not compel grantors to join in the appointment of appraisers under a deed conditioned for school use and on breach if "the grantees shall knowingly persist therein, the grantees forfeit the right herein conveyed, upon the grantor paying to them the appraised value of such buildings" and providing a method for appraising the value of such buildings. Warner *v.* Bennett, 31 Conn. 468. And if by reason of the nature of the

remedy at law is not full and complete.[36] So the circumstances may justify restoring the consideration with interest from demand, instead of enforcing the conditional deed.[37]

(II) *Maintenance or Support.* If the grantees, in conveyances conditioned for maintenance or support, so neglect or refuse to fulfil the condition that there is a breach thereof, equity has jurisdiction to rescind the contract, cancel or set aside the deed, compel a reconveyance, or otherwise restore the consideration to the grantor.[38] So equity will restore the grantor to his ownership of the property and cancel all records that might otherwise be used to his prejudice.[39] And the court will not only annul the conveyance and conditional agreement but will also do equity between the parties as to rents and improvements;[40] or the grantor may have his title quieted,[41] or other equitable relief will be granted,[42] especially so where the grantee's promises have been fraudulently made and the deed executed in reliance thereon.[43]

grant the title vests in the grantee and descends to the heirs, the grantor cannot obtain a cancellation of the deed on the ground that the grantee's attempt to perform was invalid as to its results. Bovee *v.* Hinde, 135 Ill. 137, 25 N. E. 694. So where the condition to be performed is but a small part of the consideration, the failure to perform is not a ground for canceling the conveyance. DeKay *v.* Bliss, 4 N. Y. St. 728 [*affirmed* in 120 N. Y. 91, 24 N. E. 300]. Again where a deed is in consideration of the extension of its line by a railroad company the failure after such extension to maintain as good a train service as before affords no ground for cancellation of the deed, there being no stipulation as to the kind of service to be rendered. Northrup *v.* Mollett, 35 S. W. 268, 18 Ky. L. Rep. 89.

36. Vicksburg, etc., R. Co. *v.* Ragsdale, 54 Miss. 200.

A condition in a deed to maintain railroad crossings may be enforced in equity. Aiken *v.* Albany, etc., R. Co., 26 Barb. (N. Y.) 289.

37. Stevens *v.* Pillsbury, 57 Vt. 205, 52 Am. Rep. 121.

A bill will lie to set aside a deed or to compel the execution of a trust where such deed is made in consideration of the grantee's promise to manage the land and pay off the mortgages and the agreement is not fulfilled by the grantee. Featherston *v.* Richardson, 68 Ga. 501.

38. *Connecticut.*— Penfield *v.* Penfield, 41 Conn. 474; Peck *v.* Hoyt, 39 Conn. 9.

District of Columbia.— Diggins *v.* Doherty, 4 Mackey 172.

Illinois.— Cooper *v.* Gum, 152 Ill. 471, 39 N. E. 267; Kusch *v.* Kusch, 143 Ill. 353, 32 N. E. 267; Mamero *v.* Henschel, 20 Ill. App. 346 [*affirmed* in 120 Ill. 660, 12 N. E. 203].

Iowa.— Patterson *v.* Patterson, 81 Iowa 626, 47 N. W. 768.

Kentucky.— Reeder *v.* Reeder, 89 Ky. 529, 12 S. W. 1063, 11 Ky. L. Rep. 731; Jenkins *v.* Jenkins, 3 T. B. Mon. 327.

Michigan.— Rexford *v.* Schofield, 101 Mich. 480, 59 N. W. 837; Stuyvesant *v.* Wilcox, 92 Mich. 228, 52 N. W. 617; Dodge *v.* Dodge, 92 Mich. 109, 52 N. W. 296. But see Storrs *v.* Storrs, 58 Mich. 55, 24 N. W. 654.

Ohio.— Reid *v.* Burns, 13 Ohio St. 49.

West Virginia.— Wilfong *v.* Johnson, 41 W. Va. 283, 23 S. E. 730.

Wisconsin.— Glocke *v.* Glocke, 113 Wis. 303, 89 N. W. 118; Blake *v.* Blake, 56 Wis. 392, 14 N. W. 173; Bogie *v.* Bogie, 41 Wis. 209.

See 16 Cent. Dig. tit. "Deeds," § 528.

An absolute unconditional deed cannot be rescinded on the ground of a subsequent failure of the grantee to furnish life support which is the expressed consideration. Mayer *v.* Swift, 73 Tex. 367, 11 S. W. 378.

Violation of contemporaneous oral agreement is no ground for canceling a deed made in consideration that the grantee furnish the grantor a home. Herrick *v.* Starkweather, 54 Hun (N. Y.) 532, 8 N. Y. Suppl. 145.

39. Glocke *v.* Glocke, 113 Wis. 303, 89 N. W. 118.

40. Morgan *v.* Loomis, 78 Wis. 594, 48 N. W. 109.

41. Richter *v.* Richter, 111 Ind. 456, 12 N. E. 698; Smith *v.* Smith, 23 Wis. 176, 99 Am. Dec. 153.

42. Neimeyer *v.* Knight, 98 Ill. 222, holding that if the original grantee makes payment, on his grantee's failure to comply with the condition for support, the former is entitled in equity to have the amount paid charged on the latter's land.

Even though performance is secured by bond and mortgage the grantors' remedy is not thereby restricted, but equity will regard the condition as a condition subsequent, a breach of which will cause a reversion of the title. Wanner *v.* Wanner, 115 Wis. 191, 91 N. W. 671.

Where a mother deeds a house to her daughter in consideration of a home for life, and the daughter performs her obligations till her death, when the property descends to her infant children, and her husband compels the mother to abandon the house, equity will not rescind the deed, but through a receiver will administer the property for the benefit of the children, subject to the right of the mother for support therefrom. Keister *v.* Cubine, (Va. 1903) 45 S. E. 285.

43. Wampler *v.* Wampler, 30 Gratt. (Va.) 454.

(iii) *From Forfeiture.* Equity may relieve from the forfeiture of conditions in a deed, as in case of other penalties, and will adapt the relief to the nature of the case.[44]

d. Reëntry — (i) *Right to Reënter.* The grantor may elect to reënter for breach or non-performance of the conditions annexed to his deed.[45]

(ii) *Necessity.* Upon the breach or non-performance of a condition annexed to the grant of a freehold estate, the title conveyed is not void but is only voidable by the act of the grantor or his heir, who must take advantage of the condition and repossess himself of the estate by actual reëntry, or by some act equivalent thereto and manifesting an intent to terminate the estate.[46] This rule applies even though the land is expressly conditioned to revert upon breach or non-performance of the condition.[47] But ejectment may be maintained without previous

44. Bethlehem *v.* Annis, 40 N. H. 34, 77 Am. Dec. 700. See also Bliss *v.* Bradford, 1 Gray (Mass.) 407 (where a trustee was appointed without examining whether the land had been forfeited by misappropriation); Donnelly *v.* Eastes, 94 Wis. 390, 69 N. W. 157.

Where the condition is to secure the payment of money, or the performance of an obligation the breach of which can be fairly measured in money, the particular thing to be done or the particular time of doing it not being made essential and of the very essence of the contract, a court of equity by an arbitrary rule of construction may hold that the parties did not intend the full force of their language, but intended the condition to stand as security for the performance of the obligation or the payment of an equivalent in money, especially where the person seeking the benefit thereof is not guilty of having wilfully or inexcusably violated his obligations. Maginnis *v.* Knickerbocker Ice Co., 112 Wis. 385, 88 N. W. 300.

45. Aiken *v.* Albany, etc., R. Co., 26 Barb. (N. Y.) 289; Stuyvesant *v.* New York, 11 Paige (N. Y.) 414. See also Wartenby *v.* Moran, 3 Call (Va.) 491.

A forfeiture may be availed of by the grantor or his heirs even though there is no clause reserving a right of reëntry. Adams *v.* Ore Knob Copper Co., 7 Fed. 634, 4 Hughes 589.

46. *Connecticut.*— Lewis *v.* Lewis, 74 Conn. 630, 51 Atl. 854, 92 Am. St. Rep. 240; Warner *v.* Bennett, 31 Conn. 468; Bowen *v.* Bowen, 18 Conn. 535; Chalker *v.* Chalker, 1 Conn. 79, 6 Am. Dec. 206.

Illinois.— Board of Education *v.* Normal First Baptist Church, 63 Ill. 204.

Indiana.— Preston *v.* Bosworth, 153 Ind. 458, 55 N. E. 224, 74 Am. St. Rep. 313; Clark *v.* Holton, 57 Ind. 564; Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638; Cross *v.* Carson, 8 Blackf. 138, 44 Am. Dec. 742; Van Horn *v.* Mercer, 29 Ind. App. 277, 64 N. E. 531.

Iowa.— Bonniwell *v.* Madison, 107 Iowa 85, 77 N. W. 530.

Maine.— Osgood *v.* Abbott, 58 Me. 73; Tallman *v.* Snow, 35 Me. 342.

Maryland.— Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. 1.

Massachusetts.— Hubbard *v.* Hubbard, 97 Mass. 188, 93 Am. Dec. 75; Thompson *v.* Bright, 1 Cush. 420.

Michigan.— Morris *v.* Hoyt, 11 Mich. 9.

Minnesota.— Little Falls Water-Power Co. *v.* Mahan, 69 Minn. 253, 72 N. W. 69 [*citing* Minneapolis, etc., R. Co. *v.* Duluth, etc., R. Co., 45 Minn. 104, 47 N. W. 464].

Mississippi.— Memphis, etc., R. Co. *v.* Neighbors, 51 Miss. 412.

Missouri.— Missouri Historical Soc. *v.* Academy of Science, 94 Mo. 459, 8 S. W. 346; Adams *v.* Lindell, 72 Mo. 198 [*affirming* 5 Mo. App. 197].

New Hampshire.—Rollins *v.* Riley, 44 N. H. 9; Sperry *v.* Sperry, 8 N. H. 477; Spear *v.* Fuller, 8 N. H. 174, 28 Am. Dec. 391; Willard *v.* Henry, 2 N. H. 120.

New York.— Vail *v.* Long Island R. Co., 106 N. Y. 283, 12 N. E. 607, 60 Am. Rep. 449. *Compare* People *v.* Brown, 1 Cai. 416.

South Carolina.—Kibler *v.* Luther, 18 S. C. 606.

United States.— See Atkins *v.* Ore Knob Copper Co., 7 Fed. 634, 4 Hughes 589.

See 16 Cent. Dig. tit. "Deeds," § 529.

If condition be followed by limitation over it is a conditional limitation and takes effect without any entry or claim and no act is necessary to vest estate in the party to whom it is limited. Stearns *v.* Godfrey, 16 Me. 158.

No actual entry is necessary to forfeit contingent rights which require no livery of seizin to create them (Kenner *v.* American Contract Co., 9 Bush (Ky.) 202), nor is ceremony of reëntry necessary to forfeiture (Branch *v.* Wesleyan Cemetery Directors, 11 Ohio Dec. (Reprint) 809, 29 Cinc. L. Bul. 398).

47. Chalker *v.* Chalker, 1 Conn. 79, 6 Am. Dec. 206; Osgood *v.* Abbott, 58 Me. 73; Phelps *v.* Chesson, 34 N. C. 194; Adams *v.* Ore Knob Copper Co., 7 Fed. 634, 4 Hughes 589. But see Cowell *v.* Colorado Springs Co., 100 U. S. 55, 25 L. ed. 547 [*affirming* 3 Colo. 82].

Rule applies even though it is provided that on breach the grantees shall forfeit the right conveyed therein on the grantors paying to them the appraised value of the buildings standing on the land conveyed. Warner *v.* Bennett, 31 Conn. 468.

But covenant to reconvey relieves from rule requiring reëntry. Baker *v.* St. Louis, 75 Mo. 671 [*affirming* 7 Mo. App. 429].

entry, demand, or notice.[48] And reëntry is unnecessary where the grantor or his heirs retain possession,[49] but such party must manifest an intent to hold possession.[50]

(III) *Denial.* A mere constructive possession of the grantee, such as accompanies the legal title, ought not to be deemed a denial of the grantor's right to enter. Some act must be done by the grantee which is tantamount to his disavowal of his obligation to perform the condition.[51]

(IV) *Time.* If a time is fixed for performing a condition subsequent an entry should not be made before the expiration thereof.[52] And if it be expressly provided that entry may be made within a specified time after breach and notice given, such time will run from the giving of a new notice where the breach still continues.[53] But if one has dispensed with the condition he cannot afterward enter for a subsequent breach.[54]

(V) *Sufficiency.* An entry to be sufficient must be such a notorious and unequivocal act as demonstrates the intention of the grantor to terminate the previous estate.[55] It must also be made expressly for that purpose.[56]

(VI) *Effect.* Upon entry or claim of breach of a condition subsequent the grantor or his heirs become seized of the estate had at the time of making the

48. *Kansas.*— Ritchie *v.* Kansas, etc., R. Co., 55 Kan. 36, 39 Pac. 718.

Minnesota.— Sioux City, etc., R. Co. *v.* Davis, 49 Minn. 308, 51 N. W. 907; Sioux City, etc., R. Co. *v.* Singer, 49 Minn. 301, 51 N. W. 905, 32 Am. St. Rep. 554, 15 L. R. A. 751.

New York.— Plumb *v.* Tubbs, 41 N. Y. 442.

West Virginia.— Martin *v.* Ohio River Co., 37 W. Va. 349, 16 S. E. 589.

United States.—Cowell *v.* Colorado Springs Co., 100 U. S. 55, 25 L. ed. 547 [*affirming* 3 Colo. 82]; Union Pac. R. Co. *v.* Cook, 98 Fed. 281, 39 C. C. A. 86.

See 16 Cent. Dig. tit. "Deeds," § 529.

49. Richter *v.* Richter, 111 Ind. 456, 12 N. E. 698; Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638; Lincoln, etc., Bank *v.* Drummond, 5 Mass. 321; Hamilton *v.* Elliott, 5 Serg. & R. (Pa.) 375; Adams *v.* Ore Knob Copper Co., 7 Fed. 634, 4 Hughes 589.

Trespass quare clausum fregit lies without previous reëntry where the grantor is in possession. Rollins *v.* Riley, 44 N. H. 9.

Where the grantor retains possession no formal act of entry is necessary to enable him to avail himself of his right to have damages assessed on breach or non-performance of the condition. Taylor *v.* Cedar Rapids, etc., R. Co., 25 Iowa 371.

50. Hubbard *v.* Hubbard, 97 Mass. 188, 93 Am. Dec. 75.

51. Union Pac. R. Co. *v.* Cook, 98 Fed. 281, 39 C. C. A. 86.

52. Elkhart Car Works Co. *v.* Ellis, 113 Ind. 215, 15 N. E. 249.

A suit in ejectment will be premature, where there is no restriction or condition that could affect the bargain or the grantee's conduct before the giving of the deed, and the deed has not been delivered. Jump River Lumber Co. *v.* Moore, 70 Wis. 173, 35 N. W. 360.

53. Gillis *v.* Bailey, 21 N. H. 149.

54. Dickey *v.* McCullough, 2 Watts & S. (Pa.) 88.

55. O'Brien *v.* Doe, 6 Ala. 787.

Entry is sufficient where, money being unpaid according to condition, the grantor notifies the grantee that the condition is broken and orders him to quit the premises (Frost *v.* Butler, 7 Me. 225, 22 Am. Dec. 199); or where the grantor went on the land with two witnesses and there notified the grantee that possession would be taken for the breach (Jenks *v.* Walton, 64 Me. 97. See also Rowell *v.* Jewett, 69 Me. 293). In the case of a private grant an entry by the grantor, or any act equivalent thereto showing a purpose to take advantage of the breach of the condition subsequent, and to reclaim the estate forfeited by such breach, is all that is required. Schlesinger *v.* Kansas City, etc., R. Co., 152 U. S. 444, 14 S. Ct. 647, 38 L. ed. 507 [*affirming* 39 Fed. 741].

Entry insufficient.— Entry on lots on one side of the street is not an entry on lots on the other side. O'Brien *v.* Doe, 6 Ala. 787. So where A conveys to B an estate on condition, and at the same time B mortgages to A, who on the non-payment of the mortgage debt at maturity enters for foreclosure, and while so in possession a breach of condition in the deed to B occurs, this is not sufficient without further notice to absolutely divest B's estate. Stone *v.* Ellis, 9 Cush. (Mass.) 95. Nor is the turning of cattle on the land while unimproved and uninclosed and using the land as a means of access to adjoining land such an entry as will revest the estate. Guild *v.* Richards, 16 Gray (Mass.) 309. Again it is not sufficient for the grantor to obtain a surreptitious attornment from the tenant of the grantee; and to induce such tenant to accept a lease from him. Missouri Historical Soc. *v.* Academy of Science, 94 Mo. 459, 8 S. W. 346.

Entry is not invalid for want of notice to the grantee. Langley *v.* Chapin, 134 Mass. 82.

The presence of a witness is not necessary Dugan *v.* Thomas, 79 Me. 221, 9 Atl. 354.

56. Bowen *v.* Bowen, 18 Conn. 535.

grant upon condition, freed from any subsequent lien, encumbrance, or limitation.[57] And one who reënters for breach of a condition may invoke judicial remedies relying generally upon his title to the same as if no disturbance thereof had occurred by reason of the grant on condition.[58]

e. Demand For Performance or Notice of Forfeiture. As a general rule no demand for performance of a condition subsequent is necessary.[59] If, however, there is an evident waiver of performance by the immediate grantor of the party seeking to enforce the forfeiture, a demand must be made before the right of reëntry exists.[60] It has also been held that demand for performance of a condition subsequent is a prerequisite to forfeiture of the estate;[61] or it must be made in the alternative;[62] or a reasonable notice must be given or a request made to the grantee.[63] A demand may also be equivalent to entry;[64] and it may limit the time up to which damages may be recovered.[65]

f. Damages, Rents and Profits, and Value of Use. If plaintiff in an action for possession has a judgment of title in him, the damages incidental under his demand for continuing to hold the realty after the bringing of the action to the time of trial, include the rents and profits and value of the use and occupation of the land.[66]

7. Restrictions as to Use of Property — a. Generally. A restriction should be expressed in clear and certain terms in the deed, or it should contain a promise,

57. Adams *v.* Ore Knob Copper Co., 7 Fed. 634, 4 Hughes 589.

Upon breach of the condition the estate reverts as a legal right, and if the grantor enters to claim a forfeiture the estate reverts to all intents and purposes. Rowell *v.* Jewett, 71 Me. 408. If it is stipulated that the land shall revert upon breach, and there is a breach and reëntry or acts done equivalent thereto, for the purpose of reclaiming the land, in the absence of any equity preventing the legal effect of such facts, the title to such property will thereby become revested in such person as absolutely as it was before such conveyance was made. Maginnis *v.* Knickerbocker Ice Co., 112 Wis. 385, 88 N. W. 300. And the grantor on reëntry for condition becomes seized of his first estate, and thereby avoids all intermediate charges and encumbrances. Barker *v.* Cobb, 36 N. H. 344.

58. Maginnis *v.* Knickerbocker Ice Co., 112 Wis. 385, 88 N. W. 300.

After reëntry by the grantor for condition broken, the grantee cannot recover rent from the grantor except under an express promise. Bartlett *v.* Jones, 60 Me. 246.

59. Georgia R., etc., Co. *v.* Macon, 86 Ga. 585, 13 S. E. 21; Royal *v.* Aultman, etc., Co., 116 Ind. 424, 19 N. E. 202, 2 L. R. A. 526; Ellis *v.* Elkhart Car Works Co., 97 Ind. 247.

If the condition is one of indemnity to another by the grantee the grantor may, upon its non-performance by the grantee, satisfy the indemnity and immediately, without a demand on the latter for reimbursement, enter on the land, and the estate thereupon vests in him and cannot thereafter be divested by a tender of performance by the grantee. Sanborn *v.* Woodman, 5 Cush. (Mass.) 36.

Where the grantee abandons the land without sufficient excuse and without offering to perform a continuous and fixed duty which rested upon him, no demand for performance is necessary to entitle the grantor to reënter. Richter *v.* Richter, 111 Ind. 456, 12 N. E. 698.

60. Bonniwell *v.* Madison, 107 Iowa 85, 77 N. W. 530.

61. Risley *v.* McNiece, 71 Ind. 434. See also Preston *v.* Bosworth, 153 Ind. 458, 55 N. E. 224, 74 Am. St. Rep. 313; Cory *v.* Cory, 86 Ind. 567; Schuff *v.* Ransom, 79 Ind. 458.

Demand is insufficient if made on the grantee after a sheriff's sale of his interest, which is followed by a deed from the sheriff, the deed taking effect as of the date of the sale. Cory *v.* Cory, 86 Ind. 567.

62. **There must be a demand for possession** or reëntry (Van Horn *v.* Mercer, (Ind. App. 1902) 64 N. E. 531); or the grantor must enter or claim for condition broken before he can maintain a writ of entry (Sperry *v.* Sperry, 8 N. H. 477). Nor can the grantor sue for the land unless he has made claim if entry was impossible. Kibler *v.* Luther, 18 S. C. 606.

63. Merrifield *v.* Cobleigh, 4 Cush. (Mass.) 178.

64. Clark *v.* Holton, 57 Ind. 564, holding that a demand for possession is equivalent to entry in so far as that is essential as a condition precedent to an action for possession because of an alleged breach of a condition subsequent.

Exception to rule.— Although a demand such as the law requires for possession is equivalent to a reëntry, yet where the time for performance is limited and made of the essence of the contract, and there is therefore nothing to be determined by the demand and all is determined by the lapse of time and a failure to perform, a demand for performance can subserve no useful purpose. Ellis *v.* Elkhart Car Works Co., 97 Ind. 247.

65. Little Falls Water-Power Co. *v.* Mahan, 69 Minn. 253, 72 N. W. 69.

66. Union College *v.* New York, 65 N. Y. App. Div. 553, 73 N. Y. Suppl. 51.

agreement, or undertaking on the grantee's part, or it should contain such terms as have a certain legal operation from which a covenant would necessarily arise.[67] And where an agreement limiting the use of granted premises is a covenant and not a condition its violation creates no forfeiture.[68]

b. Validity. Negative easements or conditions, or limitations restricting the use of property, if not unlawful in character, will be upheld.[69] But restrictions on the use of real estate, where not for the benefit of some individual or of the public, are contrary to public policy and void.[70]

c. Equitable Easement or Servitude. If a restriction and limitation upon the use and enjoyment of a certain portion of the premises granted is intended for the benefit of other lots, it creates to the extent of such restriction an implied equitable servitude on the lot granted in favor of the other lots and the equitable easement attaches to each and every lot so conveyed, so that the equitable rights and burdens of each lot are mutual and reciprocal.[71]

d. Construction. In construing covenants or restrictions as to the use of property the circumstances and conditions surrounding the parties and property must be considered as well as the manifest objects of the grant or restriction.[72] So the intent of the parties and the object of the deed or restriction should govern, giving the instrument a just and fair interpretation.[73] If enough appears in the deed to show the grantor's general intent that the deeds should contain restrictions

67. Gilmore *v.* Times Pub. Co., 18 Pa. Super. Ct. 363.

If the proviso is that buildings shall be erected speedily according to a design approved by the grantor and a building so erected is destroyed and the owner desires to rebuild it is not necessary to submit new plans or to follow the original plans in all their details, but the new building should be equal or superior to the former in size, materials, and appearance, and not violate any express requirements of the grantor in approving the original plans. Devries *v.* Cone, 82 Md. 186, 34 Atl. 822.

If the restriction is not to be obligatory if the grantor, his heirs or assigns, sell other land in the same locality without such restrictions, a sale by another grantee of the common grantor without the restriction is not a sale within the exception. Plumb *v.* Tubbs, 41 N. Y. 442.

68. Graves *v.* Deterling, 3 N. Y. St. 128 [*affirmed* in 120 N. Y. 447, 24 N. E. 655].

69. Duncan *v.* Central Pass. R. Co., 85 Ky. 525, 4 S. W. 228, 9 Ky. L. Rep. 92.

Restrictions as to a building line are valid. Russell *v.* Harpel, 20 Ohio Cir. Ct. 127, 10 Ohio Cir. Dec. 732.

70. Mitchell *v.* Leavitt, 30 Conn. 587.

71. Eckhart *v.* Irons, 128 Ill. 568, 20 N. E. 687.

A restriction as to the class of buildings to be erected does not create a servitude in favor of another lot which had been previously conveyed to another and on which he then held a mortgage as security for the purchase-money. Tibbetts *v.* Tibbetts, 66 N. H. 360, 20 Atl. 979.

Where a limitation creates a servitude in the nature of an exception or reservation to the grantor of an incorporeal right in the land for the benefit of adjoining property, such right will be in the nature of an equitable easement appurtenant to such adjoining land. Tinker *v.* Forbes, 136 Ill. 221, 26 N. E. 503.

72. Hawes *v.* Favor, 161 Ill. 440, 43 N. E. 1076. See also Meigs *v.* Lewis, 164 Pa. St. 597, 30 Atl. 505.

In determining whether the easement created by a building restriction is a personal right of the grantor, or is appurtenant to his other land, the situation of the premises relatively to his other land is to be considered. Peck *v.* Conway, 119 Mass. 546.

A restriction as to the cost of a building applies to all the buildings, and the fact that one has been erected at a greater cost than that specified does not authorize the erection of another at a cost less than that stipulated. Isham *v.* Matchett, 18 Ohio Cir. Ct. 338.

73. Hobson *v.* Cartwright, 93 Ky. 368, 20 S. W. 281, 14 Ky. L. Rep. 293; Summers *v.* Beeler, 90 Md. 474, 45 Atl. 19, 48 L. R. A. 54. See also Quatman *v.* McCray, 128 Cal. 285, 60 Pac. 855.

Limitation of distance within which a railroad can be constructed "from the east line of my grist-mill" will refer to a distance computed from the east line of an easterly mill, where the grantor owns two mills, and by construing the term "grist-mill" it will be applicable to either one of the two. Hutchinson *v.* Chicago, etc., R. Co., 37 Wis. 582.

Prohibition of offensive or dangerous trade or business does not prevent the grantee from constructing a temporary railroad over land, although the use contemplated thereby may be a nuisance. Bohusack *v.* McDonald, 26 Misc. (N. Y.) 493, 56 N. Y. Suppl. 347. So a prohibition of "nauseous or offensive trade" or of a purpose "which shall tend to disturb the quiet or comfort of the neighborhood" is not violated by the sale of groceries and provisions. Tobey *v.* Moore, 130 Mass. 448.

in favor of different lots against certain uses of the premises it is immaterial that such restrictions are differently expressed in different deeds.[74] The construction will also be most favorable to the grantee.[75] Nor will a restriction be enlarged or extended by construction.[76] Again a clause will be construed in its entirety as a limitation upon the use of property for a limited period of time, if by such construction all the clauses of the instrument may be made consistent.[77]

e. Persons Bound. When it appears by a fair interpretation of the words of a grant that it was the intent of the parties to create or reserve a right, in the nature of a servitude or easement in the property granted, for the benefit of other land owned by the grantor, and originally forming with the land conveyed one parcel, such right will be deemed appurtenant to the land of the grantor and binding on that conveyed to the grantee, and the right and burden thus created will respectively pass to and be binding on all subsequent grantees of the respective lots of land.[78] In such case each purchaser, taking a deed of a parcel of land subject to an equitable easement or servitude in other lots of the same tract, takes the estate burdened with a like servitude in favor of all the lots.[79] So a perpetual restriction under a recorded deed as to a street building line will bind purchasers from the grantee, even though their deeds contain no reference thereto, since such record operates as a constructive notice of the provisions of the deed.[80]

74. Bacon *v.* Sandberg, 179 Mass. 396, 60 N. E. 936.

75. Glenn *v.* Davis, 35 Md. 208, 6 Am. Rep. 389.

76. Hawes *v.* Favor, 161 Ill. 440, 43 N. E. 1076; McMurtry *v.* Phillips Invest. Co., 103 Ky. 308, 45 S. W. 96, 19 Ky. L. Rep. 2021, 40 L. R. A. 489; Roberts *v.* Porter, 100 Ky. 130, 37 S. W. 485, 18 Ky. L. Rep. 650.

Illustrations.— A right which is not personal to the owners, but which is a covenant running with the land, cannot be extended to objects not contemplated and which do not fall within the original design of the parties. Jamison *v.* McCredy, 5 Watts & S. (Pa.) 129. And if the express terms of a conveyance fix the only manner in which the principal use for which property is held can be frustrated or changed to other uses consistent with such principal use, it can be diverted only in the manner specified. Calvert *v.* Pewee Valley, 25 S. W. 5, 15 Ky. L. Rep. 644. So in the absence of a clear intent to the contrary a forfeiture will be limited to the lot to which the building restriction applies and on which the act is done constituting the forfeiture, even though the lots are conveyed by one deed and adjoin each other as a single tract. Quatman *v.* McCray, 128 Cal. 285, 60 Pac. 855. Again if a restriction is limited to a certain period it will not be extended *in futuro*, especially when such extension is manifestly inconsistent with the grant and with the evident intention of the parties. Eckhart *v.* Irons, 128 Ill. 568, 20 N. E. 687.

In the absence of express prohibition it will not be inferred that the grantor agreed that a certain space adjoining the street was to be kept open and free from buildings. Bradley *v.* Walker, 138 N. Y. 291, 33 N. E. 1079 [*reversing* 17 N. Y. Suppl. 383, 22 N. Y. Civ. Proc. 1].

77. Eckhart *v.* Irons, 128 Ill. 568, 20 N. E. 687. See also *In re* Welsh, 175 Mass. 68, 55 N. E. 1043.

78. Herrick *v.* Marshall, 66 Me. 435 [*citing* Whitney *v.* Union R. Co., 11 Gray (Mass.) 359, 71 Am. Dec. 715]; Tobey *v.* Moore, 130 Mass. 448.

A grantee of a grantee holding under a valid restriction is bound thereby, even though the deed to the subsequent grantee contains no restriction. Russell *v.* Harpel, 20 Ohio Cir. Ct. 127, 10 Ohio Cir. Dec. 732. And a railroad company is bound as purchaser of a right of way from the original grantee. Hayes *v.* Waverly, etc., R. Co., 51 N. J. Eq. 345, 27 Atl. 648.

A purchaser who has accepted a deed with restrictions as to use is restrained to the use prescribed thereby. Haskell *v.* Wright, 23 N. J. Eq. 389.

The obligation is not a mere personal one to the grantor where a grantee takes a deed with a restriction as to the height of a building, but the duty created thereby is to the owner of the adjoining premises whoever he may be. Clark *v.* Martin, 49 Pa. St. 289.

United States is not obligated by restrictive conditions, for the benefit of other lot owners, in case it should be necessary to appropriate any of the property for national defense or other public use. U. S. *v.* Certain Lands, 112 Fed. 622.

79. Eckhart *v.* Irons, 128 Ill. 568, 20 N. E. 687.

A restriction dependent upon correlative obligations obligates both the grantee and all those claiming under him. Stines *v.* Dorman, 25 Ohio St. 580.

The purchasers of successive parcels of land may by parol so contract with the owner in respect to a building line as to affect the remaining parcels with an equity requiring an occupation under like restrictions according to the general plan and so bind a subsequent purchaser with constructive notice and obligate him by the restriction. Tallmadge *v.* East River Bank, 26 N. Y. 105.

80. Townsend's Appeal, 68 Conn. 358, 36 Atl. 815.

f. Persons Benefited. In case an equitable easement is imposed upon each and all the parcels of land sold under a general scheme, so that the equitable rights and burdens are mutual and reciprocal, each lot owner is entitled to the enjoyment of the easement.[81] A building restriction may also be imposed by oral agreement and mutual conditional deeds between all the owners of land for their mutual benefit which will be obligatory upon each and all.[82]

g. Naming Person Benefited. When a negative easement is created by deed showing clearly the character of the act which the grantee is to abstain from doing and identifying the lot to which his own is made servient, it is unnecessary either to name the person, who is to be immediately benefited by the clause, or to insert words of limitation, or of inheritance, to have his rights pass to his heirs or assigns, nor are such words necessary to enable the grantee of that estate with its appurtenances to maintain the right as against those into whose hands the servient estate may fall.[83]

h. Light and Air. A prohibition as to a building line does not preclude the interruption of the access of light and air to the grantor's windows.[84]

i. Height of Building. If parties intend to prescribe a definite and fixed height beyond which a building is never to be increased it should be so plainly stated.[85] But the condition and character of the property at the time of the grant, coupled with the express language of the restriction, may be an important factor in determining the height of the erection.[86]

j. Building or Street Line. A restriction as to a building line will be held to intend only that the wall of the building should be on the line and will not prohibit the erection of a stoop, porch, or platform along it unless they project an unreasonable distance as compared with like structures or unless they unreasonably obstruct light and air,[87] or unless they are in violation of the intent of the

Grantees with notice have no greater rights than their grantor had. Anderson *v.* Rowland, 18 Tex. Civ. App. 460, 44 S. W. 911. But a vendee must have had notice, if additional restrictions are claimed, or he will not be obligated. Standard Land, etc., Co. *v.* Schanz, (N. J. Ch. 1901) 51 Atl. 620.

A town is not perpetually bound to an arbitrary building line by a vote and deeds providing that all buildings shall be regular and uniform. Hamlen *v.* Keith, 171 Mass. 77, 50 N. E. 462.

Where the proviso is a covenant running with the land and the restriction is appurtenant to the land it is not in the power of succeeding grantors of a servient lot to vary the restriction without the consent of the owners of the dominant tenement. Hanseil *v.* Downing, 17 Pa. Super. Ct. 235.

81. Eckhart *v.* Irons, 128 Ill. 568, 20 N. E. 687.

Grantees of platted lots under a common form of deed with like restrictions are each entitled to the benefit thereof. Hopkins *v.* Smith, 162 Mass. 444, 38 N. E. 1122.

A condition in a deed to a lot sold from a larger tract as to the buildings to be erected thereon inures to the benefit of a subsequent purchaser from the grantor of another part of the tract, even though such purchaser is not a party to the deed in which the condition first appears. Roberts *v.* Porter, 100 Ky. 130, 37 S. W. 485, 18 Ky. L. Rep. 650. But this rule does not apply where the deeds are not those executed by a common grantor to different purchasers and made mutually and reciprocally binding upon each, and the subsequent grantee of another part of the tract was clearly ignorant of the restrictions imposed, and it was not intended to subject any one of the lots into which the parcel might be subsequently divided to a restriction in its use for the benefit of others of such lots, and the language used does not authorize such a meaning or operation of the condition. Graham *v.* Hite, 93 Ky. 474, 20 S. W. 506, 14 Ky. L. Rep. 502.

82. Parker *v.* Nightingale, 6 Allen (Mass.) 341, 83 Am. Dec. 632.

83. Herrick *v.* Marshall, 66 Me. 435.

84. Atkins *v.* Bordman, 2 Metc. (Mass.) 457, 37 Am. Dec. 100.

But an entire passageway must be kept open to the sky where such is the substantial requirement of the deed, and the erection of a building limiting the height of such passageway and connecting the grantor's buildings on either side violates the restriction. Schwoerer *v.* Boylston Market Assoc., 99 Mass. 285.

85. Hobson *v.* Cartwright, 93 Ky. 368, 20 S. W. 281, 14 Ky. L. Rep. 293.

If the restriction limits the height of a building if in a particular form, there is no violation of such restriction by erecting a higher building not in the specified form. Smith *v.* Bradley, 154 Mass. 227, 28 N. E. 14.

86. Meigs *v.* Lewis, 164 Pa. St. 597, 30 Atl. 505.

A restriction as to the height of buildings will not be governed by a limitation as to time, where it is evident that the latter refers only to the duration of the use and occupation. Keening *v.* Ayling, 126 Mass. 404.

87. Graham *v.* Hite, 93 Ky. 474, 20 S. W.

prohibition and the deed.[88] The term "equidistant" from a certain line does not, however, require the front of the buildings to be on a uniform line.[89] And if a building line has relation to a street it means the then existing street and not a street as altered by public authority.[90] But the enjoyment of the property according to its true lines will no longer be restricted, where it is the evident intent and design of the provision that whenever the grantee should find it necessary, either by reason of the decaying condition of his house or its unfitness for the locality, to erect in its stead a more substantial structure suitable for the business purposes of that part of the city he might do so.[91]

k. Dwelling-House. In the absence of an intent in the grant that only segregated private residences may be erected, flats or apartment houses can be built under a provision restricting the use of the property to residence purposes only.[92]

506, 14 Ky. L. Rep. 502. See also Bacon *v.* Sandberg, 179 Mass. 396, 60 N. E. 936. And *compare* Payson *v.* Burnham, 141 Mass. 547, 6 N. E. 708.

Projections or erections not within inhibition.— Where deeds provide for bay-windows and circular or octagon fronts, and restrict them by limiting the length of the base of their trapezoids, and in a separate provision allow "porticoes and other usual projections" without restriction, and for a long time all parties have assumed that it was not intended to prohibit the building of porticoes, etc., close to bay-windows, and octagon and circular fronts, it will be held that the latter projections may be built, without regard to whether the base of their trapezoids overlap the porticoes and other usual projections. Atty.-Gen. *v.* Algonquin Club, 153 Mass. 447, 27 N. E. 2, 11 L. R. A. 500. Nor is the maintenance of a porch a violation of a restriction with specifications excluding bay-windows, circular or octagon fronts, but allowing the usual projections, etc. Atty.-Gen. *v.* Ayer, 148 Mass. 584, 20 N. E. 451. So the erection of a brick wall six feet high with a coping one foot high, to be used as a fence or wall on the line of the street is not a violation. Nowell *v.* Boston Academy, 130 Mass. 209. And the erection of a stoop or steps within the prohibited distance is not a violation of the restriction. Kirkpatrick *v.* Peshine, 24 N. J. Eq. 206.

88. **Projections or erections within inhibited line** include a piazza eight feet wide, inclosed by a railing and having a roof supported by posts attached to the house and extending along its entire front (Reardon *v.* Murphy, 163 Mass. 501, 40 N. E. 854); a basement story surrounded by a balcony within the space prohibited, even though such projections were usual in Europe; also two or more bay-windows close together so that the bases of their respective trapezoids would, contrary to the express terms of the deed, interlap, and the length of the base of each taken together would be greater, while the post of the bases of each which did not overlap would be less than the distance limited in the deed (Atty.-Gen. *v.* Algonquin Club, 153 Mass. 447, 27 N. E. 2, 11 L. R. A. 500); a roof extended within the inhibited line so as to cover a piazza, supported by posts within said line and to contain a dormer window by which a room in the second story is extended beyond the line (Bagnall *v.* Davies, 140 Mass. 76, 2 N. E. 786); a rectangular addition to the front projecting over the line and a building in the rear erected contrary to prohibitions as to the front line and the erection of buildings in the rear (Sanborn *v.* Rice, 129 Mass. 387); a structure within the reserved space three and one-half feet high, extending from the wall of the house to the line of the street, the top of which was covered with turf, and the interior used for coal-bins (Atty.-Gen. *v.* Gardiner, 117 Mass. 492); a projection of the whole front wall, except less than two feet at each end, into the reserved space, in the form of a bay running up the whole height of the house, with a foundation, roof, and windows, although such projections had been usual in the city for some years, and the grantor afterward conveyed lots in the same locality allowing such projections (Linzee *v.* Mixer, 101 Mass. 512); and a roofed porch, built on brick foundations and permanently attached to the whole front width of the house, although uninclosed (Ogontz Land, etc., Co. *v.* Johnson, 168 Pa. St. 178, 21 Atl. 1008 [*reversing* 14 Pa. Co. Ct. 86]).

Permitting a bay-window does not permit an extension of an entire building formed over the reserved space, by reason of a change of the street from a residence to a business thoroughfare. Vetter *v.* Flaherty, 4 Lack. Leg. N. (Pa.) 175.

A building line restriction under a recorded deed will be a perpetual one where such is the manifest intent evidenced by the purpose for which the provision was inserted, the place of the provision in the deed, the nature of the restriction, and the language thereof read in connection with other parts of the deed coupled with the notice imported by the record. Townsend's Appeal, 68 Conn. 358, 36 Atl. 815.

89. Smith *v.* Bradley, 154 Mass. 227, 28 N. E. 14.

90. Tobey *v.* Moore, 130 Mass. 448.

91. Glenn *v.* Davis, 35 Md. 208, 6 Am. Rep. 389.

92. McMurtry *v.* Phillips Invest. Co., 103 Ky. 308, 45 S. W. 96, 19 Ky. L. Rep. 2021, 40 L. R. A. 489. See also Soun *v.* Heilberg, 38 N. Y. App. Div. 515, 56 N. Y. Suppl. 341, holding that where the intent was that the

l. Threatened Violation. Acts must not be attempted which threaten a violation of a limitation in the nature of an equitable easement appurtenant to adjoining property, unless it is shown that such acts will not result in a breach of such limitation.[93]

m. Enforcement — (i) *Generally.* Building restrictions in deeds of platted lots under a general scheme for improvement will be enforced even though certain lots of the plot have been sold without such restrictions.[94]

(ii) *By and Against Whom Enforceable.* Restrictions as to the use of property may be enforced by the original proprietors who have an interest to be prejudiced;[95] by the commonwealth against one of its grantees;[96] by an owner of adjoining premises where the restriction is intended for his benefit;[97] by each grantee of a parcel, who is entitled to the benefit of the provision,[98] or the owners of other lots unfavorably affected by a violation of the restrictions;[99] against the grantee or his assigns with notice;[1] and by a subsequent purchaser from the grantee with notice, unless it is clear that the remainder of the tract will not be damaged by a violation of the restriction.[2] So an adjoining lot owner who is a subsequent purchaser may enforce a restriction where it is for his benefit to do so.[3] If, however, a building restriction is inserted to prevent an obstruction of the grantor's view, it is personal to him and is not appurtenant to the land so as to entitle his grantee to enforce the same against others.[4]

land should not be devoted to business but only for residence purposes the restriction does not preclude the erection of an apartment-house.

If the size of the dwelling-house is limited as to the number of families the restriction is broken by the erection of a building available for more families, even though its owner intends only a present use thereof within the terms of the restriction. Ivarson *v.* Mulvey, 179 Mass. 141, 60 N. E. 477.

Provision that only one single dwelling-house be erected is broken by the erection of one building consisting of several tenements, each intended to be used by separate families. Gillis *v.* Bailey, 17 N. H. 18, 21 N. H. 149.

93. Tinker *v.* Forbes, 136 Ill. 221, 26 N. E. 503.

94. Bacon *v.* Sandberg, 179 Mass. 396, 60 N. E. 936.

It is not necessary that like restrictions be inserted in every deed of the allotment in order to enforce the same where such restriction limits the cost of buildings to be erected. Isham *v.* Matchett, 18 Ohio Cir. Ct. 338.

95. Vetter *v.* Flaherty, 4 Lack. Leg. N. (Pa.) 175.

Grantor's right to maintain a bill may depend upon whether the restriction was imposed as part of a general plan. Jeffries *v.* Jeffries, 117 Mass. 184; Dana *v.* Wentworth, 111 Mass. 291. See also Haines *v.* Einwachter, (N. J. Ch. 1903) 55 Atl. 38.

96. Atty.-Gen. *v.* Gardiner, 117 Mass. 492.

Only the state can object to the erection of a monument on a public square on the ground that it is a "building" within the meaning of a condition prohibiting the erection of buildings thereon. Cincinnati Soc.'s Appeal, 154 Pa. St. 621, 26 Atl. 647, 20 L. R. A. 323.

97. Clark *v.* Martin, 49 Pa. St. 289. See also Hamlen *v.* Werner, 144 Mass. 396, 11 N. E. 684.

98. Hopkins *v.* Smith, 162 Mass. 444, 38 N. E. 1122.

Each grantee under a general scheme for the benefit of all the land may enforce the restriction against any other grantee of such parcel. Tobey *v.* Moore, 130 Mass. 448.

A restrictive clause for the benefit of the original grantor in his enjoyment of adjacent land can be insisted on by his grantees. Raynor *v.* Lyon, 46 Hun (N. Y.) 227.

99. Vetter *v.* Flaherty, 4 Lack. Leg. N. (Pa.) 175.

1. Whitney *v.* Union R. Co., 11 Gray (Mass.) 359, 71 Am. Dec. 715.

2. Cornish *v.* Wiessman, 56 N. J. Eq. 610, 35 Atl. 408.

3. Isham *v.* Matchett, 18 Ohio Cir. Ct. 338.

Where plaintiff and defendant are subsequent grantees under conveyances making no reference to the restrictions, and the covenant is not one for the benefit of plaintiff or his grantor, but only for the benefit of the original grantor and his grantees, plaintiff cannot enforce the original restriction and restrain defendant from violating the same. Barney *v.* Everard, 32 Misc. (N. Y.) 648, 67 N. Y. Suppl. 535.

4. Clapp *v.* Wilder, 176 Mass. 332, 57 N. E. 692, 50 L. R. A. 120.

A prior purchaser of a lot from the original owner of the tract cannot enforce a restriction imposed by the latter on a lot subsequently conveyed, unless in the prior deed there was a grant of a right in the residue of the land retained by the vendor, or a stipulation that the restrictions put on the lot sold by the prior deed should also be imposed on the remaining property when sales should be made to subsequent purchasers, or other indications that all the lots were sold as part of a uniform building scheme. Roberts *v.* Scull, 58 N. J. Eq. 396, 43 Atl. 583.

(III) *In Equity.* Equity has power to enforce valid restrictions, as to buildings or concerning the use of the property, in favor of those entitled to the benefit thereof and will prevent a violation of the same in a proper case by injunction or other adequate relief.[5] Dependent correlative restrictions,[6] and provisions which are valid restrictions may be enforced in equity, although unlimited as to time.[7] Equity will not, however, as a rule, enforce a restriction, where, by the acts of the grantor or of those who derived title under him, the property, and that in the vicinage, has so changed its character and environment and in the uses to which it may be put[8] as to make it unfit or unprofitable for use if the restriction be enforced, or where to grant the relief would be a great hardship upon the owner and of no benefit to complainant, or where complainant has waived or abandoned the restriction.[9]

If deeds containing building-line restrictions in no way refer to any general plan nor contain any reciprocal covenant, and the owner abandons his idea of making the land high-class residence property, and other lots are conveyed without such restrictions, they are for the benefit of the grantor personally, and cannot be enforced by the grantees who had built in accordance with the restrictions. Coughlin *v.* Barker, 46 Mo. App. 54.

5. *California.*— Quatman *v.* McCray, 128 Cal. 285, 60 Pac. 855.

Massachusetts.— Bacon *v.* Sandberg, 179 Mass. 396, 60 N. E. 936; Payson *v.* Burnham, 141 Mass. 547, 6 N. E. 708; Dorr *v.* Harrahan, 101 Mass. 531, 3 Am. Rep. 398; Parker *v.* Nightingale, 6 Allen 341, 83 Am. Dec. 632.

Michigan.— Reilly *v.* Otto, 108 Mich. 330, 66 N. W. 228. But see Jenks *v.* Pawlowski, 98 Mich. 110, 56 N. W. 1105, 39 Am. St. Rep. 522, 22 L. R. A. 863.

New Hampshire.— Winnipesaukee Camp-Meeting Assoc. *v.* Gordon, 63 N. H. 505, 3 Atl. 426.

New Jersey.—Gamm *v.* Renner, (Ch. 1899) 44 Atl. 632.

New York.—Tallmadge *v.* East River Bank, 26 N. Y. 105; Zipp *v.* Barker, 55 N. Y. Suppl. 246 [*affirmed* in 40 N. Y. App. Div. 1, 57 N. Y. Suppl. 569]; Seymour *v.* McDonald, 4 Sandf. Ch. 502. But see Moller *v.* Presbyterian Hospital, 65 N. Y. App. Div. 134, 72 N. Y. Suppl. 483.

Pennsylvania.— St. Andrew's Lutheran Church's Appeal, 67 Pa. St. 512.

See 16 Cent. Dig. tit. "Deeds," § 546.

In order to restrict one's neighbor from maintaining a private stable on his own land, it is not enough that the original owner of both parcels of land and of many others had prepared a plan which stated that none of the land should be used as a stable, it appearing that many lots were sold without the restriction, and that at public sales of both plaintiff's and defendant's lots it was announced that the restriction would not be enforced, defendant's deed containing the restriction, and plaintiff not knowing of the announcement. Beals *v.* Case, 138 Mass. 138.

6. Stines *v.* Dorman, 25 Ohio St. 580.

Restrictions will be mutual where it is the manifest intention that there should be correlative obligations on both parties, and in such case a party who seeks the aid of a court of equity does not come therein with clean hands, where he is himself guilty of violation of the restrictions in the conveyance. Compton Hill Imp. Co. *v.* Tower, 158 Mo. 282, 59 S. W. 239.

7. Tobey *v.* Moore, 130 Mass. 448.

8. But the fact that the character of the neighborhood has changed from residence to business property will not prevent relief by injunction against a violation of a restriction as to a building line, where the value of the property is as great for business purposes as for residences. Zipp *v.* Barker, 166 N. Y. 621, 59 N. E. 1133 [*affirming* 40 N. Y. App. Div. 1, 57 N. Y. Suppl. 569].

9. Ewertsen *v.* Gerstenberg, 186 Ill. 344, 57 N. E. 1051, 51 L. R. A. 310 [*citing* Star Brewery Co. *v.* Primas, 163 Ill. 652, 45 N. E. 145; Jackson *v.* Stevenson, 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476; Bangs *v.* Potter, 135 Mass. 245; Coughlin *v.* Barker, 46 Mo. App. 54; Page *v.* Murray, 46 N. J. Eq. 325, 19 Atl. 11; Columbia College *v.* Thacher, 87 N. Y. 311, 41 Am. Rep. 365; Sayers *v.* Collyer, 24 Ch. 180, 47 J. P. 741, 52 L. J. Ch. 770, 48 L. T. Rep. N. S. 939, 32 Wkly. Rep. 200; Bedford *v.* British Museum, 2 L. J. Ch. 129, 2 Myl. & K. 552]. See also Glenn *v.* Davis, 35 Md. 208, 6 Am. Rep. 389.

Equity will not relieve.— Where the restriction does not appear to have been inserted for the benefit of adjoining messuages it will not be enforced in equity at the suit of a subsequent grantee thereof by a deed containing no express mention of the restriction. Badger *v.* Boardman, 16 Gray (Mass.) 559. Nor will courts of equity enforce a forfeiture, where the restriction is waived or abandoned by subsequent conduct of the party in changing the condition of the property so that the general scheme on which the restriction is based becomes impossible of fulfilment and the restriction is thereby rendered inapplicable in its true intent and meaning. Duncan *v.* Central Pass. R. Co., 85 Ky. 525, 4 S. W. 228, 9 Ky. L. Rep. 92. So a bill cannot be maintained by grantees of a common grantor against another grantee to restrain the latter from violating the restriction, where it does not appear that the condition had been annexed to the original grant for the purpose of rendering the occupation of the estate more beneficial when it should be divided into

n. Release and Termination. A restriction can be released only by the assent of all the grantees of platted lots for whose benefit such restriction was imposed.[10] So where building restrictions are upon lands in the hands of certain persons and are conveyed by them subject to such restrictions, releases of other lands do not put an end to the restrictions and do not affect them, although it is provided that they shall be inserted in all deeds thereafter made by the grantor of other lots.[11] But a general release by the covenantee of all his right, title, etc., relieves the estate of a condition not to build in a particular manner.[12]

o. Waiver. Where the grantee, without objection, or inquiry as to his intent on the part of the grantor who has knowledge of the facts, expends large sums of money in placing valuable and lasting improvements upon the land, such conduct of the grantor operates as a waiver of any forfeiture of a building restriction which might otherwise arise from such grantee's acts.[13]

F. Loss or Relinquishment of Rights — 1. Revocation, Subsequent Conveyance, or Other Acts of Grantor. If a deed has vested the property or estate in the grantee, it cannot without his consent[14] be divested and the title reinvested in the grantor by a revocation by the latter;[15] or by the subsequent declarations[16] or acts of the grantors in relation to the title;[17] or, subject to certain exceptions,[18] by a subsequent conveyance to a third person.[19] And when a deed conveys lands

separate lots. Jewell *v.* Lee, 14 Allen (Mass.) 145, 92 Am. Dec. 744. And the erection of a projection over an inhibited building line will not be restrained in favor of one owner of a lot against another where the former had erected a similar structure, although it did not extend as much over the line as that of the latter, and the evidence is conflicting upon the point whether the structure in question was a bay or not and so excepted from the restriction. Sutcliffe *v.* Eisele, 62 N. J. Eq. 222, 50 Atl. 69.

A restriction, the fulfilment of which becomes impossible, will not be enforced in equity at the instance of the party whose acts produced such a result. Duncan *v.* Central Pass. R. Co., 85 Ky. 525, 4 S. W. 228, 9 Ky. L. Rep. 92.

10. Hopkins *v.* Smith, 162 Mass. 444, 38 N. E. 1122.

If an owner sells lots to different purchasers restricting the use of the property, he cannot thereafter release the land from the effect of the restrictions, as they inured in favor of those who became grantees and were for the benefit of the property. Raynor *v.* Lyon, 46 Hun (N. Y.) 227.

11. Kimball *v.* Commonwealth Ave. St. R. Co., 173 Mass. 152, 53 N. E. 274.

If a building restriction is not part of a general plan for the improvement of all of a certain number of lots and is not exacted from all purchasers for the benefit of each, it is a condition for the benefit of the grantor only and is nullified by a release from him. Safe-Deposit, etc., Co. *v.* Flaherty, 91 Md. 489, 46 Atl. 1009. And restrictions may be terminated by an abandonment of the general scheme on which they were based and thereafter each lot owner may use his own lot for any proper purpose. Bangs *v.* Potter, 135 Mass. 245.

12. Davis *v.* Obertenffer, 5 Pa. L. J. Rep. 413.

13. Hawes *v.* Favor, 161 Ill. 440, 43 N. E. 1076. See also Lehigh Coal, etc., Co. *v.* Early, 162 Pa. St. 338, 29 Atl. 736.

There is no waiver where plaintiff did not sleep upon his rights, but asserted them as soon as he knew he could substantiate them and defendant did not heed his claim. Herrick *v.* Marshall, 66 Me. 435. Nor does a waiver of a restriction arise from the grantor not prohibiting or complaining of the opening of a window on a certain side of the house contrary to the inhibition. Gray *v.* Blanchard, 8 Pick. (Mass.) 284.

14. Warren *v.* Tobey, 32 Mich. 45; Tyson *v.* Harrington, 41 N. C. 329.

15. McCutchen *v.* McCutchen, 9 Fort. (Ala.) 650; Pennington *v.* Lawson, 65 S. W. 120, 23 Ky. L. Rep. 1340; Warren *v.* Tobey, 32 Mich. 45.

16. Younge *v.* Moore, 1 Strobh. (S. C.) 48.

17. Hagan *v.* Waldo, 168 Ill. 646, 48 N. E. 89.

18. **Rule applies unless the grantee is a party to the subsequent conveyance.** Crocker *v.* Bellangee, 6 Wis. 645, 70 Am. Dec. 489.

If deed is upon condition and there is a breach a deed to a third party may operate as a revocation. De Bajligethy *v.* Johnson, 23 Tex. Civ. App. 272, 56 S. W. 95.

19. *Connecticut.*— Humphry *v.* Humphry, 1 Day 271; Hall *v.* Hall, 2 Root 383.

New York.— Ring *v.* Steele, 4 Abb. Dec. 68; Washburn *v.* Benedict, 46 N. Y. App. Div. 484, 61 N. Y. Suppl. 387.

Texas.— Parsons *v.* Hart, 19 Tex. Civ. App. 300, 46 S. W. 856.

Virginia.— Hess *v.* Rankin, 78 Va. 175.

Wisconsin.— Crocker *v.* Bellangee, 6 Wis. 645, 70 Am. Dec. 489.

See 16 Cent. Dig. tit. "Deeds," § 549½.

Deed operating as a covenant to stand seized to use of grantee, and which is duly recorded, cannot be limited in its effect by a subsequent deed from the grantor to a third person. Rowlett *v.* Daniel, 4 Munf. (Va.) 473.

for such uses as are set out in a will, it is not revocable if no power of revocation is reserved.[20] So a deed of the remainder in trust for indemnity and distribution is irrevocable;[21] and an absolute gift chargeable on real estate subject to the grantor's life support is not revocable during his life nor dependent upon his death.[22] Nor does a subsequently made void will of the grantor invalidate a deed;[23] nor is the grant of an annuity revoked by the insanity of the grantor.[24] But if there is no delivery of a deed the grantor may revoke or destroy it;[25] and a deed in the nature of a will, or a *donatio causa mortis* is revocable at the grantor's option.[26]

2. Mutilation, Destruction, or Alteration of Deed — a. By Grantor. Title cannot be divested and reinvested in the grantor by an erasure of his signature after the grantee's death;[27] by the erasure of the grantee's name after his death;[28] by a mutilation while in the possession of one holding it for the grantee;[29] or by a suppression[30] or destruction of the deed by the grantor[31] or his executors,[32] unless the grantee's claims would amount to a fraud.[33] Nor after a deed has been delivered and recorded has the grantor any right to alter it, as nothing that he can do can change the effect of the instrument.[34] So the grantor who conveys certain interests in lands does not have the power to thereafter change such interests without the grantee's consent.[35]

b. By Grantee. After a deed has passed the title to the grantee it has performed its office as an instrument of conveyance, and its continued existence is not necessary to the continuance of title in the grantee, and the estate remains in him until it has passed to another by some mode of conveyance recognized by law.[36] Therefore the destruction of a deed of conveyance by or at the instance

20. Craven *v.* Winter, 38 Iowa 471.

21. Johnson *v.* Mitchell, 1 Humphr. (Tenn.) 168.

22. Rutland, etc., R. Co. *v.* Power, 25 Vt. 15.

23. Garnsey *v.* Gothard, 90 Cal. 603, 27 Pac. 516.

24. Blount *v.* Hogg, 57 N. C. 46.

25. Reid *v.* Butt, 25 Ga. 28; Shovers *v.* Warrick, 152 Ill. 355, 38 N. E. 792; Stow *v.* Miller, 16 Iowa 460.

As to necessity of delivery see *supra*, III, H, 1, a.

26. Leaver *v.* Gauss, 62 Iowa 314, 17 N. W. 522. *Compare* McCarty *v.* Kearnan, 86 Ill. 291.

27. Turner *v.* Warren, 160 Pa. St. 336, 28 Atl. 781.

28. Berry *v.* Kinnaird, 20 S. W. 511, 14 Ky. L. Rep. 578.

29. Frost *v.* Peacock, 4 Edw. (N. Y.) 678.

30. Tyson *v.* Harrington, 41 N. C. 329.

31. *Alabama.*— Whitten *v.* McFall, 122 Ala. 619, 26 So. 131.

Illinois.— Gillespie *v.* Gillespie, 159 Ill. 84, 42 N. E. 305.

Nebraska.— Brown *v.* Hartman, 57 Nebr. 341, 77 N. W. 776.

North Carolina.— Tyson *v.* Harrington, 41 N. C. 329.

North Dakota.— Arnegaard *v.* Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258.

Ohio.— Jeffers *v.* Philo, 35 Ohio St. 173.

Virginia.— Vaughan *v.* Moore, 89 Va. 925, 17 S. E. 326; Ward *v.* Webber, 1 Wash. 274.

See 16 Cent. Dig. tit. "Deeds," § 553.

Subsequent destruction by the grantor of a deed delivered to a third person to hold for the grantor's wife until his death is no revocation. Albright *v.* Albright, 70 Wis. 528, 36 N. W. 254.

Where the grantor of an unregistered deed regains its possession after delivery and wrongfully destroys it the grantee's title is not divested. Edwards *v.* Dickinson, 102 N. C. 519, 9 S. E. 456.

32. Grand Tower Min. Mfg., etc., Co. *v.* Cady, 96 Ill. 430.

33. Jeffers *v.* Philo, 35 Ohio St. 173.

34. Hancock *v.* Dodd, (Tenn. Ch. App. 1896) 36 S. W. 742. See also Alexander *v.* Hickox, 34 Mo. 496, 86 Am. Dec. 118.

The insertion of a saving clause after execution, even with the grantee's consent, does not reinvest the grantor with the title which passed on execution of the deed. Booker *v.* Stivender, 13 Rich. (S. C.) 85.

35. Owings *v.* Hill, 5 S. W. 418, 9 Ky. L. Rep. 468.

Title cannot be divested by a change in the deed, with or without the grantee's consent, after execution and delivery. Gulf Red Cedar Lumber Co. *v.* O'Neal, 131 Ala. 117, 30 So. 466, 90 Am. St. Rep. 22.

A subsequent deed given to correct the first cannot impose a servitude not before existing. Regan *v.* Boston Gas Light Co., 137 Mass. 37. But on discovery of a mistake by the grantee, the grantor may substitute a new deed and the erroneous deed be thus avoided. Gardner *v.* McLannen, 79 Pa. St. 398. So the grantor may correct a deed so as to express his intent, where it has been delivered to a stranger for the use of the grantee and has not been recorded or actually delivered to the grantee. Meeks *v.* Stillwell, 54 Ohio St. 541, 44 N. E. 267.

36. Rifener *v.* Bowman, 53 Pa. St. 313.

of the grantee does not reinvest the grantor with the legal title.[37] Nor is the title reconveyed to the grantor by an alteration of the deed by the grantee after its delivery[38] or vesting of title,[39] although a fraudulent and material change may disable the holder from bringing an action upon its covenants.[40]

e. By Parties. Title once vested is not divested and revested in the grantor by the mere destruction of the deed by agreement[41] by parol between the grantor and grantee.[42]

d. By Third Person. A subsequent destruction by a third party of a recorded deed does not divest the title conveyed.[43]

e. Mere Spoliation. A mere spoliation does not affect the grantee's rights, even against a *bona fide* purchaser from the one benefited by the spoliation, unless the original grantee was guilty of fraud or negligence.[44]

3. Rescission or Cancellation. A mere agreement to cancel a deed without actually canceling it is without effect.[45] And a recorded deed cannot be canceled by parol or mutual understanding of the parties.[46] Again the cancellation of an

37. *Alabama.*—Stapp *v.* Wilkinson, 80 Ala. 47; Brady *v.* Huff, 75 Ala. 80; Reavis *v.* Reavis, 50 Ala. 60; Fawcetts *v.* Kimmey, 33 Ala. 261.

Arkansas.— Cunningham *v.* Williams, 42 Ark. 170; Neal *v.* Speigle, 33 Ark. 63; Strawn *v.* Norris, 21 Ark. 80.

California.— Killey *v.* Wilson, 33 Cal. 690; Bowman *v.* Cudworth, 31 Cal. 148.

Georgia.— Jordan *v.* Pollock, 14 Ga. 145.

Illinois.— King *v.* Gilson, 32 Ill. 348, 83 Am. Dec. 269; Duncan *v.* Wickliffe, 5 Ill. 452; National Union Bldg. Assoc. *v.* Brewer, 41 Ill. App. 223; Erwin *v.* Hall, 18 Ill. App. 315.

Indiana.— Speer *v.* Speer, 7 Ind. 178, 63 Am. Dec. 418; Connelly *v.* Doe, 8 Blackf. 320.

Maine.— Barrett *v.* Thorndike, 1 Me. 73.

Massachusetts.— Steel *v.* Steel, 4 Allen 417; Chessman *v.* Whittemore, 23 Pick. 231; Holbrook *v.* Tirrell, 9 Pick. 105.

Mississippi.— Burton *v.* Wells, 30 Miss. 688; Lisloff *v.* Hart, 25 Miss. 245, 57 Am. Dec. 203.

Missouri.— Tibeau *v.* Tibeau, 19 Mo. 78, 59 Am. Dec. 329.

Nebraska.— Brown *v.* Westerfield, 47 Nebr. 399, 66 N. W. 439, 53 Am. St. Rep. 532.

New Hampshire.— *Compare* Tomson *v.* Ward, 1 N. H. 9.

New Jersey.— Wilson *v.* Hill, 13 N. J. Eq. 143.

New York.— Parshall *v.* Shirts, 54 Barb. 99; Fonda *v.* Sage, 46 Barb. 109; Jackson *v.* Page, 4 Wend. 585; Nicholson *v.* Halsey, 1 Johns. Ch. 417; Frost *v.* Peacock, 4 Edw. 678.

Pennsylvania.— Tate *v.* Clement, 176 Pa. St. 550, 35 Atl. 214; Rifener *v.* Bowman, 53 Pa. St. 313.

Rhode Island.— Tripp *v.* Ide, 3 R. I. 51.

Tennessee.— Maloney *v.* Bewley, 10 Heisk. 642; Morgan *v.* Elam, 4 Yerg. 375.

Texas.— Thomas *v.* Groesbeck, 40 Tex. 530.

West Virginia.— Furguson *v.* Bond, 39 W. Va. 561, 20 S. E. 591.

Wisconsin.— Parker *v.* Kane, 4 Wis. 1, 65 Am. Dec. 283. But see Wilke *v.* Wilke, 28 Wis. 296.

United States.— Holmes *v.* Trout, 7 Pet. 171, 8 L. ed. 647.

See 16 Cent. Dig. tit. "Deeds," § 553.

The grantee at a guardian's sale cannot by destroying the deed to himself and procuring the guardian to make another to his wife, divest title out of himself, and vest it in his wife. Partee *v.* Matthews, 53 Miss. 140.

38. Woods *v.* Hildebrand, 46 Mo. 284, 2 Am. Rep. 513.

39. Rifener *v.* Bowman, 53 Pa. St. 313.

40. Woods *v.* Hildebrand, 46 Mo. 284, 2 Am. Rep. 513.

41. Gugins *v.* Van Gorder, 10 Mich. 523, 82 Am. Dec. 55.

An equitable interest only vests in the purchaser from the grantee, and not the legal title, where his grantor without having his original deed recorded destroys it and procures to be executed to such purchaser a deed directly from the original grantor. Russell *v.* Meyer, 7 N. D. 335, 75 N. W. 262, 47 L. R. A. 637.

A married woman cannot divest herself and children of title by merely destroying a deed to them, and consenting to the making of a deed by the grantor to another, nor is she estopped thereby to claim her interest in the land, the grantee in the new deed being a party to the arrangement and having knowledge of all the facts. Rittenhouse *v.* Clark, 110 Ky. 147, 61 S. W. 33, 22 Ky. L. Rep. 1610.

42. Van Hook *v.* Simmons, 25 Tex. Suppl. 323, 78 Am. Dec. 573.

If the parties voluntarily destroy a deed before it is recorded it is inoperative as to *bona fide* purchasers. Parker *v.* Kane, 22 How. (U. S.) 1, 16 L. ed. 286.

43. Goodman *v.* Malcolm, 5 Kan. App. 285, 48 Pac. 439.

44. John *v.* Hatfield, 84 Ind. 75.

45. Barrett *v.* Barron, 13 N. H. 150; Morse *v.* Child, 6 N. H. 521; Farrar *v.* Farrar, 4 N. H. 191, 17 Am. Dec. 410. See also Goodwin *v.* Tyrrell, (Ariz. 1903) 71 Pac. 906.

46. Turner *v.* Ogden, 1 Black (U. S.) 450, 17 L. ed. 203. See also Garver *v.* McNulty, 39 Pa. St. 473.

If a deed provides for rescission within a time certain and that the estate shall thereupon revert the title will revest upon a parol

unrecorded deed from a husband in trust for his wife without his assent has no effect upon the title vested in the wife.[47] But if an unrecorded deed is canceled by the consent of the parties thereto it may operate to restore the estate to the grantor, if the rights of third parties have not intervened.[48] Again acts of the grantor and grantee, coupled with facts of release and acquiescence in claims of right, may be such as to evidence a rescission under a deed providing therefor within a specified time.[49] And a valid deed will operate to rescind a deed declaring an illegal trust.[50]

4. Redelivery of Deed to Grantor. A subsequent surrender or redelivery to the grantor of a deed which has been executed and delivered will not revest the title in the grantor,[51] notwithstanding an agreement between the parties to

rescission being shown. Hughes *v.* Wilkinson, 37 Miss. 482.

In case an unrecorded deed is lost, the title may, as between the parties and those claiming under them, be revested by agreement in the grantor. Tomson *v.* Ward, 1 N. H. 9.

47. Coe *v.* Turner, 5 Conn. 86.

48. Nason *v.* Grant, 21 Me. 160; Faulks *v.* Burns, 2 N. J. Eq. 250.

In the absence of intervening equities in favor of third persons, a cancellation by a sheriff of a deed to a nominal purchaser at an execution sale at the instance of such purchaser and of the one paying the price, and a deed to the latter, is a good conveyance to him. Carithers *v.* Lay, 51 Ala. 390.

Where an unrecorded deed is canceled by the grantee in possession who sells the land to a third person and requests his grantor to make a new conveyance to such third person, which he does, the title by such new conveyance is valid. Com. *v.* Dudley, 10 Mass. 403. See also Holbrook *v.* Tirrell, 9 Pick. (Mass.) 105.

49. Hughes *v.* Wilkinson, 37 Miss. 482.

50. Attleboro First Nat. Bank *v.* Hughes, 10 Mo. App. 7.

51. *Alabama.*— Hollingsworth *v.* Walker, 98 Ala. 543, 13 So. 6; Whisenant *v.* Gordon, (1892) 10 So. 513; Smith *v.* Cockrell, 66 Ala. 64; Kimball *v.* Greig, 47 Ala. 230.

Arkansas.— Taliaferro *v.* Rolton, 34 Ark. 503; Straun *v.* Norris, 21 Ark. 80.

California.— Lawton *v.* Gordon, 34 Cal. 36, 91 Am. Dec. 670; Kearsing *v.* Kilian, 18 Cal. 491.

Connecticut.— Gilbert *v.* Buckley, 5 Conn. 262, 13 Am. Dec. 57; Botsford *v.* Morehouse, 4 Conn. 550.

Illinois.— Fitch *v.* Conyne, 65 Ill. 83; Duncan *v.* Wickliffe, 5 Ill. 452; Hazle *v.* Bondy, 70 Ill. App. 185.

Indiana.— Burkholder *v.* Casad, 47 Ind. 418; Connelly *v.* Doe, 8 Blackf. 320.

Maine.— Hall *v.* McDuff, 24 Me. 311.

Minnesota.— Barkey *v.* Johnson, (1903) 95 N. W. 583.

Mississippi.— McAllister *v.* Mitchner, 68 Miss. 672, 9 So. 829; Whitton *v.* Smith, Freem. 231.

Missouri.— Lawrence *v.* Lawrence, 24 Mo. 269.

Nebraska.— Bunz *v.* Cornelius, 19 Nebr. 107, 26 N. W. 621.

New York.— Parshall *v.* Shirts, 54 Barb. 99; Raynor *v.* Wilson, 6 Hill 469; Jackson *v.* Page, 4 Wend. 585; Nicholson *v.* Halsey, 1 Johns. Ch. 417. But see Newton *v.* Newton, 52 N. Y. App. Div. 96, 64 N. Y. Suppl. 981.

North Carolina.— Arrington *v.* Arrington, 114 N. C. 151, 19 S. E. 351; Churchill *v.* Speight, 3 N. C. 338.

Ohio.— Baldwin *v.* Massilon, 1 Ohio St. 141; Starr *v.* Starr, 1 Ohio 321.

Pennsylvania.—*Compare* Barncord *v.* Kuhn, 36 Pa. St. 383.

South Carolina.— Sally *v.* Sandifer, 2 Mill 445, 12 Am. Dec. 687. *Compare* Fripp *v.* Fripp, Rice Eq. 84.

Tennessee.— Howard *v.* Huffman, 3 Head 562, 75 Am. Dec. 783.

Texas.— McClendon *v.* Brockett, (Civ. App. 1903) 73 S. W. 854.

Virginia.— Jones *v.* Neale, 2 Patt. & H. 339.

Wisconsin.— Rogers *v.* Rogers, 53 Wis. 36, 10 N. W. 2, 40 Am. Rep. 756.

United States.— Suydam *v.* Beals, 23 Fed. Cas. No. 13,653, 4 McLean 12. See also Parker *v.* Kane, 22 How. 1, 16 L. ed. 286.

See 16 Cent. Dig. tit. "Deeds," § 551.

Contra.— Sawyer *v.* Peters, 50 N. H. 143; Dodge *v.* Dodge, 33 N. H. 487; Mussey *v.* Holt, 24 N. H. 248, 55 Am. Dec. 234.

Exceptions to and qualifications of rule.— No title, legal or equitable, remains in the grantee, where a paper not under seal and unregistered has been surrendered by the alleged grantee to the grantor. Waugh *v.* Blevins, 68 N. C. 167. And only the equitable and not the legal title passes under an unregistered deed, and the contract may be rescinded by the parties by the redelivery of the deed and the return of the consideration. Davis *v.* Inscoe, 84 N. C. 396. So the surrender of an unregistered deed restores the legal title to the vendor as between the parties, where no intervening interests have attached. Fortune *v.* Watkins, 94 N. C. 304; Austin *v.* King, 91 N. C. 286. But see Brown *v.* Hartman, 57 Nebr. 341, 77 N. W. 776. And the rule, that where the grantor obtains possession of the deed by delivery or with the grantee's consent, with a view to its cancellation, the grantee cannot recover the property is limited to cases between the parties to the deed or those standing in the same relation to each other. Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638. So redelivery with intent to abandon and revest title will

reseind.[52] Nor will the grantor's subsequent custody of the deed defeat its operation.[53] An equitable interest may, however, be created in the grantor, by redelivery which will operate as a defense to a suit by the grantee to establish title.[54]

5. INDORSEMENT ON DEED. Although an indorsement on the deed may as between the parties operate as a cancellation it will not divest the grantee's title, as against a judgment lien,[55] or constitute a reconveyance[56] of the legal title[57] unless sealed and acknowledged.[58] But an indorsement may be such as to indicate an agreement enforceable in equity as intended.[59]

6. LOSS OF DEED. The title of the first grantee is not impaired by the loss of a deed before it is recorded, and the conveyance of the land by the grantor to another with full notice of the original conveyance.[60]

7. RECONVEYANCE. A promise to reconvey may be enforced and the reconveyance will effectually divest the grantee's title and estop him from claiming under the original deed.[61] A reconveyance is, however, held to be necessary to revest a title conveyed to and vested in the grantee;[62] although a transaction may be such as to have the effect in equity of a reconveyance.[63] A reconveyance from one who took no title under his deed will not prejudice his grantor's prior title.[64]

VI. PLEADING.

In respect to the necessity and sufficiency of allegations as to the execution, delivery, and existence of a deed,[65] the consideration,[66] its validity or invalidity,[67]

have that effect, on the principle of estoppel, and a third person cannot claim that a redelivery to a married woman of a deed to her with the intention of abandoning it and revesting the title did not have that effect, because of the law requiring her land to be conveyed by deed with privy examination. Peterson *v.* Carson, (Tenn. Ch. App. 1898) 48 S. W. 383.

52. Cranmer *v.* Porter, 41 Cal. 462.

53. Souverbye *v.* Arden, 1 Johns. Ch. (N. Y.) 240.

54. Happ *v.* Happ, 156 Ill. 183, 41 N. E. 39.

55. King *v.* Crocheron, 14 Ala. 822.

Title cannot be revested by indorsement "I transfer the within deed to" the grantor's estate. Linker *v.* Long, 64 N. C. 296.

56. Fish *v.* Howland, 1 Paige (N. Y.) 20.

57. Tunstall *v.* Cobb, 109 N. C. 316, 14 S. E. 28.

58. Arms *v.* Burt, 1 Vt. 303, 18 Am. Dec. 680.

59. Linker *v.* Long, 64 N. C. 296.

60. Harrington *v.* Finney, 22 Ind. 340.

If a deed is lost before it is proven and registered no legal title vests in the grantee. Triplett *v.* Witherspoon, 74 N. C. 475.

61. Skeen *v.* Marriott, 22 Utah 73, 61 Pac. 296.

A conveyance back in escrow in exchange for lands if efficacious is absolute. Braman *v.* Bingham, 26 N. Y. 483.

A retrocession does not convey a new title, being only a recognition of the one previously existing in another. Amet *v.* Boyer, 43 La. Ann. 562, 9 So. 622.

62. Cranmer *v.* Porter, 41 Cal. 462.

A deed may operate as a modification rather than as a reconveyance. Mott *v.* Richtmyer, 57 N. Y. 49.

A writing is wholly inoperative which is not sealed or acknowledged, although probably intended as a reconveyance. Arms *v.* Burt, 1 Vt. 303, 18 Am. Dec. 680.

Party is not entitled to a reconveyance but only to option under a covenant that the grantor "should at any time have the right of preëmption of the premises conveyed" at a certain price. Garcia *v.* Callender, 125 N. Y. 307, 26 N. E. 283 [*affirming* 53 Hun 12, 5 N. Y. Suppl. 934].

63. Cadwallader *v.* Lovece, 10 Tex. Civ. App. 1, 29 S. W. 666, 917.

64. Barry *v.* Adams, 14 Allen (Mass.) 208.

65. *California.*— Davis *v.* Pacific Imp. Co., 118 Cal. 45, 50 Pac. 7.

Georgia.— Buffington *v.* Thompson, 98 Ga. 416, 25 S. E. 516.

Iowa.— Davenport *v.* Whisler, 46 Iowa 287.

Kentucky.— Hammon *v.* Alexander, 1 Bibb 333; Banta *v.* Henry, 10 Ky. L. Rep. 36.

Missouri.— McReynolds *v.* Grubb, 150 Mo. 352, 51 S. W. 822, 73 Am. St. Rep. 448.

Nebraska.— Brown *v.* Westerfield, 47 Nebr. 399, 66 N. W. 439, 53 Am. St. Rep. 532.

Ohio.— Andrews *v.* Moore, Tapp. 215.

United States.— Dowell *v.* Applegate, 7 Fed. 881, 7 Sawy. 232.

Canada.— Burns *v.* Robertson, 8 U. C. Q. B. 280.

See 16 Cent. Dig. tit. "Deeds," § 556 *et seq.*

66. Bird *v.* Smith, 8 Ark. 368; Lawton *v.* Buckingham, 15 Iowa 22; McClanahan *v.* Henderson, 2 A. K. Marsh. (Ky.) 388, 12 Am. Dec. 412; Poe *v.* Domee, 48 Mo. 441.

Although no consideration is expressed in a deed it may be supplied by averment. McClanahan *v.* Henderson, 2 A. K. Marsh. (Ky.) 388, 12 Am. Dec. 412.

67. Skinner *v.* Bailey, 7 Conn. 496; Powers *v.* Ware, 2 Pick. (Mass.) 451; Overton *v.* Overton, 131 Mo. 559, 33 S. W. 1; Rhino *v.* Emery, 72 Fed. 382, 18 C. C. A. 600.

and the performance or breach of conditions or the operation and effect of restrictions,[68] the general rules of pleading, where a bond, contract, or other instrument in writing is involved, apply;[69] and so also as to issues, proof, and variance.[70] An allegation of a sale and conveyance by deed imports a conveyance in fee.[71]

VII. EVIDENCE.[72]

A. Presumptions and Burden of Proof — 1. In General. The burden of proof is on a plaintiff, who seeks to set aside a deed on the ground that it was intended as a gift *causa mortis*, to prove such fact.[73] And where a party intervenes in an action to compel the execution of a conveyance in place of one lost, raising an issue as to the ownership of the land by claiming title in himself, he has the burden of showing such title.[74]

2. Execution — a. Generally. A party claiming under a deed has the burden of showing that the deed was properly executed.[75] So one who asserts that deeds were executed as escrows must show that fact.[76] And it has been decided that one who seeks to avoid a conveyance on the ground that the deed is void because not duly stamped or the stamp not canceled as provided by law, such omission being

68. *California.*— Quatman *v.* McCray, 128 Cal. 285, 60 Pac. 855.

Indiana.— Wilson *v.* Wilson, 86 Ind. 472; Clark *v.* Holton, 57 Ind. 564.

New York.— Redpath *v.* Redpath, 75 N. Y. App. Div. 95, 77 N. Y. Suppl. 668.

North Carolina.—Toler *v.* Pender, 21 N. C. 445.

Texas.— Johnston *v.* McDonnell, 37 Tex. 595.

See 16 Cent. Dig. tit. "Deeds," § 560.

69. Pleading generally see PLEADING.

For pleadings in action: By creditors see CREDITORS' SUITS; FRAUDULENT CONVEYANCES. For breach of covenant see COVENANTS. For partition see PARTITION. For specific performance see SPECIFIC PERFORMANCE. Of ejectment see EJECTMENT. For trespass to try title see TRESPASS TO TRY TITLE. On lost deed see LOST INSTRUMENTS. On bond or contract see BONDS; CONTRACTS. To cancel deed see CANCELLATION OF INSTRUMENTS. To establish lost deed see LOST INSTRUMENTS. To foreclose mortgage see MORTGAGES. To quiet title see QUIETING TITLE. To reform deed see REFORMATION OF INSTRUMENTS. To set aside deed in fraud of creditor see FRAUDULENT CONVEYANCES.

70. *Arkansas.*— Holland *v.* Rogers, 33 Ark. 251.

Georgia.— Roberts *v.* Roberts, 101 Ga. 765, 29 S. E. 271.

Illinois.— Hewes *v.* Glos, 170 Ill. 436, 48 N. E. 922 [*modifying* 69 Ill. App. 75].

Indiana.— Stumph *v.* Miller, 142 Ind. 442, 41 N. E. 812 [*citing* Holliday *v.* Thomas, 90 Ind. 398].

Iowa.— Hines *v.* Horner, 86 Iowa 594, 53 N. W. 317; Bostwick *v.* Bostwick, 52 Iowa 721, 2 N. W. 1050.

Maryland.— Glenn *v.* Randall, 2 Md. Ch. 220.

Massachusetts.— Flint *v.* Sheldon, 13 Mass. 443, 7 Am. Dec. 162; Worcester *v.* Eaton, 13 Mass. 371, 7 Am. Dec. 155.

Nebraska.— Leffel *v.* Schermerhorn, 13 Nebr. 342, 14 N. W. 418.

Texas.— Salazar *v.* Ybarra, (Civ. App. 1900) 57 S. W. 303.

Washington.—Skellinger *v.* Smith, 1 Wash. Terr. 369.

Canada.— Huron County Corp. *v.* Armstrong, 27 U. C. Q. B. 533.

See 16 Cent. Dig. tit. "Deeds," § 561.

Under the general issue evidence is admissible of duress, in avoidance of a conveyance. Worcester *v.* Eaton, 13 Mass. 371, 7 Am. Dec. 155.

71. Fleming *v.* Potter, 14 Ind. 486.

72. Evidence generally see EVIDENCE.

73. Flood *v.* Cain, 78 Hun (N. Y.) 378, 29 N. Y. Suppl. 156.

74. Meadors *v.* Brown, 29 S. W. 325, 16 Ky. L. Rep. 620.

75. Ross *v.* Gould, 5 Me. 204, holding that the burden of proof rests on the person claiming under a deed defectively executed by an attorney in fact, where the genuineness of such deed is questioned. So the party claiming under a deed has the burden of proof of its formal execution, when put in issue under the plea of *non est factum*. Newlin *v.* Beard, 6 W. Va. 110. See also Owings *v.* Iles, 3 T. B. Mon. (Ky.) 286.

If plaintiff gives prima facie evidence of the execution and delivery and contrary evidence is given by defendant and so on through the trial the burden is held to rest on plaintiff, but not where defendant offers to show that the deed was delivered as an escrow. Powers *v.* Russell, 13 Pick. (Mass.) 69.

Party offering deed in evidence must in such case establish by *prima facie* evidence the execution thereof. Trinity County Lumber Co. *v.* Pinckard, 4 Tex. Civ. App. 671, 23 S. W. 720, 1015.

76. Rowley *v.* Rowley, 2 Eq. Rep. 241, 18 Jur. 306, Kay 242, 23 L. J. Ch. 275, 23 L. T. Rep. N. S. 55, holding that one claiming that deeds of appointment of younger children's portions, which were properly executed and found in the custody of the family solicitor, were executed as escrows has the burden of showing such fact.

with intent to defraud the government, must allege and prove such fraudulent intent.[77] Conveyances between private individuals may in some cases be presumed in favor of one who has proved a right to the enjoyment of the property and whose possession is consistent with the conveyance to be presumed, especially if possession without such conveyance would have been unlawful.[78] So deeds and grants may be presumed from lapse of time.[79] And evidence that a person by a recorded deed conveyed a right of way over the land is admissible on the issue of the existence of a deed of such land to him.[80] And where one holds under a deed he is presumed to have it in his possession and to have knowledge of its existence and preservation or destruction if it is destroyed.[81] Again a presumption may arise that a deed given with a stipulation that it should not be recorded until after the grantor's death was recalled and canceled on the execution of a subsequent conveyance.[82] *Prima facie* evidence of the sealing and delivery of a deed exists upon proof of the handwriting of the instrument together with the fact of its possession by the grantee.[83] A deed which appears to have been duly acknowledged needs no further proof of execution.[84] Again it has been decided that a copy of a deed recorded is *prima facie* evidence of its execution,[85] which is pre-

77. Dowell *v.* Applegate, 7 Fed. 881, 7 Sawy. 232.

78. Ransdale *v.* Grove, 20 Fed. Cas. No. 11,570, 4 McLean 282.

79. Ryder *v.* Hathaway, 21 Pick. (Mass.) 298.

A conveyance pursuant to an agreement produced in evidence at the trial may be so presumed. Jackson *v.* Murray, 7 Johns. (N. Y.) 5.

If the party in whose favor a decree for a conveyance of land was rendered continued in the possession of the land and derived from the decree every advantage and benefit it was designed to confer, the reasonable presumption after a lapse of many years would be that the decree had been complied with, but not where the other party continued in possession. Fauntleroy *v.* Henderson, 12 B. Mon. (Ky.) 447.

Recitals in ancient conveyances taken in connection with the possession and claim of ownership of the premises in harmony with them must be deemed to create a conclusive presumption of the truth of the recitals. Dosoris Pond Co. *v.* Campbell, 25 N. Y. App. Div. 179, 50 N. Y. Suppl. 819 [*affirmed* in 164 N. Y. 596, 58 N. E. 1087].

That a deed was anciently executed and has since been lost will not be presumed except for the purpose of quieting a long-continued possession of the land. Brown *v.* Edson, 23 Vt. 435.

Where an ancient deed recites the execution of a bond for title and such deed came from proper custody and immediate possession was taken thereunder, the execution of said bond may be presumed. Grant *v.* Searcy, (Tex. Civ. App. 1896) 35 S. W. 861.

80. Heintz *v.* Thayer, (Tex. Civ. App. 1899) 50 S. W. 175.

81. Magee *v.* Merriman, 85 Tex. 105, 19 S. W. 1002.

82. Mosher *v.* Mosher, 104 Mich. 551, 62 N. W. 706.

83. Sicard *v.* Davis, 6 Pet. (U. S.) 124, 8 L. ed. 342; Grellier *v.* Neal, 1 Peake N. P. 146, 3 Rev. Rep. 669.

A deed with the attesting clause "witness my hand" signed by the grantor with a seal affixed to his name will raise the presumption of sealing and delivery. Miller *v.* Binder, 28 Pa. St. 489.

Possession by grantee is *prima facie* evidence of execution. Nixon *v.* Post, 13 Wash. 181, 43 Pac. 23.

The delivery of a trust deed may be presumed from an indorsement thereon of acceptance by the trustee in his own handwriting, although he testifies many years later, when he has become aged, that he never saw the deed and knew nothing of it. Ewing *v.* Buckner, 76 Iowa 467, 41 N. W. 164.

84. Smith *v.* Walsh, 3 Greene (Iowa) 498. See Gay *v.* Parpart, 106 U. S. 679, 1 S. Ct. 456, 27 L. ed. 256. But see Skinner *v.* Pinny, 19 Fla. 42, 45 Am. Rep. 1.

Magistrate's certificate of acknowledgment not sufficient proof of execution without the certificate of registry. Joplin *v.* Johnson, 4 N. Brunsw. 541.

Where the certificate of acknowledgment is insufficient execution may be proved by the officer who signed such certificate, his signature being taken as that of an attesting witness. Middlebrooks *v.* Barefoot, 121 Ala. 642, 25 So. 102.

85. Buckley *v.* Carlton, 3 Fed. Cas. No. 2,093, 6 McLean 125.

A warranty deed duly executed and recorded raises a presumption that the grantor had title and could convey, and that he vested a seizin of the premises by his deed in the grantee. Farwell *v.* Rogers, 99 Mass. 33.

Where it has been duly acknowledged and recorded, further proof of the execution of a deed is not essential in order that it may be read in evidence. Young *v.* Ringo, 1 T. B. Mon. (Ky.) 30; Brown *v.* Lynch, 1 Harr. & M. (Md.) 218. See *Re* Mayer, 40 L. J. C. P. 201, 24 L. T. Rep. N. S. 273, 19 Wkly. Rep. 641.

The registry of an act under private signature does not make proof of its execution by the parties to it. Grant's Succession, 14 La. Ann. 795.

sumably at the place named in its caption.[86] And, it not being customary to execute an indenture in parts, the execution of an agreement under seal by one of the parties named therein is held to raise no presumption that a counterpart was executed by the other party.[87]

b. Attestation. It will be presumed that a deed was attested at the time of its execution, where it appears to have been duly attested and acknowledged.[88]

c. Seal. Where there is no indication from the record of a deed that a seal was affixed thereto it will be presumed that there was none;[89] but although the copy of a deed as recorded contains no seal, yet if there is a recital in the attestation clause that the instrument is signed and sealed it will be presumed that the original deed was sealed.[90] And the presence of a seal on a deed raises the presumption that it was there when the instrument was signed.[91]

d. Time of. The date of a deed is *prima facie* evidence of its execution on that day.[92]

e. Forgery. Where a party makes a denial under oath of the execution of a

86. Gress Lumber Co. *v.* Georgia Pine Shingle Co., 105 Ga. 847, 32 S. E. 632, holding that presumption does not control where the attestation clause recites another place at which it was signed, sealed, and delivered. See McCandless *v.* Yorkshire Guarantee, etc., Corp., 101 Ga. 180, 28 S. E. 663.

87. Roland *v.* Pinckney, 8 Misc. (N. Y.) 458, 29 N. Y. Suppl. 1102.

88. Pringle *v.* Dunn, 37 Wis. 449, 19 Am. Rep. 772. See also Watson *v.* Peters, 26 Mich. 508 (where it was decided that an inference against the validity of the attestation is not warranted by proof that neither of two subscribing witnesses were present at the acknowledgment of the deed, in the absence of any showing that it had not been signed previously); Hronska *v.* Janke, 66 Wis. 252, 28 N. W. 166 (holding that although a deed attested by two witnesses purports to have been acknowledged by some of the grantors on different days, in different counties, and before different officers, it will be presumed to have been duly witnessed and the grantors will be presumed to have been together).

89. Switzer *v.* Knapps, 10 Iowa 72, 74 Am. Dec. 375. But under a statute enacting that a conveyance of an interest in land may be made by deed, signed and sealed by the grantor, conveyances referred to in an abstract of title as "deeds" are to be presumed to have been sealed as required by statute. McLeod *v.* Lloyd, 43 Oreg. 260, 71 Pac. 795, 74 Pac. 491.

90. McCoy *v.* Cassidy, 96 Mo. 429, 9 S. W. 926 [*overruling* Hamilton *v.* Boggess, 63 Mo. 233]. *Compare* Starkweather *v.* Martin, 28 Mich. 471; Todd *v.* Union Dime Sav. Inst., 7 N. Y. St. 449; Reusens *v.* Staples, 52 Fed. 91; LeFranc *v.* Richmond, 15 Fed. Cas. No. 8,209, 5 Sawy. 601; Talbot *v.* Hodson, 2 Marsh. 527, 7 Taunt. 251, 2 E. C. L. 348. But see Moreau *v.* Detchemendy, 41 Mo. 431.

A recital in a deed that it is "signed, sealed, and delivered" does not estop the grantor from insisting on the want of a seal where none in fact exists. Davis *v.* Judd, 6 Wis. 85.

A recital in certified copy of a deed may give rise to a presumption that the original was sealed. Macey *v.* Stark, 116 Mo. 481, 21 S. W. 1088.

The words "witness my hand and seal" are held in an early case in North Carolina to be no proof of the seal attached to a deed. Ingram *v.* Hall, 2 N. C. 222.

Where there are no seals opposite part of the names of the grantors and the deed recites that the grantors have affixed their seals it will be presumed that those whose names have no seals opposite them have adopted those opposite the other names. Burnett *v.* McCluey, 78 Mo. 676.

91. Fogg *v.* Moulton, 59 N. H. 499.

92. *Arkansas.*— Meech *v.* Fowler, 14 Ark. 29.

Illinois.— Darst *v.* Bates, 51 Ill. 439.

Iowa.— Savery *v.* Browning, 18 Iowa 246; Meldrum *v.* Clark, Morr. 130.

Massachusetts.— Smith *v.* Porter, 10 Gray 66.

North Carolina.— Newlin *v.* Osborne, 49 N. C. 157, 67 Am. Dec. 269.

Pennsylvania.— Cover *v.* Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552.

Texas.—Lacoste *v.* Odam, 26 Tex. 458.

Virginia.— Colquhoun *v.* Atkinson, 6 Munf. 550.

Wisconsin.— McFarlane *v.* Louden, 99 Wis. 620, 75 N. W. 394, 67 Am. St. Rep. 883.

See 16 Cent. Dig. tit. "Deeds," § 571.

This presumption is not overcome by the fact that the certificate of authentication by the clerk of the court to the notary's certificate on the deed bore a later date than the deed. McFarlane *v.* Louden, 99 Wis. 620, 75 N. W. 394, 67 Am. St. Rep. 883.

Actual time of execution may be proved. Geiss *v.* Odenheimer, 4 Yeates (Pa.) 278, 2 Am. Dec. 407.

If offered in evidence to affect a stranger and the time of execution becomes material the date is no evidence of the time of execution. Meldrum *v.* Clark, Morr. (Iowa) 130. See Baker *v.* Blackburn, 5 Ala. 417.

In the case of deeds in fee unattested and unacknowledged the presumption that a deed was executed on the day of its date is held not to apply. Genter *v.* Morrison, 31 Barb. (N. Y.) 155.

deed and asserts that it is a forgery the burden of proof is on the party claiming under the instrument to show its genuineness.[93] A presumption that a deed was forged arises where it is shown by certificates from the executive department that a person purporting to have signed the deed as a witness in the official capacity of justice of the peace was not in commission in the county where such deed purports to have been made, at the date of its execution.[94]

3. EXISTENCE. One who undertakes to prove the existence of a deed in the past must first show such circumstances as will evidence the fact of its existence, next the loss or destruction, and then the contents.[95]

4. NATURE AND EXTENT OF INTEREST OR ESTATE CONVEYED. It is a presumption of law that one conveying by a general warranty deed holds the original grant,[96] such a deed being also *prima facie* evidence of good title in the grantee,[97] who is presumed to enter claiming according to his deed.[98] The presumption also arises in the case of a deed which grants and conveys a fee simple that the land was at the date of the conveyance free from encumbrance.[99] And it is presumed that a grantor intends to convey everything necessary for the reasonable enjoyment of the thing granted so far as it is in his possession.[1] And a conveyance by one who has both an interest in his own right and a power will be presumed to be of the interest in the absence of any evidence to the contrary.[2] So a deed by a sheriff is *prima facie* a conveyance of the title of defendant.[3] Again where property which is a part of the community estate is conveyed by a father to his children it will be presumed to have been in discharge of the interest of the children in such estate to the extent of the value of that conveyed.[4] And where a conveyance of land is made to two persons jointly, the presumption arises, in the absence of proof to the contrary, that each one paid his proportion of the purchase-money.[5]

Where the fact of the antedating of a deed furnishes a presumption that it was executed after marriage and that the earlier date was inserted to overreach the title to dower the burden of proof rests on defendant in ejectment for dower to show that the deed was actually executed before marriage. Costigan *v.* Gould, 5 Den. (N. Y.) 290.

93. Holland *v.* Carter, 79 Ga. 139, 3 S. E. 690; Hanks *v.* Phillips, 39 Ga. 550; Carver *v.* Carver, 97 Ind. 497; Williamson *v.* Gore, (Tex. Civ. App. 1903) 73 S. W. 563; Willis *v.* Lewis, 28 Tex. 185; Cairrell *v.* Higgs, 1 Tex. Unrep. Cas. 56. But see Masterson *v.* Todd, 6 Tex. Civ. App. 131, 24 S. W. 682, holding the burden to be on the one filing the affidavit of forgery, where the deed is admissible as an ancient instrument.

In Texas, for the purpose of prescribing land under the five years' statute of limitations, a deed apparently duly registered is admissible without proof of its execution, although an affidavit of forgery has been made against it. Chamberlain *v.* Showalter, 5 Tex. Civ. App. 226, 23 S. W. 1017.

94. Parker *v.* Waycross, etc., R. Co., 81 Ga. 387, 8 S. E. 871.

Only clear and convincing proof, however, should prevail against a deed authenticated in the manner prescribed by law and which has been recorded for a long period of time, especially after the death of those whose deed it purports to be. Hall *v.* Lamb, 50 Minn. 33, 52 N. W. 267.

95. Stockdale *v.* Young, 3 Strobh. (S. C.) 501 note.

96. King *v.* Hall, 1 Overt. (Tenn.) 209.

97. Sheets *v.* Dufour, 5 Blackf. (Ind.) 549.

A patent for land issued by the commonwealth should be regarded, it is held, as a conveyance of existing rights of the state and not an assertion by the state of a good title to the whole land patented. Beeler *v.* Coy, 9 B. Mon. (Ky.) 312.

98. Melcher *v.* Flanders, 40 N. H. 139; Breck *v.* Young, 11 N. H. 485.

99. Cruger *v.* Ginnuth, 3 Tex. App. Civ. Cas. § 24.

1. Bushnell *v.* Salisbury Ore Bed, 31 Conn. 150. See also Ball *v.* Ball, 1 Phila. (Pa.) 36, 4 Pa. L. J. Rep. 424.

A deed of conveyance is presumed to carry the possession (Grubbs *v.* Barber, 102 Ind. 131, 1 N. E. 636) and the power of sale and conveyance by the grantee (Stall *v.* Cincinnati, 16 Ohio St. 169).

Rights of batture do not pass in the sale of a lot in New Orleans, fronting on the levee, unless specifically mentioned in the act of sale. Ferrière *v.* New Orleans, 35 La. Ann. 209.

Rule applied in deed of land to railroad.—International, etc., R. Co. *v.* Bost, 2 Tex. App. Civ. Cas. § 383.

Seizin is presumed to follow the title. Blethen *v.* Dwinel, 34 Me. 133.

2. Coffing *v.* Taylor, 16 Ill. 457. See Edens *v.* Simpson, (Tex. Sup. 1891) 17 S. W. 788.

3. Sutherland *v.* Whidden, 3 Nova Scotia 410.

4. Sparks *v.* Spence, 40 Tex. 693.

5. Nims *v.* Nims, 23 Fla. 69, 1 So. 527. See Wade *v.* Boyd, (Tex. Civ. App. 1900) 60 S. W. 360.

And the burden of proof rests on one alleging that a transaction was but a testamentary gift to show such fact, where the deeds purport a conveyance *in præsenti*.[6] And likewise one who alleges that a deed absolute on its face was a conveyance in trust has the burden of proving such allegation.[7] So where grantors seek to avoid a deed in part the burden rests on them to show that a conveyance was intended of less land than was in fact conveyed.[8]

5. Identity of Parties. At law real property is supposed to belong to the person or persons in whose name the title appears to stand by a conveyance;[9] and the identity of the person may be presumed from the identity of the name of a grantor or grantee.[10] So where the identity of the grantor in a deed with the owner of the land is sufficiently stated in the body of a deed it will not after a lapse of time be presumed that the deed is not that of the owner.[11] Again a recital in a deed of persons as heirs of another may be received as evidence of such fact.[12]

6. Identity of Land. Where the terms of a deed describing the property claimed are uncertain in themselves but refer to other facts and circumstances to determine their meaning, the party claiming under the deed has the burden of showing such facts and circumstances.[13] And the question whether the land in controversy is included by a deed which does not show on its face whether it includes or relates to such land is one of fact for the jury and the party is not required to locate on the ground the calls of the deed before it is admitted.[14] So where a conveyance of a tract of land excepts parcels before conveyed to others it is decided that one claiming under such conveyance in a controversy for the land, under adverse, conflicting claims must show that the land in contest is not

But a conveyance to a married woman will not be presumed a jointure where no such intention appears either expressly or by necessary implication from the deed. Chase *v.* Alley, 82 Me. 234, 19 Atl. 397.

6. Millican *v.* Millican, 24 Tex. 426.

7. Lingenfelter *v.* Richey, 62 Pa. St. 123.

8. Jordan *v.* Young, (Tex. Civ. App. 1900) 56 S. W. 762.

9. Lang *v.* Waring, 17 Ala. 145.

10. *California.*— Ward *v.* Dougherty, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151.

Michigan.— Tillotson *v.* Webber, 96 Mich. 144, 55 N. W. 837.

Missouri.— Hunt *v.* Searcy, 167 Mo. 158, 67 S. W. 206.

Nebraska.— Rupert *v.* Penner, 35 Nebr. 587, 53 N. W. 598, 17 L. R. A. 824.

Vermont.— Cross *v.* Martin, 46 Vt. 14.

See 16 Cent. Dig. tit. "Deeds," § 568.

Rule is founded on the experience of its correctness and convenience. Flournoy *v.* Warden, 17 Mo. 435.

Corporations of the same name but described as of one county in a deed to it and as of another county in a deed by it will be presumed to be the same corporation in the absence of proof that they are different corporations. Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734.

Where a father and son are of the same name and a deed of land is made leaving it uncertain on the face of the deed whether the grant is to the father or the son the law may presume that the father was intended as grantee in the absence of proof to the contrary. Doty *v.* Doty, 159 Ill. 46, 42 N. E. 174; Graves *v.* Colwell, 90 Ill. 612. But see Simpson *v.* Dix, 131 Mass. 179.

Where the name of the grantee and of a prior holder and grantor are the same identity of person may be presumed. Brown *v.* Metz, 33 Ill. 339, 85 Am. Dec. 277.

Where the description of a party suits two persons it has been decided in Mississippi that the one claiming under the deed should show that he is the person intended. Grand Gulf R., etc., Co. *v.* Bryan, 8 Sm. & M. (Miss.) 234.

11. Mackay *v.* Easton, 19 Wall. (U. S.) 619, 22 L. ed. 211.

12. Bell *v.* Barron, 14 Vt. 307.

13. Benedict *v.* Horner, 13 Wis. 256.

Where land is conveyed by metes and bounds the circumstances should be very strong to prove that the grantor meant to convey other land than that described to induce a court to set aside the conveyance of the land described and to decree that of the other. Russell *v.* Transylvania University, 1 Wheat. (U. S.) 432, 4 L. ed. 129.

Where a deed definitely calls for the low water-line of the shore as a boundary in the absence of an issue of title it will not be presumed in construing such deed that there was a want of title in the grantor to the shore by reason of the common-law rule that the title to the shore is in the state. Oakes *v.* De Lancey, 133 N. Y. 227, 30 N. E. 974, 28 Am. St. Rep. 628 [*affirming* 59 N. Y. Super. Ct. 497, 15 N. Y. Suppl. 561], holding that the common-law rule as to title in the state does not exclude the possibility of title in the grantor derived from the state or by prescription.

14. Hogans *v.* Carruth, 18 Fla. 587.

After a lapse of time it may be presumed that a deed was for the land ordered by a

embraced in the exceptions.[15] And although it is a presumption of law that when a parcel of real property is divided by the owner who conveys a portion, the parties contract with reference to the physical condition of the property at that time, yet such presumption may be repelled by the terms of the grant or actual knowledge on the part of the contracting parties of facts which negative any deduction to be drawn from the apparent condition.[16]

7. Delivery and Registration — a. Delivery in General. Unless delivery of a deed is stated to be in escrow it will be presumed to have been absolute.[17] But it is presumed that a deed was not delivered before acknowledgment.[18] And the delivery of a deed need not be proved by positive testimony, but may be inferred from circumstances,[19] or from acts and declarations of the parties constituting parts of the *res gestæ* and which show such an intention.[20] So proof of the execution of a deed is *prima facie* evidence of its delivery,[21] but not conclusive;[22] and delivery to a person designated by the vendee is *prima facie* proof of delivery to the latter.[23] Again the presumption in favor of the delivery of a deed of settlement is declared to be stronger than in the case of a bargain and sale.[24] And where a deed is in favor of an infant a greater presumption in favor of its delivery arises than in the case of an adult.[25]

b. Burden of Proof. The burden of proof of the delivery of a deed rests on him who alleges it.[26] But a grantor in order to defeat a deed executed in the presence of the parties must, it is decided, show clearly that there was neither a

decree to be conveyed. Jack *v.* Cassin, 9 Tex. Civ. App. 228, 28 S. W. 832.

15. Guthrie *v.* Lewis, 1 T. B. Mon. (Ky.) 142. See Smith *v.* Bodfish, 27 Me. 289. But see Batts *v.* Batts, 128 N. C. 21, 38 S. E. 132, holding that one claiming the benefit of an exception in a deed has the burden of proof.

A reservation of the use of a cove for certain purposes has an influence in favor of the inclusion of the cove by the conveyance. Small *v.* Wright, 74 Me. 428.

16. Simmons *v.* Cloonan, 47 N. Y. 3.

Where a given quantity of land, part of a larger tract, is conveyed by a deed, the calls of which do not identify the land with sufficient certainty, payment of the purchase-price by the grantee at the time of delivery raises no presumption that he was put in possession by the grantor of a particular tract of the land conveyed. Schenk *v.* Evoy, 24 Cal. 104.

17. Currie *v.* Donald, 2 Wash. (Va.) 58.

18. Zerbe *v.* Missouri, etc., R. Co., 80 Mo. App. 414.

19. Gardner *r.* Collins, 9 Fed. Cas. No. 5,223, 3 Mason 398.

20. Jummel *v.* Mann, 80 Ill. App. 288.

21. *Indiana.*— Louisville, etc., R. Co. *v.* Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719.

Missouri.— Allen *v.* De Groodt, (Sup. 1891) 15 S. W. 314.

North Carolina.— Levister *v.* Hilliard, 57 N. C. 12.

Pennsylvania.— Kille *v.* Ege, 79 Pa. St. 15; Diehl *v.* Emig, 65 Pa. St. 320.

Texas.— Timmony *v.* Burns, (Civ. App. 1897) 42 S. W. 133.

See 16 Cent. Dig. tit. "Deeds," § 574.

But see Boyd *v.* Slayback, 63 Cal. 493.

A devise of land previously conveyed by a deed of gift executed by a testator to a devisee does not raise a presumption that the deed was never delivered. Lewis *v.* Ames, 44 Tex. 319.

A finding that a deed is executed includes delivery as a necessary incident. Colee *v.* Colee, 122 Ind. 109, 23 N. E. 687, 17 Am. St. Rep. 345.

An admission of execution implies delivery. Jenkins *v.* McConico, 26 Ala. 213.

As against the grantor delivery is presumed from acknowledgment. Brann *v.* Monroe, 11 Ky. L. Rep. 324; Fontaine *v.* Boatmen's Sav. Inst., 57 Mo. 552. But see Alexander *v.* De Kermel, 81 Ky. 345.

Finding a deed among the papers of the decedent raises no presumption against delivery, where the deceased was as much entitled to possession as the other parties thereto. Smith *v.* Adams, 4 Tex. Civ. App. 5, 23 S. W. 49.

Proof of execution implies proof of delivery. Van Rensselaer *v.* Secor, 32 Barb. (N. Y.) 469.

22. Arthur *v.* Anderson, 9 S. C. 234.

23. Rumsey *v.* Otis, 133 Mo. 85, 34 S. W. 551.

24. Crowder *v.* Searcy, 103 Mo. 97, 15 S. W. 346.

25. Rivard *v.* Walker, 39 Ill. 413; Masterson *v.* Cheek, 23 Ill. 72; Bryan *v.* Wash, 7 Ill. 557.

Execution of deeds by a father to minor children and voluntarily recording them raise a presumption of delivery, although the grantor kept them in his possession. Abbott *v.* Abbott, 189 Ill. 488, 59 N. E. 958, 82 Am. St. Rep. 470.

26. Devaney *v.* Koyne, 54 Mich. 116, 19 N. W. 772. See Pool *v.* Davis, 135 Ind. 323, 34 N. E. 1130; Shattuck *v.* Rogers, 54 Kan. 266, 38 Pac. 280. But *compare* Scott *v.* Crouch, 24 Utah 377, 67 Pac. 1068.

delivery nor intention to deliver.[27] And where he has delivered a deed the burden is on him to show that it was intended as an escrow merely.[28]

c. Time of Delivery. A deed will, in the absence of evidence to the contrary, be presumed to have been delivered on the day on which it bears date,[29] or, as is declared in some cases, on the date of its execution and acknowledgment.[30] Again

In ejectment defendant has the burden of proof, where he claims under a deed from his father, and the deed was found among other papers of the grantor, to show delivery before the grantor's death. Tyler *v.* Hall, 106 Mo. 313, 17 S. W. 319, 27 Am. St. Rep. 337. *Compare* Doe *v.* Hiles, 4 Houst. (Del.) 87.

Where certain terms were to be complied with before the final transfer of the instrument the burden rests on the party claiming its benefit to show proof of compliance. Black *v.* Shreve, 13 N. J. Eq. 455.

27. Souverbye *v.* Arden, 1 Johns. Ch. (N. Y.) 240. *Compare* Waddell *v.* Latham, 71 Miss. 351, 15 So. 32, 42 Am. St. Rep. 467; Carnes *v.* Platt, 41 N. Y. Super. Ct. 435 (holding that one upon whom the burden rests to show that a deed was not delivered must satisfy the jury beyond a reasonable doubt that he has made out his case, and established the fact of non-delivery).

28. Chouteau *v.* Suydam, 21 N. Y. 179. See Blight *v.* Schenck, 10 Pa. St. 285, 51 Am. Dec. 478.

29. *Alabama.*—Williams *v.* Armstrong, 130 Ala. 389, 30 So. 553.

California.— McDougall *v.* McDougall, 135 Cal. 316, 67 Pac. 778; Treadwell *v.* Reynolds, 47 Cal. 171.

Delaware.— Buker *v.* Carroll, 1 Pennew. 559, 42 Atl. 986.

Florida.— Billings *v.* Stark, 15 Fla. 297.

Illinois.— Blake *v.* Fash, 44 Ill. 302; Jayne *v.* Gregg, 42 Ill. 413; Deininger *v.* McConnel, 41 Ill. 227; Schaeppi *v.* Glade, 95 Ill. App. 500.

Indiana.—Faulkner *v.* Adams, 126 Ind. 459, 26 N. E. 170; Scobey *v.* Walker, 114 Ind. 254, 15 N. E. 674; Turner *v.* Madison First Nat. Bank, 78 Ind. 19.

Iowa.— Hall *v.* Cardell, 111 Iowa 206, 82 N. W. 503; Farwell *v.* Des Moines Brick Mfg. Co., 97 Iowa 286, 66 N. W. 176, 35 L. R. A. 63.

Kansas.— Cain *v.* Robinson, 20 Kan. 456.

Kentucky.— Bunnell *v.* Bunnell, 111 Ky. 566, 64 S. W. 420, 65 S. W. 607, 23 Ky. L. Rep. 800, 1101; Alexander *v.* De Kermel, 81 Ky. 345; Ford *v.* Gregory, 10 B. Mon. 175; Breckenridge *v.* Todd, 3 T. B. Mon. 52, 16 Am. Dec. 83.

Maine.— Hill *v.* McNichol, 80 Me. 209, 13 Atl. 883; Sweetser *v.* Lowell, 33 Me. 446; Cutts *v.* York Mfg. Co., 18 Me. 190.

Massachusetts.— Smith *v.* Porter, 10 Gray 66.

Minnesota.— Banning *v.* Edes, 6 Minn. 402.

Mississippi.— Sessions *v.* Doe, 7 Sm. & M. 130.

Missouri.— Saunders *v.* Blythe, 112 Mo. 1, 20 S. W. 319.

New Jersey.— Atlantic City *v.* New Auditorium Pier Co., 63 N. J. Eq. 644, 53 Atl. 99; Flynn *v.* Flynn, (Ch. 1895) 31 Atl. 30.

New York.— Robinson *v.* Wheeler, 25 N. Y. 252; Carnes *v.* Platt, 41 N. Y. Super. Ct. 435.

North Carolina.— Kendrick *v.* Dellinger, 117 N. C. 491, 23 S. E. 438; Meadows *v.* Cozart, 76 N. C. 450; Lyerly *v.* Wheeler, 34 N. C. 290.

Oregon.— Crossen *v.* Oliver, 37 Oreg. 514, 61 Pac. 885.

Pennsylvania.— Hall *v.* Benner, 1 Penr. & W. 402, 21 Am. Dec. 394.

Virginia.— Raines *v.* Walker, 77 Va. 92; Harman *v.* Oberdorfer, 33 Gratt. 497.

See 16 Cent. Dig. tit. "Deeds," § 578.

A deed and the vendor's purchase-money security are presumed to have been delivered simultaneously. Wickham *v.* Morehouse, 16 Fed. 324.

Date is prima facie evidence of the time title passed to the grantee. Ellsworth *v.* New Jersey Cent. R. Co., 34 N. J. L. 93.

Delivery by recording will be presumed to have been at the date of deed under Cal. Civ. Code, § 1055, providing that "a grant duly executed is presumed to have been delivered at its date." Ward *v.* Dougherty, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151.

Forged deed.— No presumption in the case of a forged deed arises as to delivery at its date or at any other time. Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474. And it is error for a court to charge that an ancient deed, which is alleged to have been forged, is presumed to be genuine if coming from the proper custody. Beaumont Pasture Co. *v.* Preston, 65 Tex. 448.

If an intention that a deed shall operate from the execution thereof is apparent on its face a delivery to a third person to be afterward delivered to the parties will not be presumed to be merely as an escrow. Hosley *v.* Holmes, 27 Mich. 416.

In New York the presumption was not affected by 1 Rev. St. p. 738, § 137. Robinson *v.* Wheeler, 25 N. Y. 252.

Presumption does not control where the deed is proved to have been in the hands of the grantor at a subsequent. Elsey *v.* Metcalf, 1 Den. (N. Y.) 323.

Presumption may be overcome by direct or circumstantial evidence to the contrary. Thomas *v.* Lye, 37 Ill. App. 482. So where it appears from the record that the deeds did not reach the grantees until after the date of the grantor's death the presumption is overcome. Furenes *v.* Eide, 109 Iowa 511, 80 N. W. 539, 77 Am. St. Rep. 545. As is also the case where there was a manual delivery and acceptance, at a subsequent date. Blair State Bank *v.* Bunn, 61 Nebr. 464, 85 N. W. 527.

30. *Iowa.*— Wolverton *v.* Collins, 34 Iowa 238.

Michigan.— Johnson *v.* Moore, 28 Mich. 3.

it has been decided that where the date of a deed is prior to that of the acknowledgment, the presumption as to delivery on the day of date does not apply.[31]

d. Acceptance. The execution, acknowledgment, and delivery of a deed to the grantee raises the presumption of an acceptance of the instrument by him.[32] Actual receipt, however, of a deed by the grantee is not essential to an acceptance by him, but a constructive delivery may be established by whatever affords a presumption of his acceptance thereof.[33] So the acceptance by a grantee of a deed which has been executed for his benefit may be presumed.[34] And it is decided that the presumption of acceptance by the grantee is conclusive where he

Minnesota.—Windom *v.* Schuppel, 39 Minn. 35, 38 N. W. 757.

New Jersey.— Benson *v.* Woolverton, 15 N. J. Eq. 158.

New York.— Hulse *v.* Bacon, 167 N. Y. 599, 60 N. E. 1113; Ten Eyek *v.* Whitbeck, 35 N. Y. Suppl. 1013.

Wisconsin.— Wheeler *v.* Single, 62 Wis. 380, 22 N. W. 569.

See 16 Cent. Dig. tit. "Deeds," § 578.

31. *Maine.*—Loomis *v.* Pingree, 43 Me. 299.

Maryland.— Henderson *v.* Baltimore, 8 Md. 352.

Michigan.— Blanchard *v.* Tyler, 12 Mich. 339, 86 Am. Dec. 57.

Pennsylvania.— Brolasky *v.* Furey, 12 Phila. 428.

Texas.— Kent *v.* Ceeil, (Civ. App. 1894) 25 S. W. 715.

See 16 Cent. Dig. tit. "Deeds," § 578.

Contra.—Smith *v.* Searbrough, 61 Ark. 104, 32 S. W. 382; Lake Erie, etc., R. Co. *v.* Whitham, 155 Ill. 514, 40 N. E. 1014, 46 Am. St. Rep. 355, 28 L. R. A. 612; Smiley *v.* Fries, 104 Ill. 416; Hardin *v.* Crate, 78 Ill. 533; Jayne *v.* Gregg, 42 Ill. 413; Ford *v.* Gregory, 10 B. Mon. (Ky.) 175; McConnell *v.* Brown, Litt. Sel. Cas. (Ky.) 459; Biglow *v.* Biglow, 39 N. Y. App. Div. 103, 56 N. Y. Suppl. 794.

A deed dated, acknowledged, and recorded at different dates will be presumed to have been delivered at least as early as the date of acknowledgment. Clark *v.* Akers, 16 Kan. 166.

Presumption that the date of a deed is that of its delivery is held not to apply to a deed not acknowledged or proved and which has no subscribing witnesses. Elsey *v.* Metcalf, 1 Den. (N. Y.) 323. See Harris *v.* Norton, 16 Barb. (N. Y.) 264.

Rule that the date of acknowledgment is the date of delivery is held not to apply where the grantee dies between the dates of the deed and its acknowledgment. Eaton *v.* Trowbridge, 38 Mich. 454.

32. Banta *v.* Henry, 10 Ky. L. Rep. 36.

33. Tuttle *v.* Turner, 28 Tex. 759.

Acknowledgment, registration, and enjoyment of an estate granted will raise the presumption of acceptance by the grantee. Kearny *v.* Jeffries, 48 Miss. 343.

Failure to give notice of non-acceptance has been held not to raise the presumption of acceptance. St. Louis, etc., R. Co. *v.* Ruddell, 53 Ark. 32, 13 S. W. 418.

The giving of a bond and mortgage by a vendee for the price raises the presumption of acceptance by him. McDowell *v.* Cooper, 14 Serg. & R. (Pa.) 296.

34. *Alabama.*—Fitzpatrick *v.* Brigman, 130 Ala. 450, 30 So. 500; Mallory *v.* Stodder, 6 Ala. 801.

Arkansas.— Eastham *v.* Powell, 51 Ark. 530, 11 S. W. 823.

Connecticut.— Tibbals *v.* Jacobs, 31 Conn. 428.

Indiana.— Bremmerman *v.* Jennings, 101 Ind. 253; Henry *v.* Anderson, 77 Ind. 361; Stewart *v.* Weed, 11 Ind. 92; Guard *v.* Bradley, 7 Ind. 600.

Iowa.— Hall *v.* Cardell, 111 Iowa 206, 82 N. W. 503.

Kansas.— Wuester *v.* Folin, 60 Kan. 334, 56 Pac. 490.

Kentucky.— Haeker *v.* Hoover, 66 S. W. 382, 23 Ky. L. Rep. 1848; Lay *v.* Lay, 66 S. W. 371, 23 Ky. L. Rep. 1817; Remington *v.* Lamson, 65 S. W. 120, 23 Ky. L. Rep. 1340. But see Jefferson County Bldg. Assoc. *v.* Heil, 81 Ky. 513; Com. *v.* Jackson, 10 Bush 424.

Michigan.— Higman *v.* Stewart, 38 Mich. 513.

Mississippi.— Kearny *v.* Jeffries, 48 Miss. 343; Wall *v.* Wall, 30 Miss. 91, 64 Am. Dec. 147; Ross *v.* Wilson, 7 Sm. & M. 753.

Missouri.— Whitaker *v.* Whitaker, 175 Mo. 1, 74 S. W. 1029.

New Hampshire.— Peavey *v.* Tilton, 18 N. H. 151, 45 Am. Dec. 365.

New York.— Crain *v.* Wright, 114 N. Y. 307, 21 N. E. 401; Diefendorf *v.* Diefendorf, 8 N. Y. Suppl. 617; Church *v.* Gilman, 15 Wend. 656, 30 Am. Dec. 82; Montreal Cong. Nunnery *v.* McNamara, 3 Barb. Ch. 375, 49 Am. Dec. 184.

Ohio.— Mitchell *v.* Ryan, 3 Ohio St. 377; Hammell *v.* Hammell, 19 Ohio 17.

Tennessee.— Maloney *v.* Bewley, 10 Heisk. 642.

United States.— Hurst *v.* McNeil, 12 Fed. Cas. No. 6,936, 1 Wash. 70.

See 16 Cent. Dig. tit. "Deeds," § 579.

But see Dagley *v.* Black, 197 Ill. 53, 64 N. E. 275; Huliek *v.* Scovil, 9 Ill. 159.

Assent to a deed delivered to a third person, such deed being for the grantee's benefit, will be presumed. Eastham *v.* Powell, 51 Ark. 530, 11 S. W. 823; Tibbals *v.* Jacobs, 31 Conn. 428; Stewart *v.* Weed, 11 Ind. 92; Diefendorf *v.* Diefendorf, 8 N. Y. Suppl. 617.

Deed must be manifestly for grantee's benefit to raise a presumption of acceptance. Renfro *v.* Harrison, 10 Mo. 411.

has been in possession under the deed for a long period of time.[35] Assent, however, will not be presumed to a deed which is prejudicial to the grantee.[36]

e. Possession by Grantor. Where a deed which has been duly executed and acknowledged is subsequently found in the possession of the grantor a presumption arises that it was never delivered.[37]

f. Possession by Grantee or Assignee. Where a grantee is in possession of a deed which has been duly executed the presumption arises that it has been duly delivered.[38] And possession of a deed by one claiming under the gran-

Possession or enjoyment of land may strengthen presumption. Stewart *v.* Weed, 11 Ind. 92. See Boyd *v.* Bethel, 9 S. W. 417, 10 Ky. L. Rep. 470; Fisher *v.* Ryan, 7 Ky. L. Rep. 95; Herring *v.* Richards, 3 Fed. 439, 1 McCrary 570.

Where a grant is a pure, unqualified gift it is held that proof of actual dissent is necessary to rebut the presumption of acceptance. Mitchell *v.* Ryan, 3 Ohio St. 377.

35. Jones *v.* Hightower, 107 Ky. 5, 52 S. W. 826, 21 Ky. L. Rep. 576, so holding where possession was held under the deed for forty years.

36. Higman *v.* Stewart, 38 Mich. 513. See Gifford *v.* McCloskey, 38 Hun (N. Y.) 350.

Acceptance should not be lightly presumed from circumstances, where the grant imposes some burden on the grantee. Richner *v.* Brisbane, 19 Colo. 385, 35 Pac. 740; Rittmaster *v.* Brisbane, 19 Colo. 371, 35 Pac. 736.

37. Burton *v.* Boyd, 7 Kan. 17; Egan *v.* Horrigan, 96 Me. 46, 51 Atl. 246; Patterson *v.* Snell, 67 Me. 559; Hatch *v.* Haskins, 17 Me. 391; Powers *v.* Russell, 13 Pick. (Mass.) 69; Harvey *v.* Jones, 1 Disn. (Ohio) 65, 12 Ohio Dec. (Reprint) 490. See Blakemore *v.* Byrnside, 7 Ark. 505. But see Ewing *v.* Buckner, 76 Iowa 467, 41 N. W. 164; Howard *v.* Patrick, 38 Mich. 795.

Burden of proof of delivery is on the party claiming under the deed, where possession remains with the grantor. Miller *v.* Eshleman, 43 Leg. Int. (Pa.) 499.

Possession of a recorded deed is of less weight than where it is unrecorded. Mitchell *v.* Ryan, 3 Ohio St. 377. And see McGuire *v.* McGuire, 81 N. Y. App. Div. 636, 81 N. Y. Suppl. 1134 [*affirming* 37 Misc. 259, 75 N. Y. Suppl. 302].

Presumption is not conclusive of non-delivery. Heintz *v.* Thayer, (Tex. Civ. App. 1899) 50 S. W. 175. See McGuire *v.* McGuire, 37 Misc. (N. Y.) 259, 75 N. Y. Suppl. 302 [*affirmed* in 81 N. Y. App. Div. 636, 81 N. Y. Suppl. 1134].

38. *Alabama.*— Simmons *v.* Simmons, 78 Ala. 365; Fireman's Ins. Co. *v.* McMillan, 29 Ala. 147; Houston *v.* Stanton, 11 Ala. 412; Ward *v.* Ross, 1 Stew. 136.

Arkansas.— Scaife *v.* Byrd, 39 Ark. 568.

California.— Branson *v.* Caruthers, 49 Cal. 374.

District of Columbia.— Carusi *v.* Savary, 6 App. Cas. 330.

Florida.—Campbell *v.* Carruth, 32 Fla. 264, 13 So. 432; Billings *v.* Stark, 15 Fla. 297.

Georgia.— Black *v.* Thornton, 30 Ga. 361; Ruskin *v.* Shields, 11 Ga. 636, 56 Am. Dec. 436.

Illinois.— Inman *v.* Swearingen, 198 Ill. 437, 64 N. E. 1112; Griffin *v.* Griffin, 125 Ill. 430, 17 N. E. 782; McCann *v.* Atherton, 106 Ill. 31; Reed *v.* Douthit, 62 Ill. 348.

Indiana.— Pool *v.* Davis, 135 Ind. 323, 34 N. E. 1130; Burkholder *v.* Casad, 47 Ind. 418; Berry *v.* Anderson, 22 Ind. 36.

Iowa.— Nichols *v.* Sadler, 99 Iowa 429, 68 N. W. 709.

Maine.— Andrews *v.* Dyer, 78 Me. 427, 6 Atl. 833; Patterson *v.* Snell, 67 Me. 559; Hatch *v.* Haskins, 17 Me. 391.

Massachusetts.— Butrick *v.* Tilton, 141 Mass. 93, 6 N. E. 563.

Michigan.— Fenton *v.* Miller, 94 Mich. 204, 53 N. W. 957; Patrick *v.* Howard, 47 Mich. 40, 10 N. W. 71; Dawson *v.* Hall, 2 Mich. 390.

Missouri.— Pitts *v.* Sheriff, 108 Mo. 110, 18 S. W. 1071; Allen *v.* De Groodt, 105 Mo. 442, 16 S. W. 494, 1049; Rogers *v.* Carey, 47 Mo. 232, 4 Am. Rep. 322.

Nebraska.— Roberts *v.* Swearingen, 8 Nebr. 363, 1 N. W. 305.

New Hampshire.— Little *v.* Gibson, 39 N. H. 505.

New Jersey.— Benson *v.* Woolverton, 15 N. J. Eq. 158; Black *v.* Shreve, 13 N. J. Eq. 455.

New York.— Mercantile Safe Deposit Co. *v.* Huntington, 89 Hun 465, 35 N. Y. Suppl. 390, 2 N. Y. Annot. Cas. 215; Carnes *v.* Platt, 41 N. Y. Super. Ct. 435.

North Carolina.— Williams *v.* Springs, 29 N. C. 384.

Ohio.—Harvey *v.* Jones, 1 Disn. 65, 12 Ohio Dec. (Reprint) 490; Lore *v.* Truman, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250.

South Carolina.— Collins *v.* Bankhead, 1 Strobh. 25.

Tennessee.— Goodwin *v.* Ward, 6 Baxt. 107.

Texas.— Tuttle *v.* Turner, 28 Tex. 759; Sadler *v.* Anderson, 17 Tex. 245.

Vermont.— Dwinell *v.* Bliss, 58 Vt. 353, 5 Atl. 317.

West Virginia.— Ward *v.* Ward, 43 W. Va. 1, 26 S. E. 542.

United States.— Wright *v.* Wright, 77 Fed. 795; Mills *v.* Mills, 57 Fed. 873; Dunn *v.* Games, 8 Fed. Cas. No. 4,176, 1 McLean 321.

See 16 Cent. Dig. tit. "Deeds," § 577.

Burden of proof rests on one disputing presumption. Roberts *v.* Swearingen, 8 Nebr. 363, 1 N. W. 305. But see Jourdan *v.* Patterson, 102 Mich. 602, 61 N. W. 64.

tee is regarded as evidence of delivery to such grantee until the contrary is shown.[39]

g. Effect of Record or Delivery For Record. That a deed has been duly executed, acknowledged, and recorded is *prima facie* evidence of its delivery[40] and

Failure of a grantee to record a deed held by him and allowing the grantors to remain in possession does not alter the presumption. McGee *v.* Allison, 94 Iowa 527, 63 N. W. 324. *Compare* McFall *v.* McFall, 136 Ind. 622, 36 N. E. 517.

Possession by the grantee is prima facie evidence of delivery, not conclusive.

Florida.— Southern L. Ins., etc., Co. *v.* Cole, 4 Fla. 359.

Georgia.— Black *v.* Thornton, 31 Ga. 641.

Massachusetts.— Chandler *v.* Temple, 4 Cush. 285.

New Jersey.— Farlee *v.* Farlee, 21 N. J. L. 279.

Pennsylvania.— Rhine *v.* Robinson, 27 Pa. St. 30.

South Carolina.— Shaw *v.* Cunningham, 16 S. C. 631.

West Virginia.— Newlin *v.* Beard, 6 W. Va. 110.

See 16 Cent. Dig. tit. "Deeds," § 577.

Possession by the husband of the grantee is sufficient to show delivery to the wife. Daisz's Appeal, 128 Pa. St. 572, 18 Atl. 414.

Possession of a deed and land under it raises a presumption of delivery. Lewis *v.* Watson, 98 Ala. 479, 13 So. 570, 39 Am. St. Rep. 82, 22 L. R. A. 297; McMorris *v.* Crawford, 15 Ala. 271.

Presumption arising from possession is held not to be supported by the mere fact that the grantee received by mail an envelope addressed in his own handwriting, which contained the deed when filed for record, when it appears that the deed was not recorded until after the death of the grantor, and that both the grantor and the grantee had made declarations inconsistent with its delivery. Scott *v.* Scott, 95 Mo. 300, 8 S. W. 161.

Presumption of delivery is not overcome by indefinite evidence on behalf of the grantor. Wright *v.* Wright, 77 Fed. 795.

Where two persons have the same name a delivery to one without any statement that the deed is delivered to him for the other person will raise a presumption that it was delivered to such grantee for his own benefit. Fyffe *v.* Fyffe, 106 Ill. 646.

39. Steeple *v.* Downing, 60 Ind. 478; Stewart *v.* Redditt, 3 Md. 67; Morris *v.* Henderson, 37 Miss. 492; McClellan *v.* Zwingli, 24 N. Y. Suppl. 371. But see Andrews *v.* Dyer, 78 Me. 427, 6 Atl. 833.

Possession of a trust deed by one of the cestuis que trustent, the deed being signed by the grantor and grantee, raises presumption of delivery. Wallace *v.* Berdell, 97 N. Y. 13.

40. *California.*— Ward *v.* Dougherty, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151; Bensley *v.* Atwill, 12 Cal. 231.

Georgia.— Ross *v.* Campbell, 73 Ga. 309.

Illinois.— Warren *v.* Jacksonville, 15 Ill. 236, 58 Am. Dec. 610.

Iowa.— Robinson *v.* Gould, 26 Iowa 89; Savery *v.* Browning, 18 Iowa 246.

Kentucky.— Coppage *v.* Murphy, 68 S. W. 416, 24 Ky. L. Rep. 257.

Maine.— Rowell *v.* Hayden, 40 Me. 582.

Maryland.— Stewart *v.* Redditt, 3 Md. 67.

Michigan.— Patrick *v.* Howard, 47 Mich. 40, 10 N. W. 71.

Mississippi.— Ingraham *v.* Grigg, 13 Sm. & M. 22.

New Hampshire.— Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491.

New Jersey.— Collins *v.* Collins, 45 N. J. Eq. 813, 15 Atl. 849, 18 Atl. 860.

New York.— Lawrence *v.* Farley, 24 Hun 293; Gilbert *v.* North American F. Ins. Co., 23 Wend. 43, 35 Am. Dec. 543.

Ohio.— Harvey *v.* Jones, 1 Disn. 65, 12 Ohio Dec. (Reprint) 490.

Pennsylvania.— Kille *v.* Ege, 79 Pa. St. 15; Rigler *v.* Cloud, 14 Pa. St. 361.

South Carolina.—McDaniel *v.* Anderson, 19 S. C. 211; Dawson *v.* Dawson, Rice Eq. 243.

See 16 Cent. Dig. tit. "Deeds," § 580.

Execution and registration are only prima facie evidence of delivery, throwing the burden of proving the contrary intent on the grantor. Thompson *v.* Jones, 1 Head (Tenn.) 574.

The recording of a deed is prima facie evidence of delivery (Allen *v.* Hughes, 106 Ga. 775, 32 S. E. 927; Valter *v.* Blavka, 195 Ill. 610, 63 N. E. 499; Fireman's Fund Ins. Co. *v.* Dunn, 22 Ind. App. 332, 53 N. E. 251; Heil *v.* Redden, 45 Kan. 562, 26 Pac. 2; Bullitt *v.* Taylor, 34 Miss. 708, 69 Am. Dec. 412; Lawrence *v.* Farley, 9 Abb. N. Cas. (N. Y.) 371; Helms *v.* Austin, 116 N. C. 751, 21 S. E. 556; Mitchell *v.* Ryan, 3 Ohio St. 377; Balbec *v.* Donaldson, 2 Grant (Pa.) 459. But see Egan *v.* Horrigan, 96 Me. 46, 51 Atl. 246; McDonnell *v.* McMaster, 15 Nova Scotia 372); and only *prima facie* evidence (Doorley *v.* O'Gorman, 6 N. Y. App. Div. 591, 39 N. Y. Suppl. 768), especially where recorded by or under direction of the grantor (Wellborn *v.* Weaver, 17 Ga. 267, 63 Am. Dec. 235; Chess *v.* Chess, 1 Penr. & W. (Pa.) 32, 21 Am. Dec. 350. See Hendricks *v.* Rasson, 53 Mich. 575, 19 N. W. 192); and is subject to rebuttal (Boardman *v.* Dean, 34 Pa. St. 252; Harwood *v.* Steel, 4 Phila. (Pa.) 88. See Coppage *v.* Murphy, 68 S. W. 416, 24 Ky. L. Rep. 257; Mannix *v.* Riordan, 75 N. Y. App. Div. 135, 77 N. Y. Suppl. 357). And where a deed imposes on the grantee an obligation to pay an existing encumbrance the recording does not afford even *prima facie* evidence of delivery. Thompson *v.* Dearborn, 107 Ill. 87.

A delivery is not to be inferred for the purpose of avoiding a contract of insurance on the ground that the property was vested in another than the insured where the only evidence of delivery is the fact that it is on

acceptance.[41] And the delivery of a deed for record, by one who has executed and acknowledged it, with unqualified instructions to record the same, will raise the presumption in the absence of any rebutting circumstance that the grantor intends to part with his title.[42] Again the assent of the grantor will be presumed to the delivery of a deed for record unless a dissent be shown.[43]

h. Presumptions as to Registration. Deeds will be presumed to be filed for record in the order in which they are handed to the recorder, as it is his duty to do,[44] and to have been recorded in the proper county.[45] So a presumption arises that a deed was recorded in full on the same day on which it was entered in the general index.[46] And it will be presumed that a copy of a deed is correct and that the deed was properly recorded where it appears that the original is lost and that the copy is taken from the recorder's books, there being no other office of registration but his.[47]

8. Consideration — a. In General. A deed is *prima facie* evidence of a good consideration[48] and of what the consideration was upon which it was

record and it appears that since the execution of the deed the parties have dealt with the property the same as if no conveyance had been made. Walsh *v.* Vermont Mut. F. Ins. Co., 54 Vt. 351.

A registered deed which has been lost will be presumed to have been delivered. Powers *v.* Russell, 13 Pick. (Mass.) 69.

As against third parties and grantor's creditors recording is not conclusive as to delivery. Bullitt *v.* Taylor, 34 Miss. 708, 69 Am. Dec. 412.

Deed should come from hands of grantee or someone claiming under or through him in order that recording should be evidence of delivery. Barr *v.* Schroeder, 32 Cal. 609.

Subsequent recording of a deed which the grantee has refused to accept raises no presumption of delivery. Gaither *v.* Gibson, 61 N. C. 530.

The words "signed, sealed, and delivered" and the recording of a deed have been held no evidence of delivery. Hill *v.* McNichol, 80 Me. 209, 13 Atl. 883.

The time of filing a deed for record is by no principle of law *prima facie* the time of delivery. Bull *v.* Griswold, 19 Ill. 631.

41. Warren *v.* Jacksonville, 15 Ill. 236, 58 Am. Dec. 610; Luzenberg *v.* Bexar Bldg., etc., Assoc., 9 Tex. Civ. App. 261, 29 S. W. 237.

Acceptance of a deed beneficial to the grantee may be presumed from recording. Bowman *v.* Griffith, 35 Nebr. 361, 53 N. W. 140; Gifford *v.* Corrigan, 105 N. Y. 223, 11 N. E. 498.

42. Mitchell *v.* Ryan, 3 Ohio St. 377. See Heintz *v.* Thayer, (Tex. Civ. App. 1899) 50 S. W. 175.

43. Eau Claire Lumber Co. *v.* Anderson, 13 Mo. App. 429.

Where a grantee has obtained a deed surreptitiously and placed it on record, nothing will give it vitality except either an explicit ratification of the instrument, or such an acquiescence, after a knowledge of the facts, as would raise a presumption of express ratification. Hadlock *v.* Hadlock, 22 Ill. 384.

44. Brookfield *v.* Goodrich, 32 Ill. 363, where two deeds of trust on the same property were handed to the recorder on the same day, one immediately after the other.

45. Hill *v.* Grant, (Tex. Civ. App. 1898) 44 S. W. 1016.

46. Oconto Co. *v.* Jerrard, 46 Wis. 317, 50 N. W. 591, holding that this presumption is not rebutted by evidence of a subsequent register of the same county that it is his habit to record the deeds in full before making entries in the index book.

But a deed will not be presumed to have been recorded in the time required by law where there is no evidence offered and no indorsement on the deed to show when it was recorded, but the burden of proof is held to be on the party claiming under it to show that it was recorded in due time. Budd *v.* Brooke, 3 Gill (Md.) 198, 43 Am. Dec. 321. But see Smith *v.* Steele, 3 Harr. & M. (Md.) 103, where it is decided that the jury may presume such fact from evidence of long possession under the deed.

47. Wilson *v.* Smith, 5 Yerg. (Tenn.) 379.

Upon the question whether the registry of a deed of ancient date was authorized by any law so that the registry may be evidence of the original deed it has been decided that the law will always incline to give effect to such proceedings if possible, on the ground that a presumption in their favor that at the time they were regarded as valid arises from the fact of their having been taken, and the court will presume that the proceedings were justified by some law which then existed. Brown *v.* Edson, 23 Vt. 435.

Tenn. Code, § 2084, providing that deeds registered for twenty years shall be presumed to have been registered on lawful authority is construed as applying only to deeds executed by the grantor himself. Murdock *v.* Leath, 10 Heisk. (Tenn.) 166. See also Green *v.* Goodall, 1 Coldw. (Tenn.) 404; Webb *v.* Weatherhead, 17 How. (U. S.) 576, 15 L. ed. 35. This provision applies to deeds executed by married women. Murdock *v.* Leath, 10 Heisk. (Tenn.) 166.

48. Carson *v.* Foley, 1 Iowa 524; Parker *v.* Nichols, 7 Pick. (Mass.) 111; Wallis *v.* Wallis, 4 Mass. 135, 3 Am. Dec. 210.

The consideration of a lost deed need not be proved where a suit is brought to require the heir of a deceased grantor to execute a

executed.[49] And the burden of proof where the consideration of a deed is attacked is on the person attacking the same.[50] But the presumption that payment of the purchase-money has been made may be rebutted where nothing touching the consideration or such payment is shown by the deed.[51]

b. Sufficiency. A conveyance founded on a consideration of blood and marriage is presumed valid.[52] But where a deed which purports to be founded on a valuable consideration is impeached by showing that no such consideration was paid, it cannot be sustained by showing that the consideration was natural love and affection.[53]

9. Validity and Invalidity — a. In General — (i) *Presumptions.* Misrepresentation and deception in obtaining a conveyance may be implied from the accompanying circumstances and the fact that it was obtained for nothing.[54] But

quitclaim deed in place of his ancestor's unrecorded deed. Bennett *v.* Waller, 23 Ill. 97.

The existence of a seal raises a presumption of a consideration (Horn *v.* Gartman, 1 Fla. 63; Hyman *v.* Kelly, 1 Nev. 179; Righton *v.* Righton, 1 Mill (S. C.) 130; West Portland Homestead Assoc. *v.* Lawnsdale, 19 Fed. 291, 9 Sawy. 120. But see Walker *v.* Walker, 35 N. C. 335); and although a conveyance under seal does not on its face show a consideration it is not invalid, and a consideration need neither be pleaded nor proved (Baker *v.* Westcott, 73 Tex. 129, 11 S. W. 157).

Under Iowa Code, § 3069, providing that all contracts in writing signed by the party to be bound shall import a consideration, a deed imports a sufficient consideration. Luke *v.* Koenen, 120 Iowa 103, 94 N. W. 278.

49. Hoover *v.* Binkley, 66 Ark. 645, 51 S. W. 73; Glenn *v.* Grover, 3 Md. 212.

If consideration is not truly stated relief must be sought in equity on the ground of fraud or mistake. Maigley *v.* Hauer, 7 Johns. (N. Y.) 341.

One claiming title under a quitclaim deed need not prove *aliunde* the instrument a payment of the consideration by the grantee. Hill *v.* Grant, (Tex. Civ. App. 1898) 44 S. W. 1016.

Presumption that a wife owned the consideration money paid for a deed to her is raised by a recital therein that such money belonged to the wife, and the burden of overcoming such presumption is on the party denying it. Stall *v.* Fulton, 30 N. J. L. 430.

Recital of the purchase-price of the land is held not to be evidence against one who claims in opposition to the deed. King *v.* Mead, 60 Kan. 539, 57 Pac. 113.

50. *California.*— Blair *v.* Squire, (1899) 59 Pac. 211.

Iowa.— Carson *v.* Foley, 1 Iowa 524.

Kentucky.— Burdit *v.* Burdit, 2 A. K. Marsh. 143; Fretwell *v.* Fretwell, 62 S. W. 1017, 23 Ky. L. Rep. 434.

New York.— Clarke *v.* Davenport, 1 Bosw. 95.

Tennessee.— Gaugh *v.* Henderson, 2 Head 628.

See 16 Cent. Dig. tit. "Deeds," § 585.

When a consideration different from that expressed in a deed is attempted to be shown, the burden of proof is on the one asserting it. Harraway *v.* Harraway, 136 Ala. 499, 34 So. 836.

While under the law of Maine a grantor is not estopped from denying the actual payment of the price by an acknowledgment of the receipt of the consideration in a deed, yet he cannot defeat the operation of the deed or show that it was executed without consideration. Stowe *v.* Belfast Sav. Bank, 92 Fed. 30.

51. Davenport *v.* Mason, 15 Mass. 85.

Proof of payment of consideration was held to be essential in the case of one seeking to sustain a deed by a father to his son, the father having continued in possession and subsequently conveyed the land to a third person. Kerr *v.* Birnie, 25 Ark. 225.

The receipt in the deed acknowledging payment of the consideration is not sufficient where a person claims as a *bona fide* purchaser for value, without notice of a trust, affirmative proof by him of payment being necessary in such case. Lloyd *v.* Lynch, 28 Pa. St. 419, 70 Am. Dec. 137.

Where heirs of a person try to establish a deed to him by his wife where her title was of record they are held to have the burden of showing the execution and delivery of the deed and also a valuable consideration therefor. Blaesi *v.* Blaesi, 14 N. Y. Civ. Proc. 216.

52. Frazer *v.* Western, 1 Barb. Ch. (N. Y.) 220.

Where the consideration is partly love and affection a disproportion between the money consideration and the value of the land raises no presumption against the validity of the deed. Owen *v.* Smith, 91 Ga. 564, 18 S. E. 527. *Compare* Holmes *v.* Sullivan, 9 Ohio Dec. (Reprint) 499, 14 Cinc. L. Bul. 167.

After a lapse of twenty years it will be presumed that an adequate price was paid by a purchaser for land conveyed to him. Mills *v.* Alexander, 21 Tex. 154.

53. Burrage *v.* Beardsley, 16 Ohio 438, 47 Am. Dec. 382.

54. Archer *v.* Lapp, 12 Oreg. 196, 6 Pac. 672.

Clerical mistakes.— Where a deed purports to have been acknowledged on the day of its date, a discrepancy caused by an indorsement of a certificate of record, making it appear to have been recorded prior to such date, is not to be considered of itself as a suspicious circumstance but is to be regarded

in order that a deed should be *prima facie* void by reason of a confidential relation between the grantor and the grantee, such relation should exist before the transaction in which the deed is made.[55] And one who has executed a deed will be presumed to have known its contents until the contrary is shown.[56] Again where the evidence necessary to establish the validity of a deed is furnished by its enrolment, the *prima facie* case made by it may be repelled.[57]

(II) *Burden of Proof.* Where a deed regular upon its face is attacked as invalid the burden of proof rests on the person making such attack to establish the invalidity.[58] Again the relationship of the parties or the circumstances surrounding the execution of the deed may be such as to throw upon the grantee the burden of showing that the grantor knew and understood the character and effect of the instrument,[59] to show the fairness of the transaction,[60] or that the conveyance was not procured by fraud, artifice, or other undue means.[61]

as a clerical mistake. Munroe *v.* Eastman, 31 Mich. 283.

Undue influence may be presumed where a mother obtained a conveyance from a daughter who relied implicitly in her, took no independent advice, was wholly unacquainted with business forms, was unable by reason of ill-health and necessary training to earn her own living, and where no money consideration was paid. White *v.* Ross, 160 Ill. 56, 43 N. E. 336. So it may be presumed where the grantor and the grantee are living in unlawful cohabitation and there is no proof of a valid consideration. Leighton *v.* Orr, 44 Iowa 679. But see Hewitt's Appeal, 55 Md. 509, holding the presumption to be rebutted by a subsequent marriage. But undue influence will not be presumed in the case of a conveyance by a wife to her husband, in consideration of love and affection, where made in pursuance of an antenuptial agreement. Todd *v.* Wickliffe, 18 B. Mon. (Ky.) 866. So where a mother deeded her home to her children in consideration of care, attention, and assistance in the past, and support for the rest of her life, undue influence will not be presumed. Chadd *v.* Moser, 25 Utah 369, 71 Pac. 870.

55. Henson *v.* Hill, 3 Mackey (D. C.) 315.

56. Kimball *v.* Eaton, 8 N. H. 391. And see Cruzen *v.* Pottle, (Nebr. 1902) 91 N. W. 858; *In re* Cooper, 20 Ch. D. 611, 51 L. J. Ch. 862, 47 L. T. Rep. N. S. 89, 30 Wkly. Rep. 648.

Grantor is presumed to have read the deed where he is able to read. Michael *v.* Michael, 39 N. C. 349.

57. Barry *v.* Hoffman, 6 Md. 78.

58. Murphy *v.* Gabbert, 166 Mo. 596, 66 S. W. 536, 89 Am. St. Rep. 733; Clements *v.* Macheboeuf, 92 U. S. 418, 23 L. ed. 504; McClung *v.* Steen, 32 Fed. 373; Rowley *v.* Rowley, 2 Eq. Rep. 241, 18 Jur. 306, 1 Kay 242, 23 L. J. Ch. 275, 23 L. T. Rep. N. S. 55.

The rule applies where a deed is attacked as false, forged (O'Donnell *v.* Kelliher, 62 Ill. App. 641), or fraudulent (McNear *v.* Williamson, 166 Mo. 358, 66 S. W. 160; Sutter *v.* Lackmann, 39 Mo. 91); on the ground of undue influence (Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158; Studybaker *v.* Cofield, 159 Mo. 596, 61 S. W. 246; Coleman's Estate, 7 Pa. Dist. 731; Rowland *v.* Sullivan, 4 Desauss. (S. C.) 518); on the ground of duress (Howard *v.* Turner, 125 N. C. 107, 34 S. E. 229); or on the ground of the grantor's mental incompetency (Brown *v.* Brown, 39 Mich. 792).

To avoid a deed on the ground of failure of consideration proof of fraud in the consideration has been held essential. Rynear *v.* Neilin, 3 Greene (Iowa) 310.

59. *Maryland.*— Zimmerman *v.* Bitner, 79 Md. 115, 28 Atl. 820.

New Jersey.— Hall *v.* Otterson, 52 N. J. Eq. 522, 28 Atl. 907; Corrigan *v.* Pironi, 48 N. J. Eq. 607, 23 Atl. 355 [*affirming* 47 N. J. Eq. 135, 20 Atl. 218].

Ohio.— Baugh *v.* Buckles, 1 Ohio Cir. Dec. 607.

Rhode Island.— Earle *v.* Chace, 12 R. I. 374.

Washington.— Jackson *v.* Tatebo, 3 Wash. 456, 28 Pac. 916.

See 16 Cent. Dig. tit. "Deeds," § 588 *et seq.*

60. *Michigan.*— Gates *v.* Cornett, 72 Mich. 420, 40 N. W. 740; Duncombe *v.* Richards, 46 Mich. 166, 9 N. W. 149.

New York.— Siemon *v.* Wilson, 3 Edw. 36.

Pennsylvania.— Unruh *v.* Lukens, 166 Pa. St. 324, 31 Atl. 110; Worrall's Appeal, 110 Pa. St. 349, 1 Atl. 380, 735; Miskey's Appeal, 107 Pa. St. 611.

Tennessee.— Hester *v.* Hester, 13 Lea 189.

Wisconsin.— Smith *v.* Smith, 60 Wis. 329, 19 N. W. 47.

See 16 Cent. Dig. tit. "Deeds," § 589.

No such relation ipso facto between a man and his housekeeper exists as to shift the burden of proof in case of an action by the former to set aside the conveyance. Gardner *v.* McConlogue, 8 Pa. Co. Ct. 424.

61. *Iowa.*— Good *v.* Zook, 116 Iowa 582, 88 N. W. 376; Hanna *v.* Wilcox, 53 Iowa 547, 5 N. W. 717.

Kansas.— Hill *v.* Miller, 50 Kan. 659, 32 Pac. 354; Paddock *v.* Pulsifer, 43 Kan. 718, 23 Pac. 1049.

Kentucky.— Smith *v.* Snowden, 96 Ky. 32, 27 S. W. 855, 16 Ky. L. Rep. 353.

Nebraska.— Bennett *v.* Bennett, (1902) 91 N. W. 409.

New Hampshire.— Merrill *v.* Locke, 41 N. H. 486.

b. Capacity of Grantor. It is presumed that the grantor in a deed was competent to execute the same at the time of its execution,[62] and the burden of proving incompetency is on the person alleging it.[63] But where it appears that the grantor was afflicted with insanity prior to the execution of a deed, the burden is on the grantee to show that it was executed in a lucid interval.[64]

c. Right of Grantor to Convey. Proof of peaceable possession of premises is *prima facie* evidence of right to convey.[65] And in the absence of other evidence a deed purporting to convey real estate raises the presumption that the grantor had sufficient seizin to convey the estate and operates to vest the seizin in the grantee.[66] But no presumption of title in the grantee is raised [67] by a conveyance by one not connected with the title and not in possession of the land.[68]

d. Regularity. It may be presumed that a deed was seasonably recorded where possession of the land has been held under it;[69] that it was valid at the date of its execution;[70] that all blanks in the deed were filled before signing it;[71] and that a revenue stamp was affixed to a deed properly recorded, although the record thereof does not show such stamp.[72] So the recording is *prima facie* evidence of its

New Jersey.— Mott *v.* Mott, 49 N. J. Eq. 192, 22 Atl. 997.

New York.— Toms *v.* Greenwood, 9 N. Y. Suppl. 666.

Washington.— White *v.* Johnson, 4 Wash. 113, 29 Pac. 932.

See 16 Cent. Dig. tit. "Deeds," § 588 *et seq.*

Relationship of brother and sister, there being no special dependence of either on the other and both living in separate homes and being of mature age, raises no presumption of fraud as to a deed by him to her. Reeves *v.* Howard, 118 Iowa 121, 91 N. W. 896.

The fact that one of the parties is old, and the father of and living with the grantee, does not raise a presumption of inequality between them, so as to impose on the latter the burden of proving affirmatively that no fraud was practised, or undue influence used, and that all was fair, open, voluntary, and well understood. Kime *v.* Addlesperger, 24 Ohio Cir. Ct. 397.

Where a person unable to read executes a deed and a suit is brought to set aside the same for misrepresentation as to its contents, purport, and effect, defendant must show that the deed was read to the grantor or its contents made known to him. Hyer *v.* Little, 20 N. J. Eq. 443. See Suffern *v.* Butler, 19 N. J. Eq. 202.

62. Doe *v.* Beeson, 2 Houst. (Del.) 246; Tatom *v.* White, 95 N. C. 453; Farnsworth *v.* Noffsinger, 46 W. Va. 410, 33 S. E. 246; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788; Snodgrass *v.* Knight, 43 W. Va. 294, 27 S. E. 233; Buckey *v.* Buckey, 38 W. Va. 168, 18 S. E. 383; Hall *v.* Unger, 11 Fed. Cas. No. 5,949, 2 Abb. 507, 4 Sawy. 672.

63. Howe *v.* Howe, 99 Mass. 88; Williams *v.* Haid, 118 N. C. 481, 24 S. E. 217; Lores *v.* Truman, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250; Day *v.* Seely, 17 Vt. 542.

Where the act of making the deed is in itself reasonable and proper, and furnished no intrinsic evidence of mental incapacity, the burden is on the party assailing the act to show the incapacity of the grantor at the time the deed was made. Kime *v.* Addlesperger, 24 Ohio Cir. Ct. 397.

64. Pike *v.* Pike, 104 Ala. 642, 16 So. 689; Frazer *v.* Frazer, 2 Del. Ch. 260.

Where, however, a grantor was subject to epilepsy which caused temporary fits of mental incapacity it was decided that the presumption arises that at any particular time he was mentally sound. Corbit *v.* Smith, 7 Iowa 60, 71 Am. Dec. 431.

Ratification of a deed given by one while of unsound mind may be inferred from acts of the grantor after being restored to his right mind. Arnold *v.* Richmond Iron Works, 1 Gray (Mass.) 434.

65. Gamble *v.* Horr, 40 Mich. 561.

A strong presumption against the authenticity of an ancient deed is raised by the fact that soon after the date thereof the grantor executed a conveyance to another person who has since held possession adversely. Willson *v.* Betts, 4 Den. (N. Y.) 201.

A warranty deed from one in possession confers *prima facie* a good title. Souders *v.* Jeffries, 98 Ind. 31.

66. Bolster *v.* Cushman, 34 Me. 428; Ward *v.* Fuller, 15 Pick. (Mass.) 185.

67. **Possession of a deed of record** is not of itself sufficient to show that the grantor had any interest in the land purported to be conveyed by it. Potter *v.* Washburn, 13 Vt. 558, 37 Am. Dec. 615.

Recitals in a deed of the marshal of the court which has been executed under a decree of a court of equity are not evidence of his authority to convey as against an adverse claimant. Masters *v.* Varner, 5 Gratt. (Va.) 168, 50 Am. Dec. 114.

68. Crawford *v.* Corey, 99 Mich. 415, 58 N. W. 332; Masters *v.* Varner, 5 Gratt. (Va.) 168, 50 Am. Dec. 114.

69. Carroll *v.* Norwood, 1 Harr. & J. (Md.) 167.

70. Sessions *v.* Doe, 7 Sm. & M. (Miss.) 130.

71. Kilmer *v.* Gallaher, 107 Iowa, 676, 78 N. W. 685.

72. Hall *v.* Cardell, 111 Iowa, 206, 82 N. W. 503.

validity.[73] Again it will be presumed that a deed was executed in accordance with the formalities required by law where it has been lost and its loss and the contents thereof proved.[74]

10. Performance or Breach of Conditions. Where a deed is executed and delivered to a person as an escrow to be delivered to another on the performance of a certain condition, possession of the deed by the grantee is *prima facie* evidence that the condition has been performed.[75] But where a deed provides that a certain act shall be performed by the grantee and a question arises between him and the grantor as to the performance thereof, the burden rests on the grantee to show that he has performed such act.[76]

B. Admissibility of Evidence — 1. Execution, Existence, and Identity — a. In General. The execution and existence of a deed may be proved by the record,[77] by the subscribing witness,[78] by recitals in a subsequent deed,[79] by proof of the maker's signature,[80] or by circumstantial evidence.[81] But the fact that a person's title to land was submitted to attorneys and declared good by them is not admissible to show that such person had a deed to the land from a certain person.[82]

b. Where Another Signs Grantor's Name. Upon the issue whether a grantor directed another to subscribe his name to a deed evidence is admissible that a short time before the execution thereof the grantor directed the deed to be prepared and intended to execute it.[83]

c. Identity of Parties. In order to identify the grantor[84] or the grantee[85] evi-

73. Dumington *v.* Hubbard, 65 Md. 87, 3 Atl. 290. *Compare* Mitchell *v.* Ryan, 3 Ohio St. 377.

74. Christy *v.* Burch, 25 Fla. 942, 2 So. 258.

75. Hare *v.* Horton, 5 B. & Ad. 715, 3 L. J. K. B. 41, 2 N. & M. 428, 27 E. C. L. 302.

76. Jewett *v.* Draper, 6 Allen (Mass.) 434. See Davis *v.* Martin, 8 Pa. Super. Ct. 133; Oakman *v.* Walker, 69 Vt. 344, 38 Atl. 63.

Where a deed provides for forfeiture if the grantee fails to perform a certain act forfeiture will not be presumed to have occurred merely from a subsequent conveyance of the same land by the grantor to another person. Anderson *v.* Bock, 15 How. (U. S.) 323, 14 L. ed. 714.

77. Doe *v.* Vandewater, 7 Blackf. (Ind.) 6; Hathaway *v.* Spooner, 9 Pick. (Mass.) 23. But see Brown *v.* Cady, 11 Mich. 535, holding that the record of a deed is not primary evidence of the existence and genuineness of the original in the absence of a statute authorizing it.

Certified copies of deeds from the records are admissible in behalf of a party to prove the various links in his claim of title. Pratt *v.* Battles, 34 Vt. 391.

The registration is not the only admissible evidence of existence so as to affect the rights of third parties or subsequent purchasers. Crosby *v.* Huston, 1 Tex. 203.

Where a deed as recorded bears no signature the record is not admissible to show the execution thereof. Helton *v.* Asher, 103 Ky. 730, 46 S. W. 22, 20 Ky. L. Rep. 935, 82 Am. St. Rep. 601.

78. Subscribing witness may prove a deed executed in a foreign country. Crockford *v.* Equitable Ins. Co., 10 N. Brunsw. 651.

If subscribing witness cannot locate the time of execution the alleged maker may testify that the deed was in fact made at the time it purports to have been executed. Kelly *v.* William Sharp Saddlery Co., 99 Ga. 393, 27 S. E. 741.

79. Baeder *v.* Jennings, 40 Fed. 199. But see Ives *v.* Ashley, 97 Mass. 198.

A writing signed by a grantor, not under seal, purporting to convey land described to a grantee, and to which is annexed a memorandum reciting that it is a duplicate of a lost deed previously executed by the grantor to the grantee, as near as the grantor can make it, is not admissible in evidence to show title in the grantee. Johnston *v.* Case, 131 N. C. 491, 42 S. E. 957, 132 N. C. 795, 44 S. E. 617.

80. Ingram *v.* Hall, 2 N. C. 193. See Rector *v.* Erath Cattle Co., 18 Tex. Civ. App. 412, 45 S. W. 427.

It is not necessary to produce a subscribing witness where the handwriting of the grantor can be otherwise proved. Woods *v.* Fraser, 3 Nova Scotia 184.

81. Downing *v.* Pickering, 15 N. H. 344.

Where a fuller deed is substituted in place of one already given, but proves to be invalid, the grantee who claims title thereunder may fall back on his title under the first deed and the circumstances relating to its execution and surrender may be shown by parol. Galbreath *v.* Templeton, 20 Tex. 45.

82. Eylton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561.

83. Woodcock *v.* Johnson, 36 Minn. 217, 30 N. W. 894.

84. Wakefield *v.* Brown, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671.

85. Andrews *v.* Dyer, 81 Me. 104, 16 Atl. 405.

But where a conveyance is plain, to a certain person, and no fraud in the execution is shown or no latent ambiguity exists as to the true grantee, explanatory evidence to show

dence *aliunde* the deed is admissible. And recitals in a deed may be admissible for the purpose of identification of a party.[86]

d. Identity of Land. While express language in a deed as to the property conveyed cannot be controlled in a court of law by extrinsic evidence as to intent[87] such evidence may sometimes be resorted to to identify the premises conveyed;[88] and when extrinsic evidence has been admitted to aid a description the court will exhaust all means of ascertaining the meaning and application of the instrument.[89]

e. Identity of Interest. Evidence as to the grantor's title at the time of the grant is admissible in construing such grant.[90] And a deed, although imperfectly executed by an attorney as the deed of his principal, may be admitted in evidence in aid of the grantee's entry to show the extent of his claim of title.[91] Again, although it is presumed that a right to buildings attached to the soil passes with a conveyance in fee, yet such presumption may be overcome by proof that the grantor had no right to convey the buildings.[92] And where a person holds different interests in land the consideration may afford evidence as to which was intended to be conveyed.[93]

2. Delivery. Unless the delivery of a deed is stated to be in escrow it will be considered absolute.[94] The delivery need not be proved in the acknowledgment,[95] but may be proved either expressly or by circumstances.[96] A mere inten-

that by mistake the name of the grantee was inserted in place of another who was intended as grantee is not admissible. Crawford *v.* Spencer, 8 Cush. (Mass.) 418. See Pitts *v.* Brown, 49 Vt. 86, 24 Am. Rep. 114.

Evidence of different spelling by the same family of the family name is admissible on question of personal identity. Galveston, etc., R. Co. *v.* Stealey, 66 Tex. 468, 1 S. W. 186.

Where two persons are of the same name evidence is admissible of a delivery to one of them who entered on and occupied the land as tending to show that such person was the grantee in the deed. Kingsford *v.* Hood, 105 Mass. 495.

86. Auerbach *v.* Wylie, 84 Tex. 615, 19 S. W. 856, 20 S. W. 776. *Compare* Kearney *v.* Fagan, 2 Del. Co. (Pa.) 462.

87. Tyrrell *v.* Comstock, 18 Conn. 210. See also Hartt *v.* Rector, 13 Mo. 497, 53 Am. Dec. 157; Doe *v.* Webster, 12 A. & E. 442, 9 L. J. Q. B. 373, 4 P. & D. 270, 40 E. C. L. 223.

Notes and resolutions of the general assembly and the acts of their committees cannot be referred to for a description of the premises intended to be conveyed by an agent of the general assembly, unless they are referred to in a deed for that purpose. Kenyon *v.* Nichols, 1 R. I. 411.

88. Where the description in a deed is uncertain reference may in some cases be had to a prior deed to determine the identity of the land. Bowman *v.* Wettig, 39 Ill. 416; Conover *v.* Corderey, 20 N. J. L. 320; Ritter *v.* Barrett, 20 N. C. 266. See Labaure *v.* Declouet, 19 La. 376; Richardson *v.* Powell, 83 Tex. 588, 19 S. W. 262.

A deed to a part of a tract of land which has not been particularly located on the plats in the cause may be read in evidence where the whole tract has been located and united in the same person. Hall *v.* Gittings, 2 Harr. & J. (Md.) 380.

Articles of agreement in pursuance of which a deed was executed may be admitted to show the intent of the parties, where there is an ambiguity as to the quantity of land conveyed arising from a conflict between the calls and the courses and distances. Koch *v.* Dunke, 90 Pa. St. 264. See Bell *v.* Woodward, 46 N. H. 315.

Parol evidence generally see Evidence.

The grantee of a piece of land described in his deed as a town lot may establish his title by other evidence, although the grantor has failed to make and record a plat as required by statute. Bowman *v.* Wettig, 39 Ill. 416.

89. Bowers *v.* Andrews, 52 Miss. 596.

90. Warden *v.* Balch, 59 N. H. 468.

91. Ross *v.* Gould, 5 Me. 204.

92. Meyer *v.* Betz, 3 Rob. (N. Y.) 172.

93. Fisher *v.* Quackenbush, 83 Ill. 310, so holding where one who held a perfect title to an undivided one-fourth interest in land and of a tax-title to another undivided one-fourth made a quitclaim deed of an undivided one-fourth. But see Treadwell *v.* Bulkley, 4 Day (Conn.) 395, 4 Am. Dec. 225, where it was decided that where there is no designation in a deed of the proportions in which several grantees take evidence is not admissible of the consideration paid by each to show a right of any one to hold more than an equal share.

94. Currie *v.* Donald, 2 Wash. (Va.) 58, also holding that those witnessing the delivery cannot afterward be permitted to disprove it.

95. Dunn *v.* Games, 8 Fed. Cas. No. 4,176, 1 McLean 321.

96. Dunn *v.* Games, 8 Fed. Cas. No. 4,176, 1 McLean 321. See Van Hook *v.* Walton, 28 Tex. 59.

An entry on the back of a deed made by the draftsman and which forms no part of the deed is not admissible to show delivery. Bailey *v.* Bailey, 52 N. C. 44.

tion, however, to deliver a deed affords no proof that the intended act was done.[97] Nor is hearsay evidence admissible to show delivery.[98] Again a grantor may testify that he never parted with a deed with the intent that it should become operative.[99]

3. REGISTRATION. An abstract of title is not admissible to prove the registration of a deed offered in evidence under a statute which provides that such an abstract may be admitted on affidavit that the original deed is lost or destroyed.[1]

4. VALIDITY AND INVALIDITY — a. In General. In an action to cancel a deed[2] evidence may be admitted of want of authority in the officer who purported to have adjudged the probate and registration thereof,[3] or of the fact that the instrument is forged.[4] But an unsigned memorandum on the margin of a deed is not admissible for the purpose of affecting its validity.[5]

b. Consideration. Where the question arises whether a money consideration was paid[6] evidence is admissible of the business transactions and financial condition of the parties about the time of execution as tending to show whether such a payment was in fact made.[7]

c. Capacity and Incapacity. In determining whether a person alleged to be mentally incompetent or insane had sufficient ability to execute a particular act

A third person may prove a delivery not made in the presence of an attesting witness. Gaskill *v.* King, 34 N. C. 211.

Acts of the grantor inconsistent with a presumption of delivery may be shown as weighing against such presumption. Buckley *v.* Carlton, 4 Fed. Cas. No. 2,093, 6 McLean 125.

Evidence showing delivery.— On the question of delivery of a deed the record thereof (Scaray *v.* Eldridge, 63 Ind. 44), the fact of possession by the grantees (McFall *v.* McFall, 136 Ind. 622, 36 N. E. 517), a recital in a deed (Gragg *v.* Learned, 109 Mass. 167), a vote of a school-district, which was the grantee, in the presence of the grantor, showing assent on his part (Waller *v.* Eleventh School Dist., 22 Conn. 326), evidence that the deed was executed and left with the magistrate before whom it was acknowledged and was taken away by a brother of the grantee for him (Arrison *v.* Harmstead, 2 Pa. St. 191), or evidence as to what took place between the parties at the time of alleged delivery and acceptance and of their subsequent conduct (Dikeman *v.* Arnold, 78 Mich. 455, 44 N. W. 407) is admissible.

Time of delivery may be shown by parol evidence. Wheelock *v.* Harding, 4 Pa. Super. Ct. 21.

97. Hale *v.* Hills, 8 Conn. 39.

98. O'Kelly *v.* O'Kelly, 8 Metc. (Mass.) 436.

99. Stevens *v.* Stevens, 150 Mass. 557, 23 N. E. 378.

Where the question is whether a deed was delivered without authority by the grantor's agent acting in fraudulent collusion with the grantee, evidence is admissible of offers communicated by the agent to the grantor as coming from the grantee and of instructions which were given to such agent by the grantor in regard to delivery. Adams *v.* Kenney, 59 N. H. 133.

Where a deed was delivered to a third person by the grantor, testimony of the former as to whether he would have delivered the deed to whomsoever he understood or believed to be entitled to it under the grantor's instructions is held inadmissible to show the grantor's intention. Griffis *v.* Payne, 22 Tex. Civ. App. 519, 55 S. W. 757.

1. Walton *v.* Follansbee, 165 Ill. 480, 46 N. E. 459.

The record of a deed did not recite the date of the recording. The original book of records was produced, and the county court clerk testified as to the date of recorded deeds immediately preceding and following. It was held that the evidence was admissible. Riviere *v.* Wilkens, 31 Tex. Civ. App. 454, 72 S. W. 608.

2. Where an action is brought to cancel a deed from plaintiff to his son which is alleged to have been executed by mistake evidence is admissible of the extent and value of the land as tending to show that the grantor would never have conveyed so much, reserving none for himself. Miller *v.* Miller, 89 N. C. 209. And in an action to vacate deeds of a testatrix to part of her children as leaving one child unprovided for contrary to the provisions of the will, evidence is held admissible of a suit against testatrix's husband as an insolvent debtor as showing a motive for their execution. Beiser *v.* Beiser, 4 Silv. Supreme (N. Y.) 525, 8 N. Y. Suppl. 55.

3. Ferebee *v.* Hinton, 102 N. C. 99, 8 S. E. 922.

4. Snyder *v.* Jennings, 15 Nebr. 372, 19 N. W. 501.

Forgery may be shown by circumstantial evidence. Watson *v.* Robertson, 15 Tex. 333.

5. Nantahala Marble, etc., Co. *v.* Thomas, 106 Fed. 379, 45 C. C. A. 337.

6. The testimony of a subscribing witness is admissible on the question of validity, and where he testifies that he saw no consideration paid the one claiming under the deed may support it by proof of payment. Spencer *v.* Bedford, 4 Strobh. (S. C.) 96.

7. Douthitt *v.* Applegate, 33 Kan. 395, 6 Pac. 575, 52 Am. Rep. 533.

the inquiry should be, what degree of mental capacity is essential to the proper execution of such act, and then whether the party possessed such capacity.[8] And although upon the question of capacity a judgment as to the status of a person may be admissible, yet in order to be conclusive against those not parties to it, it should be in a proceeding the sole end and aim of which is to determine such status and which simply determines it.[9]

d. Undue Influence. Upon the question of undue influence in procuring a deed statements made by the grantor;[10] proceedings *de lunatico* subsequent to the execution of the deed;[11] letters written by the grantee showing his estimate of the grantor's mental condition;[12] the fact that the grantor was of a feeble understanding;[13] circumstances of the grantor's family, the kind of influence which the members thereof had over him, their feelings toward each other and of the grantor's intentions as to what they should receive from him;[14] and any impressions left on the mind of the witness from a conversation with the grantor on a certain occasion as to the grantor's being rational or irrational, are admissible.[15] But evidence is not admissible of facts not so connected with the execution of the deed as to be relevant.[16]

e. Fraud and Misrepresentation. Where fraud is alleged, it is proper, to sustain such charge, to consider the whole circumstances of the case and the relations of the parties.[17] But a presumption of fraud arising from the exorbitant

8. Hall *v.* Unger, 11 Fed. Cas. No. 5,949, 2 Abb. 507, 4 Sawy. 672, declaring that in such case "regard must be had, in the absence of direct testimony on the point, to all the attending circumstances — the reasonableness of the act in itself, and its approval by the family and relations of the party."

Factors to be considered.— Evidence is admissible as to age, health, mode of life, manners, conversation, acts, and general conduct before and after the execution. Doe *v.* Beeson, 2 Houst. (Del.) 246. See also Corbit *v.* Corbit, 7 Ohio Dec. (Reprint) 692, 4 Cinc. L. Bul. 1006 (evidence as to age); Chess *v.* Chess, 1 Penr. & W. (Pa.) 32, 21 Am. Dec. 350 (evidence as to subsequent declarations); Michon *v.* Ayalla, 84 Tex. 685, 19 S. W. 878 (evidence as to acts occurring before, at the time of, or after, execution).

Ability to transact ordinary business affairs may be shown. Ring *v.* Lawless, 190 Ill. 520, 60 N. E. 881.

Harsh treatment of the grantor by the husband of the grantee subsequent to the execution of a deed is inadmissible in an action to set aside a deed on the sole ground of mental incapacity. Beville *v.* Jones, 74 Tex. 148, 11 S. W. 1128.

Mental condition prior or subsequent to the execution of the deed is admissible on the question of competency. Williams *v.* Sapieha, (Tex. Civ. App. 1901) 62 S. W. 72.

Previous statements as to disposition of property are admissible. Anderson *v.* Carter, 165 N. Y. 624, 59 N. E. 1118 [*affirming* 24 N. Y. App. Div. 462, 49 N. Y. Suppl. 255]. See also Howe *v.* Howe, 99 Mass. 88, evidence of prior declarations.

Question of adequacy and payment of consideration may be considered. Hepler *v.* Hosack, 197 Pa. St. 631, 47 Atl. 847.

9. Gridley *v.* Boggs, 62 Cal. 190; Dewey *v.* Allgire, 37 Nebr. 6, 55 N. W. 276, 40 Am. St. Rep. 468.

Proceedings de lunatico are admissible. Rider *v.* Miller, 86 N. Y. 507.

10. Lemon *v.* Jenkins, 48 Ga. 313; Muir *v.* Miller, 82 Iowa 700, 47 N. W. 1011, 48 N. W. 1032.

Prior expressions of intention to make a different disposition of property may be shown. Cato *v.* Hunt, 112 Ga. 139, 37 S. E. 183.

Statement by the grantee's husband subsequent to the execution, referring presumably to the manner in which the deed was obtained, are not admissible. Beville *v.* Jones, 74 Tex. 148, 11 S. W. 1128.

11. Rider *v.* Miller, 86 N. Y. 507.

12. Barnhardt *v.* Smith, 86 N. C. 473.

13. Somes *v.* Skinner, 16 Mass. 348.

14. Soverhill *v.* Post, 22 How. Pr. (N. Y.) 386.

15. Yeandle *v.* Yeandle, 5 N. Y. Suppl. 535.

16. Guild *v.* Hull, 127 Ill. 523, 20 N. E. 665. But *compare* Jones *v.* Jones, 120 N. Y. 589, 24 N. E. 1016, holding that in an action to set aside a conveyance made by one as plaintiff's agent, as obtained by undue influence, evidence is admissible of conversations unconnected with the particular transaction to show that such person did occupy a confidential relation to plaintiff.

17. Warner *v.* Daniels, 29 Fed. Cas. No. 17,181, 1 Woodb. & M. 90. And see Bowerman *v.* Bowerman, 76 Hun (N. Y.) 46, 27 N. Y. Suppl. 579, holding that where it is claimed that the deed was procured by fraud of a decedent it is proper to show his general reputation or character, and his reputation for honesty and integrity during his lifetime.

For the purpose of showing collusion between the grantee and the agent of the grantor evidence is admissible of knowledge by the grantee of the intent of such agent to defraud his principal. Stiles *v.* Giddens, 21 Tex. 783.

price demanded for the land may be repelled by evidence of the actual price paid.[18]

f. Confirmation of Defective Deed. Where the description in a deed is impeached by the vendor as conveying in excess of the amount bargained for, the one claiming thereunder may show that he had paid in full for all the land conveyed thereby and that the deed has been confirmed by the vendor.[19]

5. Performance or Breach of Condition. Wherever conditions or limitations are clear and explicit so as to shut out all doubt as to their import, parol evidence is inadmissible to show the intention of the grantor in respect thereto;[20] but where the construction of a reservation is ambiguous or not explainable by the context, the construction by the parties themselves as proved by the manner in which they exercised their rights is legal evidence.[21] And evidence tending to show that the condition was inserted for a dishonest or illegal purpose, such as the creation of a monopoly in trade in the grantor, is held admissible.[22] So evidence which tends to show a waiver of the condition of a deed may be admitted.[23] Again for the purpose of showing that the conditions of a deed have not been complied with evidence may be admissible of the making of a subsequent deed.[24]

C. Weight and Sufficiency — 1. Execution, Existence, and Identity — a. In General. Subject of course to general rules of evidence,[25] the weight and sufficiency of evidence to show the execution or existence of a deed must depend upon the particular circumstances of each case.[26]

b. Execution. Proof of the final execution of a deed should show that it was signed, sealed, and delivered by the authority of the grantor as his deed.[27] Slight

In an action by a distributee against an administrator to set aside a deed to the latter on the ground of fraud it may be shown that the execution of a similar deed by another distributee was procured by the administrator by similar misrepresentations and concealment. Chappell *v.* Butler, 74 N. C. 459.

Similar misrepresentations to others see Beckley *v.* Riverside Land Co., (Va. 1895) 23 S. E. 778.

That the grantor was in the habit of getting drunk may, taken in connection with other facts, render competent evidence that the grantee kept a bar-room. McLeod *v.* Bullard, 84 N. C. 515.

That nothing was done about the acknowledgment of the deed is evidence of fraud in an action to set aside a deed as procured by fraud. Pritchard *v.* Palmer, 88 Hun (N. Y.) 412, 34 N. Y. Suppl. 787, 2 N. Y. Annot. Cas. 259.

18. Hunter *v.* Owens, 9 S. W. 717, 10 S. W. 376, 10 Ky. L. Rep. 651.

19. Wittbecker *v.* Walters, 69 Tex. 470, 6 S. W. 788.

20. Bailey *v.* Close, 37 Conn. 408. And *compare* Cereghino *v.* Wagener, 4 Utah 514, 11 Pac. 568, holding that where a condition in a deed makes it void if the grantee should ever desert her husband without legal cause, a record in a divorce suit between the husband and the wife which shows that the wife has abandoned her husband but which does not show that such desertion was without legal cause is not admissible.

21. Choate *v.* Burnham, 7 Pick. (Mass.) 274.

22. Chippewa Lumber Co. *v.* Tremper, 75 Mich. 36, 42 N. W. 532, 13 Am. St. Rep. 420, 4 L. R. A. 373.

23. Chippewa Lumber Co. *v.* Tremper, 75 Mich. 36, 42 N. W. 532, 13 Am. St. Rep. 420, 4 L. R. A. 373.

24. Oakman *v.* Walker, 69 Vt. 344, 38 Atl. 63.

25. See, generally, Evidence.

26. See *infra*, VII, C, 2 *et seq.*

Age of a deed, when accompanied by possession, makes its recitals *prima facie* evidence against persons claiming title under the grantor prior to such deed. James *v.* Letzler, 8 Watts & S. (Pa.) 192.

Confirmative acts dispense with exhibition of the primordial title, if its tenor be therein specially set forth, but, if not, the primordial title must be produced. Brooks *v.* Norris, 6 Rob. (La.) 175; Brown *v.* Frantum, 6 La. 39.

If a statute specifies a particular mode of authentication a copy of proceedings not in conformity therewith is insufficient evidence to maintain a title under the act. Hovey *v.* Woodward, 33 Me. 470.

Where a decree requiring a conveyance is not necessary to the validity of a deed the record of the decree need not be produced. Dunn *v.* Games, 8 Fed. Cas. No. 4,176, 1 McLean 321 [*affirmed* in 14 Pet. 322, 10 L. ed. 476].

27. Newlin *v.* Beard, 6 W. Va. 110.

Certificate of acknowledgment and registration are not proof of execution. Webber *v.* Stratton, 89 Me. 379, 36 Atl. 614.

Common law as to proof by subscribing witnesses is not in force in North Dakota. McManus *v.* Commow, 10 N. D. 340, 87 N. W. 8.

Proof of due execution includes proof of the existence of all the parties whose agency is required in the execution. Bellows *v.* Copp, 20 N. H. 492.

Proof of the grantor's handwriting to a

proof, however, of execution is sufficient where a deed is introduced only on a collateral point.[28]

c. Identity of Parties. The identity of the parties may be at least *prima facie* established, and in most cases sufficiently proven, by showing the identity of names, by connecting the chain of title or by referring to the source thereof, by proof of residence, acts of ownership, or of any other circumstances the evidence of which is relevant and within the governing rules of admissibility of evidence. No other or more specific rule of general application can be stated.[29]

deed is more satisfactory evidence of execution than proof of the subscribing witness's handwriting. Newsom *v.* Luster, 13 Ill. 175. But proof of a deed by evidence as to the handwriting of subscribing witnesses and the maker is rebutted by evidence of the maker that the deed is a forgery. Faircloth *v.* Jordan, 18 Ga. 350.

Revenue stamp is no part of a deed and the fact that the copy appearing in the record shows no stamp does not tend to show that a finding of the court that the deed was stamped is against evidence. Kiefer *v.* Rogers, 19 Minn. 32.

When evidence as to seal is sufficient.— Brolley *v.* Lapham, 13 Gray (Mass.) 294; Todd *v.* Union Dime Sav. Inst., 118 N. Y. 337, 23 N. E. 299 [*reversing* 7 N. Y. St. 449, 20 Abb. N. Cas. 270].

Sufficiency of evidence showing execution generally see the following cases:

Alabama.— Tillis *v.* Smith, 108 Ala. 264, 19 So. 374.

Colorado.— Chivington *v.* Colorado Springs Co., 9 Colo. 597, 14 Pac. 212.

Georgia.— Green *v.* Glass, 29 Ga. 246.

Illinois.— Dagley *v.* Black, 197 Ill. 53, 64 N. E. 275; Lewis *v.* McGrath, 191 Ill. 401, 61 N. E. 135.

Indiana.— Smith *v.* James, 131 Ind. 131, 30 N. E. 902; Haynes *v.* Thomas, 7 Ind. 38.

Iowa.— Slattery *v.* Slattery, 120 Iowa 717, 95 N. W. 201.

Kentucky.— Voorhies *v.* Gore, 3 B. Mon. 529.

Maine.— Emery *v.* Legro, 63 Me. 357.

Maryland.— Edelen *v.* Gough, 5 Gill 103.

Massachusetts.— Stone *v.* Stone, 179 Mass. 555, 61 N. E. 268.

Michigan.— Hogadone *v.* Grange Mut. F. Ins. Co., (1903) 94 N. W. 1045; Carpenter *v.* Carpenter, 126 Mich. 217, 85 N. W. 576.

Minnesota.— Morrison *v.* Porter, 35 Minn. 425, 29 N. W. 54, 59 Am. Rep. 331.

Missouri.—Avery *v.* Fitzgerald, 94 Mo. 207, 7 S. W. 6.

Nebraska.— Mavity *v.* Stover, (1903) 94 N. W. 834.

New Jersey.— Watson *v.* Mulford, 21 N. J. L. 500.

New York.— Dolan *v.* Leary, 174 N. Y. 540, 66 N. E. 1107 [*affirming* 69 N. Y. App. Div. 459, 74 N. Y. Suppl. 981]; Wainwright *v.* Low, 57 Hun 386, 10 N. Y. Suppl. 888; Goodhue *v.* Berrien, 2 Sandf. Ch. 630.

Ohio.— Lore *v.* Truman, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250.

Pennsylvania.— Bennett *v.* Fulmer, 49 Pa. St. 155.

South Carolina.— Dawson *v.* Dawson, Rice Eq. 243.

Texas.— Hardin *v.* Sparks, 70 Tex. 429, 7 S. W. 769; Belcher *v.* Fox, 60 Tex. 527; Collins *v.* Weiss, (Civ. App. 1905) 74 S. W. 46; Royals *v.* Lacey, (Civ. App. 1903) 73 S. W. 1062; Riviere *v.* Wilkens, 31 Tex. Civ. App. 454, 72 S. W. 608; De la Garza *v.* Macmanus, (Civ. App. 1898) 44 S. W. 704; Latham *v.* Griffin, (Civ. App. 1897) 42 S. W. 858.

Virginia.— Colquhoun *v.* Atkinsons, 6 Munf. 550.

Wisconsin.— Linde *v.* Gudden, 109 Wis. 326, 85 N. W. 323.

United States.—White *v.* Burnley, 20 How. 235, 15 L. ed. 886; Lonsdale Co. *v.* Moies, 15 Fed. Cas. No. 8,496, Brunn. Col. Cas. 655.

See 16 Cent. Dig. tit. "Deeds," § 614 *et seq.*

28. Means *v.* Means, 7 Rich. (S. C.) 533.

29. *California.*— Mott *v.* Smith, 16 Cal. 533, by identity of names and reference to source of title.

District of Columbia.— Scott *v.* Hyde, 21 D. C. 531, by identity of names, of professional title, and of residence.

Maine.— Chandler *v.* Wilson, 77 Me. 76, by deed of other lands to grantee of same name and stating residence.

Minnesota.— Rogers *v.* Manley, 46 Minn. 403, 49 N. W. 194 (by the record of a deed and other general evidence); Horning *v.* Sweet, 27 Minn. 277, 6 N. W. 782 (by proof of regular chain of title coupled with admissions in pleading).

Texas.— Fleming *v.* Giboney, 81 Tex. 422, 17 S. W. 13 (by connecting the deceased with the original party receiving preliminary title papers, and by showing marriage, residence, and possession of a patent for land); Smith *v.* Gillum, 80 Tex. 120, 15 S. W. 794 (by showing source of title and connecting the chain of title and identifying of names); Robertson *v.* DuBose, 76 Tex. 1, 13 S. W. 300 (by identity of names in chain of title).

See 16 Cent. Dig. tit. "Deeds," § 620.

Upon evidence as to physical appearance the court charged the jury substantially to find against the claim of identity unless the party was the identical person named in the deed, and the charge was held proper. Parker *v.* Chancellor, 78 Tex. 524, 15 S. W. 157.

Sufficiency of identity in case of copartnership see Dowdy *v.* McArthur, 94 Ga. 577, 21 S. E. 148; Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871.

That the surname and initials of a witness are the same as the grantee's is not *prima*

d. Identity of Land. The land should be sufficiently distinguished from other tracts[30] and be shown to be that described in the deed[31] by relevant plats, surveys, patents, deeds, or such other documentary evidence as may be necessary and admissible, aided when requisite by the testimony of witnesses competent to testify to relevant and admissible facts of identity.[32] The question of identity may, however, rest upon the construction of the deed.[33]

e. Identity of Interest. An admission in a deed of buildings that they stand on the land of the grantee is conclusive evidence that the grantor recognizes the title of the grantee to the land.[34] And a recital in a deed may in some cases be sufficiently descriptive of the interest conveyed.[35] But the acceptance of a quitclaim or even warranty deed is not in fact or in theory an admission that the grantee does not already have the superior title.[36] And the mere production of a recorded deed, with no evidence of possession, is insufficient to establish a *prima facie* title.[37]

f. Prior Existence of Deed. The proof of a deed which has been lost should show that the instrument was properly executed and the evidence of the contents should be clear and certain.[38] And although the production of the most direct evidence of a deed may not be required where there has been a

facie evidence that they were the same person, but the question is for the jury. See Liddon *v.* Hodnett, 22 Fla. 442.

Where different persons bear the same name when evidence is sufficient as to identity see Hickman *v.* Gillum, 66 Tex. 314, 1 S. W. 339; Begg *v.* Anderson, 64 Wis. 207, 25 N. W. 3.

30. Godfrey *v.* Beardsley, 10 Fed. Cas. No. 5,497, 2 McLean 412.

31. Redd *v.* Murry, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132.

32. McCullough *v.* Olds, 108 Cal. 529, 41 Pac. 420; Vejar *v.* Mound City Land, etc., Assoc., 97 Cal. 659, 32 Pac. 713; Redd *v.* Murray, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132; Saltonstall *v.* Boston Pier, 7 Cush. (Mass.) 195; Rieglesville Delaware Bridge Co. *v.* Bloom, 48 N. J. L. 368, 7 Atl. 478; Graves *v.* Texas, etc., R. Co., (Tex. Civ. App. 1895) 31 S. W. 87.

33. McCormack *v.* Crow, 15 S. W. 181, 15 Ky. L. Rep. 856.

34. Brown *v.* King, 5 Metc. (Mass.) 173.

35. Meals *v.* Brandon, 16 Pa. St. 220, holding, however, that a recital in a deed is insufficient in the absence of the deed referred to in said recital to establish title in a defendant as against a purchaser at a sale under execution against the husband who had never claimed under said deed to himself and wife.

A recital in a deed that it was made in pursuance of a resolution of the county board is not *per se* evidence of the existence of such resolution. Ward *v.* Necedah Lumber Co., 70 Wis. 445, 35 N. W. 929. *Compare* Bemis *v.* Weege, 67 Wis. 435, 30 N. W. 938.

36. Littler *v.* Lincoln, 106 Ill. 353.

37. Bell *v.* Peabody, 63 N. H. 233, 56 Am. Rep. 506. See Graves *v.* Amoskeag Mfg. Co., 44 N. H. 462.

38. Wakefield *v.* Day, 41 Minn. 344, 43 N. W. 71.

Execution and contents are sufficiently proved where the grantor testifies that he made a deed, to whom it was made, and when, the consideration, whether the deed was a warranty or quitclaim, and what property was conveyed by it. Perry *v.* Burton, 111 Ill. 138.

The manner of execution should be shown, a mere statement that such a deed was made not being sufficient proof of existence. Lampe *v.* Kennedy, 56 Wis. 249, 14 N. W. 43.

The written acknowledgment of the grantor has been held sufficient evidence of the execution of a deed which has been accidentally burned. Fearn *v.* Taylor, 4 Bibb (Ky.) 363.

Usual high degree of proof is not required, of the due execution and delivery of a lost deed, where a party claims title through a grantee after the parties are dead or cannot be found, and several years have elapsed without the grantor or any one through him claiming any interest in the property. Scott *v.* Crouch, 24 Utah 377, 67 Pac. 1068.

Where the subscribing witnesses reside in another state it has been decided that a lost deed is sufficiently proved by the depositions of persons residing in the same state as such witnesses, proving the signatures of the maker of the deed and of such witnesses. Montgomery *v.* Dorion, 7 N. H. 475.

As to sufficiency of proof of prior existence in particular cases see the following cases:

Alabama.— Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561.

Illinois.— Heacock *v.* Lubuke, 107 Ill. 396; Gorman *v.* Gorman, 98 Ill. 361.

Iowa.— Lynn *v.* Morse, 76 Iowa 665, 39 N. W. 203; Cutler *v.* Bangs, 40 Iowa 694.

Massachusetts.— Melvin *v.* Merrimac River Locks, etc., 17 Pick. 255.

Missouri.— Schaumburg *v.* Hepburn, 39 Mo. 125.

New York.— Arents *v.* Long Island R. Co., 156 N. Y. 1, 50 N. E. 422 [*affirming* 89 Hun 126, 34 N. Y. Suppl. 1085]; Metcalf *v.* Van Benthuysen, 3 N. Y. 424; Dolan *v.* Leary, 69 N. Y. App. Div. 459, 74 N. Y. Suppl. 981.

North Carolina.— Mercer *v.* Wiggins, 74 N. C. 48.

great lapse of time, yet the evidence should be no less satisfactory than of a recent transaction.[39]

g. Possession by Grantee. Such presumption as may arise in favor of the grantee by reason of his possession of the land for a long time may be rebutted by proof of his declarations adverse to his interest.[40]

h. Reconveyance. Adverse oral admissions of the grantee are not sufficient to establish a reconveyance where such admissions are purely casual, and there was an opportunity for a deed to have been executed, which, if it had been executed, would probably have been recorded.[41]

2. Delivery — a. In General. Whether there has been a delivery of a deed should, as between the grantor and the grantee, be determined by a fair preponderance of evidence; but where third persons' rights have intervened, the proof of non-delivery should be clear and positive, and in many cases the doctrine of estoppel precludes the grantor.[42] Delivery may, however, be sufficiently proven

Pennsylvania.— Crawford *v.* Neff, 3 Walk. 57.

South Carolina.— Berry *v.* Jourdan, 11 Rich. 67; Belton *v.* Briggs, 4 Desauss. 465.

Texas.— Johnson *v.* Lyford, 9 Tex. Civ. App. 85, 29 S. W. 57; Dohoney *v.* Womack, 1 Tex. Civ. App. 354, 19 S. W. 883, 20 S. W. 950.

See 16 Cent. Dig. tit. "Deeds," § 621.

39. Plummer *v.* Baskerville, 36 N. C. 252. **Mere tradition of a sealed instrument,** even to the party in whose favor it is drawn, does not necessarily make it a deed in all cases. Black *v.* Shreve, 13 N. J. Eq. 455.

40. Jackson *v.* Miller, 6 Wend. (N. Y.) 228, 21 Am. Dec. 316. But it is not necessarily overcome by the grantor's testimony that he did not execute the deed, where it also appears that the grantor raised an objection to such possession. Nixon *v.* Post, 13 Wash. 181, 43 Pac. 23.

41. Shorter *v.* Sheppard, 33 Ala. 648.

42. Carusi *v.* Savary, 6 App. Cas. (D. C.) 330. **There is sufficient evidence** of delivery: Where the grantor, being paralyzed, a bystander by his direction guided his hand so that he executed the deed (Harris *v.* Harris, 59 Cal. 620); where the grantee presented the instrument to a recording officer for registration and it was duly recorded, even though the instrument was produced on trial by the grantor's executors under notice from the grantee (Horn *v.* Gartman, 1 Fla. 63); and where the deed was delivered to a notary who delivered it to the grantee, who put it in his safety-deposit vault, where it was found unrecorded at his death, coupled with other facts showing the grantee's interest in the title (Loveland *v.* Loveland, 136 Ill. 75, 26 N. E. 381). See further as to sufficient evidence of delivery under particular facts the following cases:

Illinois.— Valter *v.* Blavka, 195 Ill. 610, 63 N. E. 499.

Kentucky.— Bunnell *v.* Bunnell, 111 Ky. 566, 64 S. W. 420, 65 S. W. 607, 23 Ky. L. Rep. 800, 1101; Kuhn *v.* Kuhn, 69 S. W. 1077, 24 Ky. L. Rep. 787.

Massachusetts.— Loud *v.* Brigham, (1891) 28 N. E. 7; Ward *v.* Lewis, 4 Pick. 518.

Michigan.— Carpenter *v.* Carpenter, 126 Mich. 217, 85 N. W. 576; Dennis *v.* Dennis, 119 Mich. 380, 78 N. W. 333.

Minnesota.— Hathaway *v.* Cass, 84 Minn. 192, 87 N. W. 610.

Nebraska.— Roberts *v.* Swearingen, 8 Nebr. 363, 1 N. W. 305.

New Hampshire.— Warren *v.* Swett, 31 N. H. 332.

New York.— Gifford *v.* Corrigan, 117 N. Y. 257, 22 N. E. 756, 15 Am. St. Rep. 508, 6 L. R. A. 610 [*affirming* 4 N. Y. Suppl. 89].

Pennsylvania.— Cummings *v.* Glass, 162 Pa. St. 241, 29 Atl. 848.

Texas.— King *v.* Hill, (Civ. App. 1903) 75 S. W. 550.

United States.— Toms *v.* Owen, 52 Fed. 417.

See 16 Cent. Dig. tit. "Deeds," § 625 *et seq.*

There is no sufficient evidence of delivery: Where the testimony is conflicting and the grantee's acts are not consistent with her claim to the deed (Pillow *v.* King, 55 Ark. 633, 18 S. W. 764); where there is an affidavit of a subscribing witness that he saw the feoffer "assign" the deed (Doe *v.* Roe, 29 Ga. 45); where upon an exchange of land the complainant laid his deed upon a table and took the exchange deed, but objected to its form and contents and demanded a return of his own deed (McDonald *v.* Minnick, 147 Ill. 651, 35 N. E. 367); where the acts of the parties are inconsistent with a voluntary and intended delivery (Stokes *v.* Anderson, 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313); where the deed was signed and left on a table in the absence of the donee (Hughes *v.* Easten, 4 J. J. Marsh. (Ky.) 572, 20 Am. Dec. 230); and where the only fact is that a deed was executed in the presence of witnesses (Parrott *v.* Avery, 159 Mass. 594, 35 N. E. 94, 38 Am. St. Rep. 465, 22 L. R. A. 153). See further as to insufficient evidence of delivery under particular facts the following cases:

Illinois.— Dagley *v.* Black, 197 Ill. 53, 64 N. E. 275; Brown *v.* Brown, 167 Ill. 631, 47 N. E. 1046; Robbins *v.* Moore, 129 Ill. 30, 21 N. E. 934.

Maine.— Egan *v.* Horrigan, 96 Me. 46, 51 Atl. 246.

by the direct testimony of one who saw it made;[43] or of the grantors that they executed the deed.[44] It may also be proven by the concurrent acts of the parties recognizing a transfer of the title.[45]

b. Acceptanee. Even though there is no evidence that the grantee ever declared his acceptance[46] the proof thereof is sufficient where it shows that the entire course of conduct of the grantee indicates such acceptance,[47] or where there is an intelligent assent.[48] If, however, the acts of the grantee clearly manifest an intention not to accept, they will have that effect;[49] and the mere reception and retention of a deed of gift is not conclusive,[50] although a long retention of a conveyance may be.[51] Again acceptance may be established by the introduction in evidence of a recorded deed by the grantee named therein.[52]

e. Deposit With Third Person. A valid delivery may be sufficiently established by evidence of the deposit of the deed with a third person for the grantee with the intent that it should so operate.[53]

Massachusetts.— Chandler *v.* Temple, 4 Cush. 285.

Michigan.— Merchant *v.* Guilds, 129 Mich. 168, 88 N. W. 391.

New York.—Beiser *v.* Beiser, 8 N. Y. Suppl. 55.

Texas.— McLaughlin *v.* McManigle, 63 Tex. 553.

Wisconsin.— Stewart *v.* Stewart, 50 Wis. 445, 7 N. W. 369.

See 16 Cent. Dig. tit. "Deeds," § 625.

If a deed is executed on the condition that an advancement be canceled, but it does not appear what the grantor did with the deed or what became of it except that it was seen at the grantee's house, and on the death of the grantee the advancement had not been canceled, and it was taken out of the grantor's share of the estate, it was held that the evidence was not sufficient to establish a delivery. Ebersole *v.* Rankin, 102 Mo. 488, 15 S. W. 422.

If delivery of an alleged deed to a husband is not inconsistent with his wife's right of possession, the jury should be so charged, in an action of ejectment against a husband and wife, where plaintiff claims title under an execution sale on a judgment against the husband. Sorenson *v.* Sorenson, 69 Mich. 351, 37 N. W. 358.

It is not necessary to make actual proof of delivery where no objection is made to the introduction of a deed in evidence. Davis *v.* Pacific Imp. Co., 118 Cal. 45, 50 Pac. 7.

Office copy of a recorded deed is insufficient to show delivery, without any evidence that the original had ever been in the possession of the grantee. Cram *v.* Ingalls, 18 N. H. 613.

That neither grantor nor his lawyer could have delivered a deed at or after its date is not sufficient to prove that no valid delivery was made. Loud *v.* Brigham, (Mass. 1891) 28 N. E. 7.

Where authenticated copies of two deeds, one from A and wife to B, and the other from B to A, both purporting to be executed and acknowledged, and the latter referring to the former, are offered in evidence and received, there is sufficient proof of delivery of the first deed. Dempsey *v.* Tylee, 3 Duer (N. Y.) 73.

43. Higgins *v.* Bogan, 4 Harr. (Del.) 330. See also Oliver *v.* Wilhite, 201 Ill. 552, 66 N. E. 837; Devereux *v.* McMahon, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205.

Testimony by a conveyancer that deeds were signed, acknowledged, and witnessed in his presence, and taken from his office, does not show an actual delivery, as delivery takes place when the deed either actually or constructively by record is placed beyond the grantor's control. Gardiner *v.* Gardiner, (Mich. 1903) 95 N. W. 973.

44. Louisville, etc., R. Co. *v.* Moore, 106 Ind. 600, 5 N. E. 413; Louisville, etc., R. Co. *v.* Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719.

Proof of execution and acknowledgment is not conclusive evidence of delivery. Arthur *v.* Anderson, 9 S. C. 234.

Where parties have declared a deed to be sealed and delivered and this is attested by the signatures of four witnesses, the delivery is sufficiently established. Currie *v.* Donald, 2 Wash. (Va.) 58.

45. Gould *v.* Day, 94 U. S. 405, 24 L. ed. 232.

46. Rose *v.* Rose, 7 Barb. (N. Y.) 174.

47. Vaughan *v.* Godman, 103 Ind. 499, 3 N. E. 257; Rose *v.* Rose, 7 Barb. (N. Y.) 174.

Actual use of a right of way is conclusive evidence of acceptance. Fazende *v.* Morgan, 31 La. Ann. 549.

Assuming control and possession of property until the grantor's death, after receiving the deed, is sufficient evidence of acceptance. Brown *v.* Danforth, 9 N. Y. Suppl. 19.

48. Higman *v.* Stewart, 38 Mich. 513.

49. Jackson *v.* Bodle, 20 Johns. (N. Y.) 184. See also Mills *v.* Gore, 20 Pick. (Mass.) 28. *Compare* Richardson *v.* Grays, 85 Iowa 149, 52 N. W. 10.

50. Higman *v.* Stewart, 38 Mich. 513.

51. Smith *v.* Cole, 109 N. Y. 436, 17 N. E. 356 [*affirming* 39 Hun 248].

52. American F. Ins. Co. *v.* Landfare, 56 Nebr. 482, 76 N. W. 1068.

53. *Illinois.*— Winterbottom *v.* Pattison, 152 Ill. 334, 38 N. E. 1050. See also Oliver *v.* Wilhite, 201 Ill. 552, 66 N. E. 837.

Indiana.— St. Clair *v.* Marquell, (Sup. 1903) 67 N. E. 693.

d. Recording. A recorded deed duly executed is evidence of a delivery, and conclusive, in the absence of evidence to the contrary, as between the grantor and the grantee and a *bona fide* purchaser.[54]

e. Delivery on Death of Grantor. A delivery may be sufficiently proven by evidence clearly showing that the grantor intended that delivery should be made or take effect upon his death.[55]

f. Possession of Deed. Where the facts show no such parting with the possession of the deed as to deprive the grantor of further control and dominion over it, delivery is unproven.[56] If, however, the evidence clearly shows that it was the intention of the grantor and grantee that the deed should immediately

Iowa.— Trask *v.* Trask, 90 Iowa 318, 57 N. W. 841, 48 Am. St. Rep. 446; Hoffman *v.* Hoffman, 81 Iowa 292, 46 N. W. 1106.

Massachusetts.— Regan *v.* Howe, 121 Mass. 424.

Michigan.— Brown *v.* Stutson, 100 Mich. 574, 59 N. W. 238, 43 Am. St. Rep. 462; Martz *v.* Eggemann, 44 Mich. 430, 6 N. W. 873.

Missouri.— Hamilton *v.* Armstrong, (Sup. 1893) 21 S. W. 1124.

See 16 Cent. Dig. tit. "Deeds," § 629.

Delivery cannot be disproved by the testimony of a third person, with whom the grantor left the deed, that if he had afterward called for it he would have given it to him, since it does not show the grantor's intention. Corker *v.* Corker, 95 Cal. 308, 30 Pac. 541.

It may be inferred from circumstantial evidence that a deed so deposited was subsequently delivered by the grantor to the grantee. Fellows *v.* Fellows, 37 N. H. 75.

When evidence of delivery to a third person is insufficient to show delivery to the grantee see Shults *v.* Shults, 159 Ill. 654, 43 N. E. 800, 50 Am. St. Rep. 188; Burnap *v.* Sharpsteen, 149 Ill. 225, 36 N. E. 1008; Ela *v.* Kimball, 30 N. H. 126; Puckett *v.* Williams, 11 Tex. Civ. App. 308, 32 S. W. 364.

54. Laughlin *v.* Calumet, etc., Canal, etc., Co., 65 Fed. 441, 13 C. C. A. 1. See also the following cases:

California.— Davis *v.* Pacific Imp. Co., 118 Cal. 45, 50 Pac. 7.

Delaware.— Smith *v.* May, 3 Pennew. 233, 50 Atl. 59.

Georgia.— Parrott *v.* Baker, 82 Ga. 364, 9 S. E. 1068.

Illinois.— Shields *v.* Bush, 189 Ill. 534, 59 N. E. 962, 82 Am. St. Rep. 474.

Maine.— Egan *v.* Horrigan, 96 Me. 46, 51 Atl. 246.

Michigan.— Jackson *v.* Cleveland, 15 Mich. 94, 90 Am. Dec. 266.

South Carolina.— Folk *v.* Varn, 9 Rich. Eq. 303; Dawson *v.* Dawson, Rice Eq. 243.

Tennessee.— McEwen *v.* Troost, 1 Sneed 186.

As to registration as presumptive evidence of delivery, it is not error for the court to refuse to charge the jury thereon where the deed was found among papers of the deceased and was not recorded until after his death. Equitable Mortg. Co. *v.* Brown, 105 Ga. 474, 30 S. E. 687.

Deeds executed without the grantee's knowledge were left for record but were not taken from the grantor and given the grantee until after property had been attached by the creditor, and it was held that no delivery was shown. Knox *v.* Clark, 15 Colo. App. 356, 62 Pac. 334.

Delivery is sufficiently established by the oath of a subscribing witness before the proper magistrate and by subsequent registration. Carver *v.* Jackson, 4 Pet. (U. S.) 1, 7 L. ed. 761.

Recording is only prima facie evidence of delivery. Fair Haven Marble, etc., Co. *v.* Owens, 69 Vt. 246, 37 Atl. 749.

Registration is not per se equivalent to a delivery. Dawson *v.* Dawson, Rice Eq. (S. C.) 243.

55. Crabtree *v.* Crabtree, 159 Ill. 342, 42 N. E. 787; Benson *v.* Hall, 150 Ill. 60, 36 N. E. 947 (delivery actually made on the day before the grantor's death); Hill *v.* Hill, 119 Ill. 242, 10 N. E. 667; Denzler *v.* Rieckhoff, 97 Iowa 75, 66 N. W. 147; Hoffman *v.* Hoffman, 81 Iowa 292, 46 N. W. 1106. But *compare* Anderson *v.* Anderson, 126 Ind. 62, 24 N. E. 1036; Barron *v.* Mercure, (Mich. 1903) 93 N. W. 1071.

There is a present delivery to the grantee, where the grantor executes the deed to her daughters and takes back a life-lease of the premises, and some months later the grantor, with one of her daughters, delivers to a third party the deed and lease, with directions to deliver the same in case of her death to one of the daughters, and afterward speaks of the deed as "the girls'" deed and occupies the premises under the lease till her death. Martin *v.* Flaharty, 13 Mont. 96, 32 Pac. 287, 40 Am. St. Rep. 415, 19 L. R. A. 242. See also Dyer *v.* Skadan, 128 Mich. 348, 87 N. W. 277.

56. Duer *v.* James, 42 Md. 492; Griffis *v.* Payne, 22 Tex. Civ. App. 519, 55 S. W. 757.

Where evidence in connection with the grantor's possession is insufficient proof of delivery see the following cases:

Alabama.— Goodlet *v.* Kelly, 74 Ala. 213.

Georgia.— Maddox *v.* Gray, 75 Ga. 452.

Illinois.— Fouts *v.* Bell, 172 Ill. 345, 50 N. E. 198; Oliver *v.* Oliver, 149 Ill. 542, 36 N. E. 955; Lancaster *v.* Blaney, 140 Ill. 203, 29 N. E. 870.

Iowa.— Reichert *v.* Wilhelm, 83 Iowa 510, 50 N. W. 19.

Maine.— McGraw *v.* McGraw, 79 Me. 257, 9 Atl. 846.

Michigan.— Burnett *v.* Burnett, 40 Mich. 361.

become operative a delivery is proven, although the instrument was left in the grantor's possession.[57] So the fact that the deed is in the grantee's possession and control[58] is, in connection with evidence showing that a delivery was clearly intended, sufficient proof of its delivery.[59]

g. Time of Delivery or Taking Effect. Although a deed is ordinarily presumed to have been delivered at the date of its execution,[60] still the actual time of the delivery or of the taking effect of a deed may be sufficiently

Mississippi.— Woods *v.* Sturdevant, 38 Miss. 68.

North Carolina.— Baldwin *v.* Maultsby, 27 N. C. 505.

South Carolina.—Jackson *v.* Inabnit, 2 Hill Eq. 411.

West Virginia.— Davis *v.* Ellis, 39 W. Va. 226, 19 S. E. 399.

Sec 16 Cent. Dig. tit. "Deeds," § 626.

Where the grantor retains possession for some time, but afterward deposits the deed in a bank subject to the grantee's orders, and he gives the grantor written authority to get it and such writing is lost, and the grantor demands the return of the deeds, which the grantee declines, there is no final delivery. Martling *v.* Martling, 47 N. J. Eq. 122, 20 Atl. 41.

That a deed was found among papers of the deceased grantor is no evidence of non-delivery, where such grantor, after making the deed, was constituted by the grantee his attorney in fact to manage and convey the property described in the deed. Gustin *v.* Michelson, 55 Nebr. 22, 75 N. W. 153.

57. Tyler *v.* Heall, 106 Mo. 313, 17 S. W. 319, 27 Am. St. Rep. 337.

When evidence in connection with the grantor's possession is sufficient proof of delivery see Snow *v.* Orleans, 126 Mass. 453; Moore *v.* Hazelton, 9 Allen (Mass.) 102; Vought *v.* Vought, 50 N. J. Eq. 177, 27 Atl. 489; Bliss *v.* West, 58 Hun (N. Y.) 71, 11 N. Y. Suppl. 374.

58. That the grantee's possession of a deed is sufficient evidence of delivery see Inman *v.* Swearingen, 198 Ill. 437, 64 N. E. 1112; Harshbarger *v.* Carroll, 163 Ill. 636, 45 N. E. 565 (deed was also recorded and there was other evidence of the grantor's recognition of title); Furenes *v.* Eide, 109 Iowa 511, 80 N. W. 539, 77 Am. St. Rep. 545; Burden *v.* Burden, 10 N. Y. App. Div. 340, 41 N. Y. Suppl. 948 (retention of deeds was coupled with other evidence of delivery); South Portland Land Co. *v.* Munger, 36 Oreg. 457, 54 Pac. 815, 60 Pac. 5 (deed was also recorded and the grantee dealt with the property as her own).

Grantee's acts inconsistent with a claim of title will preclude the finding of a delivery, although the deed was in his possession. Galbreath *v.* Galbreath, (Tenn. Ch. App. 1900) 64 S. W. 361.

If possession is wrongfully obtained without the grantor's knowledge and the deed placed on record and the grantor has frequently demanded that the deed be returned there is no delivery. Puckett *v.* Williams, 11 Tex. Civ. App. 308, 32 S. W. 364. See also Maratta *v.* Anderson, 172 Ill. 377, 50 N. E. 103.

Mere possession by the heirs of a mortgagee of an ancient deed, releasing the equity of redemption, is sufficient evidence of a delivery. Mallory *v.* Aspinwall, 2 Day (Conn.) 280.

Production on a trial by grantee's attorney of a deed is sufficient evidence of its delivery to justify its reception in evidence, without further proof of delivery. Branson *v.* Caruthers, 49 Cal. 374.

Where the grantee's possession is alleged to be fraudulent and the facts are distinctly averred, showing non-delivery, the complainant is not required to increase the weight of his evidence to overcome the answer which contains no positive denial of the facts so charged. Benson *v.* Woolverton, 15 N. J. Eq. 158.

59. McGrath *v.* Hyde, (Cal. 1889) 21 Pac. 948 (evidence here was, however, conflicting upon the point whether the grantee took possession of the deed or the grantor for her); Shields *v.* Bush, 189 Ill. 534, 59 N. E. 962, 82 Am. St. Rep. 474; Allen *v.* De Groodt, 105 Mo. 442, 16 S. W. 494, 1049; Strough *v.* Wilder, 119 N. Y. 530, 23 N. E. 1057, 7 L. R. A. 555 [*affirming* 49 Hun 405, 3 N. Y. Suppl. 567]; Smith *v.* Cole, 109 N. Y. 436, 17 N. E. 356 [*affirming* 39 Hun 248]; Dietz *v.* Farish, 44 N. Y. Super. Ct. 190 [*affirming* 53 How. Pr. 217, and *affirmed* in 79 N. Y. 520]. But see Foley *v.* McNamara, 93 Iowa 707, 62 N. W. 26; Clayton *v.* Liverman, 20 N. C. 379; Cross *v.* Barnett, 65 Wis. 431, 27 N. W. 165.

Rule is held to apply even though the grantor testifies that he never delivered and did not intend to deliver the deed to the grantee. Robinson *v.* Robinson, 116 Ill. 250, 5 N. E. 118.

Where the grantee promised the grantor in writing to return a deed on demand, or to pay him the consideration named therein, and also acknowledged in said writing the receipt of the deed, it was held, no demand for return having been made, that the title to the estate vested in the grantee. Howe *v.* Dewing, 2 Gray (Mass.) 476.

60. Gordon *v.* San Diego, 108 Cal. 264, 41 Pac. 301; Benson *v.* Woolverton, 15 N. J. Eq. 158.

The attestation clause is not conclusive as to the date of delivery. Barry *v.* Hoffman, 6 Md. 78.

Where it is shown that a deed is antedated, the date furnishes no indication of the time of the actual execution and delivery. Costigan *v.* Gould, 5 Den. (N. Y.) 290.

proven[61] by testimony of a single witness[62] or of the grantor,[63] and if the evidence shows that deeds were intended to have a present effect it will be so held.[64]

h. Question For Court or Jury. What amounts to a final delivery and acceptance of a deed is a question of law,[65] as is also the weight of uncorroborated evidence.[66] But whether facts exist which constitute a delivery is a question for the jury,[67] to be determined, under a proper charge of the court,[68] from all the evidence on that point,[69] where there is conflicting testimony.[70] The rule applies to acceptance[71] or dissent of the grantee,[72] and likewise to the question of the time of delivery.[73]

i. Disputable Presumptions. Certain presumptions as to the delivery of a deed are disputable and may be overcome by relevant and admissible evidence, but the sufficiency of such evidence is, however, peculiar to the particular case in which it is given, or the particular purpose for which it is offered. This general rule applies to presumptions arising from possession of the deed;[74] as to the time of delivery;[75] from the word "delivered" in the certificate of acknowledgment;[76] from acknowledgment, acceptance, and registration;[77] or

61. Where the weight of evidence shows that a deed was not delivered until a certain date, such date will be that of delivery. Huntley *v.* San Francisco Sav. Union, 130 Cal. 46, 62 Pac. 255.

62. Treadwell *v.* Reynolds, 47 Cal. 171.

63. Tallman *v.* Cooke, 39 Iowa 402. See Whiteside *v.* Watkins, (Tenn. Ch. App. 1900) 58 S. W. 1107.

Grantor's testimony is prima facie evidence that the time of delivery preceded suit, where a deed was delivered in one town on the same day that suit was brought in another. Lake Erie, etc., R. Co. *v.* Whitham, 155 Ill. 514, 40 N. E. 1014, 46 Am. St. Rep. 355, 28 L. R. A. 612.

64. Nichols *v.* Nichols, 94 Mich. 569, 54 N. W. 292.

It is a decisive circumstance in favor of immediate vesting, where the enjoyment of the gift over is postponed to accommodate the estate or to meet a burden first imposed, and not chiefly on account of the character of the donee. Bower's Estate, 11 Phila. (Pa.) 620.

65. Earle *v.* Earle, 20 N. J. L. 347. See also Robbins *v.* Spencer, 121 Ind. 594, 22 N. E. 660; Galbraith *v.* Zimmerman, 100 Pa. St. 374.

66. Blaesi *v.* Blaesi, 14 N. Y. Civ. Proc. 216.

67. *Alabama.*— Gregory *v.* Walker, 38 Ala. 26; Gamble *v.* Gamble, 11 Ala. 966.

Indiana.— Dearmond *v.* Dearmond, 10 Ind. 191.

Maryland.— Barry *v.* Hoffman, 6 Md. 78.

Michigan.— Fenton *v.* Miller, 94 Mich. 204, 53 N. W. 957.

New Jersey.— Hunt *v.* Swayze, 55 N. J. L. 33, 25 Atl. 850; Earle *v.* Earle, 20 N. J. L. 347.

North Carolina.— Whitman *v.* Shingleton, 108 N. C. 193, 12 S. E. 1027; Floyd *v.* Taylor, 34 N. C. 47.

Pennsylvania.— Lutes *v.* Reed, 138 Pa. St. 191, 20 Atl. 943; Galbraith *v.* Zimmerman, 100 Pa. St. 374; Harden *v.* Hays, 14 Pa. St. 91; Lesher *v.* Levan, 2 Dall. 96, 1 L. ed. 305.

Texas.— Huff *v.* Crawford, 89 Tex. 214, 34 S. W. 606; Towery *v.* Henderson, 60 Tex. 291.

See 16 Cent. Dig. tit. "Deeds," § 633.

Where delivery can only be inferred from the facts the question is one for the jury. Roll *v.* Rea, 50 N. J. L. 264, 12 Atl. 905.

Whether the grantor deposited the deeds with a third person to be delivered at his decease, without reserving any control over it during his life, and the grantor's intention, are for the jury. Parker *v.* Dustin, 22 N. H. 424.

68. Gregory *v.* Walker, 38 Ala. 26; Earle *v.* Earle, 20 N. J. L. 347.

69. Fenton *v.* Miller, 94 Mich. 204, 53 N. W. 957.

Sufficiency of rebutting evidence is for the jury. Kendrick *v.* Dellinger, 117 N. C. 491, 23 S. E. 438.

70. Jones *v.* Swayze, 42 N. J. L. 279; Miller *v.* Eshleman, (Pa. 1886) 6 Atl. 895.

71. Earle *v.* Earle, 20 N. J. L. 347.

72. Treadwell *v.* Bulkley, 4 Day (Conn.) 395, 4 Am. Dec. 225.

73. Hunt *v.* Swayze, 55 N. J. L. 33, 25 Atl. 850.

74. Blair *v.* Howell, 68 Iowa 619, 28 N. W. 199; Vreeland *v.* Vreeland, 48 N. J. Eq. 56, 21 Atl. 627; Benson *v.* Woolverton, 15 N. J. Eq. 158; Hoffman *v.* Hoffman, 6 N. Y. App. Div. 84, 39 N. Y. Suppl. 494; Stanley *v.* Schwalby, 162 U. S. 255, 16 S. Ct. 754, 40 L. ed. 960.

75. Gordon *v.* San Diego, 108 Cal. 264, 41 Pac. 301; Moody *v.* Hamilton, 22 Fla. 298; Flynn *v.* Flynn, (N. J. Ch. 1895) 31 Atl. 30; Van Rensselaer *v.* Vickery, 3 Lans. (N. Y.) 57.

Oral evidence inherently inconsistent and unreasonable is insufficient to overcome presumption of delivery on day of date. Schweigel *v.* L. A. Shakman Co., 78 Minn. 142, 80 N. W. 871, 81 N. W. 529.

76. Union Mut. L. Ins. Co. *v.* Campbell, 95 Ill. 267, 35 Am. Rep. 166.

77. Skillman *v.* Hamilton, 1 Bush (Ky.) 248.

recording;[78] and to presumptions arising as to delivery of a deed to the grantee generally.[79]

3. CONSIDERATION. In case of conflicting evidence as to the consideration the parties' written agreement will be the most reliable evidence.[80] The instrument may, however, be aided by circumstances surrounding the transaction,[81] and if the evidence is insufficient to prove a consideration none will be found.[82] The amount named in the deed is also *prima facie* evidence of the sum agreed to be paid.[83] If the evidence is sufficient to require the submission of the issue of the true consideration paid and the court fails to do so the judgment will be reversed.[84]

4. VALIDITY AND INVALIDITY — a. In General. A deed may be set aside upon sufficient proof of its invalidity.[85] It has also been determined that proof of gross

78. Union Mut. L. Ins. Co. *v.* Campbell, 95 Ill. 267, 35 Am. Rep. 166; Chick *v.* Sisson, 95 Mich. 412, 54 N. W. 895; Knolls *v.* Barnhart, 71 N. Y. 474; Van Valen *v.* Schemerhorn, 22 How. Pr. (N. Y.) 416; Boardman *v.* Dean, 34 Pa. St. 252.

79. *Maine.*— Egan *v.* Horrigan, 96 Me. 46, 51 Atl. 246, nothing in evidence to repel presumption.

Minnesota.— Hathaway *v.* Cass, 84 Minn. 192, 87 N. W. 610, held not conclusively overcome.

Mississippi.— Saffold *v.* Horne, 72 Miss. 470, 18 So. 433, held that evidence was insufficient to overcome.

North Carolina.— Williams *v.* Springs, 29 N. C. 384, held not rebutted.

Pennsylvania.— Cummings *v.* Glass, 162 Pa. St. 241, 29 Atl. 848, evidence held to show that acts were as consistent with a gift as with ownership.

United States.— Buckley *v.* Carlton, 4 Fed. Cas. No. 2,093, 6 McLean 125.

See 16 Cent. Dig. tit. "Deeds," § 634.

Burden is on the party seeking to overcome presumption of delivery from possession. Shoptaw *v.* Ridgway, 60 S. W. 723, 22 Ky. L. Rep. 1495.

Insufficiency of evidence to prove non-delivery see Estes *v.* German Nat. Bank, 62 Ark. 7, 34 S. W. 85; Corker *v.* Corker, 95 Cal. 308, 30 Pac. 541; Messelback *v.* Norman, 46 Hun (N. Y.) 414.

80. Carr *v.* Hobbs, 11 Md. 285. See also Atkins *v.* Hulse, 62 Mo. 577.

If a recital in a deed recognizes services as part at least of the consideration, they constitute a good consideration, and it is unnecessary that there should have been an original contract to compensate for such services. Doran *v.* McConlogue, 150 Pa. St. 98, 24 Atl. 357.

Receipt in the body of a deed or at the foot of it is sufficient evidence to give effect to conveyance as against the vendor; but it is no evidence to extinguish the title of a third person on the ground that the vendee is a purchaser without notice of such third person's right. Coxe *v.* Sartwell, 21 Pa. St. 480.

81. Tichy *v.* Simicek, (Nebr. 1903) 95 N. W. 629; Stringfellow *v.* Hanson, 25 Utah 480, 71 Pac. 1052.

A promise which is not a mere gratuitous declaration may upon the evidence be regarded as the consideration of a deed. Sullivan *v.* Lear, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388.

Grantee's reception of a deed containing a promise to furnish maintenance is sufficient proof of the promise. Maker *v.* Maker, 74 Me. 104.

If a deed is informally executed, but expresses a mere nominal consideration, and there is evidence of an agreement for a subsequent valuable consideration, which has been performed in good faith by the grantee, it will be upheld in equity as against an heir of the grantor. Young *v.* Young, 27 S. C. 201, 3 S. E. 202.

The consideration or price paid for the land, coupled with the terms of the deed and other surrounding circumstances, may constitute a test whether the land or the title was purchased. Carleton *v.* Lombardi, 81 Tex. 355, 16 S. W. 1081.

82. Bigelow *v.* Brewer, 29 Wash. 670, 70 Pac. 129. *Compare* Monticelli *v.* Meyer, 193 Pa. St. 545, 44 Atl. 562.

Jury may presume a legal consideration from proven circumstances without any direct evidence, under an expressed consideration in the words "for good consideration me thereunto moving." Stevens *v.* Griffith, 3 Vt. 448.

83. Burkholder *v.* Henderson, 78 Mo. App. 287. See Thomas *v.* Frank, 16 Mont. 297, 40 Pac. 762.

If the consideration in a deed is the only one consistent with all the attendant circumstances, while the additional consideration claimed by the grantors is nearly twice as much as the property with a perfect title is worth, the grantee's claim will prevail over that of the grantor. Roe *v.* Cainfax, 12 Ky. L. Rep. 469.

84. Sachse *v.* Loeb, (Tex. Civ. App. 1902) 69 S. W. 460.

85. Evidence sufficient to justify setting aside a deed as invalid see Boswell *v.* Patrick, 92 Ga. 417, 17 S. E. 633; Sayer *v.* Devore, 99 Mo. 437, 13 S. W. 201; Beckett *v.* Heston, 49 N. J. Eq. 510, 23 Atl. 1014; Reilly *v.* Reilly, 63 N. Y. App. Div. 169, 71 N. Y. Suppl. 287.

Evidence not sufficient to show invalidity see the following cases:

Illinois.— Willemin *v.* Dunn, 93 Ill. 511; Whitman *v.* Heneberry, 73 Ill. 109.

Kentucky.— Gatewood *v.* Long, 21 S. W.

inadequacy of consideration may justify the court in setting aside a deed as between the parties.[86]

b. Capacity and Incapacity. Proof of want of capacity of the grantor to execute a deed is sufficient ground for setting it aside.[87] The condition of mind should be determined by the testimony in regard to it at and about the time the deed was executed in preference to the testimony as to the condition at previous

537, 14 Ky. L. Rep. 774; Conner *v.* Garrard, 19 S. W. 926, 14 Ky. L. Rep. 214.

Mississippi.— Neblett *v.* Neblett, 70 Miss. 572, 12 So. 598.

Nebraska.— Thams *v.* Sharp, 49 Nebr. 237, 68 N. W. 474.

Pennsylvania.— Simon *v.* Simon, 163 Pa. St. 292, 29 Atl. 657.

Virginia.— Tune *v.* Fallin, 87 Va. 410, 12 S. E. 750.

See 16 Cent. Dig. tit. "Deeds," § 637 *et seq.*

Evidence sufficient to show mistake see Nixon *v.* Harmon, 17 Colo. 276, 29 Pac. 808; St. Clair *v.* Marquell, (Ind. Sup. 1903) 67 N. E. 693; Keenan *v.* Bird, 60 Hun (N. Y.) 175, 14 N. Y. Suppl. 457; Mills *v.* Mills, 8 N. Y. Suppl. 811.

Evidence insufficient to show mistake see the following cases:

Iowa.— Buck *v.* Holt, 74 Iowa 294, 37 N. W. 377.

Missouri.— Tombs *v.* Tucker, 6 Mo. 16.

Oregon.— Bingham *v.* Salene, 15 Oreg. 208, 14 Pac. 523, 3 Am. St. Rep. 152.

Texas.— Carpenter *v.* Hannig, (Civ. App. 1896) 34 S. W. 774.

West Virginia.— Pennybacker *v.* Laidley, 33 W. Va. 624, 11 S. E. 39.

Wisconsin.— Nau *v.* Brunette, 79 Wis. 664, 48 N. W. 649.

See 16 Cent. Dig. tit. "Deeds," § 643.

A legal title will not, however, ordinarily be overturned by the cancellation of a deed on the testimony of a single witness, in the absence of corroborating circumstances, where he is positively contradicted by the testimony of another, even though the latter be a party to the suit. Epps *v.* Dickerson, 35 Iowa 301.

Where a deed is objected to on the ground that the husband did not join in it, a mere recital in the will of the father of such grantor describing his daughter as the wife of a certain person is not sufficient proof of a such daughter's coverture as against one claiming under a deed of land given by her alone. Christie *v.* Gage, 2 Thomps. & C. (N. Y.) 344.

86. Galbraith *v.* McLaughlin, 91 Iowa 399, 59 N. W. 338.

87. **Evidence sufficient** to show incapacity see the following cases:

Alabama.— Ryan *v.* Price, 106 Ala. 584, 17 So. 734.

Illinois.— Ring *v.* Lawless, 190 Ill. 520, 60 N. E. 881.

Indiana.— Freed *v.* Brown, 55 Ind. 310.

Kentucky.— Clark *v.* Roberts, 7 Ky. L. Rep. 591.

Michigan.— Peters *v.* Peters, 101 Mich. 291, 59 N. W. 609; Worthington *v.* Major, 94 Mich. 325, 54 N. W. 303; Sponable *v.* Hanson, 87 Mich. 204, 49 N. W. 644.

Missouri.— Boggess *v.* Boggess, 127 Mo. 305, 29 S. W. 1018.

New Jersey.— Yard *v.* Yard, 27 N. J. Eq. 114; Clark *v.* Kirkpatrick, (Ch. 1888) 16 Atl. 309.

Ohio.— Gerke *v.* Gerke, 8 Ohio Dec. (Reprint) 249, 6 Cinc. L. Bul. 691.

Wisconsin.— Henrizi *v.* Kehr, 90 Wis. 344, 63 N. W. 285.

See 16 Cent. Dig. tit. "Deeds," § 642.

Evidence insufficient to show incapacity see the following cases:

California.— Schurr *v.* Rodenback, 133 Cal. 85, 65 Pac. 298; Springer *v.* Springer, (1901) 64 Pac. 470; Soberanes *v.* Soberanes, 106 Cal. 1, 89 Pac. 39, 527.

District of Columbia.— Nailor *v.* Nailor, 5 Mackey 93.

Illinois.— Phelan *v.* Hyland, 197 Ill. 395, 64 N. E. 360; Guild *v.* Warne, 149 Ill. 105, 36 N. E. 635; West *v.* Douglas, 145 Ill. 164, 34 N. E. 141.

Iowa.— Reeves *v.* Howard, 118 Iowa 121, 91 N. W. 896; Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158; Schneitter *v.* Carman, 98 Iowa 276, 67 N. W. 249; Caldwell *v.* Finch, 96 Iowa 698, 65 N. W. 994; Davis *v.* Latta, 94 Iowa 727, 62 N. W. 17; Brockway *v.* Harrington, 82 Iowa 23, 47 N. W. 1013.

Kentucky.— Duncan *v.* Mason, 20 S. W. 252, 14 Ky. L. Rep. 318; Adair *v.* Cook, 5 S. W. 412, 9 Ky. L. Rep. 455.

Michigan.—Allen *v.* Snyder, 100 Mich. 290, 58 N. W. 997, 59 N. W. 653; Lynch *v.* Doran, 95 Mich. 395, 54 N. W. 882; Arnold *v.* Whitcomb, 83 Mich. 19, 46 N. W. 1029.

Minnesota.— Trimbo *v.* Trimbo, 47 Minn. 389, 50 N. W. 350.

Missouri.— Fitzpatrick *v.* Weber, (Sup. 1902) 68 S. W. 913; Studybaker *v.* Cofield, 159 Mo. 596, 61 S. W. 246; Keithley *v.* Keithley, 85 Mo. 217.

New Jersey.— Earle *v.* Norfolk, etc., Hosiery Co., 36 N. J. Eq. 188.

New York.— Paine *v.* Aldrich, 133 N. Y. 544, 30 N. E. 725 [*affirming* 60 Hun 578, 14 N. Y. Suppl. 538].

Pennsylvania.—Doran *v.* McConologue, 150 Pa. St. 98, 24 Atl. 357; Elcessor *v.* Elcessor, 146 Pa. St. 359, 23 Atl. 230.

South Dakota.—Apland *v.* Pott, (1902) 92 N. W. 19.

Tennessee.— Ridley *v.* Chrisman, (Ch. App. 1901) 62 S. W. 661.

Virginia.— Porter *v.* Porter, 89 Va. 118, 15 S. E. 500; Morrison *v.* Morrison, 27 Gratt. 190; Beverley *v.* Walden, 20 Gratt. 147.

West Virginia.— Hale *v.* Cole, 31 W. Va. 576, 8 S. E. 516.

See 16 Cent. Dig. tit. "Deeds," § 642.

Insanity of grantor if sufficiently proved

times.[88] And if a person is legally *compos mentis* evidence that he is of weak understanding is not sufficient to overturn the deed in the absence of fraud.[89] Nor is the old age of the grantor of itself sufficient evidence of incapacity;[90] nor is mere physical infirmity,[91] although accompanied by some weakness of mind.[92] But the unreasonableness or injustice of the transaction may be such as to show want of capacity.[93] So inadequacy of price, although insufficient of itself to justify setting aside a deed, is a circumstance to be considered as bearing on this question.[94] A disposition, however, of property by a deed in accordance with previous intentions tends to show capacity.[95] Again the evidence of an officer taking the acknowledgment to a deed or of witnesses present at the time of its execution is entitled to peculiar weight in considering the grantor's competency.[96]

c. Undue Influence. A conveyance will not be set aside on the ground of undue influence, unless it clearly appears from the evidence that the instrument would not have been executed had not such influence been exerted.[97]

is ground for setting aside a deed. Pike *v.* Pike, 104 Ala. 642, 16 So. 689; Fisher *v.* Fisher, 5 Silv. Supreme (N. Y.) 459, 9 N. Y. Suppl. 4.

Evidence insufficient to show insanity see the following cases:

Illinois.— West *v.* Douglas, 145 Ill. 164, 34 N. E. 141.

Louisiana.— Vanosdel *v.* Hyce, 46 La. Ann. 387, 15 So. 19.

Missouri.— Cutler *v.* Zollinger, 117 Mo. 92, 22 S. W. 895.

Nebraska.— De Witt *v.* Mattison, 26 Nebr. 655, 42 N. W. 742.

New Jersey.— Wilkinson *v.* Sherman, 45 N. J. Eq. 413, 18 Atl. 228.

New York.— Hasbrouck *v.* Young, 15 N. Y. Suppl. 919.

Virginia.— Cropp *v.* Cropp, 88 Va. 753, 14 S. E. 529.

See 16 Cent. Dig. tit. "Deeds," § 639.

Evidence of intoxication insufficient to justify setting aside a deed see Oakley *v.* Shelley, 129 Ala. 467, 29 So. 385; McGowan *v.* Brooks, (Miss. 1894) 16 So. 436; Freeman *v.* Staats, 8 N. J. Eq. 814, 9 N. J. Eq. 816.

Although a person when intoxicated may be incompetent to execute a deed, yet if it appears that when sober he had sufficient capacity, it must be shown that the deed was executed when he was not sober. Conley *v.* Nailor, 118 U. S. 127, 6 S. Ct. 1001, 30 L. ed. 112.

88. Exum *v.* Canty, 34 Miss. 533; Buckey *v.* Buckey, 38 W. Va. 168, 18 S. E. 383.

Where undue influence and incapacity to contract is alleged, the evidence should be not merely as to the condition of the grantor's health and mind at the time of the making of the contract, without reference to what it was when it was consummated by a conveyance, but the inquiry should be as to the condition from the inception of the transaction to its termination. Frizzell *v.* Reed, 77 Ga. 724.

89. Hill *v.* Nash, 41 Me. 585, 66 Am. Dec. 266. See also Hovey *v.* Chase, 52 Me. 304, 83 Am. Dec. 514; Albrecht *v.* Albrecht, 44 Minn. 70, 46 N. W. 145; Buckey *v.* Buckey, 38 W. Va. 168, 18 S. E. 383.

90. Waterman *v.* Higgins, 28 Fla. 660, 10 So. 97; Francis *v.* Wilkinson, 147 Ill. 370, 35 N. E. 150; Stringfellow *v.* Hanson, 25 Utah 480, 71 Pac. 1052; Chadd *v.* Moser, 25 Utah 369, 71 Pac. 870; Buckey *v.* Buckey, 38 W. Va. 168, 18 S. E. 383.

A less degree of proof, however, is required to establish mental incapacity and undue influence in the case of a feeble man of old age than in the case of a younger man. Smith *v.* Smith, 60 Wis. 329, 19 N. W. 47.

91. Pennington *v.* Stanton, 125 Mo. 658, 28 S. W. 1067; Mann *v.* Keene Guaranty Sav. Bank, 86 Fed. 51, 29 C. C. A. 547. See also Chadd *v.* Moser, 25 Utah 369, 71 Pac. 870.

92. Peabody *v.* Kendall, 145 Ill. 519, 32 N. E. 674; Albrecht *v.* Albrecht, 44 Minn. 70, 46 N. W. 145.

93. Bussey *v.* Gross, 7 S. W. 150, 9 Ky. L. Rep. 843; Hemphill *v.* Holford, 88 Mich. 293, 50 N. W. 300. See also Pike *v.* Pike, 104 Ala. 642, 16 So. 689.

94. Berry *v.* Hall, 105 N. C. 154, 10 S. E. 903.

95. Exum *v.* Canty, 34 Miss. 533. See also Freeman *v.* Staats, 8 N. J. Eq. 814, 9 N. J. Eq. 816.

96. Buckey *v.* Buckey, 38 W. Va. 168, 18 S. E. 383. See also Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788.

97. Biglow *v.* Leabo, 8 Oreg. 147. See also Deaton *v.* Munroe, 57 N. C. 39.

Evidence sufficient to show undue influence see the following cases:

Alabama.— Harraway *v.* Harraway, 136 Ala. 499, 34 So. 836; Adair *v.* Craig, 135 Ala. 332, 33 So. 902.

Illinois.— Peabody *v.* Kendall, 145 Ill. 519, 32 N. E. 674; Rockafellow *v.* Newcomb, 57 Ill. 186.

Iowa.— Miller *v.* Muirfield, 79 Iowa 64, 44 N. W. 540.

Kentucky.— Musick *v.* Fisher, 96 Ky. 15, 27 S. W. 812, 16 Ky. L. Rep. 277.

Maryland.— Zimmerman *v.* Bitner, 79 Md. 115, 28 Atl. 820; Whitridge *v.* Whitridge, 76 Md. 54, 24 Atl. 645.

Michigan.— Smith *v.* Cuddy, 96 Mich. 562, 56 N. W. 89; Worthington *v.* Major, 94 Mich.

d. Duress. In order that a deed may be set aside on the ground that it was executed under duress the proof thereof should be of the clearest and most satisfactory character.[98]

e. Fraud and Misrepresentation. A deed will not be set aside on the ground of fraud unless such fraud is clearly proved.[99] So there must be clear and satis-

325, 54 N. W. 303; Sceley *v.* Price, 14 Mich. 541.

Missouri.— Ennis *v.* Burnham, 159 Mo. 494, 60 S. W. 1103.

Nebraska.— Staley *v.* Housel, 35 Nebr. 160, 52 N. W. 888; Kithcart *v.* Larimore, 34 Nebr. 273, 51 N. W. 768; Hansen *v.* Berthelsen, 19 Nebr. 433, 27 N. W. 423; Tichy *v.* Simicek, (1903) 95 N. W. 629.

New Jersey.— Mott *v.* Mott, 49 N. J. Eq. 192, 22 Atl. 997; Morton *v.* Morton, (Ch. 1887) 8 Atl. 807.

New York.— Green *v.* Roworth, 113 N. Y. 462, 21 N. E. 165.

Ohio.— Gerke *v.* Gerke, 8 Ohio Dec. (Reprint) 249, 6 Cinc. L. Bul. 691.

Utah.— Stringfellow *v.* Hanson, 25 Utah 480, 71 Pac. 1052; Chadd *v.* Moser, 25 Utah 369, 71 Pac. 870.

Virginia.— Fishburne *v.* Ferguson, 84 Va. 87, 4 S. E. 575.

Wisconsin.— Konrad *v.* Zimmermann, 79 Wis. 306, 48 N. W. 368; Watkins *v.* Brant, 46 Wis. 419, 1 N. W. 82; Bogie *v.* Bogie, 37 Wis. 373.

See 16 Cent. Dig. tit. "Deeds," § 641.

Evidence insufficient to show undue influence see the following cases:

District of Columbia.— Nailor *v.* Nailor, 5 Mackey 93.

Illinois.— Huffman *v.* Sharer, 191 Ill. 79, 60 N. E. 866.

Iowa.— Reeves *v.* Howard, 118 Iowa 121, 91 N. W. 896; Davis *v.* Miller, 98 Iowa 516, 67 N. W. 387; Davis *v.* Latta, 94 Iowa 727, 62 N. W. 17; Lewis *v.* Arbuckle, 85 Iowa 335, 52 N. W. 237, 16 L. R. A. 677; Brockway *v.* Harrington, 82 Iowa 23, 47 N. W. 1013.

Maine.— Metcalf *v.* Metcalf, 85 Me. 473, 27 Atl. 457.

Michigan.—Allen *v.* Snyder, 100 Mich. 290, 58 N. W. 997, 59 N. W. 653; Brennan *v.* Zehner, 97 Mich. 98, 56 N. W. 231; Stewart *v.* Curtis, 85 Mich. 496, 48 N. W. 872; Campbell *v.* Campbell, 75 Mich. 53, 42 N. W. 670.

Missouri.— Fitzpatrick *v.* Weber, 168 Mo. 562, 68 S. W. 913; Studybaker *v.* Cofield, 159 Mo. 596, 61 S. W. 246; Hamilton *v.* Armstrong, 120 Mo. 597, 25 S. W. 545; Ravens *v.* Nan, 110 Mo. 416, 19 S. W. 823. And see Ryan *v.* Ryan, 174 Mo. 279, 73 S. W. 494.

New Jersey.— Earle *v.* Norfolk, etc., Hosiery Co., 36 N. J. Eq. 188. And see Collins *v.* Toppin, (Ch. 1903) 55 Atl. 124.

South Dakota.— Apland *v.* Pott, (1902) 92 N. W. 19.

Tennessee.— Seat *v.* McWhirter, 93 Tenn. 542, 29 S. W. 220; Hadley *v.* Latimer, 3 Yerg. 537; Ridley *v.* Chrisman, (Ch. App. 1901) 62 S. W. 661.

Texas.— Saufley *v.* Jackson, 16 Tex. 579.

Virginia.— Beverly *v.* Walden, 20 Gratt. 147.

See 16 Cent. Dig. tit. "Deeds," § 641.

98. Linuenkemper *v.* Kempton, 58 Md. 159; Rexford *v.* Rexford, 7 Lans. (N. Y.) 6.

Evidence sufficient to show duress see Tapley *v.* Tapley, 10 Minn. 448, 88 Am. Dec. 76; Lamerson *v.* Johnston, 44 N. J. Eq. 93, 13 Atl. 8; Hodges *v.* Hodges, 27 Tex. Civ. App. 537, 66 S. W. 239.

Evidence insufficient to show duress see Snyder *v.* Snyder, 95 Mich. 51, 54 N. W. 721; Becht *v.* Becht, 168 Mo. 525, 68 S. W. 881; Clark *v.* Edwards, 75 Mo. 87; Pryor *v.* Hunter, 31 Nebr. 678, 48 N. W. 736; Rostein *v.* Park, 38 Oreg. 1, 62 Pac. 529.

99. Martin *v.* Clark, 116 Ill. 654, 7 N. E. 353; Fitzgerald *v.* Fitzgerald, 100 Ill. 385; Cochran *v.* Pascault, 54 Md. 1. See also Gardner *v.* Gardner, 98 Va. 525, 36 S. E. 985; and, generally, FRAUD.

Fraud may be proved by circumstances. Lore *v.* Truman, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250.

Fraud will not be predicated of a mere refusal by the grantee to perform a parol promise, not proven by any writing, to hold the same in trust for the grantor. Lovett *v.* Taylor, 54 N. J. Eq. 311, 34 Atl. 896.

If fraud is alleged and denied, in the absence of proof showing such fraud, the deed will not be set aside. Haggin *v.* Peck, 10 B. Mon. (Ky.) 210.

Inference of fraud is not repelled by an allegation that the deed was the consummation of a previously declared purpose of the grantor, where inconsistent declarations are clearly proved by the evidence. Fishburne *v.* Ferguson, 84 Va. 87, 4 S. E. 575.

Evidence sufficient to show fraud see the following cases:

Colorado.— Reddin *v.* Dunn, 22 Colo. 127, 43 Pac. 1006.

Illinois.— Fabrice *v.* Von der Brelie, 190 Ill. 460, 60 N. E. 835; Jones *v.* Neely, 72 Ill. 449.

Kansas.— Parsons *v.* Parsons, 45 Kan. 433, 25 Pac. 868.

Kentucky.— McElwain *v.* Russell, 12 S. W. 777, 11 Ky. L. Rep. 649; Hunter *v.* Owen, 9 S. W. 717, 10 S. W. 376, 10 Ky. L. Rep. 651. And see Highland *v.* Highland, 73 S. W. 791, 24 Ky. L. Rep. 2242.

Missouri.— Nearen *v.* Bakewell, 110 Mo. 645, 19 S. W. 988; Kaut *v.* Gerdemann, 109 Mo. 552, 19 S. W. 73.

New Jersey.— Gray *v.* Robbins, (Ch. 1888) 11 Atl. 860.

New York.— Anderson *v.* Carter, 165 N. Y. 624, 59 N. E. 1118 [*affirming* 24 N. Y. App. Div. 462, 49 N. Y. Suppl. 255]; Sands *v.* Hildreth, 14 Johns. 493.

factory proof of misrepresentations to justify the court in canceling a deed because of such misrepresentations.[1]

f. Forgery. Clear and convincing proof is essential to justify the setting aside of a deed on the ground that it is a forgery.[2]

g. Questions For Court and Jury. It is a question for the court to decide whether a deed was fraudulent where there is no evidence to show the intent of the parties other than that afforded by the deed itself.[3] And the court should

North Carolina.— Summerlin *v.* Cowles, 101 N. C. 473, 7 S. E. 881.

Tennessee.— Walker *v.* McCoy, 3 Head 103.

Virginia.— Barnum *v.* Barnum, 83 Va. 365, 5 S. E. 372.

See 16 Cent. Dig. tit. "Deeds," § 645.

Evidence insufficient to show fraud see the following cases:

Arkansas.— Neel *v.* Carson, 47 Ark. 421, 2 S. W. 107.

Colorado.— Olson *v.* Scott, 1 Colo. App. 94, 27 Pac. 879.

Illinois.— Ross *v.* Payson, 160 Ill. 349, 43 N. E. 399; Oliphant *v.* Liversidge, 142 Ill. 160, 30 N. E. 334; Snyder *v.* Laframboise, 1 Ill. 343, 12 Am. Dec. 187; Dowdall *v.* Cannedy, 32 Ill. App. 207. And see Smith *v.* Trefz, 202 Ill. 587, 67 N. E. 393.

Iowa.— Carter *v.* Davidson, 73 Iowa 45, 34 N. W. 603; Dussaume *v.* Burnett, 5 Iowa 95.

Kentucky.— Chowning *v.* Howser, 72 S. W. 748, 24 Ky. L. Rep. 1951.

Louisiana.— Harris *v.* Harris, 109 La. 913, 33 So. 918.

Maine.— Severance *v.* Ash, 81 Me. 278, 17 Atl. 69.

Michigan.— Nichols *v.* Nichols, 94 Mich. 569, 54 N. W. 292.

Minnesota.— Schramm *v.* Haupt, 38 Minn. 379, 37 N. W. 798.

Missouri.— Rickey *v.* Barnes, 168 Mo. 600, 68 S. W. 883; Chambers *v.* Rinkel, 76 Mo. 538.

New York.— Bowerman *v.* Bowerman, 76 Hun 46, 27 N. Y. Suppl. 579.

Oregon.— Rostein *v.* Park, 38 Oreg. 1, 62 Pac. 529.

Pennsylvania.— Cummings' Appeal, 67 Pa. St. 404; Richard *v.* Cherrington, 12 Wkly. Notes Cas. 140.

South Carolina.— Huntley *v.* Welsh, 64 S. C. 233, 41 S. E. 980.

Tennessee.— Martin *v.* Winton, (Ch. App. 1901) 62 S. W. 180; Wilson *v.* Brown, (Ch. App. 1896) 35 S. W. 1098.

Texas.— Stewart *v.* Miller, (Sup. 1888) 7 S. W. 603.

Virginia.— Gardner *v.* Gardner, 98 Va. 525, 36 S. E. 985.

West Virginia.— Curlett *v.* Newman, 30 W. Va. 182, 3 S. E. 578.

Wisconsin.— Baumann *v.* Lupinski, 108 Wis. 451, 84 N. W. 836; Kercheval *v.* Doty, 31 Wis. 476.

United States.— Hunt *v.* Oliver, 118 U. S. 211, 6 S. Ct. 1083, 30 L. ed. 128.

See 16 Cent. Dig. tit. "Deeds," § 645.

1. Harding *v.* Long, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775, holding that the proof need not be such as to satisfy the jury beyond all reasonable question.

Falsity of representation must be proved where it is sought to set aside a deed alleged to have been procured by false representation. Cochran *v.* Pascault, 54 Md. 1.

Evidence sufficient to show false representations see the following cases:

Colorado.— Sears *v.* Hicklin, 13 Colo. 143, 21 Pac. 1022.

Connecticut.— Leavette *v.* Sage, 29 Conn. 577.

Kentucky.— Brady *v.* Harper, 30 S. W. 664, 17 Ky. L. Rep. 190.

Michigan.— Shouler *v.* Bonander, 80 Mich. 531, 45 N. W. 487.

Nebraska.— Delorac *v.* Conna, 29 Nebr. 791, 46 N. W. 255.

New Jersey.— Crosland *v.* Hall, 33 N. J. Eq. 111.

See 16 Cent. Dig. tit. "Deeds," § 644.

Evidence insufficient to show false representation see the following cases:

Alabama.— Porter *v.* Collins, 90 Ala. 510, 8 So. 80.

Illinois.— Watson *v.* Watson, 118 Ill. 56, 7 N. E. 95.

Missouri.— Studybaker *v.* Cofield, 159 Mo. 596, 61 S. W. 246.

New Jersey.— Hyer *v.* Little, 20 N. J. Eq. 443.

Oregon.— De Lashmutt *v.* Seal, 26 Oreg. 601, 37 Pac. 909.

United States.—Hamblin *v.* Bishop, 41 Fed. 74.

See 16 Cent. Dig. tit. "Deeds," § 644.

2. Oliver *v.* Oliver, 119 Ill. 532, 9 N. E. 891.

Evidence sufficient to show forgery see the following cases:

Georgia.— Patterson *v.* Collier, 77 Ga. 292, 3 S. E. 119.

Illinois.— Parlin, etc., Co. *v.* Hutson, 198 Ill. 389, 65 N. E. 93; Myers *v.* Parks, 95 Ill. 408.

Kentucky.— Crate *v.* Strong, 69 S. W. 957, 24 Ky. L. Rep. 710.

Michigan.— Crawford *v.* Hoeft, 58 Mich. 1, 23 N. W. 27, 24 N. W. 645, 25 N. W. 567, 26 N. W. 870.

Nebraska.— Lindsay *v.* Palmer, 58 Nebr. 168, 78 N. W. 371.

South Carolina.— Du Pont *v.* Du Bos, 52 S. C. 244, 29 S. E. 665.

See 16 Cent. Dig. tit. "Deeds," § 647.

Evidence insufficient to show forgery see Muckelroy *v.* House, 21 Tex. Civ. App. 673, 52 S. W. 1038.

3. Addington *v.* Etheridge, 12 Gratt. (Va.) 436.

rule as a matter of law that a deed was not recorded in due time where such fact appears from an official indorsement thereon and there is no evidence contravening it.[4] But where a grantor was found to be mentally incompetent at the date of the execution of a deed which was delivered several days thereafter it has been decided that it is a question of fact whether he was in the same mental condition when it was delivered.[5]

5. Performance or Breach of Condition. Where there is a clear preponderance of evidence that a deed was a conditional one and that the title has never passed by reason of the failure of the grantee to perform the condition, a plaintiff in an action to quiet title to land under such deed is not entitled to a decree in his favor.[6] Where, however, it appears that it was the intention of the grantor to part with the whole term in a chattel it has been declared that the court will lay hold of any slight circumstance to give effect to that intention, in order to prevent a reverter.[7]

De ejectione custodiæ. A writ which lay for a guardian who had been forcibly ejected from his wardship.[1] (See Guardian and Ward.)

Deem.[2] To hold in belief, estimation, or opinion; to judge; adjudge; decide; sentence; condemn; to have or to be of an opinion;[3] to esteem; to suppose;[4] to think, judge or hold as an opinion; decide or believe on consideration;[5] to account; to judge; to hold in opinion; to regard; to be of opinion; to think; to estimate;[6] to form a judgment;[7] to adjudge or decide;[8] to conclude upon consideration.[9]

4. Budd *v.* Brooke, 3 Gill (Md.) 198, 43 Am. Dec. 321, holding, however, that if there is contravening evidence it is then a question for the jury.

5. Baxter *v.* Baxter, 76 Hun (N. Y.) 98, 27 N. Y. Suppl. 834.

6. St. Louis, etc., R. Co. *v.* Devin, 71 Iowa 666, 33 N. W. 232.

Upon proof of an entire failure by grantee to perform a condition which is the only consideration for a deed it may be set aside. Lockwood *v.* Lockwood, 124 Mich. 627, 83 N. W. 613.

7. Powell *v.* Brown, 1 Bailey (S. C.) 100.

1. Bouvier L. Dict.

2. Derived from the Anglo-Saxon word "*deman.*" U. S. *v.* Doherty, 27 Fed. 730, 734.

3. Cory *v.* Spencer, 67 Kan. 648, 73 Pac. 920, 921; Standard Dict. [*quoted* in Lawrence *v.* Leidigh, 58 Kan. 594, 601, 50 Pac. 600, 62 Am. St. Rep. 631].

4. Cory *v.* Spencer, 67 Kan. 648, 73 Pac. 920, 921; Lawrence *v.* Leidigh, 58 Kan. 594, 601, 50 Pac. 600, 62 Am. St. Rep. 631.

5. Century Dict. [*quoted* in Smith *v.* Missouri Pac. R. Co., 143 Mo. 33, 37, 44 S. W. 718].

6. Webster Dict. [*quoted* in Powell *v.* Spackman, 7 Ida. 692, 698, 65 Pac. 503].

7. U. S. *v.* Doherty, 27 Fed. 730, 735.

8. Russell *v.* Russell, 14 Ch. D. 471, 479.

Applied to a member of a mutual insurance society.— In Russell *v.* Russell, 14 Ch. D. 471, 478 [*citing* Wood *v.* Woad, L. R. 9 Exch. 190], Jessel, M. R., in speaking of "a rule which allowed a committee of a mutual insurance society to expel a member, . . . [on] the ground . . . 'that if the committee shall at any time deem the conduct of any member suspicious,'" etc., said: "I have to say a word as to the use of the word 'deem.' That word has more than one meaning, but one of its meanings is to adjudge or decide. In fact, the old word 'deemster' or 'dempster' was the name for judge. To 'deem' at one time meant to decide judicially. Consequently, taking that meaning, what they had to do was to 'deem' that the member's conduct was suspicious, and such as made him unworthy. That was in fact a decision not merely depending upon opinion, but depending on inquiry."

9. U. S. *v.* Doherty, 27 Fed. 730, 735 [*citing* Worcester Dict.].

Applied to an assessment on real property. — Where the resolution of a common council directed an assessment upon "the property deemed benefited," the court said: "The use of the word 'deem,' in the connection in which it appears, must be construed to mean a direction to investigate, consider, and determine, from which they may pronounce a proper judgment." Broezel *v.* Buffalo, 2 Silv. Supreme (N. Y.) 375, 6 N. Y. Suppl. 723, 726.

Applied under customs administrative acts. — Where a statute provided that "the decision of the appraiser . . . shall be final and conclusive as to the dutiable value of such merchandise, . . . unless the collector shall deem the appraisement of the merchandise too low," etc., the court said: "The word 'deem,' used in this connection, necessarily involves the exercise of discretion on the part of the collector." U. S. *v.* Loeb, 99 Fed. 723, 733. And where a statute authorized the appraisers of merchandise "to examine any person on oath touching any matter or thing which they may deem material in ascertain-

DEEMED. Judged, determined;[10] considered or judged.[11]

DEEPEN. To make deep or deeper.[12]

DE ESCHAETA. Writ of escheat.[13] (See Escheat.)

DE ESTOVERIIS HABENDIS. A writ which lay for a woman divorced *a mensa et thoro* to recover her alimony or estovers.[14] (See, generally, Divorce.)

DE EXCOMMUNICATO CAPIENDO. A writ commanding the sheriff to arrest one who was excommunicated, and imprison him till he should become reconciled to the church.[15]

DE EXCOMMUNICATO RECAPIENDO. Writ for retaking an excommunicated person, where he had been liberated from prison without making satisfaction to the church, or giving security for that purpose.[16]

DE EXECUTIONE JUDICII. A writ directed to a sheriff or bailiff, commanding him to do execution upon a judgment.[17]

DE EXEMPLIFICATIONE. A writ granted for the exemplification of an original.[18]

DEFACING. Impairing or effacing; blotting out; erasing; obliterating; canceling.[19] (Defacing: Brands of Animals, see Animals. Landmark, see Boundaries. Records, see Records.)

DE FACTO. In law as well as elsewhere, of fact; from, arising out of, or

ing the value," of commodities the court said that the provision "necessarily implies that the inquiry be limited . . . [to subjects which] the appraiser must 'deem' the inquiry material. To deem, here, means to judge; to determine upon consideration." U. S. *v.* Doherty, 27 Fed. 730, 734.

10. As used in a statute relative to customs duties which declared that "a person who shall offer or expose for sale, any of the articles named . . . shall be deemed the manufacturer thereof." See Cardinel *v.* Smith, 5 Fed. Cas. No. 2,395, Deady 197, where it is said: "And when it is enacted that the vendor of an article shall for any purpose, 'be deemed the manufacturer thereof,' for such purpose, he is to be absolutely considered such manufacturer."

When used in connection with a legacy.— Where a statute provided that "a legacy made to a creditor shall not be deemed to be in compensation of the debt, nor a legacy made to a servant in compensation of his wages," the court said: "The word 'deemed' used in the article simply means that no interpretation unfavorable to the creditor shall be placed upon the testament by the fact alone of the legacy to the creditor." Jackson's Succession, 47 La. Ann. 1089, 1091, 17 So. 598.

When, by statute, certain acts are "deemed" to be a crime of a particular nature, they are such crime, and not a semblance of it, nor a mere fanciful approximation to or designation of the offense. Com. *v.* Pratt, 132 Mass. 246, 247.

11. Leonard *v.* Grant, 5 Fed. 11, 16, 6 Sawy. 603, where it is said: "And, therefore, whatever an act of congress requires to be 'deemed' or 'taken' as true of any person or thing, must, in law, be considered as having been duly adjudged or established concerning such person or thing, and have force and effect accordingly."

"Deemed to belong to them" as used in a statute relative to the construction of water works by a corporation see Milnes *v.* Huddersfield, 12 Q. B. D. 443, 450, 53 L. J. Q. B. 12, 32 Wkly. Rep. 265.

"Deemed to be the place where he was last legally settled" as used in connection with the domicile of a widow see Burrell Tp. *v.* Pittsburg Guardians of Poor, 62 Pa. St. 472, 474, 1 Am. Rep. 441.

"Deemed to have been surrendered" as used in a bankruptcy act see Hill *v.* East India, etc., Dock Co., 9 App. Cas. 448, 48 J. P. 788, 53 L. J. Ch. 842, 51 L. T. Rep. N. S. 163, 168, 33 Wkly. Rep. 925.

"If deemed advisable" as used in connection with the powers of public officers under a statute see Rock Island County *v.* U. S., 4 Wall. (U. S.) 435, 445, 18 L. ed. 419.

12. Century Dict.

"Deepening the ditch" as used in a conveyance see Collins *v.* Driscoll, 34 Conn. 43, 47.

13. A writ which a lord had, where his tenant died without heir, to recover the land. Burrill L. Dict.

14. Bouvier L. Dict.

15. Black L. Dict. [*citing* 3 Blackstone Comm. 102]. And see Burnham *v.* Hall, 44 U. C. Q. B. 297, 300 [*citing* Bacon Abr. tit. "Escape" F, where it is said: "So an action on the case will lie for escape of one taken upon a writ *de excommunicato capiendo*"].

16. Black L. Dict.

17. Burrill L. Dict. [*citing* Reeve Hist. Eng. Law 56].

18. Burrill L. Dict.

19. Century Dict.

Distinguished from "obliterating."— In speaking of the offense of "altering" a cow brand contrary to statute, the court said: "The words 'altering or defacing' are not synonymous terms. Defacing would be the obliterating; altering would be changing from what it was before into a different brand." Linney *v.* State, 6 Tex. 1, 2, 55 Am. Dec. 756.

founded in fact; in deed, in point of fact; actually, really.[20] (De Facto: Apprenticeship, see Apprentices. Contract of Sale, see De Facto Contract of Sale. Corporation, see Corporations. Court, see Courts; Judges; Justices of the Peace. Director, see Banks and Banking; Corporations. Government, see International Law; States. Judge, see Judges; Justices of the Peace. Officer, see Corporations; Officers. Road, see Streets and Highways.)

DE FACTO CONTRACT OF SALE. One which has purported to pass the property from the owner to another.[21] (See Sales.)

DE FACTO CORPORATION. See Corporations.

DE FACTO COURT. See Courts.

DE FACTO DIRECTOR. See Corporations.

DE FACTO GOVERNMENT. See States.

DE FACTO JUDGE. See Judges.

DE FACTO OFFICER. See Officers.

DE FACTO ROAD. See Streets and Highways.

DEFAIRE. To undo; to reverse or set aside; to defeat.[22]

DE FAIRE ESCHELLE. In shipping, a term equivalent to a license to touch and trade at intermediate ports on the voyage.[23]

DE FAIT. Of, or in fact; by wrong, as distinguished from *de droit*, of or by right.[24]

DEFALCATION.[25] Diminution, abatement, excision of any part of a customary allowance;[26] a cutting off; a diminution, deficit or withdrawment.[27] Also a legal right, secured to a defendant who has demands against a plaintiff due in the same right and payable when suit was commenced;[28] setting off another account or another contract;[29] the reduction of the claim of one of the contracting parties against the other, by deducting from it a smaller claim due from the former to the latter.[30] (Defalcation: Of Officer and Agent, see Corporations; Embezzlement; Officers.)

DEFALKED. A lopping off, or a reduction, to some extent, of a claim which is proved, whether it be from a claim made and proved by the plaintiff, or from a set-off made and proved by the defendant.[31]

DEFAMATION. The taking from another's reputation;[32] a false publication calculated to bring one in disrepute.[33] (See Libel and Slander.)

20. McCahon *v.* Leavenworth County Com'rs, 8 Kan. 437, 442 [*citing* Burrill L. Dict.].

21. Farmers', etc., Nat. Bank *v.* Logan, 74 N. Y. 568, 575 [*citing* Cundy *v.* Lindsay, 3 App. Cas. 459, 47 L. J. Q. B. 481, 38 L. T. Rep. N. S. 573, 26 Wkly. Rep. 406]. And see Edmunds *v.* Merchants' Dispatch Transp. Co., 135 Mass. 283, 284.

22. Burrill L. Dict. [*citing* Kelham Dict.].

23. American Ins. Co. *v.* Griswold, 14 Wend. (N. Y.) 399, 491.

24. Burrill L. Dict. [*citing* Britton, c. 107].

25. Defalcation of bankrupt preventing discharge see 5 Cyc. 398.

26. Johnson Dict. [*quoted* in McDonald *v.* Lee, 12 La. 435, 436, where it is said: "He derives the verb 'defalcate' from the Latin *defalco*,—'I mow or cut off with a scythe'"].

27. Webster Dict. [*quoted* in Council Bluffs Iron Works *v.* Cuppey, 41 Iowa 104, 109, where it is said: "Under our law the distinguishing feature of instruments payable to order or bearer in money is that they are not subject to such reduction or defalcation. This is the principal quality which is implied in the term negotiable paper"].

28. Tagg *v.* Bowman, 16 Wkly. Notes Cas. (Pa.) 159, 161, where it is said: "But it may be waived by contract express or implied. An agreement to waive the right, if founded on a good consideration, is undoubtedly binding."

"Without defalcation or discount" as used in a promissory note see Cumberland Bank *v.* Hann, 18 N. J. L. 222, 224.

29. Houk *v.* Foley, 2 Penr. & W. (Pa.) 245, 250, where it is said: "Perhaps total want of consideration founded on fraud, imposition and falsehood, is not defalcation; though being relieved in the same way they are blended."

30. Bouvier L. Dict. [*quoted* in Council Bluffs Iron Works *v.* Cuppey, 41 Iowa 104, 109].

31. Pepper *v.* Warren, 2 Marv. (Del.) 225, 229, 43 Atl. 91, where it is said: "The word 'defalked' implies proof of an alleged claim, proof of some amount from which the defalkation is to be made."

32. Webster Dict. [*quoted* in Hollenbeck *v.* Hall, 103 Iowa 214, 216, 72 N. W. 518, 64 Am. St. Rep. 175, 39 L. R. A. 734].

33. Cooley Torts 193 [*quoted* in Mosnat *v.* Snyder, 105 Iowa 500, 504, 75 N. W. 356; Hollenbeck *v.* Hall, 103 Iowa 214, 216, 72

DEFAMATORY.[34] Containing defamation; calumnious; slanderous; libelous; injurious to reputation.[35] (See Libel and Slander.)

DEFAMER. One who is guilty of the offence of defamation.[36] (See Libel and Slander.)

DEFAULT.[37] Omission, neglect or failure;[38] a failure or omission to do something required;[39] something wrongful, some omission to do that which ought to have been done by one of the parties;[40] non-performance of duty;[41] a failure in the performance or fulfillment of an obligation; neglect or omission of a legal requirement; a wrong action; fault; transgression;[42] not doing what is reasonable under the circumstances — not doing something which a person ought to do, having regard to the relations he occupies toward the other persons interested.[43] In practice the non-appearance of a plaintiff or defendant at court within the time prescribed by law to prosecute his claim or make his defense;[44] a failure to appear and contest a point of law or fact by presentation of counter argument or proof;[45] non-appearance.[46] (Default: In Payment of — Interest on Note, see Commercial Paper; Mortgage, see Chattel Mortgages; Mortgages. In Performance of — Contract, see Contracts; Covenant, see Covenants; Duty, see Negligence. Judgment by, see Judgments. Of Issue, see Default of Issue.)

N. W. 518, 64 Am. St. Rep. 175, 39 L. R. A. 734].

34. "The word 'defamatory,' . . . does not, in its ordinary and proper signification, include, . . . the element of malice." Marks *v.* Baker, 28 Minn. 162, 166, 9 N. W. 678.

35. Century Dict.

36. English L. Dict.

37. "Default is a purely relative term, just like negligence." *In re* Young, etc., Contract, 31 Ch. D. 168, 174, 50 J. P. 245, 54 L. J. Ch. 1144, 53 L. T. Rep. N. S. 837, 34 Wkly. Rep. 84 [*quoted* in *In re* Woods, etc., Contract, [1898] 2 Ch. 211, 215, 67 L. J. Ch. 475, 78 L. T. Rep. N. S. 665, 46 Wkly. Rep. 643].

An expansive word.— In Doe *v.* Dacre, 1 B. & P. 250, 258, Eyre, C. J., said: "I do not know a larger or looser word than 'default.' Abstracted from other words, what does it mean? In the expressions 'judgment by default,' and 'a juror making default,' we understand it differently. In its largest and most general sense, it seems to mean, failing."

Compared with "miscarriage" see Gansey *v.* Orr, 173 Mo. 532, 544, 73 S. W. 477.

The word "does not necessarily imply culpability; it as often signifies only failure." Dime Sav. Inst. *v.* Hoboken, 42 N. J. L. 283, 288. But see *In re* Woods, etc., Contract, [1898] 2 Ch. 211, 67 L. J. Ch. 476, 480, 78 L. T. Rep. N. S. 665, 46 Wkly. Rep. 643, where it is said: "[The word] implies an element of wrong — an element over and above mere failure to perform, not necessarily involving any dishonesty."

38. Burrill L. Dict. [*quoted* in Page *v.* Sutton, 29 Ark. 304, 306].

Applied under a charter-party.— Where a charter-party stipulated that the charterers should be answerable only for detention which might result from their default, the court said: "To what extent does this provision modify their obligation? There is in the use of the word 'default' no necessary imputation of negligence. As used in such an instrument, it can mean only the nonperformance of contract duty,— a failure upon the part of one of the contracting parties to do that which he had contracted to do. The most that can be claimed for its effect is that it excludes liability of the charterers for delay in loading or discharging, if the delay result from a sudden or unforeseen interruption or prevention of the act itself of loading or discharging, not occurring through the connivance or fault of the charterers." Sixteen Hundred Tons of Nitrate of Soda *v.* McLeod, 61 Fed. 849, 851, 10 C. C. A. 115 [*cited* in Burrill *v.* Crossman, 69 Fed. 747, 752, 16 C. C. A. 381].

39. Bryan *v.* Alexander, 4 Fed. Cas. No. 2,064, 4 Woods 529.

40. Cole *v.* Hines, 81 Md. 476, 480, 32 Atl. 196, 32 L. R. A. 455; Union Trust Co. *v.* St. Louis, etc., R. Co., 24 Fed. Cas. No. 14,403, 5 Dill. 1, 22; Williams *v.* Stern, 5 Q. B. D. 409, 412, 49 L. J. Q. B. 663, 42 L. T. Rep. N. S. 719, 28 Wkly Rep. 901; Albert *v.* Grosvenor Invest. Co., L. R. 3 Q. B. 123, 129, 8 B. & S. 664, 37 L. J. Q. B. 24.

41. Anderson L. Dict. [*quoted* in State *v.* Moores, 52 Nebr. 770, 787, 73 N. W. 299].

42. Standard Dict. [*quoted* in State *v.* Moores, 52 Nebr. 770, 787, 73 N. W. 299].

43. *In re* Young, etc., Contract, 31 Ch. D. 168, 174, 50 J. P. 245, 54 L. J. Ch. 1144, 53 L. T. Rep. N. S. 837, 34 Wkly. Rep. 84 [*quoted* in *In re* Woods, etc., Contract, [1898] 2 Ch. 211, 212, 67 L. J. Ch. 475, 78 L. T. Rep. N. S. 665, 46 Wkly. Rep. 643].

44. Bouvier L. Dict. [*quoted* in Lawler *v.* Bashford-Burmister Co., (Ariz. 1896) 46 Pac. 72, 73].

Distinguished from "absence."— "There is a plain difference in meaning between 'default' and 'absence;' 'default' signifying that there has not been an appearance at any stage of the action by the party in default, while 'absence' means that the party was not present at a particular time." Covart *v.* Haskins, 39 Kan. 571, 574, 18 Pac. 522.

45. Forgotson *v.* Becker, 81 N. Y. Suppl. 321, 322.

46. Steenrod *v.* Wheeling, etc., R. Co., 25 W. Va. 133, 137 [*citing* Bouvier L. Dict.].

DEFAULTER. One who makes the default; who fails to perform a public duty; who fails to account for public money intrusted to his care; a delinquent;[47] one whose peculations have brought him within the cognizance of the law, to the extent, at least, of excluding him from a public trust.[48] (See DEFAULT; and, generally, OFFICERS.)

DEFAULT OF ISSUE. An indefinite failure of issue.[49] (See, generally, DESCENT AND DISTRIBUTION; TRUSTS; WILLS.)

DEFEASANCE.[50] A collateral deed, made at the same time with a feoffment, or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone;[51] an instrument which avoids or defeats the force or operation of some other deed;[52] a condition defeating the title of the grantee;[53] something which defeats the operation of a deed or document.[54] (Defeasance: In Bill of Sale, see CHATTEL MORTGAGES; SALES. In Bond, see BONDS. In Chattel Mortgage, see CHATTEL MORTGAGES. In Deed, see DEEDS; MORTGAGES. In Mortgage, see MORTGAGES. Of Estate, see DEEDS; ESTATES.)

DEFEASIBLE. Capable of defeating, destroying, or impairing.[55] (See DEFEASANCE.)

47. Webster Dict. [*quoted* in Walter *v.* Erdman, 4 Pa. Super. Ct. 348, 354].

Applied to a public officer.— In State *v.* Kountz, 12 Mo. App. 511, 513, it is said: "When the term defaulter is employed to explain a disqualification for holding a public office, but one meaning can attach to it in the minds of all persons of ordinary intelligence, who have a common familiarity with the English language and its most popular idioms. No one will naturally connect it with a mere delinquency as to minor social obligations, or the payment of ordinary debts. The universal application of the word in that connection is matter for judicial notice."

48. State *v.* Kountz, 12 Mo. App. 511, 513; Anderson L. Dict. [*quoted* in State *v.* Moores, 52 Nebr. 770, 787, 73 N. W. 299].

49. George *v.* Morgan, 16 Pa. St. 95, 107.

"In default of such issue" as used in a trust see Bruere *v.* Bruere, 35 N. J. Eq. 432, 435.

50. "The word is derived from the French, *defaire*, to defeat or undo." Shaw *v.* Erskine, 43 Me. 371, 373.

Applied to a bill of sale.— Where a bill of sale contained a provision for the maintenance or defeasance of the security, Day, J., said: "It appears to me that the expression 'defeasance' can only mean the putting an end to the existence of the security by the realisation of the value of the goods for the benefit of the mortgagees." Consolidated Credit, etc., Corp. *v.* Gosney, 16 Q. B. D. 24, 55 L. J. Q. B. 61, 62, 54 L. T. Rep. N. S. 21, 34 Wkly. Rep. 106 [*cited* in Lumley *v.* Simmons, 55 L. J. Ch. 759, 760, and *criticized* in Blaiberg *v.* Beckett, 18 Q. B. D. 96, 56 L. J. Q. B. 35, 37, 55 L. T. Rep. N. S. 876, 35 Wkly. Rep. 34, where Lindley, L. J., in speaking of a bill of sale which contained a stipulation "for the maintenance or defeasance of the security," said: "It is evident, . . . that 'defeasance' here cannot be taken in its strict sense. In my opinion the word here points to some condition to be performed which puts an end to the security, as, for instance, a condition as to redemption. It means a condition defeating the title of the grantee, a matter with which the stipulation here has nothing to do."]

51. Miller *v.* Quick, 158 Mo. 495, 504, 59 S. W. 955; Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486 [*quoting* 2 Blackstone Comm. 327]. And see Shaw *v.* Erskine, 43 Me. 371, 373 [*citing* 4 Cruise Dig. 82]; Lacy *v.* Kynaston, 2 Salk. 575; Fowell *v.* Forrest, 2 Saund. 47*dd*, 48 note 1.

It is not necessary that the dates of the two instruments should be the same, in order that one may be a defeasance of the other. Harrison *v.* Phillips Academy, 12 Mass. 456, 463.

52. Lippincott *v.* Tilton, 14 N. J. L. 361, 364; Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486 [*quoting* Comyns Dig. tit. "Defeasance," A]; Fowell *v.* Forrest, 2 Saund. 47*dd*, 48 note 1 [*citing* Comyns Dig. tit. "Defeasance," A]; Bouvier L. Dict. [*quoted* in Simmons *v.* West Virginia Ins. Co., 8 W. Va. 474, 486].

53. Blaiberg *v.* Beckett, 18 Q. B. D. 96, 103, 56 L. J. Q. B. 35, 55 L. T. Rep. N. S. 876, 35 Wkly. Rep. 34. And see Colthirst *v.* Bejushin, 1 Plowd. 21, 34, where it is said: "As if the Condition enlarges the Estate, then the Defendant ought to shew it, because he takes Benefit by the Enlargement." See also Nugent *v.* Riley, 1 Metc. (Mass.) 117, 119, 35 Am. Dec. 355.

54. *In re* Storey, 52 L. J. Ch. 39, 42 [*cited* in Blaiberg *v.* Beckett, 18 Q. B. D. 96, 99, 56 L. J. Q. B. 33, 55 L. T. Rep. N. S. 876, 35 Wkly. Rep. 34].

"A bond for a reconveyance upon the payment of a specified sum and interest, at a specified time, made at the same time and of the same date as the deed, is . . . an instrument in form and terms reasonably adapted and appropriate to serve as a defeasance." Butman *v.* James, 34 Minn. 547, 550, 27 N. W. 66 [*citing* Rice *v.* Rice, 4 Pick. (Mass.) 349].

55. English L. Dict.

DEFEASIBLE FEE. One where the devisee becomes invested with the fee-simple title, subject to be divested upon the happening of some contingency provided by the will.[56] (See Estates.)

DEFEASIBLE TITLE. One that is capable of being annulled or made void — not one that is already void, or an absolute nullity.[57]

DEFEAT. As a noun, frustration; a rendering null and void. As a verb, to resist with success.[58]

DEFECT.[59] A want or absence of something necessary[60] for completeness or perfection;[61] a lack or absence of something essential to completeness.[62] It includes the idea of a fault or want of perfection.[63] (Defect: In Attachment Proceedings, see Attachment. In Bridge, see Bridges. In Drain or Sewer, see Drains; Municipal Corporations. In Highway, see Municipal Corporations; Streets and Highways. In Indictment, see Indictments and Informations. In Machinery or Appliances, see Master and Servant; Negligence. In Pleading, see Pleading. In Record on Appeal, see Appeal and Error; Criminal Law. In Street, see Municipal Corporations; Streets and Highways. Of Parties, see Parties.)

DEFECTIVE. Insufficient.[64]

56. "As where an estate is devised to A., and if A. should die without children then to B.; in such a case the devise over takes effect in the event A. dies without children, and B. becomes the owner in fee of the estate." Wills *v.* Wills, 85 Ky. 486, 493, 3 S. W. 900, 9 Ky. L. Rep. 76. See also Forsythe *v.* Lansing, 109 Ky. 518, 520, 59 S. W. 854, 22 Ky. L. Rep. 1064.

57. Webster Dict. [*quoted* in Elder *v.* Schumacher, 18 Colo. 433, 448, 33 Pac. 175].

58. Webster Dict. [*quoted* in Walker *v.* Sayers, 5 Bush (Ky.) 579, 582, distinguishing "defeat" from "hinder"].

"Defeat" or "obstruct" actions.— Where a statute provided that if any persons, etc., should abscond, or conceal themselves to "defeat or obstruct" any persons who have title, from maintaining any actions, etc., and a defense to the action was that the acts of the sureties in inducing the payee of the note in question not to sue until after seven years had expired, amounted to a hindrance or obstruction to the suit, the court said: "The words 'defeat or obstruct,' as used in the act, signify the performance of some act on the part of the sureties, which will amount to a prevention or hindrance of a suit in opposition to the will and rights of the creditor, such as he cannot with reasonable diligence overcome. The terms import resistance and obstruction to his rights, and unless the acts complained of are, in point of fact, such as would hinder and prevent him from bringing the suit, notwithstanding his desire to do so, they cannot properly be said 'to defeat or obstruct' such suit." Colmean *v.* Walker, 3 Metc. (Ky.) 65, 68, 77 Am. Dec. 163.

59. "Any defect whatever" as used in a contract in reference to the sale of a vessel see Taylor *v.* Bullen, 5 Exch. 779, 785, 20 L. J. Exch. 21.

Applied to public ways.—"The words 'any defect in the condition of any bridge, street, sidewalk, or thoroughfare,' refer to defects in such public ways or structures as such, and with regard to their usefulness and safety for the purposes of travel." Pye *v.* Mankato, 38 Minn. 536, 537, 38 N. W. 621.

Applied to ways, works or machinery.— Where a statute rendered an employer liable for injury to an employee, "by reason of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer," the court said: "An unsuitableness of ways, works, or machinery for work intended to be done and actually done by means of them, is a defect within the meaning of [the statute]." Geloneck *v.* Dean Steam Pump Co., 165 Mass. 202, 217, 43 N. E. 85. And see Yarmouth *v.* France, 19 Q. B. D. 647, 658, 57 L. J. Q. B. 7, 36 Wkly. Rep. 281, where Lindley, L. J., in speaking of a similar statute, said: "The word 'defect,' and the words 'way and machinery' which occur in the section, throw some doubt on whether plant can include horses."

60. Imperial Dict. [*quoted* in Reg. *v.* Creighton, 19 Ont. 339, 344].

61. Webster Dict. [*quoted* in Bliven *v.* Sioux City, 85 Iowa 346, 351, 52 N. W. 246; Boldt *v.* Budwig, 19 Nebr. 739, 742, 28 N. W. 280]. See also Haney-Campbell Co. *v.* Preston Creamery Assoc., 119 Iowa 188, 198, 93 N. W. 297.

62. Tate *v.* Latham, [1897] 1 Q. B. 502, 506, 66 L. J. Q. B. 349, 76 L. T. Rep. N. S. 336, 45 Wkly. Rep. 400, where Bruce, J., said: "A machine may be in its nature and character a perfect machine and may yet be in an imperfect or defective condition."

63. Bliven *v.* Sioux City, 85 Iowa 346, 351, 52 N. W. 246, where the defect under consideration was a defect in a sidewalk.

64. State *v.* Lavalley, 9 Mo. 834, 836, where the court said: "The words 'defective' and 'insufficient,' although differing somewhat in signification, are frequently used indifferently by the Legislature as meaning the same thing; and as applied to recognizances, there can scarcely be said to be any distinction in fact."

DEFEND. To contest and endeavor to defeat a claim or demand made against one in a court of justice.[65]

DEFENDANT. A party sued in a personal action.[66]

DEFENSE.[67] In its legal sense, the term signifies not a justification, protection or guard, which is now its popular signification,[68] but merely an opposing or denial of the truth or validity of the complaint;[69] a general assertion that the plaintiff has no ground of action,[70] which is afterward extended and maintained in the plea;[71] a full answer to the whole or to some part of plaintiff's demand;[72]

65. Black L. Dict. [*quoted* in Boehmer *v.* Big Rock Irr. Dist., 117 Cal. 19, 28, 48 Pac. 908].

Applied in a treaty.— Where a treaty between the United States and the kingdom of Italy provided that consuls-general "may have recourse to the authorities of the respective countries within their respective districts, whether federal or local, judicial or executive, in order to defend the rights and interests of their countrymen," the court said: "The term 'defend,' as used, is to be given the broadest meaning, and includes the power to maintain affirmatively the rights of the consul's countrymen, and our local as well as federal judiciary must, in obedience to the treaty, recognize such rights." Matter of Tartaglio, 12 Misc. (N. Y.) 245, 246, 33 N. Y. Suppl. 1121, an application for distributive shares of decedent's widow and children.

66. Bouvier L. Dict.

67. "The word 'defence' is a term of art. It comes from the Norman French, and was used in common law pleading in the sense merely of denial." Cullen *v.* Woolverton, 65 N. J. L. 279, 283, 47 Atl. 626; U. S. *v.* Ordway, 30 Fed. 30, 32 [*citing* 1 Chitty Pl. 462; Rapalje & L. L. Dict.].

Distinguished from "answer" or "demurrer."— In Strauss *v.* Union Cent. L. Ins. Co., 33 Misc. (N. Y.) 571, 572, 67 N. Y. Suppl. 931, the court said: "The courts do not seem to have interpreted the word 'defence' in section 3253 in the scientific and accurate sense which it has and always has had in pleading. They interpret it, strangely enough, to mean 'answer,' or even 'demurrer,' which it does not mean and never meant. They do not even interpret it to mean the contest or opposition which a defendant makes on a trial, and which laymen call a defence, for an allowance is habitually allowed, in the first and second judicial departments, at least, where the complaint is dismissed for the plaintiff's default, or a judgment is taken against the defendant on his default, when the cause is reached for trial."

Distinguished from "counter-claim."— In Haywood *v.* Seeber, 61 Iowa 574, 576, 16 N. W. 727 [*quoted* in Yarger *v.* Chicago, etc., R. Co., 78 Iowa 650, 651, 43 N. W. 469] the court said: "A defense denies the right of recovery, and shows that plaintiffs never had a cause of action, or that it has been discharged, as by payment. A counter-claim is not a defense." See also Naylor *v.* Smith, 63 N. J. L. 596, 598, 44 Atl. 649; Lafond *v.* Lassere, 26 Misc. (N. Y.) 77, 78, 46 N. Y. Suppl. 459; Baum's Castorine Co. *v.* Thomas, 92 Hun (N. Y.) 1, 37 N. Y. Suppl. 913; Fetretch *v.* McKay, 11 Abb. Pr. N. S. (N. Y.) 453, 454; Cohn *v.* Husson, 66 How. Pr. (N. Y.) 150.

Distinguished from "denial."— "There can be no denial of the complaint or of any part of it in a 'defence.' A 'denial' and a 'defence' are distinct and separate parts of an answer." Burkett *v.* Bennett, 35 Misc. (N. Y.) 318, 319, 71 N. Y. Suppl. 144. See also Flack *v.* O'Brien, 19 Misc. (N. Y.) 399, 400, 43 N. Y. Suppl. 854, where it is said: "A denial is not a 'defense' at all, and may not be so designated. A 'defense' consists of an affirmative statement of new matter only." And see Soper *v.* St. Regis Paper Co., 38 Misc. (N. Y.) 294, 297, 77 N. Y. Suppl. 896; Green *v.* Brown, 22 Misc. (N. Y.) 279, 280, 49 N. Y. Suppl. 163.

"A partial defense is a denial of one or more of several causes of action." Travis *v.* Barger, 24 Barb. (N. Y.) 614, 631. See also McKyring *v.* Bull, 16 N. Y. 297, 308, 69 Am. Dec. 696 note.

68. Wilson *v.* Poole, 33 Ind. 443, 449; Miller *v.* Martin, 8 N. J. L. 201, 204; Bush *v.* Prosser, 11 N. Y. 347, 352 [*cited* in Foland *v.* Johnson, 16 Abb. Pr. (N. Y.) 235, 236]; Houghton *v.* Townsend, 8 How. Pr. (N. Y.) 441, 442.

69. Wilson *v.* Poole, 33 Ind. 443, 449 [*citing* 1 Chitty Pl. 428]; Cullen *v.* Woolverton, 65 N. J. L. 279, 283, 47 Atl. 626; Miller *v.* Martin, 8 N. J. L. 201, 204; Bush *v.* Prosser, 11 N. Y. 347, 352 [*cited* in Foland *v.* Johnson, 16 Abb. Pr. (N. Y.) 235, 236]; Cohn *v.* Husson, 66 How. Pr. (N. Y.) 150, 151; Stewart *v.* Travis, 10 How. Pr. (N. Y.) 148, 151; Houghton *v.* Townsend, 8 How. Pr. (N. Y.) 441, 442; Whitfield *v.* Ætna L. Ins. Co., 125 Fed. 269, 270.

"A 'defence' in pleading can consist only of 'new matter,' i. e., matter which is not embraced within the issue raised, or which might be raised, by a denial, and cannot therefore be proved under a denial." Durst *v.* Brooklyn Heights R. Co., 33 Misc. (N. Y.) 124, 125, 67 N. Y. Suppl. 297. See also Von Hagen *v.* Waterbury Mfg. Co., 22 Misc. (N. Y.) 580, 581, 49 N. Y. Suppl. 465; Green *v.* Brown, 22 Misc. (N. Y.) 279, 280, 49 N. Y. Suppl. 163.

70. Cullen *v.* Woolverton, 65 N. J. L. 279, 283, 47 Atl. 626; Bouvier L. Dict. [*quoted* in Whitfield *v.* Ætna L. Ins. Co., 125 Fed. 269, 270].

71. King *v.* Bell, 13 Nebr. 409, 414, 14 N. W. 141.

72. Wehle *v.* Butler, 43 How. Pr. (N. Y.) 5, 15. See also Bush *v.* Prosser, 11 N. Y. 347, 352 [*cited* in Foland *v.* Johnson, 16 Abb. Pr. (N. Y.) 235, 239]; Houghton *v.* Townsend, 8 How. Pr. (N. Y.) 441, 442.

that which is offered and alleged by the party proceeded against in an action or suit as a reason in law or fact why the plaintiff should not recover or establish what he seeks; what is put forward to defeat an action.[73] In a less technical sense the word is used as well in legal as in popular language, to signify, not a clause or form in pleading, but the subject of the plea.[74] (Defense: Affidavit of, see PLEADING. To Action, see ACTIONS. To Crime, see CRIMINAL LAW.)

DEFENSE AU FOND EN DROIT. In French and Canadian law, a DEMURRER,[75] *q. v.*

DEFENSE AU FOND EN FAIT. In French and Canadian law, the general issue.[76]

DEFENSE TO AN ACTION. A right possessed by the defendant, arising out of the facts alleged in his pleadings, which either partially or wholly defeats the plaintiff's claim.[77]

DEFENSIVE WAR. In the law of nations, a war commenced or carried on in defence or for the protection of national rights.[78]

DEFERRED LIFE ANNUITIES. Annuities for the life of the purchaser, but not commencing until a date subsequent to the date of buying them, so that if the purchaser die before that date, the purchase-money is lost.[79]

DEFERRED PAYMENTS. Payments postponed, or not made when due.[80]

DEFERRED STOCK. See CORPORATIONS.

DEFIANCE. The act of one who defies.[81]

DEFICIENCY.[82] The lack of a part.[83] (Deficiency: Apportionment of in Boundary, see BOUNDARIES. In Quantity of Land Sold, see VENDOR AND PURCHASER. On Foreclosure of Mortgage, see CHATTEL MORTGAGES; MORTGAGES.)

DEFICIENTE UNO SANGUINE, NON POTEST ESSE HÆRES. A maxim meaning "One blood being wanted, one cannot be heir."[84]

DEFICIT.[85] Want; deficiency in an account or a number.[86]

73. Black L. Dict. [*quoted* in Whitfield *v.* Ætna L. Ins. Co., 125 Fed. 269, 270].

74. "Thus, if in an action on contract, the defendant pleads infancy, or to an action of trespass or license, infancy in the one case, and license in the other is called the defence." Gould Pl. c. 2, § 15 [*quoted* in Houghton *v.* Townsend, 8 How. Pr. (N. Y.) 441, 442].

75. Black L. Dict.

76. Black L. Dict.

77. Utah, etc., R. Co. *v.* Crawford, 1 Ida. 770, 773.

78. Burrill L. Dict. [*citing* 1 Kent Comm. 50 note], where it is said: "A war may be defensive in its principles, though offensive in its operations."

79. Wharton L. Lex.

80. English L. Dict.

81. Century Dict.

Applied to adverse possession.— In Williams *v.* McGee, 1 Mill (S. C.) 85, 91 [*citing* Ballantine Lim. 23], the court, in speaking of acts necessary to gain a title by adverse possession, said: "The case is, 'If a cottage is built in defiance of the lord, and quiet possession has been had for twenty years, it is within the statute.' . . . By defiance, is meant, of course, a possession unequivocally adverse."

82. **"Deficiency in the cargo"** see Merrick *v.* Nineteen Thousand Five Hundred and Fourteen Bushels of Wheat, etc., 3 Fed. 340, 341.

"Deficiency in quantity" see Meyer *v.* Peck, 28 N. Y. 590, 596, 598.

"Deficiency upon the mortgage debt."— Goldsmith *v.* Brown, 35 Barb. (N. Y.) 484, 492.

Applied to municipal taxation.— Where a municipal charter provided that "the trustees shall have power, whenever there shall be any excess of money in any one fund raised by tax, to apply any such excess to supply any deficiency that may exist in any other fund," the court said: "The only reasonable construction to be given the word 'deficiency,' as used in section 9 of title 7, is that it arises where the tax imposed has not resulted in raising the amount authorized to be raised by the board of trustees." Matter of Plattsburgh, 27 N. Y. App. Div. 353, 360, 50 N. Y. Suppl. 356.

"Deficiency or surplusage" as used in a will see Bragaw *v.* Bolles, 51 N. J. Eq. 84, 87, 25 Atl. 947.

83. Worcester Dict. [*quoted* in Matter of Plattsburgh, 27 N. Y. App. Div. 353, 360, 50 N. Y. Suppl. 356].

84. Bouvier L. Dict. [*citing* Ratcliffe's Case, 3 Coke 37*a*, 41*a*].

85. **Applied to liability of sureties.**— In Mutual Loan, etc., Assoc. *v.* Price, 19 Fla. 127, 137, the court, in speaking of the liability of sureties for a deficit in an officer's accounts, said: "We do not think the term deficit necessarily or ordinarily implies misapplication. . . . Now the term 'deficit' may not only indicate an amount wanting, as shown by the books, to balance the officer's account, but the fact may be that such amount had been then misappropriated by the officer and evidence showing the true state of facts is admissible."

86. Mutual Loan, etc., Assoc. *v.* Price, 19 Fla. 127, 138 [*quoting* Johnson Dict.; Webster Dict.; Worcester Dict.].

DE FIDE ET OFFICIO JUDICIS NON RECIPITUR QUÆSTIO, SED DE SCIENTIA SIVE SIT ERROR JURIS SIVE FACTI. A maxim meaning "The bona fides and honesty of purpose of a judge cannot be questioned, but his decision may be impugned for error either of law or of fact."[87]

DEFILE. To pollute, to corrupt the chastity of, to debauch or to violate.[88]

DEFILEMENT. The act of defiling, or the state of being defiled; foulness; uncleanness; impurity.[89] (Defilement: Of Female, see RAPE; SEDUCTION.)

DEFINE.[90] To determine the end or limit;[91] to fix, establish, or prescribe authoritatively.[92]

DEFINING. Determining the limits;[93] declaring.[94]

87. Broom Leg. Max.

Applied in Snyder *v.* Snyder, 6 Binn. (Pa.) 483, 499, 6 Am. Dec. 493; Com. *v.* Sheriff, 7 Phila. (Pa.) 84, 85.

88. Webster Dict. [*quoted* in State *v.* Fernald, 88 Iowa 553, 557, 55 N. W. 534; State *v.* Montgomery, 79 Iowa 737, 738, 45 N. W. 292].

89. Century Dict.

90. **Synonymous with "declare."**— Where a statute enacted that "it shall be lawful for this Legislature, . . . to define the privileges, immunities, and powers to be held, enjoyed, and exercised by the council and assembly," etc., Lord Cranworth said: "Now, looking at the context, we cannot entertain the least doubt that (though it is, perhaps, carelessly employed) the word 'define' means, in this section, nothing more than 'declare.'" Dill *v.* Murphy, 10 Jur. N. S. 549, 10 L. T. Rep. N. S. 170, 1 Moore P. C. N. S. 487, 12 Wkly. Rep. 491, 493, 15 Eng. Reprint 784.

"Power to define" distinguished from "power to grant," etc.— In Styles *v.* Tyler, 64 Conn. 432, 452, 30 Atl. 165, the court, in speaking of a constitutional provision, for the establishment of courts, that "the powers and jurisdiction of which courts shall be defined by law," said: "A power to define is different from a power to grant or apportion; and however far the meaning of the word 'define' might be extended when the context clearly calls for extension, it is certain that when used with reference to a jurisdiction substantially described, its meaning must be confined to fixing limits for the exercise of such jurisdiction, and cannot be extended to an alteration of its character." See also *In re* Fourth Judicial Dist., 4 Wyo. 133, 147, 32 Pac. 850.

"Known" and "defined" watercourses.— In Los Angeles *v.* Pomeroy, 124 Cal. 597, 634, 57 Pac. 585, Beatty, C. J., in speaking of watercourses whose channels are known or defined, said: "'Defined' means a contracted and bounded channel, though the course of the stream may be undefined by human knowledge; and the word 'known' refers to knowledge of the course of the stream by reasonable inference." See also Medano Ditch Co. *v.* Adams, 29 Colo. 317, 326, 68 Pac. 431 (where the court, in speaking of under-ground currents of water, said: "The channels and existence of such streams, though not visible, are 'defined' and 'known' within the meaning of the law when their course and flow are determinable by reasonable inference"); Miller *v.* Black Rock Springs Imp. Co., 99 Va. 747, 757, 40 S. E. 27, 86 Am. St. Rep. 924 (where the court, in speaking of subterranean waters flowing in defined or known channels, said: "'Defined' means a contracted and bounded channel, although the course of the stream may be undefined by human knowledge. 'Known' means the knowledge, by reasonable inference, from existing and observed facts in the natural or pre-existing condition of the surface of the ground. 'Known' in this rule of law, is not synonymous with 'visible,' nor is it restricted to knowledge derived from exposure of the channel by excavation"); Huber *v.* Merkel, 117 Wis. 355, 360, 94 N. W. 354, 62 L. R. A. 589 (where the court, in speaking of a stream with a defined "channel," said: "The word 'defined' here means a contracted and bounded channel").

91. "As, to define the extent of a kingdom or country." Gould *v.* Hutchins, 10 Me. 145, 154. See also People *v.* Bradley, 36 Mich. 447, 452.

92. Century Dict. [*quoted* in Boyd Pav., etc., Co. *v.* Ward, 85 Fed. 27, 35, 28 C. C. A. 667].

Applied to punishment for piracy.— In U. S. *v.* Smith, 5 Wheat. (U. S.) 153, 160, 5 L. ed. 57, Story, J., in speaking of the power of congress "to define and punish piracy and felonies committed on the high seas, and offenses against the law of nations," said: "To define piracies, in the sense of the constitution, is merely to enumerate the crimes which shall constitute piracy; and this may be done either by a reference to crimes having a technical name, and determinate extent, or by enumerating the acts in detail, upon which the punishment is inflicted."

93. Gould *v.* Hutchins, 10 Me. 145, 154.

94. Dill *v.* Murphy, 10 Jur. N. S. 549, 550, 10 L. T. Rep. N. S. 170, 1 Moore P. C. N. S. 487, 12 Wkly. Rep. 491, 15 Eng. Reprint 784.

"Defining" results of an election.— In Higgins *v.* State, 64 Md. 419, 420, 1 Atl. 876, where a statute provided that the results of an election should be returned to certain judges who were invested with the duty of defining certain districts, etc., in which the sale of spirituous liquors should be prohibited, the court said: "The word 'defining,' as here used, we must read as synonymous with specifying or designating, and thus simply requiring the Judges to particularize in the proclamation the districts or district casting a majority of votes in favor of the law."

DEFINITE. Having fixed limits; bounded with precision; determinate.[95] (Definite: Failure of Issue, see WILLS.)

DEFINITELY. In a definite manner.[96]

DEFINITION. An explanation of the signification of a word, or of what a word is understood to express.[97]

DEFINITIVE. That which finally and completely ends and settles a controversy.[98]

DEFLORATION. Seduction or debauching; the act by which a woman is deprived of her virginity.[99] (See, generally, RAPE; SEDUCTION.)

95. Century Dict.

"Definite location of a right of way" is said to be accomplished by the "actual construction of the road." Jamestown, etc., R. Co. *v.* Jones, 177 U. S. 125, 130, 20 S. Ct. 568, 44 L. ed. 698.

"Definite period" as used in: Contract of employment see Russell *v.* National Exhibition Co., 60 N. Y. App. Div. 40, 69 N. Y. Suppl. 732. Insurance policy see Brummer *v.* Cohn, 86 N. Y. 11, 16, 40 Am. Rep. 503.

"Definite quantity" as used in a patent see De Lamar *v.* De Lamar Min. Co., 110 Fed. 538, 542.

96. Century Dict.

"Definitively condemned."—Where an international convention provided that "Property captured, and not yet definitely condemned, or which may be captured before the exchange of ratifications . . . shall be mutually restored," the court said: "The terms used in the treaty seem to apply to the actual condition of the property, and to direct a restoration of that which is still in controversy between the parties. On any other construction, the word definitive would be rendered useless and inoperative. Vessels are seldom if ever condemned, but by a final sentence. An interlocutory order for a sale is not a condemnation. A stipulation, then, for the restoration of vessels not yet condemned would, on this construction, comprehend as many cases as a stipulation for the restoration of such as are not yet definitively condemned." U. S. *v.* The Peggy, 1 Cranch (U. S.) 103, 109, 2 L. ed. 49.

"When the line or route of the road became definitely fixed," within the intent and meaning of an act of congress see St. Paul, etc., R. Co. *v.* Ward, 47 Minn. 40, 43, 49 N. W. 401; Walden *v.* Knevals, 114 U. S. 373, 374, 5 S. Ct. 898, 29 L. ed. 167; Kansas Pac. R. Co. *v.* Dunmeyer, 113 U. S. 629, 635, 5 S. Ct. 566, 28 L. ed. 1122; Van Wyck *v.* Knevals, 106 U. S. 360, 366, 27 L. ed. 201; Southern Pac. R. Co. *v.* U. S., 109 Fed. 913, 922, 48 C. C. A. 712; Southern Pac. R. Co. *v.* U. S., 69 Fed. 47, 55, 16 C. C. A. 114; Smith *v.* Northern Pac. R. Co., 58 Fed. 513, 515, 7 C. C. A. 397; U. S. *v.* McLaughlin, 30 Fed. 147, 148.

97. Webster Dict. [*quoted* in Taylor *v.* Palmer, 31 Cal. 666, 687].

"Definitions differ in their character according to the nature of the thing to be defined. Words denoting real substances existing in nature, or any of the ordinary acts of the mind, are all to be explained and defined by stating the facts and circumstances that usually accompany or follow such things or acts. The word is made intelligible only by a description, by the enumeration of the attributes or circumstances in which it agrees or differs with other things of qualities somewhat similar. Thus, a name conveying an idea generalized from many individuals is defined and explained by describing the qualities ordinarily found in such individuals. It is so in the definitions of natural objects, which are rather descriptions than definitions. It is often so in the definition of moral actions. But it is never so as to words or phrases denoting any artificial and purely technical conceptions: ideas framed by the mind itself, and not otherwise found in nature. Such words or ideas are susceptible of a strict definition." Warner *v.* Beers, 23 Wend. (N. Y.) 103, 141.

98. Black L. Dict.

"Definitive and certain sum of money."—Where a duty was imposed by statute, as follows: "Bond, &c., given as a security for the payment of any definitive and certain sum of money not exceeding £50, £1, &c., &c.," Parke, B., said: "I construe those words to mean the sum ascertained by the bond itself, — in other words, the principal sum. It is true, at the time of the execution of the bond in this case a sum was due for interest, which was ascertainable: but the amount of interest is not mentioned in the bond, and must depend on the time when it is paid. I think the words 'definitive and certain sum' refer to the principal money secured by the bond, which is to bear interest, and not to interest, whether bygone or subsequent;" Alderson, B., said: "Interest does not fall within the meaning of a 'definitive and certain sum of money' secured by the bond; it is only the amount of damage for the detention of the principal." Parker *v.* Smark, 9 Dowl. P. C. 211, 10 L. J. Exch. 200, 7 M. & W. 590, 592.

"Definitive publication."—Where a statute in relation to charitable trusts gave a right to appeal to two inhabitants within three months after "definitive publication" of the order of the Charity Commissioners, etc., the master of the rolls said: "The words 'definitive publication of any order of the board,' contained in section 8, must mean the very last time that the Charity Commissioners are expected to have the notice affixed to the church-doors. The Court is bound to attach some meaning to the word 'definitive,' and I think it means the last — the final and complete publication of the order." *Ex p.* Nicholls, 34 L. J. Ch. 169, 173.

99. Black L. Dict.

DEFORCE. To withhold lands or tenements from the rightful owner.[1]

DEFORCEMENT.[2] The holding of any lands or tenements to which another has right;[3] any species of wrong whatsoever whereby he that has the right to the freehold is kept out of possession;[4] a wrongful withholding of lands from the right owner, or in case of dower, a denial of the widow's right;[5] a privation of the freehold, where the entry of the present tenant or possession was originally lawful, but his detainer has now become unlawful.[6]

DEFRAUD. To deprive of some right,[7] interest, or property by deceitful devices; to withhold from wrongfully; to injure by embezzlement; to cheat;[8] to overreach;[9] to withhold from another that which is justly due to him, or to deprive him of a right by deception or artifice;[10] to deprive of a right by withholding from another, by indirection or device, that which he has a right to claim or obtain;[11] to deprive of something dishonestly.[12] (See, generally, FRAUD.)

DEFUNCT. Deceased; a deceased person.[13]

DE FURTO. Of theft.[14]

DEGRAS. Wool grease.[15]

DE GRATIA. Of grace or favor; by favor.[16]

DE GRATIA SPECIALI, EX CERTA SCIENTIA, ET MERO MOTU. Of special grace, certain knowledge and mere motion.[17]

DEGREE. In common parlance a person's rank in life;[18] also a mark of distinction conferred upon a student for proficiency in some art or science.[19] In the law of descent a remove or step in the line of descent or consanguinity.[20] In criminal law the term denotes a particular grade of crime more or less culpable than another grade of the same offense.[21] (Degree: Of Crime, see CRIMINAL LAW. Of Graduate of College or University, see COLLEGES AND UNIVERSITIES. Of Relationship or Kindred, see DESCENT AND DISTRIBUTION.)

DEHERISON. Disinheriting, a depriving or putting out of an inheritance.[22]

DE HOMINE REPLEGIANDO. See HABEAS CORPUS.

1. Baldwin *v.* Carter, 17 Conn. 201, 211, 42 Am. Dec. 735 [*citing* Coke Litt. 331*b*].
2. A term of most general signification.—Foxworth *v.* White, 5 Strobh. (S. C.) 113, 115.
3. Foxworth *v.* White, 5 Strobh. (S. C.) 113, 115 [*citing* 3 Blackstone Comm. 172].
4. "And applies mainly to a case where the party has the right of property, but never had the actual possession under that right." Wildy *v.* Doe, 26 Miss. 35, 40 [*citing* 3 Blackstone Comm. 173].
5. Woodruff *v.* Brown, 17 N. J. L. 246, 269. See also Hopper *v.* Hopper, 21 N. J. L. 543, 547.
6. Hoye *v.* Swan, 5 Md. 237, 247 [*quoting* 3 Blackstone Comm. 172, and *citing* 2 Crabb Real Prop. § 2457].
7. People *v.* Wiman, 85 Hun (N. Y.) 320, 339, 32 N. Y. Suppl. 1037.
8. State *v.* Rickey, 9 N. J. L. 293, 302.
9. Webster Int. Dict. [*quoted* in Petrovitzky *v.* Brigham, 14 Utah 472, 475, 47 Pac. 666].
10. Burdick *v.* Post, 12 Barb. (N. Y.) 168, 186; Bouvier L. Dict. [*quoted* in U. S. *v.* Horman, 118 Fed. 780].
11. Encyclopedia Dict. [*quoted* in Deseret Nat. Bank *v.* Kidman, 25 Utah 379, 392, 71 Pac. 873].
12. Standard Dict. [*quoted* in Horman *v.* U. S., 116 Fed. 350, 354, 53 C. C. A. 570].
13. Burrill L. Dict.
14. Black L. Dict.

One of the kinds of criminal appeal formerly in use in England. Black L. Dict. [*citing* 2 Reeve Eng. Law 40].

15. U. S. *v.* Leonard, 108 Fed. 42, 43, 47 C. C. A. 181, where it is said: "The word 'degras,' found in paragraph 279 [of the customs act of 1897], has had, to some extent, a generic meaning, and is not always limited to wool grease or its products; but, in the trade of the United States, 'degras' and 'brown grease,' found in that paragraph, have now like signification, and each is the equivalent of what is known commercially as 'wool grease.' Indeed, the proofs show that, in trade, 'degras,' 'brown wool grease,' and 'wool grease' have an identical meaning, although 'degras' or 'wool grease' is not always brown."
16. Burrill L. Dict. [*citing* Fleta, lib. 2, c. 57, § 11].
17. Formal words used in royal grants and patents. Burrill L. Dict.
18. State *v.* Bishop, 15 Me. 122, 124.
19. Rapalje & L. L. Dict.
20. Bouvier L. Dict.
21. Rapalje & L. L. Dict.
22. Abernathy *v.* Orton, 42 Oreg. 437, 443, 71 Pac. 327, 95 Am. St. Rep. 774 [*citing* 3 Blackstone Comm. 228; Burrill L. Dict.], where it is said: "And the old writ of waste called upon the tenant to appear and show cause why he had committed waste and destruction in the place named, to the deherison of the plaintiff."

DEHORS. Out of; without; beyond; foreign to; unconnected with.[23]

DE IDIOTA INQUIRENDO. A common-law writ to inquire whether a man be an idiot or not.[24] (See INSANE PERSONS.)

DEI JUDICIUM. The old Saxon trial by ordeal.[25]

DE INCREMENTO.[26] Of increase; in addition; additional.[27]

DE INJURIÂ SUÂ PROPRIÂ ABSQUE TALI CAUSÂ. A species of traverse by replication in pleading, now obsolete, which varied from the common form, and which, though confined to particular actions, and to a particular stage of the pleadings, was of frequent occurrence.[28] (De Injuria: Replication, see PLEADING.)

DE INTEGRO. Anew; a second time.[29]

DE INTRUSIONE. Writ of intrusion.[30]

DE JACTURA EVITANDA. For avoiding a loss.[31]

DE JUDICATO SOLVENDO. For payment of the amount adjudged.[32]

DE JUDICIIS. Of judicial proceedings.[33]

DE JUDICIO SISTI. For appearing in court.[34]

DE JURE. Of right; legitimate; lawful; by right and just title.[35] (De Jure: Corporation, see CORPORATIONS. Court, see COURTS; JUDGES; JUSTICES OF THE PEACE. Government, see INTERNATIONAL LAW; STATES. Judge, see JUDGES; JUSTICES OF THE PEACE. Officer, see CORPORATIONS; OFFICERS.)

DE JURE DECIMARUM, ORIGINEM DUCENS DE JURE PATRONATUS, TUNC COGNITIO SPECTAT AT LEGEM CIVILEM, I. E., COMMUNEM. A maxim meaning "With regard to the right of tithes, deducing its origin from the right of the patron, then the cognizance of them belongs to the civil law; that is, the common law."[36]

DE JURE JUDICES, DE FACTO JURATORES, RESPONDENT. A maxim meaning "The judges answer to the law, the jury to the fact."[37]

DELAY.[38] A word which is defined to mean to hinder, detain, keep back or

23. Black L. Dict. [*citing* 3 Blackstone Comm. 387].

24. Wharton L. Lex.

25. So called because it was thought to be an appeal to God for the justice of a cause, and it was believed that the decision was according to the will and pleasure of Divine providence. Wharton L. Lex.

26. Wages are sometimes spoken of as *de incremento*. Rex *v.* Lambeth, 4 M. & S. 315, 316.

27. Burrill L. Dict.

28. Wharton L. Lex. See also Moore *v.* Houston, 3 Serg. & R. (Pa.) 169, 171 (where it is said: "To the pleas in justification there was the general replication, *de injuria sua propria absque tali causa*, on which issue was also joined"); Spalding *v.* Jarvis, 11 U. C. Q. B. 596, 599; Muttlebury *v.* Hornby, 6 U. C. Q. B. 61, 95.

29. Burrill L. Dict. [*citing* Bonham *v.* Newcomb, 1 Vern. Ch. 232, 23 Eng. Reprint 435].

30. A writ which lay for a reversioner, where tenant for life, or in dower, or by the curtesy, died seised of such estate for life, and after their death a stranger intruded upon the land. Burrill L. Dict.

31. A phrase applied to a defendant, as *de lucro captando* is to a plaintiff. Black L. Dict. [*citing* Jones *v.* Sevier, 1 Litt. (Ky.) 50, 51, 13 Am. Dec. 218].

32. A term applied in Scotch and admiralty law, to bail to the action, or special bail. Burrill L. Dict. [*citing* Clerke Prax. tit. 11].

33. The title of the second part of the Digests or Pandects, including the fifth, sixth, seventh, eighth, ninth, tenth, and eleventh books. Black L. Dict.

34. A term applied in Scotch and admiralty law, to bail for a defendant's appearance. Burrill L. Dict. [*citing* Clerke Prax. Cur. Adm. tit. 11].

35. Black L. Dict., where it is said: "In this sense it is the contrary of *de facto*. It may also be contrasted with *de gratia*, in which case it means 'as a matter of right,' as *de gratia* means 'by grace or favor.' Again it may be contrasted with *de æquitate*; here meaning 'by law,' as the latter means 'by equity.'"

36. Black L. Dict.

37. Wharton L. Lex.

38. Distinguished from "defraud" see Monroe Mercantile Co. *v.* Arnold, 108 Ga. 449, 457, 34 S. E. 176; Crow *v.* Beardsley, 68 Mo. 435, 439; Torlina *v.* Trorlicht, 5 N. M. 148, 151, 21 Pac. 68; Burnham *v.* Brennan, 42 N. Y. Super. Ct. 49, 63; Burdick *v.* Post, 12 Barb. (N. Y.) 168, 186; Armstrong *v.* Ames, 17 Tex. Civ. App. 46, 62, 43 S. W. 302; Deseret Nat. Bank *v.* Kidman, 25 Utah 379, 392, 71 Pac. 873, 95 Am. St. Rep. 856.

Distinguished from "discrimination" see Gulf, etc., R. Co. *v.* Lone Star Salt Co., 26 Tex. Civ. App. 531, 533, 63 S. W. 1025.

"Hinder" and "delay" creditors.—In Ellis *v.* Valentine, 65 Tex. 532, 545, the court, in speaking of the words "hinder" and "delay" as used in a statute relative to efforts to de-

retard.[39] (Delay: Appeal Taken For, see Appeal and Error. In Bringing Action or Suit, see Actions; Equity; Limitations of Actions. In Carriage of Goods or Passengers, see Carriers. In Filing Notice of Appeal, see Appeal and Error. In Loading or Unloading Vessel, see Shipping. In Making Conveyance, see Vendor and Purchaser. In Performance of Contract, see Builders and Architects; Contracts. In Presentment, Demand, Notice, and Protest of Negotiable Instrument, see Commercial Paper. In Prosecution of Action as Ground of Dismissal, see Dismissal and Nonsuit. In Revival of Action on Death of Party, see Abatement and Revival. In Taking Appeal, see Appeal and Error.)

DEL CREDERE. Of trust; credit.[40] (Del Credere: Agency, see Factors and Brokers.)

DEL CREDERE AGENCY. See Factors and Brokers.

DELECTUS PERSONÆ. Choice of person.[41]

DELEGATA POTESTAS NON POTEST DELEGARI. A maxim meaning "A delegated authority cannot be re-delegated."[42]

DELEGATE. A person sent and empowered to act for another; one deputed to represent another.[43]

fraud creditors, said: "If the words 'hinder' and 'delay' were used in the statute in their broadest sense, then every preference given by an insolvent debtor would have the effect to hinder or delay the non-preferred creditor in subjecting the property of his debtor to sale for the payment of his debt. The effect of a preference given to one or more creditors by an insolvent debtor is necessarily to 'hinder' or 'delay' other creditors, if those words are used in their broad and popular meaning." And see Monroe Mercantile Co. *v.* Arnold, 108 Ga. 449, 459, 34 S. E. 176; Weber *v.* Mick, 131 Ill. 520, 531, 23 N. E. 646; Crow *v.* Beardsley, 68 Mo. 435, 439; Petrovitzky *v.* Brigham, 14 Utah 472, 475, 47 Pac. 666; Edgell *v.* Smith, 50 W. Va. 349, 356, 40 S. E. 402.

39. Petrovitzky *v.* Brigham, 14 Utah 472, 475, 47 Pac. 666 [*quoting* Webster Int. Dict.].

"'Delay' in sending and delivering a message, implies that it was or would be sent at some time, but not sent or delivered promptly." Baldwin *v.* U. S. Telegraph Co., 54 Barb. (N. Y.) 505, 515.

40. Anderson L. Dict.

41. Abbott L. Dict.

As used in partnership, a term which implies confidence and knowledge of the character, skill and ability of the other associates; and their personal co-operation, advice, and aid in the management of the business. Goodburn *v.* Stevens, 5 Gill (Md.) 1, 21.

42. Com. *v.* Armstrong, 4 Pa. Co. Ct. 5, 6.

Applied or quoted in the following cases:

Maine.— Curtis *v.* Portland, 59 Me. 483, 487.

Massachusetts.— Sanborn *v.* Carleton, 15 Gray 399, 403 [*citing* Broom Leg. Max.].

Michigan.— People *v.* Collins, 3 Mich. 343, 351.

New Hampshire.— Gillis *v.* Bailey, 21 N. H. 149, 162.

New Jersey.— Dwelling-House Ins. Co. *v.* Snyder, 59 N. J. L. 18, 20, 37 Atl. 1022; Hicks *v.* Willis, 41 N. J. Eq. 515, 518, 7 Atl. 507. See Cox *v.* James, 9 N. J. L. 335.

New York.— Loeschigk *v.* Addison, 3 Rob. 331, 346; Grinnell *v.* Buchanan, 1 Daly 538, 540; Mensing *v.* Birnbaum, 5 Misc. 414, 416, 25 N. Y. Suppl. 759; McEntyre *v.* Tucker, 5 Misc. 228, 232, 25 N. Y. Suppl. 95.

North Carolina.— Harrell *v.* Wilmington, etc., R. Co., 106 N. C. 258, 264, 11 S. E. 286; Forsyth *v.* Lash, 89 N. C. 159, 170.

Pennsylvania.— Com. *v.* Armstrong, 4 Pa. Co. Ct. 5, 6.

Vermont.— Willard *v.* Goodrich, 31 Vt. 597, 601; Hunt *v.* Douglass, 22 Vt. 128, 131.

West Virginia.— Crotty *v.* Eagle, 35 W. Va. 143, 152, 13 S. E. 59.

United States.—Warner *v.* Martin, 11 How. 209, 223, 13 L. ed. 667.

England.— Huth *v.* Clarke, 25 Q. B. D. 391, 395, 59 L. J. M. C. 120, 63 L. T. Rep. N. S. 348, 38 Wkly. Rep. 655; *In re* Parnell, L. R. 2 P. 379, 41 L. J. P. 35, 37, 26 L. T. Rep. N. S. 744, 20 Wkly. Rep. 494; Powell *v.* Apollo Candle Co., 10 App. Cas. 282, 289, 54 L. J. P. C. 7, 53 L. T. Rep. N. S. 638; Lord *v.* Hall, 8 C. B. 627, 630, 19 L. J. C. P. 47, 65 E. C. L. 627; Hemming *v.* Hale, 7 C. B. N. S. 487, 498, 6 Jur. N. S. 554, 29 L. J. C. P. 137, 8 Wkly. Rep. 116, 97 E. C. L. 487; De Bussche *v.* Alt, 8 Ch. D. 286, 310, 47 L. J. Ch. 381, 38 L. T. Rep. N. S. 370; Shrewsbury, etc., R. Co. *v.* Shrewsbury, etc., R. Co., 15 Jur. 548, 551, 20 L. J. Ch. 574, 1 Sim. N. S. 410, 40 Eng. Ch. 410, 4 Eng. L. & Eq. 171; Orby *v.* Molhun, 2 Vern. Ch. 531, 534, 23 Eng. Reprint 944.

Canada.— Ronne *v.* Montreal Ocean Steamship Co., 19 Nova Scotia 312, 326; Rose *v.* Morrisburg, 28 Ont. 245, 260; *Re* Bolt, etc., Co., 10 Ont. 434, 436; Ross *v.* Fitch, 6 Ont. App. 7, 16; *In re* Queen City Refining Co., 10 Ont. Pr. 415, 417; Matter of Fennell, etc., 24 U. C. Q. B. 238, 243.

43. Manston *v.* McIntosh, 58 Minn. 525, 528, 60 N. W. 672, 28 L. R. A. 605.

A member of a party convention.—Where a statute declared "An assembly or convention of delegates within the meaning of this act, is an organized assemblage of delegates representing a political party," etc., the court said: "Under all the circumstances, it seems to us that the Legislature used the word 'dele-

DELEGATE CONVENTION. A convention of delegates chosen at primaries or caucuses, and sent to the nominating convention.[44]

DELEGATED POWER. An authority which one person transfers to another.[45]

DELEGATION. The act of making or commissioning a delegate.[46] In the civil law the term denotes the change of one debtor for another, when he who is indebted substitutes a third person who obligates himself in his stead to the creditor.[47] (Delegation: Of Power, see DELEGATION OF POWER.)

DELEGATION OF POWER.[48] The transfer of authority by one person to another.[49] (Delegation of Power: By Agent, see PRINCIPAL AND AGENT. By Arbitrator, see ARBITRATION AND AWARD. By Assignee For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS. By Attorney, see ATTORNEY AND CLIENT. By Auctioneer, see AUCTIONS AND AUCTIONEERS. By City Council, see MUNICIPAL CORPORATIONS. By County Board, see COUNTIES. By Judiciary, see CONSTITUTIONAL LAW. By Legislature, see CONSTITUTIONAL LAW. By Trustee, see TRUSTS. Of Eminent Domain, see EMINENT DOMAIN. Of Sale, see EXECUTORS AND ADMINISTRATORS. To Admit to Bail, see BAIL. To Tax, see TAXATION.)

DELETERIOUS. In its common and generally accepted meaning, having the power of destroying or extinguishing life; that which is destructive, poisonous, pernicious.[50]

DELF. A quarry or mine.[51] (See MINES AND MINERALS.)

DELIBERARUM EST DIU QUOD STATUENDUM EST SEMEL. A maxim meaning "That which is to be resolved once for all should long be deliberated upon."[52]

gate' in the present law in a more popular but less accurate sense, as meaning a regularly selected member of a regular party convention." Manston *v.* McIntosh, 58 Minn. 525, 528, 60 N. W. 672, 28 L. R. A. 605.

44. Manston *v.* McIntosh, 58 Minn. 525, 528, 60 N. W. 672, 28 L. R. A. 605.

45. Crooke *v.* Kings County, 97 N. Y. 421, 441.

46. Black L. Dict.

47. Adams *v.* Power, 48 Miss. 450, 454 [*citing* 1 Dom. 919, §§ 2318, 2319], where it is said: "So that the first debtor is acquitted and his obligation extinguished, and the creditor contents himself with the obligation of the second debtor. . . . 'Delegation is not made but by the consent both of the debtor who delegates another in his place of the person who is delegated, and of the creditor who accepts the delegation, and who contents himself with the new debtor.'"

48. A term which does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself. Huth *v.* Clarke, 25 Q. B. D. 391, 395, 59 L. J. M. C. 120, 63 L. T. Rep. N. S. 348, 38 Wkly. Rep. 655.

49. Black L. Dict.

"There is a distinction between a delegation of power for public, and for private purposes. Where the power is delegated for a mere private purpose, all the persons (if more than one) upon whom the authority is conferred must unite and concur in the exercise. In cases of the delegation of a public authority to three or more persons, the authority conferred may be exercised and performed by a majority of the whole number." Perry *v.* Tynen, 22 Barb. (N. Y.) 137, 140.

50. Cartwright *v.* Canandaigua Gaslight Co., 32 Hun (N. Y.) 403, 406 [*citing* Webster Dict.].

Applied to pollution of streams.— Where a statute prohibited any person from throwing or depositing, any dye-stuff, coal-tar, lime or other deleterious substance, into or upon any rivers, lakes, ponds, streams, etc., the court said: "By the language of the section it is manifest that it was the intention of the legislature that the acts prohibited must be such as to be deleterious in fact; that is, destructive of the life of fish. The adjective 'deleterious,' as used at the close of the prohibitory clause, has the effect, and we think such was the intention of the legislature in using the same, to limit and qualify the meaning of the previous general words of the paragraph." Cartwright *v.* Canandaigua Gaslight Co., 32 Hun (N. Y.) 403, 406.

51. Wharton L. Lex.

Applied to mines.— Where a statute confirmed to the tenants their customary estates of inheritance, "saving always all mines and minerals, of what kind and nature soever, quarries and delfs of flag slate or stone," the court said: "The words 'quarries and delfs of flag slate or stone' appear to be used to describe open workings, and the specified substances got by such workings, as distinguished from mines properly so called, and mineral substances usually got by underground works. The word 'delfs' probably means open pits or diggings." Atty.-Gen. *v.* Mylchreest, 48 L. J. P. C. 36, 44.

52. Morgan Leg. Max. [*citing* 12 Coke 74, 75].

DELIBERATE.[53] As an adjective, premeditated;[54] formed with deliberation, in contradistinction to a sudden, rash act;[55] not sudden or rash, carefully considering the probable consequences of a step;[56] an act done after reflecting and weighing the matter well.[57] As a verb, to weigh in the mind; to consider and examine the reasons for and against; to consider maturely; to reflect upon;[58] to reflect, with a view to make a choice.[59]

DELIBERATE CONVICTION. A fixed opinion.[60]

DELIBERATELY.[61] Done in a cool state of the blood,[62] and not in sudden passion engendered by a lawful or some just cause of provocation;[63] done from a formed design and fixed purpose, and not in what the law calls a heat of passion;[64] with cool purpose;[65] with cool, considered purpose;[66] thought of beforehand;[67] with careful consideration or deliberation; with full intent; not hastily or carelessly.[68]

DELIBERATE USE OF A DEADLY WEAPON. An intentional use, a use that is the result of a resolution, purpose or design, formed in the mind and reflected upon and not done in self-defense.[69]

53. "The word 'deliberate' is derived from two Latin words, which mean, literally, 'concerning,' and 'to weigh.'" Craft *v.* State, 3 Kan. 450, 483.

"Deliberate design" as employed in a statute defining murder see Hawthorne *v.* State, 58 Miss. 778, 786.

"Deliberate killing."— In People *v.* Pool, 27 Cal. 572, 585, Sawyer, J., in speaking of the terms "wilful killing," "deliberate killing," and "premeditated killing," as used in a statute in relation to murder, said: "There is a 'deliberate killing,' wherever such intent or purpose is formed upon deliberation, or consideration, and the deliberation or consideration need not be for any particular period of time; a moment is as effectual as an hour or a day."

54. People *v.* Ah Choy, 1 Ida. 317, 319 [*citing* Webster Dict.]; State *v.* Lopez, 15 Nev. 407, 414; State *v.* Hobbs, 37 W. Va. 812, 827, 17 S. E. 380.

55. Martin *v.* State, 119 Ala. 1, 5, 25 So. 255; Mitchell *v.* State, 60 Ala. 26, 28. See also Republic *v.* Yamane, 12 Hawaii 189, 203; Com. *v.* York, 9 Metc. (Mass.) 93, 107, 43 Am. Dec. 373; Nye *v.* People, 35 Mich. 16, 19 [*quoted* in State *v.* Foster, 130 N. C. 666, 672, 41 S. E. 284]; People *v.* Kiernan, 3 N. Y. Cr. 247, 250.

56. Atkinson *v.* State, 20 Tex. 522, 531.

57. Bower *v.* State, 5 Mo. 364, 386, 32 Am. Dec. 325. See also State *v.* Boyle, 28 Iowa 522, 524; Craft *v.* State, 3 Kan. 450, 483 [*quoted* in Simmerman *v.* State, 14 Nebr. 568, 570, 17 N. W. 115]; Clifford *v.* State, 60 N. J. L. 287, 291, 37 Atl. 1101.

58. Webster Dict. [*quoted* in Milton *v.* State, 6 Nebr. 136, 143].

59. Com. *v.* Smith, 2 Wheel. Cr. Cas. (Pa.) 79, 86.

60. Allison *v.* Com., 99 Pa. St. 17, 31.

61. Equivalent to "premeditatedly."— In State *v.* Dale, 108 Mo. 205, 18 S. W. 976 [*quoted* in State *v.* Reed, 117 Mo. 604, 613, 23 S. W. 886], the indictment omitted the word "premeditatedly," but used both "deliberately" and "malice aforethought." The court said: "We held the indictment sufficiently charged premeditation on the ground that the word 'deliberately' was a generic term including 'premeditatedly,' and because premeditation was also included in the words 'malice aforethought.'"

Compared with "wilfully."— In State *v.* Maier, 36 W. Va. 757, 771, 15 S. E. 991, the court said: "The terms 'willfully' and 'deliberately' necessarily imply a certain degree of will-power."

62. Republic *v.* Yamane, 12 Hawaii 189, 203; State *v.* Privitt, 175 Mo. 207, 216, 75 S. W. 457; State *v.* Taylor, 171 Mo. 465, 477, 71 S. W. 1005; State *v.* McMullin, 170 Mo. 608, 619, 71 S. W. 221; State *v.* Ashcraft, 170 Mo. 409, 413, 70 S. W. 898; State *v.* Gatlin, 170 Mo. 354 363, 70 S. W. 855; State *v.* Furgerson, 162 Mo. 668, 677, 63 S. W. 101; State *v.* Grant, 152 Mo. 57, 66, 53 S. W. 432; State *v.* Harper, 149 Mo. 514, 521, 51 S. W. 89; State *v.* McKenzie, 144 Mo. 40, 43, 45 S. W. 1117; State *v.* Donnally, 130 Mo. 642, 647, 32 S. W. 1124; State *v.* Fitzgerald, 130 Mo. 407, 420, 32 S. W. 1113; State *v.* Fairlamb, 121 Mo. 137, 146, 25 S. W. 895; State *v.* Schaefer, 116 Mo. 96, 109, 22 S. W. 447; State *v.* Avery, 113 Mo. 475, 495, 21 S. W. 193; State *v.* Seaton, 106 Mo. 198, 205, 17 S. W. 169; State *v.* Ellis, 74 Mo. 207, 214; State *v.* Talbott, 73 Mo. 347, 350; State *v.* Sharp, 71 Mo. 218, 220; State *v.* Jones, 64 Mo. 391, 393; Perugi *v.* State, 104 Wis. 230, 236, 30 N. W. 593, 76 Am. St. Rep. 865.

The word implies some degree of reflection. Jones *v.* Com., 75 Pa. St. 403, 406.

63. State *v.* Taylor, 171 Mo. 465, 477, 71 S. W. 1005; State *v.* Harper, 149 Mo. 514, 521, 51 S. W. 89; State *v.* Donnelly, 130 Mo. 642, 647, 32 S. W. 1124; State *v.* Schaefer, 116 Mo. 96, 109, 22 S. W. 447; State *v.* Talbott, 73 Mo. 347, 350; State *v.* Jones, 64 Mo. 391, 393.

64. State *v.* Seaton, 106 Mo. 198, 205, 17 S. W. 169. See also Republic *v.* Yamane, 12 Hawaii 189, 203.

65. Anthony *v.* State, Meigs (Tenn.) 265, 277, 33 Am. Dec. 143.

66. State *v.* Yarborough, 39 Kan. 581, 587, 18 Pac. 474.

67. State *v.* Andrew, 76 Mo. 101, 104.

68. Ferguson *v.* State, 36 Tex. Cr. 60, 62, 35 S. W. 369.

69. State *v.* Abrams, 11 Oreg. 169, 178, 8 Pac. 327, where it is said: "It is only necessary that it be the act of the mind when the

DELIBERATING. The act of weighing and examining the reasons for and against a choice of measures; careful discussion and examinations of the reasons for and against a proposition.[70]

DELIBERATION.[71] The act of deliberating, or of weighing and examining the reasons for and against a choice or measure;[72] mature reflection;[73] that act of the mind which examines and considers whether a contemplated act should or should not be done.[74] (Deliberation: As Element of — Crime in General, see CRIMINAL LAW; Homicide, see HOMICIDE.)

DELICATUS DEBITOR EST ODIOSUS IN LEGE. A maxim meaning "A delicate debtor is hateful in the law."[75]

DELICT. See TORTS.

DELICTUM. A delict, tort, wrong, injury, or offense.[76] (See, generally, TORTS.)

DELIMIT. To mark or lay out the limits or boundary line of a territory or country.[77]

DELINEATION. The act of representing, portraying, or depicting.[78]

mind has had time to act without heat or passion."

70. Webster Dict. [*quoted* in Stuart *v.* State, 35 Tex. Cr. 440, 441, 34 S. W. 118].

"Deliberating upon the accusation against the defendant."— Where a statute provided that "a motion to set aside an indictment or information shall be based on one or more of the following causes, . . . Because that some person not authorized by law was present when the grand jury were deliberating upon the accusation against the defendant" and, "that the attorney representing the State may come before the grand jury at any time, except when they are discussing the propriety of finding a bill of indictment," the court said: "We apprehend that 'discussing the propriety of finding a bill of indictment,' and 'deliberating upon the accusation against the defendant,' mean the same thing." Stuart *v.* State, 35 Tex. Cr. 440, 441, 34 S. W. 118 [*quoted* in Sims *v.* State, (Tex. Cr. App. 1898) 45 S. W. 705, 706].

71. Compared with "premeditation."— In State *v.* Kotovsky, 74 Mo. 247, 249, the court said that "deliberation" and "premeditation" "are of the same character of mental operations, differing only in degree. . . . Deliberation is but prolonged premeditation. In other words, in law, deliberation is premeditation, in a cool state of the blood, or, where there has been heat of passion, it is premeditation continued beyond the period within which there has been time for the blood to cool, in the given case. . . . Premeditation has been defined . . . as 'thought of beforehand, for any length of time, however short.' Deliberation is also premeditation, but is something more. It is not only to think of beforehand, which may be but for an instant, but the inclination to do the act is considered, weighed, pondered upon, for such a length of time after a provocation is given, as the jury may find was sufficient for the blood to cool. One in 'a heat of passion' may premeditate without deliberating. Deliberation is only exercised in a 'cool state of the blood,' while premeditation may be, either in that state of the blood, or in 'heat of passion.'" See also the following cases:

Arkansas.— Aubrey *v.* State, 62 Ark. 368, 369, 35 S. W. 792.

Connecticut.— State *v.* Fiske, 63 Conn. 388, 390, 28 Atl. 572.

Missouri.—State *v.* Wieners, 66 Mo. 13, 25 [*quoted* in State *v.* Curtis, 70 Mo. 594, 599]; Bower *v.* State, 5 Mo. 364, 386, 32 Am. Dec. 325.

Nevada.— State *v.* Ah Mook, 12 Nev. 369, 377.

New York.— People *v.* Barberi, 12 N. Y. Cr. 210, 216.

Pennsylvania.— Keenan *v.* Com., 44 Pa. St. 55, 56, 84 Am. Dec. 414.

Texas.— Atkinson *v.* State, 20 Tex. 522, 531.

Compared with "sufficient legal provocation."— In State *v.* Smith, 10 Rich. (S. C.) 341, 347, the court said: "In the report which has been laid before us, . . . 'deliberation' and 'sufficient legal provocation' are, respectively made to characterize murder and manslaughter; and using the terms in a strict technical sense, this is correct. But deliberation must be understood to mean, not slowness and composure as distinguished from suddenness and excitement, but freedom from the temporary phrenzy, excited by sufficient legal provocation, as distinguished from that phrenzy which the law allows to moderate its rigor in pity to human frailty. A voluntary act, which is without sufficient legal provocation, is deliberate, no matter how sudden or how furious it may be."

72. Debney *v.* State, 45 Nebr. 856, 865, 64 N. W. 446, 34 L. R. A. 851; Com. *v.* Perrier, 3 Phila. (Pa.) 229, 232; Webster Dict. [*quoted* in Simmerman *v.* State, 14 Nebr. 568, 569, 17 N. W. 115].

73. Webster Dict. [*quoted* in Simmerman *v.* State, 14 Nebr. 568, 569, 17 N. W. 115].

74. U. S. *v.* Kie, 26 Fed. Cas. No. 15,528*b*.

75. Bouvier L. Dict.

76. Black L. Dict.

77. Black L. Dict.

78. Century Dict.

Postal regulation.— Where a statute condemned as unmailable matter "upon the envelope or outside cover or wrapper of which, . . . any delineations, epithets, terms, or

DELINQUENCY. Gross neglect to perform a lawful obligation, or wilful default.[79]

DELINQUENS PER IRAM PROVOCATUS PUNIRI DEBET MITIUS. A maxim meaning "A delinquent provoked by anger ought to be punished more mildly."[80]

DELINQUENT. One failing in duty, offending by neglect of duty;[81] one who fails to perform his duty; an offender or transgressor; one who commits a fault or crime.[82]

DELINQUENT LIST. See TAXATION.

DELIRIUM. That state of mind in which it acts without being directed by the power of volition, which is wholly or partially suspended;[83] mental aberration or a wandering of the mind;[84] a fluctuating state of mind, created by temporary excitement.[85]

DELIRIUM FEBRILE. In medical jurisprudence, a form of mental aberration incident to fevers, and sometimes to the last stages of chronic diseases.[86]

language of an indecent . . . character, or calculated by the terms or manner, or style of display and obviously intended to reflect injuriously upon the character or conduct of another," etc., the court said: "If the terms covered only 'writing' and 'printing,' of the character described, his acts would not be embraced. They cover, however, 'delineations' of this character, also. This term signifies representations expressed otherwise than by language,— as by the use of figures, drawings, colors, etc. If the fact that a dunning letter is contained in an envelope may be expressed by a figure or other sign impressed upon it, of a character recognized as conveying such expression, by those who may see it, such figure or sign is a 'delineation' within the meaning of the statute." U. S. *v.* Dodge, 70 Fed. 235, 236.

79. Ferguson *v.* Pittsburgh, 159 Pa. St. 435, 440, 28 Atl. 118.

Applied to a letter of indemnity.— Where a letter in reference to a merchant stated that "he will stand in need of your aid and indulgence, which if you render him, (in case of his failure or delinquency,) we will indemnify you," etc., O'Neall, J., in a dissenting opinion, said: "What is meant by the terms 'failure or delinquency?' It is true, in legal parlance, the neglect of any duty may be a failure, and the commission of any fault a delinquency; but, as I said in the outset, the defendants were merchants speaking to merchants; and their words must have their usual interpretation among them. The word 'failure,' applied to a merchant or mercantile concern, means an inability to pay his or their debts, from insolvency.— I take it, then, that the word 'failure' must be regarded as synonymous with 'insolvency.' 'Delinquency' cannot mean, when applied to a merchant, anything less than that he has proved to be dishonest, and attempted to evade the payment of his debts." Boyce *v.* Ewart, Rice (S. C.) 126, 139.

"Incorrigibility and delinquency are two different offences. One has in it the elements of continuous disobedience of parental commands, viciousness and general bad conduct. The other may be, and often is, a single offence, 'the violating of any law of this state or any city or borough ordinance.'" *In re* Shelton, 11 Pa. Dist. 155, 156.

80. Bouvier L. Dict. [*citing* 3 Inst. 55].

81. Webster Dict. [*quoted* in Cleveland Retail Grocers' Assoc. *v.* Exton, 18 Ohio Cir. Ct. 321, 324].

82. Webster Dict. [*quoted* in People *v.* Park, 41 N. Y. 21, 33; Cleveland Retail Grocers' Assoc. *v.* Exton, 18 Ohio Cir. Ct. 321, 324].

Delinquent debtor.— Where a statute provided that "the books and papers of such delinquent debtor shall at all times be subject to the inspection and examination of any creditor," the court said: "The words debtor and delinquent debtor were in this section used as synonymous with the word assignor." Matter of Herrmann Lumber Co., 21 N. Y. App. Div. 514, 517, 48 N. Y. Suppl. 509, construing N. Y. Laws (1877), c. 446.

Delinquent tax.— In Chauncey *v.* Wass, 35 Minn. 1, 14, 25 N. W. 457, 30 N. W. 826, Gilfillan, C. J., in speaking of a delinquent tax, said: "The statute most pointedly provides for a trial and judgment on a tax which cannot be called legally delinquent at the time the action is commenced. Delinquency necessarily includes present obligation to pay. It is the neglect of that obligation."

83. Owing's Case, 1 Bland (Md.) 370, 386, 17 Am. Dec. 311 [*quoted* in Clark *v.* Ellis, 9 Oreg. 128, 141], where it is said: "This happens most perfectly in dreams. But what is commonly called delirium, is always preceded or attended by a feverish and highly diseased state of the body. The patient in delirium is wholly unconscious of surrounding objects; or conceives them to be different from what they really are. His thoughts seem to drift about; wildering and tossing amidst distracted dreams. And his observations, when he makes any, as often happens, are wild and incoherent; or, from excess of pain, he sinks into a low muttering, or silent and death-like stupor."

84. Webster Dict. [*cited* in Supreme Lodge K. of H. *v.* Lapp, 74 S. W. 656, 657, 25 Ky. L. Rep. 74].

85. Brogden *v.* Brown, 2 Add. Eccl. 441, 445.

86. Black L. Dict.

DELIRIUM TREMENS.[87] A violent delirium induced by the excessive and prolonged use of intoxicating liquors;[88] a disorder of the brain arising from inordinate and protracted use of ardent spirits, and therefore almost peculiar to drunkards;[89] one of the forms of insanity consequent on excessive drinking;[90] a temporary insanity or madness, accompanied with a tremulous condition of the body or limbs, generally caused by habitual drunkenness;[91] a disease of the brain, characterized by frightful dreams and visions, and resulting from the excessive and protracted use of spirituous liquors.[92] (Delirium Tremens: Affecting Responsibility For Crime, see CRIMINAL LAW. See, generally, DRUNKARDS.)

DELIVER.[93] To give or transfer;[94] to give forth in action or exercise; to discharge.[95]

DELIVERANCE. The act of giving or transferring from one to another.[96]

DELIVERY.[97] The transfer of the possession of a thing from one person to

87. "**Death by delirium tremens** imports death by voluntary and habitual drunkenness." St. Louis Mut. L. Ins. Co. *v.* Graves, 6 Bush (Ky.) 268, 271.

88. Webster Dict. [*quoted* in Ætna L. Ins. Co. *v.* Deming, 123 Ind. 384, 389, 24 N. E. 86, 375].

89. Century Dict. [*quoted* in Ætna L. Ins. Co. *v.* Deming, 123 Ind. 384, 389, 24 N. E. 86, 375].

90. Lawton *v.* Sun Mut. Ins. Co., 2 Cush. (Mass.) 500, 517. See also Maconnehey *v.* State, 5 Ohio St. 77, 78; Evers *v.* State, 31 Tex. Cr. 318, 330, 20 S. W. 744, 37 Am. St. Rep. 811, 18 L. R. A. 421.

91. Stormonth English Dict. [*quoted* in Ætna L. Ins. Co. *v.* Deming, 123 Ind. 384, 389, 24 N. E. 86, 375]. See also U. S. *v.* McGlue, 26 Fed. Cas. No. 15,679, 1 Curt. 1 [*quoted* in Carter *v.* State, 12 Tex. 500, 506, 62 Am. Dec. 539].

92. Worcester Dict. [*quoted* in Ætna L. Ins. Co. *v.* Deming, 123 Ind. 384, 389, 24 N. E. 86, 375].

93. "**The word 'deliver' has perhaps as many different shades of meaning** ascertained by judicial interpretation as any other term known to the law." U. S. *v.* McCready, 11 Fed. 225, 234.

Applied to crops.— Where a contract required the lessee of a farm to "deliver" the lessor's portion of the crops in specified places, the court said: "To deliver to the plaintiff one-sixth part of the crops, means something more than to deposit the whole crop in the specified place. The plaintiff's portion must be secured." Manwell *v.* Manwell, 14 Vt. 14, 23. And where defendant on his part agreed, to "'carry on the farm, in a good husbandlike manner, and to deliver said Trunan, . . . one half of all the crops,'" the court said that "the defendant could not be said to have performed his part of the contract until he had 'delivered,' i. e., set apart, plaintiff's portion of the crops." Hurd *v.* Darling, 14 Vt. 214, 220.

"**Deliver" in respect to the duty of an officer** to serve a writ see Patten *v.* Sowles, 51 Vt. 388, 391.

When may be equivalent to "pass" in reference to the crime of passing a forged draft see State *v.* Watson, 65 Mo. 115, 119 [*cited* in State *v.* Mills, 146 Mo. 195, 204, 47 S. W. 938].

94. Betts *v.* Boyd, 31 Nebr. 815, 817, 48 N. W. 889; Webster Dict. [*quoted* in State *v.* McMahon, 53 Conn. 407, 414, 5 Atl. 596, 55 Am. Rep. 140].

"**Agreements to 'deliver'** import a delivery which is to pass the title, unless there is something in the character of the article or the attending circumstances to qualify the language." Shelton *v.* French, 33 Conn. 489, 496. See also Bowers *v.* Whitney, 88 Minn. 168, 171, 92 N. W. 540.

95. "As to deliver a broadside or a ball." Webster Dict. [*quoted* in Evansville *v.* Senhenn, 151 Ind. 42, 64, 47 N. E. 634, 51 N. E. 88, 68 Am. St. Rep. 218, 41 L. R. A. 728, where it is said: "That is the same meaning the word has in the sentence, 'To deliver the opinion,' 'To deliver an address.' The word used in such a connection does not imply an act of the will on the part of some one else, nor an acceptance of anything"].

96. Century Dict.

Used in action of replevin.— Where a statute provided that "if the defendant in replevin or possessor, shall claim property in the thing whereof deliverance is sought, and the sheriff, . . . having due notice, shall nevertheless proceed to make deliverance and dispossess such defendant thereof," etc., the court said: "Without stopping to inquire into the strict philological meaning of the term deliverance, whether it means to deliver to, as the defendant contends, or, as the plaintiff insists, 'to liberate,' 'to set free,' 'to deliver from,' the connection in which it stands, appears to me to leave no reasonable doubt of the sense in which it was used by the legislature in the section in question. The sheriff shall not proceed to make deliverance and dispossess the defendant. There is no ambiguity or doubt as to the meaning of the latter expression. The property is not to be taken from the possession of the defendant." Lisher *v.* Pierson, 2 Wend. (N. Y.) 345, 348, 20 Am. Dec. 612.

97. **Delivery of child** see Blake *v.* Junkins, 35 Me. 433, 435.

Delivery of transcript.— Where a statute made it the duty of a justice of the peace to make out a certified transcript and "'on demand deliver the same to the appellant or his agent,'" the court said: "The word 'deliver' is not there used in the sense of sending it by mail or messenger. Plainly it con-

another;[98] transmitting the possession of a thing from one person into the power or possession of another;[99] the transferring of the thing sold into the power and possession of the buyer;[1] the act by which the donor parts with his title and possession to the subject of a donation, and the donee acquires the right and possession thereto.[2] (Delivery: By Bailee, see Bailments. By Carrier, see Carriers. By Warehouseman, see Warehousemen. For Bailments, see Bailments. In Escrow, see Escrows. Of Assignment, see Assignments; Assignments For Benefit of Creditors. Of Award, see Arbitration and Award. Of Bail-Bond, see Bail. Of Bill of — Exchange, see Commercial Paper; Sale, see Sales. Of Bond — In General, see Bonds; On Appeal or Error, see Appeal and Error. Of Contract, see Contracts. Of Copy of — Account, see Accounts and Accounting; Book to Obtain Copyright, see Copyright. Of Deed, see Deeds. Of Deposit, see Depositaries. Of Gift, see Gifts. Of Goods Sold, see Frauds, Statute of; Sales. Of Mortgage, see Chattel Mortgage; Mortgages. Of Pledge, see Pledges. Of Policy of Insurance, see Insurance. Of Possession of Property as Affecting Validity of Assignment, see Assignments For Benefit of Creditors. Of Promissory Note, see Commercial Paper. Of Subscription Agreement, see Subscriptions. Of Telegram, see Telegraphs and Telephones. Of Verdict, see Criminal Law; Trial. To Bailee, see Bailments. To Carrier, see Carriers.)

DELIVERY BOND. A bond that goods or their value will be delivered up at

templates a demand at the office of the justice and a delivery there to the appellant or his agent." Van Sant *v.* Francisco, 55 Nebr. 650, 652, 75 N. W. 1086.

"Delivery to market." — Where the plaintiffs agreed to furnish money enough "to pay off the men (employed on the raft) within twenty-four hours after the delivery of the said lumber to market," the court said: "The words 'delivery to market' mean 'arrival at the place of destination.'" Farrington *v.* Meek, 30 Mo. 578, 584, 77 Am. Dec. 627.

Equivalent to "received." — Bullock *v.* Tschergi, 13 Fed. 345, 346, 4 McCrary 184.

Implies mutual acts. — Ostrander *v.* Brown, 15 Johns. (N. Y.) 39, 42, 8 Am. Dec. 211 [*quoted* in U. S. *v.* McCready, 11 Fed. 225, 234].

Used in different senses. — In National Bank of Commerce *v.* Chicago, etc., R. Co., 44 Minn. 224, 228, 46 N. W. 342, 560, 20 Am. St. Rep. 566, 9 L. R. A. 263, the court, in speaking of a "delivery" of wheat by an elevator company, said: "The word 'delivery' is used in different senses; and acts and facts may be sufficient to constitute a delivery for one purpose and not for another purpose." See also Morse *v.* Sherman, 106 Mass. 430, 433; De Bary *v.* Souer, 101 Fed. 425, 428, 41 C. C. A. 417.

98. Bouvier L. Dict. [*quoted* in Western Union Tel. Co. *v.* Locke, 107 Ind. 9, 13, 7 N. E. 579].

Applied to a sight draft. — Where a sight draft, attached to a sealed package addressed to the drawee of the draft, was sent by mail to a bank for collection with the instruction, "Papers to be delivered only on payment of draft," the court said: "The word 'delivery' could have no double meaning in the letter of instructions, and the delivery which the defendant was prohibited from making, except upon payment of the draft, could be no other than the delivery which it was required to make upon such payment." People's Nat. Bank *v.* Freeman's Nat. Bank, 169 Mass. 129, 133, 47 N. E. 588, 61 Am. St. Rep. 279.

Applied to a transfer of a check. — In Kinne *v.* Ford, 52 Barb. (N. Y.) 194, 197 [*quoted* in Shipman *v.* New York State Bank, 13 N. Y. Suppl. 475, 483, where one question raised was whether a check had been delivered, the court said: "Delivery was the transfer of the possession of the check in question, with the intent to transfer the title by the plaintiffs to the agent of the defendants, and the acceptance, by such agent, of the check for his employers with the intent to receive such title. It is a thing which both parties must join. The minds of both parties must concur."

"Delivery of possession of goods and chattels, may be either actual or constructive." Brown *v.* Dikerson, 2 Marv. (Del.) 119, 121, 42 Atl. 421.

99. Bouvier L. Dict. [*quoted* in Lander *v.* Peoria Agricultural, etc., Soc., 71 Ill. App. 475, 479].

"The delivery of a document is more than the production of it, for delivery imports a surrender or parting with possession for a permanent purpose. A familiar illustration of the meaning of the word 'delivery' is found in the law upon the subject of the execution of deeds, as well as in the law of contracts." Western Union Tel. Co. *v.* Locke, 107 Ind. 9, 13, 7 N. E. 579.

1. La. Code, art. 2452 [*quoted* in Lambeth *v.* Wells, 12 Rob. (La.) 51, 54].

"There may be a delivery without handling the property, or changing its position." Shindler *v.* Houston, 1 N. Y. 261, 266, 49 Am. Dec. 316 note.

2. McWillie *v.* Van Vacter, 35 Miss. 428, 449, 72 Am. Dec. 127.

a certain time or upon certain conditions.[3] (See, generally, ATTACHMENT; EXECUTIONS; REPLEVIN.)

DELSARTIAN. Of or pertaining to François Delsarte, a French musician, or to the method of developing bodily grace and strength founded by him.[4]

DE LUNATICO INQUIRENDO. See INSANE PERSONS.

DELUSION.[5] A diseased state of the mind in which persons believe things to exist, which exist only, or to the degree they are conceived of only, in their own imaginations, with the persuasion so fixed and firm that neither evidence nor argument can convince them to the contrary;[6] the conception of the existence of something extravagant, which has no existence whatever, but of which the person entertaining it is incapable of becoming permanently disabused by argument, reason or proof;[7] the mind's spontaneous conception and acceptance of that, as a fact, which has no real existence except in its imagination, and its persistent adherence to it against all evidence;[8] conceptions that originate spontaneously in the

3. English L. Dict.

4. Century Dict.

Origin and application of the term.— "'Delsarte' was the name of a French artist (1811 to 1871) who became celebrated for his theory of the method of exercise for developing bodily grace and strength and the power of dramatic expression. The general system or theory has become so well known that the word 'Delsartian,' as denoting the system, has since become a recognized generic or descriptive word of the English language." Medlar, etc., Shoe Co. *v.* Delsarte Mfg. Co., (N. J. Ch. 1900) 46 Atl. 1089 [*citing* Century Dict.; Standard Dict.].

5. **Compared with insanity.**— In Smith *v.* Tebbitt, L. R. 1 P. 398, 401, 36 L. J. P. 97, 16 L. T. Rep. N. S. 841, 16 Wkly. Rep. 18 [*quoted* in State *v.* Pike, 49 N. H. 399, 432, 6 Am. Rep. 533], it is said: "What is to be the proof of disease? What is to be the test, if there be a test, of morbid and mental action? The existence of mental 'delusions,' it would perhaps be answered. But this only postpones the question in place of answering it. For what is a mental 'delusion'? How is it to be defined so as to constitute a test, universally applicable, of mental disorder or disease? The word is not a very fortunate one. In common parlance, a man may be said to be under a 'delusion,' when he only labours under a mistake. The 'delusion' intended is, of course, something very different. To say that a 'morbid' or an 'insane delusion' is meant, is to beg the question, for the 'delusion' to be sought is to be the test of insanity; and to say that an insane or morbid delusion is the test of insanity or disease, does not advance the inquiry." And see Dew *v.* Clark, 2 Add. Eccl. 102 [*quoted* in Stanton *v.* Wetherwax, 16 Barb. (N. Y.) 259, 262], where it is said: "The true test of the absence or presence of insanity I take to be the absence or presence of what, used in a certain sense of it, is comprisable in a single term, namely delusion. Whenever the patient once conceives something extravagant to exist, which has still no existence whatever but in his own heated imagination; and whenever, at the same time, having once so conceived, he is incapable of being, or at least of being permanently reasoned out of that conception, such a patient is said to be under a delusion, in a peculiar half technical sense of the term; and the absence or presence of delusion so understood forms, in my judgment, the only true test or criterion of absent or present insanity. In short I look upon delusion, in this sense of it, and insanity to be almost, if not altogether, convertible terms." See also the following cases:

Indiana.— Burkhart *v.* Gladish, 123 Ind. 337, 342, 24 N. E. 118.

Maine.— Robinson *v.* Adams, 62 Me. 369, 16 Am. Rep. 473.

New Hampshire.— Boardman *v.* Woodman, 47 N. H. 120, 139 [*cited* in State *v.* Jones, 50 N. H. 369, 397, 9 Am. Rep. 242].

New Jersey.— Middleditch *v.* Williams, 45 N. J. Eq. 726, 734, 17 Atl. 826, 4 L. R. A. 738.

Pennsylvania.—Buchanan *v.* Pierie, 205 Pa. St. 123, 129, 54 Atl. 583.

Distinguished from "mistaken belief."—In Matter of Lapham, 19 Misc. (N. Y.) 71, 77, 44 N. Y. Suppl. 90, the court said: "Where a person tenaciously holds to the belief that a certain state of affairs exist, which in fact does not, and which can only be accounted for as the creation of a perverted imagination, without probable cause or evidence, he is suffering from a delusion and not a mistaken belief."

"Delusions of the mind which render void the act caused by such delusions must be a belief of facts which no sane person would believe." Riggs *v.* American Home Missionary Soc., 35 Hun (N. Y.) 656, 658.

6. Bouvier L. Dict. [*quoted* in Robinson *v.* Adams, 62 Me. 369, 401, 16 Am. Rep. 473; Matter of Jenkins, 39 Misc. (N. Y.) 618, 620, 80 N. Y. Suppl. 664; Phillips *v.* Chater, 1 Dem. Surr. (N. Y.) 533, 542; Matter of Smith, 24 N. Y. Suppl. 928, 929, 1 Pow. Surr. (N. Y.) 146].

7. Matter of Henry, 18 Misc. (N. Y.) 149, 154, 41 N. Y. Suppl. 1096 [*citing* Stanton *v.* Wetherwax, 16 Barb. (N. Y.) 259, 262]; Gass *v.* Gass, 3 Humphr. (Tenn.) 278, 283; Denson *v.* Beazley, 34 Tex. 191, 213.

8. Smith *v.* Smith, 48 N. J. Eq. 566, 570, 25 Atl. 11 [*citing* Middleditch *v.* Williams, 45 N. J. Eq. 726, 734, 17 Atl. 326, 4 L. R. A. 738].

mind without evidence of any kind to support them;[9] a belief in something impossible in the nature of things or circumstances of the case;[10] a belief in a state or condition of things, the existence of which no rational person would believe;[11] a belief of facts which no rational person would have believed;[12] a pertinacious adherence to some delusive idea, in opposition to plain evidence of its falsity;[13] where a person pertinaciously believes something to exist which does not exist, and acts upon that belief.[14] (Delusion: Affecting — Capacity to Make Will, see Wills; Responsibility For Crime, see Criminal Law.)

DE MAJORI ET MINORI NON VARIANT JURA. A maxim meaning "Concerning greater and less laws do not vary."[15]

DEMAND.[16] A Claim, *q. v.*; a legal obligation;[17] a requisition or request to do a particular thing specified under a claim of right on the part of the person

9. Potter *v.* Jones, 20 Oreg. 239, 249, 25 Pac. 769, 12 L. R. A. 161 [*quoted* in *In re* Scott, 128 Cal. 57, 62, 60 Pac. 527].

10. Riggs *v.* American Home Missionary Soc., 35 Hun (N. Y.) 656, 659. But see Medill *v.* Snyder, 61 Kan. 15, 23, 58 Pac. 962, 78 Am. St. Rep. 307.

11. Matter of Mason, 60 Hun (N. Y.) 46, 51, 14 N. Y. Suppl. 434.

12. Smith *v.* Tebbitt, L. R. 1 P. 398, 401, 36 L. J. P. 97, 16 L. T. Rep. N. S. 841, 16 Wkly. Rep. 18 [*quoting* Dew *v.* Clark, 2 Add. Eccl. 102].

13. Smith *v.* Tebbitt, L. R. 1 P. 398, 402, 36 L. J. P. 97, 16 L. T. Rep. N. S. 841, 16 Wkly. Rep. 18 [*quoting* Dew *v.* Clark, 2 Add. Eccl. 102, and *quoted* in State *v.* Pike, 49 N. H. 399, 432, 6 Am. Rep. 533].

Synonymous with prejudices, etc.—In Boyd *v.* Eby, 8 Watts (Pa.) 66, 72, it is said: "It seems to me that the court below fell into an error in drawing a distinction between the insane delusion itself and the impressions or prejudices occasioned by such delusion, and in supposing that the former might cease and the latter continue. They are to my mind the same thing, or rather, the presence of absurd prejudices, of groundless antipathies, of silly and chimerical hatreds, originating in acknowledged insanity, is the only evidence we can have of the existence of the delusion. The term delusion refers to the state of mind; impression, to the results of that state of mind; but when the results are gone, we can well assert that the delusion is gone."

14. *In re* Tittel, Myr. Prob. (Cal.) 12, 14.

"A delusion exists where a person, against all evidence and probability, persists in believing as facts, matters that have no existence except in his own perverted imagination." Rush *v.* Megee, 36 Ind. 69, 80. See also Davis *v.* Denny, 94 Md. 390, 393, 50 Atl. 1037.

15. Bouvier L. Dict. [*citing* Legatt *v.* Sewell, 2 Vern. Ch. 551, 552, 23 Eng. Reprint 957, 1 P. Wms. 87, 24 Eng. Reprint 306].

16. The word "demand" is one of the most comprehensive terms in the law.

Alabama.— Rosser *v.* Bunn, 66 Ala. 89, 93.

Arkansas.— State *v.* Baxter, 38 Ark. 462, 467.

California.— Adams *v.* Modesto, 131 Cal. 501, 502, 63 Pac. 1083.

Indiana.— McDonald *v.* McDonald, 142 Ind. 55, 87, 41 N. E. 336; Wiseman *v.* Wiseman, 73 Ind. 112, 116, 38 Am. Rep. 115.

Missouri.— Mayberry *v.* McClurg, 51 Mo. 256, 261; Vandolah *v.* McKee, 99 Mo. App. 342, 345, 73 S. W. 233.

New Jersey.— White *v.* Hunt, 6 N. J. L. 415, 417.

New York.— *In re* Fay, 6 Misc. 462, 466, 27 N. Y. Suppl. 910; Vedder *v.* Vedder, 1 Den. 257, 261; *In re* Denny, 2 Hill 220; Heacock *v.* Sherman, 14 Wend. 58, 60.

Pennsylvania.— Scott *v.* Morris, 9 Serg. & R. 122, 124.

Wisconsin.— Kelley *v.* Madison, 43 Wis. 638, 644, 28 Am. Rep. 576.

England.— Coke Litt. 291*b*.

"Demand made in writing" used in reference to the payment of interest coupons secured by a mortgage see Pennsylvania L., etc., Co. *v.* Philadelphia, etc., R. Co., 69 Fed. 482, 483.

"Demand or claim, is properly used in reference to the cause of action." Saddlesvene *v.* Arms, 32 How. Pr. (N. Y.) 280, 285.

The term will include taxes that accrue on the personal estate of a decedent, while in charge of an administrator or executor. State *v.* Tittmann, 103 Mo. 553, 558, 15 S. W. 936.

17. *Alabama.*— Rosser *v.* Bunn, 66 Ala. 89, 92.

Arkansas.— State *v.* Baxter, 38 Ark. 462, 467.

Iowa.— Hollen *v.* Davis, 59 Iowa 444, 447, 13 N. W. 413, 44 Am. Rep. 688.

Missouri.— Mayberry *v.* McClurg, 51 Mo. 256, 261.

Texas.— See Brackenridge *v.* State, 27 Tex. App. 513, 528, 11 S. W. 630, 4 L. R. A. 360 [*quoting* Bouvier L. Dict.].

Wisconsin.— Kelley *v.* Madison, 43 Wis. 638, 644, 28 Am. Rep. 576 [*citing* Bouvier L. Dict.].

"Claim or demand."— In Van Frachen *v.* Ft. Howard, 88 Wis. 570, 572, 60 N. W. 1062 [*quoted* in Pulitzer *v.* New York, 48 N. Y. App. Div. 6, 11, 62 N. Y. Suppl. 587], a statute provided that no action should be maintained against a city "upon any claim or demand of whatsoever nature, other than a city bond or order, unless such person shall have first presented such claim or demand to the common council of the city." It was held that the words "of whatsoever nature" expanded the meaning of the term "claim or demand" to such an extent as to make it

requesting;[18] a thing or amount claimed to be due;[19] a calling for a thing due or claimed to be due.[20] (Demand: As Affecting Running of Limitations, see Limitations of Actions. As Condition Precedent to Action — In General, see Actions; Against Absentees, see Absentees; Against Agent by Principal, see Principal and Agent; Against Assignee, see Assignments For Benefit of Creditors; Against Attorney For Money Collected, see Attorney and Client; Against Bailee, see Bailments; Against Bank, see Banks and Banking; Against Broker by Principal, see Factors and Brokers; Against Carrier, see Carriers; Against City, see Municipal Corporations; Against County, see Counties; Against Depositary, see Depositaries; Against Receiptor of Attached Property, see Attachment; Against Surety on Appeal-Bond, see Appeal and Error; Against Towns, see Towns; By Assignee, see Assignments For Benefit of Creditors; By Attorney For Compensation; see Attorney and Client; By Bailor Against Third Person, see Bailments; By Landlord For Possession, see Landlord and Tenant; By Mortgagee, see Chattel Mortgages; Mortgages; For Accounts, see Accounts and Accounting; For Breach of Contract, see Contracts; For Breach of Contract of Sale, see Sales; Vendor and Purchaser; For Breach of Marriage Promise, see Breach of Promise to Marry; For Commissions of Agent or Broker, see Factors and Brokers; Principal and Agent; For Conversion, see Trover and Conversion; For Deposit, see Banks and Banking; For Forcible Entry and Detainer, see Forcible Entry and Detainer; For Fraud or Deceit, see Fraud; For Libel or Slander, see Libel and Slander; For Rent, see Landlord and Tenant; For Specific Performance, see Specific Performance; Of Assumpsit, see Assumpsit, Action of; Of Book-Account or Book-Debt, see Accounts and Accounting; Of Detinue, see Detinue; Of Replevin, see Replevin; Of Trover, see Trover and Conversion; On Appeal-Bond, see Appeal and Error; On Award, see Arbitration and Award; On Bill or Note, see Commercial Paper; On Bond, see Bonds; On Insurance Policy, see Insurance; To Cancel Instrument, see Cancellation of Instruments; To Redeem From Mortgage, see Chattel Mortgages; Mortgages; To Reform Instrument, see Reformation of Instruments; Under Civil Damage Laws, see Intoxicating Liquors. Authority of Attorney To Make, see Attorney and Client. Bills or Notes Payable on, see Commercial Paper. By Claimant of Attached Property, see Attachment. For Appraisal of Loss Under Insurance Policy, see Fire Insurance. For Goods Confused With Other Goods, see Confusion of Goods. For Inspection of Books and Papers, see Discovery. For Jury, see Juries. For Payment — As Affecting Right to Interest, see Interest; Of Bill

broad enough to include a claim arising out of tort, the court in the opinion saying: "The term 'claim or demand,' without other words of explanation or expansion, is held to include only claims and demands arising upon contract, and does not include any cause of action arising from a tort." See also Howell *v.* Buffalo, 15 N. Y. 512, 523 (where it is said: "'Demands or claims' are the largest words of that class, and clearly embrace a cause of action founded upon a trespass to personal property. Littleton says that the most beneficial release which a man can have is a release from all demands; and Lord Coke declares that a release of all claims extends to all demands"); Vogel *v.* Antigo, 81 Wis. 642, 645, 51 N. W. 1008; Bradley *v.* Eau Claire, 56 Wis. 168, 177, 14 N. W. 10.

"Demand arising upon judgment" as used in a statute see Oakley *v.* Aspinwall, 1 Duer (N. Y.) 1, 44, per Bosworth, J., in dissenting opinion.

Demand not sounding in damages.—In Holley *v.* Younge, 27 Ala. 203, 206 [*quoted* in Rosser *v.* Bunn, 66 Ala. 89, 93], the court said: "What we understand by a demand 'not sounding in damages merely,' is one which, when the facts upon which it is based are established, the law is capable of measuring accurately by a pecuniary standard."

18. Bouvier L. Dict. [*quoted* in Brackenridge *v.* State, 27 Tex. App. 513, 528, 11 S. W. 630, 4 L. R. A. 360].

19. Rosser *v.* Bunn, 66 Ala. 89, 93 (where it is said: "It is broad enough in its signification to take in all claims, demandable or solvable in money"); Kelley *v.* Madison, 43 Wis. 638, 644, 28 Am. Rep. 576 [*citing* Burrill L. Dict.].

"Arising out of the plaintiff's demand" as used in a statute relative to set-off see Blair *v.* Johnson, (Tenn. Sup. 1903) 76 S. W. 912, 914.

"One day after demand," etc., as used in a note see Smith *v.* Ijams, 70 Hun (N. Y.) 155, 160, 24 N. Y. Suppl. 202.

20. Burrill L. Dict. [*cited* in Kelley *v.* Madison, 43 Wis. 638, 644, 28 Am. Rep. 576].

or Note, see Commercial Paper; Of Debt Guaranteed, see Guaranty. For Performance of — Contract, see Contracts; Sales; Vendor and Purchaser; Covenant, see Covenants. For Production of Books and Papers at Trial, see Evidence. Retention of Property After, see Trover and Conversion. To Charge Indorser of Negotiable Instrument, see Commercial Paper. To Fix Liability of Bail, see Bail.)

DEMANDANT. The plaintiff or party suing in a real action.[21]

DEMAND IN RECONVENTION. In the law of Louisiana a word equivalent to the term "counterclaim."[22]

DEMANDS DUE. In the commercial and popular acceptation of the words, debts presently payable.[23]

DE MEDIETATE LINGUÆ. Of half-tongue; i. e. half of one tongue or language, and half of another.[24]

DE MELIORIBUS DAMNIS. Of or for the better damages.[25]

DEMENTED. Of unsound mind.[26] (See, generally, Insane Persons.)

DEMENTIA.[27] In medical jurisprudence, that form of insanity which is characterized by mental weakness and decrepitude, and by total inability to reason,[28] where the mental derangement is accompanied with a general derangement of the faculties;[29] an extremely low condition of the mental function; profound

21. Black L. Dict. [*citing* Coke Litt. 127].

22. McLeod *v.* Bertschy, 33 Wis. 176, 177, 14 Am. Rep. 755, where it is said: "And to 'reconvene' is equivalent to interposing a counterclaim in the answer. Such pleading is denominated a 'plea of reconvention.'"

23. Ming *v.* Woolfolk, 3 Mont. 380, 385 [*citing* Leggett *v.* Sing Sing Bank, 25 Barb. (N. Y.) 326].

24. Burrill L. Dict.

A term applied to that particular description of jury in England where one-half consisted of denizens or natives, and the other half of aliens, and which was allowed both in civil and criminal actions where one of the parties was an alien. Burrill L. Dict. [*citing* 4 Blackstone Comm. 352; 3 Blackstone Comm. 360].

It was formerly in use in the state of New York, but is now abolished, as it generally is throughout the United States. Burrill L. Dict. [*citing* People *v.* McLean, 2 Johns. (N. Y.) 381].

That alien defendants are not entitled in Nova Scotia to a jury *de medictate linguæ* see 2 Cyc. 106 note 75.

25. A term used in practice to denote the election by a plaintiff against which of several defendants (where the damages have been assessed separately) he will take judgment. Black L. Dict. [*citing* in Knickerbacker *v.* Colver, 8 Cow. (N. Y.) 111, 112]. See also Clissold *v.* Machell, 26 U. C. Q. B. 422, 427, where it is said: "It is laid down in Mayne on Damages, at p. 330, 'Where damages are assessed severally instead of jointly, judgment will be reversed; but the plaintiff may cure it by taking judgment *de melioribus damnis* against one and entering up a *nolle prosequi* against the other, and this whether they have joined or severed in pleading.'"

26. Black L. Dict.

27. Defined by Sir Matthew Hale.— In Cornwell *v.* State, Mart. & Y. (Tenn.) 147, 156, it is said: "The good and the great, the humane yet firm, Sir Matthew Hale, in his history of the Pleas of the Crown, divides madness, (*dementia*) into three kinds,— idiocy, accidental or adventitious madness, and drunkenness. 'The second species, when it amounts to a total alienation of the mind, or perfect madness, excuses from the guilt of felony and treason. And further, persons afflicted with accidental madness, whether temporary (as in the case of lunacy) or continued, if they are totally deprived of the use of reason, cannot be guilty ordinarily of capital offences; for they have not the use of understanding, and act not as reasonable creatures, but their actions are, in effect, in the condition of brutes. The third sort of madness is that which is *dementia affectata*, namely, drunkenness. This vice doth deprive man of the use of reason, and puts many men into a perfect but temporary frenzy; but by the laws of England such a person shall have no privilege by this voluntarily contracted madness, but shall have the same judgment as if he were in his right senses."

It is a common form of insanity, and presents itself in an infinite variety of ways, seldom exhibiting itself in any two cases exactly in the same manner. Hall *v.* Unger, 11 Fed. Cas. No. 5,949, 4 Sawy. 672, 677.

28. Pyott *v.* Pyott, 90 Ill. App. 210, 221, where it is said: "In the case of old men it is called senile dementia, and it indicates the breaking down of the mental powers in advance of the bodily decay; the mind dwells only in the past and the thoughts succeed one another without any obvious association." See also Owings' Case, 1 Bland (Md.) 370, 390, 17 Am. Dec. 311, where it is said that though physicians do not regard it as being in itself a disorder or the effect of disease, 'the law considers it not only as a species of insanity, from which there is no hope of recovery, but as one which always becomes worse as age advances."

29. Hall *v.* Unger, 11 Fed. Cas. No. 5,949, 2 Abb. 507, 511, 4 Sawy. 672, where it is said: "It is characterized by forgetfulness, inability to follow any train of thought, by indifference to passing events. 'In dementia,'

general mental incapacity;[30] a state of enfeeblement of the mind or impairment of the mind;[31] where the person afflicted is rendered incapable of reasoning, in consequence of functional disorder of the brain, not congenital, or born with the person;[32] a term indicating an impaired state of the mental powers, a feebleness of mind caused by disease, and not accompanied by delusion or uncontrollable impulse.[33] (Dementia: As Affecting — Capacity to Make Will, see Wills; Responsibility For Crime, see Criminal Law.)

DE MERCATORIBUS. Concerning merchants.[34]

DEMESNE. See Estates.

DEMIJOHN. A glass vessel with a large body and a small neck, enclosed in wicker-work.[35]

DEMI-MARK. In old English practice, half a mark; a sum of money of the value of six shillings and eight pence.[36]

DE MINIMIS NON CURAT LEX. A maxim meaning "The law cares not for small things."[37]

says Ray, a celebrated writer on medical jurisprudence, 'the mind is susceptible of only feeble and transitory impressions, and manifests but little reflection even upon these. They come and go without leaving any trace of their presence behind them. The attention is incapable of more than a momentary effort, one idea succeeding another with but little connection or coherence. The mind has lost the power of comparison, and abstract ideas are utterly beyond its grasp. The memory is peculiarly weak; events the most recent and most nearly connected with the individual being rapidly forgotten. The language of the demented is not only incoherent, but they are much inclined to repeat insulated words and phrases without the slightest meaning.'"

30. Century Dict. [*quoted* in Pyott *v.* Pyott, 90 Ill. App. 210, 221].

31. Shaw's Will, 2 Redf. Surr. (N. Y.) 107, 132, where it is said: "Dementia is usually the result of the other forms of insanity."

32. People *v.* Lake, 2 Park. Cr. (N. Y.) 215, 218.

33. Dennett *v.* Dennett, 44 N. H. 531, 537, 84 Am. Dec. 97.

34. The name of a statute passed in the eleventh year of Edw. I, (1233,) more commonly called the "Statute of Acton Burnel," authorizing the recognizance by statute merchant. Black L. Dict. [*citing* 2 Blackstone Comm. 161].

35. U. S. *v.* Ninety Demijohns of Rum, 8 Fed. 485, 487, 4 Woods 637, where it is said: "That the statute [in relation to customs duties] does not include four-gallon demijohns under the term bottles, is clear; because, if not impossible, it would be exceedingly inconvenient and cumbersome to pack not less than one dozen such demijohns in one package, as the statute requires to be done."

36. The tender of which was formerly necessary in a writ of right; the effect of such tender being to put the demandant, in the first instance, upon proof of the seisin as stated in his count, that is, to prove that the seisin was in the king's reign there stated. Burrill L. Dict. [*citing* Roscoe Real Act 216].

37. London, etc., Mortg. Co. *v.* Gibson, 77 Minn. 394, 398, 80 N. W. 205, 777.

Applied or quoted in the following cases:

Alabama.— Slaughter *v.* Montgomery First Nat. Bank, 109 Ala. 157, 161, 19 So. 430.

Arkansas.— Ruble *v.* Helm, 57 Ark. 304, 306, 21 S. W. 470; Little Rock Trust Co. *v.* Martin, 57 Ark. 277, 279, 21 S. W. 468; St. Louis, etc., R. Co. *v.* Ferguson, 57 Ark. 16, 20, 20 S. W. 545, 38 Am. St. Rep. 217, 18 L. R. A. 110; State *v.* Watts, 48 Ark. 57, 58, 2 S. W. 342, 3 Am. St. Rep. 216; Reynolds *v.* Holland, 35 Ark. 56, 59; Hightower *v.* Handlin, 27 Ark. 20, 24; Warren *v.* Chambers, 25 Ark. 120, 121, 91 Am. Dec. 538, 4 Am. Rep. 23; Bizzell *v.* Booker, 16 Ark. 308, 319; Field *v.* Pope, 5 Ark. 66, 72; Thompson *v.* Thompson, 5 Ark. 18.

California.— Kenyon *v.* Western Union Tel. Co., 100 Cal. 454, 458, 35 Pac. 75; Clark *v.* Collier, 100 Cal. 256, 259, 34 Pac. 677; Francais *v.* Somps, 92 Cal. 503, 506, 28 Pac. 592; Kulleman *v.* Greenebaum, 92 Cal. 403, 407, 28 Pac. 674, 27 Am. St. Rep. 150; McAllister *v.* Clement, 75 Cal. 182, 184, 16 Pac. 775; Moore *v.* Boyd, 74 Cal. 167, 175, 15 Pac. 670; Wolff *v.* Prosser, 73 Cal. 219, 220, 14 Pac. 852; Merrill *v.* Hurlburt, 63 Cal. 494, 497; Bustamente *v.* Stewart, 55 Cal. 115, 116.

Connecticut.— People's Sav. Bank *v.* Norwalk, 56 Conn. 547, 558, 16 Atl. 257; Flannery *v.* Rohrmayer, 46 Conn. 558, 560, 33 Am. Rep. 36; Gilbert *v.* New Haven, 39 Conn. 467, 474; Wadsworth *v.* Tillotson, 15 Conn. 366, 375, 39 Am. Dec. 391.

Indiana.— Billingsley *v.* Groves, 5 Ind. 553, 555.

Kansas.— Prather *v.* Reeve, 23 Kan. 627, 631; U. S. Express Co. *v.* Anthony, 5 Kan. 490, 494.

Kentucky.— Moore *v.* Estes, 2 Ky. L. Rep. 256, 257.

Maine.— Barnes *v.* Hathorn, 54 Me. 124, 131 (per Dickerson, J., in dissenting opinion); Perkins *v.* Raitt, 43 Me. 280, 281; Glidden *v.* Chase, 35 Me. 90, 91, 56 Am. Dec. 690; Dwinel *v.* Soper, 32 Me. 119, 122, 52 Am. Dec. 643; Huse *v.* Merriam, 2 Me. 375.

Massachusetts.— Chenery *v.* Stevens, 97 Mass. 77, 83; Pickett *v.* Breckenridge, 22 Pick. 297, 298, 33 Am. Dec. 745; Brewer *v.*

DE MINIMIS NON CURAT PRÆTOR. A maxim meaning "The prætor does not

Tyringham, 12 Pick. 547, 549; Adams *v.* Frothingham, 3 Mass. 352, 363, 3 Am. Dec. 151.

Minnesota.— London, etc., Mortg. Co. *v.* Gibson, 77 Minn. 394, 398, 400, 80 N. W. 205, 777; Jensen *v.* Chicago Great Western R. Co., 64 Minn. 511, 513, 67 N. W. 631; Palmer *v.* Degan, 58 Minn. 505, 506, 60 N. W. 342; Van Norman *v.* Northwestern Mut. L. Ins. Co., 51 Minn. 57, 69, 52 N. W. 988.

Missouri.— Crandall *v.* Allen, 118 Mo. 403, 411, 24 S. W. 172, 22 L. R. A. 591; Beers *v.* Wolf, 116 Mo. 179, 187, 22 S. W. 620; State *v.* Green, 37 Mo. 466, 472; Wilkerson *v.* State, 13 Mo. 91, 53 Am. Dec. 437; Barnett *v.* Swearingen, 77 Mo. App. 64, 73; Cameron Sun *v.* McAnaw, 72 Mo. App. 196, 198; Cameron *v.* Hart, 57 Mo. App. 142, 146; Paxson *v.* St. Louis Drayage Co., 55 Mo. App. 566, 569; State *v.* Gage, 52 Mo. App. 464, 473; Fugate *v.* McManama, 50 Mo. App. 39, 43; Hackworth *v.* Zeitinger, 48 Mo. App. 32, 38; Campbell *v.* King, 32 Mo. App. 38, 47; St. Louis R. Co. *v.* Northwestern St. Louis R. Co., 2 Mo. App. 69, 80.

Nebraska.— State *v.* Stevenson, 18 Nebr. 416, 421, 25 N. W. 585; Burlington, etc., R. Co. *v.* Lancaster County, 15 Nebr. 251, 255, 18 N. W. 71; Forbes *v.* Omaha Nat. Bank, 10 Nebr. 338, 348, 6 N. W. 393, 35 Am. Rep. 480; Lammars *v.* Nissen, 4 Nebr. 245, 250.

New Hampshire.— Avery *v.* Bowman, 40 N. H. 453, 457, 77 Am. Dec. 728; Lisbon *v.* Bath, 21 N. H. 319, 331; Wells *v.* Burbank, 17 N. H. 393, 412.

New Jersey.— Wartman *v.* Swindell, 54 N. J. L. 589, 590, 25 Atl. 356, 18 L. R. A. 44; Hetfield *v.* Plainfield, 46 N. J. L. 119, 123; State *v.* Newark, 35 N. J. L. 168, 176, 177; State *v.* Jay, 34 N. J. L. 368, 370; Moffet *v.* Ayres, 3 N. J. L. 655; Higgins *v.* Flemington Water Co., 36 N. J. Eq. 538, 541; Conover *v.* Ruckman, 32 N. J. Eq. 685; Acquackanonk Water Co. *v.* Watson, 29 N. J. Eq. 366, 370; Johnson *v.* Jaqui, 27 N. J. Eq. 552, 555; Metler *v.* Metler, 18 N. J. Eq. 270, 276.

New Mexico.— *In re* Catron, 8 N. M. 253, 320, 43 Pac. 724, per Laughlin, J., in dissenting opinion.

New York.— Crook *v.* Rindskopf, 105 N. Y. 476, 484, 12 N. E. 174; Pronk *v.* Brooklyn, etc., R. Co., 68 N. Y. App. Div. 390, 392, 74 N. Y. Suppl. 375; Mutual Ben. Loan, etc., Co. *v.* Lynch, 54 N. Y. App. Div. 559, 563, 67 N. Y. Suppl. 6; Matter of Opening of Oneida St., 37 N. Y. App. Div. 266, 269, 55 N. Y. Suppl. 959; Stetson *v.* Brennan, 21 N. Y. App. Div. 552, 555, 48 N. Y. Suppl. 601; Corbett *v.* Spring Garden Ins. Co., 85 Hun 250, 256, 32 N. Y. Suppl. 1059; Haskell *v.* Northern Adirondack R. Co., 74 Hun 380, 381, 26 N. Y. Suppl. 595; Douglass *v.* Mainzer, 40 Hun 75, 76; People *v.* Kelly, 33 Hun 389, 392; *In re* Willis, 30 Hun 13, 14; Colman *v.* Shattuck, 2 Hun 497, 508, 5 Thomps. & C. 34; Aberle *v.* Fajen, 42 N. Y. Super. Ct. 217, 223; Beyer *v.* Marks, 2 Sweeny 715, 727; Lass *v.* Wetmore, 2 Sweeny 209, 211; Masterson *v.* Beers, 6 Rob. 368, 386; Reed *v.* Allerton, 3 Rob. 551, 566 (per Barbour, J., in dissenting opinion); Ninth Ave R. Co. *v.* New York El. R. Co., 7 Daly 174, 180; Western Transp. Co. *v.* Hawley, 1 Daly 327, 334 (per Hilton, J., in dissenting opinion); Steinhardt *v.* Baker, 20 Misc. 470, 476, 46 N. Y. Suppl. 707; People *v.* Richmond, 5 Misc. 26, 32, 25 N. Y. Suppl. 144; Moore *v.* New York El. R. Co., 4 Misc. 132, 134, 23 N. Y. Suppl. 863; Adler *v.* Metropolitan El. R. Co., 18 N. Y. Suppl. 858, 859, 28 Abb. N. Cas. 198; Blashfield *v.* Empire State Tel., etc., Co., 18 N. Y. Suppl. 250, 253; Purdy *v.* Manhattan El. R. Co., 13 N. Y. Suppl. 295, 297; McNutt *v.* Shafer, 12 N. Y. Suppl. 27, 29; Empire City Bank's Case, 8 Abb. Pr. 192, 215; Seneca Road Co. *v.* Auburn, etc., R. Co., 5 Hill 170, 175; *Ex p.* Becker, 4 Hill 613, 615.

Ohio.— Hays *v.* Lewis, 28 Ohio St. 326, 340; Frazier *v.* Brown, 12 Ohio St. 294, 301; Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 182, 62 Am. Dec. 246; Thayer *v.* Brooks, 17 Ohio 489, 494, 49 Am. Dec. 474; Farrington *v.* State, 10 Ohio 354, 355; Harper *v.* Ashtabula County, Wright 708, 709.

Pennsylvania.— Hensel *v.* Noble, 95 Pa. St. 345, 346, 40 Am. Rep. 659; Knight *v.* Abert, 6 Pa. St. 472, 47 Am. Dec. 478; Bell *v.* Ohio, etc., R. Co., 1 Grant 105, 108; Devinney *v.* Reynolds, 1 Watts & S. 328, 332; McKinney *v.* Reader, 6 Watts 34, 41; Ley *v.* Huber, 3 Watts 367, 369; Ritchie *v.* Shannon, 2 Rawle 196; Hepburn *v.* McDowell, 17 Serg. & R. 383, 384, 17 Am. Dec. 677; Obermyer *v.* Nichols, 6 Binn. 159, 172, 6 Am. Dec. 439; Downward *v.* Jordan, 7 Pa. Dist. 273; Com. *v.* Kepner, 1 Pearson 182, 188; Jones *v.* Backus, 18 Wkly. Notes Cas. 556, 560; Atty.-Gen. *v.* Lombard, etc., Pass. R. Co., 1 Wkly. Notes Cas. 489, 491; Galbraith *v.* Oliver, 3 Pittsb. 78, 85.

Utah.— Knudsen *v.* Omanson, 10 Utah 124, 129, 37 Pac. 250.

Vermont.— Fullam *v.* Stearns, 30 Vt. 443, 454, 455, 456; Paul *v.* Slason, 22 Vt. 231, 239, 54 Am. Dec. 75.

Virginia.— North Carolina State Bank *v.* Cowan, 8 Leigh 238, 258.

Wisconsin.— Hixon *v.* Oneida County, 82 Wis. 515, 533, 52 N. W. 445; Middleton *v.* Jerdel, 73 Wis. 39, 42, 40 N. W. 629; Schriber *v.* Richmond, 73 Wis. 5, 13, 40 N. W. 644; Moritz *v.* Larsen, 70 Wis. 569, 574, 36 N. W. 331; *In re* Thurston, 57 Wis. 104, 110, 15 N. W. 126; Hass *v.* Prescott, 38 Wis. 146, 151.

United States.— Edwards *v.* Kearzey, 96 U. S. 595, 604, 24 L. ed. 793; Hilson Co. *v.* Foster, 80 Fed. 896, 898; Tunstall *v.* Robinson, 24 Fed. Cas. No. 14,238*a*, Hempst. 229.

England.— Chandler *v.* Smith, [1899] 2 Q. B. 506, 510, 68 L. J. Q. B. 909, 81 L. T. Rep. N. S. 317, 47 Wkly. Rep. 677; Bickett *v.* Morris, L. R. 1 H. L. Sc. 47, 59, 12 Jur. N. S. 803, 14 L. T. Rep. N. S. 835; Whitcher *v.* Hall, 5 B. & C. 269, 277, 8 D. & R. 22, 4 L. J. K. B. O. S. 167, 29 Rev. Rep. 244, 11 E. C. L. 458; Hernulewicz *v.* Jay, 6 B. & S. 697, 703,

concern himself about trifles" or "The prætor does not apply his equitable remedies in matters of small moment." [38]

DE MINIS. Writ of threats.[39]

DEMI-OFFICIAL. Partly official or authorized, having color of official right.[40]

DEMISE.[41] As a noun, a lease for a term of years;[42] a conveyance in fee, for life or for years;[43] the conveyance or transfer of an estate, either in fee, for life or for years, most commonly the latter.[44] As a verb, to lease for a term of years.[45] (See, generally, Deeds; Landlord and Tenant.)

DEMISE AND REDEMISE. In conveyancing, where there are mutual leases made from one to another on each side, of the same land, or something out of it.[46] (See, generally, Deeds; Landlord and Tenant.)

DEMISSION. A bringing down; lowering; a relinquishment; the laying down of an office.[47]

DE MITTENDO TENOREM RECORDI. A writ to send the tenor of a record, or to exemplify it under the great seal.[48]

DEMITTERE. In old conveyancing, to transfer; to demise or lease.[49] Also, to send away, or part with.[50]

DEMITTERE PER BALIUM. To discharge by or on bail.[51]

DEMOBILIZATION. In military law, the dismissal of an army or body of troops from active service.[52]

DEMOCRACY. One of the three forms of government; that in which the

11 Jur. N. S. 581, 34 L. J. Q. B. 201, 12 L. T. Rep. N. S. 494, 13 Wkly. Rep. 807, 118 E. C. L. 697; Reg. *v.* Illidge, 2 C. & K. 871, 3 Cox C. C. 552, 559, 1 Den. C. C. 404, 13 Jur. 543, 18 L. J. M. C. 179, T. & M. 127, 61 E. C. L. 871; White *v.* Jackson, 2 Curt. Eccl. 480, 493; *In re* French Guiana, 2 Dods. 151, 163; Embrey *v.* Owen, 6 Exch. 353, 370, 15 Jur. 633, 20 L. J. Exch. 212, 4 Eng. L. & Eq. 466; Legatt *v.* Sewell, 2 Vern. Ch. 551, 552, 23 Eng. Reprint 957, 1 P. Wms. 87, 24 Eng. Reprint 306; Baxter *v.* Faulam, 1 Wils. C. P. 129.

Canada.—Dickson *v.* Stevens, 31 N. Brunsw. 611, 619; *Ex p.* Clarke, 24 N. Brunsw. 623, 630; Peters *v.* Bryson, 11 N. Brunsw. 489, 493; Boyd *v.* Kennedy, 6 N. Brunsw. 624, 629; McKay *v.* Bonnett, 14 Nova Scotia 96, 101; O'Connor *v.* Commercial Union Ins. Co., 12 Nova Scotia 119, 124; Moore *v.* Connecticut Mut. L. Ins. Co., 3 Ont. App. 230, 243.

38. Trayner Leg. Max.

Applied in: Cusson *v.* Delorme, 6 Quebec Q. B. 202, 214.

39. A writ which lay where a person was threatened with personal violence, or the destruction of his property, to compel the offender to keep the peace. Burrill L. Dict.

40. Black L. Dict.

41. Coke says: "The word 'demise' . . . 'is applied to an estate either in fee simple, fee tail, or for a term of life, and so commonly is taken in many writs.'" 12 Coke Inst. 483 [*quoted* in Krider *v.* Lafferty, Whart. (Pa.) 303, 315].

Applied to a vessel.— In Bramble *v.* Culmer, 78 Fed. 497, 501, 24 C. C. A. 182, the court said: "When a ship is let to another for a period of time, and the owner during that time has nothing whatever to do with the appointment of her officers and crew, or with the working or management of her, that is called a 'demise' or 'letting' of the ship." See also Baumvoll Manufacture, etc. *v.* Gilchrest, [1892] 1 Q. B. 253, 258.

Compared with "let."— In Hemphill *v.* Eckfeldt, 5 Whart. (Pa.) 274, 278, the court said: "Now, the word let in the lease before us, implying, according to Johnson's Dictionary, concession, and also a grant to a tenant, is the proper equivalent of the word *concessi*, or *demisi*; the English word demise, though improperly used as a synonyme, strictly denoting a posthumous grant and no more."

42. Voorhees *v.* Amsterdam Presb. Church, 5 How. Pr. (N. Y.) 58, 71 [*citing* Bouvier L. Dict.].

Apt words in a lease.— In Krider *v.* Lafferty, 1 Whart. (Pa.) 303, 315 [*citing* 2 Blackstone Comm. 317, 318; Coke Litt. 456; Sheppard Touchst. 266]; the court said: "The usual words of operation, and as it is said, most apt in a lease, are 'demise, grant, and to farm let.'" See also Voorhees *v.* Amsterdam Presb. Church, 5 How. Pr. (N. Y.) 58, 71, where it is said: "The words of conveyance appropriate in a lease are 'demise, lease, and to farm it.' These words are technical words well understood, and are the most proper that can be used in making a lease."

43. As, for instance, a grant. Mershon *v.* Williams, 63 N. J. L. 398, 405, 44 Atl. 211 [*citing* Bouvier L. Dict.].

44. Gilmore *v.* Hamilton, 83 Ind. 196, 198 [*quoting* Webster Dict.; and *citing* Bouvier L. Dict.].

45. Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64, 72, 42 S. E. 315.

46. Jacob L. Dict.

47. English L. Dict.

48. Black L. Dict.

49. Burrill L. Dict.

50. Burrill L. Dict.

51. English L. Dict.

52. Rapalje & L. L. Dict.

sovereign power is neither lodged in one man, as in a monarchy, nor in the nobles, as in an oligarchy, but in the collective body of the people.[53]

DEMOCRATIC. Relating to the democracy, or to the democratic party.[54]

DE MOLENDINO DE NOVO ERECTO NON JACET PROHIBITIO. A maxim meaning "A prohibition lies not against a newly-erected mill."[55]

DEMOLISH. To throw or pull down; destroy the structural character of, as a building or wall; reduce to ruins.[56]

DE MONETA. Concerning money.[57]

DEMONETIZATION. The disuse of a particular metal for purposes of coinage. The withdrawal of the value of a metal as money.[58]

DEMONSTRATION. An expression of the feeling by outward signs; a manifestation; a show.[59] As applied to evidence, such a degree of proof as, excluding possibility of error, produces absolute certainty.[60]

DEMONSTRATIVE. Pointing out specifically; designating particularly.[61] (Demonstrative: Evidence, see DEMONSTRATIVE EVIDENCE. Legacies, see WILLS.)

DEMONSTRATIVE EVIDENCE. That which establishes a fact beyond doubt.[62] (Demonstrative Evidence: In Civil Actions, see EVIDENCE. In Criminal Prosecutions, see CRIMINAL LAW.)

DEMONSTRATIVE LEGACIES. See WILLS.

DEMORAGE. An old form of DEMURRAGE,[63] *q. v.*

DE MORTE HOMINIS NULLA EST CUNCTATIO LONGA. A maxim meaning "When the death of a human being is concerned, no delay is long."[64]

DE MOT EN MOT. From word to word; word for word.[65]

DEMUR. In pleading, to rest or pause;[66] to interpose an objection which

53. Wharton L. Lex.

54. English L. Dict.

An American political body.— In Beardsley *v.* Bridgeport, 53 Conn. 489, 493, 3 Atl. 557, 55 Am. Rep. 152, it is said: "It is a matter of common knowledge that there is a political party known as the Democratic party, to which a large portion of the voters in every one of the United States adhere; which they support by speech and act — by advocating its principles and voting for its candidates for office; and that the determination of the question as to what persons and principles shall be in the ascendant in government for the time being depends upon the belief of the voter that the speech and the act of the candidate are true indexes of his opinion."

55. Black L. Dict.

56. Century Dict.

A house damaged by rioters is not feloniously demolished wholly or in part so as to entitle the person damnified to compensation under 7 & 8 Geo. IV, c. 31, § 2, unless the rioters when attacking the house had an intention wholly to destroy it. Drake *v.* Footitt, 7 Q. B. D. 201, 209, 45 J. P. 798, 50 L. J. M. C. 141, 45 L. T. Rep. N. S. 42.

57. Burrill L. Dict.

58. Black L. Dict.

59. Webster Unabr. Dict. [*quoted* in Miles *v.* State, 18 Tex. App. 156, 171].

60. Cal. Civ. Code, § 1826 [*quoted* in Treadwell *v.* Whittier, 80 Cal. 574, 582, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498].

Distinguished from mathematical demonstration. Where a statute provided "The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible," McFarland, J., said: "The legislature must be held as stating, or trying to state, in section 1826, the general difference between a mathematical, or strictly scientific, demonstration, and the kind of proof usually obtainable in judicial trials. They did not intend to use the words in that relation as synonymous with proof beyond a reasonable doubt." Treadwell *v.* Whittier, 80 Cal. 574, 603, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498. See also Boetgen *v.* New York, etc., R. Co., 50 N. Y. Suppl. 331, 332, where the court, in speaking of the degree of proof required to maintain an action for negligence, said: "While the proof required need not be of that high degree called 'demonstration,' which excludes all possibility of error, it must be of sufficient cogency to make it appear, by reasonable and necessary inference, that the defendant did, or omitted to do, some act amounting to a breach of duty, and that this was the sole cause of the injury."

61. As, a legacy payable out of a particular fund. Anderson L. Dict.

62. English L. Dict.

"Demonstrative evidence of negligence" see Oglesby *v.* Missouri Pac. R. Co., 177 Mo. 272, 76 S. W. 623, 638.

63. Burrill L. Dict. [*citing* Hume *v.* East India Co., 1 W. Bl. 291, 293].

64. Bouvier L. Dict. [*citing* Coke Litt. 134].

65. Burrill L. Dict. [*citing* Britton, c. 22].

66. Gould Pl. p. 46, § 43 [*quoted* in Havens *v.* Hartford, etc., R. Co., 28 Conn. 69, 89; Rice *v.* Rice, 13 Oreg. 337, 339, 10 Pac. 495].

raises an issue of law.[67] (See Demurrable; Demurrer; and, generally, Equity; Pleading.)

Demurrable. A pleading, petition, or the like which does not state such facts as support the claim, prayer or defence put forward.[68] (See Demur; Demurrer; and, generally, Pleading.)

Demurrage.[69] An extended freight,[70] or reward to the vessel in compensation of the earnings she is caused to lose improperly;[71] an allowance or compensation for the delay or detention of a vessel;[72] compensation for undue detention;[73] the compensation provided for in the contract of affreightment, for the detention of the vessel beyond the time agreed on for loading or unloading;[74] an allowance made to the master of a ship, by the freighters, for staying longer in a place than the time first appointed for his departure;[75] a sum of money due by express contract for the detention of a vessel in loading or unloading, one or more days beyond the time allowed for that purpose in the charter party;[76] payment for the delay of a vessel.[77] In a popular sense, the word is used to denote a claim for detention which may be unliquidated, or a sum agreed upon.[78]

67. Merrill *v.* Pepperdine, 9 Ind. App. 416, 36 N. E. 921.

68. Rapalje & L. L. Dict. See also *Ex p.* Coates, 5 Ch. D. 979, 980, 37 L. T. Rep. N. S. 43, 25 Wkly. Rep. 800.

69. **Demurrage is a mere name** (Falkenburg *v.* Clark, 11 R. I. 278, 283), yet it "has a known legal meaning" (Gray *v.* Carr, L. R. 6 Q. B. 522, 528, 40 L. J. Q. B. 257, 25 L. T. Rep. N. S. 215, 19 Wkly. Rep. 1173).

70. *Maine.*— Hall *v.* Barker, 64 Me. 339, 343.

Massachusetts.— Brett *v.* Van Pragg, 157 Mass. 132, 143, 31 N. E. 761.

Rhode Island.— Falkenburg *v.* Clark, 11 R. I. 278, 283.

United States.— Owen *v.* Forty-Nine Thousand Seven Hundred and Seventy-Four Bushels of Rye, 54 Fed. 185, 186; Hawgood *v.* One Thousand Three Hundred and Ten Tons of Coal, 21 Fed. 681, 686 [*citing* Sprague *v.* West, 22 Fed. Cas. No. 13,255, Abb. Adm. 548]; Donaldson *v.* McDowell, 7 Fed. Cas. No. 3,985, 1 Holmes 290, 292; Sprague *v.* West, 22 Fed. Cas. No. 13,255, Abb. Adm. 548, 554 [*quoted* in Neilsen *v.* Jesup, 30 Fed. 138, 139; The Caroline A. White, 5 Fed. Cas. No. 2,421, 5 Phila. (Pa.) 112 [*quoting* Jesson *v.* Solly, 4 Taunt. 52, 13 Rev. Rep. 557].

England.— Jesson *v.* Solly, 4 Taunt. 52, 55, 13 Rev. Rep. 557.

71. Owen *v.* Forty-Nine Thousand Seven Hundred and Seventy-Four Bushels of Rye, 54 Fed. 185, 186; Donaldson *v.* McDowell, 7 Fed. Cas. No. 3,985; 1 Holmes (U. S.) 290, 292; Sprague *v.* West, 22 Fed. Cas. No. 13,255, Abb. Adm. 548, 554 [*quoted* in Neilsen *v.* Jesup, 30 Fed. 138, 139]; *In re* Two Hundred and Seventy-Five Tons of Mineral Phosphates, 9 Fed. 209, 210 [*citing* Sprague *v.* West, 22 Fed. Cas. No. 13,255, Abb. Adm. 548, 554].

72. The Apollon, 9 Wheat. (U. S.) 362, 376, 6 L. ed. 111; Hawgood *v.* One Thousand Three Hundred and Ten Tons of Coal, 21 Fed. 681, 686. See also Kish *v.* Cory, L. R. 10 Q. B. 553, 560, 2 Aspin. 593, 44 L. J. Q. B. 205, 32 L. T. Rep. N. S. 670, 23 Wkly. Rep. 880, where Brett, J., said: "I feel certain that when the occasion arises it will be held, upon a clause like this, containing a cesser of liability of the charterer and a lien for demurrage, that 'demurrage' includes not only demurrage proper, but also that which is in the nature of demurrage, viz. detention at the port of loading."

"**Every improper detention of a vessel** may be considered a demurrage, and compensation in that name be obtained for it." Sprague *v.* West, 22 Fed. Cas. No. 13,255, Abb. Adm. 548, 554 [*citing* The Apollon, 9 Wheat. (U. S.) 362, 378, 6 L. ed. 111].

73. Lockhart *v.* Falk, L. R. 10 Exch. 132, 135, 3 Aspin. 8, 44 L. J. Exch. 105, 33 L. T. Rep. N. S. 96, 23 Wkly. Rep. 753. See also Gray *v.* Carr, L. R. 6 Q. B. 522, 551, 40 L. J. Q. B. 257, 25 L. T. Rep. N. S. 215, 19 Wkly. Rep. 1173.

"**Every improper detention of a vessel may be considered a demurrage,** and compensation under that name be obtained for it." Donaldson *v.* McDowell, 7 Fed. Cas. No. 3,984, 1 Holmes 290, 292 [*citing* The Zepherina, 2 Hagg. Adm. 317]; Sprague *v.* West, 22 Fed. Cas. No. 13,255, Abb. Adm. 548, 554 [*quoted* in Falkenburg *v.* Clark, 11 R. I. 278, 283].

74. Fisher *v.* Abeel, 44 How. Pr. (N. Y.) 432, 440.

75. Duff *v.* Lawrence, 3 Johns. Cas. (N. Y.) 162, 168.

"**Demurrage is not paid for the carriage of the goods,** but for delay in loading, nor is average; yet, by the bill of lading, demurrage and average may have to be paid for the goods, which must mean 'to have them.'" Gray *v.* Carr, L. R. 6 Q. B. 522, 553, 40 L. J. Q. B. 257, 25 L. T. Rep. N. S. 215, 19 Wkly. Rep. 1173.

76. Wordin *v.* Bemis, 32 Conn. 268, 273, 85 Am. Dec. 255.

77. Cross *v.* Beard, 26 N. Y. 85, 89.

78. Lovitt *v.* Snowball, 32 N. Brunsw. 217, 219.

"**In popular use,** demurrage covers not only what is strictly known to the law as such, but also damages for detention when such damages are recoverable." Donnell *v.* Amoskeag Mfg. Co., 118 Fed. 10, 11, 55 C. C. A. 178.

(Demurrage: Admiralty Jurisdiction Over Claims For, see Admiralty. See, generally, Carriers; Shipping.)

DEMURRAGE DAYS. Certain days sometimes allowed to a charterer of a vessel as a favor.[79]

DEMURRANT. One who demurs; the party who, in pleading, interposes a demurrer.[80]

DEMURRER.[81] In pleading, a declaration that the party demurring will go no further, because the other has not shown sufficient matter against him;[82] an admission of the fact, submitting the law arising on that fact to the court;[83] a demand of the judgment of the court whether the defendant is bound to set forth any defense.[84] (Demurrer: Book, see Demurrer Book. In Admiralty, see Admiralty. In Equity, see Equity. In Law, see Demurrer in Law. In Pleading, Generally, see Pleading. To Evidence, see Criminal Law; Trial. To Indictment, see Indictments and Informations.)

DEMURRER BOOK. In practice, a record of the issue on a demurrer at law, containing a transcript of the pleadings, with proper entries; and intended for the use of the court and counsel on the argument.[85]

DEMURRER IN LAW. The tender of an issue in law upon the facts established by the pleading.[86] (See, generally, Pleading.)

DENIAL. A term which implies a contradiction of an assertion.[87] Also a traverse in the pleading of one party of an allegation of fact set up by the other; a Defense,[88] *q. v.* (Denial: In Pleading, see Pleading.)

DENIZATION. The act of making one a denizen; the conferring of the privileges of citizenship upon an alien born.[89] (See Aliens.)

DENIZE. To make a man a denizen or citizen.[90] (See Aliens.)

DENIZEN.[91] A person in a middle state between an alien and a natural born

79. Nielsen *v.* Wait, 16 Q. B. D. 67, 70, 5 Aspin. 553, 55 L. J. Q. B. 87, 54 L. T. Rep. N. S. 344, 34 Wkly. Rep. 33, where it is said: "Those are days beyond the lay days, but during which the amount that he has to pay for the use of the ship is a fixed sum, not necessarily what it costs the owner to keep his ship, but a fixed sum, which is usually about what it is supposed it costs the owner to keep the ship. This stipulation also is in favour of the charterer, because instead of being involved in a dispute as to what he would have to pay for the days during which the ship is kept idle, a sum is fixed, and he knows what he has to pay if he keeps the ship beyond the lay days. Those are the 'demurrage days.' If he keeps the ship beyond the lay days, when he pays nothing, and only the number of demurrage days, he pays a fixed sum for demurrage. If he keeps the ship after that, it is a question of damages, and he does not know what he has to pay until the question is settled by a tribunal or by agreement."

80. Black L. Dict.

81. "The word 'demurrer' comes (as Lord Coke has said) from the Latin word 'demorari'—to abide; and therefore he that demurreth in law is said to abide in law—*moratur* or *demoratur in lege*. He will go no further, until the court has decided, whether the other party has shown sufficient matter in point of law to maintain his suit." Pickens *v.* Kniseley, 36 W. Va. 794, 796, 15 S. E. 997 [*citing* Story Eq. Pl. § 441].

82. 1 Chitty Pl. 705 [*quoted* in Davies *v.* Gibson, 2 Ark. 115, 118]; Webb *v.* Vanderbilt, 39 N. Y. Super. Ct. 4, 10.

83. *Ex p.* Vermilyea, 6 Cow. (N. Y.) 555, 559.

84. Wolf *v.* Eynn, 5 Kulp (Pa.) 5, 6 [*citing* Brooke *v.* Phillips, 6 Phila. (Pa.) 392].

85. Black L. Dict. [*citing* 3 Blackstone Comm. 317; 3 Stephen Comm. 581].

86. Goodman *v.* Ford, 23 Miss. 592, 595.

87. *In re* Scull, 21 Fed. Cas. No. 12,568, 7 Ben. 371.

88. Black L. Dict.

Distinguished from "defense."—In Flack *v.* O'Brien, 19 Misc. (N. Y.) 399, 400, 43 N. Y. Suppl. 854, the court said: "A denial is not a 'defense' at all, and may not be so designated. A 'defense' consists of an affirmative statement of new matter only. A denial raises an issue upon the whole complaint, or upon some part of it. When such issue has been raised, or if it be not raised, but the complaint be allowed to stand as true, new matter constituting a defense may be set up." See also Green *v.* Brown, 22 Misc. (N. Y.) 279, 280, 49 N. Y. Suppl. 163, where the court said: "And a denial is not a 'defence.' It can have no place in a defence. A denial in a defence is mere surplusage, and is not to be regarded. Not even a novice in pleading should plead a 'denial' as a 'defence.' In an answer 'denials' are pleaded, if there be any, and then comes 'defences.' The latter always were, and they still are, distinct from the former in both name and substance."

89. Black L. Dict.

90. Black L. Dict.

91. Distinguished from alien see 2 Cyc. 84 note 3.

citizen.[92] At common law, a person who has received letters of denization from the king.[93] (See, generally, Aliens; Citizens; Domicile.)

DENOMINATIO EST A DIGNIORE. A maxim meaning "Denomination is from the more worthy."[94]

DENOMINATIO FIERI DEBET A DIGNIORIBUS. A maxim meaning "Denomination should be deduced from the more worthy."[95]

DENOMINATION.[96] A class or collection of individuals called by the same name; a sect.[97] (See Christian; Church; Congregation; and, generally, Religious Societies.)

DE NOMINE PROPRIO NON EST CURANDUM CUM IN SUBSTANTIA NON ERRETUR; QUIA NOMINA MUTABILIA SUNT RES AUTEM IMMOBILES. A maxim meaning "As to the proper name, it is not to be regarded when one errs not in substance; because names are changeable, but things are immutable."[98]

DE NON APPARENTIBUS ET DE NON EXISTENTIBUS EADEM EST RATIO.[99] A maxim meaning "Where the court cannot take judicial notice of a fact, it is the same as if the fact had not existed."[1]

92. McClenaghan *v.* McClenaghan, 1 Strobh. Eq. (S. C.) 295, 319, 47 Am. Dec. 532 [*citing* 1 Blackstone Comm. 374], where it is said: "And although subject to some of the disabilities of the former, is entitled to many of the privileges of the latter." See also Priest *v.* Cummings, 20 Wend. (N. Y.) 338, 354, where it is said: "There is nothing in the word denizen that has any relation to any specified time, especially to the time of birth. Denization is a new privilege conferred upon the alien, but not having, like the phrase natural born or native, any relation to the fact of birth or to its time, operates only from the date of its reception."

93. Fries' Case, 9 Fed. Cas. No. 5,126, 3 Dall. 515, where it is said: "And under the royal government such a power might undoubtedly have been exercised. This power of denization is a kind of partial naturalization, giving some, but not all of the privileges of a natural born subject. He may take lands by purchase or devise, but cannot inherit. The issue of a denizen born before denization cannot inherit; but if born after may, the ancestor having been able to communicate to him inheritable blood." See also Calvin's Case, 7 Coke 1*a*, 7*a*, where it is said: ("The King by his letters patent may make a denizen, but cannot naturalize him to all purposes, as an act of Parliament may do"); Godfrey *v.* Dixon, 2 Cro. Jac. 539, 540 (where it is said that "naturalization is always by parliament, and perpetual; for if one be naturalized for a day, it is good for ever; denization is by patent, and may be *pro tempore*; as for years, life, &c.").

"The word 'denizen' is used in the common law, in a double sense; it sometimes means a natural-born subject; and sometimes, a person who, being an alien, has been denizenized by letters-patent of the crown." Levy *v.* McCartee, 6 Pet. (U. S.) 102, 118 note, 8 L. ed. 334.

94. Burrill L. Dict.

95. Wharton L. Lex.

96. Used with "number" in an indictment. — Where an indictment charged that defendants "feloniously took and carried away sundry United States treasury-notes, or national-bank bills, the number and denomination of which are to the grand jury unknown," the court said: "What is the meaning, the proper interpretation, of the words, 'number' and 'denomination?' If the word had been numbers, in the plural, we would be inclined to hold it referred to the serial numbers on the bills. Being in the singular number, it must be construed as expressing or relating to the number of bills alleged to have been stolen; not the numbers on the bills. The word denomination explains itself. It refers to the value or number of dollars the several bills represented; as, the denomination of five dollars, the denomination of ten dollars, etc." Duvall *v.* State, 63 Ala. 12, 17.

97. Webster Dict. [*quoted* in Wilson *v.* Perry, 29 W. Va. 169, 185, 1 S. E. 302].

Denomination of christians see Hale *v.* Everett, 53 N. H. 9, 231, 16 Am. Rep. 82, per Doe, J., in dissenting opinion.

A denomination of religious persons is one having a common system of faith, written or traditional. State *v.* Township 9, 7 Ohio St. 58, 64.

Under the Massachusetts constitution the Shakers are "a sect or denomination of christians." Lawrence *v.* Fletcher, 8 Metc. (Mass.) 153, 162.

98. Bouvier L. Dict. [*citing* Finch's Case, 6 Coke 63*a*, 66*a*].

99. "An old and well-established maxim in legal proceedings, and is founded on principles of justice as well as of law." U. S. *v.* Wilkinson, 12 How. (U. S.) 246, 253, 13 L. ed. 974.

1. Broom Leg. Max.

Applied or quoted in the following cases:

Maine.— Sampson *v.* Sampson, 63 Me. 328, 334, 335.

Michigan.— See Van Auken *v.* Monroe, 38 Mich. 725, 730.

New Jersey.— Guild *v.* Aller, 17 N. J. L. 310, 312.

New York.— Cook *v.* Litchfield, 5 Sandf. 330, 340.

North Carolina.— Miller *v.* Hahn, 84 N. C. 226, 228.

Pennsylvania.— Thompson *v.* Brackenridge, 14 Serg. & R. 346, 348.

DE NON SANE MEMORIE. Of unsound mind or memory.[2]

DENOUNCE. To make formal or public accusation against; inform against; accuse.[3]

DENOUNCEMENT, or DENUNCIA. The delation or accusation which one who desires to rehabilitate an old mine makes of the default which the former owner has committed and by which the previous title has been lost.[4] (See MINES AND MINERALS.)

DE NOVO. Anew; a second time.[5]

DENTIST. One whose profession is to clean and extract teeth, repair them when diseased, and replace them when necessary, by artificial ones;[6] one who performs manual or mechanical operations to preserve teeth, to cleanse, extract, insert or repair them;[7] one who practices dental surgery and mechanical dentistry;[8] a dental surgeon.[9] (See, generally, PHYSICIANS AND SURGEONS.)

DE NULLO, QUOD EST SUA NATURA INDIVISIBILE, ET DIVISIONEM NON PATITUR, NULLAM PARTEM HABERBIT VIDUA; SED SATISFACIAT EI AD VALENTIAM. A maxim meaning "A widow shall have no part of that which in its own nature is indivisible, and is not susceptible of division; but let the heir satisfy her with an equivalent."[10]

DENY. To contradict; to gainsay.[11]

Virginia.— Brown *v.* Ferguson, 4 Leigh 37, 51, 24 Am. Dec. 707; Chapman *v.* Hiden, 2 Patt. & H. 91, 94.

United States.— Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 616, 9 L. ed. 773, 938.

England.— Advocate *v.* Lovat, 5 App. Cas. 273, 303; Gwynne *v.* Burnell, 6 Bing. N. Cas. 453, 758, 37 E. C. L. 713, 7 Cl. & F. 572, 7 Eng. Reprint 1188, 1 Scott N. R. 711, West. 342; Goodright *v.* Harwood, 7 Bro. P. C. 489, 494, 3 Eng. Reprint 318, 321; Gray *v.* Chamberlain, 4 C. & P. 260, 261, 19 E. C. L. 505; The Felicity, 2 Dods 381, 387; Barkworth *v.* Young, 4 Drew 1, 10, 3 Jur. N. S. 34, 26 L. J. Ch. 153, 5 Wkly. Rep. 156; Salkeld *v.* Vernon, 1 Eden 64, 68, 28 Eng. Reprint 608; Lowther *v.* Cavendish, 1 North. 99, 109.

Canada.— Chevrier *v.* Reg, 4 Can. Supreme Ct. 1, 118; Van Koughnet *v.* Denison, 11 Ont. App. 699, 704; Frank *v.* Carson, 15 U. C. C. P. 135, 158; Kendrick *v.* Maxwell, 7 U. C. Q. B. 94, 96.

2. A phrase synonymous with *non compos mentis.* Black L. Dict.

3. Century Dict.

"An act, a thing done, is denounced when the law declares it a crime and provides a punishment for it." State *v.* De Hart, 109 La. 570, 574, 33 So. 605.

4. Castillero *v.* U. S., 2 Black (U. S.) 17, 110, 17 L. ed. 360.

"A judicial proceeding, and though real property might be acquired by an alien in fraud of the law — that is, without observing its requirements — he nevertheless retained his right and title to it, liable to be deprived of it by the proper proceeding of denouncement, which in its substantive characteristics was equivalent to the inquest of office found, at common law." De Merle *v.* Mathews, 26 Cal. 455, 477 [*quoted* in Williams *v.* Bennett, 1 Tex. Civ. App. 498, 507, 20 S. W. 856].

5. Rapalje & L. L. Dict. [*quoted* in *Ex p.* Morales, (Tex. Cr. App. 1899) 53 S. W. 107, 108].

6. People *v.* De France, 104 Mich. 563, 570, 62 N. W. 709, 28 L. R. A. 139; State *v.* Fisher, 119 Mo. 344, 353, 24 S. W. 167, 22 L. R. A. 799 [*quoting* Century Dict.].

7. State *v.* McMinn, 118 N. C. 1259, 1261, 24 S. E. 523.

A mechanical profession.—In Maxon *v.* Perrott, 17 Mich. 332, 337, 97 Am. Dec. 191, the court said: "A dentist, in one sense, is a professional man, but in another sense his calling is mainly mechanical, and the tools which he employs are used in mechanical operations. Indeed, dentistry was formerly purely mechanical, and instruction in it scarcely went beyond manual dexterity in the use of tools, and a knowledge of the human system generally, and of the diseases which might affect the teeth and render an operation important, was by no means considered necessary. Of late, however, as the physiology of the human system has become better understood, and the relations of its various parts and their mutual dependence are more clearly recognized, dentistry has made great progress as a science, and its practitioners claim, with much justice, to be classed among the learned professions."

8. State *v.* Fisher, 119 Mo. 344, 353, 24 S. W. 167, 22 L. R. A. 799 [*quoting* Century Dict.].

9. State *v.* Fisher, 119 Mo. 344, 353, 24 S. W. 167, 22 L. R. A. 799 [*quoting* Century Dict.]; State *v.* Beck, 21 R. I. 288, 293, 43 Atl. 366, 45 L. R. A. 269.

Distinguished from "physician" see State *v.* McMinn, 118 N. C. 1259, 1261, 24 S. E. 523.

Distinguished from "surgeon."— In State *v.* Fisher, 119 Mo. 344, 353, 24 S. W. 167, 22 L. R. A. 799, it was held that a dentist was not to be considered a surgeon. See also Cherokee *v.* Perkins, 118 Iowa 405, 406, 92 N. W. 68; People *v.* De France, 104 Mich. 563, 570, 62 N. W. 709, 28 L. R. A. 139.

10. Morgan Leg. Max. [*citing* Coke Litt. 32].

11. Longwell *v.* Day, 1 Mich. N. P. 286, 288.

DE OFFICE. Of office; in virtue of office; officially; in the discharge of ordinary duty.[12]

DEPART.[13] In old English law, to divide or separate.[14] In maritime law, to leave a port; to be ont of a port.[15] In pleading, to forsake or abandon the grounnd assumed in a former pleading, and assume a new one.[16]

DE PARTITIONE FACIENDA. A writ which lay to make partition of lands or tenements held by several as coparceners, tenants in common, etc.[17] (See PARTITION.)

DEPARTMENT.[18] A province or business, assigned to a particular person.[19] Also one of the divisions of the executive branch of government.[20] (See, generally, MUNICIPAL CORPORATIONS; OFFICERS; STATES; UNITED STATES.)

DEPARTURE.[21] In maritime law, a deviation from the course prescribed in the policy of insurance.[22] In pleading, when a party quits or departs from the case or defense which he has first made, and has recourse to another;[23] where one defence is abandoned or departed from, which was first made, and reconrse is had to another; and when the second plea contradicts the first plea, and does

12. Burrill L. Dict.

13. **"Depart from the state"** as used in a statute in reference to debtors see Blodgett *v.* Utley, 4 Nebr. 25, 29.

"Depart without leave" as used in a recognizance see State *v.* Bobb, 39 Mo. App. 543, 549..

14. Burrill L. Dict.

15. Burrill L. Dict.

Distinguished from to "sail."— In Moir *v.* Royal Exchange Assur. Co., 6 Taunt. 241, 245, Gibbs, C. J., said: "To 'sail' is to sail on the voyage. To 'depart,' must be to depart from some particular place."

"To 'depart from port,' to 'leave port,' to 'go to sea,' are phrases which, in popular speech, have the same signification." The Helen Brown, 28 Fed. 111, 112 [*citing* The Harriet, 11 Fed. Cas. No. 6,099, 1 Story 251, 259; U. S. *v.* Grush, 26 Fed. Cas. No. 15,268, 5 Mason 290, 299].

16. Burrill L. Dict.

17. Black L. Dict.

18. **"Department or service."**— Where a statute in relation to master and servant recited: "Provided nothing herein contained shall be so construed as to make employes . . . fellow servants with other employes engaged in any other department or service," the court said: "The words 'department or service' as here used merely mean a subdivision of business, as running a train, clearing away a wreck, repairing a track, etc." Gulf, etc., R. Co. *v.* Warner, 89 Tex. 475, 479, 35 S. W. 364.

19. U. S. *v.* Belew, 24 Fed. Cas. No. 14,563, 2 Brock. 280, 281, where it is said: "The business assigned to a particular person is, according to this definition, in his department. The business belonging to the post-office, is in a department of the post-office; a person employed in that business, is a person employed in a department of the post-office. If, then, the carrying of the mail be a part of the business of the post-office, it would seem that the person who carries it, is a person employed in a department of the general post-office."

20. Black L. Dict.

Used in this sense in the United States, where each department is charged with a specific class of duties, and comprises an organized staff of officials; e. g., the department of state, department of war, etc. Black L. Dict.

Applied to municipal service.— Where a statute conferred upon the city council the power to provide for the employment of such clerks, and other persons in any of the departments of the city government as the exigencies of the public service may demand, the court said: "The word 'departments' is not used here in a technical sense. Wherever, in any branch or portion of the city government, services are necessary for which provision has not been made, the want may be supplied by the authority of that section. The purpose of the legislature was to enable the city council to see that the city government should be provided with the necessary facilities for the efficient transaction and conduct of its business." Morgan *v.* Denver, 14 Colo. App. 147, 59 Pac. 619, 622.

21. **Departure** from United States under the Chinese exclusion acts see 2 Cyc. 126 note 82.

"A departure from the port" as used in a statute in reference to a lien for construction or repairs of a vessel see Rockefeller *v.* Thompson, 2 Sandf. (N. Y.) 395, 398.

22. Black L. Dict.

Distinguished from "sailed."— In Union Ins. Co. *v.* Tysen, 3 Hill (N. Y.) 118, 126, the court in speaking of a vessel "at sea" said: "This vessel had sailed within the case of Bond *v.* Nutt (Cowp. 601, 607). Lord Mansfield there mentions a ship as having commenced her voyage, though she had barely begun to sail, and was stopped by an embargo. Departure is a word of different meaning. It imports an effectually leaving of the place behind. If the vessel be detained or driven back, though she may have sailed, there is no departure."

23. Kimberlin *v.* Carter, 49 Ind. 111, 112; White *v.* Joy, 13 N. Y. 83, 89 [*citing* Coke Litt. 304*a*]; Andrus *v.* Waring, 20 Johns.

not contain matter pursuant to it, going to support and fortify it.[24] (Departure: From Course Prescribed in Policy of Marine Insurance, see MARINE INSURANCE. From Jurisdiction as Ground of Attachment, see ATTACHMENT. In Pleading, see PLEADING.)

DEPENDENCE. The state of deriving existence, support or direction from another; the state of being subject to the power and operation of extraneous force.[25]

DEPENDENCY.[26] A territory distinct from the country in which the supreme sovereign power resides, but belonging rightfully to it, and subject to the laws and regulations which the sovereign may think proper to prescribe.[27] As used in a statute relating to the sale of intoxicating liquors, any building used for the common purposes of an inn and situated within its curtilage.[28] (See STATES; TERRITORIES.)

DEPENDENT.[29] As a noun, a person who depends on or looks to another for support or favor; a retainer;[30] one who relies for support on another in some

(N. Y.) 153, 163; Richards *v.* Hodges, 2 Saund. 83, 84*a*, note 1.

24. Allen *v.* Watson, 16 Johns. (N. Y.) 205, 206; Bartlett *v.* Wells, 1 B. & S. 836, 841, 8 Jur. N. S. 762, 31 L. J. Q. B. 57, 5 L. T. Rep. N. S. 607, 10 Wkly. Rep. 229, 101 E. C. L. 836.

25. "As dependence is the natural condition of childhood; the dependence of life upon solar heat." Duval *v.* Hunt, 34 Fla. 85, 125, 15 So. 876.

Applied to dependent relatives.—In American Nat. Bank *v.* Cruger, 31 Tex. Civ. App. 17, 24, 71 S. W. 784, the court, in speaking of the obligation of an aunt toward her nephews and nieces whom she had largely supported, said: "Having undertaken to rear, train and nurture them, and having contributed largely to their support and maintenance, undoubtedly, there rested upon her a moral obligation to continue so to do, as long as they were in a state of dependence; and the word dependence, as here used, is not restricted to support and maintenance — food and clothing. It is intended to include moral and mental training, and that care and nurture which would be prompted by the feelings of affection which the testimony indicates existed between this aunt and the children of her unfortunate sister."

26. Distinguished from "colony."— In U. S. *v.* Nancy, 27 Fed Cas. No. 15,854, 3 Wash. 281, 287, the court, in speaking of a dependency, said: "It is not a colony, because it is not settled by the citizens of the sovereign, or mother state; but it is lawfully acquired or held, and the people are as much subjects of the state which has thus obtained it, as if they had been born in the principal state, and had emigrated to the dependent territory. The usual ways by which such acquisitions are made, are by purchase, or by conquest in war. The first, being made with the consent of the sovereign, is permanent and indefeasible; but the latter is subject to uncertainty, and liable to restoration to the sovereign, from whom it was taken, unless confirmed by a treaty of peace, or unless it be voluntarily relinquished by such sovereign. When so confirmed, or relinquished, and not before, it seems to be, in the true sense of the word, a dependency; that is, it is durably incorporated into the dominions of the conqueror, and becomes a part of his territory, as to government and national right." See also 7 Cyc. 399 note 19.

Distinguished from "possession."— Where an act of congress (Act of March 1, 1809) prohibited certain importation into the United States, of any goods, &c., wherever grown or manufactured, from any port or place situated in Great Britain, or France, or in any of the colonies, or dependencies, the court said: "The precise meaning of the word 'dependency,' as it is used by congress, in the law under consideration, cannot be ascertained with any degree of certainty. . . . The introduction of the words 'actual possession,' into the act of March 1, 1809, and the omission of them in that of May 1, 1810, afford strong evidence, that congress did not consider a dependency, as synonymous with a possession; but, on the contrary, the difference was so material, as to induce congress to sanction a trade with the former, which had been previously interdicted with both. As soon as this distinction is established, the mind of a legal man is irresistibly led to annex to the one, the idea of possession, accompanied by title, in opposition to a mere naked possession, obtained either by force, and against right, or rightfully acquired, and wrongfully withheld from the legal sovereign; and this, the court is strongly inclined to think, is the true definition of a dependency." U. S. *v.* Nancy, 27 Fed. Cas. No. 15,854, 3 Wash. 281.

27. U. S. *v.* Nancy, 27 Fed. Cas. No. 15,854, 3 Wash. 281.

28. Goff *v.* Fowler, 3 Pick. (Mass.) 300, 301. And see Com. *v.* Estabrook, 10 Pick. (Mass.) 293, 294.

29. The term does not include a creditor of a member of a beneficiary association within the meaning of Mass. Pub. St. c. 115, § 8, as enlarged by the statute of 1882, c. 195, § 1. Skillings *v.* Massachusetts Ben. Assoc., 146 Mass. 217, 218, 15 N. E. 566.

30. Duval *v.* Hunt, 34 Fla. 85, 125, 15 So. 876.

way.[31] As an adjective, not to be performed until a connected thing is done by another.[32] (Dependent: Contract, see Contracts. Covenant, see Covenants. Leaving Child, see Parent and Child. Persons — Actions by For Death, see Death; Actions by Under Civil Damage Acts, see Intoxicating Liquors; Insurance For Benefit of, see Mutual Benefit Insurance; Support of, see Poor Persons.)

DEPENDING. In practice, pending or undetermined; in progress.[33] (Depending: Action, see Abatement and Revival; Actions; Lis Pendens.)

DEPESAS. In Spanish-American law, spaces of ground in towns reserved for commons or public pasturage.[34] (See, generally, Common Lands.)

DE PLACITO. Of a plea; of, or in an action.[35] (See, generally, Pleading.)

DE PLEGIIS ACQUIETANDIS. A writ for acquitting or releasing pledges;[36] one which lies for a surety against him for whom he is surety, if he pays not the money at the day.[37]

DEPONENT.[38] One who gives evidence, bears witness or testimony;[39] one who gives information on oath or affirmation respecting some fact known to him, before a magistrate; he who makes a deposition.[40] (See Depose; and, generally, Depositions.)

DEPORTATION. The removal of an alien out of the country.[41] (Deportation: Of Chinese, see Aliens.)

DEPOSE.[42] To give evidence, bear witness or testimony;[43] to state or affirm some matter of fact in an affidavit or deposition.[44] (See, generally, Depositions.)

DEPOSIT.[45] A naked bailment of goods, to be kept for the depositor without

31. Nye *v.* Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429 [*citing* Supreme Council A. L. of H. *v.* Perry, 140 Mass. 580, 5 N. E. 634; Ballou *v.* Gile, 50 Wis. 614, 619, 7 N. W. 561].

Used in reference to benevolent societies.— In Alexander *v.* Parker, 144 Ill. 355, 366, 33 N. E. 183, 19 L. R. A. 187, the court said: "Where the statute and charter of an association provide for the payment of benefit funds to persons dependent upon the members, the word, 'dependent,' means 'some person or persons dependent for support in some way upon the deceased.' Dependence for favor, or for affection, or for companionship, or as servants, or retainers, is excluded. A dependent, as the term is used in reference to these benevolent associations, is one who is sustained by another, or relies for support upon the aid of another." See also Ballou *v.* Gile, 50 Wis. 614, 619, 7 N. W. 561 [*quoted* in Supreme Council A. L. of H. *v.* Perry, 140 Mass. 580, 590, 5 N. E. 634].

32. Anderson L. Dict.

33. Black L. Dict. [*citing* Littleton's Case, 5 Coke 47*a*, 47*b*].

34. Black L. Dict. See also Strother *v.* Lucas, 12 Pet. (U. S.) 410, 443, 9 L. ed. 1137 note, where it is said: "The difference between *propios* on the one hand, and the *depesas* and *exidos* on the other, was, that the latter were intended for specific purposes, and could not be appropriated to any others; while the municipality might convert the *propios* to the uses which it should judge most convenient."

35. Formal words used in declarations and other proceedings, as descriptive of the particular action brought. Burrill L. Dict.

36. Black L. Dict.

37. Gloucester Bank *v.* Worcester, 10 Pick. (Mass.) 528, 531 [*citing* Fitzherbert N. B. fol. 137].

38. **Distinguished from "affiant"** see 1 Cyc. 1160 note 93.

39. Richardson Dict. [*quoted* in Bliss *v.* Shuman, 47 Me. 248, 252].

40. Bouvier L. Dict. [*quoted* in Bliss *v.* Shuman, 47 Me. 248, 252]. See also Meltzer *v.* Doll, 91 N. Y. 365, 372.

41. Fong Yue Ting *v.* U. S., 149 U. S. 698, 709, 13 S. Ct. 1016, 37 L. ed. 905.

42. **"Depose and swear" not equivalent to "depose and say."**— In U. S. *v.* McConaughy, 33 Fed. 168, 169, 13 Sawy. 141, the court, in speaking of an indictment for perjury, said: "In this case it is true that the indictment states that the defendant did 'depose and swear,' as in the deposition already set forth. But this is by no means the equivalent of the sufficient allegation, 'being duly sworn, did depose and say.'"

43. Richardson Dict. [*quoted* in Bliss *v.* Shuman, 47 Me. 248, 252].

44. U. S. *v.* McConaughy, 33 Fed. 168, 169, 13 Sawy. 141.

45. **A term borrowed from the civil law.** Ft. Edward Nat. Bank *v.* Washington County Nat. Bank, 5 Hun (N. Y.) 605, 607. And a word of large and varied signification. Com. *v.* Darlington, 8 Pa. Dist. 237.

Deposit of ship's papers with consul.— Where a statute required masters of vessels to deposit their ship's papers with the consul on their arrival in a foreign port, the court said: "The term 'deposit,' carries with it the idea of something more than the mere delivery of the papers to the consul, for inspection, to be redelivered in a few hours. This word is not usually employed, except when the thing is intended

reward, and to be returned when he shall require it;[46] a bailment of goods, to be kept by the bailee without reward, and delivered according to the object or purpose of the original trust;[47] the delivery of a thing for custody, to be redelivered on demand, without compensation;[48] a thing delivered to a person for gratuitous safe keeping;[49] a temporary disposition of money for safe-keeping;[50] that which is placed anywhere for safe keeping, especially a sum of money left with a bank or broker, subject to order;[51] that which is placed in any one's hands for safe keeping; something entrusted to the care of another, specially a sum of money left with a bank or banker, subject to order.[52] As defined by statute, an act by which a person receives the thing of another person, with the obligation to keep it and to return it in kind;[53] when chattels are delivered by one person to another to keep for the use of the bailor.[54] In banking, a sum of money left with a bank for safe-keeping, subject to order, and payable, not in the specific money deposited, but in an equal sum.[55] (Deposit: As Security For — Costs, see Costs; Rent, see

to remain with the depositary for some time, and when the deposit is made for some specific object, beyond that of mere inspection or examination." Toler *v.* White, 24 Fed. Cas. No. 14,079, 1 Ware 280, 287.

Distinguished from "expose."— Where a statute provided that "a person who wilfully and maliciously . . . exposes a poisonous substance, with intent that the same should be taken by such [domestic] animal, shall be punished," &c., and an indictment contained the word "deposit" instead of "expose" the court said: "The word 'deposit' is not equivalent to the word 'expose.' They are not synonymous. They not only do not mean the same thing, but are often, perhaps generally, used to express opposite ideas. Things are often deposited so as not to be exposed, and for that purpose. One word scarcely suggests the other." State *v.* Pratt, 54 Vt. 484, 486.

Distinguished from "mandate."—In Thompson *v.* Woodruff, 7 Coldw. (Tenn.) 401, 407, the court said: "The distinction between deposit and mandate is this: In the case of deposit, the principal object of the parties is the custody of the thing, and the service and labor are merely accessorial. In the case of a mandate, the labor and services are the principal objects of the parties, and the thing is merely accessorial."

"Receive on deposit."— Where a statute rendered it unlawful "to buy or sell, barter or exchange, or receive on deposit, any cotton in the seed or ginned, . . . between the hours of sunset of any one day and sunrise of another," the court said: "The term 'receive on deposit' is used in the act in connection with sale, barter and exchange, and as a step to their accomplishment. The Legislature must be understood to have meant 'to receive on deposit' with a view to sell, and as a step taken to put the article on the market. In short, the term 'sale' must be construed to include every thing necessary to its consummation, the offer to sell being the initial move, a deposit for sale is an offer to sell." Truss *v.* State, 13 Lea (Tenn.) 311, 313.

46. *Kansas.*— Johnson *v.* Reynolds, 3 Kan. 251, 255.

New York.— Payne *v.* Gardiner, 29 N. Y. 146, 167.

Ohio.— Citizens' Nat. Bank *v.* Brown, 45 Ohio St. 39, 53, 11 N. E. 799, 4 Am. St. Rep. 526, per Spear, J., in dissenting opinion.

Pennsylvania.— See Rozelle *v.* Rhodes, 116 Pa. St. 129, 137, 9 Atl. 160, 2 Am. St. Rep. 591 [*citing* Bouvier L. Dict.].

Vermont.— Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377, 380.

47. Montgomery *v.* Evans, 8 Ga. 178, 180.

48. Ft. Edward Nat. Bank *v.* Washington County Nat. Bank, 5 Hun (N. Y.) 605, 607.

49. Matter of Patterson, 18 Hun (N. Y.) 221, 222 [*quoted* in State Sav. Bank *v.* Foster, 118 Mich. 268, 270, 76 N. W. 499, 42 L. R. A. 404].

50. Law's Estate, 144 Pa. St. 499, 507, 22 Atl. 831, 14 L. R. A. 103 [*quoted* in State *v.* Hill, 47 Nebr. 456, 533, 66 N. W. 541].

51. Webster Dict. [*quoted* in Ramsey *v.* Whitbeck, 81 Ill. App. 210, 218].

52. Webster Dict. [*quoted* in Parkesburg Bank's Appeal, 1 Chest. Co. Rep. (Pa.) 433].

53. French Civ. Code, § 1915 [*cited* in Johnson *v.* Reynolds, 3 Kan. 251, 256]; La. Civ. Code, art. 2926 [*quoted* in *In re* Louisiana Sav. Bank, etc., Co., 40 La. Ann. 514, 517, 4 So. 301].

The only real deposit is that where the depositary receives a thing to be preserved in kind, without the power of using it, and on the condition that he is to restore the identical object. La. Civ. Code, art. 2963 [*quoted* in *In re* Louisiana Sav. Bank, etc., Co., 40 La. Ann. 514, 517, 4 So. 301]; Williams *v.* Landry, 18 La. Ann. 208.

54. "The depositary may undertake to keep it without reward, or gratuitously; it is then a naked deposit." Ga. Civ. Code (1895), § 2921.

"A deposit may be voluntary or involuntary, and for safe-keeping or exchange." S. D. Comp. Laws, § 3557 [*quoted* in Hawkins *v.* Hubbard, 2 S. D. 631, 636, 51 N. W. 774].

55. *Illinois.*— See Ramsey *v.* Whitbeck, 81 Ill. App. 210, 218.

Iowa.— Hunt *v.* Hopley, 120 Iowa 695, 699, 95 N. W. 205.

Nebraska.— State *v.* Hill, 47 Nebr. 456, 532, 66 N. W. 541.

New York.— See Ft. Edward Nat. Bank *v.* Washington County Nat. Bank, 5 Hun

Landlord and Tenant. In Bank, see Banks and Banking. In Court, see Deposits in Court. In Lieu of — Bail, see Bail; Bond on Appeal, see Appeal and Error. Of Public Moneys, see Depositaries. Of Title Deeds as Mortgage, see Mortgages. Of Trust Funds, see Executors and Administrators; Guardian and Ward; Trusts. See also, generally, Bailments; Depositaries; Deposits in Court.)

605, 607; Downes *v.* Phœnix Bank, 6 Hill 297, 299.

Pennsylvania.— *In re* Law, 144 Pa. St. 499, 507, 22 Atl. 831, 4 L. R. A. 103.

South Dakota.— Allibone *v.* Ames, 9 S. D. 74, 79, 68 N. W. 165, 33 L. R. A. 585.

Wisconsin.— State *v.* McFetridge, 84 Wis. 473, 515, 54 N. W. 1, 998, 20 L. R. A. 223.

United States.—Nebraska *v.* Orleans First Nat. Bank, 88 Fed. 947, 950.

Deposit of money or "mutuum."— In Payne *v.* Gardiner, 29 N. Y. 146, 168, Mullin, J., said: "A deposit of money with a bank or private person is what is known in the civil law as a *mutuum* or irregular deposit — the distinction between the two kinds of deposit not being recognised by the common law. When money is borrowed, and no time of payment is fixed by the contract of loan, the debt, as already stated, is instantly due, and an action may be brought, without demand — the bringing of the action being a sufficient demand to entitle the lender to recover." "A deposit of money with a bank or private person is not, therefore, the deposit of the civil law, nor is it what in that law was designated by the term *mutuum*, which was a loan of property for consumption, and to be returned in kind, and without interest or compensation for the use; but it is what Pothier calls an irregular deposit, which differed from a *mutuum* in this, that the latter has principally in view the benefit of the receiver, the former the benefit of the bailor. In cases of *mutuum*, the party borrowing was not held to pay interest upon the money lent; but in cases of irregular deposit, interest was due by the depositary, both *ex nudo pacto* and *ex mora*. This distinction between the two classes of deposit, as to interest, is not recognised by our law; the depositary being liable in each for interest, in the event of a breach of duty."

"**Originally, a deposit of money** was made by placing a sum of money in gold or silver with a bank or other depositary, to be returned, when called for, in the same identical coin, and without interest, the depositor paying the depositary a compensation for his care." Curtis *v.* Leavitt, 15 N. Y. 9, 166.

DEPOSITARIES

By Arthur W. Blakemore

CROSS-REFERENCES

For Matters Relating to:
Bailment Generally, see BAILMENTS.
Deposit in Court, see DEPOSITS IN COURT.
Embezzlement or Larceny by Depositary, see EMBEZZLEMENT.
Particular Kinds of Depositaries:
Bank, see BANKS AND BANKING.
Receiptor, see ATTACHMENT; EXECUTIONS.
Safe Deposit Company, see WAREHOUSEMEN.
Stakeholder, see GAMING.
Warehouseman, see WAREHOUSEMEN.
Wharfinger, see WHARVES.

I. DEFINITION.

A depositary is the bailee in a contract of *depositum*, which is a bare, naked bailment of goods delivered by one man to another to be kept for the use of the

bailor[1] and to be restored to him either upon demand or otherwise in accordance with the terms upon which the deposit was made.[2]

II. ELEMENTS OF DEPOSIT.

A. Contract of Bailment — 1. In General. To create a valid deposit the bailee must assent to the delivery of the property to him and accept its custody and care; a deposit may be created only by contract.[3] The contract need not, however, be express. It may be implied from circumstances.[4]

2. Legality. Where a deposit is made for an illegal purpose, it has been held that there is no liability to return it or responsibility for negligence in its care.[5]

B. Delivery of Res. To constitute a deposit there must be a delivery of the *res* to the depositary.[6]

1. Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Payne *v.* Gardiner, 29 N. Y. 146; Spooner *v.* Mattoon, 40 Vt. 300, 94 Am. Dec. 395; Coggs *v.* Bernard, 2 Ld. Raym. 909, per Holt, C. J.

Other definitions are: "The party receiving a deposit; one with whom anything is lodged in trust, as 'depository' is the place where it is put." Black L. Dict. 357.

The person who receives from another the possession of personal property to be retained for the depositor or a third person. N. D. Civ. Code (1899), § 4001; S. D. Civ. Code (1903), § 1353.

Depositarius, in the Latin of the jurists, is "one who receives a deposit; a trustee, depositary." Ulpian Dig. xvi, 3, fr. 1, 7, §§ 2, 36.

A depositary is not a trustee, as a trustee is given title and active management of the *res* while a depositary has at best only a special property. Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795.

2. Black L. Dict. 357. See cases cited *infra*, note 7 *et seq.*

3. Bohannon *v.* Springfield, 9 Ala. 789; Samuels *v.* McDonald, 33 N. Y. Super. Ct. 211, 11 Abb. Pr. (N. Y.) 344, 42 How. Pr. (N. Y.) 360 (where it was held that commissioners of emigration are not liable in their official capacity for the loss of an emigrant's baggage without proof of such delivery as imposed upon them the legal obligation to care for the property); Jackson *v.* Eighmie, 27 N. Y. Wkly. Dig. 193 (holding that a person is not liable for property voluntarily left by another upon his premises, where the property cannot be found); Howard *v.* Harris, 1 Cab. & E. 253; Neuwith *v.* Over Darwen Industrial Co-operative Soc., 63 L. J. Q. B. 290, 70 L. T. Rep. N. S. 374, 10 Reports 588 (where a musician left a musical instrument in a hall without permission or notice, and it was held that there was no bailment); Lethbridge *v.* Phillips, 2 Stark. 544, 3 E. C. L. 523 (where a person was held under no duty to care for a picture sent to him unsolicited as no bailment was created).

4. Bohannon *v.* Springfield, 9 Ala. 789.

A contract may be implied from a deposit of funds with a public officer who has no authority to receive them (Aguilar *v.* Bourgeois, 12 La. Ann. 122); from the keeping of hired property after the expiration of the contract of hire (Leggo *v.* Welland Vale Mfg. Co., 2 Ont. L. Rep. 45); from the leaving of property in the hands of an agent after termination of the agency (Phalen *v.* Clark, 19 Conn. 421, 50 Am. Dec. 253); from the leaving by a departing servant of property in the hands of the employer (Chevalier *v.* Beausoleil, 13 Leg. News 90); from the taking charge by an innkeeper of property which guests have left behind (Stewart *v.* Head, 70 Ga. 449; McDaniels *v.* Robinson, 26 Vt. 316, 62 Am. Dec. 574); from the leaving of property on another's premises (Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795. But see Bohannon *v.* Springfield, 9 Ala. 789); from the accidental or temporary leaving of property of a customer with a tradesman (Bunnell *v.* Stern, 122 N. Y. 539, 25 N. E. 910, 19 Am. St. Rep. 519, 10 L. R. A. 481 [*reversing* 14 Daly 357, 13 N. Y. St. 71]; Osgoodby *v.* Lienbernin, 22 Alb. L. J. (N. Y.) 114); or with a restaurateur (Ultzen *v.* Nicols, [1894] 1 Q. B. 192, 58 L. J. 103, 63 L. J. Q. B. 289, 70 L. T. Rep. N. S. 140, 10 Reports 13, 42 Wkly. Rep. 58. See also BAILMENTS, 5 Cyc. 164 note 16).

5. Smart *v.* Cason, 50 Ill. 195 (where it was held that there could be no recovery from a sheriff of money deposited with him in lieu of bail, as he had no authority to receive the money); Taylor *v.* Chester, L. R. 4 Q. B. 309, 10 B. & S. 237, 38 L. J. Q. B. 225, 21 L. T. Rep. N. S. 359 (where the deposit was made on an illegal consideration). *Contra*, Woolf *v.* Bernero, 14 Mo. App. 518, where the value of a ring deposited with defendant for the purpose of an illegal raffle and lost by his gross negligence was held recoverable. *Compare* Ingersoll *v.* Campbell, 46 Ala. 282, where it was held that money deposited with a third person upon an illegal contract may be recovered from him, as the illegality of the contract does not taint the depositor's title. See also Carlisle First Nat. Bank *v.* Graham, 100 U. S. 699, 25 L. ed. 750, which holds that a national bank is liable for damages occasioned by the loss through gross negligence of a special deposit made with it, although the contract of deposit was *ultra vires*.

6. *Louisiana.*— Thibaud *v.* Thibaud, 1 La. 493.

New Jersey.— Dale *v.* See, 51 N. J. L. 378,

C. Obligation to Return Res — 1. In General. There must be an obligation on the part of the depositary to restore the *res* either in specie or in kind upon demand of the depositor or otherwise in accordance with the terms of the deposit.[7]

2. Return in Kind — a. General Rule. As a rule one to whom property is delivered is not a depositary unless he assumes an obligation to return the identical thing delivered to him.[8]

b. Exceptions. To this rule, however, there are important exceptions. A warehouseman with whom a marketable commodity is deposited for safe-keeping until the depositor shall elect to dispose of the same may be regarded as a deposi-

18 Atl. 306, 14 Am. St. Rep. 688, 5 L. R. A. 583.

New York.— Schmidt *v.* Blood, 9 Wend. 268, 24 Am. Dec. 143.

Pennsylvania.— Trunick *v.* Smith, 63 Pa. St. 18.

England.— Finucane *v.* Small, 1 Esp. 315.

Deposit in name of another.— If a person deposits his own money in bank to the credit of another, the latter consenting simply as an accommodation to the former and having no control over the fund other than to draw it out when the depositor shall direct, the person in whose name the deposit is made is not liable for its safe-keeping, and if the bank fails the depositor must bear the loss. Dustin *v.* Hodgen, 38 Ill. 352. See, however, Gilbert *v.* Gilman, 17 Rev. Lég. 124, 132, where it was held that a deposit of money in bank in the name of the government by a contractor as security for performance of the contract is at the risk of the government.

Grant of storage room.— A person who merely grants storage room for the property of another, whether gratuitously or for a reward, without assuming expressly or impliedly any duty of care in respect of the property, is not liable to the owner if the property is carried off or injured by a trespasser, although such theft or injury might have been prevented by the slightest care on his part. He is no bailee, because delivery is essential to a bailment. Sherman *v.* Commercial Printing Co., 29 Mo. App. 31. And see Peers *v.* Sampson, 4 D. & R. 636, 2 L. J. K. B. O. S. 212, 16 E. C. L. 216.

Unauthorized deposit.— A person is liable for money deposited with his clerk if it afterward comes to his use and possession. Dougherty *v.* Vanderpool, 35 Miss. 165. However a depositary is not ordinarily responsible for a theft committed by or from his servants or agents, where they had no authority to receive the property. Lyons First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181; Doncy *v.* Hastings, 23 Wis. 475.

Executory agreement of deposit.— An agreement to make or to receive a gratuitous deposit is not a contract, since it is without consideration, and it may therefore be disregarded or retracted by either party so long as it remains purely executory; and the death of either party before performance is entered upon operates a revocation. Farrow *v.* Bragg, 30 Ala. 261.

7. Whatley *v.* Austin, 1 Rob. (La.) 21.

Agent or broker and depositary distinguished.— An agent for the disbursement of funds confided to him by his principal is not a depositary, since it is of the essence of a deposit that the depositary shall be bound to keep the thing deposited and restore it in kind to the depositor. Longbottom *v.* Babcock, 9 La. 44. And see Vandersmith *v.* Washmein, 1 Harr. & G. (Md.) 4. So when a customer confides a sum of money to a broker, to be employed in the purchase of a commodity, the relation of debtor and creditor arises between them, and not that of depositary and depositor. Consequently if the broker deposits the sum in a bank to his credit and the fund is seized on execution against him the customer is not entitled to the fund as against the creditor. Stetson *v.* Gurney, 17 La. 162.

Deposit for third person.— The fact that the *res* is payable to a third person does not alter the character of the bailment as a deposit. Bushnell *v.* Chautauqua County Nat. Bank, 74 N. Y. 290.

Privilege of loan.— The fact that a depositary of money is given the privilege of using it if he needs it does not render the transaction a loan *ab initio*. It becomes such only on the depositary's availing himself of the privilege. Carlyon *v.* Fitzhenry, 2 Ariz. 266, 15 Pac. 273.

8. Hathaway *v.* Brady, 26 Cal. 581; Lopes *v.* Brito, 7 Hawaii 679; Geist *v.* Pollock, 58 Ill. App. 429; Bloodworth *v.* Jacobs, 2 La. Ann. 24.

Mutuary and depositary distinguished. A loan of goods to be consumed and returned in kind is a contract not of *depositum* but of *mutuum*. One important respect in which a mutuary or bailee in a contract of *mutuum* differs from a depositary is that he is not, while a depositary is, obliged to return the specific thing bailed. Derrick *v.* Baker, 9 Port. (Ala.) 362; Andrews *v.* Worcester, etc., R. Co., 159 Mass. 64, 33 N. E. 1109; 2 Kent Comm. 573; Story Bailm. §§ 47, 228.

Mutuum as sale.— By the Roman law the contract of *mutuum* passed the right of property in the goods loaned, and their value only was to be returned. Story Bailm. §§ 47, 283; Fleta, lib. 2, c. 56, §§ 5, 792. This is true by the common law also, which regards a loan of goods for consumption as a sale. Schouler Bailm. § 6. See also Lonergan *v.* Stewart, 55 Ill. 44; Seymour *v.* Brown, 19 Johns. (N. Y.) 44; Chase *v.* Washburn, 1 Ohio St. 244, 59 Am. Dec. 623. See also *infra* note 9.

tary, although he does not agree to keep the property intact or to return it in specie, but agrees only to return its equivalent in amount, kind, and quality.[9] So a deposit of money in a bank is generally termed a contract of deposit, although the fund is not to be kept intact but may be returned in equivalent legal tender. A deposit of money in a bank is said to be either general or special.[10] Certain forms of special deposit are true contracts of deposit, since in these the identical fund deposited must be returned.[11] A general deposit, however, creates the relation of debtor and creditor between the parties,[12] since the bank need not return the identical fund, but may discharge its obligation by returning its equivalent in any legal tender. For this reason general deposits are sometimes termed imperfect or irregular deposits.[13]

D. Safe-Keeping of Res. The principal object of the deposit must be the safe-keeping of the *res*.[14]

9. Nelson *v.* Brown, 53 Iowa 555, 5 N. W. 719; Sexton *v.* Graham, 53 Iowa 181, 4 N. W. 1090; Hughes *v.* Stanley, 45 Iowa 622; Erwin *v.* Clark, 13 Mich. 10; Chase *v.* Washburn, 1 Ohio St. 244, 59 Am. Dec. 623; Slaughter *v.* Green, 1 Rand. (Va.) 3, 10 Am. Dec. 488; being cases of a deposit of grain in an elevator.

Option to sell or to buy.— The transaction is a bailment, although the depositor is given an option to sell the property to the warehouseman (Lyon *v.* Lenon, 106 Ind. 567, 7 N. E. 311; O'Neal *v.* Stone, 79 Mo. App. 279); but if the warehouseman is given an option to buy the property the transaction is a sale (Lyon *v.* Lenon, 106 Ind. 567, 7 N. E. 311; O'Neal *v.* Stone, 79 Mo. App. 279; Chase *v.* Washburn, 1 Ohio St. 244, 59 Am. Dec. 623. See, however, Colton *v.* Wise, 7 Ill. App. 395; Knight *v.* Piella, 111 Mich. 9, 69 N. W. 92, 66 Am. St. Rep. 375, both cases holding that a delivery of goods to one who is given an option to buy them creates a bailment).

Deposit of grain may be a sale where that was the intention of the parties. Johnston *v.* Browne, 37 Iowa 200; Reherd *v.* Clem, 86 Va. 374, 10 S. E. 504.

Further as to this subject see WAREHOUSEMEN.

10. Wright *v.* Paine, 62 Ala. 340, 34 Am. Rep. 24; Whittier *v.* Whittier, 31 N. H. 452; Schoenmaker *v.* Hinze, 53 Wis. 116, 10 N. W. 86.

11. See BANKS AND BANKING, 5 Cyc. 513.

12. Wray *v.* Tuskegee Ins. Co., 34 Ala. 58; Geist *v.* Pollock, 58 Ill. App. 429; Anderson *v.* Foresman, Wright (Ohio) 598; Shoemaker *v.* Hinze, 53 Wis. 116, 10 N. W. 86. See also BANKS AND BANKING, 5 Cyc. 515, 517.

13. State *v.* Clark, 4 Ind. 315. Although the distinction formerly existing between a perfect and imperfect deposit is abrogated by La. Civ. Code, art. 2934, which recognizes as the only real deposit a thing received to be preserved in kind without the power of using it and to be restored identically, yet persons are at liberty by their contracts or course of dealing to create irregular deposits, which between themselves are inviolate and prevent the effects which the law in the absence of any contract or course of dealing would have upon their respective rights. Bloodworth *v.* Jacobs, 2 La. Ann. 24.

Mutuum and general deposit distinguished. A general deposit of money with a bank or a private person is not the deposit of the Roman law, nor is it what in that law was designated by the term "*mutuum*," which was a loan of property for consumption, to be returned in kind and without interest or compensation for the use; but it is what Pothier calls an "irregular deposit," which differs from a *mutuum* in this — that the latter has principally in view the benefit of the receiver, the former the benefit of the bailor. Payne *v.* Gardiner, 29 N. Y. 146; Story Bailm. 61.

14. Thibaud *v.* Thibaud, 1 La. 493. Thus where a customer confides cash to a factor to be expended by him in taking the goods to market and disposing of them, the balance to be accounted for on his return, it does not constitute a *depositum*, since a contract of deposit is essentially intended for the safety of the thing deposited. Thompson *v.* Scales, 11 La. 560.

General deposit.— This is equally true of a general deposit. While in such a case the safe-keeping of the identical *res* is not intended, yet the preservation and return of its equivalent in amount, kind, and quality is the main object of the deposit. See *supra*, II, C, 2, b.

Mandatary and depositary distinguished. A mandatary is the bailee in a contract of *mandatum*, which is a bailment of goods in regard to which the bailee engages to do some act without reward (Richardson *v.* Futrell, 42 Miss. 525; Lampley *v.* Scott, 24 Miss. 528; 2 Kent Comm. 569, 570); as where one takes goods for the purpose of repairing them (Russell *v.* Koehler, 66 Ill. 459) or for manufacture (Gleason *v.* Beers, 59 Vt. 581, 10 Atl. 86, 59 Am. Rep. 757; Brown *v.* Hitchcock, 28 Vt. 452). "Mandates and deposits closely resemble each other; the distinction being that in mandates the care and service are the principal, and the custody the accessory, while in deposits the custody is the principal thing, and the care and service are merely accessory." Black L. Dict. See also BAILMENTS, 5 Cyc. 164; Jones Bailm. 53; Story Bailm. §§ 5, 140. "The depositary

E. Gratuitous Custody. Strictly speaking it is an element of the contract of *depositum* that the bailee shall receive and keep the property for the bailor's benefit gratuitously;[15] but certain forms of bailment are commonly spoken of as deposits, although the bailee is to receive compensation for holding the property.[16]

F. Benefit to Bailor. A contract of *depositum* is commonly classified as one for the benefit of the bailor alone.[17] The benefit of the bailor is indeed the main purpose of the contract, but the fact that the bailee incidentally derives a benefit from the transaction does not detract from its character as a deposit. This is true of a case where the depositary is to be compensated for his trouble.[18] It is true also in those cases where the depositary has the right to use the *res* during the continuance of the bailment.[19] Nor is the bailment deprived of its character as a deposit because it is made for the benefit of a third person.[20]

III. Depositaries of Private Property.

A. Creation of Deposit — 1. In General. The relationship of depositor and depositary is created where personal property is delivered by one person to another upon an express or implied agreement of the latter, with or without compensation, safely to keep and return it in specie or to return it in kind, upon demand of the depositor or otherwise in accordance with the terms of the contract of deposit.[21]

2. Time of Creation. The deposit is complete upon delivery of the *res* to the depositary.[22]

3. Character of Deposit. The character of any particular deposit is to be determined by the contract between the parties.[23] In case the contract leaves it

is charged with keeping the goods only, and the mandatory with doing something with or about them." Montgomery *v.* Evans, 8 Ga. 178, 181.

15. Morris *v.* Lewis, 33 Ala. 53; Durnford *v.* Segher, 9 Mart. (La.) 470; Payne *v.* Gardiner, 29 N. Y. 146; Wilson *v.* Prosser, 5 Kulp (Pa.) 471; Bracton, fol. 99*b*; Inst. 3, 15; Jones Bailm. 36, 117; 2 Kent Comm. 560 *et seq.*; 3 Minor Inst. 271; Story Bailm. § 41.

16. See Abbott L. Dict.

17. Schouler Bailm. § 14.

Loan and deposit distinguished. A loan is usually made at the request and for the benefit of the borrower (Payne *v.* Gardiner, 29 N. Y. 146, 167); but its character as such is not altered by the fact that compensation is to be made to the lender (Payne *v.* Gardiner, *supra*. See, however, Templeman *v.* Gibbs, 86 Tex. 358, 24 S. W. 792) or by the fact that the borrower assumes the expense of the care of the *res* (Bennett *v.* O'Brien, 37 Ill. 250). A deposit may of course be changed to a loan, as where money is delivered as a special deposit and an agreement is afterward made that the depositor shall lend, and the depositary shall borrow, the money. Howard *v.* Roeben, 33 Cal. 399; Chiles *v.* Garrison, 32 Mo. 475.

Mutuum and deposit distinguished. A *mutuum* or loan for consumption has principally in view the benefit of the bailee, a deposit the benefit of the bailor. Payne *v.* Gardiner, 29 N. Y. 146; Story Bailm. 61.

18. See *supra*, II, E.

19. Farrow *v.* Bragg, 30 Ala. 261.

20. Bushnell *v.* Chautauqua County Nat. Bank, 74 N. Y. 290.

21. See cases cited *supra*, note 3 *et seq.*

A gratuitous deposit is created by an agreement under which the depositor places a slave in the possession of the depositary "to take care of him, keep him until called for, and pay nothing for his hire" (Farrow *v.* Bragg, 30 Ala. 261); by a pretended sale with agreement to return the property (King *v.* Cressap, 22 La. Ann. 211); by receiving property with permission to use it, if the depositary does not avail himself of the permission (Caldwell *v.* Hall, 60 Miss. 330, 44 Am. Rep. 410); or by leaving property on another's premises with his consent without agreement as to compensation (Burk *v.* Dempster, 34 Nebr. 426, 51 N. W. 976). The fact that the treasurer of an association serving without compensation has an official position and designation and has given bond does not make him any more than a gratuitous depositary of the funds intrusted to him in that position. Hibernia Bldg. Assoc. *v.* McGrath, 154 Pa. St. 296, 36 Atl. 377, 35 Am. St. Rep. 828.

22. Dale *v.* See, 51 N. J. L. 378, 18 Atl. 306, 14 Am. St. Rep. 688, 5 L. R. A. 583, holding that stipulations subsequent to delivery are consequently ineffeient unless assented to.

23. Wright *v.* Paine, 62 Ala. 340, 34 Am. Rep. 24 (where it was held that an instrument acknowledging a deposit for "safe-keeping" of a certain amount of gold coin which the depositary is to "return whenever called for" is a special deposit calling for return in specie); Moses *v.* Taylor, 6 Mackey (D. C.) 255 (where an agreement for the "safe return of said bonds" was held to imply the return

in doubt, the character of the depositary's business is of weight in determining the nature of the deposit.[24]

B. Rights of Depositary — 1. Against Depositor — a. Possession of Res. Ordinarily the depositary has the right to retain the *res* until the depositor demands its return,[25] but not after demand,[26] unless by the terms of the contract of deposit he is given the right to retain the *res* for a prescribed time.[27]

b. Use of Res.[28] The depositary may use the *res* so far as its use is contemplated by the parties or is beneficial to the deposit,[29] but not otherwise.[30] If the depositary was given the right to use the property the presumption is, in the absence of evidence on the point, that he was to pay for its use.[31]

c. Compensation. Strictly speaking a depositary is a bailee who accepts the gratuitous custody of the *res*, and therefore he is not entitled to compensation. By modern usage, however, the term is given a broader meaning and may include those who by contract express or implied are to be compensated for taking charge of the *res* where its safe-keeping is the main object of the bailment.[32]

d. Lien. In the absence of agreement or custom a depositary has no lien for storage,[33] but he may have a lien for labor bestowed upon the *res*.[34]

e. Set-Off. A depositary has ordinarily no right to set off personal credits in discharge of his obligation as depositary.[35]

f. Jus Disponendi. A depositary has at most only a special property right in the *res*,[36] and as against the depositor he cannot dispose of it either absolutely or

of the identical bonds); Merchants' Nat. Bank *v.* Guilmartin, 88 Ga. 797, 15 S. E. 831, 17 L. R. A. 322 (holding that the question whether a deposit is gratuitous is not to be determined by transactions, however numerous, between the depositary and third persons having no relation to the case); Rankin *v.* Craft, 1 Heisk. (Tenn.) 711 (holding that a note or due-bill given by the recipient of money, whereby he promised to pay the amount in currency on demand, conclusively showed that the transaction created a debt and not a mere deposit).

Obligation to pay interest see *infra*, note 29.

24. Keen *v.* Beckman, 66 Iowa 672, 24 N. W. 270 (where merchants receiving a deposit were held to be gratuitous bailees); Winne *v.* Illinois Cent. R. Co., 31 Iowa 583 (holding that common carriers are presumed in the absence of evidence to be depositaries for hire of property delivered to them in the course of business); Swartz *v.* Hauser, 10 Wkly. Notes Cas. (Pa.) 434 (where it was held that a bailment with a broker is presumably not gratuitous). So also a delivery to forwarders in the usual course of business with instructions to forward implies a bailment not gratuitous. Wright *v.* Paine, 62 Ala. 340, 34 Am. Rep. 24; Graves *v.* Smith, 14 Wis. 5, 80 Am. Dec. 762.

25. See cases cited *infra*, note 92 *et seq.*

26. See cases cited *infra*, note 69 *et seq.*

27. Engel *v.* Scott, etc., Lumber Co., 60 Minn. 39, 61 N. W. 825, holding that, where the depositary by the terms of the contract has a right to retain the property for a definite time, he may recover damages against the depositor for taking possession before its expiration.

28. **Liability for loss or injury** from the use of *res* see *infra*, III, C, 1, a, (I), (A), (2), (a); III, C, 1, a, (I), (B).

29. Farrow *v.* Bragg, 30 Ala. 261 (slave); Derrick *v.* Baker, 9 Port. (Ala.) 362 (horse or cow); Munson *v.* Porter, 63 Iowa 453, 19 N. W. 290 (horse); Cain *v.* Kelly, 4 Humphr. (Tenn.) 472 (horse or cow, it seems).

Implied right.— The right to use the *res* may be implied from circumstances. Farrow *v.* Bragg, 30 Ala. 261. Thus the fact that interest was to be paid is strong evidence that the depositary was to be allowed to use the deposit and that the relationship was that of debtor and creditor. Howard *v.* Roeben, 33 Cal. 399; Hathaway *v.* Brady, 26 Cal. 581; Brierre *v.* His Creditors, 43 La. Ann. 423, 9 So. 640.

30. Cain *v.* Kelly, 4 Humphr. (Tenn.) 472, holding that the depositary of a slave who set him at large and put him to labor in the field was guilty of conversion.

31. Cullen *v.* Lord, 39 Iowa 302; Story Bailm. (7th ed.) § 391*b*.

32. See *supra*, II, E.

Right to expenses of caring for property see *infra*, III, E.

33. Alt *v.* Weidenberg, 6 Bosw. (N. Y.) 176; Rivara *v.* Ghio, 3 E. D. Smith (N. Y.) 264; Lyungstrandh *v.* William Haaker Co., 16 Misc. (N. Y.) 387, 38 N. Y. Suppl. 129; Buxton *v.* Baughan, 6 C. & P. 674, 25 E. C. L. 633.

34. Longstreet *v.* Phile, 39 N. J. L. 63, where a bailee converting goods was allowed to set up his lien for labor in reduction of damages in an action of trover.

35. St. John *v.* O'Connel, 7 Port. (Ala.) 466; U. S. Bank *v.* Macalester, 9 Pa. St. 475; Fox *v.* Reed, 3 Grant (Pa.) 81 (where the right of set-off was denied as against an attachment creditor of the depositor); Woodson *v.* Payne, 1 Call (Va.) 570.

36. Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795. See also Bailments, 5 Cyc. 171.

conditionally by sale or otherwise and so defeat the rights of the depositor as general owner of the property.[37]

2. Against Third Persons. At common law the depositary was practically an insurer of the property bailed and therefore was allowed an action against a third person for loss of or injury to or detention of the thing deposited;[38] and in some states the action is still allowed.[39] In other jurisdictions the depositary's right of action is made to depend upon the question whether he is himself responsible to the depositor for the injury complained of.[40] However in replevin by a depositary against one who has taken the goods from his possession, title in a third person other than the depositor is a good defense.[41] A depositary cannot enforce notes deposited with him to indemnify sureties of the depositor.[42]

C. Duties and Liabilities of Depositary — 1. To Depositor — a. To Care For Res — (i) *During Bailment* — (A) *Measure of Care* — (1) General Rule. All bailees are bound to care for the property in their hands; the degree of care required of them depends, in the absence of a contract prescribing the measure of care,[43] on whether the bailment is for the benefit of the bailor alone, the benefit of the bailee alone, or their mutual benefit.[44] A gratuitous depositary is bound to exercise only slight care and is answerable in case of loss of or injury to the property only where it occurs through his gross negligence.[45] If, however, the

37. *Alabama.*— Calhoun *v.* Thompson, 56 Ala. 166, 28 Am. Rep. 754.

Louisiana.— McGregor *v.* Ball, 4 La. Ann. 289.

Massachusetts.—Jenkins *v.* Bacon, 111 Mass. 373, 15 Am. Rep. 33, *semble*.

New York.— Dale *v.* Brinekerhoff, 7 Daly 45.

England.— Hartop *v.* Hoare, 2 Str. 1187, Wils. Ch. 8.

See also Bailments, 5 Cyc. 188.

Right of depositor to recover *res* see *infra*, III, D, 1.

38. See Bailments, 5 Cyc. 171, 210, 222.

39. *Alabama.*— Calhoun *v.* Thompson, 56 Ala. 166, 28 Am. Rep. 754; Firemen's Ins. Co. *v.* McMillan, 29 Ala. 147, action of debt by depositary on bond of employee who embezzled deposit.

Louisiana.—Johnson *v.* Imboden, 4 La. Ann. 178, action for possession.

Maryland.— Casey *v.* Suter, 36 Md. 1, assumpsit for loss or injury.

Massachusetts.— Brewster *v.* Warner, 136 Mass. 57, 49 Am. Rep. 5, action of tort for injury.

Virginia.— Boyle *v.* Townes, 9 Leigh 158.

Canada.— Sanford *v.* Bowles, 9 Nova Scotia 304, action of conversion.

Damages for detention.— While the depositary may recover possession of the property from a third person he cannot recover the value of the use of the property while it remained in defendant's possession. For that defendant is answerable to the depositor alone. Johnson *v.* Imboden, 4 La. Ann. 178.

40. Claridge *v.* South Staffordshire Tramway Co., [1892] 1 Q. B. 422, 56 J. P. 408, 61 L. J. Q. B. 503, 66 L. T. Rep. N. S. 655, action of case for injury. And see Harrison *v.* McIntosh, 1 Johns. (N. Y.) 380, replevin. *Contra*, Chamberlain *v.* West, 37 Minn. 54, 33 N. W. 114, action for loss.

41. Harrison *v.* McIntosh, 1 Johns. (N. Y.) 380.

42. Knickerbocker Trust Co. *v.* Polley, 26 Misc. (N. Y.) 282, 57 N. Y. Suppl. 85.

43. See Sweet L. Dict. 83.

Effect of express agreement to return.— The fact that the depositary on receiving the deposit made an express agreement to return the identical property does not make him responsible for a loss occurring without negligence. Bowler *v.* Ahlo, 11 Hawaii 357; Jenkins *v.* Bowdoinham Nat. Village Bank, 58 Me. 275; Field *v.* Braekett, 56 Me. 121. See, however, Harvey *v.* Murray, 136 Mass. 377, where it was said that if a depositary for hire agrees to return a chattel in as good order as received he is liable for an injury to it from inevitable accident.

Exemption from common-law liability see *infra*, III, C, 1, a, (I), (B).

44. Carlisle First Nat. Bank *v.* Graham, 79 Pa. St. 106, 116, 21 Am. Rep. 49. See Bailments, 5 Cyc. 181 *et seq.*

45. *Arkansas.*—Lyon *v.* Tams, 11 Ark. 189.

Illinois.— Singer Mfg. Co. *v.* Tyler, 54 Ill. App. 97.

Indiana.— Dart *v.* Lowe, 5 Ind. 131.

Iowa.— Jourdan *v.* Reed, 1 Iowa 135.

Kansas.— Lobenstein *v.* Pritchett, 8 Kan. 213; Union Pac. R. Co. *v.* Rollins, 5 Kan. 167; Johnson *v.* Reynolds, 3 Kan. 251.

Kentucky.— Green *v.* Hollingsworth, 5 Dana 173, 30 Am. Dec. 680; Bakewell *v.* Talbot, 4 Dana 216.

Louisiana.— Dunn *v.* Branner, 13 La. Ann. 452; Lafarge *v.* Morgan, 11 Mart. 462.

Massachusetts.— Whitney *v.* Lee, 8 Metc. 91.

Minnesota.— Smith *v.* Minneapolis Library Bd., 58 Minn. 108, 59 N. W. 979, 25 L. R. A. 280.

Mississippi.— Searborough *v.* Webb, 59 Miss. 449; McKay *v.* Hamblin, 40 Miss. 472.

Missouri.— Wiser *v.* Chesley, 53 Mo. 547; Huxley *v.* Hartzell, 44 Mo. 370; McLean *v.* Rutherford, 8 Mo. 109; Hapgood Plow Co. *v.* Wabash R. Co., 61 Mo. App. 372; Mason *v.*

parties are to derive mutual benefit from the deposit, as for instance where the depositary is to receive compensation, then he must exercise ordinary care over the *res*.[46]

(2) Illustrations — (a) Particular Causes of Loss or Injury.[47] A depositary is not responsible for a loss or injury occurring through the overpowering force of man or the act of God;[48] nor is he liable for a loss of the goods by theft without negligence on his part.[49] If, however, he mixes the *res* with like property of his

St. Louis Union Stock Yards Co., 60 Mo. App. 93; Cohen *v.* St. Louis, etc., R. Co., 59 Mo. App. 66.

Nebraska.— Burk *v.* Dempster, 34 Nebr. 426, 51 N. W. 976.

New York.— Lyons First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181 [*reversing* 48 How. Pr. 148]; Jackson *v.* Eighmie, 10 N. Y. St. 359, 27 N. Y. Wkly. Dig. 193; Davison *v.* Exhibition Assoc., 9 How. Pr. 226.

North Carolina.— Patterson *v.* McIver, 90 N. C. 493.

Pennsylvania.— Hibernia Bldg. Assoc. *v.* McGrath, 154 Pa. St. 296, 26 Atl. 377, 35 Am. St. Rep. 828; Carlisle First Nat. Bank *v.* Graham, 79 Pa. St. 106, 21 Am. Rep. 49; Lloyd *v.* West Branch Bank, 15 Pa. St. 172, 53 Am. Dec. 581.

South Carolina.— Glover *v.* Burbidge, 27 S. C. 305, 3 S. E. 471.

Tennessee.— Colyar *v.* Taylor, 1 Coldw. 372.

Vermont.— Spooner *v.* Mattoon, 40 Vt. 300, 94 Am. Dec. 395.

Virginia.— Tancil *v.* Seaton, 28 Gratt. 601, 26 Am. Rep. 380.

Wisconsin.— Minor *v.* Chicago, etc., R. Co., 19 Wis. 40, 88 Am. Dec. 670.

United States.— Preston *v.* Prather, 137 U. S. 604, 11 S. Ct. 162, 34 L. ed. 788.

England.— Doorman *v.* Jenkins, 2 A. & E. 256, 4 N. & M. 170, 4 L. J. K. B. 29, 29 E. C. L. 132; Shiells *v.* Blackburne, 1 H. Bl. 158, 2 Rev. Rep. 750; Coggs *v.* Bernard, 2 Ld. Raym. 909.

See 16 Cent. Dig. tit. "Depositaries," § 9 *et seq.*

46. *Connecticut.*— Bradley *v.* Cunningham, 61 Conn. 485, 23 Atl. 932, 15 L. R. A. 679.

Delaware.— Chase *v.* Maberry, 3 Harr. 266; Early *v.* Wilson, 2 Harr. 47.

District of Columbia.— Laub *v.* Landsdale, 14 Fed. Cas. No. 8,118, 1 Hayw. & H. 45.

Illinois.— Russell *v.* Koehler, 66 Ill. 459; Colton *v.* Wise, 7 Ill. App. 395.

Indiana.— Conner *v.* Winton, 8 Ind. 315, 65 Am. Dec. 761.

Kansas.— Union Pac. R. Co. *v.* Rollins, 5 Kan. 167.

Kentucky.— Bakewell *v.* Talbot, 4 Dana 216.

Mississippi.— Young *v.* Thompson, 3 Sm. & M. 129.

New York.— Ouderkirk *v.* Troy Cent. Nat. Bank, 119 N. Y. 263, 23 N. E. 875 [*affirming* 52 Hun 1, 4 N. Y. Suppl. 734].

Vermont.—Carpenter *v.* Branch, 13 Vt. 161, 37 Am. Dec. 587.

United States.— Clark *v.* U. S., 95 U. S. 539, 24 L. ed. 518; McLemore *v.* Louisiana State Bank, 91 U. S. 27, 23 L. ed. 196.

See 16 Cent. Dig. tit. "Depositaries," § 9 *et seq.*

47. **Loss or injury in general** see *supra*, III, C, 1, a, (I), (A), (1).

48. *Georgia.*— Patten *v.* Baggs, 43 Ga. 167, military force, it seems.

Illinois.— Russell *v.* Koehler, 66 Ill. 459.

Louisiana.— Levy *v.* Bergeron, 20 La. Ann. 290, military force.

Missouri.— McEvers *v.* The Sangamon, 22 Mo. 187.

New York.— Hayes *v.* Kedzie, 11 Hun 577.

Pennsylvania.— Jones *v.* Gilmore, 91 Pa. St. 310, act of God.

United States.— McLemore *v.* Louisiana State Bank, 91 U. S. 27, 23 L. ed. 196, military force.

But see Harvey *v.* Murray, 136 Mass. 377.

Subsequently appearing certainty of destruction by superior force as excusing delivery to third person see *infra*, note 70.

49. *Arizona.*—Carlyon *v.* Fitzhenry, 2 Ariz. 266, 15 Pac. 273.

Iowa.— Keen *v.* Beckman, 66 Iowa 672, 24 N. W. 270.

Louisiana.— Levy *v.* Pike, 25 La. Ann. 630.

Mississippi.— Caldwell *v.* Hall, 60 Miss. 330, 44 Am. Rep. 410; McKay *v.* Hamblin, 40 Miss. 472.

Ohio.— Monteith *v.* Bissell, Wright 411.

Pennsylvania.— De Haven *v.* Kensington Nat. Bank, 81 Pa. St. 95.

Virginia.— Danville Bank *v.* Waddill, 31 Gratt. 469.

England.— Coggs *v.* Bernard, 2 Ld. Raym. 909.

Canada.— Scott *v.* Chester Valley Nat. Bank, 10 Can. L. J. N. S. 182.

Deposit for mutual benefit.— The rule is the same where the deposit is for the mutual benefit of the parties. Moore *v.* Mobile, 1 Stew. (Ala.) 284; Watkins *v.* Roberts, 28 Ind. 167; Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Platt *v.* Hibbard, 7 Cow. (N. Y.) 497.

Loss by negligence.— Theft of a deposit does not release the depositary unless it occurred without his fault. Huxley *v.* Hartzell, 44 Mo. 370; Griffith *v.* Zipperwick, 28 Ohio St. 388.

Theft by employee.— A gratuitous depositary is not liable if an employee properly selected and retained steals the property. Merchants' Nat. Bank *v.* Guilmartin, 88 Ga. 797, 15 S. E. 831, 17 L. R. A. 322. But he is liable if he was guilty of gross neglect in retaining the employee and allowing him

own and a loss of the whole occurs,[50] or if he deals with it in any way not contemplated by the terms of the deposit,[51] he is liable.

(b) Depreciation in Value. A depositary is not liable for a depreciation in the value of the property occurring without fault on his part,[52] as for instance a depreciation occurring through reasonable wear and tear as fairly contemplated by the contract.[53]

(3) Tests of Care and Negligence. A gratuitous depositary is liable only for gross negligence,[54] which has been defined as the omission of that care which even the most inattentive and thoughtless persons never fail to take of their own concerns.[55] Applying this test, it would seem that a gratuitous depositary is not liable for loss or injury unless he has failed to exercise only that care which persons of less than common prudence usually bestow on their own property,[56] or, as it is sometimes stated, that a gratuitous depositary is responsible only for such gross negligence as is equivalent to fraud.[57] However in many cases it is said

access to the property. Preston *v.* Prather, 137 U. S. 604, 11 S. Ct. 162, 34 L. ed. 788.

50. Cicalla *v.* Rossi, 10 Heisk. (Tenn.) 67.

51. *Arkansas.*— Stewart *v.* Davis, 31 Ark. 518, 25 Am. Rep. 576.

Massachusetts.— Hyde *v.* Mechanical Refrigerating Co., 144 Mass. 432, 11 N. E. 673.

New York.— Collins *v.* Bennett, 46 N. Y. 490.

Vermont.— Gray *v.* Stevens, 28 Vt. 1, 65 Am. Dec. 216; Briggs *v.* Bennett, 26 Vt. 146; Briggs *v.* Oaks, 26 Vt. 138; Swift *v.* Moseley, 10 Vt. 208, 33 Am. Dec. 197.

Virginia.—Harvey *v.* Skipworth, 16 Gratt. 393.

Wisconsin.— Lane *v.* Cameron, 38 Wis. 603.

Canada.— Adam *v.* Henderson, 1 Rev. de Leg. 504.

52. Berard *v.* Boagni, 30 La. Ann. 1125.

53. Blakemore *v.* Bristol, etc., R. Co., 8 E. & B. 1035, 4 Jur. N. S. 657, 27 L. J. Q. B. 167, 6 Wkly. Rep. 336, 92 E. C. L. 1035 (*semble*); Morris *v.* Armit, 4 Manitoba 152.

54. See *supra*, III, C, 1, a, (I), (A), (1); and, generally, Bailments.

55. Wiser *v.* Chesley, 53 Mo. 547; Tompkins *v.* Saltmarsh, 14 Serg. & R. (Pa.) 275.

Negligence and gross negligence.— The line drawn between the liability of a gratuitous depositary and one having an interest in the deposit is shadowy. In both cases it is frequently said that the depositary is liable for a lack of that prudence which responsible men exercise in regard to their own property. See cases cited *infra*, note 58. There seems to be a definite distinction, however, in those cases where the depositary is held responsible only in cases where his negligence is so gross as to amount to fraud. See cases cited *infra*, note 57. The distinction between "negligence" and "gross negligence" has been discountenanced in some cases. Mariner *v.* Smith, 5 Heisk. (Tenn.) 203; Willson *v.* Brett, 12 L. J. Exch. 264, 11 M. & W. 113; where it was said that they are "the same thing, with the addition of a vituperative epithet." See, however, Giblin *v.* McMullen, L. R. 2 P. C. 317, 336, 38 L. J. P. C. 25, 21 L. T. Rep. N. S. 214, 5 Moore P. C. N. S. 434, 17 Wkly. Rep. 445, 16 Eng. Reprint 478, where Lord Chelmsford says: "Of course, if intended as a definition, the expression 'gross negligence' wholly fails of its object. But as there is a practicable difference between the degrees of negligence for which different classes of Bailees are responsible, the term may be usefully retained as descriptive of that difference. . . . The epithet 'gross,' is certainly not without its significance."

56. Johnson *v.* Reynolds, 3 Kan. 257. *Contra*, Gray *v.* Merriam, 46 Ill. App. 337; Carlisle First Nat. Bank *v.* Graham, 79 Pa. St. 106, 21 Am. Rep. 49; Giblin *v.* McMullen, L. R. 2 P. C. 317, 38 L. J. P. C. 25, 21 L. T. Rep. N. S. 214, 5 Moore P. C. N. S. 434, 17 Wkly. Rep. 445, 16 Eng. Reprint 578.

57. *Connecticut.*— Beers *v.* Boston, etc., R. Co., 67 Conn. 417, 34 Atl. 541, 52 Am. St. Rep. 293, 32 L. R. A. 535.

Kentucky.— Sodowsky *v.* McFarland, 3 Dana 204.

Massachusetts.— Clark *v.* Eastern R. Co., 139 Mass. 423, 1 N. E. 128; Smith *v.* Westfield First Nat Bank, 99 Mass. 605, 97 Am. Dec. 59; Whitney *v.* Lee, 8 Metc. 91; Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

New York.— Edson *v.* Weston, 7 Cow. 278.

Pennsylvania.— Hibernia Bldg. Assoc. *v.* McGrath, 154 Pa. St. 296, 26 Atl. 377, 35 Am. St. Rep. 828; Scott *v.* Chester Valley Nat. Bank, 72 Pa. St. 471, 13 Am. Rep. 711; Tompkins *v* Saltmarsh, 14 Serg. & R. 275.

Vermont.— See Spooner *v.* Mattoon, 40 Vt. 300, 94 Am. Dec. 395.

United States.— See Carlisle First Nat. Bank *v.* Graham, 100 U. S. 699, 25 L. ed. 750.

England.— Giblin *v.* McMullen, L. R. 2 P. C. 317, 337, 38 L. J. P. C. 25, 21 L. T. Rep. N. S. 214, 5 Moore P. C. N. S. 434, 17 Wkly. Rep. 445, 16 Eng. Reprint 478, where it was said that the liability of a gratuitous bailee for negligence "is such as to involve a breach of confidence or trust, not arising merely from some want of foresight or mistake of judgment, but from some culpable default."

that the test of the care required of a gratuitous depositary is that care which persons of ordinary prudence in his situation and business usually exercise in the keeping of like property of their own.[58] In any event the question whether the depositary has exercised the requisite care must be considered in view of the character, value, and situation of the property, and the bearing of surrounding circumstances on its security.[59]

(4) Proximate Cause of Loss. Negligence on the part of a depositary does not render him liable for a loss, unless it was the proximate cause of the loss.[60]

(5) Care Required of Employees of Depositary. The same rules apply where the servants or agents of the depositary have the custody of the property, as where he personally has possession of it.[61]

(B) *Exemption From Liability.* A depositary other than a common carrier[62] may contract for exemption from his common-law liability for damages caused by his negligence.[63] A stipulation limiting the depositary's common-law liability need not be express but may be implied from circumstances. Thus the question of due care is governed by the known business habits of the depositary;[64] and he is not responsible for a loss resulting from any manner of caring for the property[65] or for any use of it[66] which was contemplated by the parties.

(II) *After Termination of Bailment*—(A) *After Demand For Res.* After the depositor has demanded a return of the *res*, the depositary holds the

Canada.—Harris *v.* Sheffield, 10 Nova Scotia 1, where the depositary took from the hands of an insolvent his own note and not the depositor's, and it was held that he was not responsible to the depositor for the loss of the note as he did not participate in the fraud.

See 16 Cent. Dig. tit. "Depositaries," § 10.

On the contrary it has been said that a gratuitous depositary may be guilty of gross negligence, although he acted in good faith. Gray *v.* Merriam, 46 Ill. App. 337.

58. *Alabama.*—Henry *v.* Porter, 46 Ala. 293.

Florida.—West *v.* Blackshear, 20 Fla. 457.

Illinois.—Skelley *v.* Kahn, 17 Ill. 170.

Indiana.—Green *v.* Birchard, 27 Ind. 483.

Kentucky.—Ray *v.* Commonwealth Bank, 10 Bush 344.

Louisiana.—Merrick Rev. Civ. Code (1900), art. 2937; Levy *v.* Pike, 25 La. Ann. 630; Hill *v.* Daniels, 15 La. Ann. 280; Mechanics', etc., Bank *v.* Gorden, 5 La. Ann. 604.

Maryland.—Shermer *v.* Neurath, 54 Md. 491, 39 Am. Rep. 397; Maury *v.* Coyle, 34 Md. 235.

New York.—Lyons First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181.

Ohio.—Griffith *v.* Zipperwick, 28 Ohio St. 388.

Pennsylvania.—Scott *v.* Chester Valley Nat. Bank, 72 Pa. St. 471, 13 Am. Rep. 711.

Texas.—Fulton *v.* Alexander, 21 Tex. 148.

United States.—Tracy *v.* Wood, 24 Fed. Cas. No. 14,130, 3 Mason 132.

England.—Giblin *v.* McMullen, L. R. 2 P. C. 317, 38 L. J. P. C. 25, 21 L. T. Rep. N. S. 214, 5 Moore P. C. N. S. 434, 17 Wkly. Rep. 445, 16 Eng. Reprint 578; Shiells *v.* Blackburne, 1 H. Bl. 158, 2 Rev. Rep. 750.

See 16 Cent. Dig. tit. "Depositaries," § 10.

59. Rutgers *v.* Lucet, 2 Johns. Cas. (N. Y.) 92; Griffith *v.* Zipperwick, 28 Ohio St. 388 (where the fact that the depositary kept government bonds in a vault known to be insecure when they might have been put in a place of safety was held to be gross negligence); Carlisle First Nat. Bank *v.* Graham, 79 Pa. St. 106, 21 Am. Rep. 49; Preston *v.* Prather, 137 U. S. 604, 11 S. Ct. 162, 34 L. ed. 788.

60. Lyons First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181.

61. Hall *v.* Warner, 60 Barb. (N. Y.) 198; Murray *v.* Clarke, 2 Daly (N. Y.) 102; Rivara *v.* Ghio, 3 E. D. Smith (N. Y.) 264. However a depositary is not ordinarily liable for loss of property deposited with a clerk or agent who has no authority to receive it. See *supra*, note 6.

Theft by employee see *supra*, note 49.

62. See Carriers, 6 Cyc. 385 *et seq.*

63. McLean *v.* Rutherford, 8 Mo. 109; Alexander *v.* Greene, 3 Hill (N. Y.) 9. See, however, Smith *v.* Minneapolis Library Bd., 58 Minn. 108, 59 N. W. 979, 25 L. R. A. 280, where it was said that a borrower is responsible for gross negligence, although he notifies the lender that he will not be responsible for the safety of the deposit.

64. Hibernia Bldg. Assoc. *v.* McGrath, 154 Pa. St. 296, 26 Atl. 377, 35 Am. St. Rep. 828; Glover *v.* Burbidge, 27 S. C. 305, 3 S. E. 471.

65. Knowles *v.* Atlantic, etc., R. Co., 38 Me. 55, 61 Am. Dec. 234; Schermer *v.* Neurath, 54 Md. 491, 39 Am. Rep. 397; Creager *v.* Link, 7 Md. 259; Conway Bank *v.* American Express Co., 8 Allen (Mass.) 512; Cicalla *v.* Rossi, 10 Heisk. (Tenn.) 67.

66. Carnes *v.* Nichols, 10 Gray (Mass.) 369; Ruggles *v.* Fay, 31 Mich. 141; McKenzie *v.* Lewis, 31 Nova Scotia 408.

Right to use res see *supra*, III, B, 1, b.

Wear and tear contemplated by contract see *supra*, III, C, 1, a, (I), (A), (2), (b).

property at his peril and is answerable for any subsequent loss or injury although it occur without his fault.[67]

(B) *After Notice to Remove Res.* After giving reasonable notice to the depositor to remove his property, the depositary may remove it and discharge himself of the duty of caring for it.[68]

b. To Return Res — (I) *General Rule.* It is the duty of a depositary to return the *res* to the depositor upon demand or otherwise in accordance with the terms of the contract of deposit.[69]

(II) *To Whom Delivery Should Be Made* — (A) *To Depositor.* A depositary is ordinarily bound at his peril to deliver the *res* to the depositor or his representative,[70] or to his order.[71]

(B) *To True Owner.* The depositary may clear himself of liability to the depositor by proving delivery to the true owner.[72]

(III) *Time of Delivery.* It is the duty of the depositary to deliver the *res* upon the demand of the depositor,[73] unless if the contract fixes the duration of the

67. Moody *v.* Keener, 7 Port. (Ala.) 218 [*citing* Story Bailm. 93].

68. Roulston *v.* McClelland, 2 E. D. Smith (N. Y.) 60, holding that a gratuitous depositary is not responsible for loss of the goods where he places them in the street after giving reasonable opportunity to the owner to remove them.

Sale by depositary.— A gratuitous depositary, after notice to the depositor to remove the property, is justified only in storing it and may not sell it at auction. Dale *v.* Brinckerhoff, 7 Daly (N. Y.) 45.

Sufficiency of notice.— Where the depositary heard that the depositor was in town and "mailed a note to him, at his last place, . . . to come to take the property away" it was held that sufficient notice had not been shown. Dale *v.* Brinckerhoff, 7 Daly (N. Y.) 45.

69. Beyris *v.* Spor, 22 La. Ann. 16; Lees *v.* Dwight, 10 La. Ann. 711.

An exception to this rule exists in the case of a general deposit, in which case, as has been seen, the depositary discharges his obligation by returning not the identical property deposited but its equivalent in kind, quality, or value. See *supra*, II, C, 2, b.

Demand as prerequisite of depositor's right of action see *infra*, III, D, 2, a.

Obligation to return res as element of contract of deposit see *supra*, II, C.

Return of res as terminating bailment see *infra*, III, F, 1.

70. *Massachusetts.*— Jenkins *v.* Bacon, 111 Mass. 373, 15 Am. Rep. 33; Hall *v.* Boston, etc., R. Corp., 14 Allen 439, 92 Am. Dec. 783.

Missouri.— Dufour *v.* Mepham, 31 Mo. 577; Keyes *v.* Hardin Bank, 52 Mo. App. 323, *semble*.

Nevada.— Colquhoun *v.* Wells, 21 Nev. 459, 33 Pac. 977.

New York.— Roberts *v.* Stuyvesant Safe-Deposit Co., 123 N. Y. 57, 25 N. E. 294, 20 Am. St. Rep. 718, 9 L. R. A. 438 [*reversing* 49 Hun 117, 1 N. Y. Suppl. 862].

South Carolina.— Pollock *v.* Carolina Interstate Bldg., etc., Assoc., 48 S. C. 65, 25 S. E. 977, 59 Am. St. Rep. 695.

Tennessee.— Colyar *v.* Taylor, 1 Coldw. 372.

Texas.— Nelson *v.* King, 25 Tex. 655.

Misdelivery through negligence.— This is especially true where the property is delivered to a third person without effort on the part of the depositary to verify his claim. Wear *v.* Gleason, 52 Ark. 364, 12 S. W. 756, 20 Am. St. Rep. 186.

Superior force.— The depositary is responsible for a mistake in delivery, although had he kept the property in his own possession it would have been destroyed by a superior force. James *v.* Greenwood, 20 La. Ann. 297.

Deposit by joint owners.— If a fund is deposited to the credit of two persons in the alternative, and one notifies the depositary not to pay it to the other, the depositary disregards the order at his peril. Mulcahy *v.* Devlin, 2 N. Y. City Ct. 218 [appeal *dismissed* in 103 N. Y. 646]. If a deposit is made by one of several joint owners, it is the duty of the depositary to redeliver it to the depositor, and a delivery to another joint owner does not discharge him. Nelson *v.* King, 25 Tex. 655. See also *infra*, note 88.

71. Tuttle *v.* Gladding, 2 E. D. Smith (N. Y.) 157.

Evidence of order.— Money delivered to a depositary to be paid to an association only upon the further direction of the depositors will not be assumed to have been directed to be paid because the depositors afterward proved claims against the association in sums corresponding in amount with the deposit money, but in no way referring to it. Gray *v.* Pfeiffer, 59 N. J. Eq. 510, 45 Atl. 967.

Agent's order.— A gratuitous bailee may not be held responsible for delivering goods to the wrong person if the agent of the depositor had informed him that they were intended for the one to whom they were delivered. Brant *v.* McMahon, 56 Mich. 498, 23 N. W. 187.

Equitable assignment.— To support a claim of an equitable assignment of money on deposit there must be proof of an appropriation of the identical fund. Gray *v.* Pfeiffer, 59 N. J. Eq. 510, 45 Atl. 967.

Payment to beneficiary in contract of deposit see *infra*, III, C, 2, a.

72. See *infra*, III, D, 2, f, (II), (B).

73. Farrow *v.* Bragg, 30 Ala. 261.

Demand as prerequisite of depositor's right of action see *infra*, III, D, 2, a.

term of deposit, in which event the depositary must return the property upon the expiration of that term.[74]

(iv) *Place of Delivery.* Ordinarily, it seems, the depositary may return the *res* to the depositor at the place of deposit,[75] unless the contract of deposit expressly or impliedly prescribes a different place.[76]

(v) *Manner of Delivery.* The depositary must restore the *res* in the manner contemplated by the parties; otherwise he is liable for resulting loss or injury, although he exercises due care in the delivery.[77]

c. To Return Increase. The depositary must, in the absence of an agreement to the contrary, return not only the actual thing deposited but also all increase which has accrued thereto during the term of the deposit.[78]

2. To Third Persons — a. To Beneficiary of Deposit. If a third person is named as beneficiary in the contract of deposit, the depositary is bound to deliver the *res* to him.[79]

b. To True Owner. In the absence of an order by the depositor,[80] the depositary is not bound to deliver the *res* to the true owner, if the deposit was not made in his name,[81] unless he has asserted his claim by judicial proceedings.[82] If, however, the depositor was the agent of the owner, the property may be delivered to the principal.[83]

Right to retain res until demand see *supra*, III, B, 1, a.

74. Crist *v.* Hovis, 12 N. J. Eq. 84.

75. La. Rev. Civ. Code, art. 2954; Story Bailm. § 117. See also Bartlett *v.* Gray, 4 Ky. L. Rep. 615, which holds that where a decedent's property is in the hands of a depositary in another state he ought not to be required to go to the expense of transporting it back to the state of the forum, it having been lawfully taken out of the state by the owner in her lifetime, as there is a proper mode of administering upon the effects of a decedent in a foreign state.

76. La. Rev. Civ. Code, art. 2953; Story Bailm. § 117.

77. Stewart *v.* Frazier, 5 Ala. 114; Jenkins *v.* Bacon, 111 Mass. 373, 15 Am. Rep. 33.

78. Booth *v.* Terrell, 16 Ga. 20; Story Bailm. § 257.

79. Chase *v.* Gates, 33 Me. 363 (holding that, where an indorsed note is to be delivered by a depositary as soon as a specified encumbrance shall be removed from the property for which the note was given, the note becomes the absolute property of the indorsee upon the removal of the encumbrance and may be recovered by him from the depositary); Crist *v.* Hovis, 12 N. J. Eq. 84; Bushnell *v.* Chautauqua County Nat. Bank, 71 N. Y. 290.

Conditional deposit.— Where, however, money is deposited for payment to a third person when the depositor shall have satisfied himself of the existence of a certain fact, the depositary is not liable to the third person for the deposit till notified that the depositor is satisfied of the existence of the fact; and declarations of the depositor that he was satisfied of the existence of the fact, if not made known to the depositary before commencement of the action against him, are hence inadmissible. Carle *v.* Bearce, 33 Me. 337.

80. See *supra*, III, C, 1, b, (II), (A).

81. Hill *v.* Hayes, 38 Conn. 532 (holding that if the depositary, when he delivers the property to the depositor, knows that the depositor has stolen it, the delivery is a conversion; but that a suspicion on the part of the depositary, although founded on reasonable grounds, that the property has been stolen does not render the delivery to the depositor a conversion); Loring *v.* Mulcahy, 3 Allen (Mass.) 575 (holding that a depositary who receives goods knowing that they were stolen by the depositor is not guilty of a conversion in restoring them to the depositor, in the absence of a demand by the true owner); Morrison *v.* Ashburn, (Tex. Civ. App. 1893) 21 S. W. 993 (holding that the depositary of a fund is not liable for paying a draft drawn on him by its apparent owner before he had knowledge of the fact that a third person had an interest in the fund). If, however, a depositary knowingly assists the depositor in obtaining the property illegally, and afterward delivers it to him, he is liable to the true owner. Post *v.* Ketchum, 1 N. Y. Leg. Obs. 261.

Remedy of depositary.— In case conflicting claims are made to the *res* the depositary may compel the claimants to interplead. Powell *v.* Robinson, 76 Ala. 423; Mulcahy *v.* Devlin, 2 N. Y. City Ct. 218 [appeal *dismissed* in 103 N. Y. 646].

82. Britton *v.* Aymar, 23 La. Ann. 63 (holding that mere notice of an adverse claim does not oblige the depositary to retain the *res*); Oneto *v.* Delauny, 6 La. 32 (holding that an obligation to the true owner is produced under La. Rev. Civ. Code, art. 2955 only by service of legal process); Jenkinson *v.* Cope, 7 Mart. (La.) 284. If, however, a bailee has knowledge of an adverse claim of title, and by direction of the bailor carries off the property, he is liable therefor to the claimant, whether the suit by which the claim is established is then or thereafter brought. McAnelly *v.* Chapman, 18 Tex. 198.

83. Solomon *v.* Nicholas, 113 Ill. 351, 1 N. E. 901; Ball *v.* Liney, 44 Barb. (N. Y.)

3. To Public. The depositary is bound so to care for the deposit that the public shall receive no injury therefrom.[84]

D. Rights of Depositor — 1. In General. The depositor retains the title to the property deposited,[85] and he may take it not only from the depositary,[86] but from persons in possession claiming under the depositary as vendees or otherwise.[87] The depositor may, in the absence of an agreement to the contrary, withdraw the *res* at any time, even before the execution of the purpose of the deposit.[88] If a third person converts the property the depositary may recover its proceeds,[89] and if a third person injures the property the depositor may recover from him in damages.[90]

2. Right of Action Against Depositary — a. Demand as a Prerequisite[91] — (i) *Necessity.* The depositor must make a proper demand for the return of the *res* before bringing suit against the depositary,[92] except where the depositary has

505. And see Taylor *v.* De Goicouria, 20 La. Ann. 30.

Breach of contract.—Assuming the contract between the agent and the depositary to be in form valid for the non-delivery of the goods without the agent's consent, and the delivery to the owner by the depositary without such consent to be a technical breach thereof, yet the damages which the agent could recover against the depositary would be merely nominal. Ball *v.* Liney, 44 Barb. (N. Y.) 505.

84. Frammell *v.* Little, 16 Ind. 251, where a bailee of a vicious animal was said to be responsible for damage done to the public.

85. Ball *v.* Liney, 44 Barb. (N. Y.) 505. See also Bailments, 5 Cyc. 170.

In Louisiana a privilege or preference is given by Rev. Civ. Code, art. 3222, to depositors on the *res*, where it was to be returned in specie. Brierre *v.* His Creditors, 43 La. Ann. 423, 9 So. 640; Lanoue *v.* Dumartrait, 25 La. Ann. 478; Williams *v.* Landry, 18 La. Ann. 208; Longbottom *v.* Babcock, 9 La. 44; Whatley *v.* Austin, 1 Rob. 21. See Sabatier *v.* His Creditors, 6 Mart. N. S. 585.

86. See *supra*, II, C; III, C, 1, b.

87. Calhoun *v.* Thompson, 56 Ala. 166, 28 Am. Rep. 754; Gottlieb *v.* Hartman, 3 Colo. 53 (pledgee of depositary); Rose *v.* Smith, 20 La. Ann. 218 (depositary's assignee in insolvency); Lallande *v.* McMaster, 16 La. 527 (creditor of depositary); Heacock *v.* Walker, 1 Tyler (Vt.) 338 (vendee of depositary). See also *supra*, III, B, 1, f.

Bona fide purchasers.— The depositor's right to the *res* is superior to that of a *bona fide* purchaser from the depositary. Cooper *v.* Willomatt, 1 C. B. 672, 9 Jur. 598, 14 L. J. C. P. 219, 50 E. C. L. 672; Marner *v.* Bankes, 17 L. T. Rep. N. S. 147, 16 Wkly. Rep. 62.

88. Jennings *v.* Reynolds, 4 Kan. 110 (money in the hands of a stakeholder for illegal betting); Lees *v.* Dwight, 10 La. Ann. 711; Winkley *v.* Foye, 33 N. H. 171, 66 Am. Dec. 715; *In re* Perry, 16 N. H. 44; Hoit *v.* Hodge, 6 N. H. 104, 25 Am. Dec. 451; Perkins *v.* Eaton, 3 N. H. 152 (deposit on wagering contracts); Lilley *v.* Barnsley, 2 M. & R. 548 (chattels deposited for repairs). See also Reynolds *v.* McKinney, 4 Kan. 94, 89 Am. Dec. 602.

Joint deposit.— Any one of several persons having a several interest in a deposit of money may withdraw his share. Jackman *v.* Partridge, 21 Vt. 558. See also *supra*, note 70.

89. Seavey *v.* Dana, 61 N. H. 339, holding that where the depositary of a note delivers it without the depositor's consent to a third person who collects the proceeds from the maker, the depositor may waive the tort and maintain assumpsit against the third person for money had and received.

90. Mears *v.* London, etc., R. Co., 11 C. B. N. S. 850, 31 L. J. C. P. 220, 6 L. T. Rep. N. S. 190, 103 E. C. L. 850.

91. **Demand as condition precedent:** Generally see Actions, 1 Cyc. 694. In action by bailor generally see Bailments, 5 Cyc. 214.

92. *Alabama.*— Stewart *v.* Frazier, 5 Ala. 114.

Connecticut.— Starkey *v.* Peters, 18 Conn. 181.

Georgia.— Montgomery *v.* Evans, 8 Ga. 178.

Illinois.— Selleck *v.* Selleck, 107 Ill. 389.

Maine.— Hosmer *v.* Clarke, 2 Me. 308.

New York.— Payne *v.* Gardiner, 29 N. Y. 146; Phelps *v.* Bostwick, 22 Barb. 314; Brown *v.* Cook, 9 Johns. 361.

Ohio.— Morris *v.* Bills, Wright 343; Bassett *v.* Baker, Wright 337.

South Carolina.— West *v.* Murph, 3 Hill 284.

Tennessee.— Moore *v.* Fitzpatrick, 7 Baxt. 350; Hunter *v.* Sevier, 7 Yerg. 127.

Vermont.— Jackman *v.* Partridge, 21 Vt. 558.

England.— Cullen *v.* Barclay, 10 L. R. Ir. 224.

See 16 Cent. Dig. tit. "Depositaries," § 15.

Deposit creating debt.— Where a deposit of money merely creates a debt payable on demand, no demand is necessary, the demand made by the suit being sufficient. Moore *v.* Fitzpatrick, 7 Baxt. (Tenn.) 350.

Sufficiency of demand.— Under Cal. Civ. Code, § 1823, providing that a depositary shall not be bound for the delivery of a deposit until demand made, a demand by an administrator on a depositary for the effects of his decedent, coupled with a statement that he holds a paper calling for a certain sum of money, is a sufficient demand for the money. Northrop *v.* Knott, 114 Cal. 612, 46 Pac. 599.

put it out of his power to return the property,[93] either by an actual conversion of it to his own use[94] or by a negligent injury to it.[95]

(II) *TIME.* The demand must be made within a reasonable time after the deposit is made.[96]

(III) *PLACE.* The demand need not be made at the place of delivery, but may be made wherever the depositary can be found.[97]

b. Refusal as a Prerequisite. Unless the depositary refuses to comply with a proper demand for the *res*, no right of action accrues in favor of the depositor.[98] Silence of the depositary in the face of a proper demand is equivalent to a refusal.[99] If the demand is made under circumstances not contemplated by the terms of the deposit, the depositary may refuse to deliver, but in so doing he should specify the ground of his refusal, as an unqualified refusal is a denial of the bailment and renders the depositary liable to immediate suit.[1]

c. Form of Action.[2] The depositor may sue in tort for a wrongful detention or misuse of the property,[3] or he may bring his action sounding in contract for a refusal to redeliver.[4]

93. Delamater *v.* Miller, 1 Cow. (N. Y.) 75, 13 Am. Dec. 512.

94. *Arkansas.*— McLain *v.* Huffman, 30 Ark. 428.

Connecticut.— Starkey *v.* Peters, 18 Conn. 181.

Georgia.— Montgomery *v.* Evans, 8 Ga. 178.

Ohio.— Morris *v.* Bills, Wright 343; Bassett *v.* Baker, Wright 337.

Tennessee.— Cobb *v.* Wallace, 5 Coldw. 539, 98 Am. Dec. 435; Garvin *v.* Lutrell, 10 Humphr. 16.

Texas.— Browne *v.* Johnson, 29 Tex. 40.

Vermont.— Jackman *v.* Partridge, 21 Vt. 558.

See 16 Cent. Dig. tit. "Depositaries," § 15.

What constitutes conversion.— Although money deposited is lost because of the bailee's unauthorized attempt to transmit it to the bailor at a distant place, the loss is not of itself a conversion justifying an action against the bailee for the money without a previous demand. Stewart *v.* Frazier, 5 Ala. 114. See, generally, TROVER AND CONVERSION.

95. Warner *v.* Dunnavan, 23 Ill. 380.

96. Wright *v.* Paine, 62 Ala. 340, 34 Am. Rep. 24; Codman *v.* Rogers, 10 Pick. (Mass.) 112.

Laches and limitations see *infra*, III, D, 2, f, (I).

97. Dunlap *v.* Hunting, 2 Den. (N. Y.) 643, 43 Am. Dec. 763. And see Higgins *v.* Emmons, 5 Conn. 76, 13 Am. Dec. 41.

The demand need not be personal but may be made at the dwelling-house or place of business of the depositary, especially in the case of cumbersome goods which the depositary could not be expected to retain about his person or in case of the temporary absence of the depositary. Mason *v.* Briggs, 16 Mass. 453.

98. *Maine.*— Hosmer *v.* Clarke, 2 Me. 308.

New York.— Phelps *v.* Bostwick, 22 Barb. 314; Brown *v.* Cook, 9 Johns. 361.

Ohio.— Morris *v.* Bills, Wright 343; Bassett *v.* Baker, Wright 337.

South Carolina.— West *v.* Murph, 3 Hill 284.

Tennessee.— Moore *v.* Fitzpatrick, 7 Baxt. 350.

Vermont.— Jackman *v.* Partridge, 21 Vt. 558.

99. Higgins *v.* Emmons, 5 Conn. 76, 13 Am. Dec. 41; Dunlap *v.* Hunting, 2 Den. (N. Y.) 643, 43 Am. Dec. 763.

1. Dunlap *v.* Hunting, 2 Den. (N. Y.) 643, 43 Am. Dec. 763.

2. Action for breach of contract see CONTRACTS, 9 Cyc. 685.

Assumpsit generally see ASSUMPSIT, ACTION OF, 4 Cyc. 317.

Case generally see CASE, ACTION ON, 6 Cyc. 681.

Trespass generally see TRESPASS.

Trover generally see TROVER AND CONVERSION.

3. Stevens *v.* Hurlburt Bank, 31 Conn. 146 (fraudulent sale by pledgee); Setzar *v.* Butler, 27 N. C. 212 (holding that the old action of trespass *vi et armis* will lie where the property deposited is destroyed by the depositary); Barker *v.* Cory, 15 Ohio 9; Dohorty *v.* Madgett, 58 Vt. 323, 2 Atl. 115.

Conversion.— If the depositary fails or refuses to deliver the *res* the depositor may sue in conversion for its value. Croswell *v.* Lehman, 54 Ala. 363, 25 Am. Rep. 684; Nelson *v.* King, 25 Tex. 655.

Case and not trover is the proper remedy against a bailee for goods stolen through his negligence. Brown *v.* Waterman, 10 Cush. (Mass.) 117; Kelsey *v.* Griswold, 6 Barb. (N. Y.) 436; Bromley *v.* Coxwell, 2 B. & P. 438, 5 Rev. Rep. 648; Ross *v.* Johnson, 5 Burr. 2825; Severin *v.* Keppell, 4 Esp. 156; Anonymous, 2 Salk. 655.

Remedy as affected by contract.— Where the depositary by the terms of his deposit agrees to pay for any injury the property may sustain, the depositor may maintain an action for improper use of the property. Danks *v.* Harley, 1 C. L. R. 95, 1 Wkly. Rep. 291.

4. Baren *v.* Cain, 15 Ill. App. 387; Barker *v.* Cory, 15 Ohio 9.

d. Parties.[5] In an action for the *res* by the person for whom the deposit was made, the depositary is entitled to have the depositor made a party.[6] If the depositary is a married woman her husband should not be joined in an action against her for injury to the *res*.[7]

e. Pleading.[8] In a suit to recover the *res* the declaration or bill should allege the performance of all conditions precedent to the delivery of the deposit,[9] and that depositary was duly notified thereof;[10] but it need not allege that the depositary's compensation was tendered him,[11] that the depositary had the property in his possession when the demand was made,[12] or that the depositor was the owner of the *res*; nor need the vocation of the depositary be alleged.[13]

f. Defenses — (i) *Laches and Limitations.*[14] The statute of limitations will not run in favor of a depositary during the continuance of an admitted deposit,[15] but the assertion of an adverse claim by the depositary sets the statute in motion.[16] So the statute will run from the death of either of the parties to a deposit at pleasure.[17] The statute commences to run when the depositor makes demand for the *res* and the depositary neglects or refuses to deliver it,[18] and not until that time,[19] provided that the demand be made within a reasonable time after the deposit was made.[20]

Agreement to pay for property.— Where the depositary fails to return the deposit and agrees to pay for it the bailment is converted into a sale and assumpsit will lie. Parker *v.* Tiffany, 52 Ill. 286.

5. Parties generally see PARTIES.

6. Dean *v.* Clarke, 5 La. Ann. 105; Bushnell *v.* Chautauqua County Nat. Bank, 74 N. Y. 290, holding that it is not requisite that the rights of the depositor and the person for whose benefit the deposit was made should first be determined by an action between those parties, and that while the depositary may compel the depositor to be brought in as a party, yet if he fails to make objection he waives that right.

7. Hagebush *v.* Ragland, 78 Ill. 40.

8. Pleading generally see PLEADING.

9. Kiefer *v.* Laventhal, 110 Cal. 667, 43 Pac. 205; Carle *v.* Bearce, 33 Me. 337, both cases being suits by the beneficiary of the contract of deposit.

10. Carle *v.* Bearce, 33 Me. 337, being a suit by the beneficiary of the contract of deposit.

11. Moody *v.* Keener, 7 Port. (Ala.) 218, where it was held that an omission to tender compensation is a matter of defense.

12. Moody *v.* Keener, 7 Port. (Ala.) 218.

13. Coldiron *v.* Treadway, 39 S. W. 832, 18 Ky. L. Rep. 1064.

14. Statutes of limitations generally see LIMITATIONS OF ACTIONS.

15. Landis *v.* Sexton, 105 Mo. 486, 16 S. W. 912, 24 Am. St. Rep. 403; Green *v.* Harris, 25 N. C. 210.

16. Blount *v.* Beall, 95 Ga. 182, 22 S. E. 52.

Sale of the res by the depositary is an assertion of adverse title within this rule. Crump *v.* Mitchell, 34 Miss. 449; Hall *v.* Dickey, 32 Miss. 208.

17. Kane *v.* Bloodgood, 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417; Wingate *v.* Wingate, 11 Tex. 430.

Deposits for specific time and at pleasure.— "Whether the contract is dissolved by the death of either party, depends upon the intention of the parties and the rules of law applicable to contracts in general. When the use is to be for a specific time, it generally remains in force during that period. Where it is during pleasure, it is dissolved by the death of either party." Wingate *v.* Wingate, 11 Tex. 430, 437; Story Bailm. § 419. See, however, Farrow *v.* Bragg, 30 Ala. 261, where the death of the depositor was held not to terminate the contract.

18. Marr *v.* Kübel, 4 Mackey (D. C.) 577 (where a pledge was lost and repeated promises made to find and return it, and the statute was held to run only from the time when the pledgee announced the loss and promised to pay for it); Codman *v.* Rogers, 10 Pick. (Mass.) 112; Wilkinson *v.* Verity, L. R. 6 C. P. 206, 40 L. J. C. P. 141, 24 L. T. Rep. N. S. 32, 19 Wkly. Rep. 604; *In re* Tidd, [1893] 3 Ch. 154, 62 L. J. Ch. 915, 69 L. T. Rep. N. S. 255, 3 Reports 657, 42 Wkly. Rep. 25.

19. Payne *v.* Gardiner, 29 N. Y. 146.

20. Wright *v.* Paine, 62 Ala. 340, 34 Am. Rep. 24; Codman *v.* Rogers, 10 Pick. (Mass.) 112, 119, where it was said: "If a demand previous to the commencement of an action is necessary, the statute will not begin to run until a demand is made. But in the latter case there must be some limitation to the right of making a demand. . . . A demand must be made within a reasonable time; otherwise the claim is considered stale, and no relief will be granted in a court of equity. What is to be considered a reasonable time for this purpose does not appear to be settled by any precise rule. It must depend on circumstances. If no cause for delay can be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action. There is the same reason for hastening the demand, that there is for hastening the commencement of the action; and in both cases the same presumptions arise from delay."

(II) *Want of Title in Depositor* — (A) *General Rule.* A depositary who seeks to keep the *res* for himself or to escape liability for converting it to his own use or for injuries done to it is estopped to assert that at the time the deposit was made the depositor was without title to the property.[21] In such a case the pre-existing title affords no defense to the depositor's action, whether it rests in the depositary himself[22] or in a third person.[23] In an action to recover the *res*, either by the depositor or by the person for whose benefit the deposit was made, the depositary has no right to plead a defense for a person not a party to the suit,[24] except by his authority.[25]

(B) *Exceptions.* Title in a third person is a defense, however, if the depositary has restored the *res* to him,[26] or if he has demanded it.[27] And the depositary

21. Powell *v.* Robinson, 76 Ala. 423; Calhoun *v.* Thompson, 56 Ala. 166, 28 Am. Rep. 754; Croswell *v.* Lehman, 54 Ala. 363, 25 Am. Rep. 684; Graham *v.* Williams, 21 La. Ann. 594; Bricker *v.* Stroud, 56 Mo. App. 183; Sherwood *v.* Neal, 41 Mo. App. 416.

A finder may recover from his depositary where there is no adverse claim to the property. Tancil *v.* Seaton, 28 Gratt. (Va.) 601, 26 Am. Rep. 380; Armory *v.* Delamirie, 1 Str. 505.

22. Haas *v.* Altieri, 2 Misc. (N. Y.) 252, 21 N. Y. Suppl. 950 [*affirming* 19 N. Y. Suppl. 687].

Common source of title.— A depositary may not set up title in himself acquired after the deposit from the assignee in bankruptcy of the person under whom the depositor claims. Nudd *v.* Montanye, 38 Wis. 511, 20 Am. Rep. 25.

23. Dougherty *v.* Chapman, 29 Mo. App. 233; Cole *v.* Wabash, etc., R. Co., 21 Mo. App. 443; McCafferty *v.* Brady, (Pa. 1887) 9 Atl. 37 [*affirming* 19 Wkly. Notes Cas. 553].

24. Ducros *v.* Gottschalk, 25 La. Ann. 233; Hendricks *v.* Mount, 5 N. J. L. 738, 8 Am. Dec. 623; Mercantile Trust Co. *v.* Atlantic Trust Co., 86 Hun (N. Y.) 213, 33 N. Y. Suppl. 252; *Ex p.* Davies, 19 Ch. D. 86, 45 L. T. Rep. N. S. 632, 30 Wkly. Rep. 237. Thus a depositary cannot defend himself from an action to recover the money by showing that the bailment was fraudulent as against the depositor's creditors, in the absence of an attempt by the creditors to avail themselves of the fraud. Brown *v.* Thayer, 12 Gray (Mass.) 1. So if money is deposited with one person to be delivered to another upon a third person expressing his satisfaction with certain documents, the depositary cannot defend an action for the *res* by the beneficiary on the ground that the expression of satisfaction by the third person was in fraud of the depositor's rights. McKay *v.* Draper, 27 N. Y. 256.

25. Dodge *v.* Meyer, 61 Cal. 405; Palmtag *v.* Doutrick, 59 Cal. 154, 43 Am. Rep. 245.

26. *Alabama.*—Powell *v.* Robinson, 76 Ala. 423; Calhoun *v.* Thompson, 56 Ala. 166, 28 Am. Rep. 754; Croswell *v.* Lehman, 54 Ala. 363, 25 Am. Rep. 684.

California.— Palmtag *v.* Doutrick, 59 Cal. 154, 43 Am. Rep. 245.

Missouri.— Pulliam *v.* Burlingame, 81 Mo. 111, 51 Am. Rep. 229; Matheny *v.* Mason, 73 Mo. 677, 39 Am. Rep. 541.

Nebraska.— Shellenberg *v.* Fremont, etc., R. Co., 45 Nebr. 487, 63 N. W. 859, 50 Am. St. Rep. 561.

New York.— Bliven *v.* Hudson River R. Co., 36 N. Y. 403, 2 Transcr. App. 179; Bates *v.* Stanton, 1 Duer 79; Beardslee *v.* Richardson, 11 Wend. 25, 25 Am. Dec. 596; Edson *v.* Weston, 7 Cow. 278.

United States.— Hentz *v.* The Idaho, 93 U. S. 575, 23 L. ed. 978.

England.— Biddle *v.* Bond, 6 B. & S. 225, 11 Jur. N. S. 425, 34 L. J. Q. B. 137, 12 L. T. Rep. N. S. 178, 13 Wkly. Rep. 561, 118 E. C. L. 225; Shelbury *v.* Scotsford, Yelv. 23.

27. Palmtag *v.* Doutrick, 59 Cal. 154, 43 Am. Rep. 245.

Where the depositor acquired possession by fraud, the depositary may set up that fact after demand made upon him by the true owner. Hayden *v.* Davis, 9 Cal. 573; King *v.* Richards, 6 Whart. (Pa.) 418, 427, 37 Am. Dec. 420, where the court says: "It may be correct enough to hold, where the real owner of the property does not appear and assert his right to it, that the carrier or bailee shall not be permitted, of his own mere motion, to set up, as a defence against his bailor, such right for him. But it would be repugnant to every principle of honesty to say, that after the right owner has demanded the goods of the bailee, the latter shall not be permitted, in an action brought against him by the bailor for the goods, to defend against his claim, by showing, clearly and conclusively that the plaintiff acquired the possession of the goods either fraudulently, tortiously, or feloniously, without having obtained any right thereto"); Hardman *v.* Willcock, 9 Bing. 382 note, 23 E. C. L. 626.

Remedies of depositary.— If an adverse claim is made to the *res*, the depositary may require the depositor and the claimant to interplead (Powell *v.* Robinson, 76 Ala. 423; Mulcahy *v.* Devlin, 2 N. Y. City Ct. 218 [appeal *dismissed* in 103 N. Y. 646]); or he may refuse the claimant's demand and await an action by him; and on action being brought he may notify the depositor and require him to defend the suit, in which case the depositor will be bound by the judgment rendered, whether he appear and de-

may show that since the deposit was made the depositor has parted with his title either to a third person [28] or to the depositary himself.[29]

g. Damages [30] — (i) *In General.* In an action for damages for loss of the *res* the depositor must prove its value.[31] If the *res* cannot be returned the depositor is entitled to its money value [32] at the time of the demand,[33] together with any charges for hire due him under the contract of deposit.[34] In case of a wrongful sale by the depositary the depositor may claim the proceeds as damages.[35]

(ii) *Interest.* A depositary is not liable for interest on money deposited [36] in the absence of agreement, unless he has used the money as his own [37] or has mingled it with his own,[38] or unless he has refused to return it on demand,[39] in which case the depositor is entitled to interest from the date of the demand.[40]

h. Burden of Proof. In an action against the depositary, the burden is on the depositor to prove the bailment,[41] and a failure or refusal to return the property on demand.[42] A depositor suing for the return of specific property must be able to identify it.[43] In an action for conversion the depositor must prove a conversion.[44] If a failure or refusal to return the property on demand is shown it becomes incumbent upon the depositary to explain the same.[45] If he shows

fend or not; but if he is not notified and does not appear his rights will not be affected by the judgment (Powell *v.* Robinson, 76 Ala. 423).

28. Pulliam *v.* Burlingame, 81 Mo. 111, 51 Am. Rep. 229; Higgins *v.* Turner, 61 Mo. 249; Cole *v.* Wabash, etc., R. Co., 21 Mo. App. 443.

29. Bricker *v.* Stroud, 56 Mo. App. 183; Hendricks *v.* Mount, 5 N. J. L. 738, 8 Am. Dec. 623; Burnett *v.* Fulton, 48 N. C. 486.

30. Damages generally see Damages.

Nominal damages see *supra*, note 83, p. 805.

31. Hills *v.* Daniels, 15 La. Ann. 280; Tancil *v.* Seaton, 28 Gratt. (Va.) 601, 26 Am. Rep. 380.

Deposit of gold.— In the case of a deposit of gold, if the depositor does not show that it was worth any premium at the time of demand and refusal, he can recover only the face amount of it in currency. Hewitt *v.* Brummel, 48 Ga. 481.

32. Crosswell *v.* Lehman, 54 Ala. 363, 25 Am. Rep. 684; Beyris *v.* Spor, 22 La. Ann. 16; Nelson *v.* King, 25 Tex. 655.

Deposit of money.— A depositary of funds intrusted to him for use who keeps no separate account of the same in the name of the depositor is responsible therefor in legal currency regardless of the character of the money. Guenivet *v.* Perret, 18 La. Ann. 356.

33. Hewitt *v.* Brummel, 48 Ga. 481; Henderson *v.* Williams, [1895] 1 Q. B. 521, 64 L. J. Q. B. 308, 72 L. T. Rep. N. S. 98, 14 Reports 375, 43 Wkly. Rep. 274.

34. Bigbee *v.* Coombs, 64 Mo. 529.

35. Jones *v.* Hoyt, 23 Conn. 157; State Bank *v.* Burton, 27 Ind. 426.

36. Wray *v.* Tuskegee Ins. Co., 34 Ala. 58, general deposit.

37. Taylor *v.* Knox, 1 Dana (Ky.) 291; Fogle *v.* Delmas, 11 La. Ann. 200; Faucette *v.* New Orleans, 11 La. Ann. 199.

38. Price *v.* Brown, 5 N. Y. St. 7.

39. Ingersoll *v.* Campbell, 46 Ala. 282; Check *v.* Waldrum, 25 Ala. 152; Kirkman *v.* Vanlier, 7 Ala. 217; Porter *v.* Nash, 1 Ala. 452; Johnson *v.* Haggin, 6 J. J. Marsh. (Ky.) 581.

40. Hewitt *v.* Brummel, 48 Ga. 481; Collier *v.* Lyons, 18 Ga. 648.

41. Jefferson *v.* Hale, 31 Ark. 286; Dart *v.* Lowe, 5 Ind. 131.

Prima facie case of deposit.— Proof that at the time of the death of defendant's intestate there was in his house a bag containing a purse in which was the exact amount of the alleged deposit, both labeled in intestate's writing with plaintiff's name, makes a *prima facie* case of deposit. Grimes *v.* Booth, 19 Ark. 224.

42. Beller *v.* Schultz, 44 Mich. 529, 7 N. W. 225, 38 Am. Rep. 280.

Prima facie case of non-payment.— The possession by an administrator of a receipt from defendant to his decedent for money casts on defendant the burden of proving its repayment. Northrop *v.* Knott, 114 Cal. 612, 46 Pac. 599. However there can be no recovery on a certificate of deposit if the evidence shows that it has been paid and has not been surrendered to the depositary merely through oversight. Moran *v.* Societé Catholique, etc., 107 La. 286, 31 So. 658.

43. Williams *v.* Landry, 18 La. Ann. 208; Tancil *v.* Seaton, 28 Gratt. (Va.) 601, 26 Am. Rep. 380.

General deposit.— In an action on a general deposit, however, the depositary need not identify the thing deposited. Dougherty *v.* Vanderpool, 35 Miss. 165.

44. Jefferson *v.* Hale, 31 Ark. 286; Jackson *v.* Eighmie, 27 N. Y. Wkly. Dig. 193.

Prima facie case of conversion.— Demand by the depositor and refusal by the depositary make a *prima facie* case of conversion. Wiser *v.* Chesley, 53 Mo. 547; Thompson *v.* St. Louis, etc., R. Co., 59 Mo. App. 37. So where a depositary on demand makes answer that he has not got the property, without intimating that anything has happened to discharge him from his obligation, it is evidence from which the jury may find a denial of the bailment. Dunlap *v.* Hunting, 2 Den. (N. Y.) 643, 43 Am. Dec. 763.

45. Short *v.* Lapeyreuse, 24 La. Ann. 45; Davis *v.* Tribune Job-Printing Co., 70 Minn. 95, 72 N. W. 808; Wiser *v.* Chesley, 53 Mo.

explanatory circumstances in defense, the burden reverts to the depositor to prove negligence on the part of the depositary.[46] If the depositary alleges paramount title in a third person the burden is on him to prove that fact.[47]

i. Evidence.[48] The usual rules of evidence apply in actions by depositor against depositary.[49]

j. Questions of Law and of Fact. The character of the depositary's relationship to the depositor is a question for the jury.[50] The degree of care required of a depositary is a question for the court,[51] but the question whether the depositary has in fact exercised the necessary degree of care is for the jury.[52]

k. Effect of Judgment. The property in the *res* is vested in the depositary upon the depositor's recovering damages against him for illegally detaining it.[53]

E. Duties and Liabilities of Depositor. A depositor is responsible where he omits to inform the depositary of known defects in the property and damage ensues to him.[54] The depositor is also responsible for money spent on the property by the depositary as the result of an accident to it for which he is not respon-

547; Darling *v.* Younker, 37 Ohio St. 487, 41 Am. Rep. 532.

46. *Connecticut.*— Boies *v.* Hartford, etc., R. Co., 37 Conn. 272, 9 Am. Rep. 347.

Georgia.— Collier *v.* Lyons, 18 Ga. 648.

Maine.— Leach *v.* French, 69 Me. 389, 31 Am. Rep. 296.

Maryland.— American Dist. Tel. Co. *v.* Walker, 72 Md. 454, 20 Atl. 1, 20 Am. St. Rep. 479; Hambleton *v.* McGee, 19 Md. 43.

Michigan.— See Beller *v.* Schultz, 44 Mich. 529, 7 N. W. 225, 38 Am. Rep. 280.

Mississippi.— Meridian Fair, etc., Assoc. *v.* North Birmingham St. R. Co., 70 Miss. 808, 12 So. 555; Lampley *v.* Scott, 24 Miss. 588.

New York.— Wintringham *v.* Hayes, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. Rep. 725 [*reversing* 3 Misc. 604, 23 N. Y. Suppl. 338].

Pennsylvania.— Comp *v.* Carlisle Deposit Bank, 94 Pa. St. 409; Allentown First Nat. Bank *v.* Rex, 89 Pa. St. 308, 33 Am. Rep. 767.

Texas.— Brown *v.* Johnson, 29 Tex. 40; Mims *v.* Mitchell, 1 Tex. 443.

See 16 Cent. Dig. tit. "Depositaries," § 17.

Contra.— Davis *v.* Tribune Job-Printing Co., 70 Minn. 95, 72 N. W. 808; Huxley *v.* Hartzell, 44 Mo. 370; Darling *v.* Younker, 37 Ohio St. 487, 41 Am. Rep. 532.

47. Jackson *v.* Jackson, 97 Ala. 372, 12 So. 437; Young *v.* East Alabama R. Co., 80 Ala. 100; Powell *v.* Robinson, 76 Ala. 423; Calhoun *v.* Thompson, 56 Ala. 166, 28 Am. Rep. 754; Crosswell *v.* Lehman, 54 Ala. 363, 25 Am. Rep. 684; Wetherly *v.* Straus, 93 Cal. 283, 28 Pac. 1045, holding that not even an attachment of the *res* as the property of a third person will justify the depositary in refusing to deliver it to the depositor, unless he can prove that the property belongs to the attachment defendant.

48. Evidence generally see EVIDENCE.

49. Dougherty *v.* Vanderpool, 35 Miss. 165, holding that a gratuitous depositary may not introduce in evidence his own cash-book for the purpose of showing false entries and to show that his clerks had stolen the money deposited, where this evidence would not tend to show that the money remaining was not that of plaintiff.

Estimate of loss.— Plaintiff may give his estimate of the value of articles lost. Williamson *v.* New York, etc., R. Co., 56 N. Y. Super. Ct. 508, 4 N. Y. Suppl. 834.

Incomplete record.—The record of proceedings in the settlement of another estate, introduced to show that the depositor had the money claimed to have been lost, is not incompetent because incomplete. Mayer *v.* Brensinger, 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196 [*affirming* 74 Ill. App. 475].

Receipt for money.— In an action by an administrator to recover money alleged to have been placed by his decedent in the hands of defendant as a deposit, a receipt signed by defendant for a sum of money from the decedent is admissible in evidence, although it does not state the purpose for which the money was received, such purpose being provable by parol. Northrop *v.* Knott, 114 Cal. 612, 46 Pac. 599.

50. Derrick *v.* Baker, 9 Port. (Ala.) 362 (where it was held that the fact that money deposited was not capable of identification and was used by the depositary was not as a matter of law determinative of the question); Johnston *v.* Browne, 37 Iowa 200; Green *v.* Hollingsworth, 5 Dana (Ky.) 173, 30 Am. Dec. 680. See also McCafferty *v.* Brady, 19 Wkly. Notes Cas. (Pa.) 553.

51. Green *v.* Hollingsworth, 5 Dana (Ky.) 173, 30 Am. Dec. 680.

52. Glover *v.* Burbidge, 27 S. C. 305, 3 S. E. 471; Preston *v.* Prather, 137 U. S. 604, 11 S. Ct. 162, 34 L. ed. 788.

53. Brewster *v.* Norwich, 1 Root (Conn.) 146.

54. Blakemore *v.* Bristol, etc., R. Co., 8 E. & B. 1035, 4 Jur. N. S. 657, 27 L. J. Q. B. 167, 6 Wkly. Rep. 336, 92 E. C. L. 1035; Story Bailm. § 270.

Unknown defects.— The depositor is not liable if he did not know of the defect. MacCarthy *v.* Youngs, 6 H. & N. 329, 30 L. J. Exch. 227, 3 L. T. Rep. N. S. 785, 9 Wkly. Rep. 439.

sible.[55] The depositor is not liable for damages caused to a third person by the depositary's negligent use of the property.[56]

F. Termination of Deposit — 1. By Return of Res. The deposit is terminated by a return of the *res* to the depositor pursuant to the terms of the deposit.[57]

2. By Demand and Refusal. The bailment is terminated where the depositor demands the property and the depositary refuses to deliver it.[58]

3. By Wrongful Sale of Res. The bailment is terminated if the depositary wrongfully sells the *res*.[59]

4. By Notice to Remove Res. The bailment is terminated where the depositary notifies the depositor to remove the *res* and the latter fails to do so within a reasonable time.[60]

5. By New Contract. The contract of deposit may be terminated by subsequent agreement whereby the *res* becomes the property of the depositary[61] or whereby the *res* is to be held by him by way of pledge.[62]

6. By Death of Party. Under some circumstances the death of one of the parties may put an end to the bailment.[63]

IV. Depositaries of Public Moneys.[64]

A. Definition. A depositary of public moneys is one designated by law to whom public officials may or shall confide the custody of public funds.[65]

B. Character of Depositary — 1. As Public Officer. A depositary of public funds is not strictly speaking a public officer, but is a mere custodian. One striking difference between the two is that public officers are forbidden to make personal use of money in their care while depositaries usually have that privilege.[66]

55. Harter *v.* Blanchard, 64 Barb. (N. Y.) 617.

56. Herlihy *v.* Smith, 116 Mass. 265.

57. Bradbury *v.* McClure, 93 Cal. 133, 28 Pac. 777 (holding that as between depositor and depositary the bailment may be determined by a return of the *res*, although it was deposited for the benefit of a third person); Palmtag *v.* Doutrick, 59 Cal. 154, 43 Am. Rep. 245.

58. Crosswell *v.* Lehman, 54 Ala. 363, 25 Am. Rep. 684; Nelson *v.* King, 25 Tex. 655. See also *supra*, III, C, 1, b; III, D, 2, a, b.

Care of res after termination by demand see *supra*, III, C, 1, a, (II), (A).

59. Crump *v.* Mitchell, 34 Miss. 449; King *v.* Bates, 57 N. H. 446; Cooper *v.* Willomatt, 1 C. B. 672, 9 Jur. 598, 14 L. J. C. P. 219, 50 E. C. L. 672.

Sale by depositary generally see *supra*, III, B, 1, f; III, D, 1.

60. Dale *v.* Brinckerhoff, 7 Daly (N. Y.) 45; Roulston *v.* McClelland, 2 E. D. Smith (N. Y.) 60.

Care of res after termination by notice see *supra*, III, C, 1, a, (II), (B).

61. Howard *v.* Roeben, 33 Cal. 399; Parker *v.* Tiffany, 52 Ill. 286; Chiles *v.* Garrison, 32 Mo. 475. See, however, Carlyon *v.* Fitzhenry, 2 Ariz. 266, 15 Pac. 273.

62. Preston *v.* Prather, 137 U. S. 604, 11 S. Ct. 162, 34 L. ed. 788.

63. See *supra*, III, D, 2, f, (I).

64. Public officers as custodians of public funds: Clerks of courts see Clerks of Courts. County officers see Counties. Justices of the peace see Justices of the Peace. Land-office officials see Public Lands. Municipal officers see Municipal Corporations; Schools and School Districts; Towns. Overseers of the poor see Paupers. Postal officers see Post-Office. Public officers generally see Officers. State officers see States. Tax collectors see Taxation. United States officers see United States.

65. Colquitt *v.* Simpson, 72 Ga. 501; Brown *v.* Wyandotte County, 58 Kan. 672, 50 Pac. 888.

A fiscal agent is not necessarily a depositary of public funds. State *v.* Dubuclet, 27 La. Ann. 29.

66. Colquitt *v.* Simpson, 72 Ga. 501, 510 (where the court says: "The truth is that these banks are mere depositories of public money. They are somewhat like the Bank of the United States was, a depository of funds of the government for safe-keeping; or, as certain state banks were for a time, under the administration of President Jackson, similar depositories. But no one would therefore rationally call either the Old United States bank, or the state banks so used as depositories, public officers of the United States. . . . It is clear, therefore, that they are not public officers, as understood by the general assembly which created the depositories. It follows that these depositories are instruments or agencies *sui generis* and *sui juris*, standing on their own law"); Brown *v.* Wyandotte County, 58 Kan. 672, 674, 50 Pac. 888 (where the court says: "There is no similarity between a bank acting as a depository of public funds and the class of officers mentioned [public fiscal officers]. In the case of the public and its

2. As Public Debtor. The ordinary deposit of public money in a depositary bank is in substance and legal effect a loan and not a bailment, and creates the relation of debtor and creditor between the depositary and the government,[67] not between the depositary and the officer who deposits the money,[68] although the depositary has been held a quasi-trustee.[69]

C. Appointment and Qualification — 1. Power of Appointment. The power to appoint or designate a depositary of public moneys is regulated by statute.[70]

officer the relationship is that of principal and agent; in the case of the others, it is that of creditor and debtor"). But see St. Louis County *v.* Security Bank, 75 Minn. 174, 180, 77 N. W. 815, where, on the question of whether the liability of sureties on the depositary's bond was to be governed by the rule applying to public or to private persons, the court said: "While the bank may not have been a 'public officer,' in the popular sense of that term, yet in the matter of the county money deposited with it, it was performing public duties, or duties to the public, and *pro hac vice* was a public officer." See also Hennepin County *v.* State Bank, 64 Minn. 180, 184, 66 N. W. 143, where it is said: "Depositaries of county funds, under the statute, are quasi-public officers. They are financial agents of the county, and hold its funds in place of the treasurer."

Right to use funds see *infra*, IV, G, 2.

67. *In re* State Treasurer, 51 Nebr. 116, 70 N. W. 532, 36 L. R. A. 746; State *v.* Bartley, 39 Nebr. 353, 364, 58 N. W. 172, 23 L. R. A. 67 (where it was said: "While the statute mentions 'safe keeping,' when the several provisions are construed together it is quite clear that the transaction contemplated does not amount to a special deposit. . . . The identical moneys deposited are not required to be returned. Obviously the bank receiving them had the right to use and control the money as its own. It could loan the funds for the purpose of earning the money with which to pay the stipulated interest due the state. A deposit of state funds, under the provisions of the law, amounts to a loan or investment of the funds so deposited. . . . The decisions are quite uniform to the effect that where money deposited in a bank is passed generally to the credit of the depositor, the relation of debtor and creditor is thereby created, and the transaction, although called a 'deposit,' is nevertheless in substance and legal effect a loan, and this though it is payable on demand"); South Bend First Nat. Bank *v.* Gandy, 11 Nebr. 431, 9 N. W. 566; State *v.* Keim, 8 Nebr. 63. The statement in U. S. *v.* Thomas, 15 Wall. (U. S.) 337, 21 L. ed. 89, to the effect that "all collectors, receivers and depositaries of the public money . . . are nothing but bailees," was made in the course of a discussion of the liability of public officers, and the context shows that the court did not have in mind and was not intending to speak of depositaries using money and paying interest. It has been held, however, that a statute forbidding public officers to loan the public funds does not forbid a deposit of the funds in bank. State *v.* Wilson, 77 Mo. 633; State *v.* Rubey, 77 Mo. 610. *Contra*, State *v.* Bartley, 39 Nebr. 353, 58 N. W. 172, 23 L. R. A. 67.

68. Brown *v.* Wyandotte County, 58 Kan. 672, 50 Pac. 888; *In re* State Treasurer, 51 Nebr. 116, 70 N. W. 532, 36 L. R. A. 746, holding that money which has been deposited by a state treasurer is not in his hands in such a sense that he is bound at his peril to make an accounting of it or to turn it over specifically to his successor, under a statute requiring the treasurer to "pay over all moneys received by him as such treasurer to his successor in office." *Contra*, State *v.* Wilson, 77 Mo. 633; State *v.* Rubey, 77 Mo. 610.

Public officer a bailee and not a debtor.— In many cases language has been used to the effect that a public officer receiving public money in the course of the duties of his office is as to that money a debtor and not a bailee and that the title to the money is in him and not in the state. Shelton *v.* State, 53 Ind. 331, 21 Am. Rep. 197; Rock *v.* Stinger, 36 Ind. 346; Halbert *v.* State, 22 Ind. 125; Egremont *v.* Benjamin, 125 Mass. 15; Hancock *v.* Hazzard, 12 Cush. (Mass.) 112, 59 Am. Dec. 171; Colerain *v.* Bell, 9 Metc. (Mass.) 499; Perley *v.* Muskegon County, 32 Mich. 132, 20 Am. Rep. 637; State *v.* Keim, 8 Nebr. 63; U. S. *v.* Prescott, 3 How. (U. S.) 578, 11 L. ed. 734. These cases, however, have been disapproved in an able opinion and placed upon the ground that the courts were trying to express the fact that public officers are held liable to an insurer's liability. Marx *v.* Parker, 9 Wash. 473, 37 Pac. 675, 43 Am. St. Rep. 849. See also U. S. *v.* Thomas, 15 Wall. (U. S.) 337, 21 L. ed. 89.

69. State *v.* Foster, 5 Wyo. 199, 213, 38 Pac. 926, 63 Am. St. Rep. 47, 29 L. R. A. 226, holding that public funds in the hands of a statutory depositary are impressed with a trust and may be followed as far as they can be traced in the estate of the depositary in the hands of his assignee for the benefit of creditors.

70. Halbert *v.* State, 22 Ind. 125; State *v.* Dubuclet, 27 La. Ann. 29; Van Vlissingen *v.* Clay County, 54 Minn. 555, 56 N. W. 251.

Who may appoint.— Where the statute is silent as to the appointing power, and provides for the deposit of money by a county treasurer "in bank under and by direction of the proper legal authority," the county board and not the county treasurer is "the proper legal authority" entitled to designate the depositary, as it has general supervision of

2. Mode of Appointment. In the absence of statute requiring it, sealed proposals from banks competing for the appointment as depositary are not a prerequisite of the appointment.[71]

3. Eligibility of Depositary. The depositary must satisfy the requirements of the statute as to its eligibility.[72]

4. Security For Deposit — a. In General. A depositary of public funds is commonly required by statute to furnish security for the deposit. Where the statute expressly specifies the character of the security, the depositing officer has no power to accept any other in lieu of that prescribed;[73] but the depositary may be required by the proper officer to furnish security in addition to that provided for in the statute unless the statute prohibits it.[74]

b. Bond[75] — (i) *In General.* The statutes generally provide for the execution of a bond by the depositary as security for the funds deposited.[76]

(ii) *Form and Requisites* — (a) *General Rule.* The form of a depositary's bond is usually governed by statute. A bond will be considered valid if it is in substantial compliance with the statute,[77] although containing technical defects either in the shape of an erroneous description of the obligee[78] or of the funds secured by it.[79]

the finances and property of the county. State *v.* Owen, 41 Nebr. 651, 59 N. W. 886.

Repeal of power.— A statute providing for the placing of public funds with public depositaries is not repealed by an act compelling city treasurers to account for interest on public funds in their custody, as the first statute applies to funds deposited and the later refers to cases where a depositary has not been designated. People *v.* Gibler, 78 Ill. App. 193.

Power to prefer one of several designated depositaries.— A board which has power merely to appoint a certain number of depositaries cannot require the officer whose duty it is to deposit the money to prefer one of the designated depositaries over another. State *v.* Whipple, 60 Nebr. 650, 83 N. W. 921 [*citing* State *v.* Owen, 41 Nebr. 651, 59 N. W. 886].

Power to appoint: For definite time see *infra*, IV, D. For time extending beyond appointing officer's term of office see *infra*, IV, D.

Power to revoke appointment see *infra*, IV, D.

71. New Haven *v.* Frescnius, 75 Conn. 145, 52 Atl. 823, holding that a city charter requiring sealed proposals to be submitted for work and supplies does not require sealed proposals to be made by banks competing for city funds.

72. Marquette *v.* Wilkinson, 119 Mich. 655, 659, 78 N. W. 893, 44 L. R. A. 493, holding that under Mich. Pub. Acts (1875), p. 158, providing that no officer shall "directly or indirectly, receive any pecuniary or valuable consideration as an indorsement for the deposit of any public moneys with any particular bank, firm, or corporation," a deposit of public money by a board of commissioners in a bank of which the treasurer of the board is the owner is unlawful. See also State *v.* Owen, 41 Nebr. 651, 59 N. W. 886.

Designation before bond given.— A statute forbidding the deposit of funds with a proposed depositary until the bond is filed does not render an appointment before the bond is filed illegal, but simply makes it ineffectual until that time. Meeker County *v.* Butler, 25 Minn. 363. See also St. Louis County *v.* American L. & T. Co., 75 Minn. 489, 78 N. W. 113, 67 Minn. 112, 69 N. W. 704.

73. Van Vlissingen *v.* Clay County, 54 Minn. 555, 56 N. W. 251, holding that where the statute requires the deposit to be secured by a bond, and provides that the deposit shall not exceed one-half the amount of the bond, an assignment of a security by the depositary to secure a contemplated excess of deposits and the delivery of it to a third person having no authority to accept it in behalf of the depositing officer will not be sustained as against a subsequent assignment by the depositary for the benefit of its creditors which took effect before the actual acceptance of the security by the depositing officer. It will not be presumed that he would have accepted the security for the unlawful purpose, and the court will compel its delivery to the assignee in insolvency, especially where it does not appear that the bond does not amply secure the deposits actually made.

74. Richards *v.* Osceola Bank, 79 Iowa 707, 45 N. W. 294.

Power to require new bond see *infra*, IV, C, 4, b, (vi).

75. Bonds generally see Bonds, 5 Cyc. 721 *et seq.*

76. Van Vlissinger *v.* Clay County, 54 Minn. 556, 56 N. W. 251.

77. Manitowoc County *v.* Truman, 91 Wis. 1, 64 N. W. 307.

78. St. Louis County *v.* American L. & T. Co., 67 Minn. 112, 69 N. W. 704, where a bond payable to the board of county commissioners was held valid under a statute requiring it to be made payable to the county.

79. Myers *v.* Kiowa County, 60 Kan. 189, 193, 56 Pac. 11, which holds that where a statute provides for a bond covering public funds, a bond purporting to secure county

(B) *Execution and Delivery.* A bond is not invalid because it was executed before the appointment of the depositary, where it was executed in view of the appointment.[80] Failure to attach the stamps required by the United States revenue law does not invalidate the bond. Ordinarily an obligor on the bond cannot show that he thought he was signing some other paper, or that others would sign the bond with him. Where one of the obligors delivers the bond to an attorney of a party in interest, and he holds it for some months and then delivers it to the obligee, it is a sufficient delivery.[81]

(C) *Consideration.* If the bond is under seal it imports a consideration. Apart from this a deposit of money in reliance on the bond furnishes an actual consideration for it.[82]

(D) *Ultra Vires.* If a bank is threatened with insolvency it is not *ultra vires* for it to give a bond to induce deposits.[83]

(E) *Approval.* A depositary's bond is not binding until approved by the proper authority,[84] but the approval of the majority of the officials named in the statute is sufficient where all have acted or been notified of the contemplated action.[85]

(III) *Deposits Secured*[86] — (A) *Past and Future Deposits.* A depositary's bond usually covers deposits made before as well as after its execution.[87]

funds will cover funds collected on state taxes and deposited by the county treasurer in the depositary's bank, the court saying: "These funds in the treasurer's hands, the proceeds of other than county taxes, must, in our judgment, be regarded as belonging to the county until they are actually paid over to the state, municipality or persons for whom they were collected. The county is responsible for their safe-keeping, and if it is not the absolute owner it holds as trustee for the benefit of the real owners."

80. Colquitt *v.* Simpson, 72 Ga. 501.

81. Wylie *v.* Commercial, etc., Bank, 63 S. C. 406, 41 S. E. 504.

82. Wylie *v.* Commercial, etc., Bank, 63 S. C. 406, 41 S. E. 504, holding also that a bond conditioned to pay out the money on demand is based on a valid consideration, although apart from the condition it is the depositary's duty to pay out the money.

Presumption of reliance on bond.— Evidence that a bond was filed and a deposit then made raises a presumption that the deposit was made in reliance on the bond. St. Louis County *v.* American L. & T. Co., 75 Minn. 489, 78 N. W. 113.

83. Wylie *v.* Commercial, etc., Bank, 63 S. C. 406, 41 S. E. 504.

84. People *v.* Van Ness, 79 Cal. 84, 21 Pac. 554, 12 Am. St. Rep. 134; Farmers' Bank *v.* Cooper, 36 Me. 179; St. Louis County *v.* American L. & T. Co., 67 Minn. 112, 69 N. W. 704.

85. *In re* State Treasurer, 51 Nebr. 116, 70 N. W. 532, 36 L. R. A. 746, where the statute required the bond to be "approved by the governor, secretary of state, and attorney-general," and it was held that the approval of the governor was unnecessary, he having been consulted on the matter.

86. Description of funds see *supra*, IV, C, 4, b, (II), (A).

87. Brown *v.* Wyandotte County, 58 Kan. 672, 675, 50 Pac. 888, where the bond was conditioned "to pay any and all deposits of the county which may be deposited with it," and the court says: "Grammatically, the clause 'which may be deposited' may have as much the signification of past or present as of future time. The law will principally look at the purpose for which the instrument was required and given, to determine the tense of the verb." The rule is the same where the statute provides that before a deposit is made by the officer or received by the depositary the officer shall take and the depositary give a sufficient bond. Myers *v.* Kiowa County, 60 Kan. 189, 56 Pac. 11; People *v.* Sheppard, 37 N. Y. App. Div. 119, 55 N. Y. Suppl. 1130. So where the bond is conditioned for the payment of "all moneys which are or may have been deposited," it is sufficient to bring all moneys previously deposited within its scope and in legal effect to accomplish a redeposit of them under the bond; and hence a contention that the moneys previously deposited are not secured by the bond, since the statute authorizes bonds for future deposits only, is without force. Meeker County *v.* Butler, 25 Minn. 363. If the bond is conditioned to pay over all moneys "now in deposit in said bank, or due, or to become due therefrom," it covers existing deposits in the bank. Barnes *v.* Cushing, 168 N. Y. 542, 61 N. E. 902 [*reversing* 43 N. Y. App. Div. 158, 59 N. Y. Suppl. 345]. However past deposits are not covered by a bond which secures only the repayment of "funds which shall be deposited." St. Louis County *v.* American L. & T. Co., 67 Minn. 112, 69 N. W. 704.

Application of payments.— A pass-book of the depositary containing its account with the county is admissible to show the application by consent of the parties of the checks first paid by the depositary after the bond was given to the payment of amounts previously deposited and which stood to the credit of the county when the bond was given, and hence to show that the payment of those

(B) *Illegal Excess.* Although deposits are made in excess of the amount allowed by law, the bond is valid to the extent of the sum legally deposited.[88]

(IV) *Breach of Bond.* A breach of the bond takes place wherever the obligor fails to deliver on demand the funds deposited,[89] or incapacitates itself to make delivery.[90]

(V) *Liability of Sureties.*[91] Sureties are liable for a deposit covered by the bond, although the depositary issues an interest-bearing time-certificate of deposit therefor to the officer making the deposit.[92] The failure of the officials properly to pursue their remedy against an insolvent depositary does not release the sureties on the depositary's bond;[93] nor are the sureties on an annual bond released from liability thereon by the acceptance by the state of an annual bond for the next succeeding year.[94]

(VI) *New Bond.* A depositary may be required to furnish a new bond by any public official who has power to require the original bond.[95]

5. De Facto Depositaries. The bond of a *de facto* depositary is binding where public funds have been deposited with it in reliance thereon, although the designation of the depositary was not made in accordance with statute.[96]

D. Term of Deposit. Where the power to appoint is given in general terms only, it would seem that the appointing authority cannot bind itself by appointing for any definite time, but that it has at all times power to revoke and reappoint in its discretion.[97] However an appointment is valid without renewal until a new appointment is made.[98] The appointing power cannot make a binding

checks did not deplete the amount deposited after the bond was given. St. Louis County *v.* American L. & T. Co., 75 Minn. 489, 78 N. W. 113.

88. *In re* State Treasurer, 51 Nebr. 116, 70 N. W. 532, 36 L. R. A. 746.

89. Wylie *v.* Commercial, etc., Bank, 63 S. C. 406, 41 S. E. 504. See also *infra*, IV, H, 4, a.

90. St. Louis County *v.* American L. & T. Co., 75 Minn. 489, 78 N. W. 113; Board of Courthouse Com'rs, etc. *v.* Irish-American Bank, 68 Minn. 470, 71 N. W. 674.

91. Execution of bond by sureties see *supra*, IV, C, 4, b, (II), (B).

Sureties of de facto depositary see *infra*, IV, C, 5.

92. St. Louis County *v.* American L. & T. Co., 75 Minn. 489, 78 N. W. 113.

93. St. Louis County *v.* Security Bank, 75 Minn. 174, 77 N. W. 815, holding that the failure of the county officials to file a claim against the estate of an insolvent depositary did not release the sureties either in whole or in part, although the claim would have realized forty per cent, it appearing that the sureties made no effort to secure a filing of the claim. See also Monroe County *v.* Ottis, 62 N. Y. 88.

94. Barnes *v.* Cushing, 168 N. Y. 542, 61 N. E. 902 [*reversing* 43 N. Y. App. Div. 158, 59 N. Y. Suppl. 345].

95. Van Vlissingen *v.* Clay County, 54 Minn. 555, 56 N. W. 251; People *v.* Backus, 4 N. Y. Suppl. 728.

New bond as release of original bond see *supra*, IV, C, 4, b, (V).

96. St. Louis County *v.* American L. & T. Co., 75 Minn. 489, 78 N. W. 113; Hennepin County *v.* State Bank, 64 Minn. 180, 183, 66 N. W. 143 (where the court says: "Public interests would be seriously jeopardized if the sureties upon a county depositary bond could exonerate themselves from liability by showing that he was not such *de jure*. . . . In principle, this case falls within the rule that the sureties upon an official bond, by virtue of which the officer has been inducted into office, cannot, when called upon to answer for his official defaults, escape liability upon the ground that their principal was not duly elected or appointed, or did not legally qualify"); Renville County *v.* Gray, 61 Minn. 242, 23 N. W. 635.

Presumption of reliance on bond.— If after a bond is given and approved a deposit is made with the depositary the presumption is that it was made in reliance on the bond. St. Louis County *v.* American L. & T. Co., 75 Minn. 489, 78 N. W. 113.

97. Medicine Lodge First Nat. Bank *v.* Peck, 43 Kan. 643, 23 Pac. 1077 (where the court held that in the absence of express authority, a board of county commissioners has no power to bind itself by an appointment for a definite time, on the ground largely that the safety and convenience of the public treasury necessitate the right speedily to change the disposition of the funds); Van Vlissingen *v.* Clay County, 54 Minn. 555, 56 N. W. 251. But see City Sav. Bank *v.* Huebner, 84 Mich. 391, 47 N. W. 690, where it was said that an appointment for a definite time was valid until the expiration of the term of office of the appointing officer, although the question of the validity of a revocation of the designation by that officer was not before the court.

98. Manitowoc County *v.* Truman, 91 Wis. 1, 64 N. W. 307.

appointment for a term extending beyond its own term of office,[99] except where it is given express authority to make deposits for a definite time.[1]

E. Funds Subject of Deposit. The moneys that may or must be deposited with a depositary are generally defined by statute.[2]

F. Duty to Make Deposit. The duty of depositing public funds is generally imposed on various public officers by statute.[3]

G. Rights of Depositary — 1. To Demand Funds. The question whether a depositary may demand of the depositing officer the custody of the funds to which it is by statute entitled seems not to have been decided.[4] However, it has been held that the depositary may not recover of its predecessor any damages for an illegal detention of the funds.[5]

2. To Use Funds. A depositary bank may generally use the funds deposited.[6]

3. To Compensation. A depositary is not entitled to compensation for holding public funds, in the absence of agreement therefor.[7]

H. Duties of Depositary — 1. To Demand Funds. Under some conditions it may be the duty of the depositary to demand the fund from a bank which has its temporary custody.[8]

99. Medicine Lodge First Nat. Bank *v.* Peck, 43 Kan. 643, 23 Pac. 1077; City Sav. Bank *v.* Huebner, 84 Mich. 391, 47 N. W. 690.

1. Board of Liquidators *v.* Municipality No. 1, 6 La. Ann. 21, where the statute provided for the deposit of the municipal sinking fund in a certain bank from which it was to be withdrawn only in certain contingencies, and it was held that the deposit constituted a pledge and that the appointment of a new depositary for the funds was a breach of contract beyond the power of the legislature.

2. State *v.* Bartley, 39 Nebr. 353, 58 N. W. 172, 23 L. R. A. 67 (holding that a statute providing that a state treasurer shall deposit the "several current funds" of the state includes all state money in his hands); Roberts *v.* Laramie County, 8 Wyo. 177, 56 Pac. 915.

Deposit as loan of funds see *supra*, note 67, p. 813.

3. New Haven *v.* Fresenius, 75 Conn. 145, 52 Atl. 823, holding that the provision of a city charter that all city funds shall be deposited by the treasurer in a bank designated by the board of finance is mandatory, and that the deposits must be made by the treasurer within a reasonable time after his reception of the funds; that where a certain bank had been designated as a depositary, and had agreed to pay interest, and the treasurer deposited funds in another bank which paid no interest, the fact that the treasurer supposed he had a discretion in the matter and acted in good faith, or that the board of finance knew what he was doing, was no defense in an action against him by the city for damages; and that the city might sue him for damages rather than on his official bond.

Mandamus is the proper remedy to compel an officer to comply with the statutory duty to make deposits. People *v.* Gibler, 78 Ill. App. 193.

4. State *v.* Bartley, 39 Nebr. 353, 370, 58 N. W. 172, 23 L. R. A. 67, where the court, in issuing a writ of mandamus at the instance of the depositary to compel the deposit of public funds, declined to pass on the question whether the relator had such an interest as entitled it to maintain the action, since its right to do so was not raised by counsel, the court saying: "As the state at large is directly interested in the enforcement of the depository law, the attorney general could, and doubtless it is his duty to, institute the proceedings to compel the depositing of the funds in the banks designated as depositories; and perhaps a bank which has complied with the law might do so, at least in case the attorney general should refuse to appear and file the application." See People *v.* Gibler, 78 Ill. App. 193.

5. Lewis *v.* Park Bank, 42 N. Y. 463 [*affirming* 2 Daly 85 (*affirming* 2 Abb. Pr. 93, 30 How. Pr. 115)].

6. State *v.* Bartley, 39 Nebr. 353, 58 N. W. 172, 23 L. R. A. 67.

Duty to keep funds separate see *infra*, IV, H, 2.

7. McQuiston *v.* Central Bd. of Education, 88 Pa. St. 29, holding that where one statute provides that the depositary of a certain fund shall receive a specified compensation, and another statute provides that the bank offering the highest rate of interest shall be selected as the depositary of that fund, a bank which contracts under the latter act without mention being made of the compensation provided for in the former act is not entitled to compensation.

8. Trumpbour *v.* Trumpbour, 70 Hun (N. Y.) 571, 24 N. Y. Suppl. 212 [*affirmed* in 144 N. Y. 652, 39 N. E. 494], holding that where a depositary accepts an order of court directing a bank in which court money is temporarily deposited to pay it over to the depositary, and through its own fault omits to obtain the money from the bank, it is responsible therefor to the court and to the beneficiaries of the fund the same as if it had received the money.

2. To Keep Funds Separate. A depositary is not ordinarily bound to keep the funds deposited separate from other funds.[9]

3. To Pay Interest. A depositary is not liable for interest on deposits[10] in the absence of statute[11] or contract[12] providing for the payment of interest.

4. To Make Payment on Demand — a. In General. It is the duty of the depositary to pay out the fund on proper demand of the depositing officer or on his order.[13]

b. Payment of Illegal Bonds. A depositary of public moneys is not responsible for paying out the funds under illegal bonds issued by the proper public officers[14] unless it had knowledge of the illegality.[15]

9. Brown *v.* Wyandotte County, 58 Kan. 672, 675, 50 Pac. 888 (where the court says: "The county was a general depositor of funds, and by the act of deposit the reciproeal obligations of creditor and debtor arose. The deposit not being speeial, the funds were not supposed to be kept on hand for the depositor, and were not so kept, but as deposited they beeame the property of the Bank, whieh became liable to pay the amount on demand"); St. Louis County *v.* Ameriean L. & T. Co., 67 Minn. 112, 60 N. W. 704.

Duty to keep separate accounts of separate funds see *infra*, note 13.

Right to use funds see *supra*, IV, G, 2.

10. Cass County *v.* Harrisonville Bank, 157 Mo. 133, 57 S. W. 736; New York *v.* Tradesmen's Nat. Bank, 11 N. Y. Suppl. 95.

11. Cass County *v.* Harrisonville Bank, 157 Mo. 133, 57 S. W. 736, holding that a requirement of interest on county funds does not necessitate the payment of interest on other funds deposited with the state eustodian.

12. MeQuiston *v.* Central Bd. of Edueation, 88 Pa. St. 29, holding that a depositary must pay the rate of interest eontraeted for, although above the legal rate, where the statute authorizes the seleetion as depositary of the person who shall bid "the highest rate of interest."

Authority to contract.— After agreement to pay interest the depositary eannot objeet that the state offieial had no authority to make the eontraet. New York *v.* National Broadway Bank, 10 N. Y. Suppl. 555. However a depositary of court moneys must pay the rate of interest provided in its eharter, notwithstanding a different agreement with parties to the suit, as only the court itself may make sueh an agreement. Rutland Nat. Bank *v.* Hankinson, 33 Fed. 561.

Implied contract.— An agreement to pay interest may be inferred from a previous course of dealing between the parties; but proof that other banks paid interest under like eireumstanees is no evidence of any obligation on the depositary in question to pay interest. New York *v.* Tradesmen's Nat. Bank, 11 N. Y. Suppl. 95.

Varying contract by parol.— A written agreement as to interest eannot be controlled by a prior or eontemporaneous oral agreement limiting the liability to pay interest on certain funds. Commereial State Bank *v.* Antelope County, 48 Nebr. 496, 67 N. W. 465.

13. Hall County *v.* Thomssen, 63 Nebr. 787, 89 N. W. 393, holding that where an outgoing county treasurer delivered to his successor two ehecks covering a deposit in a depositary bank, and took them to the bank and had them certified instead of drawing out the cash, after which the bank failed, it did not amount to a redeposit of the funds as a general deposit, and the liability of the bank upon its depositary bond continued. See also *supra*, IV, C, 4, b, (IV).

Court depositaries.— It is not the duty of a depositary of court funds so to keep its books that it shall not pay out in any one case more than has been deposited therein. "The deposits being, as required, in the name and to the eredit of the court, the bank was authorized and required to honor all eheeks drawn by the eourt, and to pay them generally out of sueh deposits; and the order or eheek for withdrawing the money, in stating the eause in or on aeeount of which it is drawn, was a memorandum imposing no duty upon the bank, but only operating for the eonvenience of the court and its offieers, in keeping its aecounts." Springfield State Nat. Bank *v.* Dodge, 124 U. S. 333, 345, 8 S. Ct. 521, 31 L. ed. 458. And see State Nat. Bank *v.* Reilly, 124 Ill. 464, 14 N. E. 657. See also *infra*, IV, I, 2, a.

Application of payments see *supra*, note 87, p. 815.

14. Owensboro Deposit Bank *v.* Daviess County Ct., 12 S. W. 930, 931, 11 Ky. L. Rep. 681, 13 S. W. 101, where the eourt says: "The bank was not a trustee, but a mere naked depositary, with the agents of the county to supervise its action. The fund was a trust fund, to be applied in a particular way, not by the bank, but the agents of the county. The bank was required to know that the bond or eoupon issued had been signed and delivered,— in other words, that it was a genuine bond, nothing more; and the mere faet that it might have been an over issue ereated no liability, unless there was fraud and eollusion between the bank and the eommittee in an appropriation of the fund to a purpose they knew was unauthorized."

15. Howard *v.* Owensboro Deposit Bank, 80 Ky. 496, 4 Ky. L. Rep. 406.

Notice of illegality.— The mere faet that the president of the depositary bank was an offieial of the eompany in whose favor illegal bonds were issued, and that one of the committee ordering their issue was eashier of the bank and secretary of the eompany, did

c. Set-Off and Priority. A depositary of public money may not refuse to pay holders of bonds issued against a fund in its hands because the state owes it money on another account.[16] The state has a prior right to public funds deposited with a statutory depositary,[17] but this priority may be defeated by a set-off by debtors of the depositary of debts due them from it.[18]

I. Liabilities of Depositary — 1. To Government — a. Suit Apart From Bond.[19] In those states where a deposit of funds creates a debt not between the government and the depositary, but between the depositing officer and the depositary,[20] the government has no right of action against the depositary apart from its bond,[21] especially where the deposit was made illegally,[22] except in case perhaps of fraudulent collusion between the depositary and the depositing officer[23] or in case of statutory permission.[24]

b. Suit on Bond — (I) *Demand as a Prerequisite.* Where the depositary has put it out of its power to fulfil the conditions of the bond, as by going into insolvency, no demand is necessary before suit is brought on the bond.[25]

(II) *Pleading*[26] — (A) *Complaint.* In a suit on a depositary's bond, a specific allegation must be made of the designation of the principal as depositary,[27] and as a rule the declaration or complaint should contain an assignment

not charge the bank with notice that the bonds were invalid where these officials claimed consistently that the bonds were legal. Owensboro Deposit Bank *v.* Daviess County Ct., 12 S. W. 930, 11 Ky. L. Rep. 681.

16. U. S. Bank *v.* Macalester, 9 Pa. St. 475, expressly refraining, however, from an opinion as to the right of set-off against the state itself.

Set-off by state.— A depositary's claim against the public may, however, be set off by a deposit made by a public officer. Com. *v.* Phœnix Bank, 11 Metc. (Mass.) 129.

17. Seay *v.* Rome Bank, 66 Ga. 609 (holding that a lien given by statute on "property" of a depositary covers choses in action); State *v.* Foster, 5 Wyo. 199, 38 Pac. 926, 63 Am. St. Rep. 47, 29 L. R. A. 226 (holding that since a state or county treasurer is merely a custodian or trustee of public moneys coming into his hands, if he deposits such funds with one who knows their trust character and who afterward becomes insolvent, the state or county may sue to impress a trust on the insolvent estate). However, the state cannot bring an action against an assignee of a county depositor to claim a preference under the Missouri act of Feb. 11, 1881, providing that debts due the state from an insolvent shall be preferred, since the funds being county funds the debt of the depositor is to the county and not to the state. State *v.* Rubey, 77 Mo. 610.

18. State *v.* Brobston, 94 Ga. 95, 21 S. E. 146, 47 Am. St. Rep. 138.

19. Actions against depositary of county funds see Counties, 11 Cyc. 514.

20. See *supra*, IV, B, 2.

21. State *v.* Wilson, 77 Mo. 633; State *v.* Rubey, 77 Mo. 610.

Liability on depositing officer's bond.—The liability of a depositary for loss of the fund cannot be enforced in an action on the depositing officer's bond, on which the depositary is surety, where that officer and hence his sureties as such are not liable for the loss. Roberts *v.* Laramie County, 8 Wyo. 177, 56 Pac. 915.

Garnishment of fund by state see *infra*, note 42.

22. State *v.* Kein, 8 Nebr. 63, holding that as an unauthorized deposit is not binding on the state, it does not found a cause of action in favor of the state, and the state must have recourse to the depositing officer's bond. See, however, McIntosh *v.* Johnson, 51 Nebr. 33, 70 N. W. 522; Marx *v.* Parker, 9 Wash. 473, 37 Pac. 675, 43 Am. St. Rep. 849, in both of which cases this decision is criticized. A contrary rule is now in force by statute in Nebraska. Comp. St. c. 8, §§ 4, 5; McIntosh *v.* Johnson, 51 Nebr. 33, 70 N. W. 522.

23. State *v.* Wilson, 77 Mo. 633; State *v.* Rubey, 77 Mo. 610.

24. McIntosh *v.* Johnson, 51 Nebr. 33, 70 N. W. 522; People *v.* Sheppard, 37 N. Y. App. Div. 119, 55 N. Y. Suppl. 1130.

25. St. Louis County *v.* American L. & T. Co., 75 Minn. 489, 78 N. W. 113; Board of Courthouse Com'rs, etc. *v.* Irish-American Bank, 68 Minn. 470, 71 N. W. 674.

Demand on receiver.— Where a bank is in the hands of a receiver, a demand for payment of a deposit due by the bank is properly made by drawing a check on the bank and demanding payment thereof of the receiver. Wylie *v.* Commercial, etc., Bank, 63 S. C. 406, 41 S. E. 504.

Variance.— It is not ground for reversal that the complainant alleged a demand for the fund and the court admitted evidence of facts rendering a demand unnecessary, in the absence of a showing of prejudice. St. Louis County *v.* American L. & T. Co., 75 Minn. 489, 78 N. W. 113.

26. Pleading generally see Pleading.

Variance between pleading and proof see *supra*, note 25.

27. St. Louis County *v.* American L. & T. Co., 67 Minn. 112, 69 N. W. 704, where a re-

of breaches of the bond in terms sufficient to apprise defendant of what is relied on as a breach.[28]

(B) *Bill of Particulars.* A suit on a depositary's bond is not in the nature of a suit on an account entitling defendant as a matter of right to a bill of particulars.[29]

(III) *Evidence.*[30] Designation as depositary may be proved by a recital of the appointment in the bond.[31] The existence and amount of the deposit may be shown by the pass-book issued by the depositary.[32] The amount due may be shown by the record of a decree in an independent suit.[33]

c. Summary Remedy on Bond. A summary remedy on the bond of the depositary is sometimes given by statute.[34]

2. To Third Persons[35]— a. In General. A depositary of court funds is in all respects exempt from the process of the litigants.[36] Claims against the funds must be made in the court which ordered the deposit to be made,[37] and in the same cause.[38] Funds deposited by a city in a bank to the credit of holders of city bonds cannot be sequestered as property of the bondholders.[39]

b. Garnishment[40] and Sequestration.[41] Funds in the custody of a depositary are not liable to garnishment by a debtor of the depositing officer, since the money is that of the government.[42] A writ of sequestration cannot properly issue against a depositary of city funds on a claim against the city.[43]

J. Liability of Government For Loss of Funds.[44] The United States is not liable to the claimants of court funds which have been deposited with a duly designated depositary and lost through its failure.[45]

cital of designation in the bond set out in the complaint was held not sufficient as an allegation of designation.

28. **Necessity of assigning breach** of bond in general see BONDS, 5 Cyc. 826.

29. St. Louis County *v.* American L. & T. Co., 75 Minn. 489, 78 N. W. 113.

The proper remedy is by motion to make the complaint more definite and certain. St. Louis County *v.* American L. & T. Co., 75 Minn. 489, 78 N. W. 113; Rochester *v.* McDowell, 12 N. Y. Suppl. 414.

30. **Evidence** generally see EVIDENCE.

Parol evidence to vary contract see *supra*, note 12.

31. St. Louis County *v.* American L. & T. Co., 75 Minn. 489, 78 N. W. 113.

32. Myers *v.* Kiowa County, 60 Kan. 189, 56 Pac. 11; St. Louis County *v.* American L. & T. Co., 75 Minn. 489, 78 N. W. 113.

33. Wylie *v.* Commercial, etc., Bank, 63 S. C. 406, 41 S. E. 504, holding that a decree finding the amount due in a suit to which all the parties to the action on the bond were before the court is *res judicata*.

34. Scay *v.* Rome Bank, 66 Ga. 609, a case under a statute authorizing the issuance of an execution against a depositary on its bond upon default without suit.

35. **Duty as to paying out court funds** see *supra*, note 13.

Set-off and priority see *supra*, IV, H, 4, c.

36. Jones *v.* Merchants' Nat. Bank, 76 Fed. 683, 22 C. C. A. 483, 35 L. R. A. 698, holding that a bill in equity by a litigant will not lie to recover the funds.

37. Gregory *v.* Boston Safe-Deposit, etc., Co., 173 Mass. 419, 53 N. E. 889 (holding that where money deposited to the credit of a certain cause in a federal court is paid out by the depositary pursuant to order, the depositary cannot be charged for the money in a suit in a state court on the ground that the federal court had no jurisdiction to make the order); Gregory *v.* Merchants' Nat. Bank, 171 Mass. 67, 50 N. E. 520.

Remedy of claimant.— Where a person entitled to money in possession of a depositary of court, on receiving notice that it is to be paid out to another on an order of court, calls on the depositary and attempts to secure a delay, and on refusal fails to apply for an order staying proceedings for payment of the money, he cannot recover it of the depositary after payment, although he commenced his action before payment. Swart *v.* Central Trust Co., 4 Silv. Supreme (N. Y.) 387, 7 N. Y. Suppl. 558.

38. Gregory *v.* Boston Safe-Deposit, etc., Co., 36 Fed. 408 [*modified* in 144 U. S. 665, 12 S. Ct. 783, 36 L. ed. 585].

39. Southern Bank *v.* Louisiana Nat. Bank, 28 La. Ann. 97.

40. **Garnishment** generally see GARNISHMENT.

41. **Sequestration** generally see SEQUESTRATION.

42. Marx *v.* Parker, 9 Wash. 473, 37 Pac. 675, 43 Am. St. Rep. 849. It is otherwise where the deposit was illegally made. South Bend First Nat. Bank *v.* Gandy, 11 Nebr. 431, 9 N. W. 566. And it seems that the state may garnish funds deposited by the county treasurer, if it is entitled to them. State *v.* Rubey 77 Mo. 610.

43. Southern Bank *v.* Louisiana Nat. Bank, 28 La. Ann. 97.

44. **Liability of county officers** for loss of funds see COUNTIES, 11 Cyc. 447.

45. Coudert *v.* U. S., 175 U. S. 178, 20 S. Ct. 56, 44 L. ed. 122 [*affirming* 73 Fed.

DEPOSIT COMPANY. A company whose business is the safe-keeping of securities or other valuables deposited in boxes or safes in its building which are leased to the depositors.[1] (See, generally, WAREHOUSEMEN.)

DEPOSITED.[2] Intrusted.[3]

DEPOSITES. Money received by the banks as such.[4]

505, 19 C. C. A. 543]; Branch *v.* U. S., 100 U. S. 673, 25 L. ed. 759 [*affirming* 12 Ct. Cl. 281].

1. Black L. Dict.

2. **Not synonymous with "filed."**— Where a statute provided a punishment against "A person who willfully . . . mutilates, destroys, . . . a record, . . . paper, document or other thing filed or deposited in a public office," etc., Herrick, J., said: "The words 'filed' and 'deposited' are evidently not used as synonymous or as the equivalents of each other, but as words having a different signification." And, after defining the word "filed" as placed on file, with the idea of permanent preservation, the judge proceeded: "Deposit does not carry with it the same meaning; it may or may not mean a permanent disposition of the thing placed or deposited. . . . It may mean a mere temporary disposition or placing of the thing. And the words of the statute being coupled together, or rather disjoined by the conjunction 'or,' the same meaning is not to be given to each, but that meaning or signification which distinguishes it from the other, and thus each word given full force and effect." People *v.* Peck, 67 Hun (N. Y.) 560, 569, 570, 22 N. Y. Suppl. 576 [*citing* Bouvier L. Dict.; Century Dict.; Rapalje & L. L. Dict.; Worcester Dict.]

3. Walster *v.* U. S., 42 Fed. 891, 895.

"**The words 'intrusted or deposited' imply**, in their ordinary signification, something more than mere possession." Staniels *v.* Raymond, 4 Cush. (Mass.) 314, 316.

4. Lloyd *v.* West Branch Bank, 15 Pa. St. 172, 175, 53 Am. Dec. 581.

DEPOSITIONS

By James Beck Clark

CROSS-REFERENCES

For Matters Relating to:
Adverse Party as Witness, see DISCOVERY; WITNESSES.
Affidavits, see AFFIDAVITS.
Attendance of Witness in General, see WITNESSES.
Deposition:
Appellate Procedure Relating to, see APPEAL AND ERROR.
Contradiction of, see WITNESSES.
Corroboration of, see WITNESSES.
Credibility of, see WITNESSES.
Expense of Taking, see COSTS.
False, see PERJURY.
Impeachment of, see WITNESSES.
In Admiralty, see ADMIRALTY.
In Bankruptcy, see BANKRUPTCY.
In Court of Claims, see COURTS.
In Supplementary Proceedings, see EXECUTIONS.
On Preliminary Examination, see CRIMINAL LAW.
Taken by Coroner, see CORONERS.
Taking as Ground For Continuance, see CONTINUANCES IN CIVIL CASES; CONTINUANCES IN CRIMINAL CASES.
Used by Jury, see TRIAL.
Used in Former Trial, see EVIDENCE.
Used in Other Action, see EVIDENCE.
Use of on Trial, see TRIAL.

For Matters Relating to — (*continued*)
Discovery, see Discovery.
Effect of Appearance Generally, see Appearances.
Evidence in General, see Evidence.
Examination of Party Before Trial, see Discovery.
Examination of Witness at Trial, see Witnesses.
Ex Parte Statements on Oath, see Affidavits.
Inspection of Document Before Trial, see Discovery.
Interrogatories to Adverse Party, see Discovery.
Proof After Publication, see Equity.
Proof in Chancery, see Equity.
Witnesses In General, see Witnesses.

I. Definition.

A deposition is the testimony of a witness put or taken down in writing under oath or affirmation, before a commissioner, examiner, or other judicial officer, in answer to interrogatories oral or written.[1]

1. 3 Blackstone Comm. 449; Burrill L. Dict.; Tidd Pr. 810, 811.

Other definitions are: "A matter related upon oath." Rex *v.* Cambridge University, 1 Str. 557, 564.

"Evidence put down in writing by way of answer to questions." Reg. *v.* Hamilton, 2 Can. Cr. Cas. 409, 12 Manitoba 354, 372.

"Testimony of a witness given or taken down in writing under oath or affirmation, before a commissioner, examiner, or other judicial officer, in answer to interrogatories and cross-interrogatories, and usually subscribed by the witness." Aven *v.* Wilson, 61 Ark. 287, 298, 32 S. W. 1074 [*citing* Weeks Dep. 3].

"Testimony of a witness, reduced to writing, in due form of law, by virtue of a commission or other authority of a competent tribunal, or according to the provision of some statute law, to be used on the trial of some question of fact in a court of justice." Bouvier L. Dict. [*quoted* in Indianapolis Water Co. *v.* American Straw-Board Co., 65 Fed. 534, 535].

"Testimony taken out of court, under authority which will entitle it to be read, as evidence, in court, and has no relation to oral testimony taken in court, or before a master." Troy Iron, etc., Factory *v.* Corning, 24 Fed. Cas. No. 14,197, 7 Blatchf. 16 [*quoted* in Indianapolis Water Co. *v.* American Straw-Board Co., 65 Fed. 534, 535].

"Testimony that is deposited or laid down in writing." Indianapolis Water Co. *v.* American Straw-Board Co., 65 Fed. 534, 535.

"The answer of the witness to such interrogations as it is thought expedient to put to him, to establish certain facts which the plaintiff alleges, and on which his case depends." Lawrence, J., in Berkeley's Case, 4 Camph. 401, 412.

"Written declaration under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine; or upon written interrogatories." 2 S. D. Annot. St. (1901) § 6510.

"Written statements, under oath, of a witness in a judicial proceeding." Rapalje & L. L. Dict.

"Written testimony." Indianapolis Water Co. *v.* American Straw-Board Co., 65 Fed. 534, 535; U. S. *v.* Clark, 25 Fed. Cas. No. 14,804, 1 Gall. 497.

"Written testimony of a witness given in the course of a judicial proceeding." State *v.* Dayton, 23 N. J. L. 49, 54, 53 Am. Dec. 270.

"Written testimony of a witness given in the courts of a judicial proceeding, either at law or in equity." The Sallie P. Linderman, 22 Fed. 557, 558. And see Ferguson *v.* Dent, 46 Fed. 88, 93.

The word "deposition" may be used in two senses. In its restricted and technical sense, it is usually limited to the written testimony of a witness given in the course of a judicial proceeding, at law or in equity. But it is also a generic expression, which embraces all written evidence verified by oath, and thus includes "affidavits." Baker *v.* Magrath, 106 Ga. 419, 421, 32 S. E. 370 [*citing* Anderson L. Dict.]. See also Stimpson *v.* Brooks, 23 Fed. Cas. No. 13,454, 3 Blatchf. 456. "In common parlance, and in some clauses of the statute, [deposition] is often used to designate the document containing the interrogatories, answers and certificate of the magistrate; while in other sections, it is more appropriately used to designate the narrative of the witness, made under the sanction of an oath, and reduced to writing." Fuller *v.* Hodgdon, 25 Me. 243, 247.

A paper which does not show in what cause it was taken, whether with or without notice, or who was present examining or cross-examining, and which was not filed, is not a deposition. Mincke *v.* Skinner, 44 Mo. 92.

A statement of facts in writing, without date or venue, purporting to have been signed by a witness, but giving neither age nor residence of such witness, which statement is not shown to have been made under oath,

II. RIGHT TO TAKE.

A. Dependent on Jurisdiction — 1. In General. Unless where the right is inherent, as in equity in certain cases,[2] there is no authority to cause depositions to be taken except in those cases where the right is conferred by statute, and the court or judge to which application is made is vested with jurisdiction to grant it;[3]

nor the oath waived, nor to have been taken on notice or in the presence of parties, nor before any official authorized to administer oaths, and which is not accompanied by a certificate of a competent official, from which compliance with any of the requisites for the taking of depositions in judicial proceedings can be inferred, is not a deposition, although so labeled and filed in a pending suit. Lutcher *v.* U. S., 72 Fed. 968, 19 C. C. A. 259.

Bastardy proceedings.— Under the English statute (7 & 8 Vict. c. 101, § 2) respecting bastardy proceedings, and requiring the mother to make a deposition, etc., evidence taken down in writing. Reg. *v.* Fletcher, L. R. 1 C. C. 320, 11 Cox C. C. 558, 40 L. J. M. C. 123, 24 L. T. Rep. N. S. 742, 19 Wkly. Rep. 781.

Coroner's inquest.— An entry indorsed on an inquisition taken by a coroner, purporting to be the examination of witnesses, without a jurat or certificate of the coroner that the witnesses testified on oath, or a showing that it is the handwriting of the officer or was taken by his direction, or that the witnesses were in fact sworn and that their testimony is truly stated, is insufficient under the statute. People *v.* White, 22 Wend. (N. Y.) 167.

In criminal procedure testimony taken on a preliminary hearing, and reduced to writing by the committing magistrate. Cyclopedic L. Dict. "Depositions," in Cal. Pen. Code, § 871, requiring the magistrate presiding at the preliminary examination of a person charged with crime, to indorse the discharge of the prisoner upon the depositions taken includes the testimony taken on the presentation of the complaint before issue of the warrant, as well as the testimony taken on the examination of the accused. Mattingly *v.* Nichols, 133 Cal. 332, 65 Pac. 748. Evidence taken on the examination of the accused for the benefit of the state is not a deposition which is required to be taken with prescribed statutory formalities. Kerry *v.* State, 17 Tex. App. 178, 50 Am. Rep. 122.

Notes of testimony taken at a former trial of the same suit, where there was an opportunity to cross-examine, are substantially a deposition. Zell *v.* Benjamin, 1 Walk. (Pa.) 113. But notes of testimony taken before an auditor without further proof will not answer the definition of a deposition. Matthewson *v.* Wilson, 7 Wkly. Notes Cas. (Pa.) 29. And the notes of testimony taken down by the shorthand reporter in the presence of the court at the time of the granting of the continuance, but not read over to the witnesses or corrected or signed by them, nor certified by the reporter or by any other person, are lacking in the essential elements of a deposition. Thomas *v.* Black, 84 Cal. 221, 23 Pac. 1037.

The distinction between an affidavit and a deposition is that the former is *ex parte* and voluntary, and the latter is made after notice and is compulsory. Crenshaw *v.* Miller, 111 Fed. 450. A deposition differs from an affidavit, in that the opposite party has an opportunity to cross-examine the witness who makes the former. Woods *v.* State, 134 Ind. 35, 33 N. E. 901. "A deposition is evidence given by a witness under interrogatories, oral or written, and usually written down by an official person; while an affidavit is the mere voluntary act of the party making the oath, and may be, and generally is, taken without the cognizance of the one against whom it is to be used." Stimpson *v.* Brooks, 23 Fed. Cas. No. 13,454, 3 Blatchf. 456. "Deposition" in Cal. Pen. Code, § 129, making the offense of perjury complete when a deposition is delivered with the intent that it be uttered or published includes an affidavit. People *v.* Robles, 117 Cal. 681, 49 Pac. 1042. See also AFFIDAVITS, 2 Cyc. 4 note 3.

"There is an obvious distinction between an oath and a deposition. . . . the ordinary and usual meaning of the word 'deposition' is confined to written testimony at least in legal proceedings." U. S. *v.* Clark, 25 Fed. Cas. No. 14,804, 1 Gall. 497.

The testimony of each witness taken separately is a deposition within a statute authorizing the collection of a prescribed fee for the deposition of each witness taken, etc. Broyles *v.* Buck, 37 Fed. 137.

2. See *infra*, II, A, 2.

3. *Alabama.*— Brown *v.* Turner, 15 Ala. 832.

Kentucky.— Kaelin *v.* Com., 84 Ky. 354, 1 S. W. 594, 8 Ky. L. Rep. 293.

Louisiana.— State *v.* Fulford, 33 La. Ann. 679.

Massachusetts.—Frye *v.* Barker, 2 Pick. 65.

Mississippi.— American Express Co. *v.* Bradford, (1903) 33 So. 843; Ragan *v.* Cargill, 24 Miss. 540.

New Hampshire.— Russell *v.* Fabyan, 35 N. H. 159.

New York.—Paddock *v.* Kirkham, 102 N. Y. 597, 8 N. E. 214; *In re* Attorney, 83 N. Y. 164; McColl *v.* Sun Mut. Ins. Co., 50 N. Y. 332 [*affirming* 34 N. Y. Super. Ct. 310]; Erwin *v.* Voorhees, 26 Barb. 127; Crane *v.* Evans, 12 N. Y. Civ. Proc. 445; People *v.* Haight, 13 Abb. N. Cas. 197; Dwinelle *v.* Howland, 1 Abb. Pr. 87; *In re* Whitney, 4 Hill 533; Wood *v.* Howard Ins. Co., 18 Wend. 646; Brown *v.* Southworth, 9 Paige 351.

Pennsylvania.— McCullough's Estate, 20 Wkly. Notes Cas. 451.

and the power should never be exercised unless the authority is clear and not presumptive.[4]

2. Equity Jurisdiction. The court of chancery from an early day exercised the power to procure testimony by deposition and to issue commissions for that purpose. This power is inherent in courts of equity, and except so far as their authority in this respect has been abrogated or curtailed by statutory regulation, it is independent thereof.[5]

3. Early Practice at Law. Formerly the common-law courts had no power to procure testimony by deposition, but litigants therein were obliged to resort to chancery,[6] or to procure the consent of the adverse party — the court lending its

South Carolina.— Ivy *v.* Clawson, 14 S. C. 267; Stone *v.* Jones, 4 McCord 254; English *v.* English, 2 McCord 238.

Washington.— State *v.* Hunter, 18 Wash. 670, 52 Pac. 247; State *v.* Humason, 5 Wash. 499, 32 Pac. 111.

Wisconsin.— Brand *v.* Butler, 30 Wis. 681.

United States.— U. S. *v.* Hom Hing, 48 Fed. 635.

England.— *In re* Shaw, [1892] 1 Q. B. 91, 61 L. J. Q. B. 141; Francisco *v.* Gilmore, 1 B. & P. 177; Cox *v.* Leech, 1 C. B. N. S. 617, 3 Jur. N. S. 442, 26 L. J. C. P. 125, 5 Wkly. Rep. 199, 87 E. C. L. 617; Atty.-Gen. *v.* Bovet, 3 D. & L. 492, 15 L. J. Exch. 155, 15 M. & W. 60. See Reg. *v.* Wood, 9 Dowl. P. C. 310, 10 L. J. Exch. 168, 7 M. & W. 571; Tidd Pr. 741.

Canada.— Seymour *v.* Doull, 23 Nova Scotia 364.

See 16 Cent. Dig. tit. "Depositions," § 8 *et seq.*

Effect of subsequent legislation.—A deposition taken without the authority of statute is not validated by a subsequent statute permitting the taking of a deposition under like circumstances. Brand *v.* Butler, 30 Wis. 681, where the subsequent statute placed parties on the same plane as witnesses.

U. S. Rev. St. (1878) § 866 [U. S. Comp. St. (1901) p. 663], authorizing the issue of a dedimus by any of the courts of the United States "in any case where it is necessary in order to prevent a failure or delay of justice," applies only to cases of which those courts have jurisdiction. U. S. *v.* Hom Hing, 48 Fed. 635.

4. Something more than a mere presumption of authority is required. U. S. *v.* Hom Hing, 48 Fed. 635.

5. Una *v.* Dodd, 38 N. J. Eq. 460; Brown *v.* Southworth, 9 Paige (N. Y.) 351.

Origin of the power.— This power is said to have been borrowed from the civil law and to have constituted a part of the original jurisdiction of the chancery court. It is also said that it is a power inherent in all courts of justice, for "by the law of nations, courts of justice of different countries are bound, mutually, to aid and assist each other in the furtherance of justice." Una *v.* Dodd, 38 N. J. Eq. 460, 463 [*citing* Daniell Ch. Pr. 932; 1 Greenleaf Ev. § 320]. In Una *v.* Dodd, 38 N. J. Eq. 460, 466, the vice-chancellor, after the consideration of several English authorities, said that the court of chancery "independent of any authority conferred by statute, has power, in every cause and proceeding pending before it, where it is necessary in order to ascertain the truth of the matters in dispute, to have the evidence of witnesses residing in other jurisdictions, to take their evidence."

Coördinate jurisdiction.— The chancellor has power in all cases to grant a commission for the examination of absent witnesses, notwithstanding the register and clerk have like power in certain cases. Clark *v.* Bundx, 6 Paige (N. Y.) 432.

Statutory change.— A statute permitting the court to try suits in equity in the same manner as actions at law are tried without a jury, but authorizing a reference of such suits, leaves no provision for taking the deposition of a witness, even *de bene esse*, unless a reference is made to find the facts or facts and law. Marks *v.* Crow, 14 Oreg. 382, 13 Pac. 55.

6. Una *v.* Dodd, 38 N. J. Eq. 460; Macaulay *v.* Shackell, 1 Bligh N. S. 96, 4 Eng. Reprint 809; Bridges *v.* Fisher, 1 Bing. N. Cas. 510, 1 Hodges 36, 4 L. J. C. P. 117, 1 Scott 485, 27 E. C. L. 742; Nicol *v.* Verelst, 4 Bro. P. C. 416, 2 Eng. Reprint 282; Devis *v.* Turnbull, 6 Madd. 232; Angell *v.* Angell, 1 Sim. & St. 83, 24 Rev. Rep. 149, 1 Eng. Ch. 83; 1 Chitty Pl. 276 and note.

In England a common-law court had no general power to issue a commission until 1 Wm. IV, c. 22. Dwinelle *v.* Howland, 1 Abb. Pr. (N. Y.) 87.

In New Hampshire the courts of law for an unknown period exercised the power of issuing commissions abroad, although the source of their jurisdiction in this respect does not satisfactorily appear. Russell *v.* Fabyan, 35 N. H. 159.

Concurrent jurisdiction.— Where a court sitting as a court of law has full power to grant a commission to take testimony, it is both unnecessary and improper to apply to the equity side. Peters *v.* Provost, 19 Fed. Cas. No. 11,032, 1 Paine 64.

Special commissions.— A motion for a special commission to take the testimony of a witness unable to attend court, on the ground that he has refused to give his testimony before a justice, and the remedy by attachment and fine or by a suit at law is inadequate, will be refused as an unusual exercise of the powers of the court; there being no doubt of the power of the court as a court of

aid to procure unwilling suitors to consent by adjourning the trial or refusing to render judgment..[7]

4. STATUTORY AUTHORITY — a. Power of Legislature to Confer. It is within the powers of a legislature to confer authority on particular courts to prescribe the forms and modes of obtaining evidence [8] and to authorize the use of depositions by the accused in criminal cases;[9] but there is no power to authorize the taking and use of depositions by the prosecution, where the accused is entitled to meet his accuser face to face and to be confronted with the witnesses against him.[10]

b. Statutory Changes. Unless so expressly provided, statutes enlarging or diminishing the grounds for which depositions may be taken, or changing the mode in which they may be procured or the manner of taking them, are inapplicable to cases instituted before their enactment,[11] and a statute applicable to existing cases only will not extend to cases subsequently arising.[12] Neither is a deposition taken under one mode invalidated by a subsequent statute prescribing a different mode,[13] nor existing provisions respecting the perpetuation of testimony affected by a statute abolishing discovery.[14]

c. Statutes Applicable. Where depositions are permitted to be taken under different statutory provisions prescribing different modes of taking testimony under particular circumstances, the party seeking the testimony must resort to the particular mode prescribed and applicable to the conditions existing in the case presented, and cannot proceed under the other provisions.[15]

equity to cause the deposition to be taken *de bene esse*, on a bill for that purpose. Russell *v.* Fabyan, 35 N. H. 159.

7. Amory *v.* Fellowes, 5 Mass. 219; Ragan *v.* Cargill, 24 Miss. 540; Dwinelle *v.* Howland, 1 Abb. Pr. (N. Y.) 87; Vanriper *v.* Vanriper, 3 Lanc. Bar (Pa.) 155.

According to the principles of the common law a party had the right to insist on the presence of witnesses in court, that he might cross-examine them in the presence of the jury, and by the original practice in the common-law courts depositions *de bene esse* could be taken only by consent of the parties. But as great practical inconvenience frequently resulted from a rigid adherence to these rules, the court uniformly exercised every legitimate power it possessed to induce parties to consent, by putting off the trial at the instance of defendant, if plaintiff would not give consent, and if defendant refused, by declining to render judgment, as in case of nonsuit. Ragan *v.* Cargill, 24 Miss. 540.

8. U. S. Rev. St. (1878) § 862 [U. S. Comp. St. (1901) p. 661] empowering the supreme court of the United States to prescribe the forms and modes of taking and obtaining evidence is valid and constitutional. White *v.* Toledo, etc., R. Co., 79 Fed. 133, 24 C. C. A. 467.

Canada.— The parliament of the Dominion of Canada has power to provide for the taking of evidence of persons residing within the province of Ontario for use in foreign tribunals. *Re* Wetherell, 4 Ont. 713.

9. The legislature may allow a defendant in a criminal case to take and use the depositions of witnesses in his behalf, and to specify the circumstances under which and how they may be taken. Kaelin *v.* Com., 84 Ky. 354, 1 S. W. 594, 8 Ky. L. Rep. 293.

10. Kaelin *v.* Com., 84 Ky. 354, 1 S. W. 594, 8 Ky. L. Rep. 293. See also CRIMINAL LAW, 12 Cyc. 544.

Requiring accused to permit state to take depositions.— A statute permitting one charged with a crime to take testimony in foreign jurisdictions by deposition is not unconstitutional because requiring defendant to enter of record a consent that the prosecution may also taken depositions without the state. Butler *v.* State, 97 Ind. 378.

11. Va. Acts (1849), p. 666, § 34, which provided a new and simpler method of taking depositions, did not relax the requirements of the law which it superseded as to cases commenced before its enactment. Smith *v.* Grosjean, 1 Patt. & H. (Va.) 109.

12. Statutes relative to supplying the titles to lands to which the deeds "have been" lost or defaced do not authorize the perpetuation of testimony relating to a deed lost since the passage of those acts. Matter of Koockagey, 6 Phila. (Pa.) 46.

13. A deposition taken *ex parte* under a statute permitting such practice is not invalidated by a subsequent statute requiring depositions to be taken on notice. Armstrong *v.* Griswold, 28 Vt. 376.

Change before completion of deposition.— An act providing that no new law shall be construed to repeal a former law as to any act done or any right accrued, etc., under the former law, or in any way whatever to affect any act so done, or any right accrued or claimed, arising before the new law takes effect, etc., will give no right to use a deposition, the taking of which was commenced before but completed after the passage of an act inhibiting the use of such depositions. Crawford *v.* Halstead, 20 Gratt. (Va.) 211.

14. Lang *v.* Brown, 6 Hun (N. Y.) 256.

15. Glover *v.* Millings, 2 Stew. & P. (Ala.) 28; North American Transp., etc., Co. *v.*

B. Perpetuation of Testimony — 1. In General. Depositions may be taken to perpetuate testimony where no action has been brought, and it is sought to secure the evidence of some right or interest which may be endangered or lost if the testimony on which it depends is not preserved.[16] The right does not depend on

Howells, 121 Fed. 694, 58 C. C. A. 442; The Alexandra, 104 Fed. 904; Bird *v.* Halsy, 87 Fed. 671; Turner *v.* Shackman, 27 Fed. 183; Cortes Co. *v.* Tannhauser, 18 Fed. 667, 21 Blatchf. 552; Jones *v.* Oregon Cent. R. Co., 13 Fed. Cas. No. 7,486, 3 Sawy. 523.

Appeal from justice.— Depositions in an action pending in the county court on appeal from a justice should be taken under the statute relative to the taking of depositions in cases brought in the county court, and not under the statute as to depositions in actions pending before a justice. Wilson *v.* Welch, 12 Colo. App. 185, 55 Pac. 201.

Probate of will.— A statute prescribing the mode of taking the deposition of a witness to a will in the probate court will not preclude the taking of such a deposition in common form to establish a will in the circuit court. Cawthorn *v.* Haynes, 24 Mo. 236. The deposition of a sick, aged, or infirm witness in a probate proceeding must be taken under a provision conferring the right to take depositions in such cases, and not under provisions relating to the taking of depositions generally. Matter of McCrosky, 5 Dem. Surr. (N. Y.) 256.

United States courts.— A dedimus will not issue to take testimony which can be taken *de bene esse*. Turner *v.* Shackman, 27 Fed. 183.

Following state practice.— The mode of issuing and executing a dedimus in the federal court is regulated by the state statute relating to depositions on commission and not by a statute relating to depositions *de bene esse*. Jones *v.* Oregon Cent. R. Co., 13 Fed. Cas. No. 7,486, 3 Sawy. 523.

"Common usage," in U. S. Rev. St. (1878) § 866 [U. S. Comp. St. (1901) p. 663], is construed to mean the rule or law governing the practice of the court at the time — the state statute. Jones *v.* Oregon Cent. R. Co., 13 Fed. Cas. No. 7,486, 13 Sawy. 523.

U. S. supreme court.—The provisions of the judiciary act of 1789 relative to taking depositions *de bene esse* do not apply to causes pending in the supreme court of the United States but only to cases pending in the district and circuit courts. In the supreme court the testimony can be taken only according to its rules. The London Packet, 2 Wheat. (U. S.) 371, 4 L. ed. 264; The Argo, 2 Wheat. (U. S.) 287, 4 L. ed. 241.

16. *Delaware.*— Hall *v.* Stout, 4 Del. Ch. 269; Hickman *v.* Hickman, 1 Del. Ch. 133.

Maine.— Ocean Ins. Co. *v.* Bigler, 72 Me. 469.

New York.— Matter of Fulton, 75 N. Y. App. Div. 623, 78 N. Y. Suppl. 116; Martin *v.* Hicks, 6 Hun 238, 1 Abb. N. Cas. 341; Matter of Ketchum, 60 How. Pr. 154.

Pennsylvania.— Norristown Ins., etc., Co. *v.* Burgess, 14 Montg. Co. Rep. 91.

Texas.— Sullivan *v.* Dimmitt, 34 Tex. 114.

England.— Angell *v.* Angell, 1 Sim. & St. 83, 24 Rev. Rep. 149, 1 Eng. Ch. 83.

See 16 Cent. Dig. tit. "Depositions," § 26.

See also *infra*, VII.

Maine Rev. St. c. 107, which authorizes the perpetuation of the testimony of non-resident witnesses, empowers the court to issue a commission as well where all the adverse parties are non-residents as where some of them reside within the state. Ocean Ins. Co. *v.* Bigler, 72 Me. 469.

New York.— The statutes authorizing the perpetuation of testimony do not authorize the perpetuation of the testimony of non-resident witnesses. McCall *v.* Sun Mut. Ins. Co., 50 N. Y. 332 [*affirming* 34 N. Y. Super. Ct. 310].

Texas.— The right to perpetuate testimony was recognized and established many centuries ago by the civil law, and was the law of Mexico and of Texas prior to the revolution. Sullivan *v.* Dimmitt, 34 Tex. 114.

When proper.—They may be taken where a party is in actual undisturbed possession of land, and although no action has been brought, he is exposed to a future attack. Hickman *v.* Hickman, 1 Del. Ch. 133. So where land is devised from an heir who intends to bring suit to recover it, but has had no opportunity to examine his witness and there is danger of losing his testimony before a judicial investigation can be had. Hickman *v.* Hickman, 1 Del. Ch. 133. Where a person in possession has reason to believe that another intends to impeach his title, upon the ground that the title by which he holds the estate is a forgery, and as the person in possession can take no step to establish his title, and as the person out of possession will not bring an ejectment against him, until his witnesses are dead, then the person in possession may file a bill to perpetuate the testimony of his own witness and thus frustrate the design of the person out of possession, who delays bringing suit. Ellice *v.* Roupell, 32 Beav. 299, 307, 318, 9 Jur. N. S. 530, 32 L. J. Ch. 563, 624, 8 L. T. Rep. N. S. 191, 2 New Rep. 3, 150, 11 Wkly. Rep. 579. A bill to perpetuate testimony will lie only in aid of a right purely legal and not in aid of equitable proceedings. Baxter *v.* Farmer, 42 N. C. 239; Smith *v.* Turner, 39 N. C. 433, 47 Am. Dec. 353. The testimony of the witnesses to a deed (Caldwell *v.* Head, 17 Mo. 561; Mason *v.* Goodburne, Rep. T. Finch 391, 23 Eng. Reprint 214); or a bond (Suffolk *v.* Green, 1 Atk. 450, 26 Eng. Reprint 286) may be perpetuated. The testimony may be perpetuated where an action for infringement of a patent is anticipated. New York, etc., Coffee Polishing Co. *v.* New York Coffee Polishing Co., 9 Fed. 578, 20 Blatchf. 174, 62 How. Pr. (N. Y.) 485. Depositions may be taken by one threatened with suits on promissory notes alleged to have been

the condition of the witness but upon the situation of the party and his power to bring his right to an immediate investigation,[17] and will not be defeated because it may subject the defendant to injurious consequences as a penalty.[18]

2. RIGHTS AND INTERESTS PROTECTED. Only present rights can be protected by this mode of taking depositions, but it is immaterial that the interest is slight or remote. A mere contingency, however near or valuable, is not sufficient.[19]

3. NOT FAVORED. Unless the right to perpetuate testimony is absolute, the preservation of evidence by depositions in this mode is not favored, and will not be permitted unless where necessary to prevent a failure of justice.[20]

III. WHOSE DEPOSITION MAY BE TAKEN.

A. In General. The testimony of a corporation may be taken by procuring

forged with his name. He may take the deposition of the forger who is imprisoned on a conviction for other forgeries. Graham *v.* Bank, 3 Lanc. Bar (Pa.) 68. Sureties may examine the principal on a bond touching usury in the consideration, but they must first offer to pay the amount acknowledged to be due. Crawford *v.* McAdams, 63 N. C. 67. In Belfast *v.* Chichester, 2 Jac. & W. 439, it was questioned whether a court of equity had jurisdiction to entertain a bill filed to perpetuate testimony in support of a claim to a dignity. One contemplating a tortious act cannot perpetuate testimony to shield him from the legal consequences of his proposed wrong-doing. Hanford *v.* Ewen, 79 Ill. App. 327.

17. Hall *v.* Stout, 4 Del. Ch. 269.

18. Hickman *v.* Hickman, 1 Del. Ch. 133 [*citing* Suffolk *v.* Green, 1 Atk. 450, 26 Eng. Reprint 286]. A party may bring a bill to perpetuate the testimony in many cases where he cannot bring a bill for relief, without waiving the penalty as in waste, or in the case of a foreign deed, or in the case of insurances after a commission to examine witnesses beyond seas as to fraudulent losses. Suffolk *v.* Green, 1 Atk. 450, 26 Eng. Reprint 286.

19. May *v.* Armstrong, 3 J. J. Marsh. (Ky.) 260, 20 Am. Dec. 137; Brandlyn *v.* Ord, 1 Atk. 571, 26 Eng. Reprint 359; Belfast *v.* Chichester, 2 Jac. & W. 439; Allan *v.* Allan, 15 Ves. Jr. 130, 33 Eng. Reprint 704; Smith *v.* Atty.-Gen. [*cited* in Dursley *v.* Berkeley, 6 Ves. Jr. 251, 256, 31 Eng. Reprint 1036].

Establishment of right at law.— The right sought to be protected must have been established at law. Hitchcock *v.* Sedgwick, 2 Vern. Ch. 156, 23 Eng. Reprint 707; Parry *v.* Rogers, 1 Vern. Ch. 441, 23 Eng. Reprint 574; Pawlet *v.* Ingres, 1 Vern. Ch. 308, 23 Eng. Reprint 487; Bechinall *v.* Arnold, 1 Vern. Ch. 354, 23 Eng. Reprint 519. But see Dorset *v.* Girdler, Prec. Ch. 531, 24 Eng. Reprint 238.

The right contemplated by the Illinois statute is a present right, either vested or contingent, and the proceeding cannot be maintained to protect a mere possibility or expectancy. Hanford *v.* Ewen, 79 Ill. App. 327.

Establishing will of lunatic.—If one makes a will and afterward becomes a lunatic, a bill will not lie, during the life of the lunatic, to perpetuate the testimony of the witnesses to it. Glover *v.* Faulkner, 1 Vern. Ch. 152, 1 Eq. Cas. Abr. 233, 23 Eng. Reprint 579; Sackvill *v.* Ayleworth, 1 Vern. Ch. 105, 23 Eng. Reprint 346.

Next of kin of a lunatic, however hopeless his condition, have no interest whatever in the property which will sustain such a bill. Dursley *v.* Berkeley, 6 Ves. Jr. 251, 31 Eng. Reprint 1036. The next of kin of a lunatic who has contracted to sell his expectancy has such an interest as will entitle him to file a bill *in perpetuam* relative to such expectancy. Butler *v.* Haskell, 4 Desauss. (S. C.) 651.

Reversioner.— A bill by one of two persons, each claiming to be the purchaser of a reversion after an estate for life, will not lie in the lifetime of the life-tenant. Hitchcock *v.* Sedgwick, 2 Vern. Ch. 156, 23 Eng. Reprint 707.

Release of cause of action.— There is no right to preserve testimony for protection against a possible action for slander, where the probable plaintiff releases all claims which he may have for the utterances. Hanford *v.* Ewen, 79 Ill. App. 327.

Right which may be barred.— The court will not perpetuate testimony of a right which may be immediately barred by the defendant. Dursley *v.* Berkeley, 6 Ves. Jr. 251, 31 Eng. Reprint 1036.

Tenant by the curtesy.— The possession of one claiming as tenant by the curtesy is a sufficient interest to be protected. Hall *v.* Stout, 4 Del. Ch. 269.

In England courts of equity have jurisdiction to perpetuate testimony with a view to proceedings in foreign courts. Morris *v.* Morris, 11 Jur. 93, 16 L. J. Ch. 286, 2 Phil. 205.

20. Crawford *v.* McAdams, 63 N. C. 67; Dorset *v.* Girdler, Prec. Ch. 531, 24 Eng. Reprint 238; Angell *v.* Angell, 1 Sim. & St. 83, 24 Rev. Rep. 149, 1 Eng. Ch. 83.

The reasons assigned are that the testimony is not given under the sanction of the penalties which the general policy of the law imposes upon the crime of perjury, and that as the depositions cannot be used until the death of the witness any perjury committed must necessarily go unpunished. Angell *v.* Angell, 1 Sim. & St. 83, 24 Rev. Rep. 149, 1 Eng. Ch. 83.

Testimony as to trivial matters should not

the depositions of its officers or agents.[21] And a commission may issue to take the deposition of one regularly committed to a lunatic asylum without the state, subject to inquiry on the return of the commission as to the admissibility of the testimony.[22]

B. Parties. Where parties are not precluded from testifying because of interest, or the right to take their depositions is expressly or impliedly conferred by statute,[23] their testimony may be taken in that form on their own behalf,[24] at

be perpetuated. Gell *v.* Hayward, 1 Vern. Ch. 312, 23 Eng. Reprint 490; Pawlet *v.* Ingres, 1 Vern. Ch. 308, 23 Eng. Reprint 487.

21. The chief engineer of a railway company is an officer thereof within a statute permitting the examination of officers of corporations. Oakley *v.* Toronto, etc., R. Co., 6 Ont. Pr. 253.

The local manager of a mill owned by a corporation, who is not an officer or stockholder therein, but acts under the direction of its president, and handles the money used in conducting the operation of the mill, pays employers, looks after outside business and purchases material, but has nothing to do with hiring help or with the mechanical operation of the mill, is not the general managing agent of a corporation, which is a party, within a statute authorizing the testimony of such an agent to be taken by deposition, at the instance of the adverse party. Kreider *v.* Wisconsin River Paper, etc., Co., 110 Wis. 645, 86 N. W. 662.

22. Hand *v.* Burrows, 23 Hun (N. Y.) 330.

23. Murphy *v.* Sullivan, 77 N. Y. Suppl. 950, 10 N. Y. Annot. Cas. 303 [*following* Bigelow *v.* Mallory, 17 How. Pr. (N. Y.) 427, and *disapproving* Fairbanks *v.* Tregent, 17 How. Pr. (N. Y.) 258]; Moffatt *v.* Prentice, 6 Ont. Pr. 33. See also Proctor *v.* Grant, 9 Grant Ch. (U. C.) 26.

Ala. Code (1886), § 2823, which provides that "the testimony of a witness may be taken conditionally, and perpetuated," applies only to witnesses who are not parties. Winter *v.* Elmore, 88 Ala. 555, 7 So. 250.

By Ga. Code, § 3877, par. 4, which enumerates "all female witnesses" among those whose depositions may be taken "at the instance of either party," the deposition of a female party may be taken at her own instance. Powell *v.* Augusta, etc., R. Co., 77 Ga. 192, 3 S. E. 757.

The Vermont Laws (1852), p. 11, contemplated the examination of a party as a witness in open court only, and did not authorize the use of his deposition. Armstrong *v.* Griswold, 28 Vt. 376.

In Nova Scotia the testimony of a party to the action cannot be taken *de bene esse*, under a statute authorizing that mode of taking the examination of witnesses. Seymour *v.* Doull, 23 Nova Scotia 364.

24. *Alabama.*— Douglass *v.* Montgomery, etc., R. Co., 37 Ala. 638, 79 Am. Dec. 76; Huggins *v.* Carter, 7 Ala. 630; Moore *v.* Hatfield, 3 Ala. 442.

California.— Skidmore *v.* Taylor, 29 Cal. 619.

Georgia.— Powell *v.* Augusta, etc., R. Co., 77 Ga. 192, 3 S. E. 757.

Indiana.— Bourgette *v.* Hubinger, 30 Ind. 296; Abshire *v.* Mather, 27 Ind. 381.

Louisiana.— McLear *v.* Hunsicker, 30 La. Ann. 1225.

Maine.— Bliss *v.* Shuman, 47 Me. 248; Kidder *v.* Blaisdell, 45 Me. 461.

Minnesota.— Hart *v.* Eastman, 7 Minn. 74; Tyson *v.* Kane, 3 Minn. 287; Claflin *v.* Lawler, 1 Minn. 297.

Nebraska.— Sells *v.* Haggard, 21 Nebr. 357, 32 N. W. 66.

New York.— Murphy *v.* Sullivan, 77 N. Y. Suppl. 950, 10 N. Y. Annot. Cas. 303; Jarvis *v.* Brennan, 33 N. Y. Suppl. 723, 24 N. Y. Civ. Proc. 383; McVitey *v.* Stanton, 13 N. Y. Suppl. 914, 20 N. Y. Civ. Proc. 409; Briggs *v.* Taylor, 4 N. Y. Civ. Proc. 328; Block *v.* Haas, 8 Abb. Pr. 335; Fairbanks *v.* Tregent, 7 Abb. Pr. 21, 16 How. Pr. 187; McCarty *v.* Edwards, 24 How. Pr. 236; Bigelow *v.* Mallory, 17 How. Pr. 427; Suydam *v.* Suydam, 11 How. Pr. 518. *Contra*, Fairbanks *v.* Tregent, 17 How. Pr. 258.

Oregon.— Roberts *v.* Parrish, 17 Oreg. 583, 22 Pac. 136.

Texas.— Wheelock *v.* Wright, 38 Tex. 496.

Wisconsin.— Brand *v.* Butler, 30 Wis. 681.

United States.— New Jersey R., etc., Co. *v.* Pollard, 22 Wall. 341, 22 L. ed. 877; Nash *v.* Williams, 20 Wall. 226, 22 L. ed. 254.

England.— Ross *v.* Woodford, [1894] 1 Ch. 38, 63 L. J. Ch. 191, 70 L. T. Rep. N. S. 22, 8 Reports 20, 42 Wkly. Rep. 188; New *v.* Burns, 64 L. J. Q. B. 104, 71 L. T. Rep. N. S. 681, 14 Reports 339, 43 Wkly. Rep. 182. See also Nadin *v.* Bassett, 25 Ch. D. 21, 53 L. J. Ch. 253, 49 L. T. Rep. N. S. 454, 32 Wkly. Rep. 70; Light *v.* Anticosti Co., 58 L. T. Rep. N. S. 25.

Canada.— Mills *v.* Mills, 12 Ont. Pr. 473.

See 16 Cent. Dig. tit. "Depositions," § 12.

An executor who is a party to and interested in the event of a cause is within an exception to a statute removing the disability of parties generally to testify, which precludes the testimony of an interested party in actions to which personal representatives are parties, and may be examined on his own behalf. Walker *v.* Parker, 29 Fed. Cas. No. 17,082, 5 Cranch C. C. 639.

In Arkansas an order to take the deposition of a party will be made as of course, on a suggestion that he has no interest in the cause. Pryor *v.* Ryburn, 16 Ark. 671.

In England it is an order of course that defendant may be examined *de bene esse* (Colchester *v.* ——, 1 P. Wms. 595, 24 Eng. Reprint 532; Glover *v.* Faulkner, 1 Vern. Ch. 452, 23 Eng. Reprint 579), but otherwise as to plaintiff (Colchester *v.* ——, 1 P. Wms. 595, 24 Eng. Reprint 532).

the instance of a co-party,[25] or by the adverse party,[26] in like manner as may the depositions of witnesses who are not parties. However, where the court is vested with a discretion in the premises, it will not permit a party to have his testimony taken by deposition where prejudice will or may result to the adverse party, but only where it satisfactorily appears that he is unable to attend.[27]

IV. GROUNDS FOR TAKING.

A. In General. Although the right to perpetuate testimony and the right to take depositions *de bene esse* rest on different grounds, the reason for preserving testimony by either mode is practically the same, that is, the danger of losing

N. Y. Code Civ. Proc. § 872, subd. 5, which requires the affidavit to procure an examination before trial to set forth the physical disability of the person to be examined or other special circumstances which render an examination proper, and provides that "this subdivision does not apply to a case where the party to be examined is a party to the action," by this proviso merely exempts a party to an action from the restrictions contained in the other part of the subdivision and does not affect his right to obtain his own deposition or that of any other party to the action under the general provisions of the statute. Farmers' L. & T. Co. *v.* Siefke, 144 N. Y. 354, 39 N. E. 358; Jarvis *v.* Brennan, 33 N. Y. Suppl. 723, 24 N. Y. Civ. Proc. 383; McVitey *v.* Stanton, 13 N. Y. Suppl. 914, 20 N. Y. Civ. Proc. 409 [*disapproving* Williams *v.* Folsom, 52 Hun (N. Y.) 68, 5 N. Y. Suppl. 211, 3 N. Y. Suppl. 681]; Preston *v.* Hencken, 9 Abb. N. Cas. (N. Y.) 68, to the contrary]. See Briggs *v.* Taylor, 4 N. Y. Civ. Proc. 328. Also see *contra*, Montague *v.* Worstell, 55 How. Pr. (N. Y.) 406, which is manifestly overruled by the foregoing cases.

To support plea of usury.— The fact that an act permits a defendant who pleads usury to give testimony in support of the plea will not authorize him to have his testimony taken by deposition on the ground that he is about to leave the state. Stone *v.* Jones, 4 McCord (S. C.) 254.

25. Respass *v.* Morton, Hard. (Ky.) 226; Shufelt *v.* Power, 10 How. Pr. (N. Y.) 286; Wilson *v.* McDonald, 13 Ont. Pr. 6; Grimshawe *v.* Parks, 6 Can. L. J. 142.

26. *Ex p.* Miller, 11 Ohio S. & C. Pl. Dec. 69, 8 Ohio N. P. 142 [*affirmed* in 21 Ohio Cir. Ct. 445, 12 Ohio Cir. Dec. 102]; *In re* Robinson, 7 Ohio N. P. 105, 9 Ohio S. & C. Pl. Dec. 763; Texas *v.* Chiles, 21 Wall. (U. S.) 488, 22 L. ed. 650. See Harrison *v.* Greer, 2 Ch. Chamb. (U. C.) 438; Weir *v.* Matheson, 1 Ch. Chamb. (U. C.) 224.

A provision authorizing a reference to procure a deposition from a person, who refuses to make an affidavit for use on a motion, does not authorize the procurement in that mode of a deposition of a party to the action. Cockey *v.* Hurd, 43 How. Pr. (N. Y.) 140.

One of two defendants who has permitted judgment by default may be examined. Bacon *v.* Campbell, 12 Can. L. J. N. S. 17.

Notice by adverse party of intention to testify.— In New York, prior to the amendment of section 399 of the Code of Procedure, the examination of a non-resident party under a commission could not be had, unless the adverse party had given notice of his intention to offer himself as a witness at the trial (Block *v.* Haas, 8 Abb. Pr. 335; Hull *v.* Wheeler, 7 Abb. Pr. 411); but the amendments (1857, 1859) obviated this objection so that a party, except in certain specified cases, could be examined the same as any other witness without previous notice (Block *v.* Haas, 8 Abb. Pr. 335; Fairbanks *v.* Tregent, 7 Abb. Pr. 21, 16 How. Pr. 187. But see this case on appeal, 17 How. Pr. 258. And see Bigelow *v.* Mallory, 17 How. Pr. 427). This section as amended did not require the party notified to give notice and specify the points on which he intends to be examined, which the section requires his adversary to do in giving notice of his intended examination. Burling *v.* Ogden, 14 How. Pr. 75. Where, under a general notice that sundry witnesses are to be examined, a party is called and examined in the absence of the adverse party, his agent or attorney, no subsequent notice of an intention to use such deposition on the trial can be considered a compliance with a statute providing that he shall not testify unless he give reasonable notice of his intention to do so. Brown *v.* A Raft of Lumber, 1 Handy (Ohio) 13, 12 Ohio Dec. (Reprint) 1.

In Kentucky a party cannot take the deposition of his adversary unless the latter consent. Musick *v.* Ray, 3 Metc. 427.

In the United States courts the deposition of a party cannot be taken at the instance of his adversary, although permissible by the state practice. *Ex p.* Fisk, 113 U. S. 713, 5 S. Ct. 724, 28 L. ed. 1117; Turner *v.* Shackman, 27 Fed. 183. But see Texas *v.* Chiles, 21 Wall. 488, 22 L. ed. 650.

27. Goodman *v.* Wineland, 61 Md. 449, where the court said that the true rule seems to be that while a non-resident plaintiff has not an absolute right to have his testimony taken under a commission he should be allowed to do so in the sound discretion of the court upon his causing it satisfactorily to appear that by reason of permanent inability he is unable to attend the court in person.

Special circumstances.— The examination of a party to an action *de bene esse* will only be permitted under special circumstances. Seymour *v.* Doull, 23 Nova Scotia 364.

material testimony — in the one case in an anticipated action, and in the other in in an action actually pending.[28]

B. Non-Residence. The residence of a witness in a foreign country or in another state or county or beyond the reach of process of the court is a well recognized ground for taking his deposition.[29]

28. *Delaware.*— Hall *v.* Stout, 4 Del. Ch. 269; Hickman *v.* Hickman, 1 Del. Ch. 133.

Indiana.— Tullis *v.* Stafford, 134 Ind. 258, 33 N. E. 1023.

Maine.— Ocean Ins. Co. *v.* Bigler, 72 Me. 469.

Minnesota.— State *v.* Elliott, 75 Minn. 391, 77 N. W. 952.

Missouri.— Caldwell *v.* Head, 17 Mo. 561.

New Hampshire.— Russell *v.* Fabyan, 35 N. H. 159.

New York.— *In re* Fulton, 75 N. Y. App. Div. 623, 78 N. Y. Suppl. 116; Martin *v.* Hicks, 6 Hun 238, 1 Abb. N. Cas. 341; Cheever *v.* Saratoga County Bank, 47 How. Pr. 376.

Pennsylvania.— Norristown Ins., etc., Co. *v.* Burgess, 14 Montg. Co. Rep. 91; Graham *v.* Bank, 3 Lane. L. Rev. 68.

Texas.— Sullivan *v.* Dimmitt, 34 Tex. 114.

United States.— New York, etc., Coffee Polishing Co. *v.* New York Coffee Polishing Co., 9 Fed. 578, 20 Blatchf. 174, 62 How. Pr. (N. Y.) 485; Kellogg *v.* Warmouth, 14 Fed. Cas. No. 7,667.

England.— Cann *v.* Cann, 1 P. Wms. 567, 24 Eng. Reprint 520; Mason *v.* Goodburne, Rep. T. Finch 391, 23 Eng. Reprint 214; Angell *v.* Angell, 1 Sim. & St. 83, 24 Rev. Rep. 149, 1 Eng. Ch. 83.

See 16 Cent. Dig. tit. "Depositions," § 26 *et seq.*

Perpetuation unnecessary.— A petition for proceedings to perpetuate the testimony of a city clerk, within the state, in regard to the ballots cast at an election, which are in a ballot-box, sealed according to law, and merely in his custody as such clerk, is insufficient, within Minn. Gen. St. (1894) c. 73, tit. 4, since the law preserves and secures the ballots, and all the clerk could testify to is his custody, which testimony can be as well secured on the trial of any action in the future. State *v.* Elliott, 75 Minn. 391, 77 N. W. 952.

Professional engagements of physician.— Under a statute authorizing the taking of the deposition of a witness who is about to depart from the state, or who, by reason of age, sickness, "or other cause," shall be unable, or likely to be unable, to attend court, an affidavit averring that a witness living in another county is a physician with a large practice, whose professional engagements are more than ordinarily numerous in October, and that it is likely he will be unable to attend the court to be held in October or April, is insufficient to warrant taking a deposition. American Express Co. *v.* Bradford, (Miss. 1903) 33 So. 843.

Where the attendance of a witness in a criminal case can be compelled, a commission to take his deposition will not issue. U. S. *v.* Thomas, 27 Fed. Cas. No. 16,476, 1 Hayw. & H. 243.

29. *California.*— Skidmore *v.* Taylor, 29 Cal. 619.

Illinois.— See Mason *v.* Chicago Title, etc., Co., 77 Ill. App. 19.

Iowa.— Nevan *v.* Roup, 8 Iowa 207; Fabian *v.* Davis, 5 Iowa 456.

Michigan.— Brown *v.* Watson, 66 Mich. 223, 33 N. W. 493.

New York.— Frounfelker *v.* Delaware, etc., R. Co., 81 N. Y. App. Div. 67, 80 N. Y. Suppl. 701; *In re* Adams, 31 N. Y. App. Div. 298, 52 N. Y. Suppl. 617; Hart *v.* Ogdensburg, etc., R. Co., 67 Hun 556, 22 N. Y. Suppl. 401; Cheever *v.* Saratoga County Bank, 47 How. Pr. 376; Pooler *v.* Maples, 1 Wend. 65.

Pennsylvania.— Cunnius *v.* Reading School Dist., 25 Pa. Co. Ct. 17.

West Virginia.— Abbott *v.* L'Hommedieu, 10 W. Va. 677.

England.—Castelli *v.* Groome, 18 Q. B. 490, 16 Jur. 888, 21 L. J. Q. B. 308, 83 E. C. L. 490; Coch *v.* Allcock, 21 Q. B. D. 178, 57 L. J. Q. B. 489, 36 Wkly. Rep. 747; Pole *v.* Rogers, 3 Bing. N. Cas. 780, 5 Dowl. P. C. 632, 3 Hodges 83, 6 L. J. C. P. 216, 4 Scott 479, 32 E. C. L. 359; Farnworth *v.* Hyde, 14 C. B. N. S. 719, 11 Wkly. Rep. 783, 108 E. C. L. 719; Richardson *v.* Lowther, 1 Ch. Cas. 273, 21 Eng. Reprint 911; Armour *v.* Walker, 25 Ch. D. 673, 53 L. J. Ch. 413, 50 L. T. Rep. N. S. 292, 32 Wkly. Rep. 214; Langen *v.* Tate, 24 Ch. D. 522, 53 L. J. Ch. 361, 49 L. T. Rep. N. S. 758, 32 Wkly. Rep. 189; Wainright *v.* Bland, 3 Dowl. P. C. 653, 1 Gale 103; Mendizabel *v.* Machado, 4 L. J. Ch. O. S. 142, 2 Sim. & St. 483, 1 Eng. Ch. 483; Adams *v.* Corfield, 28 L. J. Exch. 31; Lawrence *v.* Maule, 3 Wkly. Rep. 534; Allatt *v.* Bailey, 1 Wkly. Rep. 383. See Lawson *v.* Vacuum Brake Co., 27 Ch. D. 137, 54 L. J. Ch. 16, 51 L. T. Rep. N. S. 275, 33 Wkly. Rep. 186; Nadin *v.* Bassett, 25 Ch. D. 21, 53 L. J. Ch. 53, 49 L. T. Rep. N. S. 454, 32 Wkly. Rep. 70.

Canada.— Wilson *v.* McDonald, 13 Ont. Pr. 6.

See 16 Cent. Dig. tit. "Depositions," § 27.

Domicile immaterial.— If the witness resides without the state it is immaterial that he has a domicile therein. Pooler *v.* Maples, 1 Wend. (N. Y.) 65.

Not within state.— It is not enough that the witness is a non-resident, it must also appear that he is not within the state. Brown *v.* Russell, 58 N. Y. App. Div. 218, 68 N. Y. Suppl. 755.

Presumption of non-residence.—Where nothing appears to the contrary, if a deposition is taken in the usual mode on a commission issued out of the state, it will be presumed that the witness is a non-resident. Doe *v.* Welsh, 4 Houst. (Del.) 233. It is *prima facie* suffi-

C. Distant Residence — 1. In General. In some jurisdictions the residence of the witness at a great distance [30] or at a prescribed distance from the place of trial will authorize the taking of his testimony by deposition.[31]

2. Computation of Distance. In determining the propriety of permitting the deposition to be taken, the distance from the residence of the witness to the place of trial is as a rule computed along the ordinary, usual, and shortest way or route of public travel and not in a straight line.[32]

cient if the notice, deposition, and return state the witness to be a non-resident. Oliver *v.* Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307.

Residence out of the county.— In Michigan where the witnesses in a chancery cause reside in a county other than that in which the suit is pending, the practice is to take their testimony in the county where they reside. Lyon *v.* Brunson, 48 Mich. 194, 12 N. W. 32. An act authorizing the taking of the deposition of a witness in an action pending in certain designated counties, where he resides in another specified city or county, does not permit the examination of a witness who resides in such city in an action pending in a new county formed since the passage of the act out of part of one of the counties so designated. Brown *v.* Turner, 15 Ala. 832.

Temporary absence.— A deposition taken out of the state by stipulation is not invalidated by the fact that the actual residence of the witness was within the state. Mason *v.* Chicago Title, etc., Co., 77 Ill. App. 19.

Without county but within prescribed distance.—Where a deposition may be taken if a witness resides out of the county in which his testimony is to be used, or more than thirty miles from the place of trial, it is sufficient if he live without the county, although his place of residence is less than thirty miles from the place of trial. Skidmore *v.* Taylor, 29 Cal. 619.

Return of witness.— In Atkins *v.* Palmer, 5 Madd. 19, before the commission reached its destination the witness had returned to the jurisdiction, and the court refused to permit his examination *de bene esse*, and held that the bill should be amended.

Existence of other ground.— The residence of the witness is immaterial, where a good ground for taking his deposition is shown. Potts *v.* Coleman, 86 Ala. 94, 5 So. 780.

Expert testimony.— In a suit for infringing a patent, a commission to examine witnesses abroad should be granted in the case of a contest involving the chemistry of coloring compounds, when it is asserted by the moving party, and denied by the opposing party, that the art is so little practised here that the best expert testimony can only be obtained by such a commission. Holliday *v.* Schultzeberge, 57 Fed. 660.

30. Marston *v.* Forward, 5 Ala. 347.

31. **In Minnesota** a deposition may be taken within the state where the witness lives more than thirty miles from the place of trial. Davison *v.* Sherburne, 57 Minn. 355, 59 N. W. 316, 47 Am. St. Rep. 618; Atkinson *v.* Nash, 56 Minn. 472, 58 N. W. 39.

In Pennsylvania depositions of witnesses who reside more than forty miles from the place of trial may be taken. Fuller *v.* Guernsey, 6 Luz. Leg. Reg. 152, 24 Pittsb. Leg. J. 200.

In the United States courts the deposition of a witness may be taken *de bene esse* if he lives at a greater distance from the place of trial than one hundred miles; but not if he lives within that distance and his attendance can be compelled. Texas, etc., R. Co. *v.* Reagan, 118 Fed. 815, 55 C. C. A. 427; U. S. *v.* Cameron, 15 Fed. 794, 5 McCrary 93; Curtis *v.* Central R. Co., 6 Fed. Cas. No. 3,501, 6 McLean 401; Dreskill *v.* Parish, 7 Fed. Cas. No. 4,076, 5 McLean 241; Dunkle *v.* Worcester, 8 Fed. Cas. No. 4,162, 5 Biss. 102; Gustine *v.* Ringgold, 11 Fed. Cas. No. 5,877, 4 Cranch C. C. 191; Russell *v.* Ashley, 21 Fed. Cas. No. 12,150, Hempst. 546; Wellford *v.* Miller, 29 Fed. Cas. No. 17,380, 1 Cranch C. C. 485.

"Lives" construed.— A witness "lives" where he can be found, and is sojourning, residing, or abiding for his health or any other lawful purpose. Mutual Ben. L. Ins. Co. *v.* Robison, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325.

Deposition taken in state court before removal.— A deposition properly taken in an action pending in a state court is not invalidated where the cause is subsequently removed to a federal court, by the fact that when taken the witness resided less than one hundred miles from the place where the cause was pending. U. S. Life Ins. Co. *v.* Ross, 102 Fed. 722, 42 C. C. A. 601.

Depositions in foreign countries.—The statutory provisions respecting the taking of depositions under such circumstances apply only to depositions *de bene e. .e* (Sergeant *v.* Biddle, 4 Wheat. (U. S.) 508, 4 L. ed. 627; Warren *v.* Younger, 18 Fed. 859; Curtis *v.* Central R. Co., 6 Fed. Cas. No. 3,501, 6 McLean 401), and not to the taking of testimony in a foreign country (The Alexandra, 104 Fed. 904; Bird *v.* Halsy, 87 Fed. 671).

Under the former English practice if the defendant lived more than thirty miles from London a dedimus might be issued to take his answer. 3 Blackstone Comm. 447.

32. *In re* Foster, 44 Vt. 570; Jennings *v.* Menaugh, 118 Fed. 612.

Public road.— A witness who resides less than forty miles from the place of trial by public road cannot be examined, although the distance by railroad is greater than that prescribed. Gordon *v.* Todd, 16 Wkly. Notes Cas. (Pa.) 35.

The distance by the usual land route should govern, although there may be a nearer route

D. Witness "About to Leave." It is proper to permit a deposition to be taken where the witness is about to leave the state or jurisdiction and will probably be absent therefrom when the case is called for trial.[33]

E. Physical Inability. Another common ground for granting a commission or otherwise authorizing a deposition to be taken is the physical inability of the witness to attend the trial because of illness, old age, or other bodily infirmity.[34]

by water which is more used. Marston *v.* Forward, 5 Ala. 347.

33. *Delaware.*— Porter *v.* Beltzhoover, 2 Harr. 484; Hall *v.* Stout, 4 Del. Ch. 269; Hickman *v.* Hickman, 1 Del. Ch. 133.

Indiana.— Tullis *v.* Stafford, 134 Ind. 258, 33 N. E. 1023.

Maryland.— Bryden *v.* Taylor, 2 Harr. & J. 396, 3 Am. Dec. 554.

Minnesota.— Davison *v.* Sherburne, 57 Minn. 355, 59 N. W. 316, 47 Am. St. Rep. 618; Atkinson *v.* Nash, 56 Minn. 472, 58 N. W. 39.

New Jersey.— Burley *v.* Kitchell, 20 N. J. L. 305.

New York.— McVitey *v.* Stanton, 13 N. Y. Suppl. 914, 20 N. Y. Civ. Proc. 409; Cardall *v.* Wilcox, 9 Johns. 266.

Pennsylvania.— Schoneman *v.* Fegley, 7 Pa. St. 433.

United States.— Turner *v.* Shackman, 27 Fed. 183.

England.— Pirie *v.* Iron, 8 Bing. 143, 1 Dowl. P. C. 252, 1 Moore & S. 223, 21 E. C. L. 481; Warner *v.* Mosses, 16 Ch. D. 100, 50 L. J. Ch. 28, 29 Wkly. Rep. 201; Webster *v.* Paulson, Dick. 540, 21 Eng. Reprint 380; Birt *v.* White, Dick. 473, 21 Eng. Reprint 353; Botts *v.* Verelst, Dick. 454, 21 Eng. Reprint 346; Weekes *v.* Pall, 6 Dowl. P. C. 462, 5 Scott 713; Shelley *v.* ——, 13 Ves. Jr. 56, 33 Eng. Reprint 215. See Chitty *v.* Selwyn, 2 Atk. 359, 26 Eng. Reprint 617; Dicher *v.* Power. Dick. 112, 21 Eng. Reprint 211; Baskett *v.* Toosey, 6 Madd. 261; Anonymous, Moseley 85.

See 16 Cent. Dig. tit. "Depositions," § 26 *et seq.*

It is not a sufficient ground for a deposition that the witness has no property and is about to remove from one part of the state to another (McFarlane *v.* Moore, 1 Overt. (Tenn.) 32, 3 Am. Dec. 752); that he is a transient person, moving from place to place, and talked of moving out of the country (Turnley *v.* Evans, 3 Humphr. (Tenn.) 222); or that he "is a seaman on board a gunboat . . . and liable to be ordered to some other place, and not to be able to attend the court at the time of its sitting" (The Samuel, 1 Wheat. (U. S.) 9, 4 L. ed. 23).

Non-resident witness within the state may be examined on commission *de bene esse* as a going witness. Porter *v.* Beltzhoover, 2 Harr. (Del.) 484.

Residence at place of taking.— To authorize the deposition of a going witness it is not necessary that he should be a permanent resident of the place where his deposition is taken; a temporary or transient residence is sufficient. Bryden *v.* Taylor, 2 Harr. & J. (Md.) 396, 3 Am. Dec. 554.

The deposition of an army officer who expects to be ordered away may be taken. Cardall *v.* Wilcox, 9 Johns. (N. Y.) 266.

The Maryland act of 1779 related only to persons who were residents at the time the depositions were taken and who afterward left the state or died before the trial of the cause. Shane *v.* Clarke, 3 Harr. & M. (Md.) 101.

Witnesses servants of applicant.— In East India Co. *v.* Naish, Bunb. 320, 2 Fowl. Exch. Pr. 127, an application for the examination of two ship captains on the ground that they were about to go on a voyage was refused because they were servants of the applicant and under its control, and also because the time was too short to cross-examine.

Criminal proceeding.— Under a statute providing that a defendant in a criminal case may take the depositions of his witnesses if they are about to leave the state without his procurement or consent, or are physically unable to attend the trial, or their death is apprehended, there is no right to a commission to take depositions in a foreign country. Kaelin *v.* Com., 84 Ky. 354, 1 S. W. 594, 8 Ky. L. Rep. 293.

34. *Alabama.*— Reese *v.* Beck, 24 Ala. 651.

Delaware.— Hays *v.* Johnson, 3 Houst. 219; Hall *v.* Stout, 4 Del. Ch. 269; Hickman *v.* Hickman, 1 Del. Ch. 133.

Indiana.— Humbarger *v.* Carey, 145 Ind. 324, 42 N. E. 749, 44 N. E. 302; Tullis *v.* Stafford, 134 Ind. 258, 33 N. E. 1023; Dare *v.* McNutt, 1 Ind. 148, Smith 30.

Maryland.— Goodman *v.* Wineland, 61 Md. 449.

Michigan.— Styles *v.* Decatur, 131 Mich. 443, 91 N. W. 622.

Minnesota.— Davison *v.* Sherburne, 57 Minn. 355, 59 N. W. 316, 47 Am. St. Rep. 618; Atkinson *v.* Nash, 56 Minn. 472, 58 N. W. 39.

Missouri.— Kirton *v.* Bull, 168 Mo. 622, 68 S. W. 927.

New Hampshire.— Russell *v.* Fabyan, 35 N. H. 159.

New York.— Johnston *v.* Bush, 57 N. Y. 633; Chever *v.* Saratoga County Bank, 47 How. Pr. 376.

Virginia.— Taylor *v.* Mallory, 96 Va. 18, 30 S. E. 472.

United States.— Richter *v.* Jerome, 25 Fed. 679; New York, etc., Coffee Polishing Co. *v.* New York Coffee Polishing Co., 9 Fed. 578, 20 Blatchf. 174, 62 How. Pr. (N. Y.) 485.

England.— Fitzhugh *v.* Lee, Ambl. 65, 27 Eng. Reprint 38; Ellice *v.* Roupell, 32 Beav. 299, 307, 318, 9 Jur. N. S. 530, 32 L. J. Ch. 563, 624, 8 L. T. Rep. N. S. 191, 2 New Rep. 3, 150, 11 Wkly. Rep. 579; Wade *v.* George, Cary 40, 21 Eng. Reprint 22; Warner *v.* Mosses, 16 Ch. D. 100, 50 L. J. Ch. 28, 29

F. Exclusive Knowledge of Witness. In chancery depositions of a single witness, sometimes of two, may be taken *de bene esse*, where the knowledge of the matter rests wholly with the witness or with two witnesses — this in view of the general uncertainty of human life.[35] But this rule has never been adopted in this country by courts of law,[36] although the right to take depositions on this ground has been conferred by statute.[37]

G. Special Circumstances. Special circumstances may authorize the taking of a deposition; as the confinement of the witness in jail,[38] the pendency of criminal proceedings against him,[39] his engagement as attorney in another court,[40] or his inability to furnish security for his appearance as a witness for the people in a criminal case.[41] So where it appears that the witness is a female,[42] is a practising physician,[43] is deaf,[44] it is inconvenient for him to attend,[45] or generally where the justice of the case requires that the testimony be taken in this form.[46]

Wkly. Rep. 201; Pond *v.* Dimes, 2 Dowl. P. C. 730, 3 Moore & S. 161, 30 E. C. L. 494; Cann *v.* Cann, 1 P. Wms. 567, 24 Eng. Reprint 520; Philips *v.* Carew, 1 P. Wms. 117, 24 Eng. Reprint 318; Mason *v.* Goodburne, Rep. T. Finch 391, 23 Eng. Reprint 214; Angell *v.* Angell, 1 Sim. & St. 83, 24 Rev. Rep. 149, 1 Eng. Ch. 83; Rowe *v.* ——, 13 Ves. Jr. 261, 33 Eng. Reprint 292; Shelley *v.* ——, 13 Ves. Jr. 56, 33 Eng. Reprint 215; Bellamy *v.* Jones, 8 Ves. Jr. 31, 6 Rev. Rep. 205, 32 Eng. Reprint 261.

See 16 Cent. Dig. tit. "Depositions," § 28.

Ability to attend trial.—Where the witness departs from the county, an order to take his deposition on the ground that there is good reason to believe that he cannot attend within a reasonable time on account of age, sickness, or infirmity, should not be made, as the departure is an indication of an ability to return. McCoskry's Estate, 10 N. Y. Civ. Proc. 178.

Extent of illness.— The ill-health must be such that the witness is in a dangerous state. Bellamy *v.* Jones, 8 Ves. Jr. 31, 6 Rev. Rep. 205, 32 Eng. Reprint 261.

Witness over seventy.— In England the rule is that the witness must be seventy years old (Fitzhugh *v.* Lee, Ambl. 65, 27 Eng. Reprint 38; Bidder *v.* Bridges, 26 Ch. D. 1, 50 L. T. Rep. N. S. 287, 32 Wkly. Rep. 445 [*affirming* 53 L. J. Ch. 479]; Prichard *v.* Gee, 5 Madd. 364); when over seventy the order for leave to examine is of course (Rowe *v.* ——, 13 Ves. Jr. 261, 33 Eng. Reprint 292). In Fitzhugh *v.* Lee, Ambl. 65, 27 Eng. Reprint 38, the rule requiring the witness to be seventy years of age was dispensed with in the case of the surviving witness to a will, upwards of sixty years old, afflicted with gravel, and the parties residing in Virginia, the chancellor saying: "The parties living in Virginia, is a favorable circumstance; for it would be long before they could be served with process, and possibly when they were, might not pay regard to it."

35. Ellice *v.* Roupell, 32 Beav. 299, 307, 318, 9 Jur. N. S. 530, 32 L. J. Ch. 563, 624, 8 L. T. Rep. N. S. 191, 2 New Rep. 3, 150, 11 Wkly. Rep. 579; Cholmondely *v.* Oxford, 4 Bro. Ch. 157, 29 Eng. Reprint 828; Hankin *v.* Middleditch, 2 Bro. Ch. 641, 29 Eng. Reprint 355; Brydges *v.* Hatch, 1 Cox Ch. 423, 29 Eng. Reprint 1231; Pearson *v.* Ward, 1 Cox Ch. 177, 29 Eng. Reprint 1116. 2 Dick. 648, 21 Eng. Reprint 424; Hall *v.* Stout, 4 Del. Ch. 269; Hickman *v.* Hickman, 1 Del. Ch. 133; Shirley *v.* Ferrers, Moseley 389, 3 P. Wms. 77, 24 Eng. Reprint 976; Angell *v.* Angell, 1 Sim. & St. 83, 24 Rev. Rep. 149, 1 Eng. Ch. 83; Rowe *v.* ——, 13 Ves. Jr. 261, 33 Eng. Reprint 292; Shelley *v.* ——, 13 Ves. Jr. 56, 33 Eng. Reprint 215; Bellamy *v.* Jones, 8 Ves. Jr. 31, 6 Rev. Rep. 205. 32 Eng. Reprint 261.

It is not necessary that the witness should be old or infirm. Pearson *v.* Ward, 1 Cox Ch. 177, 29 Eng. Reprint 1116, Dick. 648, 21 Eng. Reprint 424; Shirley *v.* Ferrers, Moseley 389, 3 P. Wms. 77, 24 Eng. Reprint 976.

36. Carloss *v.* Colclough, 1 Brev. (S. C.) 462.

37. **In Alabama** it is provided by statute that a deposition may be taken "where the claim or defense, or a material part thereof, depends exclusively on the evidence of the witness." May *v.* May, 28 Ala. 141.

38. Hopper *v.* Williams, 2 Pa. L. J. Rep. 447, 4 Pa. L. J. 235.

39. In Mills *v.* Mills, 12 Ont. Pr. 473, an action of alimony, the application of a defendant against whom plaintiff had instituted criminal proceedings for bigamy, to be examined abroad, was granted, the reason assigned by him for inability to attend the trial, viz., that he was afraid to return to the jurisdiction on account of the criminal proceedings, being held sufficient.

40. Huffman *v.* Barkley, 1 Bailey (S. C.) 34.

41. People *v.* Lee, 49 Cal. 37.

42. In **Georgia** female witnesses may be examined by interrogatories. Powell *v.* Augusta, etc., R. Co., 77 Ga. 192, 3 S. E. 757.

43. Alexander *v.* Montgomery Branch Bank, 5 Ala. 465.

44. Hussey *v.* Bodkin, 2 Hog. 214.

45. Ogilby *v.* Gregory, 25 L. J. Ch. 32, 4 Wkly. Rep. 67.

46. *In re* Mysore West Gold Min. Co., 42 Ch. D. 535, 58 L. J. Ch. 731, 1 Meg. 347, 61 L. T. Rep. N. S. 453, 38 Wkly. Rep. 794; Warner *v.* Mosses, 16 Ch. D. 100, 50 L. J. Ch. 28, 29 Wkly. Rep. 201; Blackwood *v.* Burrowes, Fl. & K. 630, 4 Ir. Eq. 609; Shelley

V. Actions and Proceedings in Which Taken.

A. Civil Actions. Generally depositions may be taken and used in all actions or suits, whether at law or in equity.[47]

B. Special Proceedings. Statutes authorizing depositions to be taken and used in actions give no right to them in special proceedings.[48] They may be

v. ——, 13 Ves. Jr. 56, 33 Eng. Reprint 215. And see U. S. *v.* Hom Hing, 48 Fed. 635; Payne *v.* Bosgrave, 2 Fowl. Exch. Pr. 125.

Accuracy of accounts.— A commission may issue to determine the accuracy of accounts. Parker *v.* Peet, 1 De G. & Sm. 216; *Re* Imperial Land Co., 37 L. T. Rep. N. S. 588.

Jurisdiction of foreign court.— A commission may issue to examine as to the extent of the jurisdiction of a foreign court, but not as to its original constitution. Gage *v.* Stafford, 2 Ves. 556, 28 Eng. Reprint 354.

Nationality of vessel.— A commission may be granted to determine the nationality of a vessel seized by customs officers. Laragoity *v.* Atty.-Gen., 2 Price 172.

Proper amount of alimony.— In Forrest *v.* Forrest, 3 Bosw. (N. Y.) 661, the court refused a commission to obtain testimony to be used on a reference to ascertain the proper amount of alimony to be paid upon the reversal of so much of a decree for divorce as fixed the amount of permanent alimony.

Questioning foreign judgment.— A commission will not be granted for the purpose of questioning a foreign judgment. Martin *v.* Nicolls, 3 Sim. 458, 6 Eng. Ch. 458.

To prove foreign unwritten laws a commission may issue, although the statute laws may be proved by official printed copies and the unwritten laws by resident lawyers versed in the laws of the foreign country. Boyes *v.* Bossard, 87 N. Y. App. Div. 605, 84 N. Y. Suppl. 563. But see The M. Moxham, 1 P. D. 107, 24 Wkly. Rep. 577; Lord *v.* Colvin, 23 L. J. Ch. 469, 2 Wkly. Rep. 134.

47. Cobb *v.* Rice, 130 Mass. 231; Brown *v.* Watson, 66 Mich. 223, 33 N. W. 493; Crane *v.* Evans, 12 N. Y. Civ. Proc. 445; Stegner *v.* Blake, 36 Fed. 183. See Reed *v.* Gold, (Va. 1903) 45 S. E. 868.

Depositions may be taken in a *qui tam* action (Moses *v.* Gunn, 1 Root (Conn.) 307), in an action to recover a statutory penalty (Indiana Millers' Mut. F. Ins. Co. *v.* People, 65 Ill. App. 355), in an action against a corporation (Eastman *v.* Coos Bank, 1 N. H. 23), in an injunction proceeding (Rancour's Petition, 66 N. H. 172, 20 Atl. 930), in a foreclosure suit (Lombard *v.* Thorp, 70 Iowa 220, 30 N. W. 490), in an issue out of chancery to try the validity of a will (Green *v.* Green, 5 Ohio 278), on the trial of a feigned issue out of chancery (Lockyer *v.* Lockyer, 1 Edm. Sel. Cas. (N. Y.) 107), or in an interpleading proceeding (Canada Permanent Bldg. Soc. *v.* Forest, 6 Ont. Pr. 254).

Action for separation.— Where a wife brings a counteraction for a separation, on the ground of cruel and inhuman treatment consisting of charges of adultery with a person named, the husband should be permitted to take depositions as to the misconduct of the wife with the person referred to, for the purpose of justifying his alleged cruel and inhuman treatment. Israel *v.* Israel, 54 N. Y. App. Div. 408, 66 N. Y. Suppl. 777.

An investigation by a foreign judge as to an alleged smuggling transaction is not within a statute providing that the testimony of any witness residing in the United States may be obtained by commission or letters rogatory, to be used in a suit for the recovery of money or property depending in any court in a foreign country when the government of that country is a party, or interested in the suit, and do not warrant an order directing the attendance of a witness to answer the interrogatories. *In re* Letters Rogatory, 36 Fed. 306.

In Indiana depositions may be taken without the state in an action pending before a mayor having the jurisdiction and powers of a justice of the peace. Reeves *v.* Allen, 42 Ind. 359.

The court must have jurisdiction of the cause. U. S. *v.* Hom Hing, 48 Fed. 635.

The federal statutes relative to the taking and use of depositions are applicable only to cases in the United States circuit and district courts. The Argo, 2 Wheat. (U. S.) 287, 4 L. ed. 241.

48. A statute which authorizes depositions to be taken in actions only will not authorize the taking of a deposition to be used on a motion by a person not a party to an action to be relieved from a purchase made at a judicial sale (Crane *v.* Evans, 12 N. Y. Civ. Proc. 445), to take testimony to be used in supplementary proceedings (Morrell *v.* Hey, 15 Abb. Pr. (N. Y.) 430, 24 How. Pr. (N. Y.) 48; Champlin *v.* Stodart, 64 How. Pr. (N. Y.) 378; Graham *v.* Colburn, 14 How. Pr. (N. Y.) 52), or to examine a party to an action for the purpose of procuring his testimony to be used on a special motion (Stake *v.* Andre, 18 How. Pr. (N. Y.) 159), nor can a commission issue in proceedings to disbar an attorney (*In re* Attorney, 83 N. Y. 164), in a statutory proceeding by a receiver before referees, in relation to claims against an insolvent insurance company (Wood *v.* Howard Ins. Co., 18 Wend. (N. Y.) 646), or in proceedings against an absconding debtor (*In re* Whitney, 4 Hill (N. Y.) 533).

In Vermont the provisions of the statute relative to the taking of depositions in civil causes do not apply to that class of cases in which the supreme court has jurisdiction, involving the trial of matters of fact on evidence, as granting divorces, establishing highways, granting new trials on petition, and vacating levies of execution on real estate. Briggs *v.* Green, 33 Vt. 565.

taken, however, when expressly permitted, or when they are authorized in civil cases generally.[49]

C. Criminal Prosecutions. In many jurisdictions statutes have been enacted which, either expressly or by implication, permit a defendant in a criminal case to take a deposition in his own behalf.[50] If no such statute exists the deposition cannot be taken[51] unless the accused first procures the consent

49. **Depositions may be taken** and used in contempt proceedings (Una *v.* Dodd, 38 N. J. Eq. 460), in a proceeding for the discovery of the assets of an estate (*Ex p.* Gfeller, (Mo. Sup. 1903) 77 S. W. 552; Eckerle *v.* Wood, 95 Mo. App. 378, 69 S. W. 45), in bastardy proceedings (State *v.* Hickerson, 72 N. C. 421), in garnishment proceedings (—— *v.* Galbraith, 2 Dall. (Pa.) 78, 1 L. ed. 297), in probate proceedings (*In re* Arrowsmith, 206 Ill. 352, 69 N. E. 77; Moore *v.* Smith, 88 Ky. 151, 10 S. W. 380, 10 Ky. L. Rep. 729; Gildersleeve *v.* Atkinson, 6 N. M. 250, 27 Pac. 477, in proceedings for the appointment of a receiver (Robinson *v.* McConnell, 19 Ohio Cir. Ct. 716), in proceedings in a surrogate's court to fix a transfer tax (Matter of Wallace, 71 N. Y. App. Div. 284, 75 N. Y. Suppl. 838), in proceedings on return to a writ of habeas corpus (*Re* Smart Infants, 12 Ont. Pr. 2), in proceedings to disbar an attorney (*In re* Wellcome, 23 Mont. 259, 59 Pac. 711. But see *In re* Attorney, 83 N. Y. 164), on a motion for a new trial (O'Connor *v.* McLaughlin, 80 N. Y. App. Div. 305, 80 N. Y. Suppl. 741; Llewellyn *v.* Levy, 33 Wkly. Notes Cas. (Pa.) 310), on an appeal from an order of filiation and maintenance (Hildreth *v.* Overseers of Poor, 13 N. J. L. 5), on the trial of an election petition (Maclennan *v.* Bergin, 1 Hodg. El. Rep. (U. C.) 803), or on a summary application to set aside proceedings on the ground of bad faith in establishing them (Pictou Bank *v.* Pugsley, 32 N. Brunsw. 384).

Surrogate proceedings.— A statute by its terms applicable to depositions in actions, which by another section is extended to surrogates' courts and to "the proceedings therein, so far as they can be applied to the substance and subject-matter of a proceeding, without regard to its form," authorizes the surrogate's court to grant commissions to take testimony out of the state to be used in special proceedings before it. *In re* Plumb, 135 N. Y. 661, 32 N. E. 22 [*affirming* 64 Hun 317, 19 N. Y. Suppl. 79, 22 N. Y. Civ. Proc. 209].

When a special appearance is entered for the purpose of having an unauthorized general appearance stricken out on a motion, the court cannot order a commission to take testimony for the purpose of ascertaining whether the general appearance was authorized, as such an order presupposes the entry of a general appearance, and assumes the very point in issue. Woods *v.* Dickinson, 7 Mackey (D. C.) 301.

Where a will is offered for probate before the clerk in vacation, depositions cannot be taken and used to establish the due execution of the will. Duckworth *v.* Hibbs, 38 Ind. 78.

Where, by statute, the same proceedings are to be had in a proceeding as in an action a commission may be issued. Paddock *v.* Kirkham, 102 N. Y. 597, 8 N. E. 214.

50. *Arkansas.*—Giboney *v.* Rogers, 32 Ark. 462.

California.— People *v.* Lundquist, 84 Cal. 23, 24 Pac. 153.

Florida.— Newton *v.* State, 21 Fla. 53.

Illinois.—Richardson *v.* People, 31 Ill. 170.

Kansas.— State *v.* McCarty, 54 Kan. 52, 36 Pac. 338.

Texas.— Johnson *v.* State, 27 Tex. 758; Adams *v.* State, 19 Tex. App. 250.

United States.— U. S. *v.* Cameron, 15 Fed. 794, 5 McCrary 93; U. S. *v.* Wilder, 14 Fed. 393, 4 Woods 475.

See 16 Cent. Dig. tit. "Depositions," § 25.

In Kansas the deposition need not be taken on written interrogatories, as in civil cases. State *v.* McCarty, 54 Kan. 52, 36 Pac. 338.

Expense of procuring.— In the absence of statutory provisions authorizing it, the accused is not entitled to be furnished with money with which to procure his depositions. Nite *v.* State, 41 Tex. Cr. 340, 54 S. W. 763.

Where a criminal case is removed by certiorari into the supreme court and retained on the civil side, a commission may issue to take the deposition of a foreign witness as in a civil case. People *v.* Vermilyea, 7 Cow. (N. Y.) 369.

Where, under the constitution, a person charged with a crime has the right to compulsory process to enforce the attendance of his witnesses within the state, but no legislative provisions have been made for the means of such enforcement, the court may permit the taking of the depositions of witnesses beyond the reach of its process. State *v.* Fulford, 33 La. Ann. 679; State *v.* Hornsby, 8 Rob. (La.) 554, 41 Am. Dec. 305.

51. *Alabama.*— *Ex p.* Harkins, 6 Ala. 63, 41 Am. Dec. 38.

Georgia.— McLane *v.* State, 4 Ga. 335.

Louisiana.— State *v.* Fahey, 35 La. Ann. 9; State *v.* Fulford, 33 La. Ann. 679.

Maryland.— Young *v.* State, 90 Md. 579, 45 Atl. 531.

New York.— People *v.* Squire, 3 N. Y. St. 194.

Washington:— State *v.* Hunter, 18 Wash. 670, 52 Pac. 247; State *v.* Humason, 5 Wash. 499, 32 Pac. 111.

United States.— U. S. *v.* Thomas, 28 Fed. Cas. No. 16,476, 1 Hayw. & H. 243.

England.— Reg. *v.* Upton St. Leonard, 10 Q. B. 827, 12 Jur. 11, 17 L. J. M. C. 13, 2 New Sess. Cas. 582, 59 E. C. L. 827; Anonymous, 19 Ves. Jr. 321.

of the state.[52] The state with the consent of defendant may take depositions for use in the prosecution;[53] but otherwise cannot do so;[54] and it seems that a deposition taken without the consent of the accused cannot be used in his favor.[55]

VI. PERSONS AND OFFICIALS WHO MAY TAKE.

A. Statutory Designation — 1. In General. The United States statutes designate the judicial officers, magistrates, and others before whom depositions *de bene esse* may be taken for use in the federal courts,[56] and many of the states have substantially similar statutes which specify the particular officials before whom depositions may be taken generally,[57] or provide for the taking of deposi-

See 16 Cent. Dig. tit. "Depositions," § 25.

Inquiry as to sanity of accused.— Where the object of a statute is to authorize the taking of a deposition for use on the trial of the indictment, it cannot be taken to be used on an inquiry into the sanity of defendant by a commission appointed by the court before the trial. People *v.* Haight, 13 Abb. N. Cas. (N. Y.) 197.

52. **In South Carolina** the testimony of a non-resident witness can be taken by defendant only by the consent of the solicitor for the state, which consent the court has no power to compel. State *v.* Murphy, 48 S. C. 1, 25 S. E. 43.

53. Wightman *v.* People, 67 Barb. (N. Y.) 44; State *v.* Bowen, 4 McCord (S. C.) 254.

54. Dominges *v.* State, 7 Sm. & M. (Miss.) 475, 45 Am. Dec. 315; People *v.* Restell, 3 Hill (N. Y.) 289; State *v.* Bowen, 4 McCord (S. C.) 254.

55. Dominges *v.* State, 7 Sm. & M. (Miss.) 475, 45 Am. Dec. 315.

56. Under U. S. Rev. St. (1878) § 863 [U. S. Comp. St. (1901) p. 661] which designates among others before whom depositions *de bene esse* may be taken, a judge of a county court of any of the United States, the following have been held competent: A "justice" of a county court (Smith *v.* Williams, 22 Fed. Cas. No. 13,127), the judge of a probate court, being a court of record and possessing a seal (Merrill *v.* Dawson, 17 Fed. Cas. No. 9,469, Hempst. 563 [*affirmed* in 11 How. 375, 13 L. ed. 736]), and the judge of a county court within a county other than that to which his judicial functions are limited (Voce *v.* Lawrence, 28 Fed. Cas. No. 16,979, 4 McLean 203). A judge of a city court (Foreman *v.* Holmead, 9 Fed. Cas. No. 4,935, 5 Cranch C. C. 162) or a judge of a county commissioners' court is not within section 30 of the federal judiciary act authorizing depositions to be taken before certain magistrates and judicial officers (Garey *v.* Union Bank, 10 Fed. Cas. No. 5,241, 3 Cranch C. C. 91). Section 30 of the judiciary act which does not include justices of the peace among the officials who may take depositions *de bene esse* refers to depositions taken without a rule. A deposition may be taken under a rule in the federal court, before such a justice. Banert *v.* Day, 2 Fed. Cas. No. 836, 3 Wash. 243.

Act of July 29, 1854.— A deposition under section 30 of the act of Sept. 24, 1789, may, under the provisions of the act of July 29, 1854 (10 U. S. St. at L. 315 [U. S. Comp. St. (1901) p. 661]) be taken before a notary public. Dinsmore *v.* Maroney, 7 Fed. Cas. No. 3,920, 4 Blatchf. 416.

In a territorial court, following the federal admiralty practice, a deposition for use in admiralty may be taken before a notary public. Phelps *v.* Panama, 1 Wash. Terr. 615.

57. **In Michigan** a deposition for use in a circuit court may be taken before a justice of the peace, in a county other than that in which the trial is to be had. Eslow *v.* Mitchell, 26 Mich. 500.

In Mississippi the practice in chancery is to take depositions before justices of the peace without commission and on notice. Gordon *v.* Watkins, Sm. & M. Ch. 37.

In Oregon a deposition may be taken before an officer authorized to administer oaths on notice and without a commission. Wheeler *v.* Burckhardt, 34 Oreg. 504, 56 Pac. 644.

Assistants to surrogate.— Where assistants to a surrogate are authorized to administer and certify oaths, if depositions are reduced to writing and the jurat signed by an assistant the presence of the surrogate is constructive and sufficient to satisfy the statute requiring witnesses giving their depositions on probate of a will to be examined before him. *In re* Clark, 1 Tuck. Surr. (N. Y.) 119.

Coördinate authority.— A deposition noticed to be taken before a county judge may be taken before the county clerk, where both officers have the like authority in the premises, and the statute does not require that the officer should be specified in the notice. Williams *v.* Chadbourne, 6 Cal. 559. Under a statute designating among others justices of the supreme court and county judges as officials to whom application for an order to take depositions *in perpetuam* may be made, and providing that the examination may be ordered to be had before any officer to whom application might have been originally made, where application is made to a supreme court justice he may direct the examination to take place before a county judge qualified to act in the premises. Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267. Testimony taken by a notary public under the act of 1883 providing "that, in addition to the methods for

tions in other states before persons empowered to take depositions or administer oaths therein.[58] It follows that in such jurisdictions depositions can be taken only by officials of the kind or class so designated, and under the circumstances and conditions prescribed.[59]

taking testimony now provided by law," the mode provided for by the act may be resorted to, stands upon the same footing as that taken by a regular commissioner. Petrie *v.* Columbia, etc., R. Co., 27 S. C. 63, 2 S. E. 837.

De facto officer.— A deposition is not invalidated because taken before a *de facto* notary public who has failed to file his bond as prescribed by statute. Keeney *v.* Leas, 14 Iowa 464.

On proceedings to probate a will before the surrogate, the testimony of a witness unable to attend before that officer because of bodily infirmity must be taken by him and not by a referee. McCoskry's Estate, 10 N. Y. Civ. Proc. 178.

On the death of a magistrate before whom depositions were to have been taken, they may be taken before the magistrate to whom the docket of the deceased magistrate was transferred. Phelps *v.* Young, 1 Ill. 327.

Standing commissioner.— Under a statute authorizing a commissioner appointed by a circuit superior court to take depositions in any cause depending in any court of the state, a commissioner appointed by a superior court in chancery may take depositions in an action at law. McGuire *v.* Pierce, 9 Gratt. (Va.) 167. In West Virginia a master commissioner of the circuit court to whom a cause is referred to take, state, and settle an account of indebtedness has authority to take depositions. Hickman *v.* Painter, 11 W. Va. 386.

58. Greene *v.* Tally, 39 S. C. 338, 17 S. E. 779; Mattocks *v.* Bellamy, 8 Vt. 463; Pike *v.* Blake, 8 Vt. 400; Patterson *v.* Patterson, 1 D. Chipm. (Vt.) 200.

Clerk of court of record.— A deposition taken before a "county clerk" is not taken before the clerk of a court of record, where it does not appear that he is the clerk of a county court. Bolds *v.* Woods, 9 Ind. App. 657, 36 N. E. 933.

Deputy clerk.— A statute empowering the clerk of a court to take depositions does not confer the like authority on the deputy clerk. Hartman *v.* Hartman, 15 Ky. L. Rep. 368; Urquhart *v.* Burleson, 6 Tex. 502; Hughes *v.* Prewitt, 5 Tex. 264.

Non-resident standing commissioners.—The authority given to the commissioners of the state of Tennessee, resident in other states, to take affidavits, to be read as evidence in the courts of that state, includes the authority to take depositions. McCandlass *v.* Polk, 10 Humphr. (Tenn.) 617. In Maine, it is not necessary that a magistrate before whom depositions are taken in another state should be a commissioner appointed by the governor and council of Maine to take depositions. George *v.* Nichols, 32 Me. 179.

Unauthorized officer.— It is immaterial that the officer was not authorized to take depositions in the foreign state. City Bank *v.* Young, 43 N. H. 457. Depositions taken in another state before justices not empowered by the laws thereof to take depositions may be read if they would be admissible if taken within the state. Bostwick *v.* Lewis, 1 Day (Conn.) 33. It is immaterial that no objection was made to the official character of the officer. Thompson *v.* Wilson, 34 Ind. 94.

U. S. consul.— The Code of Criminal Procedure nowhere prescribes rules for taking depositions out of the United States, but Tex. Rev. St. art. 2226, provides that in civil cases a United States consul may take depositions, and Code Cr. Proc. art. 762, extends to criminal cases the rules prescribed for civil cases when not in conflict with the criminal code. It was held that a United States consul in Mexico is a proper person to execute a commission to take testimony in Mexico. Adams *v.* State, 19 Tex. App. 250. An American consul residing in a foreign country, and who has been duly accredited there, is a magistrate authorized to take affidavits and depositions in such country, within the rule of court. Savage *v.* Birckhead, 20 Pick. (Mass.) 167.

According to the English practice a commission must be executed before a person authorized by the law of the foreign country to administer oaths and take depositions. Levitt *v.* Levitt, 2 Hem. & M. 626.

Special examiners.— In England instead of commissioners the court may name special examiners. *In re* Smith, L. R. 8 Eq. 23, 17 Wkly. Rep. 758; London Bank *v.* Hart, L. R. 6 Eq. 467, 18 L. T. Rep. N. S. 553; Crofts *v.* Middleton, 9 Hare (App.) xviii, lxxv, 17 Jur. 112, 1 Wkly. Rep. 163, 41 Eng. Ch. (App.) xviii, lxxv; Edwards *v.* Spaight, 2 Johns. & H. 617; Laurence *v.* Maule, 3 Wkly. Rep. 534. A barrister chosen by the parties to take special evidence must be a special examiner. Reed *v.* Prest, 1 Kay (App.) xiv.

59. *California.*— McCann *v.* Beach, 2 Cal. 25, 32.

Indiana.— Thompson *v.* Wilson, 34 Ind. 94.

Kentucky.— Watson *v.* Stucker, 5 Dana 581. See Lockwood *v.* Brush, 6 Dana 433.

Maryland.— Crichton *v.* Smith, 34 Md. 42.

Mississippi.— Ragan *v.* Cargill, 24 Miss. 540.

Montana.— McCormick *v.* Largey, 1 Mont. 158.

Nebraska.— Starring *v.* Mason, 4 Nebr. 367.

Ohio.— Gibson *v.* McArthur, 5 Ohio 329; Matter of Herckelrath, 5 Ohio S. & C. Pl. Dec. 565, 7 Ohio N. P. 537.

2. Presumption of Authority. If the deposition purports to have been taken by competent authority the official character assumed and the authority of the person who acted will be presumed until the contrary appears.[60]

3. Territorial Jurisdiction. An officer having general authority to take depositions has no power to act out of the jurisdiction where, under his appointment or the like, he is alone authorized to exercise his functions.[61]

B. Special Appointment or Designation — 1. In General. Persons may be appointed by statute or empowered by state authority to execute commissions or take depositions within or without the state on behalf of and for the use of courts within the state of the appointment;[62] they may be designated by the

Tennessee.— Carter *v.* Ewing, 1 Tenn. Ch. 212.

Texas.— Lieupo *v.* State, 28 Tex. App. 179, 12 S. W. 588.

See 16 Cent. Dig. tit. "Depositions," § 72 *et seq.*

60. Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575; Steele *v.* Stone, 12 N. H. 90; Barron *v.* Pettes, 18 Vt. 385; Crane *v.* Thayer, 18 Vt. 162, 46 Am. Dec. 142; Jasper *v.* Porter, 13 Fed. Cas. No. 7,229, 2 McLean 579.

De facto officer.— Proof that the justice of the peace by whom a foreign deposition was taken was at the time a justice of the peace *de facto* is good *prima facie* evidence of his being so *de jure*. Adams *v.* Graves, 18 Pick. (Mass.) 355; Allen *v.* Perkins, 17 Pick. (Mass.) 369.

Officer not specially designated.— Under a rule of court requiring a commission to be directed to a justice of the peace, notary public, or other officer legally empowered to take depositions, a justice of the peace or a notary public is presumed to have authority, and the power need not be affirmatively shown; but where the commission issues to any other officer his authority must appear. Steele *v.* Stone, 12 N. H. 90; Shepard *v.* Thompson, 4 N. H. 213.

Failure to state official title.— Where a commission issues to a notary public and is returned by the person who executed it, without a statement of his official title, the deposition is a nullity. Argentine Falls Silver Min. Co. *v.* Molson, 12 Colo. 405, 21 Pac. 190. In Bryden *v.* Taylor, 2 Harr. & J. (Md.) 396, 3 Am. Dec. 554, a deposition taken before a justice of the peace was permitted to be read, although his official character did not appear. It is no objection to the reading of a deposition that the persons before whom it was taken are not described as justices of the peace in the commission or their own certificate. Ridge's Orphans *v.* Lewis, 1 N. C. 536.

Stipulation to take depositions before a person named, styling him a justice of the peace in a county of one of the British provinces, is a concession that there was a person of that name occupying the official position of justice of the peace at the place mentioned, and an agreement under the statute upon that person as commissioner. Blackie *v.* Cooney, 8 Nev. 41.

61. *Maryland.*— Brandt *v.* Mickle, 28 Md. 436.

Missouri.— Silver *v.* Kansas City, etc., R. Co., 21 Mo. App. 5.

New Hampshire.— Douglass *v.* Douglass, 38 N. H. 323.

New York.— Fonda *v.* Armour, 49 How. Pr. 72; Jackson *v.* Leek, 12 Wend. 105.

United States.— Celluloid Mfg. Co. *v.* Russell, 35 Fed. 17.

See 16 Cent. Dig. tit. "Depositions," § 79.

Examiners in United States courts.—Under equity rule 67, adopted by the supreme court of the United States, the federal courts are authorized to appoint examiners to take testimony orally beyond the limits of the district in which a suit is pending, and the attendance of witnesses before such an examiner may be compelled by the courts in the district to which the examiner is sent. White *v.* Toledo, etc., R. Co., 79 Fed. 133, 24 C. C. A. 467; Western Div. N. C. R. Co. *v.* Drew, 29 Fed. Cas. No. 17,434, 3 Woods 691. See Arnold *v.* Cheesebrough, 35 Fed. 16 (where the power to make such an appointment is doubted); Celluloid Mfg. Co. *v.* Russell, 35 Fed. 17 [*distinguishing* Western Div. N. C. R. Co. *v.* Drew, 29 Fed. Cas. No. 17,434, 3 Woods 69] (where it is held that an examiner in one district cannot take testimony outside of his district).

In Canada the court will not direct the examination of witnesses to take place before an examiner in a county where no resident master has been appointed, although consented to by the parties. Phelan *v.* Phelan, 6 Grant Ch. (U. C.) 384.

62. See McCandlass *v.* Polk, 10 Humphr. (Tenn.) 617.

Appointment by state authority.— A commissioner appointed by the court of another state is appointed under the authority of the state within a provision that depositions may be taken within the state "before commissioners appointed under authority of the state or government in which the suit is pending." Com. *v.* Smith, 11 Allen (Mass.) 243.

Effect of subsequent statutes.—The powers of a commissioner appointed by statute do not cease by the passage of a subsequent statute which does not affect the officer or his powers or duties except in those particulars in which the former statute is changed or modified. Currier *v.* Boston, etc., R. Co., 31 N. H. 209.

court in which the action is pending or a judge thereof[63] on suggestion;[64] they may be selected by the party suing out the commission;[65] or each party may participate in the selection.[66] When appointed by a foreign court to execute a commission within the state, the commissioner derives his authority from the foreign state and court.[67]

2. MISNOMER OR MISDESCRIPTION. A deposition cannot be taken before any one but the commissioner named; hence where a commission directed to a person by name or by his official title is executed by a person of different name or having a different title the deposition cannot be read,[68] unless it appears or is proven that the party who executed the commission was the person intended.[69]

63. A provision that depositions *de bene esse* may be taken before, as well as after, issue joined, in which former case the clerk shall name the commissioner, implies that in the latter case the judge shall name him. Kerchner *v.* Reilly, 72 N. C. 171.

A foreign court or the judges thereof may be designated to take testimony. Wilson *v.* Wilson, 9 P. D. 8, 49 L. T. Rep. N. S. 430, 32 Wkly. Rep. 282; Lumley *v.* Gye, 2 Ch. R. 936, 3 E. & B. 114, 18 Jur. 466, 23 L. J. Q. B. 112, 77 E. C. L. 114; Fischer *v.* Izataray, E. B. & E. 321, 4 Jur. N. S. 632, 27 L. J. Q. B. 239, 6 Wkly. Rep. 549, 96 E. C. L. 321; Murray *v.* Lawford, 6 Sim. 573, 9 Eng. Ch. 573. But see *In re* Boyse, 20 Ch. D. 760, 51 L. J. Ch. 660, 46 L. T. Rep. N. S. 522, 30 Wkly. Rep. 812, where a commission to a foreign court was refused because under the procedure the witness would not be examined in the ordinary way.

Commissioners need not be barristers. Henderson *v.* Philipson, 17 Jur. 615, 22 L. J. Ch. 1037.

In Maryland testimony may be taken before a justice of the peace under an order of the chancery court. Townshend *v.* Duncan, 2 Bland 45.

If commissioners refuse to act others may be appointed in their stead. —— *v.* Fortescue, Hardres 170.

64. The suggestion of a commissioner by a foreign witness will not invalidate his appointment. Spinney *v.* Field, 17 N. Y. Suppl. 890.

On an application to have a witness within the jurisdiction of the court examined on interrogatories the person who is to conduct the examination should be named. Thorn *v.* Phillips, 1 Dowl. P. C. 56.

The parties may agree on the commissioners. Nicol *v.* Alison, 11 Q. B. 1006, 12 Jur. 598, 17 L. J. Q. B. 355, 63 E. C. L. 1006.

65. Harris *v.* Wilson, 2 Wend. (N. Y.) 627.

Insertion in notice of suing out dedimus. — A party cannot insert the name of the commissioner in his notice of suing out a dedimus. Cole *v.* Choteau, 18 Ill. 439.

66. Tussey *v.* Behmer, 9 Lanc. Bar (Pa.) 45.

Consent.— Depositions taken before a notary public by stipulation of the parties are evidence, not by virtue of any authority of the notary to act as commissioner, but by force of the stipulation and his power to administer oaths under the statute. Crone *v.* Angell, 14 Mich. 340. To same effect see Knight *v.* Emmons, 4 Mich. 554.

Each party has the right to select his own examiner and one may conduct the direct and the other the cross-examination. Troup *v.* Haight, 6 Johns. Ch. (N. Y.) 335; Turner *v.* Burleigh, 17 Ves. Jr. 354. The right of exceptants to interrogatories to name a commissioner to act on their behalf is not affected by the fact that the party at whose instance the commission is to be issued has also named one. Lowry's Estate, 4 Pa. Dist. 691, 17 Pa. Co. Ct. 131.

Waiver of right.— Defendant's neglect, after receiving notice of the name of plaintiff's commissioner, to name another commissioner, must be considered as a waiver of his right to have two commissioners, and a consent to the execution of the commission by the one named. Cover *v.* Smith, 82 Md. 586, 34 Atl. 465; Billingslea *v.* Smith, 77 Md. 504, 26 Atl. 1077.

The appointment of a commissioner to take testimony in chancery will not preclude the chancellor from taking depositions to be used on the hearing. Martinez *v.* Lucero, 1 N. M. 208.

67. Matter of Canter, 40 Misc. (N. Y.) 126, 81 N. Y. Suppl. 338.

68. *Illinois.*— Provident Sav. L. Assur. Soc. *v.* Cannon, 103 Ill. App. 534 [*affirmed* in 201 Ill. 260, 66 N. E. 388].

Iowa.— State *v.* Cross, 68 Iowa 180, 26 N. W. 62; Jones *v.* Smith, 6 Iowa 229; Plummer *v.* Roads, 4 Iowa 587.

Louisiana.— Follain *v.* Lefevre, 3 Rob. 13.

Maryland.— Maryland Ins. Co. *v.* Bossiere, 9 Gill & J. 121.

Pennsylvania.— Breyfogle *v.* Beckley, 16 Serg. & R. 264.

United States.— Banert *v.* Day, 2 Fed. Cas. No. 836, 3 Wash. 243.

See 16 Cent. Dig. tit. "Depositions," § 83.

69. *Illinois.*— Whitaker *v.* Wheeler, 44 Ill. 440.

Iowa.— Plummer *v.* Roads, 4 Iowa 587. See State *v.* Cross, 68 Iowa 180, 26 N. W. 62.

Louisiana.— Frierson *v.* Irwin, 4 La. Ann. 277; Follain *v.* Lefevre, 3 Rob. 13.

Michigan.— Cronkhite *v.* Mills, 76 Mich. 669, 43 N. W. 679.

Ohio.— Friend *v.* Thompson, Wright 636.

See 16 Cent. Dig. tit. "Depositions," § 83.

Presumption of identity.— Where a commission is returned by a person of the same name with the commissioner to whom it was

3. Necessity of Official Capacity. Except in those jurisdictions where it is essential that the commission should be directed to an official person,[70] if the commission is directed to a person by name, he derives his authority from the appointment, which carries with it all the powers necessary to execute the commission, including the power to administer oaths to the witnesses, and his official capacity is immaterial.[71]

4. Several Commissioners — a. In General. Two or more commissioners may be appointed;[72] but except by statute if the commission is directed to more than one it must be executed by all,[73] unless by the terms of the commission less than

directed there is a presumption of identity. Wallace *v.* McElevy, 2 Grant (Pa.) 44.

70. Newton *v.* Brown, 1 Utah 287. See also State *v.* Cardinas, 47 Tex. 250.

Proceedings before non-official voluntary. — Where a commission issues from a foreign court to a person not vested with judicial authority, the proceedings before him, in the absence of a statute, are voluntary. Martin *v.* People, 77 Ill. App. 311. See *In re* Bushnell, 19 Misc. (N. Y.) 307, 44 N. Y. Suppl. 257.

71. *Alabama.*— Potier *v.* Barclay, 15 Ala. 439.

Colorado.— Ford *v.* Rockwell, 2 Colo. 376.

Louisiana.— Morrison *v.* White, 16 La. Ann. 100; Bradford *v.* Cooper, 1 La. Ann. 325; Baum's Succession, 11 Rob. 314; Skipworth *v.* His Creditors, 19 La. 198; Baine *v.* Wilson, 18 La. 59; Shipman *v.* Haynes, 17 La. 503; Gordon *v.* Nelson, 16 La. 321; Harrison *v.* Bowen, 16 La. 282; Robertson *v.* Lucas, 1 Mart. N. S. 187; Dunn *v.* Blunt, 4 Mart. 677.

Maryland.— Gibson *v.* Tilton, 1 Bland 352, 17 Am. Dec. 306.

Massachusetts.—Adams *v.* Graves, 18 Pick. 355.

Michigan.— McGeorge *v.* Walker, 65 Mich. 5, 31 N. W. 601.

North Carolina.— Hunt *v.* Williams, 1 N. C. 143.

Pennsylvania.— Frank *v.* Colhoun, 59 Pa. St. 381; Machine Co. *v.* Shillow, 14 Lanc. Bar 58; Melvin *v.* Handley, 1 Wilcox 235, 6 Lanc. L. Rev. 235; Smith *v.* Cokefair, 8 Pa. Co. Ct. 45.

Tennessee.— Clarissa *v.* Edwards, 1 Overt. 393.

United States.— Hoyt *v.* Hammekin, 14 How. 346, 14 L. ed. 449; Gilpins *v.* Consequa, 10 Fed. Cas. No. 5,452, Pet. C. C. 85, 3 Wash. 184.

See 16 Cent. Dig. tit. "Depositions," § 84.

Commissioners are not the agents of the parties who nominate them. Machine Co. *v.* Shillow, 14 Lanc. Bar (Pa.) 58; Gilpins *v.* Consequa, 10 Fed. Cas. No. 5,452, Pet. C. C. 85, 3 Wash. 184.

Residents as foreign commissioners.— A commission to be executed out of the state may be directed to persons residing within it. Jackson *v.* Van Loon, 3 Cai. (N. Y.) 105.

Wife of witness.— In The Norway, 18 Fed. Cas. No. 10,358, 2 Ben. 121, which was an application for a commission to examine a witness in the East Indies, it appeared that after diligent inquiry the party making the application had been unable to find the name of any official or merchant who resided near the witness, or any one else whom it would be proper to name as commissioner, and it appearing that the wife of the witness was a lady of intelligence and education she was appointed.

72. Tussey *v.* Behmer, 9 Lanc. Bar (Pa.) 45.

The North Carolina statute directing that commissions to take depositions shall be directed to two justices of the peace does not apply to commissions to take depositions outside of the state. Blount *v.* Stanley, 3 N. C. 163.

73. Montgomery St. R. Co. *v.* Mason, 133 Ala. 508, 32 So. 261; Marshall *v.* Frisbie, 1 Munf. (Va.) 247; Armstrong *v.* Brown, 1 Fed. Cas. No. 542, 1 Wash. 43; Guppy *v.* Brown, 11 Fed. Cas. No. 5,871, 4 Dall. 410, 1 L. ed. 887; Munns *v.* De Nemours, 17 Fed. Cas. No. 9,926, 3 Wash. 31; Kingsbury *v.* Kimball, 32 Pa. St. 518. See Miller *v.* George, 30 S. C. 526, 9 S. E. 659, where three commissioners were named by the party procuring the commission and but two acted, the third having had no notice of his appointment or of the time and place of taking the testimony, and the deposition was permitted to be read over the objection of the adverse party.

Identification.—Where one party to a joint commission named commissioners and gave their profession and address, and the other merely named the commissioners without identifying them or giving their specific addresses, it was held that the commission was well executed by the commissioners specifically identified, after an unsuccessful endeavor to find the others. Pigott *v.* Holloway, 1 Binn. (Pa.) 436.

Notice.— A commission to two cannot be executed by one without notice by the acting commissioner to the other. Hoofnagle *v.* Dering, 1 Yeates (Pa.) 302.

Waiver of objection.—Where a commission for the examination of witnesses abroad was issued directing the depositions to be taken before four commissioners, one of whom, although notified, did not attend, and the commission was executed by the other three, in the absence of any protest at the time, or suggestion that defendant had been injured by its execution by three only, and where he had an opportunity of applying at term to suppress the depositions, but failed to do so, the court held that the ob-

the whole number of the commissioners who are therein designated are empowered to act.[74]

b. Statutory Provisions. In some jurisdictions by statute a majority of the commissioners named [75] or any one of them may execute the commission,[76] unless it contain an express direction to the contrary.[77]

C. Incompetency or Disqualification — 1. In General. A commission cannot be executed by a commissioner incompetent to act or disqualified.[78]

2. Interest or Bias — a. In General. The commissioner must stand indifferent between the parties. If he directly or indirectly bear to either party such a relation as would authorize a presumption of bias or prejudice in favor of or against either party he is not competent.[79]

jection was waived. Gilbert *v.* Campbell, 12 N. Brunsw. 474.

74. Cage *v.* Courts, 1 Harr. & M. (Md.) 239; Louden *v.* Blythe, 16 Pa. St. 532, 55 Am. Dec. 527; The Griffin, 11 Fed. Cas. No. 5,814, 4 Blatchf. 203.

Deposition of commissioner.— A commission directed to two persons named, or either of them, authorizes the deposition of one to be taken by the other. Lonsdale *v.* Brown, 15 Fed. Cas. No. 8,492, 3 Wash. 404.

Failure of commissioner to attend.— One commissioner named in a joint and several commission may execute it, although the commissioner of the other party fail to attend. Pennock *v.* Freeman, 1 Watts (Pa.) 401. Where the commission provided that if either of two commissioners named were absent the other might execute it, and both were at the same place when the commission was received, but it was executed by one in the absence of the other, it was held that, in the absence of any proof of abuse or of any unfairness or partiality by the commissioner who acted, this was no ground for vacating the commission. Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518.

75. Stone *v.* Cannon, 9 Sm. & M. (Miss.) 595.

An agreement to waive the provision of a statute requiring two commissioners to act, and that one may take the depositions, must be strictly pursued. Rooney *v.* Southern Bldg., etc., Assoc., 115 Ga. 400, 41 S. E. 648.

76. O'Brien *v.* Commercial F. Ins. Co., 41 N. Y. Super. Ct. 224.

Abuse of process.— If the execution by only one of the commissioners was the result of a scheme to abuse the process of the court, and to deprive the parties of an opportunity of having their rights protected, the authority of the court may be invoked and should be exercised to suppress the commission after its return. O'Brien *v.* Commercial F. Ins. Co., 41 N. Y. Super. Ct. 224.

The provision of the Maryland code that when a commission in an equity case is issued to two commissioners either of them may execute it applies as well to actions at law. Purner *v.* Piercy, 40 Md. 212, 17 Am. Rep. 591.

77. O'Brien *v.* Commercial F. Ins. Co., 41 N. Y. Super. Ct. 224.

78. A person not named in the commission cannot assist in its execution. Willings *v.* Consequa, 30 Fed. Cas. No. 17,767, Pet. C. C. 301.

Holding incompatible offices.— Where under constitutional provisions the offices of county clerk and notary public are incompatible, a deposition purporting to have been taken by a notary after he had been elected and qualified as county clerk is irregularly taken. Biencourt *v.* Parker, 27 Tex. 558.

Illiteracy.— A deposition taken by two commissioners, one of whom made his mark instead of signing, is properly rejected; the presumption being that he could neither read nor write and was therefore incompetent to act. Osten *v.* Carey, 23 Ga. 4.

Non-residence of commissioner.— That a commissioner appointed by a foreign court to take a deposition within the state is a resident of the foreign state is no reason for the refusal by the state court of its aid in procuring the execution of the commission. Matter of Canter, 40 Misc. (N. Y.) 126, 81 N. Y. Suppl. 338 [*reversed* on another ground in 82 N. Y. App. Div. 103, 81 N. Y. Suppl. 416, in which Van Brunt, P. J., in concurring in the result, said that the foreign court could not confer on a foreigner the right to exercise semijudicial functions within the state].

Termination of authority.— Where a commission issues to take the depositions of several witnesses without the state, the commissioner's authority expires on the return of his commission pursuant to the direction thereon, and the filing of the same with the clerk of the court from whence it issued, together with the depositions of a portion of the witnesses; and the commissioner has no power thereafter to take the depositions of other witnesses named in the commission. Benedict *v.* Richardson, 68 Hun (N. Y.) 202, 22 N. Y. Suppl. 839.

79. *District of Columbia.*— Massachusetts Mut. Acc. Assoc. *v.* Dudley, 15 App. Cas. 472.

Georgia.— Tillinghast *v.* Walton, 5 Ga. 335.

New Hampshire.— Whicher *v.* Whicher, 11 N. H. 348.

New York.— McLean *v.* Adams, 45 Hun 189.

Pennsylvania.— Beck *v.* Bethlehem, 2 Pa. Co. Ct. 511.

Texas.— Floyd *v.* Rice, 28 Tex. 341.

United States.— Hacker *v.* U. S., 37 Ct. Cl. 86.

b. Attorneys or Agents. An attorney, counsel, solicitor,[80] or agent of one of the parties to the cause is not competent to execute a commission or take depositions therein,[81] and with some exceptions[82] this disqualification has been held to

England.— Peacock's Case, 9 Coke 70*b*; Cooke *v.* Wilson, 4 Madd. 380.

See 16 Cent. Dig. tit. "Depositions," § 87 *et seq.*

Action against town — Taxpayer.— If the statute declares that a magistrate is not disqualified from acting because one of the parties is a town in which the magistrate is a taxpayer, he is not disqualified from taking a deposition in behalf of a town in which he is a taxpayer. New Hartford *v.* Canaan, 52 Conn. 158.

Action by county clerk to county commissioners.— In a suit brought by a county depositions taken before a justice who is also clerk of the county commissioners may, in the absence of unfair action on his part, be offered in evidence. Overseers of Poor *v.* Forest County, 91 Pa. St. 404.

Bookkeeper for party.— A notary public is not disqualified because he is the bookkeeper of one of the parties. Palmer *v.* Hudson River State Hospital, 10 Kan. App. 98, 61 Pac. 506.

Certificate of impartiality.— Where in an action by a corporation it is agreed that a commission may be executed by a person named, providing that he certifies that he is not interested in the suit or in plaintiff as an officer, member, or otherwise, a certificate that he is not of counsel or kin to any of the parties in the suit or interested therein is insufficient. Rooney *v.* Southern Bldg., etc., Assoc., 115 Ga. 400, 41 S. E. 648.

Extent of bias.— In Coffin *v.* Jones, 13 Pick. (Mass.) 441, the court permitted the deposition to be read, although the magistrate who took it on the part of defendant testified that he was defendant's friend, and felt it to be his duty to aid him by advice, etc., in his defense; that he was present at the taking of other depositions and gave advice; and that defendant then said he wished to take some depositions before him, after which he acted impartially between the parties. It also appeared that plaintiff agreed to the commission under which the deposition was taken, and declared himself satisfied with the magistrate's impartiality; and that the deposition was used at a previous trial without objection.

Foreign judge who is hostile to the party procuring the commission may be omitted, and the foreign court requested not to permit him to take part in the examination. Valentin *v.* Hall, 35 L. J. Q. B. 121, 14 Wkly. Rep. 606.

Intimacy with witness.—In Ongley *v.* Hill, 22 Wkly. Rep. 817, a commission was issued to a minister resident at a foreign court to examine a witness attached to the embassy, one of whom was the minister's personal attendant.

Name identical with that of interested party.— Mere identity of name of itself is not sufficient to establish the fact that the commissioner before whom a deposition is taken is the same person who is shown by the papers in the cause to be an interested party. Colgin *v.* Redman, 20 Ala. 650.

Proof of interest.— A mere suggestion of interest is insufficient. There must be an affidavit specifying the ground. Biays *v.* Merrihew, 3 Johns. (N. Y.) 251.

The interest of the commissioner with the party objecting on that ground is immaterial. Ballard *v.* Perry, 28 Tex. 347.

80. Whicher *v.* Whicher, 11 N. H. 348; Hacker *v.* U. S., 37 Ct. Cl. 86; Sayer *v.* Wagstaff, 5 Beav. 462, 12 L. J. Ch. 35; Fricker *v.* Moore, Bunb. 289; Selwyn's Case, Dick. 563, 21 Eng. Reprint 389. See Williams *v.* Rawlins, 33 Ga. 117; Clopton *v.* Norris, 28 Ga. 188; Gordon *v.* Gordon, 1 Swanst. 166, 1 Wils. C. P. 155, 36 Eng. Reprint 341.

Attorney in other cases.— That the officer who took a deposition is an attorney for one of the parties in other cases is no ground for suppressing the deposition. Burton *v.* Galveston, etc., R. Co., 61 Tex. 526.

Conclusiveness of finding below.— A finding below supported by evidence that a commissioner was not the attorney for one of the parties will not be disturbed. Augusta, etc., R. Co. *v.* Killian, 79 Ga. 234, 4 S. E. 165.

Relationship at time of taking deposition. — A deposition will not be suppressed on the ground of the professional relationship of the officer to the party procuring the testimony, where it is not shown to have existed at the time the deposition was taken. McGrew *v.* Wilson, (Tex. Civ. App. 1900) 57 S. W. 63.

Special employment.— An attorney in a distant city, employed to find and furnish the names of witnesses to prove certain facts, is incompetent to act as the notary to take the depositions of such witnesses. Testard *v.* Butler, 20 Tex. Civ. App. 106, 48 S. W. 753.

What constitutes relation.— A magistrate to be disqualified must be counsel or attorney within the meaning of the statute. Coffin *v.* Jones, 13 Pick. (Mass.) 441.

81. Smith *v.* Smith, 2 Me. 408; Mostyn *v.* Spencer, 6 Beav. 135, 9 Jur. 97, 14 L. J. Ch. 1.

Proof of agency.— The fact that the commissioner had two years previously addressed letters of inquiry about claims adverse to plaintiff's title, his appointment as agent not having been proven, is insufficient to show his incompetency. Craig *v.* Lambert, 44 La. Ann. 885, 11 So. 464.

82. Not interested in cause.— A partner of the solicitor of one of the parties, who is not retained in nor interested in the cause, is not disqualified. Potier *v.* Barclay, 15 Ala. 439.

Presumption as to scope of partnership.— A deposition will not be rejected because it was taken before a master who was the part-

extend to the partners,[83] and clerks of the attorneys or counsel.[84] However the mere fact of having been previously connected with the cause as attorney or counsel is not a ground of disqualification, if that connection has ended.[85]

c. Consanguinity or Affinity. The relationship by blood[86] or with some exceptions[87] the affinity of the commissioner or other like officer to a party to the cause[88] operates as a disqualification.

D. Compensation — 1. In General. Where depositions are taken within the state or in the federal courts, the fees of the officers designated to take them are fixed by statute.[89] But in the absence of any statute limiting or regulating the compensation of commissioners appointed to take depositions in suits or actions pending in other states, their compensation is the subject of adjustment by the court by whom they were appointed and whose officers they are.[90]

2. Amount. The compensation of a commissioner should not be limited by the fees fixed by statute for like services rendered by a notary public or a justice of the peace, nor should it exceed the fees allowed a referee, and in determining the question in a given case the limits furnished by these analogous employments should govern.[91]

ner of one of the counsel who appeared in the matter, as it will not be presumed, in the absence of proof, that the partnership covered business of this nature. Whitcher *v.* Morey, 39 Vt. 459.

83. Dodd *v.* Northrop, 37 Conn. 216; Swink *v.* Anthony, 96 Mo. App. 420, 70 S. W. 272; Nichols *v.* Harris, 18 Fed. Cas. No. 10,243, 1 McArthur Pat. Cas. 302.

84. Tillinghast *v.* Walton, 5 Ga. 335. *Contra*, Lopes *v.* De Tastet, 4 Moore C. P. 424, 16 E. C. L. 380.

Student in office of attorney.— Depositions taken by a student at law of an attorney in the cause, and in the office and presence of the attorney, are inadmissible. Glanton *v.* Griggs, 5 Ga. 424.

Clerk to solicitors and commissioners.— It is a ground to suppress depositions that the clerk to the commissioners was a clerk to one of the solicitors (Newton *v.* Foot, Dick. 793, 21 Eng. Reprint 479; Cooke *v.* Wilson, 4 Madd. 380) or parties (Shaw *v.* Lindsey, 15 Ves. Jr. 380, 33 Eng. Reprint 798).

Previous employment of an engrossing clerk by one of the solicitors will not incapacitate him from acting in a like capacity for the commissioners. Wood *v.* Freeman, 4 Hare, 552, 9 Jur. 549, 14 L. J. Ch. 371, 30 Eng. Ch. 552.

85. Wood *v.* Cole, 13 Pick. (Mass.) 279; Welborne *v.* Downing, 73 Tex. 527, 11 S. W. 501; Missouri, etc., R. Co. *v.* Byas, 9 Tex. Civ. App. 572, 29 S. W. 1122.

An attorney who acted for a party in obtaining a judgment may act as commissioner in taking a deposition for the party, to be used in a claim suit growing out of the judgment; he not being the attorney in the claim suit, and it not being shown that he has any interest in the event of the suit. Taylor *v.* Huntsville Branch Bank, 14 Ala. 633.

86. Call *v.* Pike, 66 Me. 350; Mostyn *v.* Spencer, 6 Beav. 135, 9 Jur. 97, 14 L. J. Ch. 1.

An uncle of one of the parties is incompetent. Groves *v.* Groves, 57 Miss. 658; Bean *v.* Quimby, 5 N. H. 94.

The brother of the attorney for one of the parties who has contracted for a conditional fee is not disqualified. Paris, etc., R. Co. *v.* Stokes, (Tex. Civ. App. 1897) 41 S. W. 484.

87. **A son-in-law** of a party is not disqualified as a party interested in the cause. Chandler *v.* Brainard, 14 Pick. (Mass.) 285; Heacock *v.* Stoddard, 1 Tyler (Vt.) 344.

88. **The brother-in-law** of a party is incompetent. Bryant *v.* Ingraham, 16 Ala. 116. See *contra*, Culver *v.* Benedict, 13 Gray (Mass.) 7. The fact that one of the parties had a brother-in-law who had resided within the state and was of the same name as the commissioner who took a deposition abroad is no evidence of the identity of the two or of the incompetency of the commissioner. Blakey *v.* Blakey, 33 Ala. 611.

Presumption.— Until the contrary appears, it will be presumed that the commissioner is not of kin to either party. Grigg *v.* Mallett, 111 N. C. 74, 15 S. E. 936. See Blair *v.* State Bank, 11 Humphr. (Tenn.) 84.

89. George *v.* Starrett, 40 N. H. 135; Lockwood *v.* Cobb, 5 Vt. 422; Edison Electric Light Co. *v.* Mather Electric Co., 63 Fed. 559.

90. Peters *v.* Rand, 108 Pa. St. 255. See Lyman *v.* Hayden, 118 Mass. 422.

A notary cannot recover for services in taking depositions in a case in which he was attorney for defendant, although his law partner was present representing defendant. Stewart *v.* Emerson, 70 Mo. App. 482.

91. Manning *v.* Standard Theatre, 83 Mo. App. 627; Watkins *v.* McDonald, 70 Mo. App. 357.

Analogous to compensation of referee.— Where the compensation is not fixed by statute the commissioner may be allowed compensation not to exceed the fees allowed a referee. Manning *v.* Standard Theatre, 83 Mo. App. 627.

As to the fixed fees of special examiners in England see Wright *v.* Larmuth, L. R. 10 Eq. 139, 22 L. T. Rep. N. S. 903, 18 Wkly. Rep. 1103; Payne *v.* Little, 21 Beav. 65.

In England commissioners are paid accord-

3. Liability For. The fees or charges of executing a commission are chargeable in the first instance to the party at whose request it was issued and executed,[92] and commissioners employed by the parties or counsel are entitled, if their compensation is not fixed by statute or has not been agreed on,[93] to recover such sums as their services are reasonably worth.[94]

VII. Bills in Equity.

A. To Perpetuate Testimony — 1. In General. A bill to perpetuate testimony or to examine witnesses *in perpetuam rei memoriam* is an original bill in anticipation of litigation not instituted, and is designed to secure the evidence of some present right or interest which may be endangered or lost, if the testimony on which it depends is not preserved.[95] It is not a bill of discovery in the strict

ing to the days they actually sit. Small *v.* Atwood, 4 L. J. Exch. Eq. 1, 1 Y. & Coll. Exch. 53. See Howell *v.* Tyler, 7 Jur. 525, 12 L. J. Ch. 223, 2 Y. & Coll. 284, 21 Eng. Ch. 284, where a small sum was allowed for perusing the pleadings.

Reference to ascertain amount.—An action to recover compensation may be restrained and a reference made to ascertain what is due. Ambrose *v.* Dunmow Union, 8 Beav. 43; Blundell *v.* Gladstone, 3 Jur. 413, 8 L. J. Ch. 109, 9 Sim. 455, 16 Eng. Ch. 455.

92. Paxson *v.* Macdonald, 97 Mo. App. 165, 70 S. W. 1101; Cullin's Estate, 18 Wkly. Notes Cas. (Pa.) 199; Grove *v.* Young, 15 Jur. 97, 20 L. J. Ch. 167; Parsons *v.* Benn, 19 L. J. Ch. 264; Rogers *v.* Aylmer, 5 Ir. Eq. 516; Milner *v.* Joseph, 5 Ir. Eq. 214.

A stenographer employed by a commissioner must look to the latter for his pay. Manning *v.* Standard Theatre, 83 Mo. App. 627. The commissioner is entitled to an allowance for a stenographer, where the parties have agreed that one should be employed. Watkins *v.* McDonald, 70 Mo. App. 357.

Commissioners have a lien for their fees and may refuse to return the depositions until they have been paid. Peters *v.* Beer, 14 Beav. 101, 15 Jur. 1024, 20 L. J. Ch. 424; Smith *v.* Hallen, 2 F. & F. 678. But see Lucan *v.* O'Malley, 8 Ir. Eq. 386; Doherty *v.* Doherty, 8 Ir. Eq. 379. But see Melvin *v.* Handley, 1 Wilcox (Pa.) 235, 6 Lanc. L. Rev. 47.

93. **Agreement with attorney.**— Authority to an attorney to engage the services of a commissioner carries with it as an incident the power to stipulate with him as to the amount of his compensation. Fairchild *v.* Michigan Cent. R. Co., 8 Ill. App. 591.

94. Peoples' Bank *v.* McLendon, 57 Ga. 384; Fairchild *v.* Michigan Cent. R. Co., 8 Ill. App. 591; Lyman *v.* Hayden, 118 Mass. 422; Paxson *v.* Macdonald, 97 Mo. App. 165, 70 S. W. 1101.

Compensation fixed by court.— In the absence of contract, where the court of another state has fixed the compensation of a commissioner appointed by it, he cannot sue in the state in which the commission was executed for the recovery of a larger sum upon a *quantum meruit*. Peters *v.* Rand, 108 Pa. St. 255.

Employment of counsel by commissioner. — The employment of a commissioner appointed under the authority of one state to take depositions in another carries with it no implied authority to employ counsel, either to instruct the commissioner in his own duties or to look after the interests of a party to the controversy to which the depositions relate. Lyman *v.* Hayden, 118 Mass. 422.

95. Hall *v.* Stout, 4 Del. Ch. 269; Hickman *v.* Hickman, 1 Del. Ch. 133; Tullis *v.* Stafford, 134 Ind. 258, 33 N. E. 1023; Crawford *v.* McAdams, 63 N. C. 67; Belfast *v.* Chichester, 2 Jac. & W. 439.

For grounds to sustain the bill see *supra*, IV.

Such bills are according to the usage of the Roman law. Mason *v.* Goodburne, Rep. T. Finch 391, 23 Eng. Reprint 214, which in Cooper Eq. p. 51, is said to be the first and leading case on a bill of this character.

In England, when lands are devised from the heir, the devisee, in order to perpetuate the testimony of witnesses, exhibits a bill in chancery against the heir, sets forth the will *verbatim* and suggests that the heir is inclined to dispute its validity. Then, defendant having answered, they proceed to issue as in other cases and examine the witness to the will, after which the cause is at an end without proceeding to any decree, no relief being prayed by the bill. This is what is known as proving a will in chancery. Hickman *v.* Hickman, 1 Del. Ch. 133.

Under U. S. Rev. St. (1878) § 866 [U. S. Comp. St. (1901) p. 663], providing that any circuit court on application to it as a court of equity may according to the usages of chancery direct depositions to be taken *in perpetuam*, if they refer to any matters that may be cognizable in any court of the United States, refers to the usage of the English chancery, and a proceeding cannot be maintained in equity under any circumstances by mere *ex parte* petition to take depositions *in perpetuam*, without any bill filed, or process issued, or served on defendants in interest, although they are not in the country. Green *v.* Compagnia Generale Italiana Di Navigation, 82 Fed. 490.

Effect of statute.— The Virginia code of 1849 providing for the perpetuation of testi-

sense of the term and cannot be made to perform the double functions of both species of these bills.[96]

2. NECESSARY AVERMENTS — a. In General. The ground or reason for perpetuating the testimony must be set forth.[97]

b. Title or Interest — (I) *OF COMPLAINANT.* The complainant must distinctly set forth his right, title, or interest in the matter or thing to which the evidence relates.[98]

(II) *OF DEFENDANT.* The bill must also show that defendant claims no title or interest in the subject-matter as to which the testimony is sought.[99]

c. Subject-Matter of Controversy. The bill must specifically state the subject-matter of the controversy.[1]

d. Inability to Obtain Judicial Investigation. The bill must aver that the facts to which the testimony relates cannot be made the subject of immediate judicial investigation, or if they can, that the sole right of action belongs to the other party, or that some impediment to an investigation exists or has been interposed by such other party.[2]

e. Naming Witnesses. Although it has been held that the names of the witnesses should be stated,[3] it has also been held that such a statement is unnecessary [4]

mony merely prescribed a new mode of taking depositions for that purpose and did not change the form of proceeding by a bill in equity for the same purpose. Smith *v.* Grosjean, 1 Patt. & H. (Va.) 109.

Parties.— The bill must be filed against all those concerned in interest. Glover *v.* Faulkner, 1 Vern. 452, 1 Eq. Cas. Abr. 234.

Necessity of filing.— It is improper to take depositions after the subpœna, before the bill is filed and without an order to take the testimony. Smith *v.* Grosjean, 1 Patt. & H. (Va.) 109.

Service of bill in first instance.— The court ordered a commission for examination of an aged witness to issue without requiring a bill to be served in the first instance, the object of the suit being to perpetuate testimony, and it having been sworn that there was danger of testimony being lost. Hunt *v.* Prentiss, 4 Grant Ch. (U. C.) 487.

To establish usury — Tender of amount due.— A bill filed by the sureties on a bond against the obligee, alleging that the bond was usurious, and that the knowledge of the usury was confined to the principal and defendant, and praying that the principal might be examined touching the usury in the consideration of the bond, and his testimony be perpetuated, will not be entertained unless the sureties offer to pay the amount which they acknowledge to be due. Crawford *v.* McAdams, 63 N. C. 67.

96. Ellice *v.* Roupell, 32 Beav. 299, 308, 318, 9 Jur. N. S. 530, 32 L. J. Ch. 563, 624, 8 L. T. Rep. N. S. 191, 2 New Rep. 3, 150, 11 Wkly. Rep. 579.

97. Hickman *v.* Hickman, 1 Del. Ch. 133; Norristown Ins., etc., Co. *v.* Burgess, 14 Montg. Co. Rep. (Pa.) 91; Mason *v.* Goodburne, Rep. T. Finch 391, 23 Eng. Reprint 214.

An allegation as to the old age and infirmity of the witnesses is unnecessary, and the denial and disproof of it can have no effect. Hall *v.* Stout, 4 Del. Ch. 269.

98. *Connecticut.*— Jerome *v.* Jerome, 5 Conn. 352.

Delaware.— Hickman *v.* Hickman, 1 Del. Ch. 133.

Kentucky.— May *v.* Armstrong, 3 J. J. Marsh. 260, 20 Am. Dec. 137.

North Carolina.—Smith *v.* Turner, 39 N. C. 433, 47 Am. Dec. 353.

England.— Cressett *v.* Mytton, 3 Bro. Ch. 481, 29 Eng. Reprint 655, 1 Ves. Jr. 449, 30 Eng. Reprint 431; Belfast *v.* Chichester, 2 Jac. & W. 439; Mason *v.* Goodburne, Rep. T. Finch 391, 23 Eng. Reprint 214; Gell *v.* Hayward, 1 Vern. Ch. 312, 23 Eng. Reprint 490.

See 16 Cent. Dig. tit. "Depositions," § 40.

Certainty.— The title of plaintiff ought to be plainly but succinctly stated, and that with all necessary and convenient certainty as to the material facts, and as to the time, place, manner, and other incidents. Jerome *v.* Jerome, 5 Conn. 352.

99. Jerome *v.* Jerome, 5 Conn. 352; May *v.* Armstrong, 3 J. J. Marsh. 260, 20 Am. Dec. 137.

1. Pettebone *v.* Lehigh Valley Coal Co., 4 Kulp (Pa.) 349.

Bill to establish deed.— A bill to perpetuate the testimony of witnesses to a deed should properly describe the deed. Smith *v.* Turner, 39 N. C. 433, 47 Am. Dec. 353.

2. Hall *v.* Stout, 4 Del. Ch. 269; Hickman *v.* Hickman, 1 Del. Ch. 133; Booker *v.* Booker, 20 Ga. 777; State *v.* Elliott, 75 Minn. 391, 77 N. W. 952; Barnsdale *v.* Lowe, 2 Russ. & M. 142, 11 Eng. Ch. 142; Angell *v.* Angell, 1 Sim. & St. 83, 24 Rev. Rep. 149, 1 Eng. Ch. 83; Parry *v.* Rogers, 1 Vern. Ch. 441, 23 Eng. Reprint 574; Morrison *v.* Arnold, 19 Ves. Jr. 670. See Brandlyn *v.* Ord, 1 Atk. 571, 26 Eng. Reprint 359; Pawlet *v.* Ingres, 1 Vern. Ch. 308, 23 Eng. Reprint 487.

3. Smith *v.* Turner, 39 N. C. 433, 47 Am. Dec. 353, a bill to perpetuate the testimony of witnesses to a deed. See also Smith *v.* Grosjean, 1 Patt. & H. (Va.) 109.

4. Since the purpose of a bill to perpetuate testimony may include the testimony of any

f. Facts as to Which Examination Is Sought. The facts as to which the plaintiff desires an examination of the witnesses should be set forth sufficiently to inform the defendant of the point or points as to which they are to be examined, but not the evidence which they are expected to give.[5]

g. Danger of Loss of Evidence. It must sufficiently appear by the bill that the complainant is in danger of losing the evidence sought to be perpetuated before a judicial investigation can be had.[6]

3. Prayer For Relief. As the object of the bill is attained so soon as the desired testimony is procured, it is sufficient to pray for a commission and subpœna, and a prayer for relief is unnecessary and improper.[7]

4. Demurrer. The remedy of a defendant who deems the bill insufficient to entitle the complainant to preserve the testimony is to demur; but it is too late to object after a commission has been ordered.[8]

5. Dismissal For Want of Prosecution. The bill may be dismissed for want of prosecution at any time before replication and examination of witnesses.[9]

6. Affidavit. No affidavit is necessary where the bill sets forth the ground or reason for perpetuating the testimony.[10]

7. Answer. The answer should not put in controversy matters which can be decided only on a trial of the main issue.[11] And an averment of readiness to

witness to certain facts material to the subject in controversy, the names of the witnesses need not be stated in the bill. Pettebone *v.* Lehigh Valley Coal Co., 4 Kulp (Pa.) 349.

5. Smith *v.* Turner, 39 N. C. 433, 47 Am. Dec. 353; Pettebone *v.* Lehigh Valley Coal Co., 4 Kulp (Pa.) 349; Cressett *v.* Mytton, 3 Bro. Ch. 481, 29 Eng. Reprint 655, 1 Ves. Jr. 449, 30 Eng. Reprint 431.

Bill to establish forgery of note.—Where a bill alleges that certain notes in respondent's possession have been forged, and prays for an order to perpetuate the testimony of the forger (in prison, and about to be sentenced), it is not necessary that it should set forth the notes *in hæc verba*. Graham *v.* Bank, 3 Lanc. L. Rev. 68.

Supplemental bill.— Where, after the completion of the examination of witnesses upon a bill to perpetuate testimony, the commission is closed, plaintiff cannot sustain a supplemental bill for the further examination of witnesses upon the ground that new material facts have been discovered since the filing of the former bill, without stating in the bill what his facts are. Knight *v.* Knight, 4 Madd. 1.

6. Booker *v.* Booker, 20 Ga. 777; State *v.* Elliott, 75 Minn. 391, 77 N. W. 952; Mason *v.* Goodburne, Rep. T. Finch 391, 23 Eng. Reprint 214.

7. Jerome *v.* Jerome, 5 Conn. 352; Hickman *v.* Hickman, 1 Del. Ch. 133. See also Smith *v.* Grosjean, 1 Patt. & H. (Va.) 109; Rose *v.* Gannel, 3 Atk. 439, 26 Eng. Reprint 1053; Anonymous, 2 Ventr. 365; Morrison *v.* Arnold, 19 Ves. Jr. 671.

If the bill prays for relief it will be dismissed because improperly joining distinct subjects. Jerome *v.* Jerome, 5 Conn. 352; Anonymous, 2 Ventr. 365.

The bill should pray for a commission and a subpœna to the parties concerned to show cause. Mason *v.* Goodburne, Rep. T. Finch 391, 23 Eng. Reprint 214.

The form of the prayer of the bill to take testimony *in perpetuam* is the same as in ordinary bills, except the requirement that the defendants abide the decree of the court. Green *v.* Compagnia Generale Italiana, etc., 82 Fed. 490.

8. Hickman *v.* Hickman, 1 Del. Ch. 133.

9. Anonymous, Amb. 237, 27 Eng. Reprint 158, 2 Ves. 497, 28 Eng. Reprint 318. But see Parr *v.* Howlin, San. & Sc. 124. The proper application is that plaintiff proceed within a given time and pay costs. Wright *v.* Tatham, 2 Sim. 459, 2 Eng. Ch. 459; Shrine *v.* Powell, 10 L. J. Ch. 18. See Barham *v.* Longman, 2 Sim. 460 note, 2 Eng. Ch. 460.

Want of reply.— The bill will not be dismissed for want of a reply, but a reply will be ordered, and plaintiff directed to proceed or pay costs. Beavan *v.* Carpenter, 11 Sim. 22, 34 Eng. Ch. 22.

10. Hickman *v.* Hickman, 1 Del. Ch. 133.

Contra.— A bill to perpetuate testimony must be supported by an affidavit that the witnesses are old and infirm or likely to die before the disputed question can be legally determined, but such affidavit is sufficient when made a part of the bill itself. Norristown Ins., etc., Co. *v.* Burgess, 14 Montg. Co. Rep. (Pa.) 91.

11. As for instance questions of title. May *v.* Armstrong, 3 J. J. Marsh. (Ky.) 260, 20 Am. Dec. 137; Pettebone *v.* Everhart, 4 Kulp (Pa.) 353. In Ellice *v.* Roupell, 32 Beav. 299, 308, 318, 9 Jur. N. S. 530, 32 L. J. Ch. 563, 624, 8 L. T. Rep. N. S. 191, 2 New Rep. 3, 150, 11 Wkly. Rep. 579, plaintiff filed a bill *in perpetuam*, on the ground that the matters in dispute could not be then made the subject of judicial investigation. Defendant answered, and plaintiff amended in immaterial matters. Defendant then pleaded that since answering plaintiff had himself filed another bill, raising the point in dispute and showing that the mat-

become defendant in an action by plaintiff to determine a dispute as to a title is impertinent, unless it is also averred that defendant is in possession.[12] An answer accompanied by a release of all claims on the part of defendant against plaintiff is sufficient to defeat the bill and authorize its dismissal.[13]

8. Setting Down Cause For Hearing. The bill is never brought to a hearing because the end is answered by the examination. If the cause is set down the bill will be dismissed with costs;[14] but the dismissal will not prejudice the plaintiff in the perpetuation of his testimony.[15]

9. Publication. The testimony when taken must be sealed and kept not to be published until after the death of the witness by a special order made on an affidavit showing such decease.[16]

10. Hearing — a. Scope of Inquiry. If defendant merely answers, and does not join in the commission[17] plaintiff will be confined to the interrogatories annexed to the bill.[18]

b. Questions Considered. Eligibility to a public office cannot be considered on the hearing of a bill to preserve testimony to prosecute an action for the office.[19]

B. To Take Testimony De Bene Esse — 1. In General. A bill to examine

ters in question could now be made the subject of judicial investigation, and it was held that the plea could not be sustained, and that if at all it should have been pleaded in the first instance.

12. Pettebone *v.* Everhart, 4 Kulp (Pa.) 353.

13. Hanford *v.* Ewen, 79 Ill. App. 327, where defendant released the petitioner from all claims against him for slanderous utterances.

14. Hickman *v.* Hickman, 1 Del. Ch. 133; Anonymous, Ambl. 237, 27 Eng. Reprint 158, 2 Ves. 497, 28 Eng. Reprint 318; Ellice *v.* Roupell, 32 Beav. 299, 308, 318, 9 Jur. N. S. 530, 32 L. J. Ch. 563, 624, 8 L. T. Rep. N. S. 191, 2 New Rep. 3, 150, 11 Wkly. Rep. 579; Hall *v.* Hoddesdon, 2 P. Wms. 162, 24 Eng. Reprint 683; Vaughan *v.* Fitzgerald, 1 Sch. & Lef. 316.

The reason why the bill is dismissed under such circumstances is that such a course is unnecessary, is productive of expense to the other side, and because it would permit the publication of the evidence. Hickman *v.* Hickman, 1 Del. Ch. 133.

15. Hickman *v.* Hickman, 1 Del. Ch. 133; Anonymous, Ambl. 237, 27 Eng. Reprint 158, 2 Ves. 497, 28 Eng. Reprint 318; Hall *v.* Hoddesdon, 2 P. Wms. 162, 24 Eng. Reprint 683.

Decree on dismissal.— Where a bill to perpetuate testimony is dismissed, the decree need not state that the dismissal is without prejudice to the perpetuation of the testimony. Acland *v.* Cuming, 2 Madd. 28.

16. Hall *v.* Stout, 4 Del. Ch. 269; Hickman *v.* Hickman, 1 Del. Ch. 133; Crawford *v.* McAdams, 63 N. C. 67; Ellice *v.* Roupell, 32 Beav. 299, 308, 318, 9 Jur. N. S. 530, 32 L. J. Ch. 563, 624, 8 L. T. Rep. N. S. 191, 2 New Rep. 3, 150, 11 Wkly. Rep. 579; Abergavenny *v.* Powell, 1 Meriv. 434, 35 Eng. Reprint 733; Dorset *v.* Girdler, Prec. Ch. 531, 24 Eng. Reprint 238; Cann *v.* Cann, 1 P. Wms. 567, 24 Eng. Reprint 520; Barnsdale *v.* Lowe, 2 Russ. & M. 142, 11 Eng. Ch. 142; Angell *v.* Angell, 1 Sim. & St. 83, 24 Rev. Rep. 149, 1 Eng. Ch. 83; Morrison *v.* Arnold, 19 Ves. Jr. 670. In Morrison *v.* Arnold, 19 Ves. Jr. 670, 673, a motion being made to publish the depositions of living witnesses, Eldon, Lord Chancellor, said: "There is no precedent that I can find for publishing these depositions. After considerable research, there is not a single instance, except of a person sick, incapable of traveling, or prevented by accident: all the orders, but in those excepted cases, stating, that the witness is dead." See *infra*, XIX, B.

Delivery of copies.— The court will not order copies of depositions taken to perpetuate the testimony of witnesses to be delivered out for the purpose of perfecting the title to an estate, even when the witnesses are dead. Teale *v.* Teale, 1 Sim. & St. 385, 1 Eng. Ch. 385.

Discretion of court.— Where depositions are taken under a bill *in perpetuam* it is a matter for discretion in the court to allow publication or not, according to the case made; but publication will not be ordered before the death of the witness unless in a strong case. Harris *v.* Cotterell, 3 Meriv. 678, 36 Eng. Reprint 260.

17. **But where defendant joins in the commission** or rule, plaintiff may exhibit such interrogatories as he pleases. Because by joining defendant is at liberty to examine as largely as he pleases, and this authorizes plaintiff to extend his examination to any matters suitable to his case. Hickman *v.* Hickman, 1 Del. Ch. 133.

18. In such a case the commission or rule will be for the benefit of plaintiff only, and he cannot go beyond the interrogatories annexed to the bill. Hickman *v.* Hickman, 1 Del. Ch. 133.

19. Such a question can come before the court only on a direct action at law to test the title to the office. Kellogg *v.* Warmouth, 14 Fed. Cas. No. 7,667.

witnesses *de bene esse* is in aid of a trial at law or in equity, where the testimony is in danger of being lost before the matter to which it relates can be examined into by the proper tribunal;[20] or it may be made a part of a bill in equity, brought in a case in which such testimony has a direct bearing and reference.[21]

2. NECESSARY AVERMENTS. The bill must sufficiently aver facts sufficient to authorize the court to issue a commission or order the taking of the testimony.[22] Thus the bill must aver that an action is pending[23] and the pleas therein,[24] the probable inability to procure the attendance of the witness at the trial and the reasons therefor,[25] the facts to be proved by the witnesses,[26] and the materiality of their testimony,[27] that the court may judge of the necessity of taking the testimony, and the danger of loss by delay.

3. AFFIDAVIT. The bill must always be accompanied with an affidavit showing the circumstances by which the evidence intended to be preserved is in danger of being lost.[28] It should name the witness,[29] specify the matters as to which his testimony is desired,[30] and state the grounds on which the testimony is sought —

20. *Delaware.*— Hall *v.* Stout, 4 Del. Ch. 269; Hickman *v.* Hickman, 1 Del. Ch. 133.

Indiana.— Tullis *v.* Stafford, 134 Ind. 258, 33 N. E. 1023.

New Hampshire.— Russell *v.* Fabyan, 35 N. H. 159.

Pennsylvania.— Vanriper *v.* Vanriper, 3 Lanc. Bar 155.

England.—Devis *v.* Turnbull, 6 Madd. 232; Ebden *v.* Prince, 8 Price 290; Philips *v.* Carew, 1 P. Wms. 117, 24 Eng. Reprint 318; *Ex p.* Coles, Brick 293; Grinnell *v.* Cobbold, 4 Sim. 546, 6 Eng. Ch. 546; Angell *v.* Angell, 1 Sim. & St. 83, 24 Rev. Rep. 149, 1 Eng. Ch. 83; Bowden *v.* Hodge, 2 Swanst. 258, 36 Eng. Reprint 614; Cock *v.* Donovan, 3 Ves. & B. 76, 35 Eng. Reprint 407. See Hart *v.* Strong, 2 Russ. 559, 3 Eng. Ch. 559.

Grounds for taking depositions *de bene esse* see *supra*, IV.

Nature of bill.— Such a bill is not a bill for relief. Mills *v.* Campbell, 1 Jur. 865, 7 L. J. Exch. Eq. 5, 2 Y. & C. Exch. 402.

Asking discovery.—In Thorpe *v.* Macauley, 5 Madd. 218, a demurrer to a bill for discovery and for a commission abroad in aid of defendant was overruled with liberty to amend, plaintiff being entitled to the commission, but not to the discovery.

Service of bill and subpœna.— Where defendant refused his consent to a commission and a bill was filed by plaintiff, defendant having retired from the jurisdiction of the court, service of the subpœna to appear and a bill on his attorney at law was ordered to be good service. Devis *v.* Turnbull, 6 Madd. 232.

Cause ended by examination.— After an examination of the witnesses there is an end of the cause. Morrison *v.* Arnold, 19 Ves. Jr. 670.

21. Hickman *v.* Hickman, 1 Del. Ch. 133; Shirley *v.* Ferrars, Moseley 389, 3 P. Wms. 77, 24 Eng. Reprint 976; Philips *v.* Carew, 1 P. Wms. 117, 24 Eng. Reprint 318.

22. Shedden *v.* Baring, 3 Anstr. 880; Anonymous, 1 Anstr. 201; Chimelli *v.* Chauvet, Younge 302.

Failure to make an essential averment in a bill to take depositions *de bene esse* is ground for demurrer; but ordinarily the allegations of the bill cannot be put in issue by an answer to a greater extent than could similar allegations in an affidavit to take depositions *de bene esse*. Richter *v.* Jerome, 25 Fed. 679.

23. Richter *v.* Jerome, 25 Fed. 679; Angell *v.* Angell, 1 Sim. & St. 83, 24 Rev. Rep. 149, 1 Eng. Ch. 83.

24. A bill to take testimony for use in an action at law should show the pleas, but it will be sufficient to refer to them so as to make them a part of the bill. Macaulay *v.* Shackell, 1 Bligh N. S. 96, 4 Eng. Reprint 809.

25. Cholmondely *v.* Oxford, 4 Bro. Ch. 157, 29 Eng. Reprint 828; Hankin *v.* Middleditch, 2 Bro. Ch. 641, 29 Eng. Reprint 355.

Residence of witness.— Where the depositions are intended to be used in an action of libel, it is unnecessary to allege that the witnesses resided in England at the time of the libel or have since left it. Macaulay *v.* Shackell, 1 Bligh N. S. 96, 4 Eng. Reprint 809.

26. Richter *v.* Jerome, 25 Fed. 679.

27. Richter *v.* Jerome, 25 Fed. 679; Macaulay *v.* Shackell, 1 Bligh N. S. 96, 4 Eng. Reprint 809. And see Shackell *v.* Macaulay, 3 L. J. Ch. O. S. 27, 2 Sim. & S. 79, 1 Eng. Ch. 79.

In the United States courts the bill must show that the depositions cannot be taken in the ordinary methods, and the necessity of resorting to equity. Richter *v.* Jerome, 25 Fed. 679.

28. Hickman *v.* Hickman, 1 Del. Ch. 133; Angell *v.* Angell, 1 Sim. & St. 83, 24 Rev. Rep. 149, 1 Eng. Ch. 83; Philips *v.* Carew, 1 P. Wms. 117, 24 Eng. Reprint 318.

29. Mendizabel *v.* Machado, 4 L. J. Ch. O. S. 142, 2 Sim. & St. 483, 1 Eng. Ch. 483.

Excusing absence of averment.— The danger of exposing the witness to be tampered with is not a sufficient reason for not naming him. Mendizabel *v.* Machado, 4 L. J. Ch. O. S. 142, 2 Sim. & St. 483, 1 Eng. Ch. 483.

30. Mendizabel *v.* Machado, 4 L. J. Ch. O. S. 142, 2 Sim. & St. 483, 1 Eng. Ch. 483.

as that the witness is aged,[31] infirm,[32] or in a dangerous state of health,[33] or that the witness or witnesses sought to be examined are acquainted with the facts and is or are the only witness or witnesses to the particular fact or facts.[34]

4. Publication. The ordinary course is that depositions are not to be published, unless the witness is dead or is absent, so that it is impossible to have a subsequent examination,[35] and then the publication can only be by special order.[36]

VIII. Application For Commission or Leave to Take Testimony.

A. Necessity. Except where depositions may be taken on notice[37] or the parties consent,[38] a formal application to take the testimony of a witness in the form of a deposition is essential and necessary.[39]

B. Consent.[40] A commission may issue or depositions may be taken by consent of the parties without an application or affidavit.[41]

31. Bellamy *v.* Jones, 8 Ves. Jr. 31, 6 Rev. Rep. 205, 32 Eng. Reprint 261.

The English rule is said to be that when the examination is sought because of age, the affidavit must state the witness to be seventy years old. See Hickman *v.* Hickman, 1 Del. Ch. 133. But see Fitzhugh *v.* Lee, Ambl. 65, 27 Eng. Reprint 38, where the witness was sixty years of age but afflicted with a dangerous disease.

32. Philips *v.* Carew, 1 P. Wms. 117, 24 Eng. Reprint 318.

33. Bellamy *v.* Jones, 8 Ves. Jr. 31, 6 Rev. Rep. 205, 32 Eng. Reprint 261.

34. Rowe *v.* ——, 13 Ves. Jr. 261, 33 Eng. Reprint 292; Bellamy *v.* Jones, 8 Ves. Jr. 31, 6 Rev. Rep. 205, 32 Eng. Reprint 261.

Necessity of stating age of witness.— Where the ground is that the matter lies in the knowledge of a single witness or of two the affidavit need state that fact only, and need not state the age of the witness. Cholmondely *v.* Oxford, 4 Bro. Ch. 157, 29 Eng. Reprint 828; Hankin *v.* Middleditch, 2 Bro. Ch. 641, 29 Eng. Reprint 355; Shirley *v.* Ferrars, Moseley 389, 3 P. Wms. 77, 24 Eng. Reprint 976.

35. Hickman *v.* Hickman, 1 Del. Ch. 133; Gasson *v.* Wordsworth, Ambl. 108, 27 Eng. Reprint 70, 2 Ves. 335, 28 Eng. Reprint 209; Bradley *v.* Crackenthorpe, Dick. 182, 21 Eng. Reprint 239; Price *v.* Bridgman, Dick. 144, 21 Eng. Reprint 223; Cann *v.* Cann, 1 P. Wms. 567, 24 Eng. Reprint 520. See *infra*, XIX, B.

Consent or strong case.—Depositions taken *de bene esse* under a bill are not published but by consent or on a very strong case being made. Harris *v.* Cotterell, 3 Meriv. 678, 36 Eng. Reprint 260.

Publication for comparison.— The court will refuse to permit depositions to be published in order to compare them with the depositions in the same cause taken on an examination in chief. Cann *v.* Cann, 1 P. Wms. 567, 24 Eng. Reprint 520.

36. Hickman *v.* Hickman, 1 Del. Ch. 133; Gasson *v.* Wordsworth, Ambl. 108, 27 Eng. Reprint 70, 2 Ves. 325, 28 Eng. Reprint 209; Cann *v.* Cann, 1 P. Wms. 567, 24 Eng. Reprint 520.

Form of order.— The order is that the depositions be published, and that the officer attend with and produce to the court at law the record of the whole proceedings, and that the parties may make such use of the same as by law he can. Atty.-Gen. *v.* Ray, 2 Hare 518, 24 Eng. Ch. 518.

37. See *infra*, XVI, A.

38. See *infra*, VII, B.

39. *Alabama.*— Worsham *v.* Goar, 4 Port. 441.

Louisiana.—Folse *v.* Kittredge, 15 La. Ann. 222; Mann *v.* Hunt, 1 Mart. 22.

Mississippi.— Ragan *v.* Cargill, 24 Miss. 540.

New Jersey.—Hendricks *v.* Craig, 5 N. J. L. 567; Den *v.* Farley, 4 N. J. L. 124.

New York.— Renwick *v.* Renwick, 10 Paige 420.

United States.— Sutton *v.* Mandeville, 23 Fed. Cas. No. 13,650, 1 Cranch C. C. 115.

Canada.— See Dickson *v.* Covert, 2 Ch. Chamb. (U. C.) 342.

See 16 Cent. Dig. tit. "Depositions," § 41 *et seq.*

Form.— A petition to a master to take testimony as to the incompetency of a witness who has been examined must be by petition in writing verified by affidavit. Gass *v.* Stinson, 10 Fed. Cas. No. 5,261, 2 Sumn. 605.

Without special application a commission may issue until the cause is set for hearing. Berry *v.* Wallin, 1 Overt. (Tenn.) 107. So a commission may issue in vacation to take the deposition of a witness during his last illness without an application therefor. Hays *v.* Johnson, 3 Houst. (Del.) 219.

40. For form of consent to take deposition see Knapp *v.* American Hand-Sewed Shoe Co., 63 Kan. 698, 66 Pac. 996; Moore *v.* Willard, 30 S. C. 615, 9 S. E. 273.

41. Pickard *v.* Bates, 38 Ill. 40; Colvin *v.* Warford, 18 Md. 274; Maryland, etc., Coal, etc., Co. *v.* Wingert, 8 Gill (Md.) 170; Knight *v.* Emmons, 4 Mich. 554; Renwick *v.* Renwick, 10 Paige (N. Y.) 420.

Necessity of consent at common law see *supra*, II, A, 3.

Effect of consent.— Consent is an admission that the cause is in a condition to permit a commission to issue. Maryland, etc., Coal, etc., Co. *v.* Wingert, 8 Gill (Md.) 170.

In New York a stipulation to waive irregularities in procuring or executing a com-

C. Who May Apply — 1. In General. Either party may make the application personally[42] or by attorney.[43]

2. Interveners. A person not a party to an action has no right to take depositions therein, although he intended to intervene.[44]

D. Who May Entertain. The application should be made to the court, a judge thereof, or such officer as may be designated by statute, and who has jurisdiction in the premises[45] and is within the county or district wherein he is

mission must be in writing. Mason, etc., Organ Co. *v.* Pugsley, 19 Hun 282.

Informalities in procuring the testimony, or in the return, may be waived by consenting to the commission. Bird *v.* Halsy, 87 Fed. 671.

Misapprehension.— An order to take a deposition *de bene esse* may be vacated when granted by the consent of the adverse party given under a misapprehension. Seymour *v.* Doull, 32 Nova Scotia 364.

Statutory requirement of order.— Where a deposition in a criminal case can be taken by the accused only by order of the court and upon notice to the attorney-general, a deposition cannot be taken without an order, although the attorney-general consent. Curtis *v.* State, 14 Lea (Tenn.) 502.

42. The taking of a deposition by one party will not preclude a subsequent application by the other. Woodruff *v.* Garner, 39 Ind. 246.

A dedimus may issue on the application of one party, although the other refuses to consent. Farnsworth *v.* Pierce, 7 Vt. 83.

Failure of applicant to proceed.— Where notice of intention to take a deposition has been given, and interrogatories and cross interrogatories have been filed, a party on whom the notice is served, as well as the party giving the notice, may obtain the commission and take the deposition, in case the other party fails to do so. Burton *v.* Galveston, etc., R. Co., 61 Tex. 526. Where plaintiff has obtained an order for a commission but has not served it, defendant is entitled as of course to a like order. Markland *v.* Jones, 6 L. J. Ch. 63. See also Sheward *v.* Sheward, 2 Ves. & B. 116, 35 Eng. Reprint 263, where a commission was granted to defendant who had cross-examined only on plaintiff's commission.

43. Brooks *v.* Brooks, 16 S. C. 621.

44. Riviere *v.* Wilkins, (Tex. Civ. App. 1903) 72 S. W. 608.

45. See, generally, cases cited *infra*, this note.

At common law where consent was obtained, the practice was to apply to the court in term or to a judge in vacation. Ragan *v.* Cargill, 24 Miss. 540.

Application must be made in open court and not to a judge at chambers. Peters *v.* Prevost, 19 Fed. Cas. No. 11,032, 1 Paine 64.

Court or judge.— A statute authorizing judges of a superior court to perform the duties of justices of the supreme court confers the power to summon a witness whose testimony is desired on the judges of the former court and not on the court itself. Fonda *v.* Armour, 49 How. Pr. (N. Y.) 72.

Inferior courts of record.— A statute conferring authority generally on courts of record to issue commissions will empower an inferior court of record to procure testimony in this mode. Watson *v.* Smith, 13 Wend. (N. Y.) 51.

Justices of the peace.— Under a statute authorizing a justice of the peace to issue a commission to take the testimony of a witness, who is not within the county or within an adjoining county, the justice may issue a commission to take the testimony of a witness without the state. Collins *v.* Shaffer, 78 Hun (N. Y.) 512, 29 N. Y. Suppl. 574. A statute authorizing the issue of a commission by a justice to take the deposition of a witness empowers the issue of a commission to take the deposition of a party to the action. Murphy *v.* Sullivan, 77 N. Y. Suppl. 950, 10 N. Y. Annot. Cas. 303.

Officers authorized to perform the duties of the court, the judges thereof, or of officers of other courts as clerks of the court (Cannon *v.* White, 16 La. Ann. 85; Henning *v.* Boyle, 112 Fed. 397), court commissioners (Fonda *v.* Armour, 49 How. Pr. (N. Y.) 72), or a county judge authorized to perform the duties of a supreme court judge at chambers (Lang *v.* Brown, 6 Hun (N. Y.) 256) may entertain the application.

Probate courts and judges.— A statute authorizing a judge of probate to "make and issue all warrants and processes that may be necessary or proper to carry into effect the powers granted to him," etc., authorizes the judge to issue a dedimus (Amory *v.* Fellowes, 5 Mass. 219), or a commission to take the deposition of the witness to a will, who resides without the state (*In re* High, 2 Dougl. (Mich.) 515). In New York the surrogates' courts have statutory power to issue a commission to take the testimony of witnesses without the state in a proceeding pending in such court (Matter of Wallace, 71 N. Y. App. Div. 284, 75 N. Y. Suppl. 838; Matter of Plumb, 64 Hun 317, 19 N. Y. Suppl. 79), or to direct the examination of a witness residing in another county to be taken before a referee (*In re* Gee, 33 N. Y. Suppl. 425, 24 N. Y. Civ. Proc. 241). The Washington code confers authority on a superior court sitting in probate to issue a commission to take necessary testimony. North America Reformed Presb. Church *v.* McMillan, 31 Wash. 643, 72 Pac. 502.

Referee to hear and determine cannot entertain an application for a commission (Rathbun *v.* Ingersoll, 34 N. Y. Super. Ct. 211), unless specially authorized (see Hughes *v.* Rees, 9 Ont. Pr. 86; Moffatt *v.* Prentice, 6 Ont. Pr. 33).

authorized to entertain and grant applications for taking testimony in the form of depositions.[46]

E. Time of Application — 1. In General. The application should be made with due diligence,[47] although if no prejudice has resulted delay may be disregarded, and the application granted.[48]

2. As Dependent on Condition of Cause — a. Perpetuation of Testimony. The object of perpetuating testimony is to preserve evidence which may be lost because of the inability of a party to bring the matter in controversy to a judicial investigation, and the consequent danger of losing the testimony. Hence depositions can be taken in this mode only in anticipation of litigation and when by no

The Maine statute which contemplates notice to all parties interested without regard to their residence does not limit the court to cases where one or more of the parties interested are non-residents, because of a single provision therein prescribing the notice to be given to non-residents. Ocean Ins. Co. *v.* Bigler, 72 Me. 469.

The provision of the Chinese exclusion acts for the examination before United States commissioners of Chinese persons alleged to be unlawfully in this country clothes them with a jurisdiction independent of the district court; and that court has no power to issue a dedimus potestatem to take testimony to be used in such an investigation. U. S. *v.* Hom Hing, 48 Fed. 635.

Trial of issue in chancery.— A motion for a commission to take testimony on an issue directed out of chancery should be made to the court in which the trial is to be had. Bourdeaux *v.* Rowe, 1 Bing. N. Cas. 721, 1 Hodges 93, 1 Scott 648, 27 E. C. L. 834.

46. Where by statute any justice of a court of general jurisdiction may grant an order for a commission, and by a subsequent statute all motions are required to be made within the district in which the action is triable or in a county adjoining, the place of application is governed by the latter statute. Sturgess *v.* Weed, 13 How. Pr. (N. Y.) 130.

District of trial.— An application for a commission to examine a witness may be made in the district in which the action is to be tried, or before a county judge in a county adjoining that of trial. Erwin *v.* Voorhees. 26 Barb. (N. Y.) 127.

47. Wilcox *v.* Stern, 89 N. Y. App. Div. 14, 85 N. Y. Suppl. 159; Rathbun *v.* Ingersoll, 34 N. Y. Super. Ct. 211; Forrest *v.* Forrest, 3 Bosw. (N. Y.) 661; Morse *v.* Grimke, 8 N. Y. Suppl. 1, 18 N. Y. Civ. Proc. 37; Carman *v.* Hurd, 1 Pinn. (Wis.) 619; Stuart *v.* Gladstone, 7 Ch. D. 394, 47 L. J. Ch. 154, 37 L. T. Rep. N. S. 575, 26 Wkly. Rep. 277; Brydges *v.* Fisher, 4 Moore & S. 458; Hart *v.* Strong, 2 Russ. 559, 38 Eng. Reprint 445; Todd *v.* Aylwin, 1 Sim. 271, 2 Eng. Ch. 271.

After replication.— A defendant is not guilty of laches in failing to procure a commission until six months after plea, where he acts immediately after the filing of the replication. Buchanan *v.* Trotter, 4 Fed. Cas. No. 2,075.

Delay of five months.— Where a cause was held open to enable a party to take testimony abroad, it was held that a delay of five months in applying justified the refusal of the application. Coombs *v.* Bodkin, 81 Minn. 245, 83 N. W. 986.

Injunction proceedings.— No greater diligence to take testimony under commission is required in proceedings by injunction, which are summary than in ordinary cases. Slidell *v.* Rightor, 4 Rob. (La.) 59.

In Louisiana an application the fifth day of the first term after an injunction is in time. Slidell *v.* Rightor, 4 Rob. 59.

Under the New York Code of Procedure, and in analogy to the former practice defendant had twenty days after reply in which to make application. Charleston Bank *v.* Hurlbut, 1 Sandf. 717.

48. Mills *v.* Campbell, 1 Jur. 865, 7 L. J. Exch. Eq. 5, 2 Y. & C. Exch. 402; De Rossi *v.* Polhill, 7 Scott 836; Todd *v.* Aylwin, 1 Sim. 271, 2 Eng. Ch. 271.

Imposition of terms where the applicant has been guilty of laches see *infra*, VII, J, 3, f.

Doubt of ability to use testimony.— In his discretion a surrogate may deny an application for a commission made after a large amount of testimony has been taken, where it is doubtful if it can be returned before the expiration of his term of office. Matter of Hodgman, 11 N. Y. App. Div. 344, 42 N. Y. Suppl. 1004.

Rights not impaired.—A delay in applying for the commission is no ground for denying it, where no right of the adverse party has been impaired, and the parties will be able to execute the commission before the next trial term. Hart *v.* Ogdensburg, etc., R. Co., 67 Hun (N. Y.) 556, 22 N. Y. Suppl. 401.

Stay of proceedings may be refused where there was an unreasonable delay in the application. Butler *v.* Fox, 9 C. B. 199, 67 E. C. L. 199.

In New York a commission may issue, although the application is not made until the fourth special term after issue joined. Beall *v.* Dey, 7 Wend. 513. An application should not be denied on the ground of laches, because of the refusal of the court to grant two prior applications on the ground of defects in the moving papers. Margulies *v.* Damrosch, 24 N. Y. App. Div. 15, 48 N. Y. Suppl. 936.

means the party can have a present investigation and determination.[49] To preclude a party from maintaining a bill of this nature it must rest in his power and not be optional with defendant to bring the matter to a present judicial investigation.[50]

b. Depositions De Bene Esse — (i) *Civil Actions* — (A) *Necessity of Pending Action.* The statutes generally provide that depositions other than those for the perpetuation of testimony[51] can be taken only in a pending action or where an action has been commenced by the service of process, or defendant or the subject-matter has been brought within the jurisdiction of the court in some recognized legal mode.[52] The service of process must have been duly made and must be

49. *Delaware.*— Hall *v.* Stout, 4 Del. Ch. 272; Hickman *v.* Hickman, 1 Del. Ch. 133.

Indiana.— Tullis *v.* Stafford, 134 Ind. 258, 33 N. E. 1023.

Massachusetts.— Greenfield *v.* Cushman, 16 Mass. 393.

Minnesota.— State *v.* Elliott, 75 Minn. 391, 77 N. W. 952.

North Carolina.— Crawford *v.* McAdams, 63 N. C. 67; Baxter *v.* Farmer, 42 N. C. 239; Smith *v.* Ballard, 3 N. C. 289.

Pennsylvania.— Pettebone *v.* Everhart, 4 Kulp 353; Graham *v.* Bank, 3 Lanc. L. Rev. 68. See Montgomery *v.* Dickey, 2 Yeates 212, where depositions taken in the presence of both parties before any cause was pending were permitted to be read to prove the lines of an old survey.

United States.— New York, etc., Coffee Polishing Co. *v.* New York Coffee Polishing Co., 9 Fed. 578, 20 Blatchf. 174.

England.— Spencer *v.* Peek, L. R. 3 Eq. 415, 15 Wkly. Rep. 478; Ellice *v.* Roupell, 32 Beav. 299, 308, 318, 9 Jur. N. S. 530, 32 L. J. Ch. 563, 624, 8 L. T. Rep. N. S. 191, 2 New Rep. 3, 150, 11 Wkly. Rep. 579; Cox *v.* Colley, Dick. 55, 21 Eng. Reprint 188; North *v.* Gray, Dick. 14, 21 Eng. Reprint 171; Dew *v.* Clarke, 1 L. J. Ch. O. S. 37, 1 Sim. & St. 108, 1 Eng. Ch. 108; Dorset *v.* Girdler, Prec. Ch. 531, 532, 24 Eng. Reprint 238 [*citing* Wynn *v.* Hatty]; Angell *v.* Angell, 1 Sim. & St. 83, 24 Rev. Rep. 149, 1 Eng. Ch. 383; Parry *v.* Rogers, 1 Vern. Ch. 441, 23 Eng. Reprint 574; Bechinall *v.* Arnold, 1 Vern. Ch. 354, 23 Eng. Reprint 519; Gell *v.* Hayward, 1 Vern. Ch. 312, 23 Eng. Reprint 490; Pawlet *v.* Ingres, 1 Vern. Ch. 308, 23 Eng. Reprint 487.

See 16 Cent. Dig. tit. "Depositions," § 13 *et seq.*

No suit being brought the party has no opportunity to examine his witness and is exposed to a future attack or to a future loss in a judicial investigation. Hickman *v.* Hickman, 1 Del. Ch. 133.

Raising triable issue.— Where a person files a bill to perpetuate testimony and raises an issue which can be tried at once at law, there is no proper case for a bill to perpetuate testimony on the trial, as the evidence when taken cannot be used if the witnesses are alive, and as the depositions are sealed up and can only be used when the case arises thereafter, it would be idle for the court when the question might be tried at once, and the witnesses might be examined, to perpetuate their testimony. Ellice *v.* Roupell, 32 Beav. 299, 9 Jur. N. S. 530, 32 L. J. Ch. 563, 8 L. T. Rep. N. S. 191, 2 New Rep. 3, 150, 11 Wkly. Rep. 579.

50. It is no objection to a bill to perpetuate testimony, that defendant, or any other person except plaintiff, can make the matter to which the testimony relates the subject of an immediate judicial investigation. Spencer *v.* Peek, L. R. 3 Eq. 415, 15 Wkly. Rep. 478.

Action after filing bill.— The institution of an action of ejectment by defendant after the filing of the bill will not preclude the complainant, because the action might be discontinued at any time before a commission could issue. Hall *v.* Stout, 4 Del. Ch. 269.

Existing suit.— A bill to perpetuate testimony relating to a matter which is the subject of an existing suit against plaintiff is demurrable, although plaintiff could not himself have made such matter the subject of present judicial investigation. Spencer *v.* Peek, L. R. 3 Eq. 415, 15 Wkly. Rep. 478.

Part of subject-matter involved.— The right to the relief will not be affected by the fact that defendant has instituted an action of ejectment as to a part of the realty in controversy. Hall *v.* Stout, 4 Del. Ch. 269.

51. See *supra*, VIII, E, 2, a.

52. *Alabama.*— Oxford Iron Co. *v.* Quinchett, 44 Ala. 487.

Delaware.— Hall *v.* Stout, 4 Del. Ch. 269; Hickman *v.* Hickman, 1 Del. Ch. 133.

Illinois.— Joy *v.* Aultman, etc., Mfg. Co., 11 Ill. App. 413.

Indiana.— Tullis *v.* Stafford, 134 Ind. 258, 33 N. E. 1023.

Louisiana.— Mayo *v.* Savory, 4 Rob. 1.

Maine.— Howard *v.* Folger, 15 Me. 447.

Massachusetts.— Amory *v.* Fellowes, 5 Mass. 219.

Mississippi.— Saunders *v.* Erwin, 2 How. 732.

New Jersey.— Lummis *v.* Strattan, 2 N. J. L. 245; Bickham *v.* Pissant, 1 N. J. L. 220.

New York.— Long Island Bottlers' Union *v.* Bottling Brewers' Protective Assoc., 65 N. Y. App. Div. 459, 72 N. Y. Suppl. 976; Conklin *v.* Hart, 1 Johns. Cas. 103, Col. Cas. 74. See also *In re* Whitney, 4 Hill 533; Wood *v.* Howard Ins. Co., 18 Wend. 646.

Ohio.— *In re* Rauh, 65 Ohio St. 128, 61

complete,[53] although in exceptional cases and for good reason shown, the taking of depositions may be permitted before the service of process[54] or before the return when actual service has been made.[55]

N. E. 701; Meader *v.* Root, 11 Ohio Cir. Ct. 81, 5 Ohio Cir. Dec. 61; Buss *v.* Horrocks, 1 Ohio Dec. (Reprint) 376, 8 West. L. J. 419; *Ex p.* Miller, 11 Ohio S. & C. Pl. Dec. 69, 8 Ohio N. P. 142 [*affirmed* in 21 Ohio Cir. Ct. 445, 12 Ohio Cir. Dec. 102]; *In re* Robinson, 9 Ohio S. & C. Pl. Dec. 763, 7 Ohio N. P. 105; *In re* Pfirman, 1 Ohio S. & C. Pl. Dec. 177.

Pennsylvania.— Richards *v.* Richards, 2 Chest. Co. Rep. 108.

South Carolina.— Ivy *v.* Clawson, 14 S. C. 267.

Vermont.— Bowen *v.* Hall, 22 Vt. 612.

United States.—Henning *v.* Boyle, 112 Fed. 397; Green *v.* Compagnia Generale Italiana Di Navigation, 82 Fed. 490.

England.—Philips *v.* Carew, 1 P. Wms. 117, 24 Eng. Reprint 318. Courts of equity will not entertain a bill for a commission to examine witnesses abroad in aid of a trial at law, where a present action may be brought but is not brought. Angell *v.* Angell, 1 Sim. & St. 83, 24 Rev. Rep. 149, 1 Eng. Ch. 83 [*explaining* Moodalay *v.* Morton, 1 Bro. Ch. 469, 28 Eng. Reprint 1245, 2 Dick. 652, 21 Eng. Reprint 425].

Canada.— Stovel *v.* Coles, 3 Ch. Chamb. (U. C.) 362; McKenzie *v.* Clark, 4 Ont. Pr. 95.

See 16 Cent. Dig. tit. "Depositions," § 13 *et seq.*

Time of application see *infra*, VIII, E.

After service of summons.— Under Ohio Rev. St. §§ 5243, 5266, authorizing the taking of the deposition of a party or a witness by the adverse party at any time after the service of summons, a deposition may be taken immediately after the summons is served. *In re* Rauh, 65 Ohio St. 128, 61 N. E. 701; *Ex p.* Miller, 11 Ohio S. & C. Pl. Dec. 69, 8 Ohio N. P. 142 [*affirmed* in 21 Ohio Cir. Ct. 445, 12 Ohio Cir. Dec. 102]; *In re* Robinson, 9 Ohio S. & C. Pl. Dec. 763, 7 Ohio N. P. 105.

After filing bill.— In South Carolina by rule of court a commission to examine witnesses may issue at any time after the filing of the bill. State Bank *v.* Rose, 2 Strobh. Eq. 90.

After nonsuit.— A deposition procured after a judicial nonsuit and before an order taking it off is taken during the pendency of the suit. Brown *v.* Foss, 16 Me. 257. Subsequently to the issuing of a commission, and prior to the taking of the deposition, the court granted a continuance of the cause on condition of plaintiff's paying costs. It was held that although the costs remained unpaid the depositions so taken might be used, since the neglect to pay the costs did not operate as a nonsuit, no order to that effect having been obtained. Kelton *v.* Montaut, 2 R. I. 151.

Effect of appearance.— Where plaintiff took a deposition in a cause before defendant was properly brought into court, the irregularity was not cured by defendant's subsequent voluntary appearance. Oxford Iron Co. *v.* Quinchett, 44 Ala. 487.

Attachment.— A suit is "pending," within the meaning of the first section of the statute concerning depositions, after an attachment of lands of non-residents is made, and before the summons is served. Lewin *v.* Dille, 17 Mo. 64.

Bastardy proceeding.— An *ex parte* deposition of the mother cannot be taken before the institution of a bastardy proceeding. McDonald *v.* Hobby, 1 Root (Conn.) 154.

The attendance of the witness is not a waiver of the irregularity, as the objection goes to the jurisdiction. Stovel *v.* Coles, 3 Ch. Chamb. (U. C.) 362.

Under U. S. Rev. St. (1878) § 868 [U. S. Comp. St. (1901) p. 664], depositions *in perpetuam* cannot be taken *ex parte* by a proceeding in equity without service of process upon defendants in interest, although they are out of the country. Green *v.* Compagnia Generale Italiana Di Navigation, 82 Fed. 490.

53. Lewis *v.* Northern R. Co., 139 Mass. 294, 1 N. E. 546.

The writ must be returned.— Holbrook *v.* Martin, 1 N. C. 562.

54. Moodalay *v.* Morton, 1 Bro. Ch. 469, 28 Eng. Reprint 1245, Dick. 652, 21 Eng. Reprint 425; McKenzie *v.* Clark, 4 Ont. Pr. 95.

Notice of institution of suit.— That interrogatories and notice to take depositions were served on defendant before citation in the case is not a sufficient objection to the deposition, as such service sufficiently apprises him that suit has been brought against him, and gives him an opportunity to cross-examine. Kottwitz *v.* Bagby, 16 Tex. 656.

Witness going to sea.— In Massachusetts under the provincial laws the depositions of witnesses going to sea might be taken after a bond given for review and before service of the writ. Hallowell *v.* Dalton, Quincy 33.

In England it has been held that a bill will lie before the commencement of an action, provided plaintiff annexes thereto an affidavit of the truth of his alleged statement with respect to the witnesses. Philips *v.* Carew, 1 P. Wms. 117, 24 Eng. Reprint 318 [*criticized* in Angell *v.* Angell, 1 Sim. & St. 83, 24 Rev. Rep. 149, 1 Eng. Ch. 83].

55. Richards *v.* Richards, 2 Chest. Co. Rep. (Pa.) 108, where the witness was dangerously ill.

On issuing a subpœna in an action for divorce a rule may be entered to take depositions before its return. Anonymous, 1 Yeates (Pa.) 404.

Taking subject to opinion of the court.— Depositions may be taken *de bene esse*, under a rule, subject to the opinion of the court before the return of the writ. Gilpin *v.* Semple, 1 Dall. (Pa.) 251, 1 L. ed. 123.

(B) *Joinder of Issue.* By the strict rules of the common law a deposition cannot be taken *de bene esse* before issue joined, and this requirement is preserved in many of the states by statute.[56] But this rule has been relaxed under special circumstances so as to permit the taking of testimony before answer when the exigencies of the case so require.[57]

Going witness — Party confined.— On affidavit that defendant is in confinement, and that material witnesses in his favor are about to leave the state, a rule will issue to take their depositions, although the writ is not returnable till the next term. Stotesbury *v.* Covenhoven, 1 Dall. (Pa.) 164, 1 L. ed. 83.

56. *Alabama.*— Daily *v.* Reid, 74 Ala. 415.

Indiana.— Phillips *v.* Phillips, 5 Ind. 190.

Michigan.— S. C. Hall Lumber Co. *v.* Gustin, 54 Mich. 624, 20 N. W. 616.

New York.— McColl *v.* Sun Mut. Ins. Co., 50 N. Y. 332 [*affirming* 34 N. Y. Super. Ct. 310]; Boyes *v.* Bossard, 87 N. Y. App. Div. 605, 84 N. Y. Suppl. 563; Jackson *v.* Bankcraft, 3 Johns. 259; Lee *v.* Huntoon, Hoffm. 447. And see Bell *v.* Richmond, 50 Barb. 571, 4 Abb. Pr. N. S. 44; *In re* Whitney, 4 Hill 533; Wood *v.* Howard Ins. Co., 18 Wend. 646; Hackley *v.* Patrick, 2 Johns. 478; Anonymous, 2 Cai. 259, Col. & C. Cas. 406. See also Murphy *v.* Sullivan, 77 N. Y. Suppl. 950, 10 N. Y. Annot. Cas. 303.

Tennessee.— Gaugh *v.* Henderson, 2 Head 628; Morrow *v.* Hatfield, 6 Humphr. 108.

Virginia.— Reed *v.* Gold, (1903) 45 S. E. 868.

United States.— See Turner *v.* Shackman, 27 Fed. 183.

England.— Finney *v.* Beesley, 17 Q. B. 86, 15 Jur. 898, 20 L. J. Q. B. 395, 79 E. C. L. 86; Noble *v.* Garland, Coop. 222, 35 Eng. Reprint 538, 19 Ves. Jr. 372, 34 Eng. Reprint 556; Clutterbuck *v.* Jones, 6 D. & L. 251, 13 Jur. 152, 18 L. J. Q. B. 11; Mondell *v.* Steele, 9 Dowl. P. C. 812, 5 Jur. N. S. 511; Watt's Case, Hardre 331; —— *v.* Brown, Hardre 315; Cook *v.* Stephens, 3 L. J. Ch. O. S. 226; King *v.* Allen, 4 Madd. 247; Cheminant *v.* De la Cour, 1 Madd. 208; Marsden *v.* Bound, 1 Vern. Ch. 331, 23 Eng. Reprint 502.

Canada.— Thomson *v.* Gye, 13 Ont. Pr. 273; Smith *v.* Greey, 10 Ont. Pr. 531.

See 16 Cent. Dig. tit. "Depositions," § 19.

Action need not be technically at issue, but it will be sufficient if some issue is raised by the pleadings. Smith *v.* Grcey, 11 Ont. Pr. 38.

Consent to take a deposition is an admission that the issues are made up. Maryland, etc., Coal, etc., Co. *v.* Wingert, 8 Gill (Md.) 170.

Effect of amending pleadings.— Plaintiff by amending his bill does not postpone his liability to be examined until after the time for answering the amendments expires. Fowler *v.* Boulton, 12 Grant Ch. (U. C.) 437.

If issue is joined as to one defendant a commission may issue. Treadwell *v.* Pomeroy, 2 Thomps. & C. (N. Y.) 470. Defendant has a right to examine plaintiff as soon as his answer is filed, although there may be other defendants who have not answered. Fowler *v.* Boulton, 12 Grant Ch. (U. C.) 437.

Setting aside decree permitting answer.— The validity of a deposition taken after joinder of issue is not affected by the subsequent rescission of an interlocutory decree which permitted the answer to be filed. Brooke *v.* Berry, 2 Gill (Md.) 83.

Setting aside decree pro con.— Where a party defendant to a bill in equity died before the time to answer expired and a decree *pro confesso* taken against his administrator was set aside and permission given him to answer, depositions taken after the administrator was made a party, and also after setting aside the decree but before answer, were held to have been taken before the cause was at issue. Henderson *v.* Hall, 134 Ala. 455, 32 So. 840.

Time of objection.—See Vesturme *v.* Way, 15 Wkly. Notes Cas. (Pa.) 224, where the commission was returned before plea and although the claim would be barred by limitation if the deposition were rejected, the court declined to pass on its validity in advance of the trial.

57. *Arkansas.*— Blackburn *v.* Morton, 18 Ark. 384.

Colorado.— Glenn *v.* Brush, 3 Colo. 26.

Illinois.— Doyle *v.* Wiley, 15 Ill. 576.

Maryland.— Lingan *v.* Henderson, 1 Bland 236.

New Jersey.— Leonard *v.* Sutphen, 7 N. J. Eq. 545.

New York.— Bell *v.* Richmond, 50 Barb. 571, 4 Abb. Pr. N. S. 44; Odivene *v.* Hills, 1 Wend. 18; Packard *v.* Hill, 7 Cow. 489; Hackley *v.* Patrick, 2 Johns. 478; Brain *v.* Rodelicks, 1 Cai. 73; Anonymous, 2 Cai. 259, Col. & C. Cas. 406; Fort *v.* Ragusin, 2 Johns. Ch. 146.

Texas.— Connor *v.* Mackey, 20 Tex. 747.

United States.— The Pride of the Ocean, 19 Fed. Cas. No. 11,419, 10 Ben. 610.

England.— Finney *v.* Beesley, 17 Q. B. 86, 15 Jur. 898, 20 L. J. Q. B. 395, 79 E. C. L. 86; Bagnold *v.* Green, Cary 48, 21 Eng. Reprint 26, Dick. 2, 21 Eng. Reprint 166; Braun *v.* Mollett, 16 C. B. 514, 3 C. L. R. 925, 24 L. J. C. P. 213, 81 E. C. L. 514; Noble *v.* Garland, Coop. 222, 35 Eng. Reprint 538, 19 Ves. Jr. 372, 34 Eng. Reprint 556; Clutterbuck *v.* Jones, 6 D. & L. 251, 13 Jur. 152, 18 L. J. Q. B. 11; Forbes *v.* Forbes, 9 Hare 461, 41 Eng. Ch. 461; Shackell *v.* Macaulay, 3 L. J. Ch. O. S. 27; Southwell *v.* Limerick, 9 Mod. 133; Mendizabel *v.* Machado, 2 Russ. 540, 4 L. J. Ch. O. S. 62, 3 Eng. Ch. 540, 38 Eng. Reprint 438; Bower *v.* Child, 3 Sim. 457, 6 Eng. Ch. 457. See Atwood *v.* Hurrill, 2 Fowl. Exch. Pr. 126; Byrne *v.* Byrne, 2 Molloy 440.

Canada.— McClennaghan *v.* Buchanan, 7 Grant Ch. (U. C.) 92.

See 16 Cent. Dig. tit. "Depositions," § 19.

Before appearance.— Under special cir-

(c) *Abatement of Action.* A deposition cannot be taken after the abatement of the action by the death of a party and before its revival.[58]

(d) *Cause Ready For Trial.* Unless under special circumstances depositions will not be permitted to be taken if the cause is ready, has been noticed, or set for trial. This rule is specially applicable in equity causes.[59]

(e) *During Trial.* Ordinarily depositions cannot be taken during the progress of a trial,[60] nor, without special order made upon sufficient showing after

cumstances the taking of a deposition before appearance may be authorized. Allen *v.* Annesley, 2 Jones 260; Campbell *v.* Atty.-Gen., 11 Jur. N. S. 922, 13 L. T. Rep. N. S. 356, 14 Wkly. Rep. 45; Frere *v.* Green, 19 Ves. Jr. 319, 34 Eng. Reprint 536.

Commission by consent.— A deposition taken under a consent commission cannot be objected to on the ground that the replication was not filed at the time the deposition was taken, as the consent is an admission that the issues are made up. Maryland, etc., Coal, etc., Co. *v.* Wingert, 8 Gill (Md.) 170.

Contemplated issue.— Depositions may be taken on a contemplated issue. Maze *v.* Heckinger, 13 Ky. L. Rep. 541. In Street *v.* Cuthbert, 3 Can. L. J. 9, leave was granted to administer interrogatories before plea pleaded, leave to plead several matters being asked for in the same summons, and the interrogatories having particular reference to the pleas sought to be pleaded.

Contempt of witness.— Ordinarily defendant must answer before the testimony is taken, but if after being served with process he refuses to answer or absconds the depositions have been allowed to be taken on these facts being proved. Green *v.* Compagnia Generale Italiana Di Nav., 82 Fed. 490; Lancaster *v.* Lancaster, 6 Sim. 439; Frere *v.* Green, 19 Ves. Jr. 319, 34 Eng. Reprint 536, where it was said by Lord Eldon that there is no instance of such an examination before appearance, except after service of subpœna, and then, there being no appearance, the court, holding defendant to be in contempt, has granted the examination.

Death of witness before replication.— In Marsden *v.* Bound, 1 Vern. Ch. 331, 23 Eng. Reprint 502, a deposition *de bene esse* taken before answer was permitted to be read, the witness having died before replication.

Difficulty in transmitting commission.— Where the witness resided in a foreign port which was open only to certain privileged vessels, a commission issued where an opportunity of transmitting it by such a vessel presented itself, although the cause was not at issue. Brain *v.* Rodelicks, 1 Cai. (N. Y.) 73.

Retarding joinder of issue.— Plaintiff may be permitted to take depositions *de bene esse*, where defendant delays answering and prevents a joinder of issue. Coveny *v.* Athill, Dick. 355, 21 Eng. Reprint 306; Cann *v.* Cann, 1 P. Wms. 567, 24 Eng. Reprint 520.

58. Kershman *v.* Swhela, 59 Iowa 93, 12 N. W. 807; Mitchell *v.* Mitchell, 1 Gill (Md.) 66; Ela *v.* Rand, 4 N. H. 54.

Where, pending the execution of a commission abroad, the suit abated by the death of plaintiff, but the witnesses were examined before notice of the death, the examination was held to be regular, although another witness was living. Thompson's Case, 3 P. Wms. 195, 24 Eng. Reprint 1027.

59. Salmon *v.* Clagett, 3 Bland (Md.) 125; Paton *v.* Westervelt, 5 How. Pr. (N. Y.) 399.

Statutory provisions.— Where the state statute requires a deposition in chancery to be taken within six months after replication, it is of no validity if taken after that time, unless taken by consent or by order of the court, or unless it was taken out of the district. Wiggins *v.* Wiggins, 29 Fed. Cas. No. 17,627, 1 Cranch C. C. 299.

Supersession of rule by statute.— A statute providing that evidence shall be taken in the same manner in equity as at law supersedes a rule in equity whereby a cause is deemed set for hearing four months after replication, so as to permit a commission to issue after the expiration of the four months. Pingree *v.* Coffin, 12 Cush. (Mass.) 600.

The early New York rule was that a defendant intending to sue out a commission was required to give notice of his intention before he received notiee of trial, or within a reasonable time after issue joined according to the circumstances of the case (Jones *v.* Ives, 1 Wend. 283; Burr *v.* Skinner, 1 Johns. Cas. 391); and this rule was not changed by the Code of Procedure (Brokaw *v.* Bridgman, 6 How. Pr. 114, Code Rep. N. S. 407).

Prior opportunity.— An application made after the cause has been noticed and moved for trial will be denied, where by stipulation ample opportunity was afforded to take the deposition before that time. Wilcox *v.* Stern, 89 N. Y. App. Div. 14, 85 N. Y. Suppl. 159.

In Canada defendant is entitled to examine plaintiff before a special examiner, notwithstanding that the cause has been set down and notice of examination and hearing served. Clarke *v.* Hawke, 1 Ch. Chamb. (U. C.) 346.

Permission to examine orally.— The refusal to permit depositions to be taken by commission in a case which was set for trial at a previous term, and where the application is made about the time the trial is to be had, is not oppressive, when accompanied by permission to orally examine the witnesses who are in attendance. Hamilton *v.* Walters, 3 Greene (Iowa) 556.

After adjournment.— In Bank *v.* Farques, Ambl. 145, leave was given to examine witnesses after adjournment of the cause.

60. Worthy *v.* Shields, 90 N. C. 192.

Inability to give notice.— As where a particular mode of taking depositions on

argument.[61] However they have been permitted to be taken during the trial under special circumstances, and where the court was vested with discretion,[62] and after the close of plaintiff's case.[63] So testimony in rebuttal has been permitted to be taken in this mode.[64]

(F) *After Default, Trial, or Judgment.* Depositions may be taken after defendant has made default in pleading and a decree *pro confesso* has been entered,[65] but not after a trial and determination of the matters in controversy.[66]

(G) *On Appeal.* Although it has been held that a commission cannot issue pending an appeal from the judgment,[67] it has also been held that the pendency of an appeal will not preclude the right to take a deposition to preserve testimony,[68] and that the right will not be lost where an appeal has been taken but not

notice is prescribed. Ogden *v.* Robertson, 15 N. J. L. 124.

Place of taking remote from court-house. — A party cannot be required, during the progress of a trial, to take a rebutting deposition at a place so remote from the court-house that he cannot be present at the resumption of the trial. Wise *v.* Postlewait, 3 W. Va. 452.

61. Anonymous, 4 Hen. & M. (Va.) 409; Dangerfield *v.* Claiborne, 4 Hen. & M. (Va.) 397.

62. *Colorado.*— Willard *v.* Mellor, 19 Colo. 534, 36 Pac. 148.

New Hampshire.— Deming *v.* Foster, 42 N. H. 165.

New Jersey.— Johnson *v.* Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527.

New York.— Cole *v.* Cole, 12 Hun 373.

Canada.— Thompson *v.* Hind, 1 Ch. Chamb. (U. C.) 247.

See 16 Cent. Dig. tit. "Depositions," § 20.

As condition of continuance.— The taking of the evidence of attending witnesses by deposition may be directed as the condition of a continuance. Thomas *v.* Black, 84 Cal. 221, 33 Pac. 103.

Expediting trial.— A statute authorizing the court to order the taking of depositions whenever it is deemed necessary to determine the rights of the parties or to expedite the trial of the cause empowers the court to permit the taking of depositions during the progress of the trial. Humbarger *v.* Carey, 145 Ind. 324, 42 N. E. 749, 44 N. E. 302.

63. Bronson *v.* Bronson, 4 Brewst. (Pa.) 394, a libel for divorce.

64. Stegner *v.* Blake, 36 Fed. 183.

65. Jordan *v.* Jordan, 17 Ala. 466; Planters', etc., Bank *v.* Walker, 7 Ala. 926. In Higgins *v.* Horwitz, 9 Gill (Md.) 341, an interlocutory decree passed against two defaulting defendants, and an *ex parte* commission was ordered. On the same day the guardian of an infant defendant appeared, and a commission was then issued to commissioners "as named on the part of the complainant and defendants," requiring notice to be given "to the respective parties," and it was held that this was a commission in chief, although the statute provided for an *ex parte* commission as against defaulting defendants.

The deposition of one of two defendants may be taken after he has suffered a default. Bacon *v.* Campbell, 12 Can. L. J. N. S. 17.

66. McColl *v.* Sun Mut. Ins. Co., 34 N. Y. Super. Ct. 310 [*affirmed* in 50 N. Y. 332]; White *v.* White, 22 R. I. 602, 48 Atl. 1038. See Lenox *v.* Clifton, Toth. 192, 21 Eng. Reprint 165; Throckmorton *v.* Cromwell, Toth. 85, 21 Eng. Reprint 131; Touck *v.* Thomas, Toth. 85, 21 Eng. Reprint 131; Anonymous, Cary 27, 21 Eng. Reprint 15, in which an examination after hearing was permitted. But the authority of these cases is doubted. See 6 Mews' Eng. Case L. Dig. 994.

After commissioner's report.— A deposition taken as to matters controverted in a commissioner's report may be disregarded. Buster *v.* Holland, 27 W. Va. 510.

After interlocutory decree.— An act authorizing the taking of depositions "from the filing of the bill to the final hearing" will not authorize the issue of a commission after an interlocutory decree to take depositions as to matters settled by the decree. Moore *v.* Hilton, 12 Leigh (Va.) 1. But see Summers *v.* Darne, 31 Gratt. (Va.) 791, in which it was said that there was no rule of practice or of law which precluded a party from taking new evidence on a question of fact passed upon by an interlocutory decree, even before a rehearing is obtained.

Examination of aged witness for new trial. — In Anonymous, 6 Ves. Jr. 573, 31 Eng. Reprint 1202, on suggestion of an intention to move for a new trial an order was made to examine a witness over seventy.

67. Perkins *v.* Testerment, 3 Greene (Iowa) 207; McColl *v.* Sun Mut. Ins. Co., 50 N. Y. 332 [*affirming* 34 N. Y. Super. Ct. 310].

Cause pending in another court.— A justice of the peace has no power to take a deposition to be used in the county court where the cause is pending in the supreme court on exceptions and could not be pending in the county court at the term named in the caption. Bowen *v.* Hall, 22 Vt. 612.

Other remedy.— In Richter *v.* Jerome, 115 U. S. 55, 5 S. Ct. 1162, 29 L. ed. 345, the supreme court of the United States declined to grant a commission, pending an appeal, to take testimony *in perpetuam* for use below in the event of reversal, nothing appearing to show that the testimony could not be taken on application to the circuit court.

68. Long *v.* Straus, 124 Ind. 84, 24 N. E. 664.

Probate of will.— A statute permitting a

perfected;[69] and that a rule may be entered below to take depositions to be read in the event of reversal and the award of a venire de novo.[70]

(H) *After Filing or Publication.* After depositions taken have been filed, published, and read, the adverse party will not be permitted to take depositions on his behalf, unless for special reasons justifying a further examination, and on explanation of the previous neglect to move.[71]

(II) *Criminal Proceedings.* Depositions in criminal cases should not be taken until after indictment,[72] and when the case is pending in court.[73]

F. Affidavit[74]— **1. Necessity.** The particular facts upon which the right to procure the testimony depends should usually be presented by affidavit, verified petition, or the like.[75]

deposition to be taken in proceedings to probate a will authorizes the taking of a deposition on appeal from an order admitting the will to probate. *In re* Arrowsmith, 206 Ill. 352, 69 N. E. 77.

Probate proceedings.— Ky. Gen. St. c. 113, § 31, providing that when a will is offered for probate, and an attesting witness is out of the state or unable to attend, the court may cause a commission to issue annexed to the will, authorizing a deposition, does not apply to proceedings in the circuit court on appeal from the county court in probate proceedings, and depositions in the circuit court may be taken in such a case as in any other civil proceeding. Moore *v.* Smith, 88 Ky. 151, 10 S. W. 380, 10 Ky. L. Rep. 729.

69. A rule to take the depositions of ancient, infirm, and going witnesses may be granted after an appeal has been taken from the decision of a justice of the peace, but before a transcript of his judgment has been filed in the court of common pleas. Harlan *v.* Stewart, 2 Rawle (Pa.) 333.

70. Huidekoper *v.* Cotton, 3 Watts (Pa.) 56.

Danger of losing testimony.— A suit having been dismissed on demurrer, and an appeal from such dismissal having been taken to the United States supreme court, which probably would not be decided in less than two or three years, a bill to take depositions *de bene esse* of aged and infirm witnesses whose testimony would be material if the decision were reversed and the case remanded for trial upon the merits ought to be allowed. Richter *v.* Jerome, 25 Fed. 679.

71. Woodlin *v.* Hynson, 1 Harr. (Del.) 224; Hamersly *v.* Lambert, 2 Johns. Ch. (N. Y.) 432; Howard *v.* Prince, 3 Jur. 766; Smith *v.* Turner, 3 P. Wms. 413, 24 Eng. Reprint 1124; Cann *v.* Cann, 1 P. Wms. 567, 24 Eng. Reprint 520. See Hook *v.* Hackney, 16 Serg. & R. (Pa.) 385, holding that after plaintiff has had a commission executed, defendant may have a new commission to examine the same witnesses on matters not inquired of by plaintiff's interrogatories.

Object of rule.— This rule is intended to guard against the mischiefs which would result from holding out an opportunity to supply a defect by fabricated evidence. Hamersly *v.* Lambert, 2 Johns. Ch. (N. Y.) 432.

After filing answers to interrogatories.— Where parties are permitted to interrogate each other, a party putting interrogatories need not sue out a commission until the answers are filed. Montgomery *v.* Russell, 7 Mart. N. S. (La.) 288.

In England applications have been granted after publication to examine on new matter on terms of not delaying the trial (Newland *v.* Horseman, 2 Ch. Cas. 74, 1 Vern. Ch. 21, 23 Eng. Reprint 275) and to examine as to the credit of witnesses previously cross-examined (Wood *v.* Hammerton, 9 Ves. Jr. 145, 32 Eng. Reprint 557). See also Scott *v.* Allgood, Prac. Reg. Ex. 87, where after publication in the original cause plaintiff in the cross cause was permitted to examine.

72. Com. *v.* Ricketson, 5 Metc. (Mass.) 412; People *v.* Restell, 3 Hill (N. Y.) 289.

A reasonable time after the arrest should be allowed the accused to employ counsel, where he requests it. Otherwise the deposition will be invalid. People *v.* Restell, 3 Hill (N. Y.) 289.

73. Couch *v.* State, 63 Ala. 163, under the Alabama statute.

Recognizance as condition precedent.— Nev. Cr. Prac. Act (1861) § 167, as amended in 1867, requiring the magistrate to take from each of the material witnesses examined before him on behalf of the people a written recognizance to appear and testify at the trial, does not make the taking of a recognizance a condition precedent to the taking of a witness' deposition. State *v.* Parker, 16 Nev. 79.

74. **Affidavits** generally see Affidavits, 2 Cyc. 1.

75. Gass *v.* Stinson, 10 Fed. Cas. No. 5,261, 2 Sumn. 605.

In England in certain cases, as where the application is made on the ground of the ill-health of the witness, there must be an affidavit as to his condition. Bellamy *v.* Jones, 8 Ves. Jr. 31, 6 Rev. Rep. 205, 32 Eng. Reprint 261.

In Kentucky it is not necessary that an affidavit should be filed to authorize the court to grant an order to take a deposition, but it is otherwise where the application is made to the clerk. Thomas *v.* Davis, 7 B. Mon. 227.

Special statute.— No affidavit was necessary to obtain an order for the examination of a non-resident witness under the New York police act of 1844. People *v.* Hadden, 3 Den. (N. Y.) 220.

Proof of fact of affidavit.— The fact that an affidavit which cannot be found was actually made may be proved by the clerk.

2. Who May Make. When practicable the affidavit should be made by the party for whose benefit the testimony is sought.[76] When not practicable because of his absence or his lack of personal knowledge, or where permitted by statute, it may be made by his attorney or agent,[77] or by any person acquainted with the facts, although not a party to the suit.[78]

3. Who May Take. The affidavit must be sworn to before any duly qualified officer.[79]

4. Necessary Statements and Averments — a. In General.[80] The affidavit should set forth all the facts requisite to entitle the applicant to take the desired testimony, and ordinarily will be sufficient if it substantially complies with the statute.[81] It should be as positive as the circumstances of the case will permit;[82] and although affidavits on information and belief have been held sufficient,[83] the

Taylor *v.* Illinois Bank, 7 T. B. Mon. (Ky.) 576; Foster *v.* Montgomery, 6 Humphr. (Tenn.) 231.

76. Brown *v.* McConnel, 1 Bibb (Ky.) 265.

One of several parties may make the required affidavit. Tayon *v.* Hardman, 23 Mo. 539.

Where the action is brought in the name of a nominal party, the affidavit may be made by the real party in interest. Curle *v.* Beers, 3 J. J. Marsh. (Ky.) 170.

In an action on an insurance policy an affidavit of an agent will not be received in support of a commission to examine abroad; it must be made by the party or his attorney. Bonham *v.* Leigh, 5 Price 444.

77. Reese *v.* Beck, 24 Ala. 651; Weeks *v.* Deblac, 2 Mart. (La.) 135; Eaton *v.* North, 7 Barb. (N. Y.) 631, 3 Code Rep. (N. Y.) 234; Beall *v.* Dey, 7 Wend. (N. Y.) 513; Lloyd *v.* Henderson, 6 Ont. Pr. 254.

A statute permitting a stranger to the action to make the affidavit is sufficient to authorize the attorney of the party to act in the premises. Young *v.* McLemore, 3 Ala. 295.

Authority of attorney.— A rule for a commission will not be stayed until the attorney applying files his warrant. Boutlier *v.* Johnson, 2 Browne (Pa.) 17.

Information and belief.— In Eaton *v.* North, 7 Barb. (N. Y.) 631, the affidavit was held sufficient where the party who applied for the commission himself residing out of the county, his attorney signed the affidavit in support of the application, and swore that the witness was material in his information and belief, and no laches was imputable to the party applying.

Excusing omission of party to make affidavit.— An affidavit by an attorney based on information derived from his client is insufficient if it states no reason why it was not made by his informant. Clark *v.* Sullivan, 4 Silv. Supreme (N. Y.) 1, 8 N. Y. Suppl. 565. A commission will be issued upon the affidavit of an agent or attorney in fact, without showing an excuse for its not being made by the party himself. Murray *v.* Kirkpatrick, 1 Cow. (N. Y.) 210.

78. Demar *v.* Van Zandt, 2 Johns. Cas. (N. Y.) 69; McHardy *v.* Hitchcock, 11 Beav. 93.

In Louisiana the oath of a disinterested witness is sufficient. Cucullu *v.* New Orleans Ins. Co., 5 La. 453.

79. The affidavit may be sworn to before the clerk of the court in which the action is pending (Wolfe *v.* Parham, 18 Ala. 441) unless the statute requires it to be taken before a particular officer, as a justice of the peace (Thompson *v.* Coster, 4 Bibb (Ky.) 70).

Attorney of party.— The testimony taken will not be invalidated by the fact that the affidavit was taken by one of the attorneys of record. Gary *v.* Burnett, 16 S. C. 632.

80. For forms of affidavit on application: For commissions (see Boardman *v.* Ewing, 3 Stew. & P. (Ala.) 293; Laidlaw *v.* Stimson, 67 N. Y. App. Div. 545, 74 N. Y. Suppl. 684; Laidley *v.* Rogers, 23 N. Y. Civ. Proc. 110); to procure open commission (Jones *v.* Hoyt, 10 Abb. N. Cas. (N. Y.) 324, 63 How. Pr. (N. Y.) 94; and to procure oral examination on commission (see Clayton *v.* Yarrington, 16 Abb. Pr. (N. Y.) 273 note).

81. See cases cited *infra* this note and note 82 *et seq.*

Failure to comply with the statute in a single particular is fatal. Adams *v.* State, 19 Tex. App. 250.

Shortcomings.—A motion for a commission ought not to be denied because of any shortcomings in the affidavit. Voorhis' Estate, 5 N. Y. Civ. Proc. 444, 2 Dem. Surr. (N. Y.) 298.

Unnecessary statements.— An order to examine a party before trial cannot be vacated because the affidavit on which it was granted showed more than is required by the statute. Trotter *v.* Brevoort, 29 Misc. (N. Y.) 662, 61 N. Y. Suppl. 181.

82. Evans *v.* Gray, 12 Mart. (La.) 475.

Examination of parties.— Plaintiff when seeking to take his own testimony must show strong and positive reasons why he will be unable to attend the trial (Light *v.* Anticosti Co., 58 L. T. Rep. N. S. 25); but the court is more favorable to the application of defendant than it is to an application by plaintiff, and will usually grant it in the absence of special circumstances. Ross *v.* Woodford, [1894] 1 Ch. 38, 63 L. J. Ch. 191, 70 L. T. Rep. N. S. 22, 8 Reports 20, 42 Wkly. Rep. 188; New *v.* Burns, 64 L. J. Q. B. 104, 71 L. T. Rep. N. S. 681, 14 Reports 339, 43 Wkly. Rep. 182.

83. Coote *v.* Coote, 1 Bro. Ch. 448, 28 Eng. Reprint 1233; Robinson *v.* Somes, 1 Y. & J.

better practice requires that the belief should be founded on investigation by the affiant, who should state the grounds of his belief,[84] or it should appear that the facts on which the allegations are based are beyond dispute.[85]

b. Jurisdiction of Court or Officer. It should affirmatively appear by suitable averment that the court or judge to which the application is made has jurisdiction to entertain it.[86]

c. Identification of Cause. An affidavit to obtain a deposition *de bene esse* must sufficiently designate or identify the cause or proceeding in which it is intended to use the testimony.[87]

d. Condition of Cause. If the condition of the cause need not be stated in the affidavit an allegation in respect thereto is unnecessary;[88] but where it must be shown that issue is joined in the cause, that fact must appear or some reason be given for applying before joinder.[89]

e. Grounds — (i) *Sickness or Physical Disability.* If the ground on which the deposition is sought is the sickness or infirmity of the witness, the affidavit must sufficiently show that his physical condition is such as to afford reasonable ground for believing that he will not be able to attend the trial.[90]

578. An agent (Evans *v.* Gray, 12 Mart. (La.) 475) or attorney (Fitzpatrick *v.* Montgomery Bank, 127 Ala. 589, 29 So. 16; Reese *v.* Beck, 24 Ala. 651) may make the affidavit on information and belief. See Olcott *v.* Evans, 4 N. Y. Suppl. 703.

84. Burr *v.* Sears, 18 Abb. N. Cas. (N. Y.) 447; Hope *v.* Hope, 3 Beav. 317, 4 Jur. 1124, 10 L. J. Ch. 70, 43 Eng. Ch. 317; Laragoity *v.* Atty.-Gen., 2 Price 172.

85. Hart *v.* Ogdensburg, etc., R. Co., 67 Hun (N. Y.) 556, 22 N. Y. Suppl. 401.

86. See cases cited *infra*, this note.

Court of inferior jurisdiction.— The moving papers on the application for a commission out of a court of inferior jurisdiction must show that the court has jurisdiction of the proceeding. Matter of Wallace, 71 N. Y. App. Div. 284, 75 N. Y. Suppl. 838.

Proceeding to fix transfer tax.— Where an application for a commission to take testimony without the state in proceedings to fix a transfer tax on certain money is based on a petition, and also on an affidavit, which latter states that the money was the proceeds of the sale of an interest in a partnership in the city of New York, and was deposited in a bank in that city in the name of the wife of the seller, since deceased, it gives the surrogate of New York county jurisdiction, although the petition is insufficient in that it does not show that the property was ever in such county. Matter of Wallace, 71 N. Y. App. Div. 284, 75 N. Y. Suppl. 838.

Proper district.—An application for a commission to examine a foreign witness must affirmatively show that the motion is made in the district where the cause is triable or in the county adjoining it. Dodge *v.* Rose, 1 Code Rep. (N. Y.) 123.

Where action triable.— On motion for a commission to take testimony, an order taken by default is not a nullity merely because the motion papers do not disclose the name of the county in which the action is to be tried. Blackman *v.* Van Inwagen, Code Rep. N. S. (N. Y.) 80.

87. Saunders *v.* Erwin, 2 How. (Miss.) 732; People *v.* Chrystal, 8 Barb. (N. Y.) 545.

Final settlement of administrator.— An affidavit for taking a deposition, made by the attorney of the administrator *de bonis non*, in a proceeding for the final settlement of the accounts of the deceased administrator of intestate between such administrator's personal representative and the administrator *de bonis non*, which describes the cause as "a cause now pending in the Probate Court, in the matter of the final settlement of the estate of" said intestate, sufficiently identifies the proceeding. McDonald *v.* Jacobs, 77 Ala. 524.

Surplusage.— Where an affidavit is entitled in a court, a judge of which is alone empowered to order the perpetuation of testimony for use in the court in which the action is pending, such entitling may be treated as surplusage, where the action and the court in which it is pending otherwise sufficiently appear. Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267.

88. **Condition of cause** see *supra*, VIII, E, 2.

Service of summons.— Although depositions cannot be taken prior to the service of summons, the affidavit required to be made need not show that summons has been served. Lambert *v.* McFarland, 7 Nev. 159.

89. Hackley *v.* Patrick, 2 Johns. (N. Y.) 478; Allen *v.* Hendree, 6 Cow. (N. Y.) 400.

Sufficiency.— Upon an application for a foreign commission it is not necessary to show that the action is technically at issue; it is sufficient that it be shown that some issue is raised on the pleadings which must be tried in the action. Smith *v.* Greey, 11 Ont. Pr. 38. It is sufficient to show that an issue of fact has been joined without further showing that the action is at issue as to all the defendants. Boyes *v.* Bossard, 87 N. Y. App. Div. 605, 84 N. Y. Suppl. 563.

90. W. P. Davis Mach. Co. *v.* Robinson, 42 Misc. (N. Y.) 52, 85 N. Y. Suppl. 574;

(II) *Absence or Non-Residence.* The non-residence of the witness or his absence from the state, when relied on to secure his testimony by deposition, must be so alleged or proved as to bring the case within the statute.[91]

(III) *Intended Departure.*[92] The intended departure of the witness from the state or jurisdiction, and the probability of inability to procure his attendance at the trial must be appropriately set forth.[93]

f. Naming or Identifying Witness. Unless where the application is for an

Johnson *v.* New Home Sewing Mach. Co., 62 N. Y. App. Div. 157, 70 N. Y. Suppl. 875; Montgomery *v.* Kniekerbaeker, 43 N. Y. Suppl. 787.

Extent of disability.— In England where the motion to take testimony is based on the ill-health of the witness, the affidavit must show that the witness is in a dangerous state. Bellamy *v.* Jones, 8 Ves. Jr. 31, 6 Rev. Rep. 205, 32 Eng. Reprint 261.

Information and belief.— An affidavit by the attorney for the applieant "that the affiant has been informed and believes that the witness is unable to attend eourt beeause of siekness and great bodily infirmity" is suffieient. Reese *v.* Beck, 24 Ala. 651. In Oleott *v.* Evans, 4 N. Y. Suppl. 703, an applieation based on an affidavit made on information and belief was resisted, and another affidavit suffieiently stating the facts as to the state of health of the witness being submitted, it was held that under the eireumstanees diselosed and in view of the gravity of the eonsequenees should the testimony not be seeured, the court properly granted the applieation instead of denying the motion with leave to renew on the second affidavit.

91. Saunders *v.* Erwin, 2 How. (Miss.) 732; Hendrieks *v.* Craig, 5 N. J. L. 567; *In re* Adams, 31 N. Y. App. Div. 298, 52 N. Y. Suppl. 617; Burnell *v.* Coles, 23 Mise. (N. Y.) 615, 52 N. Y. Suppl. 200; Hoopes *v.* Devaughn, 43 W. Va. 447, 27 S. E. 251. See Laidlaw *v.* Stimson, 67 N. Y. App. Div. 545, 74 N. Y. Suppl. 684, in whieh the affidavit was held sufficient.

Common intent.— It need only be shown to a common intent that the witness is a non-resident. Boardman *v.* Ewing, 3 Stew. & P. (Ala.) 293.

Inability to attend trial.— It should appear by the oath of the applieant that the non-resident witnesses cannot personally attend the trial. Atty.-Gen. *v.* Gooderham, 10 Ont. Pr. 259.

Intention to remain away.— A statement that the witness is in a designated plaee without the jurisdiction, without further stating that he there resided, or that he intended to remain there is insuffieient. Parmelee *v.* Thompson, 7 Hill (N. Y.) 77.

Notice of taking affidavit.— An affidavit to show that a witness lives out of the state, and to obtain thereby a eommission for the examination of sueh witness, need not be taken on notice. Den *v.* Wood, 10 N. J. L. 62.

Presumption of continuance of non-residence.— Where the affidavit was made five months prior to the issue of the commission, it was presumed that the non-residence continued. Pharr *v.* Baehelor, 3 Ala. 237.

Witness traveling.— On an application for a foreign eommission to examine a witness who is traveling, it should be shown that he will remain at the plaee to which the commission is directed a sufficient time to allow of its due execution. Singer *v.* C. W. Williams Mfg. Co., 8 Ont. Pr. 483.

Sufficiency.— Under a statute authorizing the taking of the deposition of a witness who "is not within the state," a mere showing that the witness is a non-resident or is absent from the state is insuffieient. Brown *v.* Russell, 58 N. Y. App. Div. 218, 68 N. Y. Suppl. 755; Apollinaris Co. *v.* Venable, 57 Hun (N. Y.) 587, 10 N. Y. Suppl. 469; Wallaee *v.* Blake, 56 N. Y. Super. Ct. 519, 4 N. Y. Suppl. 438. A statute authorizing the taking of the deposition of a witness on an affidavit that he resides out of the state, or is out of it in the serviee of the state, is complied with by showing, either by the deposition itself or by other evidence, that the witness resided out of the state, or was not in it when the deposition was taken. Abbott *v.* L'Hommedieu, 10 W. Va. 677.

92. For form of allegation of intention of witness to depart see Higginson *v.* New York Seeond Nat. Bank, 53 Hun (N. Y.) 129, 6 N. Y. Suppl. 172.

93. W. P. Davis Mach. Co. *v.* Robinson, 42 Mise. (N. Y.) 52, 85 N. Y. Suppl. 574; Henderson *v.* Fullerton, 54 How. Pr. (N. Y.) 422.

An affidavit on information and belief is suffieient where the affiant's belief is based on his investigation. Burr *v.* Sears, 18 Abb. N. Cas. (N. Y.) 447.

Evidence to cure defective affidavit.— An affidavit defeetive beeause of an insufficient allegation as to the eontemplated absenee of the witness from the state at the time of trial is not eured by the testimony of the witness showing a design to leave the state and probable inability to attend the trial. Henderson *v.* Fuller, 54 How. Pr. (N. Y.) 422.

Non-resident witness.—An affidavit alleging an intended departure of the witness from the state on a speeified date will not be regarded as fraudulently made, nor as suppressing the truth, beeause at the time of its presentation the witness was a non-resident, and proposed to come within the state to be examined, and to leave as alleged. Higginson *v.* New York Seeond Nat. Bank, 53 Hun (N. Y.) 129, 6 N. Y. Suppl. 172.

open commission [94] or where the circumstances are such that the court has a discretion in the premises,[95] the name or names of the witness or witnesses whose testimony is sought must appear, or they should be properly identified.[96]

g. Materiality of Witness and Testimony. It should appear that the person proposed to be examined is a material witness, by presenting facts as to the nature of the proof expected, and not inferences deducible therefrom,[97] so that

94. Burnell *v.* Coles, 26 Misc. (N. Y.) 810, 56 N. Y. Suppl. 888 [*dismissing* appeal in 25 Misc. 409, 54 N. Y. Suppl. 940].

95. Heaton *v.* Findlay, 12 Pa. St. 304; Leggett *v.* Austin, 1 Pa. L. J. Rep. 310, 2 Pa. L. J. 247.

Proof of pedigree.—As where a commission is sued out to take evidence in relation to pedigree. Parker *v.* Nixon, 18 Fed. Cas. No. 10,744, Baldw. 291.

96. *Louisiana.*— Evans *v.* Gray, 12 Mart. 475.

Maryland.— Salmon *v.* Clagett, 3 Bland 125.

New York.—Renwick *v.* Renwick, 10 Paige 420.

England.— Gunter *v.* McKear, 4 Dowl. P. C. 722, 1 Gale 440, 5 L. J. Exch. 115, 1 M. & W. 201, 1 Tyrw. & G. 245; Mendizabel *v.* Machado, 4 L. J. Ch. O. S. 142, 2 Sim. & St. 483, 1 Eng. Ch. 483; Kirwan *v.* Lindsay, 2 Ir. Ch. 23; O'Farrell *v.* O'Farrell, 2 Molloy 364. *Contra*, McHardy *v.* Hitchcock, 11 Beav. 93; Carbonell *v.* Bessell, 5 Sim. 636, 9 Eng. Ch. 636; Rougemont *v.* Royal Exch. Assur. Co., 7 Ves. Jr. 304, 32 Eng. Reprint 124.

Canada.—Atty.-Gen. *v.* Gooderham, 10 Ont. Pr. 259.

See 16 Cent. Dig. tit. "Depositions," § 51.

Identification without naming.—An affidavit stating the fact expected to be proved by a certain party's clerks, without naming them, is sufficient. Murray *v.* Winter, 2 Mart. (La.) 100.

Misnomer.— When the name of a witness is written in the affidavit, "C. Swabine," and "Catharine Swab" in the deposition, the discrepancy will not vitiate the deposition, if in other respects legal. Beal *v.* Brandt, 7 La. 583.

Non-resident witnesses.—An affidavit stating that "some" of the witnesses reside without the state without naming them is insufficient. Lesne *v.* Pomphrey, 4 Ala. 77.

Omission of christian name.— A deposition will not be suppressed, because the christian name of the witness is not stated in the affidavit made to procure the issuance of the commission, when the commission and notice so describe and identify the witness as to preclude the idea that the opposite party could have been misled or injured by the omission. Parsons *v.* Boyd, 20 Ala. 112.

The names of some of the witnesses at least should be given. Cow *v.* Kynnersley, 1 D. & L. 906, 8 Jur. 364, 13 L. J. C. P. 114, 6 M. & G. 981, 7 Scott N. R. 892; Dimond *v.* Vallance, 7 Dowl. P. C. 590, 3 Jur. 385, 2 W. W. & H. 67; Jackson *v.* Strong, 13 Price 309. If some are named the commission may issue to examine them "and others." Nadin *v.* Bassett, 25 Ch. D. 21, 53 L. J. Ch. 253, 49 L. T. Rep. N. S. 454, 32 Wkly. Rep. 70; Beresford *v.* Easthope, 8 Dowl. P. C. 294, 4 Jur. 104.

To examine abroad it is enough to name the witness and to state that he is out of the jurisdiction of the court. Norton *v.* Melbourne, 3 Bing. N. Cas. 67, 5 Dowl. P. C. 181, 2 Hodges 114, 5 L. J. C. P. 343, 3 Scott 398, 32 E. C. L. 40; Oldham *v.* Carleton, 4 Bro. Ch. 88, 29 Eng. Reprint 792.

Waiver by crossing commission.— If the names or residences of the witnesses be not stated, nor what they are to prove, a party who *sub silentio* crosses the commission cannot afterward object that there is no such statement in the affidavit or interrogatories. Quadras *v.* The Daniel Webster, 11 La. Ann. 203; Denton *v.* Murdock, 5 Rob. (La.) 127.

97. *Florida.*— Hodge *v.* State, 29 Fla. 500, 10 So. 556.

Louisiana.— Stierle *v.* Kaiser, 45 La. Ann. 580, 12 So. 839; Lee *v.* Lee, 1 La. Ann. 318; Fleckner *v.* Grieve, 6 Mart. 504; Mann *v.* Hunt, 1 Mart. 22.

Maryland.— Salmon *v.* Clagett, 3 Bland 125.

Michigan.— Thayer *v.* Swift, Walk. 384.

Mississippi.— Saunders *v.* Erwin, 2 How. 732.

New York.— Johnson *v.* New Home Sewing Mach. Co., 62 N. Y. App. Div. 157, 70 N. Y. Suppl. 875; Einstein *v.* General Electric Co., 9 N. Y. App. Div. 570, 41 N. Y. Suppl. 808; Byrne *v.* Mulligan, 41 N. Y. Super. Ct. 515; Rathbun *v.* Ingersoll, 34 N. Y. Super. Ct. 211; Burnell *v.* Coles, 23 Misc. 615, 52 N. Y. Suppl. 200; Preston *v.* Hencken, 9 Abb. N. Cas. 68; Lansing *v.* Mickles, 1 How. Pr. 248; Parmelee *v.* Thompson, 7 Hill 77; Seymour *v.* Strong, 19 Wend. 98; Vandervoort *v.* Columbian Ins. Co., 3 Johns. Cas. 137; Franklin *v.* United Ins. Co., 2 Johns. Cas. 285; Franklin *v.* United Ins. Co., 2 Johns. Cas. 68; Renwick *v.* Renwick, 10 Paige 420.

Pennsylvania.— Hodell Furniture Co. *v.* Leonard, 17 Pa. Co. Ct. 513.

England.— Moody *v.* Steele, 2 Anstr. 336; Hope *v.* Hope, 3 Beav. 317, 4 Jur. 1124, 10 L. J. Ch. 70, 43 Eng. Ch. 317; Norton *v.* Melbourne, 3 Bing. N. Cas. 67, 5 Dowl. P. C. 181, 2 Hodges 114, 5 L. J. C. P. 343, 3 Scott 398, 32 E. C. L. 40; Oldham *v.* Carleton, 4 Bro. C. C. 88, 29 Eng. Reprint 792; Lane *v.* Bagshaw, 16 C. B. 576, 3 C. L. R. 919, 81 E. C. L. 576; Healy *v.* Young, 2 C. B. 702, 52 E. C. L. 702; Baddely *v.* Gilmore, 1 Gale 410, 5 L. J. Exch. 115, 1 M. & W. 50, 1 Tyrw. & G. 369.

See 16 Cent. Dig. tit. "Depositions," § 50.

Allegation by attorney.— The affidavit of

the court or officer to whom application is made may determine the materiality and necessity of the testimony. There are, however, decisions to the effect that a general allegation of materiality will be sufficient.[98]

materiality may be made by the person for whose benefit the testimony is sought (Brown *v.* McConnel, 1 Bibb (Ky.) 265) or his attorney (Fitzpatrick *v.* Montgomery Bank, 127 Ala. 589, 29 So. 16; Reese *v.* Beck, 24 Ala. 651; Young *v.* McLemore, 3 Ala. 295; Beall *v.* Dey, 7 Wend. (N. Y.) 513).

Effect of filing interrogatories.— In Louisiana interrogatories should be filed with the affidavit for a commission to examine witnesses out of the state, or the materiality of the testimony sought should be shown by the oath required. Stierle *v.* Kaiser, 45 La. Ann. 580, 12 So. 839; Lee *v.* Lee, 1 La. Ann. 318. See also Quadras *v.* The Daniel Webster, 11 La. Ann. 203; Bradford *v.* Cooper, 1 La. Ann. 325; Denton *v.* Murdock, 5 Rob. 127; Rife *v.* Henson, 2 La. 96, all holding that where a commission has been granted and cross interrogatories propounded, the absence of an affidavit of materiality may be disregarded. The order of itself dispenses with the affidavit.

Effect of omission.— A deposition taken by a person who was both commissioner and clerk of the court cannot be rejected on the ground that no preliminary proof of the witness' materiality was made. Nelson *v.* Woodruff, 1 Black (U. S.) 156, 17 L. ed. 97.

Filing.—Where a change of venue has been granted, but the record has not been removed, the affidavit of materiality should be filed in the court in which the suit was instituted. Phelps *v.* Young, 1 Ill. 327.

Necessity of stating expected proof.— Where no laches is imputable, and there is nothing to cast suspicion on the application, the applicant is not bound to state what he expects to prove by the witness whose testimony he seeks to procure. Eaton *v.* North, 7 Barb. (N. Y.) 631, 3 Code Rep. (N. Y.) 234.

Only witness.— It should be clearly shown that the witness is the only witness as to the fact sought to be proved by him; an affidavit of the solicitor as to his belief is insufficient. Jameson *v.* Jones, 3 Ch. Chamb. (U. C.) 98.

On motion to rescind an order for the examination of witnesses in an action of slander, the court may require the applicant to state what he expects to prove by them. Barry *v.* Barclay, 15 C. B. N. S. 849, 109 E. C. L. 849.

The points on which it is intended to examine need not be stated. Grove *v.* Young, 3 De G. & Sm. 397, 13 Jur. 847; Carbonell *v.* Bessell, 5 Sim. 636, 9 Eng. Ch. 636; Rougemont *v.* Royal Exch. Assur. Co., 7 Ves. Jr. 304, 32 Eng. Reprint 124. But see *contra*, Mendizabel *v.* Machado, 4 L. J. Ch. O. S. 142, 2 Sim. & St. 483, 1 Eng. Ch. 483.

Where defendant states what he "expects to prove" if the probability that the expected testimony will be as stated is supported by the affidavits of others, the materiality of the testimony is disclosed by satisfactory proof. Burnell *v.* Coles, 26 Misc. (N. Y.) 810, 56 N. Y. Suppl. 888 [*dismissing* appeal in 25 Misc. 409, 54 N. Y. Suppl. 940].

Instances of insufficiency.— A statement that the applicant has a good claim and cannot proceed to a hearing without the testimony of a designated witness (Thayer *v.* Swift, Walk. (Mich.) 384), that the witness "is or may be a material witness" (Parmelee *v.* Thompson, 7 Hill (N. Y.) 77), by the counsel of one accused of crime, that he is acquainted with the case of defendant, and what is necessary for his defense, and verily believes that the testimony of a named witness, to whom interrogatories calling for his opinion as an expert, and accompanying the motion for a commission, are addressed, "is necessary, material, and important to the defendant" (Hodge *v.* State, 29 Fla. 500, 10 So. 556), and that the testimony of the proposed witnesses will be necessary to defendant and competent to his defense (Burnell *v.* Coles, 23 Misc. (N. Y.) 615, 52 N. Y. Suppl. 200). So an affidavit which fails to state that the witness is material as affiant is advised by his counsel after stating to him his case is insufficient. Lansing *v.* Mickles, 1 How. Pr. (N. Y.) 248. See Beall *v.* Dey, 7 Wend. (N. Y.) 513.

Waiver by joining in commission see *infra*, VIII, I, 1.

98. A general allegation of materiality made by an attorney is sufficient. Beall *v.* Dey, 7 Wend. (N. Y.) 513. See Fitzpatrick *v.* Montgomery Bank, 127 Ala. 589, 29 So. 16.

A positive statement in the affidavit of the materiality of the absent witness must be credited, where the affiant might know from personal knowledge that the witness is material. Eaton *v.* North, 7 Barb. (N. Y.) 631, 3 Code Rep. (N. Y.) 234.

"Cannot proceed to trial without testimony," etc.— An affidavit that the witness is material and out of the jurisdiction of the court is sufficient without a further statement that the party cannot safely proceed to trial without his testimony. Brackett *v.* Dudley, 1 Cow. (N. Y.) 209.

Exclusive witness as to defense.— An affidavit that "a material part of the defense to said action depends exclusively on the evidence of said witness" is sufficient. Potts *v.* Coleman, 86 Ala. 94, 5 So. 780.

Information and belief.— Under a statute permitting an attorney to make an affidavit as to the materiality of a non-resident witness, he may do so on information and belief. Fitzpatrick *v.* Montgomery Bank, 127 Ala. 589, 29 So. 16.

In surrogates' courts.— Under the provisions of the New York Code of Procedure applicable to depositions in surrogates' courts, a general allegation of materiality is sufficient. Voorhis' Estate, 5 N. Y. Civ. Proc. 444, 2 Dem. Surr. 298.

G. Affidavit of Merits. An affidavit of merits or an affidavit showing a defense on the merits is necessary when defendant seeks a stay until the return of the commission.[99]

H. Perpetuation of Testimony.[1] Where no action is pending, the applicant must comply with statutory requirements or bring himself within the chancery rule respecting bills *in perpetuam*, and aver in his affidavit the existence of such conditions as will sustain such a bill.[2]

I. Notice of Application — 1. Necessity. Unless special circumstances exist which will permit a commission or order to take depositions to issue *ex parte*,[3] notice to the adverse party or his attorney of the application for the commission or order is absolutely necessary.[4] The adverse party may waive notice by joining

99. Seymour *v.* Strong, 19 Wend. (N. Y.) 98; Hoyt *v.* Brisban, 1 Wend. (N. Y.) 27; Franklin *v.* United Ins. Co., 2 Johns. Cas. (N. Y.) 285.

Where no stay is asked for no such affidavit is required. Warner *v.* Harvey, 9 Wend. (N. Y.) 444. See Baddely *v.* Gilmore, 1 Gale 410, 5 L. J. Exch. 115, 1 M. & W. 50, 1 Tyrw. & G. 369; Woodhead *v.* Boyd, 6 Price 101.

1. **For form of petition** to perpetuate testimony see *In re* Carter, 3 Oreg. 293.

2. Matter of White, 44 N. Y. App. Div. 119, 60 N. Y. Suppl. 702, 7 N. Y. Annot. Cas. 154; Matter of Ketchum, 60 How. Pr. (N. Y.) 154.

Cause of action against definite person.— An application under the New York Code of Civil Procedure to obtain testimony for use in a contemplated action must show that the applicant has a cause of action against a person definitively named. Matter of White, 44 N. Y. App. Div. 119, 60 N. Y. Suppl. 702.

Cannot safely proceed without knowledge of testimony.— A statement by the party showing that it is important that he should know what the witness will testify to and that he cannot with safety bring an action until thus advised does not disclose circumstances rendering it necessary for his protection that the testimony should be perpetuated. Matter of White, 44 N. Y. App. Div. 119, 60 N. Y. Suppl. 702, 7 N. Y. Annot. Cas. 154.

Danger of losing testimony.— An affidavit to perpetuate testimony must show a hazard of losing if it is not preserved. Matter of Fulton, 75 N. Y. App. Div. 623, 78 N. Y. Suppl. 116.

Inability of witness to attend trial.— An affidavit to procure the perpetuation of testimony need not state the probable inability of the witness to attend the trial. Jackson *v.* Perkins. 2 Wend. (N. Y.) 308.

Waiver of insufficiency.— The insufficiency of an affidavit for the failure to request that the deposition might be taken "to perpetuate the remembrance of the thing" is waived by the failure to make proper objection. Com. *v.* Stone, Thach. Cr. Cas. (Mass.) 604.

3. Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181; Putnam *v.* Macleod, 23 R. I. 373, 50 Atl. 646; Trevall *v.* Bache, 9 Fed. Cas. No. 5,113, 5 Cranch C. C. 463.

In Maryland notice is not necessary on executing a commission to take testimony in a foreign country, but time should be given to allow the opposite party to exhibit cross interrogatories. Owings *v.* Norwood, 2 Harr. & J. 96.

Examination of party.— An application for an order for defendant to attend at his own expense and be examined on his answer may be made *ex parte*. Harrison *v.* Greer, 2 Ch. Chamb. (U. C.) 438.

Ill-health of witness.— An application for an order to examine a witness *de bene esse* on account of dangerous ill-health may be made *ex parte*. Crippen *v.* Ogilvy, 2 Ch. Chamb. (U. C.) 304; Oliver *v.* Dickey, 2 Ch. Chamb. (U. C.) 87.

Ill-health — Old age — Only witness.— In England the motion is of course to examine *de bene esse* a witness over seventy in a dangerous state or the only witness. Tomkins *v.* Harrison, 6 Madd. 315; Prichard *v.* Gee, 5 Madd. 364; Rowe *v.* ——, 13 Ves. Jr. 261, 33 Eng. Reprint 292; Bellamy *v.* Jones, 8 Ves. Jr. 31, 6 Rev. Rep. 205, 32 Eng. Reprint 261; Scott *v.* Scott, 9 Ir. Eq. 261. *Contra*, Hope *v.* Hope, 3 Beav. 317, 4 Jur. 1124, 10 L. J. Ch. 70, 43 Eng. Ch. 317; McKenna *v.* Everitt, 2 Beav. 188, 3 Jur. 1166, 9 L. J. Ch. 98, 17 Eng. Ch. 188.

That the witness is going abroad will also dispense with notice. McIntosh *v.* Great Western R. Co., 1 Hare 328, 6 Jur. 454, 11 L. J. Ch. 283, 23 Eng. Ch. 328; Shelley *v.* ——, 13 Ves. Jr. 56, 33 Eng. Reprint 215.

Discretion to require.— Where the granting of an order to perpetuate testimony is discretionary, the judge may require notice of the application to be given to the adverse party and permit counter affidavits to be filed. *In re* Carter, 3 Oreg. 293.

4. *Connecticut.*— *In re* Payne, 2 Root 156.

Illinois.— Corgan *v.* Anderson, 30 Ill. 95.

Massachusetts.— India Mut. Ins. Co. *v.* Bigler, 132 Mass. 171.

Mississippi.— Saunders *v.* Erwin, 2 How. 732.

New Jersey.— Ogden *v.* Robertson, 15 N. J. L. 124; Hendricks *v.* Craig, 5 N. J. L. 567; Den *v.* Farley, 4 N. J. L. 144.

New York.— Brokaw *v.* Bridgman, 6 How. Pr. 114, Code Rep. N. S. 407; Watson *v.* Delafield, 2 Cai. 260, Col. & C. Cas. 407. See Voorhis' Estate, 5 Civ. Proc. 444, 2 Dem. Surr. 298.

Pennsylvania.— Patterson *v.* Greenland, 37 Pa. St. 510.

Virginia.— Blincoe *v.* Berkeley, 1 Call 405.

in the commission,[5] or declining to file cross interrogatories,[6] but will not be deemed to have waived it by appearing at the execution of the commission.[7]

2. Requisites and Sufficiency. The notice should designate the witnesses,[8] but not the proposed commissioner.[9] It should be given within the time prescribed,[10] and be sufficient to acquaint the adverse party of the fact of the application.[11]

3. Service. Unless personal service on the adverse party is expressly required, service on his attorney will be sufficient.[12] The service must be made in the mode prescribed by law,[13] and proof thereof duly made.[14]

United States.— U. S. *v.* Parrott, 27 Fed. Cas. No. 15,999, McAll. 447.

England.— Bellamy *v.* Jones. 8 Ves. Jr. 31, 6 Rev. Rep. 205, 32 Eng. Reprint 261; Shelley *v.* ——, 13 Ves. Jr. 56, 32 Eng. Reprint 215.

Canada.— Horsman *v.* Horsman, 2 Can. L. J. 211; Anderson *v.* Anderson, 1 Ch. Chamb. (U. C.) 291; Early *v.* McGill, 1 Ch. Chamb. (U. C.) 257.

See 16 Cent. Dig. tit. "Depositions," § 45.

In justice's court.— Under a provision dispensing with notice of the application for a commission when it is granted at the time of joining issue before a justice, where the allowance on the trial of amendment to an answer setting up defense of payment may be treated as a joinder of issue, if plaintiff does not immediately, on the allowance of the amendment, apply for a commission, but rests till evidence is received, he is not entitled to the same without notice. Murphy *v.* Sullivan, 77 N. Y. Suppl. 950, 10 N. Y. Annot. Cas. 303.

In England a motion to examine witnesses *de bene esse* except in certain cases, as upon the ground of age, requires notice. Bellamy *v.* Jones, 8 Ves. Jr. 31, 6 Rev. Rep. 205, 32 Eng. Reprint 261.

In Canada an application for an order that a party to a suit do submit to be examined at his own expense or in default be committed will not be granted *ex parte*; notice must be served. Weir *v.* Matheson, 1 Ch. Chamb. (U. C.) 224.

An order shortening the time to take a deposition obtained without notice is irregular. Nevitt *v.* Crow, 1 Colo. App. 453, 29 Pac. 749.

5. Notice is waived by a party who joins in the proceedings by nominating commissioners. Tussey *v.* Behmer, 9 Lanc. Bar (Pa.) 45.

6. A waiver of the privilege of filing cross interrogatories will dispense with the necessity of notice under a statute providing that a commission to take the deposition of a nonresident witness may issue, on filing a copy of the interrogatories and giving the opposite party notice thereof ten days before the commission is to issue. Cook *v.* Martin, 5 Sm. & M. (Miss.) 379.

7. Blincoe *v.* Berkeley, 1 Call (Va.) 405.

8. A notice designating the witnesses as "such person or persons as were acting tellers or cashiers" of a designated bank on a day stated is insufficient. Pilmer *v.* Des Moines Branch State Bank, 16 Iowa 321.

9. The name of the prospective commissioner should not be inserted in the notice. Cole *v.* Chotean, 18 Ill. 439.

10. **In Iowa** five days' notice to the adverse party in the county in which the action is pending of suing out a commission to be executed in another state is sufficient. Cook *v.* Gilchrist, 82 Iowa 277, 48 N. W. 84 [*distinguishing* Kennedy *v.* Rosier, 71 Iowa 671, 33 N. W. 226, where the depositions were taken on notice].

Computation.— In Iowa and Michigan the time within which notice of suing out a commission must be given is computed by excluding the day of service. Bonney *v.* Cocke, 61 Iowa 303, 16 N. W. 139; Eaton *v.* Peck, 26 Mich. 57; Arnold *v.* Nye, 23 Mich. 286. A rule requiring fifteen days' notice of the commission will not authorize the issue of a commission on October 14, on notice given the last day of the previous September. Coxe *v.* Ewing, 4 Yeates (Pa.) 429.

11. **Order to show cause.**— In California it is sufficient to serve on the opposite party a copy of an order of the court or judge requiring the party to show cause on a day named why a commission should not issue. No other notice of the application is required. If the day named is less than the five days required for notice by the statute, the order and the issuing of the commission are equivalent to an order shortening the time. Dambmann *v.* White, 48 Cal. 439.

Service of interrogatories by copy left at the office of the attorney of the opposite party is sufficient notice of taking out a commission. Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. (Del.) 233.

12. Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. (Del.) 233; Potts *v.* Skinner, 19 Fed. Cas. No. 11,348, 1 Cranch C. C. 57.

Where a party resides out of the state, notice of an application to examine witnesses residing out of the state may be given to his attorney. Colclough *v.* Ingram, 3 Hill (S. C.) 10.

13. **Service of sheriff by deputy.**— Under provisions that notice of the issuance of a commission to take depositions is to be served by persons authorized to serve original notices; and that original notices can only be served by a person not a party to the action — in an action against the sheriff, the deputy sheriff is disqualified to serve such notice. Gollsbitsch *v.* Rainbow, 84 Iowa 567, 51 N. W. 48.

14. **By certificate of officer.**—Proof of service by a marshal may be made by his certificate. La Grande Nat. Bank *v.* Blum, 27 Oreg. 215, 41 Pac. 659.

J. Hearing and Determination — 1. Resistance to Application. The adverse party may oppose the application and make proper objections to the commission or order for examination;[15] but he cannot deprive the moving party of the right to protect himself against contingencies which may result in the loss of material testimony,[16] by asserting the non-existence of facts which will authorize the reading of the deposition;[17] nor can a party or a witness defeat the right to take a deposition by insisting on his ability and intention to be present at the trial.[18]

2. What May Be Considered. The materiality of the testimony and the purposes for which it is invoked may be considered,[19] but a statute imposing restrictions on the right to take testimony in other cases,[20] or the fact that the applicant has given security for costs cannot be considered in determining whether or not a commission should issue;[21] nor can the merits of the controversy be gone into.[22]

3. Discretion to Grant or Refuse — a. In General. Ordinarily the right to a commission or to an order permitting depositions to be taken is not absolute, but rests in the judicial discretion of the court or judge, although usually permission is granted as a matter of course on a proper presentation of facts.[23] But where the

In open court.—Notice is regularly proved, when proved in open court, before the clerk, and by him indorsed with the probate. Dixon *v.* Steele, 5 Hayw. (Tenn.) 28.

Necessity of filing.— Where the notice has been duly served it is unnecessary that it should be on file on the day fixed for the commission to issue. Bonney *v.* Cocke, 61 Iowa 303, 16 N. W. 139.

Proof without state.— The original notice may be taken from the files and sent to another state for proof of service. Whitenack *v.* Voorheis, 17 N. J. L. 24.

Uncertainty.— Service of a notice ten days before the dedimus is sued out is not shown by an affidavit that notice was given ten days prior to a specified date. Corgan *v.* Anderson, 30 Ill. 95.

15. See Machine Co. *v.* Shillow, 12 Lanc. Bar (Pa.) 58; Gooday *v.* Corlies, 1 Strobh. (S. C.) 199.

It is proper to show cause against an order for the examination of an interested party. Glover *v.* Faulkner, 1 Vern. Ch. 452, 23 Eng. Reprint 579.

Impeaching witness.— A commission will issue to examine a witness, notwithstanding that his character for veracity is impeached. The proper course in such a case is to call witnesses at the trial for that purpose. Nordheimer *v.* McKillop, 10 Ont. Pr. 246.

16. *In re* Abcles, 12 Kan. 451; Meader *v.* Root, 11 Ohio Cir. Ct. 81, 5 Ohio Cir. Dec. 61.

That a party did not proceed promptly in the cause is no answer to an application for the examination of a witness going abroad. Weekes *v.* Pale, 6 Dowl. P. C. 462, 5 Scott 713.

Indebtedness for costs.— A commission will not be refused because the applicant is indebted to the adverse party for costs. Oughgan *v.* Parish, 4 Dowl. P. C. 29.

17. Wehrs *v.* State, 132 Ind. 157, 31 N. E. 779.

18. An affidavit of an adverse party, whose deposition is sought to be taken, that he is in good health and expects to attend the trial is not sufficient to defeat the right to take his deposition. *In re* Robinson, 9 Ohio S. & C. Pl. Dec. 763, 7 Ohio N. P. 105.

Where causes for taking depositions are not specified by statute, although causes in which they may be read are, the party desiring the deposition and not the witness is the judge of its necessity. Wehrs *v.* State, 132 Ind. 157, 31 N. E. 779.

19. U. S. *v.* Parrott, 27 Fed. Cas. No. 15,999, McAll. 447.

20. In deciding whether a party is entitled to an order for his examination before trial, N. Y. Code Civ. Proc. § 872, subd. 5, imposing restrictions on the right to the examination of witnesses before trial, but which is expressly made inapplicable to parties to the action, will not be considered. Trotter *v.* Brevoort, 29 Misc. (N. Y.) 662, 61 N. Y. Suppl. 181.

21. Stewart *v.* Russell, 66 N. Y. App. Div. 542, 73 N. Y. Suppl. 249.

22. On a bill to preserve testimony to enable the complainant to prosecute a suit at law whereby he may establish his right to an office, the question of his eligibility for the office cannot be gone into. Kellogg *v.* Warmouth, 14 Fed. Cas. No. 7,667.

23. *Arkansas.*— Pryor *v.* Ryburn, 16 Ark. 671.

Colorado.—Willard *v.* Mellor, 19 Colo. 534, 36 Pac. 148.

Connecticut.— Lynde *v.* Patten, 2 Root 515.

Hawaii.— Matter of Ivers, 12 Hawaii 99.

Iowa.— Lombard *v.* Thorp, 70 Iowa 220, 30 N. W. 490.

Maryland.— Goodman *v.* Wineland, 61 Md. 449.

Missouri.— Shepard *v.* Missouri Pac. R. Co., 85 Mo. 629, 55 Am. Rep. 390.

New York.— Anonymous, 59 N. Y. 313 [*dismissing* appeal in 1 Hun 76, 3 Thomps. & C. 79]; Wilcox *v.* Stern, 89 N. Y. App. Div. 14, 85 N. Y. Suppl. 159; Frounfelker *v.* Delaware, etc., R. Co., 81 N. Y. App. Div. 67, 80 N. Y. Suppl. 701; Keenan *v.* O'Brien, 53 Hun 30, 5 N. Y. Suppl. 490, 16 N. Y.

statute confers the right to take a deposition on the presentation of prescribed facts, the court or an officer thereof has no discretion in the premises, but must grant a commission, or permit the taking of a deposition whenever the proof meets the requirements of the statute, and there is no imputation of bad faith.[24]

Civ. Proc. 431, 23 Abb. N. Cas. 63; McMonagle *v.* Conkey, 14 Hun 326; Jones *v.* Hoyt, 48 N. Y. Super. Ct. 118, 10 Abb. N. Cas. 324, 63 How. Pr. 94; Rathbun *v.* Ingersoll, 34 N. Y. Super. Ct. 211; Forrest *v.* Forrest, 3 Bosw. 661; Mitchell *v.* Montgomery, 4 Sandf. 676; Ring *v.* Mott, 2 Sandf. 683; Cheever *v.* Saratoga County Bank, 47 How. Pr. 376; Allen *v.* Gibbs, 12 Wend. 202; Vandervoort *v.* Columbian Ins. Co., 3 Johns. Cas. 137.

Oregon.— *In re* Carter, 3 Oreg. 293.

Pennsylvania.— Com. *v.* Miller, 5 Pa. Dist. 186, 16 Pa. Co. Ct. 656.

United States.— U. S. *v.* Cameron, 15 Fed. 794, 5 McCrary 93; Cunningham *v.* Otis, 6 Fed. Cas. No. 3,485, 1 Gall. 166; U. S. *v.* Parrott, 27 Fed. Cas. No. 15,999, McAll. 447.

England.—Berdan *v.* Greenwood, 20 Ch. D. 764 note, 46 L. T. Rep. N. S. 524 note; Adams *v.* Corfield, 28 L. J. Exch. 31; Lousada *v.* Templer, 2 Russ. 561, 38 Eng. Reprint 446; —— *v.* ——, 1 Anstr. 201.

Canada.— Mills *v.* Mills, 12 Ont. Pr. 473.

See 16 Cent. Dig. tit. "Depositions," § 4.

Examination of fugitive from justice.— The court in the exercise of a sound discretion may refuse to permit a party to have his examination taken abroad upon commission, where he is a fugitive from justice or the cause of his absence is the pendency of a criminal charge against him. Keenan *v.* O'Brien, 53 Hun (N. Y.) 30, 5 N. Y. Suppl. 490, 16 N. Y. Civ. Proc. 431, 23 Abb. N. Cas. (N. Y.) 63; McMonagle *v.* Conkey, 14 Hun (N. Y.) 326.

Interested witness.— The question of the interest of the witness may be left to be determined at the hearing. Pryor *v.* Ryburn, 16 Ark. 671.

Letters rogatory will not issue of course. U. S. *v.* Parrott, 27 Fed. Cas. No. 15,999, McAll. 477.

Perpetuation of testimony.— Unless expressly conferred by statute there is no absolute right to perpetuate the testimony of a witness, but it is for the judge to whom application is made to determine whether or not such a danger of losing the testimony exists as is contemplated by the statute. Cheever *v.* Saratoga Bank, 47 How. Pr. (N. Y.) 376. The perpetuation of testimony may be refused in the discretion of the judge where in his opinion the physical condition of the witness does not require a resort to such a remedy. Cheever *v.* Saratoga County Bank, 47 How. Pr. (N. Y.) 376.

Renewal of application.— A motion for a commission will not be entertained by the court after the refusal of a similar application by a judge thereof. Allen *v.* Gibbs, 12 Wend. (N. Y.) 202.

Substitute for examination.— Where the question of legitimacy depended upon a chain of circumstances in the knowledge of different individuals, and defendant, an infant, kept out of the way, the court was inclined to order an examination *de bene esse*, but in lieu thereof had the infant brought into court and assigned one of the clerks of chancery as guardian to put in his answer. Shelley *v.* ——, 13 Ves. Jr. 56, 33 Eng. Reprint 215.

Taking deposition in own behalf.— Where a party seeks to take his own examination the court will be more circumspect than in the case of an ordinary witness. Mills *v.* Mills, 12 Ont. Pr. 473.

U. S. supreme court.— Where to furnish further proof a witness is offered in the supreme court, an order to take his deposition may be made by the court in lieu of an examination *vive voce*. The Samuel, 3 Wheat. (U. S.) 77, 4 L. ed. 338.

Witnesses in hostile country.— A commission will not be granted to examine witnesses in a foreign, hostile country. Barrick *v.* Buba, 16 C. B. 492, 3 C. L. R. 921, 1 Jur. N. S. 1020, 3 Wkly. Rep. 524, 81 E. C. L. 492.

Review of discretion.— The order for a commission, although in a sense discretionary with the judge who granted it, affects a substantial right and therefore is reviewable. Rathbun *v.* Ingersoll, 34 N. Y. Super. Ct. 211 [*following* Matter of Duff, 41 How. Pr. (N. Y.) 350]. See Berdan *v.* Greenwood, 20 Ch. D. 764 note, 46 L. T. Rep. N. S. 524 note; Adams *v.* Corfield, 28 L. J. Exch. 31. An order denying a commission affects a substantial right, because it tends to deprive a party of testimony necessary to his case; but an order granting a commission affects no substantial right because it merely dictates the mode of taking such testimony. Wallace *v.* American Linen Thread Co., 2 Thomps. & C. (N. Y.) 574; Treadwell *v.* Pomeroy, 2 Thomps. & C. (N. Y.) 470. The papers presented on the application may be examined by the appellate court, for the purpose of determining whether or not there were grounds for the exercise of discretion. Burnell *v.* Coles, 23 Misc. (N. Y.) 615, 52 N. Y. Suppl. 200, 26 Misc. (N. Y.) 810, 56 N. Y. Suppl. 888.

24. Newton *v.* State, 21 Fla. 53; Martin *v.* Hicks, 6 Hun (N. Y.) 238, 1 Abb. N. Cas. (N. Y.) 341; Morse *v.* Grimke, 8 N. Y. Suppl. 1, 18 N. Y. Civ. Proc. 37.

"**Conditionally**" in a statute providing that parties to a pending suit "may obtain the deposition of any witness, to be used in such suit conditionally" limits not the right to take, but the right to use, such deposition. *Ex p.* Livingston, 12 Mo. App. 80.

Deposition in support of motion.— The fact that a witness whose deposition is sought had previously testified on the trial will not preclude the right to take his deposition in support of a motion for a new trial. O'Con-

b. Good Faith of Applicant. The taking of a deposition will not be permitted where it is evident that the applicant is not proceeding in good faith,[25] as where the application is of a fishing character, the object is to discover in advance of the trial what the witness will testify to,[26] or the real object is other than the procurement of testimony.[27]

c. Testimony Not Beneficial — Useless Expense. A commission will not issue where no useful purpose will be served. The parties will only be subjected to need less expense, and unnecessary delay will be caused.[28]

nor *v.* McLaughlin, 80 N. Y. App. Div. 305, 80 N. Y. Suppl. 741.

25. Matter of Spinks, 63 N. Y. App. Div. 235, 71 N. Y. Suppl. 398; Clark *v.* Candee, 29 Hun (N. Y.) 139; Martin *v.* Hicks, 6 Hun (N. Y.) 238, 1 Abb. N. Cas. (N. Y.) 341; Forrest *v.* Forrest, 3 Bosw. (N. Y.) 661; Morse *v.* Grimke, 8 N. Y. Suppl. 1, 18 N. Y. Civ. Proc. 37; Cheever *v.* Saratoga County Bank, 47 How. Pr. (N. Y.) 376; Paton *v.* Westervelt, 5 How. Pr. (N. Y.) 399; Rogers *v.* Rogers, 7 Wend. (N. Y.) 514; Ablon *v.* Barbey, 1 N. Y. Leg. Obs. 154; *In re* Pfirman, 1 Ohio S. & C. Pl. Dec. 177; Sparks *v.* Barrett, 7 L. J. C. P. 65, 5 Scott 402. And see Lloyd *v.* Key, 3 Dowl. P. C. 253.

In New York the rules of practice authorize the court to deny a petition for a commission, unless the court is satisfied that the application is made in good faith. See Matter of Spinks, 63 N. Y. App. Div. 235, 71 N. Y. Suppl. 398.

Proof that the applicant could obtain the evidence that he seeks from resident witnesses may tend to show bad faith, but is not conclusive. Morse *v.* Grimke, 8 N. Y. Suppl. 1, 18 N. Y. Civ. Proc. 37.

26. *Minnesota.*— State *v.* Elliott, 75 Minn. 391, 77 N. W. 952.

Missouri.— *Ex p.* Krieger, 7 Mo. App. 367.

New York.— Matter of Spinks, 63 N. Y. App. Div. 235, 71 N. Y. Suppl. 398; Matter of White, 44 N. Y. App. Div. 119, 60 N. Y. Suppl. 702; Matter of Anthony, 42 N. Y. App. Div. 66, 58 N. Y. Suppl. 907; Einstein *v.* General Electric Co., 9 N. Y. App. Div. 570, 41 N. Y. Suppl. 808; Burnell *v.* Coles, 23 Misc. 615, 52 N. Y. Suppl. 200.

Ohio.— *In re* Pfirman, 1 Ohio S. & C. Pl. Dec. 177.

United States.— Turner *v.* Shackman, 27 Fed. 183.

Canada.— McKenzie *v.* Clark, 4 Ont. Pr. 95; Street *v.* Proudfoot, 2 Can. L. J. 213.

Attempt to ascertain existence of cause of action.— The taking of a deposition to perpetuate testimony will not be allowed where the real object is to ascertain whether the party seeking to take it has a cause of action against a proposed defendant. Matter of White, 44 N. Y. App. Div. 119, 60 N. Y. Suppl. 702; Matter of Anthony, 42 N. Y. App. Div. 66, 58 N. Y. Suppl. 907.

Business competitors will not be permitted to secure private information, through the medium of a deposition. Matter of Spinks, 63 N. Y. App. Div. 235, 71 N. Y. Suppl. 398.

Presumptions.— The court will not assume that the object of taking the deposition of an adverse party immediately after the commencement of the action is a fishing excursion for evidence, but the burden is upon the party who resists the taking of the deposition to show abuse of process of the court. *In re* Robinson, 9 Ohio S. & C. Pl. Dec. 763, 7 Ohio N. P. 105.

27. *In re* Carter, 3 Oreg. 293, where the order if granted would have operated in effect as a habeas corpus.

Definite purpose.— Orders to examine witnesses *de bene esse* are only granted where it is shown that the evidence is to be used for some definite purpose; yet, the court will make such an order when it considers that the practice requires it. Whitehead *v.* Buffalo, etc., R. Co., 5 Can. L. J. 232.

28. Forrest *v.* Forrest, 3 Bosw. (N. Y.) 661. An application to take immaterial testimony should be denied. Ablon *v.* Barbey, 1 N. Y. Leg. Obs. 154.

Ability to procure attendance of witness. — Where an open commission can only be allowed to take testimony in the United States or in Canada, such a commission will not issue to take testimony in Florida, where it appears that the witnesses reside in Cuba, no reason except the difference in expense being given to show that it would be any more difficult to procure the attendance of the witness within the jurisdiction. Purdy *v.* Webster, 9 N. Y. Civ. Proc. 144.

Cumulative testimony.— A commission will will not issue where the object is to procure cumulative testimony on a point on which there was conflicting evidence at a former trial and the expense of executing the commission will exceed the amount involved in that point. Mitchell *v.* Montgomery, 4 Bosw. (N. Y.) 676.

Examination futile.— A commission is properly refused where the examination would be futile, as for instance when the applicant does not ask for an adjournment. Dryer *v.* Sexsmith, 40 Hun (N. Y.) 242, 10 N. Y. Civ. Proc. 29. In O'Callaghan *v.* O'Brien, 116 Fed. 934, where after the return of a commission to take testimony as to kinship, the court refused to issue a new commission at the instance of defendant, to take additional testimony, where by the affidavits of the proposed new witnesses submitted in support of the application, it appeared that their testimony would not directly contradict that in behalf of the complainant, and would be as strongly for as against him, the same rule was applied.

d. Prejudice to Adverse Party. The application for a commission or for the taking of a deposition will be denied when prejudice or injury will or may result to the adverse party.[29]

e. Admissions by Adverse Party. A commission may be denied when the adverse party admits the facts which are sought to be elicited by the deposition;[30] but the truth of the facts must be admitted. It will not be enough to admit that the witness if present would testify to them.[31]

f. Terms and Conditions. In granting the application such terms or conditions may be imposed as will protect the adverse party against possible injury or prejudice,[32] as where the applicant has been guilty of laches in making the

Pivileged communication.— In an action to recover for negligence an application by defendant to take the testimony of plaintiff's physician, upon commission, in respect of certain statements made to him by plaintiff concerning the circumstances under which the injury was received, and in respect of what took place between him and another physician at the time of their consultation, was held to have been properly denied. Enright *v.* Brooklyn Heights R. Co., 26 N. Y. App. Div. 538, 50 N. Y. Suppl. 609.

Witness interested.— The application will not be denied because the adverse party asserts that the witnesses named are interested; but the question of their competency will be examined at the trial of the cause. Graves *v.* Delaplaine, 11 Johns. (N. Y.) 200.

29. Goodman *v.* Wineland, 61 Md. 449; Ring *v.* Mott, 2 Sandf. (N. Y.) 683; McKenzie *v.* Clark, 4 Ont. Pr. 95.

Disadvantage.— In Hollander *v.* Baiz, 43 Fed. 35, a libel suit against a foreign consul by a plaintiff who had been expelled from the country which the consul represented, by order of its government, the consul applied for a commission to examine witnesses in such country, and it appeared that the foreign government refused to allow plaintiff to attend such commission, and that the government of such foreign country stood in the virtual relation of principal to defendant, because the alleged libel was published by him under orders from such government, and the application was denied except as to documentary evidence, because of the disadvantage of the adverse party.

Injury to business.— The application will not be denied because the witnesses are business patrons of the adverse party, and he fears the taking of their testimony may disrupt the business relations existing between them. Morse *v.* Grimke, 8 N. Y. Suppl. 1, 18 N. Y. Civ. Proc. 37.

30. People *v.* Young, 108 Cal. 8, 41 Pac. 281; Newton *v.* State, 21 Fla. 53; Wilcox *v.* Stern, 89 N. Y. App. Div. 14, 85 N. Y. Suppl. 159; Bank of Commerce *v.* Michel, 1 Sandf. (N. Y.) 687.

Construction of stipulation.— Where, in consideration of the abandonment of a proceeding to perpetuate decedent's testimony, defendant's general attorney stipulated that plaintiff might testify in any suit thereafter brought as to what the decedent said was the cause, character, and extent of his injuries, the stipulation was sufficiently broad to justify evidence that decedent stated on returning home that he was a passenger on defendant's freight train, on which certain of his cattle were being transported, and that near a certain station the train-men caused the car in which he was riding to give a sudden, violent jerk, which threw him from his seat against the door-casing of the car, causing injuries to his head, shoulder, back, and side. Thompson *v.* Ft. Worth, etc., G. R. Co., (Tex. Civ. App. 1903) 73 S. W. 29.

Residence of witnesses.— A statement in an affidavit made in opposition to an application that the adverse party will consent that the witnesses reside at the places indicated in the application, provided that they will admit that they are citizens of such places, is too problematical to be treated as a concession. Boyes *v.* Bossard, 87 N. Y. App. Div. 605, 84 N. Y. Suppl. 563.

Refusal to accept affidavit of witness.— It is not an objection to a commission that after notice given of intention to apply for it, a proposition was made to accept the affidavit of the witness, which proposition was declined before the time for issuing the commission expired. Brooks *v.* Brooks, 16 S. C. 621.

Statement as to proof required.— Where a commission will cause great delay, and the adverse party shows that the testimony sought will probably be insufficient, and proposes to admit whatever the applicant will swear he expects to prove on the commission, the latter will be required to state what he so expects to prove. Bank of Commerce *v.* Michel, 1 Sandf. (N. Y.) 687.

31. Newton *v.* State, 21 Fla. 53; Bank of Commerce *v.* Michel, 1 Sandf. (N. Y.) 687.

32. Ring *v.* Mott, 2 Sandf. (N. Y.) 683; Clayton *v.* Yarrington, 16 Abb. Pr. (N. Y.) 273 note; Barry *v.* Barclay, 15 C. B. N. S. 849, 109 E. C. L. 849; Reeve *v.* Hodson, 10 Hare (App.) xix, xxiv, 17 Jur. 341, 44 Eng. Ch. 731, 738.

Payment into court.— On a bill for a commission to obtain testimony for use in an action at law, the court will not require the money in controversy to be paid into court. Cock *v.* Donovan, 3 Ves. & B. 76, 35 Eng. Reprint 407. But see Marryatt *v.* Notre, McClel. & Y. 101; Ebden *v.* Prince, 8 Price 290; Jackson *v.* Strong, 13 Price 309.

Presence of witness at trial.— In August *v.* Fourth Nat. Bank, 9 N. Y. Suppl. 270, plaintiffs who sought to take the deposition of a witness in jail under an order of arrest

application and by reason thereof the adverse party will be greatly inconvenienced or prejudiced if it is granted.[33]

IX. Order For Commission or to Take Testimony.

A. Necessity — 1. In General. Where an order for a commission[34] or to take testimony *de bene esse*[35] or procure the depositions of witnesses *in per-*

procured by them were required to stipulate that the deposition should be suppressed, if they permitted the witness to leave the jurisdiction.

Safe conduct in foreign jurisdiction.— In Hollander *v.* Baiz, 40 Fed. 659, an action against a foreign consul-general, in which the plaintiff sought to take testimony in the country represented by defendant, it appeared that plaintiff's presence at the execution of the commission was necessary, but that the foreign government declined to permit him to enter its territory, and it was held that the commission should issue only on condition that defendant obtain from his government, and furnish to plaintiff, a safe-conduct, allowing him to enter the country and return, and be present on the execution of the commission.

33. Severe terms may be imposed. Mills *v.* Campbell, 1 Jur. 865, 7 L. J. Exch. Eq. 5, 2 Y. & C. Exch. 402.

Costs may be imposed. Todd *v.* Aylwin, 1 Sim. 271, 2 Eng. Ch. 271. Where notice of a motion for a commission is served by defendant without unnecessary delay, and before notice of trial served by plaintiff, the motion will be granted without the payment of plaintiff's costs of preparing for trial. Brokaw *v.* Bridgman, 6 How. Pr. (N. Y.) 114.

Security for costs.— Where a non-resident plaintiff unnecessarily delays his application, and his recovery is doubtful, he may be required to give security for costs. Hames *v.* Judd, 16 Daly (N. Y.) 110, 9 N. Y. Suppl. 743, 18 N. Y. Civ. Proc. 324. In Fischer *v.* Hahn, 13 C. B. N. S. 659, 32 L. J. C. P. 209, 11 Wkly. Rep. 342, 106 E. C. L. 659, a plaintiff seeking to be examined on his own behalf on the ground that he was going abroad, in addition to special terms was required to give security for costs and to furnish an additional affidavit as to his *bona fides*. In De Rossi *v.* Polhill, 7 Scott 836, the court directed a reference as to the advisability of increasing the security the applicant had given for costs.

Payment into court.— If there is a reason to suspect that the application of defendant is for delay, the court may direct that the money sued for be brought into court. Sparks *v.* Barrett, 7 L. J. C. P. 65, 5 Scott 402. See also Lloyd *v.* Key, 3 Dowl. P. C. 253.

34. Mason, etc., Organ Co. *v.* Pugsley, 19 Hun (N. Y.) 282; Tracy *v.* Suydam, 30 Barb. (N. Y.) 110; Whitney *v.* Wyncoop, 4 Abb. Pr. (N. Y.) 370; Holbrook *v.* Martin, 1 N. C. 624.

Even though the parties consent that the deposition be taken. Mason, etc., Organ Co. *v.* Pugsley, 19 Hun (N. Y.) 282.

At common law a dedimus or commission could only issue by leave of the court. Hume *v.* Scott, 3 A. K. Marsh. (Ky.) 260.

Under the Kentucky statutes no dedimus or order therefor is necessary to authorize the taking of a deposition *de bene esse*. Hume *v.* Scott, 3 A. K. Marsh. (Ky.) 260.

In Louisiana no order is necessary where the commission is to be executed within the state. Hall *v.* Acklen, 9 La. Ann. 219.

In the United States courts, in accordance with the state practice, the clerk may issue a commission without an order of the court. U. S. *v.* Louisville, etc., R. Co., 18 Fed. 480.

In term-time.— Where the clerk has no authority to grant an order or commission to take depositions in term-time, but only in vacation, a deposition taken under a commission issued by the clerk in term-time is illegal. McCandlass *v.* Polk, 10 Humphr. (Tenn.) 617.

During vacation a commission may issue to take the deposition of a witness who is fatally ill, without the special order or direction of the court. Hays *v.* Johnson, 3 Houst. (Del.) 319.

Failure to enter order.— A commission taken by both parties may be read in evidence, although the rule on which it was grounded was not entered on the docket. Dawson *v.* Tibbs, 4 Yeates (Pa.) 349.

Sufficiency.— The signing by the judge of a commission issued by the clerk of the court is a sufficient approval of the commission and a sufficient order therefor. Bradford *v.* Cooper, 1 La. Ann. 325.

35. Travis *v.* Brown, 43 Pa. St. 9, 82 Am. Dec. 540; Curtis *v.* State, 14 Lea (Tenn.) 502.

Leave of court or notice.— Under a statute providing that defendant in a criminal case "may, by leave of the court, take the depositions of witnesses residing out of the State," upon consenting that the state may also take depositions, and that "the defendant may, on the same terms, by leave of court, or by notice to the prosecuting attorney, take the deposition of any witness conditionally," a deposition may be taken by defendant within the state on notice and without leave of the court. Tullis *v.* Stafford, 134 Ind. 258, 33 N. E. 1023.

During recess.— Depositions taken in term-time, during a recess of the court, the opposite party having notice, are received, although taken without an order of the court. Jones *v.* Spring, 7 Mass. 251.

In Illinois the statute authorizes a person filing a bill, before issue joined, to take depositions substantiating its averments; and without an order to that effect he may proceed to take his depositions *de bene esse*. Doyle *v.* Wiley, 15 Ill. 576.

In Pennsylvania the testimony of a witness

petuam[36] is a prerequisite to the issue of the commission or to the right to take or preserve testimony in this form a deposition taken without an order is irregular and invalid.

2 In Chancery. Ordinarily the deposition of a witness or a party cannot be taken in chancery without an order therefor,[37] but this rule has been relaxed in many jurisdictions, so that by the practice a deposition may be taken without leave, subject to the right of the party against whom it is proposed to read it to except.[38]

3. Federal Practice. The provisions of the United States Revised Statutes which empowers the courts of the United States whenever it may be necessary to prevent a failure or delay of justice to grant a dedimus to take depositions according to common usage,[39] or to adopt the state practice relative to taking depositions,[40] authorizes the issue of a commission or the granting of permission to take depositions, according to the law of the state in which the court is held,[41] whenever the right to take it is conferred by the federal statutes,[42] except where

who resides more than forty miles from the place of trial may be taken by rule or commission, if he is unable to attend. Buck *v.* Strong, 6 Pa. Dist. 116, 19 Pa. Co. Ct. 174.

Motion for new trial.— Depositions in support of a motion for a new trial may be taken and presented without leave of court first had. Llewellyn *v.* Levy, 33 Wkly. Notes Cas. (Pa.) 310.

36. Under the Virginia practice there must be an order to take the testimony sought to be perpetuated, and when taken a final decree perpetuating it. Smith *v.* Grosjean, 1 Patt. & H. (Va.) 109.

37. Hanson *v.* Power, 8 Dana (Ky.) 91; Payne *v.* Cowan, Sm. & M. Ch. (Miss.) 26.

The deposition of a party cannot be taken by the adverse party without leave. Hoyt *v.* Hammekin, 14 How. (U. S.) 346, 14 L. ed. 449; Payne *v.* Cowan, Sm. & M. Ch. (Miss.) 26 [*citing* Barden *v.* Gorman, 2 Molloy 376]; Hewitt *v.* Crane, 6 N. J. Eq. 159; Lewis *v.* Owen, 36 N. C. 290 [*citing* Mulvany *v.* Dillon, 2 Ball. & B. 418, 12 Rev. Rep. 43]. See Sproule *v.* Samuel, 5 Ill. 135.

Unsigned order.— In Cummins *v.* Wire, 6 N. J. Eq. 73, a paper purporting to be the certified copy of an order and of the signature of the chancellor thereto, for the examination of a defendant in a suit, was sent by the clerk to the solicitor of defendant, but by some oversight the original draft of the order had not been presented to the chancellor for his signature, and it was held that the court might receive the testimony, if the party examined was not interested.

In Ontario the leave of the court or a judge is necessary to authorize interrogatories either with the declaration or pleas or at any other time. Upper Canada Bank *v.* Ruttan, 3 Ont. Pr. 46.

38. *Illinois.*— Sproule *v.* Samuel, 5 Ill. 135.

Ohio.— Choteau *v.* Thompson, 3 Ohio St. 424.

Pennsylvania.— *In re* Armstrong, 6 Watts 236.

Virginia.— Moore *v.* Hilton, 12 Leigh 1.

Canada.— Fuller *v.* Richmond, 2 Grant Ch. (U. C.) 509.

39. U. S. Rev. St. (1878) § 866 [U. S. Comp. St. (1901) p. 663].

"According to common usage" in the judiciary act of 1789 refers to usage of the state courts in the particular state where the United States court is to be held. Warren *v.* Younger, 18 Fed. 839; U. S. *v.* Cameron, 15 Fed. 794, 5 McCrary 93. In Warren *v.* Younger, 18 Fed. 859, 862, the court said: "It is the universal experience that most of our knowledge of the common usage of courts is absorbed by us in the atmosphere of the courts; that it is perpetuated by tradition, and only partial and unsatisfactory, and often delusive glimpses of it can be caught now and then in text-books and reports. This usage, like the usage or general custom of trade, has life in itself and grows to meet the cases of the growth of the business to which it relates."

Examination of party before trial.— It is not "according to common usage" to call a party in advance of the trial for the purpose of extracting information which may be thereafter used or not, as serves the purpose of the party obtaining it. Matter of Fisk, 113 U. S. 713, 5 S. Ct. 724, 28 L. ed. 1117. A common usage, within the meaning of the statute, cannot be established by a state statute authorizing the examination of a party to obtain facts on which to frame a pleading. Turner *v.* Shackman, 27 Fed. 183.

40. U. S. Rev. St. (1878) § 914 [U. S. Comp. St. (1901) p. 684]. And see Courts, XII, E, 1 [11 Cyc. 884]. See also 27 U. S. St. at L. 7 [U. S. Comp. St. (1901) p. 663], to the effect that, "in addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held."

41. McLennan *v.* Kansas City, etc., R. Co., 22 Fed. 198; U. S. *v.* Louisville, etc., R. Co., 18 Fed. 480.

42. 27 U. S. St. at L. 7 [U. S. Comp. St. (1901) p. 664] providing that depositions may be taken for use in the federal courts in the mode prescribed by the state laws, merely provides an additional method of taking depositions in cases already authorized, and does not confer any additional rights to take tes-

the mode of taking it whether under commission or otherwise is expressly provided for therein.[43]

B. Notice of Order or Entry. In some jurisdictions where an order to take testimony or for a commission is taken or entered *ex parte*, the adverse party must be served with a written notice, specifying the commissioners and indicating where they can be found.[44]

C. Form and Requisites[45] **— 1. Order For Commission.** The order should show the existence of a sufficient ground for issuing the commission,[46] and should designate and identify the commissioner and the witnesses.[47] In England it is required that the order specify the time, place, and manner of executing the commission.[48]

timony under state laws. National Cash Register Co. *v.* Leland, 77 Fed. 242.

Grounds.— The right to take the testimony must depend upon a statute of the United States and not on a state statute. McLennan *v.* Kansas City, etc., R. Co., 22 Fed. 198. In adopting the state practice the court does not dispense with the requirement of the act of congress which authorizes depositions to be taken when the witness lives more than one hundred miles from the place where the case is tried. The adoption of the state law only refers to the form and mode of taking depositions. Warren *v.* Younger, 18 Fed. 859; Curtis *v.* Central R. Co., 6 Fed. Cas. No. 3,501, 6 McLean 401.

Examination of party before trial.— The courts of the United States cannot compel a party to submit to an examination before trial as provided for by state statutes, nor enforce an order for such examination made in the state court previous to the removal of the cause. Matter of Fisk, 113 U. S. 713, 5 S. Ct. 724, 28 L. ed. 117.

Choice of modes.— Where the right exists under the federal statutes, the parties may follow as to the mere mode of procuring the deposition at their election, either the provisions of the state law or of the act of congress. McLennan *v.* Kansas City, etc., R. Co., 22 Fed. 198; U. S. *v.* Louisville, etc., R. Co., 18 Fed. 480.

Conflict of laws.— The courts of the United States will not authorize the taking of depositions under the statutes of a state which conflict with the act of congress relating to depositions in similar or analogous cases. Randall *v.* Venable, 17 Fed. 162.

43. U. S. *v.* Pings, 4 Fed. 714.

44. Kellum *v.* Smith, 39 Pa. St. 241; Patterson *v.* Greenland, 37 Pa. St. 510; Rhoades *v.* Selin, 20 Fed. Cas. No. 11,740, 4 Wash. 715.

Sufficiency.— A *bona fide* substantial compliance with the rule requiring notice is sufficient. Kellum *v.* Smith, 39 Pa. St. 241.

Sufficiency of service.— A rule of court requiring service of notice of a rule to take depositions upon a party is not complied with by service on his attorney, and a waiver of service on the party cannot be implied from the attorney's omission expressly to dissent to the service on himself. Cunningham *v.* Jordan, 1 Pa. St. 442.

An order to examine a party need not be served on him. Smith *v.* Pincombe, 13 Jur. 91, 158, 18 L. J. Ch. 211, 16 Sim. 497.

45. **For form of order:** For commission see Clayton *v.* Yarrington, 16 Abb. Pr. (N. Y.) 273 note; U. S. *v.* Hom Hing, 48 Fed. 635. For oral examination see Clayton *v.* Yarrington, 16 Abb. Pr. (N. Y.) 275 note.

46. **Absence of witness.**— Where it is necessary to show that the witness is not within the state, it is not enough to state that he resides out of the state, or that he is absent from the state at the time of the trial. Wallace *v.* Blake, 56 N. Y. Super. Ct. 519, 4 N. Y. Suppl. 438, 16 N. Y. Civ. Proc. 384.

47. Corbin *v.* Anderson, 84 N. Y. App. Div. 268, 82 N. Y. Suppl. 683; Wallace *v.* Blake, 56 N. Y. Super. Ct. 519, 4 N. Y. Suppl. 438, 16 N. Y. Civ. Proc. 384.

An order for an open commission should state the names of the witnesses to be examined. Corbin *v.* Anderson, 84 N. Y. App. Div. 268, 82 N. Y. Suppl. 683.

Description of commissioners.— A rule for a commission to take the testimony in another state, which names commissioners but fails to state their residences or to specify the county or place in the state where the commission is to be executed, is so defective that the depositions taken under the commission cannot be read. Patterson *v.* Greenland, 37 Pa. St. 510.

Omission of name of commissioner — Authorizing party to submit names of witnesses. — Where it is provided that the commission may issue to one or more persons to be named therein, an order in which the name of the commissioner is not inserted, and which provides for the examination of "such other witnesses as the defendant may submit the names and addresses of to the plaintiff," is irregular in both respects. Wallace *v.* Blake, 56 N. Y. Super. Ct. 519, 4 N. Y. Suppl. 438, 16 N. Y. Civ. Proc. 384.

In England the order need not name the commissioner. Nicol *v.* Alison, 11 Q. B. 1006, 12 Jur. 598, 17 L. J. Q. B. 355, 63 E. C. L. 1006.

Sufficiency.— An order for a commission to examine witnesses in a city within one of the United States and to return the same before a specified date is sufficient as to time and place. Bulham *v.* Mears, 6 Wkly. Rep. 597.

48. Greville *v.* Stultz, 11 Q. B. 997, 12 Jur. 49, 17 L. J. Q. B. 14, 63 E. C. L. 997; Stein-

2. Order to Take Testimony. Among other requirements it has been held that an order to take testimony should properly designate the cause in which the testimony is to be taken,[49] and specify the notice to be given to the adverse party,[50] as well as the time and place of taking the deposition.[51] But where the officer by whom the deposition is to be taken is implied, an order which is silent in that respect is not bad for that reason.[52]

X. The Commission.[53]

A. In General. At common law the ordinary mode of procuring depositions is by commission, and this mode of procedure is usually required by statute, especially where the witness is beyond the jurisdiction. It follows that except where the common-law rule has been abrogated,[54] or special circumstances exist

keller *v.* Newton, 1 Scott N. R. 148. See Simms *v.* Henderson, 11 Q. B. 1015, 12 Jur. 773, 17 L. J. Q. B. 209, 63 E. C. L. 1015.

49. People *v.* Ward, 4 Park. Cr. (N. Y.) 516.

Criminal proceeding.— An order to take the testimony of a non-resident complaining witness to be used on the trial of the accused which is entitled as in a pending proceeding, when in fact no indictment has been found is irregular. People *v.* Ward, 4 Park. Cr. (N. Y.) 516. To same effect see People *v.* Chrystal, 8 Barb. (N. Y.) 545.

Misnomer of party.— A mistake in the christian name of plaintiff will not vitiate the order, if in fact it was made in the right cause. Monteeth *v.* Caldwell, 7 Humphr. (Tenn.) 13.

50. Ellis *v.* Jaszynsky, 5 Cal. 444.

Time of notice.— Where a rule of court authorizes a rule to take depositions to be entered of course, stipulating reasonable notice, the construction of the rule must, so far as respects the necessity of specifying the number of days' notice in the rule, depend on the usage and practice of the court. Cunningham *v.* Irwin, 7 Serg. & R. (Pa.) 247, 10 Am. Dec. 458; McConnell *v.* McCoy, 7 Serg. & R. (Pa.) 223.

"Forthwith."— An order directing service thereof "forthwith," and specifying that the examination shall take place on the same day "at 1 o'clock," sufficiently specifies the length of notice of examination to be given. People *v.* Chrystal, 8 Barb. (N. Y.) 545.

In Oregon the notice to be given rests in the discretion of the judge. *In re* Carter, 3 Oreg. 293.

51. Gill *v.* Atwood, 2 Bibb (Ky.) 400; Reese *v.* Warren, 1 Browne (Pa.) 255.

Under the Colorado statute respecting depositions in criminal causes, it is the duty of the judge to fix the time and place of taking the testimony. Ryan *v.* People, 21 Colo. 119, 40 Pac. 775.

In Oregon the time and place of taking is discretionary with the judge. *In re* Carter, 3 Oreg. 293.

52. A rule to take depositions is not bad, for not expressing that they are to be taken before a judge or justice of the peace, as that is implied. Keller *v.* Nutz, 5 Serg. & R. (Pa.) 246.

53. For form of commission see Street *v.* Andrews, 115 N. C. 417, 20 S. E. 450.

For forms of commencement to commission see Ala. Civ. Code (1886), § 3470; Fla. Rev. St. (1892) § 1128; Bullitt Civ. Code Ky. (1895) p. 74; Mo. Rev. St. (1889) p. 2259; Street *v.* Andrews, 115 N. C. 419; State *v.* Bourne, 21 Oreg. 218, 27 Pac. 1048.

54. In Iowa where the witness resides within the state, but in a different county from the place of the trial, his deposition may be taken either upon notice or written interrogatories. If he resides without the state a commission should issue to the officer or commissioner taking the same; if within the county where the trial is to take place no commission is necessary; if within the state, but in a different county, then the party may pursue either of the two methods. Fabian *v.* Davis, 5 Iowa 456.

Under the Kentucky statutes testimony may be taken *de bene esse* without a dedimus. Hume *v.* Scott, 3 A. K. Marsh. (Ky.) 260.

The Tennessee act providing that hereafter it shall not be necessary to procure an order of the court or to make any affidavit previous to taking a deposition, but that either party litigant in any of the courts of the state may take depositions on notice to the adverse party in all cases that by law can be taken abolishes the commission and renders it unnecessary. Dossett *v.* Miller, 3 Sneed 72; Hoover *v.* Rawlings, 1 Sneed 287.

U. S. judiciary act.— If a deposition is taken in conformity to section 30 of the Judiciary Act it will not be invalidated by the fact that it was taken more than one hundred miles from the place of trial without a commission or rule of court. Pettibone *v.* Derringer, 19 Fed. Cas. No. 11,043, 4 Wash. 215.

In chancery a commission is not necessary. Gordon *v.* Watkins, Sm. & M. Ch. (Miss.) 37.

Non-resident within the jurisdiction.— A commission is not necessary to take the deposition of a non-resident witness, who is within the jurisdiction of the court. Porter *v.* Beltzhoover, 2 Harr. (Del.) 484; Anderson *v.* Easton, 16 Iowa 56.

Defective commission.— Where no commission is necessary, the fact that the deposition was taken under a defective commission is immaterial. Dossett *v.* Miller, 3 Sneed (Tenn.) 72.

which require despatch,[55] if the issue of a commission is a prerequisite to the right to take testimony by deposition, testimony cannot be so taken without a commission.[56]

B. By Whom Issued. The commission is usually issued by the clerk of the court in which it is granted,[57] or by the deputy clerk.[58]

C. Time of Issue. The commission should issue at or within the time prescribed by statute or the rules of practice,[59] but the failure to observe such requirements may be disregarded where no prejudice has resulted.[60]

55. In Porter *v.* Beltzhoover, 2 Harr. (Del.) 484, depositions taken without a commission actually issued were sustained, it appearing that the commission had been ordered, and the commissioner appointed by the court, under circumstances requiring despatch.

56. *Georgia.*— Merchants' Nat. Bank *v.* Vandiver, 108 Ga. 768, 33 S. E. 430.

Illinois.— Corgan *v.* Anderson, 30 Ill. 95.

Indiana.— Madison, etc., R. Co. *v.* Whitesel, 11 Ind. 55; Boggs *v.* State, 8 Ind. 463.

Iowa.— Anderson *v.* Easton, 16 Iowa 56.

Kentucky.— Gilly *v.* Singleton, 3 Litt. 249.

Maryland.— See Stoddert *v.* Manning, 2 Harr. & G. 147.

Mississippi.— Ragan *v.* Cargill, 24 Miss. 540; Saunders *v.* Erwin, 2 How. 732.

Texas.— Western Union Tel. Co. *v.* Haman, 2 Tex. Civ. App. 100, 20 S. W. 1133.

Virginia.— Unis *v.* Charlton, 12 Gratt. 484.

United States.— Stein *v.* Bowman, 18 Pet. 209, 10 L. ed. 129; Cortes *v.* Tannhauser, 18 Fed. 667, 21 Blatchf. 552; Bleecker *v.* Bond, 3 Fed. Cas. No. 1,534, 3 Wash. 529; Frevall *v.* Bache, 9 Fed. Cas. No. 5,113, 5 Cranch C. C. 463.

In law courts the chancery practice of taking depositions without a commission is inapplicable. Ragan *v.* Cargill, 24 Miss. 540.

Waiver.— The necessity of a commission is not waived by participating in the examination. Ragan *v.* Cargill, 24 Miss. 540.

Taking depositions without reference to outstanding commission.— In David *v.* Allen, 14 Pick. (Mass.) 313, it was said that after a commission has issued, it is doubtful if the party procuring it can cause depositions to be taken without reference to it.

57. Haviland *v.* Simons, 4 Rich. (S. C.) 338.

Clerk ex officio.— A deposition taken under a commission issued in the name, and by the clerk, of the district court, may be read on the trial of a cause in a county court of which by virtue of his office he is also clerk. Palamourges *v.* Clark, 9 Iowa 1.

Election contest.—Ala. Code (1886), p. 134, art. 1, which relates to the contest of any office that may be filled by vote of the people, and which provides (section 402) that the testimony in such contest shall be by deposition, either on interrogatories or subpœna, and that the commission shall be issued by the clerk of the court in which the trial shall be had, authorizes the clerk of the circuit court to file interrogatories and to issue commissions to take testimony in the contest of the election of a member of the general assembly. Roney *v.* Simmons, 97 Ala. 88, 11 So. 740.

Issue out of wrong court.— In Horton *v.* Arnold, 18 Wis. 223, an affidavit, rule for a commission, and interrogatories were duly filed and served on the adverse party, but by mistake the commission issued out of a court other than that in which the cause was pending, and it was held that the commission being a nullity, on its return, a commission might issue from the proper court on the papers so filed and served.

Presumption of regularity.— A commission regular on its face and bearing the seal of the court will be presumed to have issued by its authority. Plummer *v.* Roads, 4 Iowa 587; Smith *v.* North America Min. Co., 1 Nev. 423. See *In re* Cole, 6 Fed. Cas. No. 2,975, 8 Reporter 105, 7 Wkly. Notes Cas. (Pa.) 114.

58. Rhodes *v.* Myers, 16 La. Ann. 398; Brooks *v.* Brooks, 16 S. C. 621.

59. Machine Co. *v.* Shillow, 14 Lanc. Bar (Pa.) 58.

Expiration of life of order.— Depositions taken on a dedimus issued more than one term previous to their taking when, at the last term before taking, there was neither a continuance of the old order or a new one issued, cannot be read. White *v.* Edgman, 1 Overt. (Tenn.) 19 note.

Where the adverse party files cross interrogatories and takes out a commission, the party initiating the proceedings is entitled to a commission, although the time prescribed has not elapsed since service of notice and precept by him. St. Louis, etc., R. Co. *v.* Skaggs, (Tex. Civ. App. 1903) 74 S. W. 783.

60. Bonney *v.* Cocke, 61 Iowa 303, 16 N. W. 139.

After filing cross interrogatories.— That within five days from the filing of direct interrogatories by defendant the commission issued at the instance of plaintiff, who filed cross interrogatories, is not a ground for suppressing the deposition at defendant's request. The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117.

For the premature issue of the commission a deposition will not be quashed where the objectant has cross-examined under a commission subsequently procured by him. St. Louis, etc., R. Co. *v.* Skaggs, (Tex. Civ. App. 1903) 74 S. W. 783.

Opportunity to object.— Where a commission issued before plaintiff had an opportunity to strike commissioners, but he was given a reasonable time before the commis-

D. Form and Requisites — 1. In General. The dedimus or commission should conform to the order for its issue and should be in the form and contain all the requirements prescribed by statute or otherwise;[61] but mere informalities or irregularities which do not substantially affect or prejudice the rights of the parties may be disregarded.[62]

2. Designation of Cause. While the commission should accurately designate the action or suit in which the testimony is to be taken,[63] where the action is or may be otherwise identified, and the error is not misleading or prejudicial, a mere misdescription of it,[64] clerical errors in the initials or names of the parties,[65] or as to the capacity in which they sue or are sued,[66] or incorrect statements as to the court in which the litigation is pending,[67] may be disregarded.

3. Designation of Commissioner — a. In General. In many of the states the commission must designate by name the commissioners by whom the testimony is to be taken,[68] with such specificness as will leave no reasonable doubt of his identity.[69] In those states, however, where the commission may be directed to designated officials authorized to administer oaths, it is ordinarily sufficient to

sion was forwarded, the irregularity was cured. De Sobry *v.* De Laistre, 2 Harr. & J. (Md.) 191, 3 Am. Dec. 555.

61. **In Mississippi** the issue of a commission in the form required by statute is absolutely necessary to the validity of the deposition. Ragan *v.* Cargill, 24 Miss. 540.

The ordinary form will not be departed from without special reasons. Follett *v.* Delany, 7 C. B. 775, 62 E. C. L. 775.

62. A deposition may be read, although the commission issued by the clerk of the court directs it to be taken absolutely, while the order of the court authorized it to be taken *de bene esse*, if it be shown that proper diligence has been used to enforce the attendance of the witness. Hodges *v.* Nance, 1 Swan (Tenn.) 57.

Several witnesses.— One commission may issue to take the testimony of several witnesses. Howe *v.* Pierson, 12 Gray (Mass.) 26; Fowler *v.* Merrill, 11 How. (U. S.) 375, 13 L. ed. 736.

63. **"Above-mentioned suit."**— It is sufficient if the commission, after the names of the parties and court have been given in the caption, direct the evidence to be taken in the above-mentioned suit. Stone *v.* Stillwell, 23 Ark. 444.

The omission of defendant's name may be disregarded where objection for that reason is made for the first time at the trial. Hodges *v.* Cobb, L. R. 2 Q. B. 652, 8 B. & S. 583, 36 L. J. Q. B. 265, 16 L. T. Rep. N. S. 792, 15 Wkly. Rep. 1038.

The title of the cause may be abbreviated, as by stating the names of one of each of the parties and adding "and others." Lincoln *v.* Wright, 4 Beav. 166, 10 L. J. Ch. 331.

Where a firm is a party it is sufficient to designate it by the partnership name. Evans *v.* Norris, 1 Ala. 511.

64. McCraven *v.* Doe, 23 Miss. 100.

65. Jordan *v.* Hazard, 10 Ala. 221; Dixon *v.* Steele, 5 Hayw. (Tenn.) 28; Keene *v.* Meade, 3 Pet. (U. S.) 1, 7 L. ed. 581 [*affirming* 16 Fed. Cas. No. 9,373, 3 Cranch C. C. 51].

Error not apparent.— Where defendants were designated as the executors of "John Turner" instead of "John Peterson" and it did not appear that there was no case against the executors of "John Turner" on the docket, the deposition was rejected. Ellicott *v.* Turner, 4 Md. 476, in which it was said that had it been shown that no case against "John Turner's" executors was on the docket, the words "John Turner" would have been treated as a clerical misprision.

66. Buckner *v.* Stewart, 34 Ala. 529; Reese *v.* Beck, 24 Ala. 651; Hobbs *v.* Godlove, 17 Ind. 359.

67. Dobson *v.* Finley, 53 N. C. 495; Armstrong *v.* Dalton, 15 N. C. 568.

68. *Alabama.*— Guice *v.* Parker, 46 Ala. 616; Worshaw *v.* Goar, 4 Port. 441.

Mississippi.— Hemphill *v.* McBride, 12 Sm. & M. 620; Rupert *v.* Grant, 6 Sm. & M. 433.

New York.— Hemenway *v.* Kneedson, 73 Hun 227, 25 N. Y. Suppl. 1018.

Virginia.— Marshall *v.* Frisbie, 1 Munf. 247.

Wisconsin.— Sydnor *v.* Palmer, 29 Wis. 226.

United States.—Vanstophorst *v.* Maryland, 2 Dall. 401, 1 L. ed. 433; Walsh *v.* Walsh, 29 Fed. Cas. No. 17,117, 3 Cranch C. C. 651.

See 16 Cent. Dig. tit. "Depositions," § 56.

Immaterial addition of title.— Where the commissioner is named and his official title, notary public, added, if it is evident that it was the intention to appoint a special commissioner, the words "notary public" may be treated merely as words of description. Michael *v.* Matheis, 77 Mo. App. 556.

Proof of omission to name commissioner.— It is competent for plaintiff in a suit to prove by the deputy clerk that a commission to take a deposition for defendant issued in blank as to the name of the commissioner. Hemphill *v.* McBride, 12 Sm. & M. (Miss.) 620.

69. The abbreviation of the given name or names of the commissioner is not objectionable. Feagin *v.* Beasley, 23 Ga. 17; Brown *v.* Ellis, 103 Fed. 834. *Contra*, Frierson *v.* Irwin, 4 La. Ann. 277.

Misnomer.— Where the notice named the commissioner as "Corey," but the clerk addressed the commission to "Carey," it was

issue the commission to such persons by their official title,[70] or to them by name, adding their title,[71] or by name only,[72] designating the state and county in which they reside or are authorized to act.[73]

b. Alternative Designation. Although it has been held that a commission may be directed to persons named in the alternative,[74] it has also been held improper to address the writ to several officers in the alternative;[75] and that if addressed to a person by name or to any officer it will be good as to the person named only.[76]

c. Substitution of Commissioner. A commissioner other than the one named in the commission may be substituted by the officer issuing the commission by consent of the parties.[77] But a party cannot strike out the name of the commissioner to insert another;[78] and where a commission has issued with one name the

held that as the adverse party was not misled the misnomer was immaterial (Bibb *v.* Allen, 149 U. S. 481, 13 S. Ct. 950, 37 L. ed. 819), but where the commission was addressed to "Barnham" and the real name of the commissioner was "Barham" the commission was held to have been improperly executed (Kirk *v.* Suttle, 6 Ala. 679).

70. *Colorado.*— See Argentine Falls Silver Min. Co. *v.* Molson, 12 Colo. 405, 21 Pac. 190.

Indiana.—Dumont *v.* McCracken, 6 Blackf. 355; Earl *v.* Hurd, 5 Blackf. 248.

Iowa.— Gilman *v.* Sheets, 78 Iowa 499, 43 N. W. 299; Levally *v.* Harmon, 20 Iowa 533.

Kentucky.— Turner *v.* Patterson, 5 Dana 292; Mobley *v.* Hamit, 1 A. K. Marsh. 590.

Massachusetts.— Tucker *v.* Utley, 168 Mass. 415, 47 N. E. 198.

See 16 Cent. Dig. tit. "Depositions," § 56.

In Illinois under the statute providing that the commission may be "directed to any competent or disinterested person as commissioner, or to any judge," etc., no individual need be expressly named as commissioner. Brackett *v.* Nikirk, 20 Ill. App. 525.

In Indiana a dedimus in a pending suit to take depositions out of the state must be directed to a justice of the peace; but a person only expecting to become a party to a suit may have a dedimus, by the statute, directed to any officer of another state who is there authorized to take depositions. Hobbs *v.* Godlove, 17 Ind. 359; Dumont *v.* McCracken, 6 Blackf. 355.

In Louisiana a commission to take testimony within the state may be directed generally to any judge or justice of the peace in a particular parish. Dwight *v.* Splane, 11 Rob. 487. Where a deposition is actually taken before an officer of another state, as intended, the fact that the dedimus was erroneously addressed "to any judge or justice of the peace" of the state in which the dedimus issued is immaterial. Morris *v.* White, 28 La. Ann. 855.

A commission addressed to any notary public in a designated county in another state is sufficient. Sheriff *v.* Hull, 37 Iowa 174.

71. Brown *v.* Luehrs, 79 Ill. 575; Levally *v.* Harmon, 20 Iowa 533. See Argentine Falls Silver Min. Co. *v.* Molson, 12 Colo. 405, 21 Pac. 190, where the return failed to show the official character of the person who took the testimony and the deposition was rejected.

72. Dambmann *v.* White, 48 Cal. 439; Dunn *v.* Blunt, 4 Mart. (La.) 677.

73. Levally *v.* Harmon, 20 Iowa 533.

Sufficiency.— A commission addressed to "any notary public within and for Dauphin Co., Pa.," sufficiently designates the county and state in which he is authorized to act. Gilman *v.* Sheets, 78 Iowa 499, 43 N. W. 299. Where a commission issues to a notary public, if within the United States or Canada, it is sufficient to name the county of his residence; but if the deposition is to be taken in some foreign country, the city or town of his residence must be stated. Lyon *v.* Barrows, 13 Iowa 428. A dedimus issued in Missouri and directed "to any judge . . . of the city of New Orleans" is of no validity, since the court will not take judicial notice that New Orleans is a municipal division of any of the United States. The statute providing that depositions may be taken before any judge, etc., in any of the United States or territories. Ober *v.* Pratte, 1 Mo. 80.

74. Martin *v.* King, 3 How. (Miss.) 125.

Two commissioners named in order.— A deposition taken in another state, under a commission directed to both or either commissioners, where a rule had been entered naming two commissioners, is admissible. Berghaus *v.* Alter, 9 Watts (Pa.) 386.

75. Levally *v.* Harmon, 20 Iowa 533.

76. A commission to take depositions issued to A B, "or any justice of the peace of Lauderdale county," is good as an authority to A B, but not to any one else, although a justice of the peace in that county. Campbell *v.* Woodcock, 2 Ala. 41.

77. Hall *v.* Barton, 25 Barb. (N. Y.) 274.

Where the justice inserted the name of the substitute in the commission, his omission to do so in the heading to the interrogatories, where the name of the original commissioner appeared, was held not to vitiate the commission. Hall *v.* Barton, 25 Barb. (N. Y.) 274.

78. If a commission be filled up by the clerk and master, the party may not strike out the name of the commissioner to insert another. Dawson *v.* Speight, 1 N. C. 144.

unauthorized insertion by the party who procured it of two other names will vitiate it.[79]

d. Filling Blanks. A commission to take testimony without the state may issue in blank as to the name of the commissioner, which may be inserted afterward,[80] or by the commissioner at the time of taking the testimony;[81] and it has been held that the failure of a commissioner to insert his name in a blank commission will not vitiate it, if the return shows who the commissioner was,[82] and that the deposition was taken before the proper person.[83]

4. Designation of Witnesses — a. Necessity. It is the general rule that the witnesses who are to be examined must be named in the commission, or in some other manner sufficiently identified.[84] Under special circumstances, however, the party may be allowed to take the depositions of such witnesses as he may produce before the commissioner without naming them, for the purpose of proving a distinct fact.[85]

79. Hemphill *v.* McBride, 12 Sm. & M. (Miss.) 620.

80. Hall *v.* Lay, 2 Ala. 529; Carlyle *v.* Plumer, 11 Wis. 96. *Contra*, Vanstophorst *v.* Maryland, 2 Dall. (U. S.) 401. 1 L. ed. 433. Blanks in a printed commission may be filled up by a party's attorney, where it is signed by the clerk and sealed with his official seal. Dwight *v.* Splane, 11 Rob. (La.) 487.

81. McCandlass *v.* Polk, 10 Humphr. (Tenn.) 617. And see Oliver *v.* State Bank, 11 Humphr. (Tenn.) 74.

Contra.— A commission to take the answer of a non-resident defendant to a bill in chancery, for discovery, issued by the register in blank as to the name of the commissioner, is invalid: and the request of the register to the person receiving it to insert his name as commissioner does not legalize the act. Guice *v.* Parker, 46 Ala. 616.

82. Page *v.* Dodson Printers' Supply Co., 106 Ga. 77, 31 S. E. 804; Jordan *v.* Rivers, 20 Ga. 108.

Contra.—A commission issued and returned with the deposition in blank is a nullity. Oliver *v.* State Bank, 11 Humphr. (Tenn.) 74.

83. Waters *v.* Brown, 3 A. K. Marsh. (Ky.) 557.

84. Strayer *v.* Wilson, 54 Iowa 565, 7 N. W. 7; Pilmer *v.* Des Moines Branch State Bank, 16 Iowa 321; Bonella *v.* Maduel, 26 La. Ann. 112; Flower *v.* Downs, 12 Rob. (La.) 101; Lazarus *v.* Schroder, 49 N. Y. App. Div. 393, 63 N. Y. Suppl. 359; Predigested Food Co. *v.* Scott, 28 N. Y. App. Div. 59, 50 N. Y. Suppl. 896; Darling *v.* Klock, 74 Hun (N. Y.) 248, 26 N. Y. Suppl. 445; Hemenway *v.* Knudson, 73 Hun (N. Y.) 227, 25 N. Y. Suppl. 1018; Wright *v.* Jessup, 3 Duer (N. Y.) 642.

An open commission authorizing the examination of any witness that may be produced by either party, but which does not name or describe the witnesses or limit them to persons residing within the state is erroneous. Darling *v.* Klock, 74 Hun (N. Y.) 248, 26 N. Y. Suppl. 445.

Following terms of order.—Where an order was made for a commission to examine a witness named "and others" the commission cannot issue to examine such witness only, without amending the order. Smith *v.* Babcock, 9 Ont. Pr. 175.

One commission may be sued out to take the depositions of several witnesses. Howe *v.* Pierson, 12 Gray (Mass.) 26.

Foreign witnesses.—In Pennsylvania it has never been the practice to require parties issuing a commission to examine foreign witnesses to name them, although the court has a discretion to compel them to do so. Lowry's Estate, 4 Pa. Dist. 690, 17 Pa. Co. Ct. 131; Cot Co. *v.* Sternberger, 12 Wkly. Notes Cas. 290; Huber *v.* Huber, 17 Phila. 322.

Members of partnership.— Where it is desired to examine the members of a copartnership, it is not enough to state the firm-name. The names of its members must be given. Lazarus *v.* Schroder, 49 N. Y. App. Div. 393, 63 N. Y. Suppl. 359.

Witnesses named by one party.— Where by statute the commission must authorize the commissioner to take the deposition of such persons as shall be named by "either party," a commission authorizing him to take the depositions of such persons as shall be named "by the plaintiff" will be quashed. McLean *v.* Thorp, 4 Mo. 256.

85. McMahon *v.* Allen, 18 Abb. Pr. (N. Y.) 292.

As to open commission see *infra*, XI.

Inability to ascertain names.— Where the applicant shows that the facts which he wishes to establish can only be proved by persons in the employ of his adversary whose names are unknown to him, the court will either permit the commission to issue generally without the names of the witnesses or grant a stay of proceedings until their names can be ascertained. Shaffer *v.* Wilcox, 2 Hall (N. Y.) 502. On proof that the names of witnesses or the importance of their evidence was not discovered until the commission was put in execution abroad, their testimony may be taken. The Infanta, 13 Fed. Cas. No. 7,030, Abb. Adm. 263.

"Members of the bar."— If no objection is made before the commission issues, a direction to take the deposition of a person named

b. Sufficiency. The misnomer or misdescription of a witness by the omission of a second initial letter or name or a variation which does not change the sound of the name or the like, is immaterial;[86] but the deposition of a person whose name is clearly dissimilar from the name designated in the dedimus or commission must be rejected, although he is the person whose testimony is intended.[87]

c. Additional Witnesses. When necessary to prevent a failure of justice the commission may be modified by inserting the name of an additional witness;[88] but a new name will not be inserted on the death of a witness named — a new commission should issue.[89]

5. Time and Place of Execution. Ordinarily the time and place of executing the commission should be inserted therein;[90] but a commission to be executed in another state need not designate the particular place of execution.[91]

6. Instructions to Commissioners[92] — a. In General. The commissioners should be instructed generally as to the mode of executing the commission,[93] and may be

and other "members of the bar" at a designated place will authorize the commission to take the depositions of such other members. Richardson *v.* Forepaugh, 7 Gray (Mass.) 546.

The general rule is never departed from, unless under very special circumstances, and never when by reasonable diligence the names might have been ascertained. Wright *v.* Jessup, 3 Duer (N. Y.) 642.

86. *Alabama.*— McCutchen *v.* Loggins, 109 Ala. 457, 19 So. 810.

Colorado.— Man *v.* Wetzel, 3 Colo. 2.

Iowa.— Strayer *v.* Wilson, 54 Iowa 565, 7 N. W. 7.

Massachusetts.— Smith *v.* Castles, 1 Gray 108.

Michigan.— Ellis *v.* Spaulding, 39 Mich. 366.

Tennessee.— Brooks *v.* McKean, Cooke 162.

Texas.— International, etc., R. Co. *v.* Kindred, 57 Tex. 491; Atkinson *v.* Wilson, 31 Tex. 643; Galveston, etc., R. Co. *v.* Daniels, 1 Tex. Civ. App. 695, 20 S. W. 955.

See 16 Cent. Dig. tit. "Depositions," § 57.

87. *California.*— Smith *v.* Westerfield, 88 Cal. 374, 26 Pac. 206.

Illinois.— Scholes *v.* Ackerland, 13 Ill. 650.

Iowa.— Strayer *v.* Wilson, 54 Iowa 565, 7 N. W. 7.

Mississippi.— Henderson *v.* Cargill, 31 Miss. 367.

New York.— Brown *v.* Southworth, 9 Paige 351.

See 16 Cent. Dig. tit. "Depositions," § 57.

88. See The Infanta, 13 Fed. Cas. No. 7,030, Abb. Adm. 263, where new witnesses, the importance of whose testimony had been discovered since the execution of the commission had begun, were permitted to be examined.

Omission of name of party.— Where, on application by a non-resident plaintiff for commission to examine non-resident witnesses, the opposing affidavit avers that plaintiff has purposely omitted his name as a witness to embarrass defendant in obtaining certain evidence in his possession, the order granting the commission will be modified by requiring plaintiff's name to be inserted, unless he stipulates to be present at the trial for examination. Merino *v.* Munoz, 63 N. Y. App. Div. 613, 71 N. Y. Suppl. 321.

89. McVickar *v.* Woolcot, 3 Cai. (N. Y.) 321, Col. & C. Cas. (N. Y.) 501.

90. See Simms *v.* Henderson, 11 Q. B. 1015, 12 Jur. 773, 17 L. J. Q. B. 209, 63 E. C. L. 1015; Steinkeeler *v.* Newton, 1 Scott N. R. 148.

The omission is a mere irregularity. Howkins *v.* Baldwin, 16 Q. B. 375, 15 Jur. 749, 2 L. M. & P. 250, 20 L. J. Q. B. 198, 71 E. C. L. 375.

"To-morrow."— There is no error in the commissioner being directed by the commission to take the deposition on "to-morrow," the commission bearing a specific date. Wolfe *v.* Parham, 18 Ala. 441.

91. **In Missouri** a commission to take testimony without the state may be addressed to any judge, notary public, justice of the peace, or other judicial officer within the state, without designating the place therein where the deposition is to be taken. Borders *v.* Barber, 81 Mo. 636.

Failure to specify county.— A deposition taken without the state is not objectionable because the dedimus failed to designate the county in which it was to be taken. Turner *v.* Patterson, 5 Dana (Ky.) 292.

92. **For forms of directions to commissioner** see Ala. Civ. Code (1886), § 3470; Union Square Bank *v.* Reichmann, 9 N. Y. App. Div. 596, 41 N. Y. Suppl. 602; Hall *v.* Barton, 25 Barb. (N. Y.) 274; Nelson *v.* U. S., 17 Fed. Cas. No. 10,116, Pet. C. C. 235.

93. See cases cited *infra*, this note.

Failure to annex statutory provisions.— The omission to annex to the commission as prescribed by statute a copy of the provisions as to its execution is immaterial, where the commission has been properly executed. Hall *v.* Barton, 25 Barb. (N. Y.) 274; Williams *v.* Eldridge, 1 Hill (N. Y.) 249.

As to additional interrogatories.—In granting a foreign commission it is proper to direct the commissioner not to admit any additional interrogatories. Cunningham *v.* Otis, 6 Fed. Cas. No. 3,485, 1 Gall. 166.

Indorsement on interrogatories.— It is immaterial that the directions for executing the commission are indorsed on the inter-

instructed specially when such instruction is necessary as to who may appear before them.[94]

b. Notice to Adverse Party. The commission should contain a direction that notice be given to the adverse party of the time and place of taking the deposition.[95]

c. As to Return. The commission must contain a direction for its return[96] to the proper court or officer,[97] the mode or manner thereof,[98] and usually the time at or within which the return shall be made.[99]

7. Signature. The commission should be signed or authenticated by the clerk of the court,[1] although the signature of the judge will be sufficient, where the commission is issued by authority of the court.[2]

8. Date. The commission should bear date as of its issue, but it will not be invalidated by an erroneous date if it properly issued in fact.[3]

rogatories and not on the commission. Hurd *v.* Pendrigh, 2 Hill (N. Y.) 502.

Instructions in English are sufficient, although the commissioner may be a foreigner. Darling *v.* Darling, 8 Ont. Pr. 391.

Omission of clerk to sign.— A deposition will not be suppressed where the commission appears to have been properly executed, although the form of instructions to the commissioner, annexed to the commission, was not signed by the clerk or defendant's counsel, as required by a rule of court. U. S. *v.* Pings, 4 Fed. 714.

94. Where a commission is granted to take evidence in a foreign country, the court may direct the commissioner not to allow either party or his counsel to appear before him. Cunningham *v.* Otis, 6 Fed. Cas. No. 3,485, 1 Gall. 166.

95. Ferguson *v.* Morrill, Brayt. (Vt.) 40.

If sufficient notice was actually given, the omission of a direction as to notice may be disregarded. Parker *v.* Haggerty, 1 Ala. 632; Brahan *v.* De Brell, 1 Stew. (Ala.) 14.

96. Smith *v.* Randall, 3 Hill (N. Y.) 495.

Who may direct.— A statute authorizing the judges of the court to prescribe a return of the commission empowers the presiding judge, who has the power of a judge in vacation, to direct the return. Homer *v.* Martin, 6 Cow. (N. Y.) 156.

Place of direction.— An explicit direction as to its return contained in the body of the commission is a sufficient compliance with a statute requiring such a direction on the commission. Hall *v.* Barton, 25 Barb. (N. Y.) 274.

Amendment.— The omission of the judge to sign the instructions for the return may be remedied by amendment when the deposition is offered. Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518.

97. **To clerk.**— Where it does not appear that the place of trial was changed merely for the convenience of witnesses, it is proper to direct the return to be made to the clerk of the county originally named in the complaint as the place of trial, instead of to the clerk of the county afterward selected. Whitney *v.* Wyncoop, 4 Abb. Pr. (N. Y.) 370.

98. Mason, etc., Organ Co. *v.* Pugsley, 19 Hun (N. Y.) 282; Smith *v.* Randall, 3 Hill (N. Y.) 495.

Where the return is to be made by mail, it is indispensable that the direction to so return it should be indorsed on the commission and signed by the officer who settles the interrogatories. Crawford *v.* Loper, 25 Barb. (N. Y.) 449.

99. A statute requiring process to be returnable to the term next ensuing its teste, does not apply to commissions to take depositions, which may be made returnable to any subsequent term. Duncan *v.* Hill, 19 N. C. 291.

Improper return-day.— A deposition will not be rejected because the clerk made the commission returnable at a day when the court was not sitting. Scott *v.* Baber, 13 Ala. 182.

Failure to fix return-day.— A commission is not rendered void by the neglect of the court to fix a return-day. Follain *v.* Lefevre, 3 Rob. (La.) 13.

1. Steptoe *v.* Read, 19 Gratt. (Va.) 1.

Sufficiency.— A signature "F. U. T., clk. by T. R. T., D. C." is a sufficient teste by the deputy clerk. Miller *v.* George, 30 S. C. 526, 9 S. E. 659.

Where, through inadvertence, the clerk omits to subscribe the commission, if the paper bears on its face the usual attestation clause denoting its official character and finality, and is in the handwriting of the clerk, the omission will not invalidate the commission. Steptoe *v.* Read, 19 Gratt. (Va.) 1.

Amendment.— A commission to take interrogatories is not invalidated by the fact that another than the clerk's name appears in the attesting clause, but the court may permit it to be amended by erasure, and by inserting the clerk's name. Linskie *v.* Kerr, (Tex. Civ. App. 1896) 34 S. W. 765.

2. Goodyear *v.* Vosburgh, 41 How. Pr. (N. Y.) 421.

3. **Date prior to suit.**— A dedimus is not vitiated because bearing a date prior to the institution of the suit, where it is apparent from the clerk's books and from other testimony that the date is erroneous. Curle *v.* Beers, 3 J. J. Marsh. (Ky.) 170.

Date subsequent to day of application.— On objection that the commission was dated as of a day subsequent to the day on which the notice stated the application would be made comes too late on the trial. Foster *v.* Henderson, 29 Oreg. 210, 45 Pac. 899.

9. SEAL. Except where dispensed with by statute[4] or waived by the parties,[5] the dedimus or commission can only issue under the seal of the court.[6]

10. ATTACHING EXHIBITS. The weight of authority is to the effect that in actions on a promissory note or draft where plaintiff has procured a commission to be issued, he cannot be compelled to annex thereto the instrument sued on, especially where its production for inspection or for any other purpose can be had in other modes.[7] But where the identity of an instrument sued on or its genuineness is involved it should be attached to the commission or interrogatories for submission to the witness.[8]

XI. OPEN COMMISSION.

A. In General. An open commission should never be granted without the strongest proof of its necessity and unless it satisfactorily appear that the interests of justice require it, and further that an ordinary commission with interrogatories will be inadequate and will not protect the rights of the parties.[9]

4. A provision that the clerk of a designated court shall not affix its seal to process issued to the county dispenses with a seal to a commission to take a deposition within the county. McArter *v.* Rhea, 122 N. C. 614, 30 S. E. 128.

5. Sealing is waived by a stipulation "that the annexed commission do issue." Churchill *v.* Carter, 15 Hun (N. Y.) 385.

6. Ford *v.* Williams, 24 N. Y. 359; Mason, etc., Organ Co. *v.* Pugsley, 19 Hun (N. Y.) 282; Tracy *v.* Suydam, 30 Barb. (N. Y.) 110; Whitney *v.* Wyncoop, 4 Abb. Pr. (N. Y.) 370; Sehorn *v.* Williams, 51 N. C. 575; Freeman *v.* Lewis, 27 N. C. 91; Loy *v.* Kennedy, 1 Watts & S. (Pa.) 396.

Certified copy under seal.— Where a commission by a register of wills of Pennsylvania to take testimony issues without the official seal, and the testimony is taken and returned to the register, a certified copy of it under seal given by the register is sufficient to admit the will in evidence in an action of ejectment respecting land devised by the will. Loy *v.* Kennedy, 1 Watts & S. (Pa.) 396.

Proof of authenticity.— A commission issued in another state is sufficiently authenticated by the seal of a county in that state, without further proof of its genuineness. Mencke *v.* Strause, 17 Phila. (Pa.) 104.

The judge of a county court acting as his own clerk cannot issue a commission without a seal, where by statute it must be issued by the clerk under the seal of the court. Blakeslee *v.* Dye, 1 Colo. App. 118, 27 Pac. 881.

The omission of the clerk to affix the seal of the court is a mere irregularity which is not fatal to the deposition. The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117.

Sealing after execution of commissions.— The clerk may be permitted to affix his seal after the depositions have been taken. The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117.

7. *Alabama.*— Mobley *v.* Leophart, 47 Ala. 257.

Kansas.— Stevens *v.* Blake, 5 Kan. App. 124, 48 Pac. 888.

Louisiana.— Forbes *v.* Fahrmer, 15 La. Ann. 319.

New York.— Butler *v.* Lee, 32 Barb. 75.

Pennsylvania.— Kohn *v.* Teller, 2 Wkly. Notes Cas. 487.

See 16 Cent. Dig. tit. "Depositions," § 64.

8. In an action on a note claimed to be a forgery, the original and not a copy should be attached to the interrogatories. Weidner *v.* Conner, 9 Pa. St. 78.

Attaching will.— The Illinois statute which provides for the taking of the depositions of attesting witnesses to a will on dedimus issued, with the will attached, being applicable to probate courts, does not limit circuit courts to that mode, after appeal; and a deposition may be taken as in other cases, without the will attached, the will being properly identified and submitted to the witness by the proper custodian. *In re* Noble, 124 Ill. 266, 15 N. E. 850.

Interrogatories referring to an account should have the same attached so that it may be identified. Shockley *v.* Morgan, 103 Ga. 156, 29 S. E. 694.

9. Stewart *v.* Russell, 66 N. Y. App. Div. 542, 73 N. Y. Suppl. 249; Predigested Food Co. *v.* Scott, 28 N. Y. App. Div. 59, 50 N. Y. Suppl. 896; Darling *v.* Klock, 74 Hun (N. Y.) 248, 26 N. Y. Suppl. 445; Burnell *v.* Coles, 23 Misc. (N. Y.) 615, 52 N. Y. Suppl. 615; Lentilhon *v.* Bacon, 20 N. Y. Suppl. 488; Kaempfer *v.* Gorman, 17 N. Y. Suppl. 857, 22 N. Y. Civ. Proc. 34; Parker *v.* Lithgoe, 36 N. Y. St. 981; Heney *v.* Mead, 4 Month. L. Bul. (N. Y.) 10.

Consideration for adverse party.— The right to an open commission depends on the desire of the party moved against, and not on the desire or convenience of the moving party. Kaempfer *v.* Gorman, 17 N. Y. Suppl. 857, 22 N. Y. Civ. Proc. 34.

Prior resort to ordinary commission.— If the ground of the application is that some of the witnesses are unwilling to testify, but it is alleged that other proposed witnesses are willing, and it does not appear but that the testimony of the latter will suffice, it is not unreasonable to require that their testimony should be first taken in the ordinary

B. When Permissible. An open commission is proper where the party desiring the testimony has no exact knowledge as to the persons from whom it may be obtained,[10] or where fraud is charged, and the witnesses are more or less friendly to the adverse party, and are unwilling or reluctant to testify;[11] but it is no reason for granting such a commission that the proposed witnesses are hostile to the applicant.[12]

C. Right to Name Witnesses. Both parties may name witnesses whose testimony they desire.[13]

method, before an open commission is issued. Burnell *v.* Coles, 23 Misc. (N. Y.) 615, 52 N. Y. Suppl. 200. An open commission to take the testimony of witnesses is properly refused where the witnesses have already been examined under a commission, with interrogatories, and the only object sought is to examine them further as to facts to which their attention has been directed, and to obtain certain books, there being nothing to prevent a further examination under a commission, with interrogatories. Beadleston *v.* Beadleston, 2 N. Y. Suppl. 814.

Who may be examined.—A commission for the examination of corporate officers who have possession of books and papers should be limited in a general way to an examination of those present and past officers, agents, and clerks of the corporation who have or have had charge of the books and papers, and who have knowledge of the facts alleged in the complaint. Hart *v.* Ogdensburg, etc., R. Co., 67 Hun (N. Y.) 556, 22 N. Y. Suppl. 401.

Annexing interrogatories.—Where an open commission is granted it is improper to require the examination to be on interrogatories and cross interrogatories annexed to the commission. Clark *v.* Sullivan, 4 Silv. Supreme (N. Y.) 1, 8 N. Y. Suppl. 565.

Non-residence of witness.— An averment that the proposed witness does not reside within the state is insufficient to justify an open commission. The proof must be that the witness was not within the state at the time the application is made. Burnell *v.* Coles, 23 Misc. (N. Y.) 615, 52 N. Y. Suppl. 200.

Witnesses hostile.—In an action to recover money loaned on fraudulent securities, plaintiff's claim that certain witnesses residing in another state were hostile, based upon the fact that the bank of which they were officials was the correspondent of defendant bank, and that they refused to plaintiff any information concerning the alleged cause of action, is not sufficient ground to justify the granting of an open commission to examine them. Thalmann *v.* Importers', etc., Nat. Bank, 74 N. Y. App. Div. 629, 77 N. Y. Suppl. 586.

Appeal.— An order granting an open commission affects substantial rights and is appealable. Jemison *v.* Citizens' Sav. Bank, 85 N. Y. 546 [*reversing* 24 Hun 350]; Anonymous, 59 N. Y. 313.

An order granting an open commission will not be disturbed unless the adverse party consents that testimony in another action against the same defendant, involving the same issues, and taken under a like commission may be used. Bliss *v.* Hornthal, 87 Hun (N. Y.) 110, 33 N. Y. Suppl. 1018.

10. Complicated corporate transactions.— In an action by stock-holders of one corporation to prevent its consolidation with another on the ground that plaintiffs' company is absolutely controlled by the other, and that plaintiffs' stock will be rendered valueless by the inequitable nature of the contract for consolidation, an open commission will issue when it appears that the ordinary commission with written interrogatories would be useless, in view of the want of exact knowledge of the methods of the two corporations possessed by plaintiffs and their counsel, and when it further appears that plaintiffs do not know the names of the precise persons who have possession of the important books and documents which they may need, or of the names of those who may have passed from the service of defendants, but who were actors at the time of the various events relied on to show the inequitable nature of the proposed consolidation. Hart *v.* Ogdensburg, etc., R. Co., 67 Hun (N. Y.) 556, 22 N. Y. Suppl. 401.

To prove bad character.— In an action for breach of promise of marriage, defendant may have an open commission to procure testimony in support of his defense setting up in mitigation of damages, plaintiff's bad character and immoral and licentious conduct. Burnell *v.* Coles, 25 Misc. (N. Y.) 409, 54 N. Y. Suppl. 940.

Undue influence and testamentary incapacity.—An open commission may be granted where a will is contested for undue influence and testamentary incapacity, and testator had resided in another state for over a year prior to her death and for some time prior to the execution of her will, all the witnesses as to her capacity, and the influences surrounding her at the time she executed the will also residing there. Matter of Anderson, 84 N. Y. App. Div. 268, 82 N. Y. Suppl. 683.

11. In an action charging fraud plaintiff is entitled to an open commission where the witnesses had sustained long-continued business relations with defendant, supplemented by more or less of personal intercourse and friendship, and were unwilling or at least reluctant to testify. Jones *v.* Hoyt, 10 Abb. Pr. (N. Y.) 324, 63 How. Pr. (N. Y.) 94.

12. Kaempfer *v.* Gorman, 17 N. Y. Suppl. 857, 22 N. Y. Civ. Proc. 34.

13. Matter of Anderson, 84 N. Y. App. Div. 268, 82 N. Y. Suppl. 683. See Darling *v.* Klock, 74 Hun (N. Y.) 248, 26 N. Y. Suppl. 445.

XII. ORAL EXAMINATION.

In some jurisdictions oral examinations under an order or commission are expressly provided for,[14] or under particular circumstances may be permitted in addition to the examination of the witness under written interrogatories;[15] but as a rule an examination in this mode is not favored, and will be allowed only in a

Necessity of naming witnesses in commission see *supra*, X, D, 4.

14. In Hawaii the court may direct an oral examination under a statute authorizing it to "give all such directions touching the time, place and circumstances connected with such examination as may appear reasonable and just." Matter of Ivers, 12 Hawaii 99.

In Illinois the statute permitting the oral examination of non-resident witnesses is applicable as well to persons residing without the county in which suit is pending as to persons residing without the state. Gardner *v.* Meeker, 169 Ill. 40, 48 N. E. 307 [*affirming* 69 Ill. App. 422].

Prior notice to take on interrogatories.— A deposition is improperly taken on written interrogatories where, subsequent to the giving of the notice of intention to take the same, the opposite party gave notice of his election to take it upon oral interrogatories, as allowed by statute. Lewis *v.* Fish, 40 Ill. App. 372.

In Kentucky there is no provision for interrogatories, consequently they are unnecessary. Smith *v.* Leavill, 29 S. W. 319, 16 Ky. L. Rep. 609.

In New York under a statute providing that the parties may stipulate or the court may direct that a commission issue without written interrogatories, and that the deposition be taken on oral questions, or partly on oral questions and partly on written interrogatories, the court has the power to direct an oral commission against the objection of one of the parties. Laidley *v.* Rogers, 22 N. Y. Suppl. 468, 23 N. Y. Civ. Proc. 110. See also Matter of Anderson, 84 N. Y. App. Div. 268, 82 N. Y. Suppl. 683; Deshon *v.* Packwood, 16 Abb. Pr. 272, where the court said there was no precedent for an order for an oral examination.

In Pennsylvania under the act June 25, 1895, allowing testimony to be taken out of the state by way of depositions, instead of upon commission, the court will allow a rule to take such testimony unless cause be shown to the contrary. Reed *v.* Fidelity, etc., Co., 39 Wkly. Notes Cas. 438.

U. S. equity rule 67 authorizes the court to appoint examiners for the taking of depositions orally, outside as well as inside its territorial jurisdiction. Bischoffsheim *v.* Baltzer, 10 Fed. 1. 20 Blatchf. 229; Western North Carolina R. Co. *v.* Drew, 29 Fed. Cas. No. 17,434. 3 Woods 691.

In England the examination of witnesses *de bene esse* is taken orally. Cook *v.* Hall, 9 Hare (App.) xx, 16 Jur. 1008, 22 L. J. Ch. 12, 1 Wkly. Rep. 31, 41 Eng. Ch. (App.) xx.

In Canada where a commission was issued to England to take evidence in a case involving many intricate questions of fact, the evidence was ordered to be taken on *viva voce* questions instead of upon interrogatories. Watson *v.* McDonald, 8 Ont. Pr. 354.

Subsequently propounding written interrogatories.—Where leave is given to examine orally, if after an oral examination, written interrogatories are propounded by the officer, the deposition is invalidated. Nevitt *v.* Crow, 1 Colo. App. 453, 29 Pac. 749.

15. Wainwright *v.* Low, 49 Hun (N. Y.) 283, 1 N. Y. Suppl. 786; Anderson *v.* West, 9 Abb. Pr. N. S. (N. Y.) 209; Clayton *v.* Yarrington, 16 Abb. Pr. (N. Y.) 273 note.

Where witnesses were examined orally, and afterward on written interrogatories sent by one party, the deposition was rejected. Nevitt *v.* Crow, 1 Colo. App. 453, 29 Pac. 749.

Oral cross-examination.— Where plaintiff procures a commission to examine witnesses on interrogatories and it is difficult for defendant to anticipate what their testimony will be, so as to enable him to properly frame his cross interrogatories, he will be granted the right to cross-examine them orally, with leave to plaintiff to reëxamine the witnesses orally, or to have an oral direct examination if he prefers. Laidley *v.* Rogers, 22 N. Y. Suppl. 468, 23 N. Y. Civ. Proc. 110. Where interrogatories annexed to a commission are so numerous and cover so many transactions that it would be difficult to frame cross interrogatories properly to develop the answers, the adverse party will be given leave to attend and cross-examine orally. Parsons *v.* Middleton, 9 Pa. Dist. 53.

Condition of granting commission.— An order granting a commission to take testimony abroad may be upon condition that the applicant consent that the witnesses be examined and cross-examined orally. Clayton *v.* Yarrington, 16 Abb. Pr. (N. Y.) 273 note.

In Pennsylvania when a commission has issued, the court has no authority to authorize the adverse party to call witnesses before the commissioner in his own behalf, and examine them orally, subject to cross-examination by the party obtaining the commission. McCullough's Estate, 5 Pa. Co. Ct. 87, 20 Wkly. Notes Cas. 471.

Written cross interrogatories furnished.— Where the adverse party does not join in a commission, but furnishes written interrogatories, there is no irregularity in permitting an oral cross-examination. Grill *v.* General Iron Screw Collier Co., L. R. 1 C. P. 600. 2 Jur. N. S. 727, 35 L. J. C. P. 321, 14 L. T. Rep. N. S. 711, 14 Wkly. Rep. 893.

clear case of necessity and where it is apparent that an examination in the usual mode by interrogatories and cross interrogatories will be inadequate.[16]

XIII. LETTERS ROGATORY.[17]

Letters rogatory are letters or a formal communication containing a request by a court in which an action is pending of a foreign court or tribunal that the testimony of a witness residing within its jurisdiction may be formally taken under its direction and transmitted to the court making the request. At an early period this process was in use between the states of the Union. The procurement of depositions in this manner rests entirely on comity.[18] This mode of obtaining testimony should be resorted to only where a commission cannot be executed or would be inadequate,[19] and not where it would be objectionable because removing

16. Carter *v.* Producers' Oil Co., 5 Pa. Dist. 640; Sprague *v.* Greenwald, 5 Pa. Dist. 631; Com. *v.* Miller, 5 Pa. Dist. 186; Coates *v.* Merrick Thread Co., 41 Fed. 73, 24 Blatchf. 478; Day *v.* Brown, 18 Grant Ch. (U. C.) 681.

Adverse witnesses.— The court should allow plaintiff in a divorce suit to take her proof on oral examination upon notice to the adverse party, where the proof, if any can be had, must in the main come from the friends and associates of defendant, thus making an oral examination necessary to do justice to plaintiff. McCampbell *v.* McCampbell, 103 Ky. 745, 46 S. W. 18, 20 Ky. L. Rep. 552. When it appears from the statement of a witness that he is reluctant to testify for plaintiff, owing to his employment by defendant, and it is impossible to foresee whether he will testify frankly to questions framed, and it is probable that he may manifest a spirit of unfairness to plaintiff, the issuance of a commission to examine the witness on oral questions is proper. Frounfelker *v.* Delaware, etc., R. Co., 81 N. Y. App. Div. 67, 80 N. Y. Suppl. 701.

Biased witness.— The unwillingness of the witness to submit to cross-examination or the fact that he is the son of the applicant is no objection to a rule for an examination *viva voce*, where it does not appear that the witness is under his father's influence. Carruthers *v.* Graham, 9 Dowl. P. C. 947.

Discretion of court.— The exercise of discretion in refusing to grant an oral examination will not be interfered with. Matter of Ivers, 12 Hawaii 99.

Review of conflicting evidence.— The court will not interfere with the discretion of a master in deciding on the relative veracity of witnesses, where evidence has been taken *viva voce* before him. Waddell *v.* Smyth, 3 Ch. Chamb. (U. C.) 412.

17. For form of letters rogatory see Doubt *v.* Pittsburgh, etc., R. Co., 6 Pa. Dist. 238, 19 Pa. Co. Ct. 178.

18. Black L. Dict.

Discretion.— The power to make letters rogatory effective rests upon comity, which implies the right to exercise judicial discretion and leaves the court whose power is invoked the right to determine the legality and rightfulness of its exercise. Doubt *v.* Pittsburgh, etc., R. Co., 6 Pa. Dist. 238, 19 Pa. Co. Ct. 178. Pa. Pub. Laws, 308, relative to letters rogatory, do not deprive the courts of this discretion. Doubt *v.* Pittsburgh, etc., R. Co., 6 Pa. Dist. 238, 19 Pa. Co. Ct. 178.

Every presumption in favor of a demand made by a foreign court will be indulged, but its sufficiency may be determined by the court to which it is addressed. Doubt *v.* Pittsburgh, etc., R. Co., 6 Pa. Dist. 238, 19 Pa. Co. Ct. 178. The court to which the letters are directed will not pass on the validity of their issue but will give an opportunity to the party objecting to apply to the tribunal issuing them to have them vacated, and leave it to determine upon their regularity. McKenzie's Case, 2 Pars. Sel. Cas. (Pa.) 227, 1 Pa. L. J. Rep. 356, 2 Pa. L. J. 343. When letters rogatory are issued from another state, they will not be regarded as coming from a foreign government; but the court to which they are issued will extend to the citizens of each state, in as far as practicable, all the advantages which could be given to citizens of the state, under the laws thereof. McKenzie's Case, 2 Pars. Sel. Cas. (Pa.) 227, 1 Pa. L. J. Rep. 356, 2 Pa. L. J. 343.

In England an order for letters of request can only be made to examine witnesses and not for the production of documents. Cape Copper Co. *v.* Comptoir d' Escompte, 38 Wkly. Rep. 763.

Materiality of testimony.— The evidence sought to be procured by the letters must be directly material to the question to be tried. Ehrmann *v.* Ehrmann, [1896] 2 Ch. 611, 65 L. J. Ch. 745, 75 L. T. Rep. N. S. 37, 45 Wkly. Rep. 149.

Interrogatories must be attached. Doubt *v.* Pittsburgh, etc., R. Co., 6 Pa. Dist. 238, 19 Pa. Co. Ct. 178.

Viva voce examination.— The court to which the letters are addressed will refuse to lend its aid where the examination by the statute of the state in which it is situated is limited to interrogatories, and the request is to permit an examination *viva voce*, without restriction. Doubt *v.* Pittsburgh, etc., R. Co., 6 Pa. Dist. 238, 19 Pa. Co. Ct. 178.

19. Anonymous, 59 N. Y. 313; Froude *v.* Froude, 1 Hun (N. Y.) 76, 3 Thomps. & C. (N. Y.) 79; Ferrie *v.* Public Administrator, 3 Bradf. Surr. (N. Y.) 249; Gross *v.* Palmer,

the investigation from the control of the domestic court, and from the operation of the rules of evidence prevailing therein.[20]

XIV. STAY OF PROCEEDINGS.

In the absence of a statute or rule of court to that effect the issue of a commission or an order therefor will not operate as a stay of proceedings unless so ordered on a direct application,[21] which is addressed to the discretion of the court or judge,[22] and will usually be granted,[23] on conditions which will protect the adverse party,[24] unless the applicant has been guilty of laches,[25] or there is a sus-

105 Fed. 833; Nelson *v.* U. S., 17 Fed. Cas. No. 10,116, Pet. C. C. 235.

Prior issue of commission.— It must be shown with certainty that a commission is not adequate, preferably by the issuance of such commission and its return, showing the impossibility, after proper efforts, of obtaining the desired testimony thereunder. Gross *v.* Palmer, 105 Fed. 833.

Substitution of commission.—That witness testified falsely before the foreign commissioner because not recognizing the binding obligation of the oath administered will not authorize the substitution of a commission. Anonymous, 59 N. Y. 313; Froude *v.* Froude, 1 Hun (N. Y.) 76, 3 Thomps. & C. (N. Y.) 79.

To afford complete justice.— The request in the letters should be complied with, when the court sending them cannot do complete justice without the testimony. Shannon Mfg. Co. *v.* George W. McCaulley, etc., Co., (Del. 1902) 56 Atl. 367.

20. Ferrie *v.* Public Administrator, 3 Bradf. Surr. (N. Y.) 249.

A resident who has brought suit in another state against a corporation of both states, on a cause of action arising in the state of his residence, should not be permitted to take depositions under letters rogatory. Doubt *v.* Pittsburgh, etc., R. Co., 6 Pa. Dist. 238, 19 Pa. Co. Ct. 178.

The proper practice in objecting to the action of a court receiving letters rogatory from a sister state is to file formal objections, as the court is then enabled to dispose of the questions more methodically and with more certainty of considering all the questions raised. Doubt *v.* Pittsburgh, etc., R. Co., 6 Pa. Dist. 238, 19 Pa. Co. Ct. 178.

21. Maynard *v.* Chapin, 7 Wend. (N. Y.) 520; Jackson *v.* Woodworth, 18 Johns. (N. Y.) 135.

Early New York practice.— In New York, prior to 1830, if a commission was obtained within the time required by the rules of the court (four days in term next after issue joined) it will stay proceedings of course, without anything to that effect in the rule. Jackson *v.* Woodworth, 18 Johns. 135.

Limited stay.— A rule of court for an examination of witnesses on interrogatories is not an absolute but only a limited stay of proceedings. Forbes *v.* Wells, 3 Dowl. P. C. 318.

Necessity of vacating order for commission. — A rule for a commission to take the testimony of a witness suspends the trial till the rule be vacated, or leave to proceed is obtained; but a defendant in whose favor a commission was granted, by appearing at the trial and examining witnesses, waives his commission, and a *vacatur* is unnecessary. Brain *v.* Rodelicks, 1 Cai. (N. Y.) 73, decided in 1803. The plaintiff is entitled to proceed with the trial where defendant had joined in a commission which has not been returned, without vacating the rule for the commission. Shuter *v.* Hallett, 1 Cai. (N. Y.) 115. Where defendant has obtained a rule for a commission at a previous term and has done nothing further under it, plaintiff is not stayed. Kirby *v.* Watkiss, 1 Cai. (N. Y.) 503.

Notice by defendant of an intention to sue out a commission given before he received notice of trial will stay the proceedings. Brokaw *v.* Bridgman, 6 How. Pr. (N. Y.) 114, Code Rep. N. S. (N. Y.) 407; Jones *v.* Ives, 1 Wend. (N. Y.) 283 [*citing* Burr *v.* Skinner, 1 Johns. Cas. (N. Y.) 391]. See Novals *v.* Dorrien, 4 Madd. 362.

In Pennsylvania a party desiring to take the deposition of a witness out of the jurisdiction of the court could formerly file a bill in chancery for a commission, and to stay proceedings at law pending its execution. Vanriper *v.* Vanriper, 3 Lanc. Bar (Pa.) 155.

22. Lombard *v.* Thorp, 70 Iowa 220, 30 N. W. 490; Morse *v.* Grimke, 8 N. Y. Suppl. 1, 18 N. Y. Civ. Proc. 37.

23. Huggins *v.* Carter, 7 Ala. 630; Rathbun *v.* Ingersoll, 34 N. Y. Super. Ct. 211; Nicol *v.* Verelst, 4 Bro. P. C. 416, 2 Eng. Reprint 282; Bowden *v.* Hodge, 2 Swanst. 258, 36 Eng. Reprint 614.

When an injunction to stay proceedings should be refused see Cojamaul *v.* Verelst, 4 Bro. P. C. 407, 2 Eng. Reprint 276.

24. Pomeroy *v.* Lounsbury, 1 How. Pr. (N. Y.) 30; Lafarge *v.* Luce, 2 Wend. (N. Y.) 242; Jackson *v.* Woodworth, 18 Johns. (N. Y.) 135.

25. Rathbun *v.* Ingersoll, 34 N. Y. Super. Ct. 211; Morse *v.* Grimke, 8 N. Y. Suppl. 1, 18 N. Y. Civ. Proc. 37; Starbuck *v.* Hall, 1 How. Pr. (N. Y.) 58. In Butler *v.* Fox, 9 C. B. 199, 67 E. C. L. 199, the court discharged so much of an order for a commission as stayed the proceedings on the ground of an unreasonable delay in the application.

Dissolution for delay in return.— Where a commission is not returned two years after its issue an injunction then granted should be dissolved. Penney *v.* Edgar, 1 Anstr. 276.

picion of bad faith or an ulterior motive on the part of the party making application for the stay.[26]

XV. INTERROGATORIES.

A. In General. The party who procures a commission to be issued is entitled to propound direct interrogatories, and the adverse party to present cross interrogatories.[27]

B. Form.[28] The interrogatories, both direct and cross, must be in proper form, and substantially comply with all requirements prescribed by statute or by rules of court.[29]

C. Propriety — 1. In General. Interrogatories should not be so general as to deprive the other party of an opportunity to properly prepare interrogatories

If the party moves promptly the length of the stay will be proportioned to the distance and difficulty of procuring the evidence. Morse *v.* Grimke, 8 N. Y. Suppl. 1, 18 N. Y. Civ. Proc. 37.

26. A stay should not be granted, except in a case free from suspicion that any part of the motive in applying for it is to delay or annoy plaintiff, nor unless it appears that great injustice would probably be done by refusing it. Forrest *v.* Forrest, 3 Bosw. (N. Y.) 661. In Beall *v.* Dey, 7 Wend. (N. Y.) 513, a stay was granted, although application for the commission was not made until the fourth special term after issue joined.

Necessity of showing bona fides.— Where much time has elapsed very satisfactory excuse is required, and the party must make out so strong a case, not only excusing the laches, but also of the necessity and materiality of the evidence sought, as to remove the natural suspicion of bad faith. Rathbun *v.* Ingersoll, 34 N. Y. Super. Ct. 211.

27. Hendricks *v.* Craig, 5 N. J. L. 668; Van Amringe *v.* Ellmaker, 4 Pa. St. 281. And see cases cited *infra*, this and succeeding notes.

Interrogatories on retaking see *infra*, XIX, F.

In Kentucky no provision is made for interrogatories. Smith *v.* Leavill, 29 S. W. 319, 16 Ky. L. Rep. 609.

Nominal party.— Where the facts to be proved by a commission taken out by plaintiff's creditors, prosecuting the suit for their benefit on the ground that he is about to abandon it, go to support his allegations, he cannot exclude the commission because he had no opportunity to cross it. Baum's Succession, 11 Rob. (La.) 314.

28. For form of interrogatories see Bullitt Civ. Code Ky. (1895) p. 724; Jones *v.* Jones, 75 Hun (N. Y.) 35, 27 N. Y. Suppl. 274.

For form of caption to interrogatories see Spaids *v.* Cooley, 113 U. S. 278, 5 S. Ct. 449, 28 L. ed. 984.

29. See cases cited *infra*, this note.

Misnomer of witness.— A deposition is not excluded by a discrepancy as to the witness' name between the interrogatories and the deposition, if the opposite party knew what person was intended to be examined, and directed his cross-examination accordingly. Tompkins *v.* Williams, 19 Ga. 569.

Place of statement.— A statute providing that the party desiring a commission shall state in the caption to his direct interrogatories the name and place of residence of each witness, "and shall serve a copy thereof. . . . with notice that . . . a commission will be issued," is complied with when the residences of the witnesses are stated in the notice accompanying the interrogatories, although not in the caption. Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889.

Residence of witnesses.— In Georgia interrogatories prepared prior to the issuance of a commission must state the place of residence of the witness if known. McWilliams *v.* McWilliams, 68 Ga. 459. So in Wisconsin. Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889.

Signing.—The New Jersey statute requires the interrogatories to be signed by the parties or their counsel. Graham *v.* Whitley, 26 N. J. L. 254. In New York the interrogatories may be signed by an attorney (Ludlam *v.* Broderick, 15 N. J. L. 269) and when so signed will be sufficient, although the person signing fails to further state that he is an attorney (Homer *v.* Martin, 6 Cow. (N. Y.) 156).

A general interrogatory inquiring for matters tending to the advantage of plaintiff does not comply with a rule requiring such an interrogatory to inquire of the witness whether he knows of anything of advantage to the parties or either of them. Smith *v.* Cokefair, 1 Pa. Co. Ct. 48.

A general cross interrogatory requiring the witness to "state anything else you may know that would be of benefit to the defendant connected with the title in controversy" is objectionable in that it did not call for, but rather excluded, the whole truth. Allen *v.* Hoxey, 37 Tex. 320.

Exhibits.— Where notes or other writings are to be proved by two or more witnesses, they may be attached to one set of interrogatories, and referred to by appropriate description in the others. Mobley *v.* Leophart, 51 Ala. 587.

There may be one set of interrogatories for several witnesses. Howe *v.* Pierson, 12

on his behalf,[30] or so framed as to elicit incompetent or inadmissible testimony;[31] and interrogatories, direct or cross, which are clearly irrelevant or immaterial should not be permitted.[32] However mere informalities or irregularities may be disregarded where it is apparent that the witness will or did understand the purpose of the interrogatories, and no prejudice will or did result.[33]

2. LEADING INTERROGATORIES. An interrogatory which suggests the answer or instructs the witness how to answer on a material point, or which, embodying a material fact, admits of an answer by a simple negative or affirmative is

Gray (Mass.) 26; Fowler *v.* Merrill, 11 How. (U. S.) 375, 13 L. ed. 736.

30. St. Louis, etc., R. Co. *v.* Whitaker, 68 Tex. 630, 637, 5 S. W. 448, where after a statement of the case, the witnesses were asked to "state any fact within their knowledge that will assist the court in arriving at a correct and just conclusion of the case, as fully as if specially here inquired about." But see Cator *v.* Chamberlain, (Tex. Civ. App. 1902) 68 S. W. 196, where after an interrogatory describing the note in suit and asking the witness if he knew the parties to the action, an objection to the question "Please state fully and explicitly all you know about the execution and delivery of said note by" the maker to the payee, that the interrogatories were so general as to leave defendant to conjecture what the answers would be, and practically deprive him of the right to cross-examine, was held to have been properly overruled.

31. Conely *v.* McDonald, 40 Mich. 150; Gilpin *v.* Appleby, 13 N. Y. Suppl. 394; Gilpin *v.* Daly, 12 N. Y. Suppl. 448, 20 N. Y. Civ. Proc. 91.

Admissions of party.—Where an interrogatory seeks to establish a party's admission of an act, the cross interrogatory may require the witness to disclose what the party at the same time stated as his inducement to the act. Taylor *v.* Paterson, 9 La. Ann. 251.

Eliciting partial proof.— An interrogatory is not objectionable because the answer thereto will not make out a sufficient case. Montgomery's Estate, 3 Brewst. (Pa.) 306.

Lost instrument.— An interrogatory is not objectionable because asking the witness to "state the contents or the substance of the contents" of a lost deed, when proof of the exact words of the instrument is unnecessary. Potts *v.* Coleman, 86 Ala. 94, 5 So. 780.

Official corruption.— In an action for professional services in obtaining a claim against the United States a cross interrogatory of a witness tending to show bribery and corruption of members of congress is improper. Cummings *v.* Thomas, 2 Wkly. Notes Cas. (Pa.) 368.

Reference to interrogatory stricken out.— A cross interrogatory will not be suppressed because it directs the attention of the witness to a particular matter, and requests, in case he shall have answered a preceding interrogatory that such particular fact did not exist, to state that another fact did exist, where such preceding interrogatory was stricken out. New York, etc., R. Co. *v.* Green, (Tex. Civ. App. 1896) 36 S. W. 812.

Cross interrogatories need not be confined to the question propounded, but will be sufficient if pertinent to the issues. Evansich *v.* Gulf, etc., R. Co., 61 Tex. 24.

32. Walton *v.* Godwin, 54 Hun (N. Y.) 387, 7 N. Y. Suppl. 926; Moreling *v.* Navigation Co., 4 Wkly. Notes Cas. (Pa.) 72; Missouri, etc., R. Co. *v.* Melugin, (Tex. Civ. App. 1901) 63 S. W. 338.

Private business of witness.— Interrogatories are not objectionable because they call for matters concerning the private business of the witness. Fry *v.* Manhattan Trust Co., 2 Misc. (N. Y.) 520, 22 N. Y. Suppl. 386, 23 N. Y. Civ. Proc. 98.

Production of mass of written testimony.— Interrogatories are not objectionable because calling for such a mass of written testimony that it will be a great burden to the witness to produce it. Fry *v.* Manhattan Trust Co., 2 Misc. (N. Y.) 520, 22 N. Y. Suppl. 386, 23 N. Y. Civ. Proc. 98.

Unless clearly frivolous an interrogatory should not be disallowed so as to deprive a party of the opportunity of securing the testimony, that they may offer it at the trial, and if it is excluded have the benefit of an exception. Jones *v.* Jones, 75 Hun (N. Y.) 35, 27 N. Y. Suppl. 274.

33. **Assumption of fact.**— Depositions as to the value of legal services will not be suppressed merely because one of the interrogatories assumed the rendition of the services instead of being hypothetical. Howard *v.* Metcalf, (Tex. Civ. App. 1894) 26 S. W. 449.

Calling attention to subject of inquiry.— A statement merely calling the witness' attention to the subject-matter of the inquiry is no ground for suppressing the answer. Lott *v.* King, 79 Tex. 292, 15 S. W. 231.

Indefiniteness.— It is not error to refuse to exclude a deposition, because the interrogatories are vague and indefinite as to the person concerning whom inquiries are made, where it appears from the answers of the witness that he fully knew to whom the interrogatories referred. Florida R., etc., Co. *v.* Webster, 25 Fla. 394, 5 So. 714.

Prolixity — Multifariousness.— Depositions are not objectionable because the interrogatories are prolix, multifarious, or double, but if the record is unnecessarily encumbered, the offending party may be taxed with the costs unnecessarily incurred. Borland *v.* Walker, 7 Ala. 269.

Showing bias.— A question as to any fact tending to show a bias in the evidence of the adverse party is admissible, whether it be offered by the examination in chief or on cross-examination. Evansich *v.* Gulf, etc., R. Co., 61 Tex. 24.

objectionable because leading.[34] But in many jurisdictions it is discretionary with the court or judge to permit such an interrogatory.[35] However it is not important that some interrogatories were leading, where it appears that the deposition would not be materially affected by the omission of the answers to those interrogatories,[36] or where all the material facts testified to were elicited by other unobjectionable interrogatories.[37]

D. Filing, Service, and Notice. Where so prescribed by rule or statute the interrogatories must be filed,[38] and due notice of the filing thereof must be given

34. *Arkansas.*—Clark *v.* Moss, 11 Ark. 736.
Kentucky.— Doran *v.* Shaw, 3 T. B. Mon. 411; Craddock *v.* Craddock, 3 Litt. 77.
Maine.— Cleaves *v.* Stockwell, 33 Me. 341.
Pennsylvania.— Summers *v.* Wallace, 9 Watts 161.
Texas.— Lott *v.* King, 79 Tex. 292, 15 S. W. 231; Trammell *v.* McDade, 29 Tex. 360.
See 16 Cent. Dig. tit. "Depositions," § 66.
The following interrogatories were held to be unobjectionable: An interrogatory commencing "state whether or not" (Montgomery's Estate, 3 Brewst. (Pa.) 306); "please state whether or not you have, from year to year, given in and paid all legal taxes chargeable by law on the debt which is the foundation of this suit" (Shorter *v.* Marshall, 49 Ga. 31); "did the plaintiff make any inquiry of you, in relation to the line or boundary between him and defendant about the time said plaintiff was preparing to build on said land, or at any other time" (Payne *v.* Benham, 16 Tex. 364); "state whether or not you ever sold and conveyed" a certain described certificate (Lott *v.* King, 79 Tex. 292, 15 S. W. 231); "is the account in the schedule to your affidavit correct" (Lockwood *v.* Bew, 10 Ont. Pr. 655); and an interrogatory requiring the witness to state whether a certain person paid money to defendant, and what amount, if any (Mathis *v.* Buford, 17 Tex. 152).
A statute permitting leading interrogatories to be propounded to the adverse party will not authorize leading interrogatories to one of two joint defendants who has made no defense and whose interests are adverse to those of his co-defendant, although the latter has an opportunity to file cross interrogatories. Bizzell *v.* Hill, (Tex. Civ. App. 1896) 37 S. W. 178. A judgment will not be reversed because one of the defendants was permitted to answer a leading interrogatory addressed to him by plaintiff. Lee *v.* Stowe, 57 Tex. 444.
Where several questions are so linked together that they cannot be separated and left as independent questions and answers without seriously affecting their import, and the form of the main questions is leading, the entire interrogatory is properly suppressed. Mayton *v.* Sonnefield, (Tex. Civ. App. 1898) 48 S. W. 608.
If interrogatories are settled by the attorneys, and a stipulation to that effect is indorsed thereon, neither party can at the trial object to the reading of the depositions on the ground that the interrogatories are leading. Cope *v.* Sibley, 12 Barb. (N. Y.) 521. To same effect see Morse *v.* Cloyes, 11 Barb. (N. Y.) 100.

35. Trammell *v.* Hudmon, 86 Ala. 472, 6 So. 4; Bliss *v.* Shuman, 47 Me. 248; Chambers *v.* Hunt, 22 N. J. L. 552. *Contra,* Bizzell *v.* Hill, (Tex. Civ. App. 1896) 37 S. W. 178.

36. Turner *v.* Patterson, 5 Dana (Ky.) 292.

37. Birely *v.* Staley, 5 Gill & J. (Md.) 432, 25 Am. Dec. 303. Although a leading interrogatory to a deponent is objected to when it is filed, yet if the answer thereto shows that he was not led by it, or if the answer relate to matter proved *aliunde,* respecting which the party, who objects to the interrogatory, has given evidence, the interrogatory and answer may be read. Stiles *v.* Western R. Corp., 11 Metc. (Mass.) 376.

38. See cases cited *infra,* this note.
In the federal courts the practice is that the interrogatories shall be filed therein by both parties previous to the issue of a commission to take testimony abroad. Cunningham *v.* Otis, 6 Fed. Cas. No. 3,485, 1 Gall. 166. Notwithstanding a rule permitting depositions to be taken on notice where interrogatories and cross interrogatories are first filed, depositions may be taken without the usual interrogatories, where the evidence is to be derived from books chiefly not yet examined. Russell *v.* McLellan, 21 Fed. Cas. No. 12,158, 3 Woodb. & M. 157.
Time of filing.— Where cross interrogatories were filed after the time prescribed by rule, but before the commission issued, it was held error to refuse to annex them. Case *v.* Cushman, 1 Pa. St. 241. In the circuit court of the District of Columbia it was the practice (following the law of Maryland) to file interrogatories ten days before the rule day, and if the opposite party did not file cross interrogatories within five days thereafter the commission issued upon the order of the court or of a judge in vacation without notice of the motion. Frevall *v.* Bache, 9 Fed. Cas. No. 5,113, 5 Cranch 463.
Where cross interrogatories are not filed within a prescribed time after notice of the filing of the direct interrogatories, they will not be stricken from the files, if they were actually filed before the commission issued. East Tennessee, etc., R. Co. *v.* Watson, 90 Ala. 41, 7 So. 813.
Presumption.— Where a party has a right to a commission on a prescribed day after giving notice of the filing of his interrogatories, and it issues on that day, if the cross interrogatories are not embraced therein, it

to,[39] or service of the interrogatories on, the adverse party must be made,[40] in the manner and within the time prescribed.[41]

will be presumed that they were not filed when the commission issued, and their absence will not invalidate the deposition. McKinney *v.* O'Connor, 26 Tex. 5.

Enlarging time.— In Leggett *v.* Austin, 1 Pa. L. J. Rep. 310, 2 Pa. L. J. 247, the party seeking the commission refusing to name his witnesses, the court directed him to do so and enlarged the time of filing cross interrogatories until a specified time after the names of the witnesses should be given.

When filing unnecessary.— It is not necessary that previous to the issuing of a commission to take the deposition of a non-resident witness, the interrogatories should be filed in the clerk's office. The party may examine the witness before the commissioners. Wiggins *v.* Pryor, 3 Port. (Ala.) 430.

After a decree pro confesso it is not necessary that the interrogatories should remain on file the time prescribed in other cases. Attkisson *v.* Attkisson, 17 Ala. 256.

39. State *v.* Jones, 2 Harr. (Del.) 393.

In Louisiana prior to the adoption of the Code of Procedure, notice of the filing of the interrogatories was unnecessary. Clay *v.* Kirkland, 4 Mart. 405.

After a decree pro confesso the party in contempt is not entitled to notice. Attkisson *v.* Attkisson, 17 Ala. 256.

Failure to give notice of the filing of interrogatories is not fatal. Frevall *v.* Bache, 9 Fed. Cas. No. 5,113, 5 Cranch C. C. 463.

Sufficiency of notice.—A commission issued contrary to a rule requiring fifteen days' notice to file cross interrogatories is of no validity, where but fourteen days' notice was given, thus depriving the adverse party of his full opportunity to file his cross interrogatories. Van Amringe *v.* Ellmaker, 4 Pa. St. 281.

40. Saunders *v.* Erwin, 2 How. (Miss.) 732; Rhoades *v.* Selin, 20 Fed. Cas. No. 11,740, 4 Wash. 715.

Where parties join in a commission they must serve on each other copies of their direct interrogatories simultaneously. Brush *v.* Vandenbergh, 1 Edw. (N. Y.) 649.

Service may be made on the party or his counsel. Hallock *v.* Caruthers, 5 Rob. (La.) 190.

Service on attorney.— Where defendants have an attorney of record within the jurisdiction of the court service on a curator appointed in an attachment suit before issue joined is bad. Lard *v.* Strother, 4 Rob. (La.) 95. Service of notice of interrogatories to be propounded to a party to the action may be made on his attorney. Huggins *v.* Carter, 7 Ala. 630.

Service on warrantor.—In a petitory action for the recovery of slaves, it is sufficient, prior to the call in warranty, to make service of interrogatories upon defendant, and it is immaterial that they are not served on the warrantor. Pagett *v.* Curtis, 15 La. Ann. 451.

Service on absentee without counsel.—Service must be made at the domicile of an absentee not appearing by counsel. Medley *v.* Wetzlar, 5 La. Ann. 217.

Service on witness.— Personal service of the interrogatories on the witness is unnecessary. Blanchin *v.* Pickett, 21 La. Ann. 680.

Exhibits.— The copy of a plat of survey, annexed to interrogatories and filed in the clerk's office, need not be served. Dwight *v.* Richard, 5 La. Ann. 365.

Admission of service.— A party who acknowledges service of interrogatories handed to him and returns them the next day crossed waives any further delay. Tollett *v.* Jones, 3 Rob. (La.) 274.

Waiver of service.—The sentence, "Let the commission issue as proposed," written by defendant's attorney on the interrogatories in chief served upon him, constitutes a waiver of further service of the interrogatories and all other formalities in the issuance of the commission. Baltimore, etc., R. Co. *v.* State, 60 Md. 449.

The South Carolina act of 1883 does not require the interrogatories to be served. Moore *v.* Willard, (S. C. 1889) 9 S. E. 273.

41. **Georgia.**—Where notice is given to the adverse party on the same day, but after the filing of the interrogatories, and then ten full days are allowed before the issuing of the commission to take testimony, it is a sufficient compliance with Code, § 3879, which provides that a copy of the interrogatories must be served on the opposite party with a notice of the time of filing, and that the original interrogatories shall then be filed and remain in the office for ten days. Malone *v.* Robinson, 77 Ga. 719.

Maryland.— An interval of fourteen days, after the filing of interrogatories in the clerk's office, before the commission goes out, will be deemed notice enough to the other party to file cross interrogatories. Hatton *v.* McClish, 6 Md. 407.

Time of sending out commission.— Service, without filing the same, of a copy of the interrogatories on or about the day of sending off a foreign commission is not sufficient notice. Parker *v.* Sedgwick, 4 Gill (Md.) 318.

Proof of service.— Service by the clerk may be proved by parol. Purner *v.* Piercy, 40 Md. 212, 17 Am. Rep. 591.

At the trial.—Where the reading of a deposition is objected to on the ground that the record fails to show the service of notice and copies of the interrogatories, the court may hear proofs of the service, return, and loss of the notice and copies. Thompson *v.* Herring, 27 Tex. 282, where the action of the trial court in overruling the objection and permitting the deposition to be read was sustained.

Sufficiency.— An affidavit that a copy of the interrogatories was given to the adverse party ten days before a specified date does not show that it was so given ten days prior

E. Settlement[42] — **1. In General.** Where the parties cannot agree on the interrogatories it is usual for the party dissatisfied to object specifically,[43] and have the objections passed on and the interrogataries settled by the court or a judge thereof[44] on due notice of the time and place of settlement.[45]

to suing out the dedimus as required by statute. Corgan *v.* Anderson, 30 Ill. 95.

Amendment of return.— The sheriff's return of service may be amended at the trial to conform to the fact. Miller *v.* New Orleans Canal, etc., Co., 8 Rob. (La.) 236.

42. For form of notice of settlement of interrogatories see Cronkhite *v.* Mills, 76 Mich. 669, 43 N. W. 679.

For form of order settling interrogatories see Brewer *v.* Press Pub. Co., 20 Misc. (N. Y.) 509, 46 N. Y. Suppl. 639.

43. The objection should be specific in order that the adverse party may vary or correct the interrogatory objected to. Allen *v.* Babcock, 15 Pick. (Mass.) 56. See Cannon *v.* Kinney, 3 Harr. (Del.) 317.

Objections to the form of the interrogatories must be taken before they are annexed to the commission and go to the commissioner. Anonymous, 2 Pick. (Mass.) 165; Potter *v.* Leeds, 1 Pick. (Mass.) 309; Morse *v.* Cloyes, 11 Barb. (N. Y.) 100. See Francis *v.* Ocean Ins. Co., 6 Cow. (N. Y.) 404. At the time of settlement see Brewer *v.* Press Pub. Co., 20 Misc. (N. Y.) 509, 46 N. Y. Suppl. 639.

In Pennsylvania the proper form of objecting to interrogatories in chief is by exceptions and not by motion to strike off. McMurdy *v.* Connecticut Gen. L. Ins. Co., 5 Wkly. Notes Cas. (Pa.) 211. But see *contra*, Machine Co. *v.* Shillow, 14 Lanc. Bar (Pa.) 58. In the orphans' court, an entry of an office rule to strike out interrogatories filed *sur* commission to take testimony is not allowable. Yorke's Estate, 5 Pa. Dist. 264.

In Canada an application to strike out objectionable interrogatories may be made before the issue of the commission to take evidence. Lockwood *v.* Bew, 10 Ont. Pr. 655. See Millville Mut. Mar., etc., Ins. Co. *v.* Driscoll, 11 Can. Supreme Ct. 183; McDonald *v.* Murray, 5 Ont. 559; Darling *v.* Darling, 8 Ont. Pr. 391; Williams *v.* Corby, 8 Ont. Pr. 83.

Waiver.— Objection to the form of the interrogatories is waived by a stipulation that the settlement of the interrogatories shall be without prejudice to any valid objection to the competency of the witness; also to the admissibility in evidence of any entries in the books of the witness; also, without prejudice to any valid objection on account of the immateriality of the first two cross interrogatories. Morse *v.* Cloyes, 11 Barb. (N. Y.) 100.

44. A county judge has no authority to allow and settle interrogatories for a commission in an action pending in the supreme court. Erwin *v.* Voorhees, 26 Barb. (N. Y.) 127.

A referee has no jurisdiction to strike out interrogatories for impertinence. The proper course is for the witness to demur. Williams *v.* Corby, 8 Ont. Pr. 83.

The interrogatories may be referred to a master in chancery to be settled by him, subject to the ultimate review of the court. Cocker *v.* Franklin Hemp, etc., Co., 5 Fed. Cas. No. 2,930, 1 Story 169.

In the absence of any provision in the rules of practice concerning the settlement of interrogatories, they must be settled in accordance with the practice which was in force prior to the time of the adoption of the Code of Civil Procedure. Brewer *v.* Press Pub. Co., 20 Misc. (N. Y.) 509, 46 N. Y. Suppl. 639.

Admissions.— Interrogatories should not be disallowed because the adverse party offers to admit the facts intended to be elicited, where it is doubtful if the admission will benefit to the same extent as the evidence. Thorp *v.* Riley, 56 N. Y. Super. Ct. 254, 3 N. Y. Suppl. 547.

Indorsement of allowance.—That the judge before whom the interrogatories are settled indorses his allowance of the same upon the commission by referring to them as annexed to it is a sufficient compliance with the statute. Halleran *v.* Field, 23 Wend. (N. Y.) 38.

The omission of the court to rule upon objections made by defendant to interrogatories filed to a witness, whose deposition was taken, was not error of which he could complain, where all grounds of objection upon which he was entitled to rely were passed upon when the answers of the witness were offered in evidence. Trammell *v.* Hudmon, 86 Ala. 472, 6 So. 4.

45. Where the court orders a settlement on a shorter notice than that prescribed by statute, a party who admits due service of the notice, interrogatories, and order and who appears on the day specified for the settlement and secures an adjournment to enable him to file cross interrogatories, has no ground of objection. Hobart *v.* Jones, 5 Wash. 385, 31 Pac. 879.

Notice of exceptions.— Where interrogatories are excepted to, notice of the exceptions must be given, that the party filing the interrogatories may correct them if he sees fit, or abide the result of an objection at the trial. Cannon *v.* Kinney, 3 Harr. (Del.) 317.

It is improper to settle interrogatories prior to the hour appointed in the notice. Cronkhite *v.* Mills, 76 Mich. 669, 43 N. W. 679.

A direct interrogatory, added, without notice to the other party, after the interrogatories are crossed, will be disregarded. Stubbs *v.* Fleming, 92 Ga. 354, 17 S. E. 935.

In New York unless the order granting the commission prescribes some other mode, or the interrogatories are settled by consent, a copy of the proposed interrogatories must be

2. Matters Considered. On settling interrogatories their materiality and pertinency to the issue will alone be regarded, and unless a proposed interrogatory is manifestly improper or impertinent it should be allowed subject to objections at the trial.[46]

F. Annexing to Commission. Where the examination is required to be had on interrogatories they should accompany the commission;[47] but otherwise where the commission is the only authority necessary to empower the commissioner to act.[48]

XVI. Notice of Taking Depositions.

A. Necessity. Where it is permissible to take depositions on notice to the adverse party, or he is entitled to notice of the execution of the commission or the examination of the witness,[49] the giving of such notice is ordinarily essential

served on the attorney for the adverse party with notice of settlement, and the other party may propose interrogatories and give notice of presentation of the same for settlement at the same time and place. Krauss *v.* Hallbemier, 29 N. Y. Suppl. 1106, 23 N. Y. Civ. Proc. 317.

46. Treadwell *v.* Greene, 89 N. Y. App. Div. 60, 85 N. Y. Suppl. 318; Walton *v.* Godwin, 54 Hun (N. Y.) 387, 7 N. Y. Suppl. 926; Wilcox *v.* Dodge, 53 Hun (N. Y.) 565, 6 N. Y. Suppl. 368, 23 Abb. N. Cas. (N. Y.) 209, 17 N. Y. Civ. Proc. 248; Thorp *v.* Riley, 56 N. Y. Super. Ct. 254, 3 N. Y. Suppl. 547; Macdonald *v.* Garrison, 2 Hilt. (N. Y.) 510, 9 Abb. Pr. (N. Y.) 178; Hemenway *v.* Knudson, 21 N. Y. Suppl. 679; Dent *v.* Friars Minor Soc., 16 N. Y. Suppl. 684; Gilpin *v.* Appleby, 13 N. Y. Suppl. 394; Gilpin *v.* Daly, 12 N. Y. Suppl. 448, 20 N. Y. Civ. Proc. 91.

In settling cross interrogatories, the judge has not the discretion which he can exercise on an examination at a trial, and must allow all pertinent questions, although at the trial he might, in his discretion, exclude them. Uline *v.* New York Cent., etc., R. Co., 79 N. Y. 175, 53 Am. Rep. 123.

On settling interrogatories, their pertinency is determined by the fact that they may under some circumstances become pertinent and not by the fact that they do not at present seem pertinent. Fry *v.* Manhattan Trust Co., 2 Misc. (N. Y.) 520, 22 N. Y. Suppl. 386, 23 N. Y. Civ. Proc. 98 [*following* Uline *v.* New York Cent., etc., R. Co., 79 N. Y. 175].

Questions as to transactions with decedent. — It is not a ground for disallowing interrogatories that the evidence sought to be elicited is within a statutory inhibition relative to evidence of personal transactions with a deceased person, etc., inasmuch as something may occur at the trial to render the evidence admissible, or it may not then be objected to. Wilcox *v.* Dodge, 53 Hun (N. Y.) 565, 6 N. Y. Suppl. 368, 23 Abb. N. Cas. (N. Y.) 209, 17 N. Y. Civ. Proc. 248.

The sufficiency of the answer as a defense will not be considered. Thorp *v.* Riley, 56 N. Y. Super. Ct. 254, 3 N. Y. Suppl. 547.

Striking out cross interrogatories.— Where particular direct interrogatories are objected to, and cross interrogatories are propounded on the same matters, on sustaining the objection it is proper to strike out the cross interrogatories and the answers thereto. Stepp *v.* National L., etc., Assoc., 37 S. C. 417, 16 S. E. 134.

47. **Originals or copies.**— Although it may be required that the original interrogatories should be annexed to the commission, the fact that copies are annexed and the originals permitted to remain on file will not be deemed prejudicial. Stone *v.* Stillwell, 23 Ark. 444.

Neglect of clerk.— It is a good objection to the reading of a deposition that cross interrogatories filed after the time prescribed by rule but before the issuing of the commission were not annexed thereto because of error of judgment on the part of the clerk. Case *v.* Cushman, 1 Pa. St. 241.

The accidental omission to annex cross interrogatories will not require suppression of the deposition. Darling *v.* Darling, 8 Ont. Pr. 391.

48. Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181.

49. *Alabama.*— Garnett *v.* Yoe, 17 Ala. 74; Lesne *v.* Pomphrey, 4 Ala. 77. See Wilkinson *v.* Wilkinson, 133 Ala. 381, 32 So. 124.

California.— Attwood *v.* Fricot, 17 Cal. 37, 76 Am. Dec. 567; Ellis *v.* Jaszynsky, 5 Cal. 444; McCann *v.* Beach, 2 Cal. 32; McCann *v.* Beach, 2 Cal. 25.

Colorado.— Jones *v.* Carruthers, 1 Colo. 291.

Indiana.— Carpenter *v.* Dame, 10 Ind. 125; Black *v.* Marsh, 31 Ind. App. 53, 67 N. E. 201.

Iowa.— See Fabian *v.* Davis, 5 Iowa 456.

Kansas.— Case *v.* Huey, 26 Kan. 553.

Kentucky.— Kentucky Union Co. *v.* Lovely, 110 Ky. 295, 61 S. W. 272, 22 Ky. L. Rep. 1742; Johnson *v.* Beauchamp, 5 Dana 70; Thorne *v.* Haley, 1 Dana 268; Rennick *v.* Willoughby, 2 A. K. Marsh. 22; Henderson *v.* Howard, 1 A. K. Marsh. 26.

Louisiana.— Underwood *v.* Lacapere, 10 La. Ann. 766; Bowman *v.* Flowers, 2 Mart. N. S. 267; Robertson *v.* Lucas, 1 Mart. N. S. 187.

Maryland.—Boreing *v.* Singery, 2 Harr. & J. 455. See Thomas *v.* Clagett, 2 Harr. & M. 172.

Massachusetts.— Faunce *v.* Gray, 21 Pick.

to the validity of the deposition. *Ex parte* depositions may be taken, however, where no notice is required by statute, or an absolute necessity exists for dispensing therewith,[50] or where the proof required is merely formal or of some isolated

243; Davis *v.* Allen, 14 Pick. 313; Bryant *v.* Com., 9 Pick. 485; Anonymous, 3 Pick. 14; Coffin *v.* Abbot, 7 Mass. 252; Daniels *v.* Bullard, Quincy 41.

Michigan.— See Brown *v.* Watson, 66 Mich. 223, 33 N. W. 493.

Mississippi.— Gordon *v.* Warfield, 74 Miss. 553, 21 So. 151; Daily *v.* Johnson, 48 Miss. 246; Pickett *v.* Ford, 4 How. 246; Gordon *v.* Watkins, Sm. & M. Ch. 37.

New Hampshire.— Deming *v.* Foster, 42 N. H. 165; Cater *v.* McDaniel, 21 N. H. 231.

New Jersey.— Wilson *v.* Cornell, 4 N. J. L. 117; Parker *v.* Hayes, 23 N. J. Eq. 186.

New York.— Brooks *v.* Schultz, 3 Abb. Pr. N. S. 124.

Ohio.— Lattier *v.* Lattier, 5 Ohio 538; Houpt *v.* Houpt, Wright 156.

Pennsylvania.— See —— *v.* Galbraith, 2 Dall. 78, 1 L. ed. 297; Hoofnagle *v.* Dering, 1 Yeates 302.

South Carolina.— Gooday *v.* Corlies, 1 Strobh. 199.

Texas.— Millikin *v.* Smoot, 71 Tex. 759, 12 S. W. 59, 10 Am. St. Rep. 813; Ft. Worth Live-Stock Commission Co. *v.* Hitson, (Civ. App. 1898) 46 S. W. 915; Lumpkin *v.* Minor, (Civ. App. 1898) 46 S. W. 66; Zerkel *v.* Wooldridge, (Civ. App. 1896) 36 S. W. 499.

Vermont.— Ferguson *v.* Morrill, Brayt. 40.

Virginia.— Unis *v.* Charlton, 12 Gratt. 484; Stubbs *v.* Burwell, 2 Hen. & M. 536; Collins *v.* Lowry, 2 Wash. 75.

Wisconsin.— Sika *v.* Chicago, etc., R. Co., 21 Wis. 370.

United States.— Walsh *v.* Rogers, 13 How. 283, 14 L. ed. 147; Green *v.* Compagnia Generale, etc., 82 Fed. 490; The Argo, 1 Fed. Cas. No. 517, 2 Gall. 314; Zantzinger *v.* Weightman, 30 Fed. Cas. No. 18,202, 2 Cranch C. C. 478. See Henning *v.* Boyle, 112 Fed. 397; Goodhue *v.* Bartlett, 10 Fed. Cas. No. 5,538, 5 McLean 186; Rhoades *v.* Selin, 20 Fed. Cas. No. 11,740, 4 Wash. 715.

England.— Loveden *v.* Milford, 4 Bro. C. C. 540, 29 Eng. Reprint 1031. See Cholmondeley *v.* Clinton, 2 Meriv. 81, 16 Rev. Rep. 167, 35 Eng. Reprint 871.

Canada.— Holmes *v.* Canadian Pac. R. Co., 5 Manitoba 346.

See 16 Cent. Dig. tit. "Depositions," § 92.

In the United States courts notice to the adverse party or his counsel must be given when either is within one hundred miles of the place of caption. Dick *v.* Runnels, 5 How. 7, 12 L. ed. 26; Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Woodb. & M. 121; The Argo, 1 Fed. Cas. No. 517, 2 Gall. 314 [*affirmed* in 2 Wheat. 287, 4 L. ed. 241]. If beyond that distance (Merrill *v.* Dawson, 17 Fed. Cas. No. 9,469, Hempst. 563 [*affirmed* in 11 How. 375, 13 L. ed. 736]; Miller *v.* Young, 17 Fed. Cas. No. 9,596, 2 Cranch C. C. 53) or the commission is to be executed abroad, no notice is necessary (Frevall *v.* Bache, 9 Fed. Cas. No. 5,113, 5 Cranch C. C. 463).

Under the early Connecticut practice the prescribed distance was twenty miles. Fowler *v.* Norton, 2 Root 25; Killingsworth *v.* Goshen, 1 Root 480; Hillyard *v.* Nichols, 1 Root 493; Williams *v.* Fitch, 1 Root 316; Moses *v.* Gunn, 1 Root 307; Whiting *v.* Jewell, Kirby 1. In Johnson *v.* Foot, Kirby 283, and Nichols *v.* Hillyer, Kirby 219, where the depositions were admitted, the witnesses lived within twenty miles from the adverse party, but when sworn were absent from home and more than twenty miles distant.

Actual notice is equivalent to formal notice. Nelson *v.* Woodruff, 1 Black (U. S.) 156, 17 L. ed. 97.

Copy of officer's appointment.— Service on the solicitor of a copy of the examiner's appointment for the examination of a party is a sufficient notice to the solicitor. Fowler *v.* Boulton, 12 Grant Ch. (U. C.) 437.

Death of officer.— Where a magistrate before whom depositions were to have been taken dies the party desiring the testimony may give further notice to his adversary of the death of the magistrate, and that the examination of the witnesses will take place before another magistrate at the same place and hour, and to whom the docket and papers of the deceased magistrate have been transferred. Phelps *v.* Young, 1 Ill. 327.

Notice of application.— No special notice is necessary where interrogatories have been filed and the adverse party has received notice of the application for the commission. O'Neill *v.* Henderson, 15 Ark. 235, 60 Am. Dec. 568.

Service of affidavit.— In Colorado depositions of witnesses residing in the state, but outside the county where the case is tried, may be taken under a dedimus with interrogatories, without service of an affidavit, and in the same manner as the testimony of a witness residing out of the state. Mackey *v.* Briggs, 16 Colo. 143, 26 Pac. 131.

The general notice of a master appointed to take an account (Miller *v.* Cox, 38 W. Va. 747, 18 S. E. 960) or to adjust, settle, and report matters referred to him (Geiser Mfg. Co. *v.* Chewning, 52 W. Va. 523, 44 S. E. 193) is sufficient.

The neglect of the clerk to obey a directory requirement to give notice will not vitiate the deposition. Shea *v.* Maby, 1 Lea (Tenn.) 319.

Under a notice entitled in two distinct cases a deposition cannot be taken unless both cases are between the same parties on the same matter. Laithe *v.* McDonald, 7 Kan. 254.

50. Moore *v.* Heineke, 119 Ala. 627, 24 So. 374; Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13; Goodwin *v.* Mussey, 4 Me. 88; Patapsco Ins. Co. *v.* Southgate, 5 Pet. (U. S.) 604, 8 L. ed. 243 [*overruling* Evans *v.* Hettick, 8 Fed. Cas. No. 4,562, 3 Wash. 408]. See

fact.[51] Nor is the failure to give notice material where the adverse party has refused or neglected to join in the commission;[52] and the necessity of notice is obviated by propounding cross interrogatories.[53] But the failure to give notice of the execution of a commission is not cured by extending the time of execution to enable notice to be given.[54]

B. Waiver.[55] Notice may be waived by agreement,[56] by consenting to the issue of a commission,[57] or by the appearance of the adverse party at the examination[58] and by participation therein.[59]

C. Form and Requisites[60] — **1. In General.** The notice should be in substantial compliance with the requirements of statutes or rules prescribing it,[61] and should give such information to the adverse party as will enable him to participate in the examination or take such other steps as he may see fit.[62]

Wainwright *v.* Webster, 11 Vt. 576, 34 Am. Dec. 707.

In Louisiana, where the commission is to be executed within the state, no notice is necessary, although the adverse party decline to file cross interrogatories, and reserve the right to notice. Hall *v.* Acklen, 9 La. Ann. 219. See also Gasquet *v.* Johnson, 1 La. 425, holding that notice of the execution of a commission without the state is unnecessary.

In Mississippi depositions may be taken in chancery without notice. Gordon *v.* Watkies, Sm. & M. Ch. 37.

After default and decree pro con.— No notice is required to be given by plaintiff where defendant has made default, and a decree *pro confesso* has been entered. Jordan *v.* Jordan, 17 Ala. 466; Planters', etc., Bank *v.* Walker, 7 Ala. 926; Brooke *v.* Berry, 2 Gill (Md.) 83; Oliver *v.* Palmer, 11 Gill & J. (Md.) 426.

Inability to give notice.— Where a witness was about to leave the state, and reside permanently abroad, the court on motion permitted him to be examined *de bene esse*, without previous notice of the motion, it appearing that such notice could not well be given. Rockwell *v.* Folsom, 4 Johns. Ch. (N. Y.) 165.

Refusal to proceed — Right of adverse party.— Where one party gives the required notice that he will take the deposition of a witness, and is present at the designated time and place, but declines to take the deposition, it may be taken by the adverse party without further notice. Crabb *v.* Orth, 133 Ind. 11, 32 N. E. 711.

51. Walsh *v.* Rogers, 13 How. (U. S.) 283, 14 L. ed. 147.

52. Merrill *v.* Dawson, 17 Fed. Cas. No. 9,469, Hempst. 563.

53. Bradford *v.* Cooper, 1 La. Ann. 325. If the interrogatories under a foreign commission are filed soon enough to allow the opposing party an opportunity to file cross interrogatories, notice need not be given. Parker *v.* Sedwick, 5 Md. 281.

54. Parker *v.* Hayes, 23 N. J. Eq. 186.

55. **Propounding cross interrogatories** as waiver of notice see *supra*, XVI, A.

56. Rockford Wholesale Grocery Co. *v.* Stevenson, 65 Ill. App. 609; Murray *v.* Phillips, 59 Ind. 56; Ormsby *v.* Granby, 48 Vt. 44.

An agreement or stipulation that depositions previously taken may be used is a waiver. Wilkinson *v.* Ward, 42 Ill. App. 541.

57. Bird *v.* Halsy, 87 Fed. 671.

58. Mumma *v.* McKee, 10 Iowa 107.

59. Wilkinson *v.* Ward, 42 Ill. App. 541; Nevan *v.* Roup, 8 Iowa 207; Gasquet *v.* Johnson, 1 La. 425; Ragan *v.* Cargill, 24 Miss. 540.

Joining in execution of commission.— Objections to informalities are waived by practically joining in the execution of the commission. Bird *v.* Halsy, 87 Fed. 671.

60. For forms of notice of taking depositions see Sandels & H. Ark. Dig. 1631; Bullitt Civ. Code Ky. (1895) p. 723; Maine Rev. St. (1883) c. 107, § 9; Campau *v.* Dewey, 9 Mich. 381; Payne *v.* Cowan, Sm. & M. Ch. (Miss.) 26.

61. Dorrance *v.* Hutchinson, 22 Me. 357; Marcy *v.* Merrifield 52 Vt. 606; Brintnall *v.* Saratoga, etc., R. Co., 32 Vt. 665.

Annexing copy of rule of court.— Where a rule of court prescribes that notice of taking depositions shall have a copy of the rule to take the deposition affixed, if such copy is not affixed to the notice the deposition cannot be read. Alexander *v.* Alexander, 5 Pa. St. 277.

The notice need not be verified. Colton *v.* Rupert, 60 Mich. 318, 27 N. W. 520. But see *contra*, Campau *v.* Dewey, 9 Mich. 381.

62. The notice need not state the reason for taking the deposition. U. S. *v.* Louisville, etc., R. Co., 18 Fed. 480; De Butts *v.* McCulloch, 7 Fed. Cas. No. 3,718, 1 Cranch C. C. 286.

Materiality of testimony.— The omission of the notice to state that the testimony of non-resident witnesses was material and therefore necessary is unimportant, where that fact appears on the face of the deposition. Independent Dryer Co. *v.* Livermore Foundry, etc., Co., 60 Ill. App. 390.

One of two witnesses may be examined under a notice by commissioners of the intention to execute a commission to examine witnesses. Hall *v.* Connell, 3 Y. & C. Exch. 528.

Requirement of cross interrogatories.— Notice need not require the party on whom it is served "to put interrogatories if he should think fit." Bussard *v.* Catalino, 4 Fed. Cas. No. 2,228, 2 Cranch C. C. 421.

2. IDENTIFICATION OF CAUSE. The action or suit in which the testimony is to be taken should be identified [63] and the parties thereto designated.[64] But the incorrect entitling of the cause [65] or an insufficient statement of the venue [66] will not vitiate the notice if the party receiving it is not misled.

3. NAMES AND RESIDENCES OF WITNESSES. When so prescribed the notice must specify the names of the witnesses to be examined [67] and their residences.[68]

Divorce suit.— The notice of the taking of depositions in divorce cases must be the same as in other cases. Whipple *v.* Whipple, 43 N. H. 235.

Improper direction.— A deposition taken on behalf of plaintiff on a notice directed by mistake to "plaintiff" or his attorney, although served on defendant in interest, cannot be read. Adams *v.* Easton, 6 Watts (Pa.) 456.

63. It is sufficient to designate the court in which the action is pending, without describing the cause of action. Bundy *v.* Hyde, 50 N. H. 116.

Time of holding court.— It is not necessary that the notice should state the time when the court where the cause is pending is to be held. Great Falls Mfg. Co. *v.* Mathes, 5 N. H. 574.

64. Kingsbury *v.* Smith, 13 N. H. 109.

Action against administrator.— The failure to describe the action as against an administrator will not invalidate the deposition. Ballou *v.* Tilton, 52 N. H. 605.

Action by infant.— A notice to defendant stating the action to be one "in which the plaintiff sues by his guardian," naming him, sufficiently indicates the parties. Kingsbury *v.* Smith, 13 N. H. 109.

Full names.— The parties' names need not appear in full. Fowler *v.* Boulton, 12 Grant Ch. (U. C.) 437.

65. Stephens *v.* Joyal, 45 Vt. 325, where the title of the cause differed from that docketed, but in fact stated the names of the real parties.

"Above-entitled action."— A notice is sufficient where its caption includes the name of the court and the title of the action, and it contains a statement that the deposition is "to be used on the trial of the above-entitled action." Sparks *v.* Sparks, 51 Kan. 195, 32 Pac. 892.

Knowledge of adverse counsel.— Where counsel for the adverse party knew inferentially the case referred to, and was informed of the witness to be examined, and signified his intention to be present, the notice is sufficient. Matthews *v.* Dare, 20 Md. 248.

Appearance and cross-examination.— A party who attended and examined the witnesses cannot complain. Erwin *v.* Bailey, 123 N. C. 628, 31 S. E. 844.

66. Thus notice that the deposition would be taken to be read "in a case now pending in the superior court of law for the said county, wherein I am plaintiff and you are defendant" without specifically designating the county is sufficient, in the absence of any evidence of the pendency of any other suit. Owens *v.* Kinsey, 51 N. C. 38. A notice to take a deposition within the state is sufficient, although it states the county in which the suit is pending only. Davis *v.* Settle, 43 W. Va. 17, 26 S. E. 557. A notice to take depositions in a suit pending in a federal circuit court which correctly states the title of the case and the name of the court, but lays the venue in the state and county, instead of in the district, does not vitiate the deposition. Gormley *v.* Bunyan, 138 U. S. 623, 11 S. Ct. 453, 34 L. ed. 1086. A statement that the action was pending in one county, whereas in fact it was pending in another, is insufficient. Bowyer *v.* Knapp, 15 W. Va. 277.

67. *Louisiana.*— Flower *v.* Downs, 12 Rob. 101.

Massachusetts.— Minot *v.* Bridgewater, 15 Mass. 492; Barnes *v.* Ball, 1 Mass. 73.

Michigan.— Patterson *v.* Wabash, etc., R. Co., 54 Mich. 91, 19 N. W. 761.

North Dakota.— Ashe *v.* Beasley, 6 N. D. 191, 69 N. W. 188.

Tennessee.—Robertson *v.* Campbell, 1 Overt. 172.

Contra, Neeley *v.* Harris, Tapp. (Ohio) 209.

The names of all the witnesses need not be given. Mumma *v.* McKee, 10 Iowa 107.

"Divers witnesses."— The deposition of a party cannot be taken under a notice that the testimony of "divers witnesses" will be taken. Brown *v.* A Raft of Timber, 1 Handy (Ohio) 13, 12 Ohio Dec. (Reprint) 1.

A clerical error in substituting the name of the commissioner for that of the witness is immaterial, where all the other papers are correct, so that the opposite party could not have been misled. Eastman *v.* Bennett, 6 Wis. 232.

Slight errors in describing witnesses may be disregarded where it appears that they had been formerly examined upon the same points in another case, by the same counsel, who, upon their second examination, had copies of their former depositions. Blackett *v.* Laimbeer, 1 Sandf. Ch. (N. Y.) 366. A difference between the names given in a notice of the taking of depositions and those signed to the depositions is not a cause for suppression of the depositions at the trial, where it appears that the deponents had been witnesses at a former trial of the same case, and that the party against whom the depositions were to be used filed cross interrogatories. Galveston, etc., R. Co. *v.* Morris, (Tex. Sup. 1901) 61 S. W. 709 [*affirming* (Civ. App. 1901) 60 S. W. 813].

68. Indorsement on interrogatories.— An indorsement of the residence of the witness on the back of the interrogatories served is a substantial compliance with the statute. Fidelity Mut. L. Assoc. *v.* Harris, (Tex. Civ. App. 1897) 40 S. W. 341.

4. DESIGNATION OF OFFICER. The citation or notice should specify the magistrate or other officer before whom the deposition is to be taken.[69]

5. TIME AND PLACE OF TAKING — a. In General. The notice must specify the time[70] and the place of taking the deposition,[71] with sufficient particularity to enable the party notified to attend the examination if he so desire.

b. Sufficiency as to Time. The time of taking a deposition has been held to be sufficiently specified,[72] if the notice states that the deposition will be taken on several or successive days[73] or on alternate days,[74] although no particular hour is

In Illinois the residence of the witness need not be stated. Hays *v.* Borders, 6 Ill. 46.

The notice need only presumptively show that the witness is a non-resident of the county where the action is pending. Toledo, etc., R. Co. *v.* Baddeley, 54 Ill. 19, 5 Am. Rep. 71.

69. Clough *v.* Bowman, 15 N. H. 504; Kingsbury *v.* Smith, 13 N. H. 109; Carmalt *v.* Post, 8 Watts (Pa.) 406; Chase *v.* Watson, 75 Vt. 385, 56 Atl. 10; Davis *v.* Davis, 48 Vt. 502; St. Johnsbury *v.* Goodenough, 44 Vt. 662. *Contra,* Neeley *v.* Harris, Tapp. (Ohio) 209.

"Any justice."— A notice to take depositions before "any justice of the peace" of a designated county is irregular. Carmalt *v.* Post, 8 Watts (Pa.) 406.

Initials.— The first names of the magistrate may be designated by initials. Barber *v.* Bennett, 58 Vt. 476, 4 Atl. 231, 56 Am. Rep. 565.

A slight misspelling of the notary's name will not be regarded as prejudicial. Sloan *v.* Hunter, 56 S. C. 385, 34 S. E. 658, 879, 76 Am. St. Rep. 551.

Residence.— The omission to state the residence of the officer to whom the commission issued will not vitiate the deposition. Rayburn *v.* Central Iowa R. Co., 74 Iowa 637, 35 N. W. 606, 38 N. W. 520.

70. *Arkansas.*— Caldwell *v.* McVicar, 9 Ark. 418; Humphries *v.* McCraw, 9 Ark. 91; Harris *v.* Hill, 7 Ark. 452, 46 Am. Dec. 295; Reardon *v.* Farrington, 7 Ark. 364.

Illinois.— Lewis *v.* Fish, 40 Ill. App. 372.

Kentucky.— May *v.* Russell, 1 T. B. Mon. 223; Crown *v.* Louisville, etc., R. Co., 7 Ky. L. Rep. 95.

Louisiana.— Doane *v.* Farrow, 9 Mart. 222.

Missouri.— Benton *v.* Craig, 2 Mo. 198; Front Rank Steel Range Co. *v.* Jeffers, 79 Mo. App. 174.

New Hampshire.— Clough *v.* Bowman, 15 N. H. 504; Kingsbury *v.* Smith, 13 N. H. 109; Shepherd *v.* Thompson, 4 N. H. 213.

North Carolina.— Bedell *v.* State Bank, 12 N. C. 483.

Pennsylvania.— Carmalt *v.* Post, 8 Watts 406.

Vermont.— Miller *v.* Truman, 14 Vt. 138.

United States.— Knode *v.* Williamson, 17 Wall. 586, 21 L. ed. 670.

See 16 Cent. Dig. tit. "Depositions," § 97.

71. *Arkansas.*— Harris *v.* Hill, 7 Ark. 452, 46 Am. Dec. 295.

California.— Lucas *v.* Richardson, 68 Cal. 618, 10 Pac. 183.

Illinois.— Lewis *v.* Fish, 40 Ill. App. 372.

Indiana.— Rodman *v.* Kelly, 13 Ind. 377.

Kentucky.— Crozier *v.* Gano, 1 Bibb 257.

New Hampshire.— Clough *v.* Bowman, 15 N. H. 504; Kingsbury *v.* Smith, 13 N. H. 109.

North Carolina.— McNauchton *v.* Lester, 2 N. C. 423.

Virginia.— Hunter *v.* Fulcher, 5 Rand. 126, 16 Am. Dec. 738.

United States.— Knode *v.* Williamson, 17 Wall. 586, 21 L. ed. 670.

See 16 Cent. Dig. tit. "Depositions," § 96.

Proof of change of place.— An agreement to change the place of taking a deposition may be shown by the certificate of the justice of the peace before whom it was taken. Fry *v.* Coleman, 1 Grant (Pa.) 445.

The federal court may pursue the state practice which does not require the notice to specify the time and place of taking the deposition. U. S. *v.* Louisville, etc., R. Co., 18 Fed. 480.

Constructive notice.— In Maryland actual notice may be given directly by the commissioner, or constructive notice will result from filing the interrogatories in the clerk's office before the commission goes out. Hatton *v.* McClish, 6 Md. 407. Likewise the service of copies of the interrogatories in sufficient time to enable the adverse party to file cross interrogatories will be sufficient notice of the time and place of its execution. Law *v.* Scott, 5 Harr. & J. (Md.) 438.

Verbal notice.— Although the omission to notify the opposite party in writing of the time and place of taking the deposition may be good cause to suppress it, if the fact of notice is denied, yet a verbal notice is sufficient if the fact of notice is not denied. Milton *v.* Rowland, 11 Ala. 732.

72. An undated notice served on the second day of the month, and stating that the depositions will be taken on "the 27th day of this present month of December, is good." Sweitzer *v.* Meese, 6 Binn. (Pa.) 500.

73. *Kentucky.*—Thomas *v.* Davis, 7 B. Mon. 227.

North Carolina.— Harris *v.* Peterson, 4 N. C. 358; Ridge *v.* Lewis, 1 N. C. 599.

Pennsylvania.— Phillipi *v.* Bowen, 2 Pa. St. 20.

Tennessee.— Smith *v.* Cocke, 1 Overt. 296.

Virginia.—Kincheloe *v.* Kincheloe, 11 Leigh 393.

See 16 Cent. Dig. tit. "Depositions," § 97.

74. Moore *v.* Humphreys, 2 J. J. Marsh. (Ky.) 54; Kennedy *v.* Alexander, 2 N. C. 25.

specified,[75] or the time designated is between stated hours of a particular day or date.[76]

c. Sufficiency as to Place. The place of taking the deposition is sufficiently designated if it can be readily ascertained or identified, and it does not appear that there is any other place answering the description or that the party notified was misled.[77]

6. Nature of Deposition. A notice of the taking of a deposition *de bene esse* need not specifically state that it is to be so taken,[78] if it contains enough to show that fact.[79] But a notice that a deposition in chancery will be taken conditionally is bad, for the reason that such depositions are taken absolutely,[80] and a notice to take a deposition to be read absolutely is not authorized by a rule to take the deposition *de bene esse*.[81]

7. Signature and Date. The notice should be signed[82] and dated.[83] But the omission of the attorney's signature[84] or irregularities in the signing[85] are immaterial if the party notified was not misled or prejudiced.

D. By Whom Given. Notice of the time and place of executing a commission is usually given by the commissioners,[86] and notice of taking a deposition without a commission may be given by the judge[87] or magistrate before whom it is to be taken,[88] or by either party who may desire to use it or by his attorney,

75. McGinley *v.* McLaughlin, 2 B. Mon. (Ky.) 302.

76. Sweitzer *v.* Meese, 6 Binn. (Pa.) 500; J. I. Case Threshing Mach. Co. *v.* Pederson, 6 S. D. 140, 60 N. W. 747.

77. *Indiana.*— Hobbs *v.* Godlove, 17 Ind. 359; Bulla *v.* Morrison, 1 Blackf. 521; Clawson *v.* Shortridge, Wils. 282.

Kansas.— Atchison, etc., R. Co. *v.* Pearson, 6 Kan. App. 825, 49 Pac. 681.

Kentucky.—Barbour *v.* Whitlock, 4 T. B. Mon. 180; Overstreet *v.* Phillips, 1 Litt. 120.

Nebraska.— Britton *v.* Berry, 20 Nebr. 325, 30 N. W. 254.

North Carolina.— Pursell *v.* Long, 52 N. C. 102; Owens *v.* Kinsey, 51 N. C. 38; Ridge *v.* Lewis, 1 N. C. 599.

North Dakota.— Moore *v.* Booker, 4 N. D. 543, 62 N. W. 607.

Ohio.— Straw *v.* Dye, 2 Ohio Dec. (Reprint) 312, 2 West. L. Month. 389.

Pennsylvania.— Gibson *v.* Gibson, 20 Pa. St. 9; Sweitzer *v.* Meese, 6 Binn. 500.

West Virginia.— Davis *v.* Settle, 43 W. Va. 17, 26 S. E. 557.

See 16 Cent. Dig. tit. "Depositions," § 96.

Compliance with notice as to place see *infra*, XVII, E, 2.

An apparent alteration in the name of the county in which the deposition was noticed to be taken will be presumed to have been made before service of the notice. Davis *v.* Davis, 48 Vt. 502.

The designation of the place of business of a party where the witnesses are employed is sufficient where it does not appear that the other party will be prejudiced. State Bank *v.* Carr, 130 N. C. 479, 41 S. E. 876.

78. Johnson *v.* Fowler, 4 Bibb (Ky.) 521.

79. Henderson *v.* Williams, 57 S. C. 1, 35 S. E. 261.

80. Crittenden *v.* Woodruff, 11 Ark. 82.

81. Lindsey *v.* Lee, 12 N. C. 464.

82. Bohn *v.* Devlin, 28 Mo. 319.

83. Huston *v.* Noble, 4 J. J. Marsh. (Ky.) 130.

84. Wallingford *v.* Western Union Tel. Co., 60 S. C. 201, 38 S. E. 443, 629, where the affidavit attached to the notice to take the deposition of a witness for plaintiff showed that the affiant was one of plaintiff's attorneys, and it appeared on the face of the notice that the name of the firm of attorneys for plaintiff was omitted inadvertently, and the defendant was not misled or prejudiced.

85. Osgood *v.* Sutherland, 36 Minn. 243, 31 N. W. 211 (where the notice was signed by one of the attorneys for the party, individually instead of by the firm); Clement *v.* Brooks, 13 N. H. 92 (where notice to defendant of the caption was signed by plaintiff as justice of the peace).

86. Notice of the time and place of taking the testimony, given by the commissioners, if the interrogatories are not filed soon enough to allow the opposite party an opportunity to file cross interrogatories, is sufficient. Parker *v.* Sedwick, 5 Md. 281.

By attorney.— Notice of the execution of a commission is not sufficient if it comes from the attorney of the party, without consent or approbation of the commissioners. Parker *v.* Sedwick, 5 Md. 281.

87. In Colorado it is the duty of the judge before whom a deposition is to be taken for use in a criminal trial, to fix the time and place of taking and to notify the accused and the prosecuting attorney, and this when done by the prosecuting attorney is a nullity. Ryan *v.* People, 21 Colo. 119, 40 Pac. 775.

An order requiring the adverse party to appear and attend the examination of a witness is made out of court, and without notice, and may be made by any judge of the court, in any part of the state. Silver Creek Bank *v.* Browning, 16 Abb. Pr. (N. Y.) 272..

88. In Vermont the personal notice required must be given by the magistrate himself, *viva voce*, in the presence and hearing of the party to be notified. Fitts *v.* Whitney, 32 Vt. 589.

this last being the most usual mode and always necessary where depositions are to be taken on notice.[89]

E. Who Entitled to Notice — 1. Adverse Party. Notice to the attorneys of record for the adverse party is insufficient but must be given to the party or his attorney in fact, when so required by statute[90] or rule of court,[91] or where the deposition is to be taken before the return of the writ and no appearance by attorney can be entered.[92]

2. Attorney For Party. Ordinarily it will be sufficient to give notice to the attorney for the adverse party,[93] especially where the latter is absent from the state

Notice of taking depositions for use in the federal courts must be given by the magistrate before whom they are to be taken, and not by the party intending to use them. Young *v.* Davidson, 30 Fed. Cas. No. 18,157, 5 Cranch C. C. 515.

89. King *v.* Ritchie, 18 Wis. 554.

Counsel not authorized.— A deposition cannot be taken to be read on behalf of a party, upon notice by counsel not representing such party. Payne *v.* Cowan, Sm. & M. Ch. (Miss.) 26.

The party delivering the commission in another state should notify the commissioners of the other party. Tussey *v.* Behmer, 9 Lanc. Bar (Pa.) 45.

90. *Alabama.*—McEwen *v.* Morgan, 1 Stew. 190.

Connecticut.— McDonald *v.* Hobby, 1 Root 154.

New Jersey.— Arnold *v.* Renshaw, 11 N. J. L. 317; Middleton *v.* Taylor, 1 N. J. L. 445.

Virginia.— Cahill *v.* Pintony, 4 Munf. 371.

United States.— Buddicum *v.* Kirk, 3 Cranch 293, 2 L. ed. 444; Wheaton *v.* Love, 29 Fed. Cas. No. 17,484, 1 Cranch C. C. 429.

See 16 Cent. Dig. tit. "Depositions," § 107. And see Williams *v.* Gilchrist, 3 Bibb (Ky.) 49; Doane *v.* Farrow, 9 Mart. (La.) 222; Miller *v.* McKenna, 18 Mo. 253.

In Kentucky in an action for divorce notice to defendant is sufficient without serving the county attorney. Lambdin *v.* Lambdin, 4 Ky. L. Rep. 835.

Notice to the attorney instead of to the party is equivalent to waiver of notice to the client, where the attorney appears and represents the latter. Hunt *v.* Crane, 33 Miss. 669, 69 Am. Dec. 381.

One who disclaims any connection with a commission is not entitled to notice. McCombie *v.* Anton, 6 M. & G. 27, 6 Scott N. R. 923, 46 E. C. L. 27.

Party who interpleads after depositions are taken cannot complain of want of notice. Miller *v.* Campbell Commission Co., (Okla. 1903) 74 Pac. 507.

Party without county.— Service on the partner of the attorney at his office is not sufficient where the statute requires the notice to be left at the residence of the party where he is not to be found in the county. Toulman *v.* Swain, 47 Mich. 82, 10 N. W. 117.

91. Fleming *v.* Beck, 48 Pa. St. 309; Gracy *v.* Bailee, 16 Serg. & R. (Pa.) 126; Voris *v.* Smith, 13 Serg. & R. (Pa.) 334; Nash *v.* Gilkeson, 5 Serg. & R. (Pa.) 352; Claiborne *v.* Frazier, 2 Brev. (S. C.) 47.

If the party acquiesces in service on his attorney it will be sufficient. Snyder *v.* Wilt, 15 Pa. St. 59.

92. Gilpin *v.* Semple, 1 Dall. (Pa.) 251, 1 L. ed. 123.

93. *Arkansas.*— Bailey *v.* Wright, 24 Ark. 73.

California.— Griffith *v.* Gruner, 47 Cal. 644.

Indiana.— Coffin *v.* Anderson, 4 Blackf. 395.

Maine.— Herrin *v.* Libby, 36 Me. 350.

Massachusetts.— Smith *v.* Bowditch, 7 Pick. 37.

Mississippi.— Foy *v.* Foy, 25 Miss. 207.

Missouri.— Poe *v.* Domie, 54 Mo. 119.

New York.— Elverson *v.* Vanderpoel, 41 N. Y. Super. Ct. 257.

Ohio.— McClatchy *v.* McClatchy, 19 Ohio Cir. Ct. 201, 10 Ohio Cir. Dec. 262.

Pennsylvania.— Snyder *v.* Wilt, 15 Pa. St. 59.

Texas.— Newman *v.* Dodson, 61 Tex. 91.

Wisconsin.— King *v.* Ritchie, 18 Wis. 554.

United States.— Barrell *v.* Limington, 2 Fed. Cas. No. 1,040, 4 Cranch C. C. 70; Irving *v.* Sutton, 2 Fed. Cas. No. 575, 1 Cranch C. C. 575; Bowie *v.* Talbot, 3 Fed. Cas. No. 1,732, 1 Cranch C. C. 247.

See 16 Cent. Dig. tit. "Depositions," § 107.

Address or direction.— Where the notice is addressed to attorneys by their firm-name, without stating that they are attorneys at law, by whom the declaration was filed, it will be presumed, in the absence of any denial on their part, to have been addressed to them in the same character in which they filed the declaration. Reese *v.* Beck, 24 Ala. 651.

Adverse party residing beyond prescribed distance.— Where the statute requires notice to the adverse party if living within thirty miles of the place of caption, if he lives beyond that distance his attorney who lives within the limit need not be notified. Heacock *v.* Stoddard, 1 Tyler (Vt.) 344.

Corresponding attorney.— Where defendant who is within the county has not entered his appearance, the notice may be served on his corresponding attorney. Railey *v.* Railey, 66 S. W. 414, 23 Ky. L. Rep. 1891.

Forwarding to party.—Depositions will not be suppressed where, defendant being imprisoned in the state in which the depositions were to be taken, service was made on his attorney who mailed it to defendant who never received it, it appearing that the depositions were taken three or four months before trial, and that no effort was made to secure a cross-examination. Diedrich *v.* Diedrich, (Nebr. 1903) 94 N. W. 536.

or jurisdiction.[94] It must appear, however, that the attorney is duly authorized to represent the party.[95]

3. Agent of Party. Where service of notice may be made on the agent or attorney in fact of the adverse party or a person designated by him to accept service,[96] it must appear that such agent or other person is authorized to act in the particular matter.[97]

4. Several Parties. Where there are several parties to a cause, plaintiffs or defendants, a deposition taken therein is admissible only against such of the parties as had notice,[98] unless the statute provides that notice to one shall be sufficient

Party or attorney.— Whether or not the notice of the commissioner of the execution of the commission is given to the guardian or his solicitor is immaterial. Higgins *v.* Horwitz, 9 Gill (Md.) 341.

Under the California practice act notice was required to be served on the attorney of the other party, even if he lived out of the county where the action was pending. Notice to the party himself was not sufficient. Griffith *v.* Gruner, 47 Cal. 644.

Criminal proceedings.— Service of notice to take a deposition in a criminal proceeding may be made on the prosecuting attorney. State *v.* McCarty, 54 Kan. 52, 36 Pac. 338.

94. *Arkansas.*— Bailey *v.* Wright, 24 Ark. 73.

Kentucky.—Pettis *v.* Smith, 2 A. K. Marsh. 194.

Louisiana.— Doane *v.* Farrow, 9 Mart. 222.

New Hampshire.— Graves *v.* Ticknor, 6 N. H. 537.

North Carolina.— Savage *v.* Rice, 1 N. C. 19.

Vermont.— Marcy *v.* Merrifield, 52 Vt. 606.

United States.— Leiper *v.* Bickley, 15 Fed. Cas. No. 8,222, 1 Cranch C. C. 29.

See 16 Cent. Dig. tit. "Depositions," § 107.

In Tennessee if a party be absent from home and from the state, notice must be given by leaving it at his residence, and by service on his attorney also. Wilson *v.* Drake, 5 Hayw. 108.

95. Brown *v.* Ford, 52 Me. 479; Allen *v.* Doyle, 33 Me. 420; Pierce *v.* Pierce, 29 Me. 69.

Acceptance of service.— It is a good service on plaintiff and one of defendants if a notice addressed to the attorney, who has appeared as attorney for both, is accepted by him, although he appends to his signature to the acceptance language indicating that he is the attorney for plaintiff only. Walker *v.* Abbey, 77 Iowa 702, 42 N. W. 519.

New partnership.— Notice to a new partner of one of a dissolved law firm which had acted for the party in the cause is insufficient, where the new firm did not succeed to the business of the old one. Johnston *v.* Ashley, 7 Ark. 470.

Service on an attorney who appeared without authority is sufficient. Smith *v.* Bowditch, 7 Pick. (Mass.) 137.

Service on substituted attorneys is sufficient, although no formal substitution has been entered. King *v.* Ritchie, 18 Wis. 554.

96. After revocation of authority.— Notice to a person appointed as state agent and attorney to accept service after his authority has been revoked, but before the appointment of a substitute, is good. U. S. Life Ins. Co. *v.* Ross, 102 Fed. 722, 42 C. C. A. 601.

97. Thus notice to the wife of the party (Bauman *v.* Zinn, 3 Yeates (Pa.) 157), his overseer (Chapman *v.* Chapman, 4 Hen. & M. (Va.) 426), or special bail (Weaver *v.* Cochran, 3 Yeates (Pa.) 168) is insufficient where no agency is shown.

Agreement as to who may be served.— Where it is agreed that notice may be given to persons designated, a notice to others is insufficient. Bohr *v.* The Baton Rouge, 7 Sm. & M. (Miss.) 715.

The station agent of a railroad company is not within a provision permitting service of notice on the agent of the adverse party. Atchison, etc., R. Co. *v.* Meek, 49 Nebr. 295, 68 N. W. 509.

98. *Connecticut.*—Clap *v.* Lockwood, Kirby 100.

Illinois.— McConnell *v.* Stettinius, 7 Ill. 707.

Kentucky.— Hanly *v.* Blackford, 1 Dana 1, 25 Am. Dec. 114.

North Carolina.— Cox *v.* Smitherman, 37 N. C. 66.

United States.—Brown *v.* Platt, 4 Fed. Cas. No. 2,026, 2 Cranch C. C. 253.

See 16 Cent. Dig. tit. "Depositions," § 106.

Deposition by one defendant.— A statute providing that depositions may be taken on notice "to the adverse party, if there be only one person; if there be several, to any one of them who is a real party in interest" does not authorize one of two defendants to take depositions by service of notice on the sole plaintiff, and thereby bind his co-defendant. Black *v.* Marsh, 31 Ind. App. 53, 67 N. E. 201.

Notice to one defendant.— The deposition of one defendant taken without notice to the other is not admissible against the latter, at whose instance the deponent was made a party, and who seeks relief against both him and plaintiff. Zerkel *v.* Wooldridge, (Tex. Civ. App. 1896) 36 S. W. 499.

Irregularity in a notice to one defendant is cured by a proper notice to his co-defendant who is the attorney of record for both. Newman *v.* Dodson, 61 Tex. 91.

Objection by defendant served.— Defendants on whose attorney notice has been properly served cannot object that their co-defendants were not notified. Glenn *v.* Glenn, 17 Iowa 498.

Ejectment.—In ejectment depositions taken on notice to the tenants, but without notice to their co-defendant, the warrantor, cannot

as to all,[99] or the party served is the real party interested in the determination of the controversy.[1]

5. Perpetuation of Testimony. Notice of proceedings to perpetuate testimony must be given to the parties interested in the subject-matter to which the testimony relates.[2]

F. Reasonableness — 1. In General. Where the time within which notice must be given is not prescribed or otherwise fixed, such reasonable notice must be given to the adverse party[3] as will afford him an opportunity to attend the

be read if the tenants claim only through the warrantor. Woodard *v.* Spiller, 1 Dana (Ky.) 179, 25 Am. Dec. 139.

Injunction.— In a proceeding by creditors to enjoin the removal of goods purchased from them by one who prior to the purchase had conspired with third parties to seize the goods under fictitious executions against him, notice to the third parties is sufficient. Field *v.* Holzman, 93 Ind. 205.

In trespass against several, a deposition may be read against one of the defendants, although the notice was served on him alone, and it contains statements conducing to prove the others guilty. Logan *v.* Steele, 3 Bibb (Ky.) 230.

99. Chase *v.* Hathorn, 61 Me. 505; Ellis *v.* Lull, 45 N. H. 419.

Discretion.— The authority conferred by the Tennessee code on the court or clerk to determine whether notice shall be given to each person, and if not to whom it shall be given, is to be exercised in the discretion of the court or clerk, as the case may be. Thompson *v.* Commercial Bank, 3 Coldw. (Tenn.) 46.

1. Nicholson *v.* Eichelberger, 6 Serg. & R. (Pa.) 546; Spaulding *v.* Ludlow Woolen Mill, 36 Vt. 150.

Nominal defendant.— In trespass to try title the failure to serve one defendant who is in possession of the premises as the servant of his co-defendant who was duly served is immaterial. King *v.* Maxey, (Tex. Civ. App. 1894) 28 S. W. 401.

Party of record.— Notice may properly be given to the party of record. Richter *v.* Selin, 8 Serg. & R. (Pa.) 425.

A party interested on the question whether or not a claim is just should have notice of the taking of a deposition as to that fact. Vaught *v.* Murray, 71 S. W. 924, 24 Ky. L. Rep. 1587. In taking a deposition in support of a claim filed against an estate, it is not necessary to notify every person who has an ultimate interest in the distribution of the property. It is sufficient to notify the executor and any other person who may have appeared to resist the claim. Deuterman *v.* Ruppel, 103 Ill. App. 106.

Creditors.— In an action against an assignee for the benefit of creditors who had been summoned but did not become parties to the record, where the validity of the assignment is alone in issue, notice to the trustee alone is sufficient. Totman *v.* Sawyer, 39 Me. 528.

2. Dearborn *v.* Dearborn, 10 N. H. 473.

Parties interested.— In Maine under a statute requiring a person wishing to perpetuate testimony to make a sworn statement containing the names of all persons supposed to be interested in the subject, and cause notice to be given to all persons so named, a notice served on the husband is not enough, when the wife, being the owner of the premises to which the testimony relates, is not named in the statement or notified, although the husband appeared at the time of taking the deposition, and put interrogatories to the deponent. Danforth *v.* Bangor, 85 Me. 423, 27 Atl. 268. Under the New Jersey act of 1784 notice was required to be served on the party interested, and service on his attorney was a nullity. Middleton *v.* Taylor, 1 N. J. L. 445. Under 22 Ohio Laws, p. 104, the judges taking depositions are required to notify only parties interested who are within the county, or their attorneys, if within the county. Myers *v.* Anderson, Wright (Ohio) 513.

3. *California.*— Ellis *v.* Jaszynsky, 5 Cal. 444.

Connecticut.— Phelps *v.* Hunt, 40 Conn. 97; Masters *v.* Warren, 27 Conn. 293; Sharp *v.* Lockwood, 12 Conn. 155.

Kentucky.— Cross *v.* Cross, 41 S. W. 272, 19 Ky. L. Rep. 650; Greer *v.* Ludlow, 7 Ky. L. Rep. 290.

Maine.— Harris *v.* Brown, 63 Me. 51.

Massachusetts.— Allen *v.* Perkins, 17 Pick. 369.

Michigan.—Drosdowski *v.* Supreme Council O. of C. L., 114 Mich. 178, 72 N. W. 169.

Mississippi.— Hunt *v.* Crane, 33 Miss. 669, 69 Am. Dec. 381.

Missouri.— *In re* Wogan, (App. 1903) 77 S. W. 490.

Nebraska.— Cool *v.* Roche, 15 Nebr. 24, 17 N. W. 119.

New York.— Elverson *v.* Vanderpoel, 41 N. Y. Super. Ct. 257.

Ohio.— Devinny *v.* Jelly, Tapp. 159.

Vermont.— Kimpton *v.* Glover, 41 Vt. 283; Stephens *v.* Thompson, 28 Vt. 77.

Virginia.— Payne *v.* Zell, 98 Va. 294, 36 S. E. 379; Trevelyan *v.* Lofft, 83 Va. 141, 1 S. E. 901; Fant *v.* Miller, 17 Gratt. 187.

United States.— Uhle *v.* Burnham, 44 Fed. 729; Bell *v.* Nimmon, 3 Fed. Cas. No. 1,259, 4 McLean 539; Jamieson *v.* Willis, 13 Fed. Cas. No. 7,204, 1 Cranch C. C. 566; Renner *v.* Howland, 20 Fed. Cas. No. 11,700, 2 Cranch C. C. 441.

See 16 Cent. Dig. tit. "Depositions," § 98.

The giving of insufficient notice is such evidence of bad faith as will invalidate the deposition. *In re* Wogan, (Mo. App. 1903) 77 S. W. 490.

examination personally or by counsel, or to take such other steps as he may deem advisable. What constitutes reasonable notice is a question dependent on the peculiar circumstances of each particular case,[4] and is for the determination of the court.[5]

Notice by commissioners.—Where a rule of court provides that commissioners shall give "such notice as they may deem reasonable," it is enough if the notice actually given was reasonable in fact. Waters *v.* Waters, 35 Md. 531.

Where the clerk omits to specify what notice shall be given, it must be shown that the notice actually given was reasonable. Lesne *v.* Pomphrey, 4 Ala. 77; Parker *v.* Haggerty, 1 Ala. 632.

Attendance of party.— Where a party to a suit, having no solicitor, is required to attend before a master to be examined, it would seem that forty-eight hours' notice thereof should be given to him. Watson *v.* Ham, 1 Ch. Chamb. (U. C.) 293.

4. The chief circumstances to be considered are distance, number of witnesses, and facility of communication to obtain proper representation at the taking. American Exch. Nat. Bank *v.* Spokane Falls First Nat. Bank, 82 Fed. 961, 27 C. C. A. 274.

Instances.— It is sufficient to give notice at eleven o'clock in the morning, for the examination of a witness bound to sea at four o'clock in the afternoon (Vinal *v.* Burrill, 16 Pick. (Mass.) 401); in the forenoon to take a deposition at two-twenty o'clock in the afternoon, where at that time notice was given to attend at four o'clock (Allen *v.* Perkins, 17 Pick. (Mass.) 369); one entire day (Allen *v.* Champion, Wright (Ohio) 672) where the witness is a seafaring man (Bowie *v.* Talbot, 3 Fed. Cas. No. 1,732, 1 Cranch C. C. 247); two days (Georgetown Water Co. *v.* Central Thompson-Huston Co., 16 Ky. L. Rep. 125) or more than two days when the deposition is to be taken in the country (Hamilton *v.* McGuire, 2 Serg. & R. (Pa.) 478). Where the adverse party or his attorney resides at the same place where the deposition is to be taken, notice of the taking given on the same day (Vinal *v.* Burrill, 16 Pick. (Mass.) 401; Mumford *v.* Church, 1 Johns. Cas. (N. Y.) 147; McGinnis *v.* Washington Hall Assoc., 12 Gratt. (Va.) 602; Leiper *v.* Bickley, 15 Fed. Cas. No. 8,222, 1 Cranch C. C. 29; Nicholls *v.* White, 18 Fed. Cas. No. 10,235, 1 Cranch C. C. 58), or on the preceding day (Harris' Appeal, 58 Conn. 492, 20 Atl. 617; Atkinson *v.* Glenn, 2 Fed. Cas. No. 610, 4 Cranch C. C. 134), will be deemed sufficient.

Four days' notice of the examination of witnesses about to go abroad is sufficient. See Dicher *v.* Power, Dick. 112, 21 Eng. Reprint 211.

Depositions in China.— In Sing Cheong Co. *v.* Yung Wing, 59 Conn. 535, 22 Atl. 289, it was held that two months' notice of taking depositions in China, given in Connecticut, was insufficient, although the trip to the place of taking could be made in twenty-nine days, in view of the fact that the length of time required to reach that place furnished no safe guide for the reasonableness of the notice, as it would in a country where no special preparations are necessary for the proper taking of depositions.

If no time is specified by a commissioner to perpetuate testimony fourteen days will be deemed reasonable. Jackson *v.* Perkins, 2 Wend. (N. Y.) 308.

Parties residing near each other.— Where there was no rule of court or settled practice as to the number of days' notice of taking a deposition under a rule, and it is uncertain whether the rule was not entered by order of court, and many years have elapsed, and no objection has been made, a deposition taken on six days' notice, the parties living near each other, will be admitted. Carpenter *v.* Groff, 5 Serg. & R. (Pa.) 162.

What laws govern.— The sufficiency of the notice as to time is determinable by the laws of the state where the action is pending. *In re* Wogan, (Mo. App. 1903) 77 S. W. 490.

Inconvenience of attorney.— Where the notice is served on the attorney of record in apt time, the sufficiency of the notice is not affected by the fact that it is inconvenient for the attorney to attend. Bailey *v.* Wright, 24 Ark. 73.

Duty to inform adverse party of intended departure of witness.— Where defendant objects to taking a deposition at the appointed time, on account of the insufficiency of notice, plaintiff is not bound to inform him that the witness is about to leave the state, and therefore his deposition cannot be postponed, provided he is guilty of no fraudulent concealment. McGinnis *v.* Washington Hall Assoc., 12 Gratt. (Va.) 602.

Presumption.— Where notice was given on the eleventh of the month of an intention to take a deposition in an adjoining state, and the examination was had on the seventeenth, it will be presumed, in the absence of anything to the contrary, that the notice was sufficient to enable the party notified to attend. Greene *v.* Tally, 39 S. C. 338, 17 S. E. 779.

Waiver.— The insufficiency of the notice is waived by appearance and cross-examination. Nevan *v.* Roup, 8 Iowa 207.

5. Gerrish *v.* Pike, 36 N. H. 510; Darling *v.* Woodward, 54 Vt. 101; Folsom *v.* Conner, 49 Vt. 4; Hough *v.* Lawrence, 5 Vt. 299.

By trial judge.— Where the judge who issued a commission failed to fix the time of notice and the parties disagree as to its sufficiency, the question should be determined by the judge who presides when the depositions are offered. Cherry *v.* Slade, 9 N. C. 400.

The reason for giving short notice by a commissioner can be shown only by his certificate. Oral proof cannot be given at the trial. Chase *v.* Garretson, (N. J. Sup. 1891)

2. Time of Notice — a. In General. Where the time within which notice of taking a deposition must be given is prescribed by statute or rule, or is fixed by a judge of the court, the validity of the deposition depends upon compliance with such statute, rule, or direction as the case may be.[6]

b. Notice of Taking at Different Times and Places. Notice or notices of taking depositions at different places at the same time,[7] or at such times and places that the adverse party or his attorney cannot attend are unreasonable.[8] In such a case the party may attend at either place designated and disregard the notice as to the other, and the depositions taken in his absence will be suppressed,[9] or as it has been held in some cases the depositions taken will be rejected.[10]

c. As Dependent on Distance, Route, and Means of Travel. In determining the reasonableness of the notice, the distance, traveling conveniences, condition of the roads, and other matters affecting the ability of the party or his counsel to attend the examination or to attend it and return in time for trial must be considered;[11] and where the notice is inadequate to permit such attendance and

22 Atl. 787 [*affirmed* in 54 N. J. L. 42, 23 Atl. 353].

Review.— The determination of the court below as to the reasonableness of the notice will not be revised. Nelms *v.* Kennon, 88 Ala. 329, 6 So. 744; Hough *v.* Lawrence, 5 Vt. 299.

6. Richardson *v.* Burlington, etc., R. Co., 8 Iowa 260.

By commissioner.— In proceedings under the act to perpetuate the testimony of witnesses, the commissioner should specify in the order the number of days for which notice is to be given. If no time is specified, he will be considered as having deemed fourteen days reasonable notice. Jackson *v.* Perkins, 2 Wend. (N. Y.) 308.

By court.— Where it is necessary to take a deposition during the trial the court may prescribe the notice to be given. Deming *v.* Foster, 42 N. H. 165.

By judge.— The judge who grants the commission should fix the time of the notice. Cherry *v.* Slade, 9 N. C. 400. A deposition will not be set aside where the order of the judge fixed the time of notice at three days, and the counsel of the opposite party acknowledged service of a written copy of notice more than three days before the taking of the deposition. Attwood *v.* Fricot, 17 Cal. 37, 76 Am. Dec. 567.

Forthwith.— Under a provision for at least five days' notice unless the judge prescribe a shorter time, an order to take depositions on the day of the order, and directing service of notice forthwith, is insufficient to justify less than five days' notice. Howell *v.* Howell, 66 Cal. 390, 5 Pac. 681.

Special order.— Where a standing rule requires ten days' notice, a deposition taken under a special *ex parte* order on three days' notice cannot be read. Quynn *v.* Brooke, 22 Md. 288.

Notice which barely exceeds that prescribed is good, although the indulgence of the court may be needed in allowing a party taken by surprise to meet it. Toulman *v.* Swain, 47 Mich. 82, 10 N. W. 117.

Computation.— A requirement of ten days' notice contemplates that the party should receive the notice ten days prior to the examination and not that it should be left for him. Gooday *v.* Corlies, 1 Strobh. (S. C.) 199.

The Iowa code which prescribes five days' notice of the taking of any deposition when the notice is served on the party "within the county" has reference to the county in which the depositions are taken, and not to the county in which the cause is pending and in which the depositions are to be used. Kennedy *v.* Rosier, 71 Iowa 671, 33 N. W. 226.

Relaxation of statutory requirement.— A requirement of forty-eight hours' notice will not be applied strictly in the case of an examination abroad before special examiners. De Brito *v.* Hillel, L. R. 15 Eq. 213, 42 L. J. Ch. 307, 28 L. T. Rep. N. S. 59, 21 Wkly. Rep. 379.

7. Evans *v.* Rothschild, 54 Kan. 747, 39 Pac. 701; Water *v.* Harrison, 4 Bibb (Ky.) 87; Uhle *v.* Burnham, 44 Fed. 729.

Party giving, connected with but one case. — The fact that plaintiff's attorneys notified defendant that they would take depositions in one state on the same day as other depositions were taken by them in another distant state will not vitiate either deposition, where plaintiff is connected with only one of the causes, and the objection is not made until the calling of the case. Wytheville Ins., etc., Co. *v.* Teiger, 90 Va. 277, 18 S. E. 195.

8. Hankinson *v.* Lombard, 25 Ill. 572, 79 Am. Dec. 348; Cole *v.* Hall, 131 Mass. 88. *Contra*, Nolan *v.* Johns, 126 Mo. 159, 28 S. W. 492.

Where deposition can be taken at one place only.— Where one of the witnesses died before the time fixed by the notice and the adverse party by reasonable inquiry could have ascertained that fact in time to enable him to attend the examination of the others, the notice and deposition taken thereunder were upheld. Taylor *v.* Bate, 4 Dana (Ky.) 198.

9. Hankinson *v.* Lombard, 25 Ill. 572, 79 Am. Dec. 348; Evans *v.* Rothschild, 54 Kan. 747, 39 Pac. 701; Cole *v.* Hall, 131 Mass. 88.

10. Waters *v.* Harrison, 4 Bibb (Ky.) 87; Uhle *v.* Burnham, 44 Fed. 729.

11. *Arkansas.*—Lindauer *v.* Delaware Mut. Safety Ins. Co., 13 Ark. 461.

return because of the existing conditions affecting travel the deposition cannot be read.[12]

d. Computation of Time and Distance — (i) *Time.* Where the time to be allowed is prescribed by statute or rule one day should be counted inclusive and the other exclusive.[13]

(ii) *Distance.* In considering distance for the purpose of determining the sufficiency of the time allowed by the notice, it has been held that the computation should be made from the residence of the party notified to the place of

Connecticut.— Sing Cheong Co. *v.* Yung Wing, 59 Conn. 535, 22 Atl. 289.

New Hampshire.—Gerrish *v.* Pike, 36 N. H. 510.

Virginia.— Trevelyan *v.* Lofft, 83 Va. 141, 1 S. E. 901.

United States.—American Exch. Nat. Bank *v.* Spokane Falls First Nat. Bank, 82 Fed. 961, 27 C. C. A. 274.

See 16 Cent. Dig. tit. "Depositions," §§ 100, 101.

12. *Connecticut.*—Sing Cheong Co. *v.* Yung Wing, 59 Conn. 535, 22 Atl. 289.

Indiana.— Cefert *v.* Burch, 1 Blackf. 400; Henthorn *v.* Doe, 1 Blackf. 157.

Iowa.— Richardson *v.* Burlington, etc., R. Co., 8 Iowa 260.

Kansas.— Hartley *v.* Chidester, 36 Kan. 363, 13 Pac. 578.

Kentucky.— Kincaid *v.* Kincaid, 1 J. J. Marsh. 100; May *v.* Russell, 1 T. B. Mon. 223; Shropshire *v.* Dickinson, 2 A. K. Marsh. 20.

Missouri.— *In re* Wogan, (App. 1903) 77 S. W. 490.

New York.— Sandford *v.* Burrell, Anth. N. P. 250.

Virginia.— Trevelyan *v.* Lofft, 83 Va. 141, 1 S. E. 901.

United States.— Barrell *v.* Simonton, 2 Fed. Cas. No. 1,042, 3 Cranch C. C. 681.

See 16 Cent. Dig. tit. "Depositions," §§ 100, 101.

Instances of sufficiency.—The following notices have been held reasonable and sufficient: Two miles distant, one day's notice (McGuiley *v.* McLaughlin, 2 B. Mon. (Ky.) 302); less than twenty miles, twelve hours (Balser *v* Singer, 1 Ohio Dec. (Reprint) 56, West. L. J. 394); eighty-three miles, five days (Dean *v.* Tygert, 1 A. K. Marsh. (Ky.) 172); two hundred and forty-one miles, one day, excluding Sundays, for each twenty miles (Pinkham *v.* Cockell, 77 Mich. 265, 43 N. W. 93); one thousand five hundred miles, ten days, where the distance could be traveled in six days (Carlisle *v.* Tuttle, 30 Ala. 613); six days' notice at Ft. Wayne, Ind., of taking depositions at Topeka, Kan. (Fitzpatrick *v.* Papa, 89 Ind. 17); nine days' notice in Indiana of examination in New York city, N. Y. (Manning *v.* Gasharic, 27 Ind. 399); eight days' notice where journey could be made in thirty-six hours (Hipes *v.* Cochrane, 13 Ind. 175); thirty days' notice in Kentucky for taking in Philadelphia, Pa. (Gaskill *v.* Glass, 1 B. Mon. (Ky.) 252); twenty days' notice in Ohio of examination at Little Rock, Ark. (Timms *v.* Wayne, 1 Handy (Ohio) 400, 12 Ohio Dec. (Reprint) 204); ten days' notice at Olympia, Wash., of taking deposition at Seattle, in same state (Phelps *v.* Panama, 1 Wash. Terr. 615); forty-five days' notice in New Hampshire of taking at San Francisco, Cal. (Gerrish *v.* Pike, 36 N. H. 510).

Additional days allowed for travel.— In some of the states one day is allowed for every twenty miles of travel in the ordinary mode, from the place where the notice is given, or the trial is to take place, to the place of caption, and notice given in accordance with the rule will be deemed sufficient. Lindauer *v.* Delaware Mut. Safety Ins. Co., 13 Ark. 461; Central Bank *v.* Allen, 16 Me. 41; Pinkham *v.* Cockell, 77 Mich. 265, 43 N. W. 921. An additional day is not required, unless for twenty full additional miles travel. Scammon *v.* Scammon, 33 N. H. 52. A party claiming the notice to be unreasonable because time was not allowed for travel must show affirmatively that he is entitled to the additional time. Adams *v.* Peck, 4 Iowa 551.

In Kentucky a notice which allows travel at the rate of thirty miles a day and two days for preparation is deemed sufficient. Sneed *v.* Wiester, 2 A. K. Marsh. 277.

13. Littleton *v.* Christy, 11 Mo. 390; Beasley *v.* Downey, 32 N. C. 284.

One day.— Under an order allowing testimony to be taken on one day's notice, a notice given on one day to take testimony on the next is sufficient. Walsh *v.* Boyle, 30 Md. 262.

Exclusion of day.— In Iowa the first day is excluded and the last included. Richardson *v.* Burlington, etc., R. Co., 8 Iowa 260. Notice served on the tenth to take testimony on the twentieth of the same month is not reasonable notice of not less than ten days. Williams *v.* Halford, 67 S. C. 296, 45 S. E. 207. A requirement of not less than ten days' notice is complied with by a notice served on the thirteenth to take depositions on the twenty-third of the same month. Williams *v.* Halford, 64 S. C. 396, 42 S. E. 187. Where at least five days' notice must be given, and one day in addition allowed for every thirty miles travel, where the distance from the place of service to the place of caption is thirty miles, a notice given on the twenty-first for an examination on the twenty-sixth of the same month is insufficient. Richardson *v.* Burlington, etc., R. Co., 8 Iowa 260.

Exclusion of days of service and examination.— In computing the time the day of service and the day specified for the examination should be excluded. Atty.-Gen. *v.* Ball, 9 Ir. Eq. 463.

caption,[14] or with reference to the distance of the attorney from the place of examination when he is nearer than the party.[15] In all cases the computation should be by the shortest available route.[16]

G. Service of Notice — 1. Who May Serve. The notice may be served by any competent private person,[17] unless it is required that service be made by an officer[18] or by some person specially authorized.[19]

2. Modes of Service — a. On Party. Unless otherwise prescribed service of the notice must be personal on the party.[20]

b. On Attorney. Service may be made by leaving the notice at the attorney's office, during his absence from the state, with a person of suitable age.[21]

c. Reading. A requirement of service of a notice in writing is not complied with by reading the notice to the person for whom it is intended.[22]

d. Leaving at Residence. In some jurisdictions, where the party is not absent from the state or on a journey, the notice may be served by leaving it or a copy thereof at the residence of the person for whom it is intended with a person of suitable age and discretion.[23]

14. Porter *v.* Pillsbury, 36 Me. 278.

15. Toulman *v.* Swain, 47 Mich. 82, 10 N. W. 117.

16. A notice given in time to allow the party notified to reach the place named by the shortest possible route, although not by the ordinary railroad route, is sufficient. Ellis *v.* Lull, 45 N. H. 419.

Land or water route.— Where the notice is seasonable if the usual land route is traveled, but too short if the distance is computed by the actual route by water, it will be held sufficient. Lindauer *v.* Delaware Mut. Safety Ins. Co., 13 Ark. 461.

If the place of trial has been changed but the record has not been removed, the distance should be computed from the county where the suit was brought. Phelps *v.* Young, 1 Ill. 327.

17. Bell *v.* Fry, 5 Dana (Ky.) 341; Colton *v.* Rupert, 60 Mich. 318, 27 N. W. 520.

18. O'Connell *v.* Dow, 182 Mass. 541, 66 N. E. 788.

By sheriff.— A citation by a justice addressed to any sheriff or constable in the state notifying a party to a suit pending in another county, of the taking of a deposition out of the state, may be served by the sheriff of the county where the justice exercises jurisdiction in the county where the party resides. Parker *v.* Meader, 32 Vt. 300.

Unauthorized officer.— Where service is required to be made by an officer who is authorized generally to serve process of the court which has jurisdiction of the action in which the notice is given, a constable cannot serve notice to take a deposition in an action pending in the superior court. Cullen *v.* Absher, 119 N. C. 441, 26 S. E. 33.

19. The authorization of an indifferent person is a judicial act requiring the exercise of judicial discretion, hence authorization by a magistrate who was counsel for one of the parties is invalid. St. Johnsbury *v.* Goodenough, 44 Vt. 662.

20. McEwen *v.* Morgan, 1 Stew. (Ala.) 190; Burns *v.* State, 73 Ga. 747; Carrington *v.* Stimson, 5 Fed. Cas. No. 2,450, 1 Curt. 437.

Service on commissioners.— Where four commissioners are allowed on each side, the party procuring the commission may serve any two of the commissioners of the adverse party, and is not bound to serve those whom the other party may choose. Anonymous, 3 Atk. 633.

21. Lindley *v.* Hagens, 11 Rob. (La.) 203, where the person with whom the notice was left was over fourteen years of age.

But merely leaving a notice at the law office of an attorney in his absence and the party not being present is insufficient. Jonas *v.* Smith, 2 Cinc. Super. Ct. 63.

22. Woodruff *v.* Laflin, 4 Ark. 527; Williams *v.* Brummel, 4 Ark. 129.

Reading the notice has been held sufficient where no copy was demanded. Brewington *v.* Endersby, 4 Greene (Iowa) 263.

Personal service of a copy of the notice is sufficient without reading. Prather *v.* Pritchard, 26 Ind. 65.

Service by an officer of a magistrate's citation by reading it to the party is insufficient. Fitts *v.* Whitney, 32 Vt. 589.

23. *Kentucky.*— Bell *v.* Fry, 5 Dana 341; May *v.* Russell, 1 T. B. Mon. 223.

Louisiana.— Cohen *v.* Harvard, 5 Mart. N. S. 212.

North Carolina.— Kennedy *v.* Fairman, 2 N. C. 404.

Pennsylvania.— Campbell *v.* Shrum, 3 Watts 60.

Tennessee.— Wilson *v.* Drake, 5 Hayw. 108.

United States.— Merrill *v.* Dawson, 17 Fed. Cas. No. 9,469, Hempst. 563 [*affirmed* in 11 How. 375, 13 L. ed. 736].

See 16 Cent. Dig. tit. "Depositions," § 112.

Party concealed or in neighborhood.— Notice may be left at the residence of the party, if he be in the house and conceal himself, or if he be in the neighborhood. Wilson *v.* Drake, 5 Hayw. (Tenn.) 108.

Party without or in distant part of state. — If the party is in a distant part of the state or in another state service of the notice by leaving it at his residence is insufficient. Wilson *v.* Drake, 5 Hayw. (Tenn.) 108. Where the notice was left with the wife of

e. Mailing. Mailing the notice to the party entitled thereto has been held under some circumstances or in connection with other modes of service to be sufficient.[24]

f. Publication. Where the whereabouts of the adverse party is unknown, and he is not represented by an attorney, service may be made by publication.[25]

3. Proof of Service — a. Necessity. The party offering the deposition must show that the required notice was given.[26]

b. Modes of Proof. Where the service is made by an officer, it is proved by his return;[27] when notice was given by the officer before whom the deposition was taken proof is made by his certificate,[28] if served by a private person or an officer not authorized to make service, by his affidavit,[29] or by parol proof;[30]

the party, at his dwelling-house, when it was known by the adverse party that he was absent on a journey to another state, and when it appeared also that the notice might have previously been given to the party himself, and that the taking of the deposition might have been postponed, as it respected the trial of the cause, until he returned, the service was held to be insufficient, and the deposition inadmissible. Coleman *v.* Moody, 4 Hen. & M. (Va.) 1.

Unable to find within county.—In Michigan the notice may be left at the residence of the party, if he cannot be found within the county. Toulman *v.* Swain, 47 Mich. 82, 10 N. W. 117.

Where both parties reside in the same town, leaving a copy of the notice at the residence of the adverse party is insufficient. Lemon *v.* Bishop, 1 Penr. & W. (Pa.) 485.

24. A letter directed to the opposite party, and put into the post-office on the twenty-first day of the month, informing him that the deposition of a certain witness would be taken on the twenty-eighth of the same month, is not conclusive evidence of notice, if in fact the letter was not received until the twenty-ninth, although it appears that in the due course of mail the notice should have been received on the twenty-second or twenty-third. Walker *v.* Parker, 29 Fed. Cas. No. 17,082, 5 Cranch C. C. 639.

In connection with other modes.— In Trevelyan *v.* Lofft, 83 Va. 141, 1 S. E. 901, it was held that the notice was sufficiently served by posting at the door of the party's residence, he and all of his family being absent from home, and also by serving a copy on his counsel upon the same day, and by mailing a copy to him abroad, which he received in due course of mail.

25. Maxwell *v.* Holland, 2 N. C. 302, where an order was made directing publication for three successive weeks in a newspaper, of notice that the deposition would be taken at a certain place and day three months after publication.

But unless authorized by statute it has been held that the attempted service of notice by publication is a nullity. Lattier *v.* Lattier, 5 Ohio 538.

Must be in conformity with the statute.— Publication under a statute which requires the notice to be published once a week for four successive weeks is completed on the fourth issue of the newspaper containing it and if a reasonable time elapses between the date of said fourth issue and the taking of the depositions the notice will be sufficient. Miller *v.* Neff, 33 W. Va. 197, 10 S. E. 378, 6 L. R. A. 515.

26. Smelser *v.* Williams, 4 Rob. (La.) 152; Gill *v.* Phillips, 6 Mart. N. S. (La.) 298.

Recording proof.— In Thomas *v.* Clagett, 2 Harr. & M. (Md.) 172, a deposition was held inadmissible because it did not appear that proof of notice was lodged for record, with the clerk of the county where the deposition was taken, nor that the notice was recorded.

27. Hour of service.— A return of service on the day before the time appointed for taking the deposition, without stating the hour of service, fails to show that the party had the twenty-four hours' notice allowed by statute. Hunt *v.* Lowell Gas Light Co., 1 Allen (Mass.) 343.

Sufficiency.— A return "executed by delivering a true copy of the above notice" sufficiently shows service on the party to whom the notice is addressed. Helm *v.* Shackleford, 5 J. J. Marsh. (Ky.) 390. A return "executed this writ on the 18th of June, 1859," although informal, if in other respects unexceptionable, is sufficient. Bewley *v.* Cummings, 3 Coldw. (Tenn.) 232.

28. Conclusiveness of proof see *infra*, XVI, G, 3, e.

Annexation of notice.— Where the magistrate omits to certify that the adverse party was duly notified, but annexes the notice, from which it appears that legal notice was given, the deposition may be read. Homer *v.* Brainerd, 15 Me. 54.

Who may certify.— Service of a notice to take a deposition, to be used in the circuit court of the United States, should be certified by the magistrate as well as by the marshal. Harris *v.* Wall, 7 How. (U. S.) 693, 12 L. ed. 875.

29. Bell *v.* Fry, 5 Dana (Ky.) 341; Gordon *v.* Watkins, Sm. & M. Ch. (Miss.) 37.

In deposition.— A witness who serves notice may prove the service in his deposition. Balser *v.* Singer, 1 Ohio Dec. (Reprint) 56, 1 West. L. J. 394.

Verification of return.— A return by a clerk who served notice is not legal evidence unless verified by his affidavit. Hyde *v.* Benson, 6 Ark. 396.

30. Hobbs *v.* Duff, 43 Cal. 485; Bell *v.* Fry, 5 Dana (Ky.) 341; Pickard *v.* Polhe-

or service may be shown by the written admission of the attorney of the party.[31]

c. Presumptions. In the absence of any showing to the contrary it will be presumed that the officer performed his duty in serving the notice,[32] and that the date of the notice was the date of its service.[33]

d. Sufficiency. The proof of service must show that the notice was served within the time[34] and in the manner required by law.[35] If the party was not served personally the reason for the omission should appear.[36]

e. Conclusiveness. While it has been held that the return of an officer[37] or the certificate of the magistrate[38] or notary[39] before whom the deposition was taken is only *prima facie* evidence of its truth, it has also been held that the certificate of the magistrate renders conclusive the recitals in the caption of the deposition as to the fact of notice.[40]

XVII. EXECUTING COMMISSION OR TAKING DEPOSITION.

A. In General. Statutes respecting the taking of depositions must be substantially complied with and no material deviation therefrom will be allowed, unless by the agreement or waiver of the parties.[41] Where a deposition is taken

mus, 3 Mich. 185; Laurence *v.* Phelps, 2 Root (Pa.) 334. *Contra,* Barnes *v.* Ball, 1 Mass. 73.

Oath of party.—A party cannot prove service by his own oath. Lockwood *v.* Adams, 10 Ohio 397.

Proof before commissioner.— A commissioner to take depositions in another state, to whom the commission is sent, may take evidence by affidavit that notice of the time and place of holding the commission was served on the other commissioners appointed in the matter. Tussey *v.* Behmer, 9 Lanc. Bar (Pa.) 45.

31. Coffin *v.* Anderson, 4 Blackf. (Ind.) 395; Claiborne *v.* Frazier, 2 Brev. (S. C.) 47.

Admission by partner of attorney.— In Brown *v.* Clement, 68 Ill. 192, there was held to be sufficient service where the notice sent by mail was returned with an admission of service, and acted upon under the belief that it was signed by authority of the attorney, who was in fact absent, and it appeared that the admission was signed by the attorney's son and law partner.

32. **Advertisements.**— Where the commissioner is directed to "advertise the time and place of his sittings," the court will presume, in the absence of any evidence to the contrary, that the commissioner did his duty. Maze *v.* Heckinger, 13 Ky. L. Rep. 541.

Identity of person served.— If the notice is executed by the sheriff on a person bearing the same name as one of the partners of the firm, it will be presumed that the sheriff did his duty, and that the person on whom the notice was served was a partner of the firm. Reese *v.* Beck, 24 Ala. 651.

33. Keller *v.* Nutz, 5 Serg. & R. (Pa.) 246.

34. Proof that notice was given ten days before a specified date does not show compliance with a requirement of notice ten days before the dedimus is sued out. Corgan *v.* Anderson, 30 Ill. 95.

35. **Service at residence.**— Where service by leaving the notice at the residence of the party is relied on, the proof must specify the residence (Hill *v.* Norvell, 12 Fed. Cas. No. 6,497, 3 McLean 583), and state with whom the notice was left (Crozier *v.* Gano, 1 Bibb (Ky.) 257). If the notice was left with the wife of the party the proof need not show that she was informed of its purport (McCall *v.* Towers, 15 Fed. Cas. No. 8,674, 1 Cranch C. C. 41), and it will be presumed that she was at home and that service was therefore made at the dwelling-house of the party (Snyder *v.* Wilt, 15 Pa. St. 59).

36. Wilson *v.* Drake, 5 Hayw. (Tenn.) 108, where the service was made on the attorney.

37. Bowyer *v.* Knapp, 15 W. Va. 277.

38. Pierce *v.* Pierce, 29 Me. 69; Minot *v.* Bridgewater, 15 Mass. 492; Barnes *v.* Ball, 1 Mass. 73.

39. Lyon *v.* Ely, 24 Conn. 507.

40. True *v.* Plumley, 36 Me. 466; Norris *v.* Vinal, 33 Me. 581; Cooper *v.* Bakeman, 33 Me. 376 [*explaining* and *distinguishing* Pierce *v.* Pierce, 29 Me. 69; Minot *v.* Bridgewater, 15 Mass. 492; Barnes *v.* Ball, 1 Mass. 73].

Impeachment by return of officer.— The statement in the caption cannot be controlled by an officer's return on a notification attached, which is not referred to in the caption, nor by the fact that the adverse party or his attorney was actually absent at the time. Norris *v.* Vinal, 33 Me. 581.

Parol evidence to impeach.— Parol testimony to show that the time between the notice and the caption was less than allowed by the statute is inadmissible. Cooper *v.* Bakeman, 33 Me. 376.

41. *Alaska.*—Dunbar *v.* De Groff, 1 Alaska 25.

California.— Thomas *v.* Black, 84 Cal. 221, 23 Pac. 1037; McCann *v.* Beach, 2 Cal. 32; McCann *v.* Beach, 2 Cal. 25.

Colorado.— Ryan *v.* People, 21 Colo. 119, 40 Pac. 775.

Illinois.— Corgan *v.* Anderson, 30 Ill. 95; Greene County *v.* Bledsoe, 12 Ill. 267.

Maryland.—Williams *v.* Banks, 5 Md. 198;

in another state to be used within the state in which the commission issued, the proceedings are the proceedings of the court which issued it, and are to be regulated by the laws of the state in which it is situated.[42]

B. By Person Designated. The deposition must be taken before the magistrate, notary, or other officer designated in the notice,[43] unless the notice states that it will be taken before the officer named or some other like official or proper authority.[44]

C. Oath of Commissioner or Officer. When so required by statute or rule the commissioner must take the prescribed oath,[45] but if not so required he need not be sworn;[46] nor need an official to whom a general oath of office has been administered be specially sworn when acting as a commissioner or taking depositions in a particular case.[47] Where commissioners certify that they were duly

Tolly *v.* Ford, 1 Harr. & J. 413; Lowes *v.* Holbrook, 1 Harr. & J. 153; Bladen *v.* Cockey, 1 Harr. & M. 230.

Massachusetts.— Bradstreet *v.* Baldwin, 11 Mass. 229.

Missouri.— Patterson *v.* Fagan, 38 Mo. 70.

New Hampshire.— Fabyan *v.* Adams, 15 N. H. 371.

New Jersey.— Moran *v.* Green, 21 N. J. L. 562; Hendricks *v.* Craig, 5 N. J. L. 567; Lawrence *v.* Finch, 17 N. J. Eq. 234.

Texas.— Johnson *v.* State, 27 Tex. 758.

United States.— Bell *v.* Morrison, 1 Pet. 351, 7 L. ed. 174; Luther *v.* The Merritt Hunt, 15 Fed. Cas. No. 8,610, Newb. Adm. 4; Hacker *v.* U. S., 37 Ct. Cl. 86.

Canada.— Millville Mut. Mar., etc., Ins. Co. *v.* Driscoll, 11 Can. Supreme Ct. 183.

Non-execution.— If the caption to the interrogatories recites that the answers were taken by consent of parties, the taking of the answers cannot be referred to a commission. The commission is to be considered as unexecuted by the express return of the commissioners. Louisville, etc., R. Co. *v.* Chaffin, 84 Ga. 519, 11 S. E. 891.

Substantial compliance.— Compliance with the substance of the law is sufficient. Greene County *v.* Bledsoe, 12 Ill. 267.

This rule is superseded by the Idaho code, which requires its provisions to be liberally construed. Darby *v.* Heagerty, 2 Ida. (Hasb.) 282, 13 Pac. 85.

That all the witnesses named in the commission were not examined does not require the suppression of the depositions of those that were. Schmior *v.* Russell, 83 Tex. 83, 18 S. W. 484.

In England.— A strict and literal compliance with the directions in an order for a commission under the English statute (1 Wm. IV, c. 22, § 4), to examine witness abroad is unnecessary. Hodges *v.* Cobb, L. R. 2 Q. B. 652, 8 B. & S. 583, 36 L. J. Q. B. 265, 16 L. T. Rep. N. S. 792, 15 Wkly. Rep. 1038.

42. Commandeur *v.* Russell, 5 Mart. N. S. (La.) 456; Pratt *v.* Roman Catholic Orphan Asylum, 20 N. Y. App. Div. 352, 46 N. Y. Suppl. 1035, where proof of the law of England was attempted to be made by letter and declaration executed under the laws of that country providing for the taking of proof to be used in its colonies.

43. Daggett *v.* Tallman, 8 Conn. 168; Henry *v.* Huntley, 37 Vt. 316.

A deposition taken before a justice of the peace named is good under a notice that the deposition will be taken before such person without designating him by his official title. Patterson *v.* Hubbard, 30 Ill. 201.

44. Daggett *v.* Tallman, 8 Conn. 168; Alexander *v.* Alexander, 5 Pa. St. 277; Gormley *v.* Bunyan, 138 U. S. 623, 11 S. Ct. 453, 34 L. ed. 1086.

45. Clogg *v.* McDaniel, 89 Md. 416, 43 Atl. 795; Tolley *v.* Ford, 1 Harr. & J. (Md.) 413; Frevall *v.* Bache, 9 Fed. Cas. No. 5,113, 5 Cranch C. C. 463; D'Alton *v.* Trimleston, Fl. & K. 663; Huggins *v.* Moffitt, Fl. & K. 621.

Commissioners may qualify each other. Williams *v.* Richardson, 12 S. C. 584.

Sufficiency of oath.— A statute requiring a commissioner to make oath that he will "faithfully, fairly and impartially execute the commission" is not complied with by an oath that he will faithfully execute the commission (Perry *v.* Thompson, 16 N. J. L. 72) or by swearing that he will truly, faithfully, and without partiality take the examination and depositions (Lawrence *v.* Finch, 17 N. J. Eq. 234).

Swearing himself.— A single commissioner appointed to take evidence abroad may administer the oath to himself. Wilson *v.* De Coulon, 22 Ch. D. 841, 53 L. J. Exch. 248, 48 L. T. Rep. N. S. 514, 31 Wkly. Rep. 839.

46. Wolfe *v.* Parham, 18 Ala. 441; People *v.* Riley, 75 Cal. 98, 16 Pac. 544. See Gilpins *v.* Consequa, 10 Fed. Cas. No. 5,452, Pet. C. C. 85, 3 Wash. 184.

Under special circumstances the oath of commissioners named to execute a commission in a foreign country may be dispensed with. Clay *v.* Stephenson, 3 A. & E. 807, 1 H. & W. 409, 4 L. J. K. B. 212, 5 N. & M. 318, 30 E. C. L. 367; Bolen *v.* Milladew, 10 C. B. 898, 20 L. J. C. P. 172, 70 E. C. L. 898.

In the English court of exchequer commissioners appointed in aid of the master, after a decree, are not sworn to secrecy. Hall *v.* Clee, 1 Jur. 918, 2 Y. & C. Exch. 725.

47. See Hoyt *v.* Hammekin, 14 How. (U. S.) 346, 14 L. ed. 449.

Justice of the peace.— It is not necessary that a justice of the peace who takes a deposition under a commission and issues his citation and makes his return as justice of the peace should be sworn as a commissioner. Kelton *v.* Montaut, 2 R. I. 151.

sworn[48] or there is evidence on the face of the commission that the oath was administered, and the commissioners so certify, it will be presumed that it was administered by a competent officer.[49]

D. As to Witness. The deposition of a person other than the witness designated is inadmissible,[50] unless the adverse party is aware that the person examined was the witness intended.[51]

E. Place of Taking — 1. In General. Where the commission or the order for taking a deposition directs where it is to be taken, or the place of taking is prescribed by statute or rule of court, if the deposition is taken elsewhere it is inadmissible,[52] unless the circumstances or exigencies of the case authorized a departure from the general rule.[53]

Original qualification.—A standing commissioner, who has taken the oath prescribed in "open court," and whose certificate of qualification was filed at that time, is sufficiently qualified to take depositions, although the act under which he was appointed directs that his certificate be "recorded," and that his oath must be taken "before the judge." Quynn *v.* Brooke, 22 Md. 288.

48. State *v.* Levy, 3 Harr. & M. (Md.) 591.

49. Snavely *v.* McPherson, 5 Harr. & J. (Md.) 150; Walkup *v.* Pratt, 5 Harr. & J. (Md.) 51; Wilson *v.* Mitchell, 3 Harr. & J. (Md.) 91.

Aliter where the commissioners merely certify that they took the oath, and no signature of an officer is appended thereto. Brewer *v.* Bowersox, 92 Md. 567, 48 Atl. 1060, where the commissioner merely certified "I took the oath annexed to said commission."

Presumption.— Depositions taken abroad and returned with the commission are admissible in evidence without proof that the commissioners had taken the oath prescribed by the commission, or returned by them to that effect. Such oath is required to be taken, but the court will presume that this has been done, nothing appearing to the contrary. Wilmot *v.* Haws, 3 N. Brunsw. 351.

50. Harlan *v.* Richmond, 108 Iowa 161, 78 N. W. 809; Patterson *v.* Wabash, etc., R. Co., 54 Mich. 91, 19 N. W. 761; Miller *v.* Frey, 49 Nebr. 472, 68 N. W. 630.

Witnesses named "and others."— A notice of the taking of the depositions of certain named witnesses "and others" is sufficient to authorize the taking of the deposition of an additional witness not specifically named. Independent Dryer Co. *v.* Livermore Foundry, etc., Co., 60 Ill. App. 390. And *compare* McDugald *v.* Smith, 33 N. C. 576, to the effect that under a notice to take the depositions of two persons named and others the depositions of other witnesses than those named may be taken, although the witnesses named are not examined.

51. Kent *v.* Buck, 45 Vt. 18.

Stipulation as to witness.— The deposition of James V. taken without objection, under an agreement to take the deposition of John V., is admissible. Hays *v.* Phelps, 3 Sandf. (N. Y.) 64.

52. Biddle *v.* Frazier, 3 Houst. (Del.) 258; Beach *v.* Workman, 20 N. H. 379; Bank *v.* Brodhead, 2 Lehigh Val. L. Rep. (Pa.) 383; Bondereau *v.* Montgomery, 3 Fed. Cas. No. 1,694, 4 Wash. 186.

County where witness "sojourns."— A person living without the state who does business in a city within the state "sojourns" in such city, within a statute providing that a commission issued in another state may be executed in the county in which the witness resides or sojourns. Wittenbrock *v.* Mabins, 57 Hun (N. Y.) 146, 10 N. Y. Suppl. 733.

Place different from that designated.— Where the office of the commissioner is specified by designating its location in a city, a deposition taken at his office at another location but in the city named is admissible. Sayles *v.* Stewart, 5 Wis. 8.

The convenience of the parties' counsel or witnesses may be taken into consideration (Kahn *v.* Redford, 3 Ch. Chamb. (U. C.) 55); but a party or a witness should not be compelled to attend anywhere but the place at which he has a right to be examined unless under special circumstances (Gallagher *v.* Gairdner, 2 Ch. Chamb. (U. C.) 480; McDermid *v.* McDermid, 2 Ch. Chamb. (U. C.) 372). For the convenience of defendant summoned as a witness, instead of compelling him to appear before the examiner, his testimony may be taken in the county where he and some of the complainants' counsel reside. Prevost *v.* Gorrell, 19 Fed. Cas. No. 11,405*a*.

Evidence of place of taking.—Where a commission issued to take a deposition abroad it is competent for the judge to find that it was taken in the foreign country, from evidence that the envelope in which the deposition was received bore the post-mark and postage stamp of such foreign country. McKinney *v.* Wilson, 133 Mass. 131.

Office of interested attorney.— The practice of taking depositions in the office of an attorney interested in the cause is objectionable, but the fact that a notary before whom a deposition was taken has his office in a room occupied by the attorneys who represented the parties taking the deposition is not of itself sufficient to warrant the exclusion of the deposition when offered to be read upon the trial. Singer Mfg. Co. *v.* McAllister, 22 Nebr. 359, 35 N. W. 181.

Hostile country.— A commission may be executed in the enemy's country. —— *v.* Romney, Ambl. 62; Cahill *v.* Shepherd, 12 Ves. Jr. 335, 33 Eng. Reprint 127.

53. Aged witnesses living in a distant part of the state may be examined before a master

2. Compliance With Notice. The deposition should be taken at the place designated in the notice.[54]

F. Time of Taking — 1. In General. Statutes and rules prescribing the time for taking a deposition must be strictly complied with.[55] If the time is not prescribed they must be taken with reasonable diligence[56] and at a reasonable time of day,[57] but should not be taken at a time when it is evident that the adverse party or his counsel cannot attend.[58]

in their own county, on interrogatories approved by the master before whom the reference is pending. Mason *v.* Roosevelt, 3 Johns. Ch. (N. Y.) 627.

County of commissioners' appointment.— Witnesses may be examined *in perpetuam* out of the county of the commissioners' appointment, if they consent. Jackson *v.* Leek, 12 Wend. (N. Y.) 105.

County other than that of residence.— Where a witness has the right to be examined in the county of his residence it is immaterial that his deposition was taken in another county, if he voluntarily appeared. Harding *v.* Larkin, 41 Ill. 413.

Going witness, out of the state.— A commission to take the testimony of a going witness may be taken out of the state after he has left it. Boston *v.* Bradley, 4 Harr. (Del.) 524.

Non-resident — Within the state.— A commission to take the testimony of a non-resident witness may be executed within the state. Cox *v.* Cox, 2 Port. (Ala.) 533.

54. McClintock *v.* Crick, 4 Iowa 453; Gill *v.* Jett, 6 Mart. N. S. (La.) 279; Gilly *v.* Logan, 2 Mart. N. S. (La.) 196; Young *v.* Mackall, 4 Md. 362; Collins *v.* Elliott, 1 Harr. & J. (Md.) 1; Young *v.* Mackall, 3 Md. Ch. 398; Alston *v.* Taylor, 2 N. C. 381.

But if it is shown that it was taken substantially at the place specified (De Witt *v.* Bigelow, 11 Ala. 480; Trapnell *v.* State Bank, 18 Ark. 53); that the place is so identified in the notice that the adverse party could not have been misled (Sparks *v.* Sparks, 51 Kan. 195, 32 Pac. 892; Taylor *v.* Shemwell, 4 B. Mon. (Ky.) 575; May *v.* Russell, 1 T. B. Mon. (Ky.) 223; Ellmore *v.* Mills, 2 N. C. 359), that there were not two places answering the same description (Sample *v.* Robb, 16 Pa. St. 305), or that he was present at or participated in the examination (Sonnenborn *v.* Southern R. Co., 65 S. C. 502, 44 S. E. 77; Cartside Coal Co. *v.* Maxwell, 20 Fed. 187), the deposition will be received.

Parol evidence is admissible to prove that a deposition was taken at the place designated. Waters *v.* Brown, 3 A. K. Marsh. (Ky.) 557.

Witness recalled.— A deposition taken in the absence of the opposing party, a short distance from the place stated in the notice, will not be suppressed, where it appears that on the same day the counsel for the opposing party appeared, and by consent of all the deposition was opened, and the witness recalled and cross-examined. Southern Kansas R. Co. *v.* Robbins, 43 Kan. 145, 23 Pac. 113.

55. *Kentucky.*— May *v.* Russell, 1 T. B. Mon. 223.

Ohio.— Creager *v.* Minard, Wright 519; Wilkinson *v.* Fallis, Wright 308.

Vermont.— Plattsburgh First Nat. Bank *v.* Post, 65 Vt. 222, 25 Atl. 1093; Hennessy *v.* Stewart, 31 Vt. 486.

Virginia.— Hunter *v.* Fulcher, 5 Rand. 126, 16 Am. Dec. 738.

United States.— Western Electric Co. *v.* Capital Telephone, etc., Co., 86 Fed. 769.

See 16 Cent. Dig. tit. "Depositions," § 120.

Absence of commissioners of other party — A witness may be examined on the part of one party after the commissioners for the other have left with the commission. Trevor *v.* Treveman, Toth. 189, 21 Eng. Reprint 164.

An objection that a deposition was not taken in proper time will not be considered, where there was no claim that the objecting party attempted to appear at the taking of the deposition or desired to be present, and there is no evidence that he was in any way prejudiced by an adjournment, to which he objected. Ueland *v.* Dealy, 11 N. D. 529, 89 N. W. 325.

56. Taylor *v.* Knox, 5 Dana (Ky.) 466; Ulmer *v.* Hills, 8 Me. 326.

Day preceding session of court.— A deposition taken on the day next preceding that on which the court at which it was to be used was to commence its session, without regard to the distance of the place of caption, will not be rejected, where no sinister purpose was in view. Wyman *v.* Wood, 25 Me. 436 [*distinguishing* Ulmer *v.* Hills, 8 Me. 326].

In chancery, if it is permitted to take depositions at any time before final hearing, and by agreement the date of the final hearing is to be determined by the parties, depositions may be taken until such determination. Radford *v.* Fowlkes, 85 Va. 820, 8 S. E. 817, where pending the rehearing of an interlocutory decree the parties agreed to submit the cause for hearing in vacation not later than a day named, and the adverse party appeared and cross-examined. But a deposition taken after the filing of the master's report cannot be used on the hearing of exceptions thereto. Allison *v.* Perry, 130 Ill. 9, 22 N. E. 492; Cox *v.* Pierce, 120 Ill. 556, 12 N. E. 194.

57. It is not irregular to execute a commission after four o'clock in the afternoon. Moreton *v.* Moreton, Dick. 21, 21 Eng. Reprint 174.

58. Shipman *v.* Danbert, 7 Mo. App. 576; Unis *v.* Charlton, 12 Gratt. (Va.) 484.

That counsel was attending court out of the county at the time the deposition was taken furnishes no reason why it should not be read. Warring *v.* Martin, Wright (Ohio) 380. Where an attorney was party to a suit,

2. COMPLIANCE WITH RULE OR ORDER. As a rule depositions cannot be taken after the time fixed by the rule or order for their taking;[59] but the suppression of depositions so taken is discretionary, where the delay was caused by the adverse party,[60] or no prejudice has been sustained by the irregularity.[61]

3. COMPLIANCE WITH NOTICE. The deposition may be taken at the time specified in the notice or at any time within the hours or days so specified,[62] but not at any other time.[63] The depositions should not be closed until the expiration of the time designated in the notice.[64] It has been held, however, that depositions taken before the expiration of the time will not be rejected, where the adverse party was afforded a reasonable time for appearance and cross-examination.

4. AFTER RETURN-DAY. Depositions taken after the day the commission is returnable cannot be received.[65]

5. TIME STIPULATED. Where the parties have stipulated as to the time when depositions shall be taken or closed, depositions taken thereafter are inadmissible.[66]

6. DEPOSITIONS TAKEN IN TERM. Unless by order of the court or consent of the parties a deposition cannot be taken during the term of the court in which the

and a deposition was taken by the opposite party while the court was sitting in the county where the attorney resided, it was held that such deposition could not be rejected unless the party taking the depositions knew that the court would be sitting at that time. Ela *v.* Rand, 4 N. H. 54.

59. Williams *v.* Banks, 5 Md. 198; Bachman's Case, 2 Binn. (Pa.) 72. In the federal courts depositions may be taken under Judiciary Act (1789), § 30, after the expiration of a rule to take them. Buckingham *v.* Burgess, 4 Fed. Cas. No. 2,088, 3 McLean 368.

Lack of bad faith.—Where defendant failed to take all his depositions until six months after the time fixed by order of court, a suppression of the depositions and proceeding with the case without allowing a continuance is too severe a penalty, in the absence of anything showing bad faith. Sweet *v.* Brown, 61 Iowa 669, 17 N. W. 44.

60. Mix *v.* Baldwin, 156 Ill. 313, 40 N. E. 959.

61. Underhill *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 339.

62. Cameron *v.* Clarke, 11 Ala. 259.

Misstatement of day of week.—A deposition taken on the day of the month specified in the notice is admissible, although the day of the week is misstated therein. Rand *v.* Dodge, 17 N. H. 343.

"From day to day."—Under a notice by plaintiff to take depositions on a certain day, and "from day to day," he may adjourn over from day to day, and over Sunday, until he completes his depositions, so long as he is in fact taking proof in good faith. Cross *v.* Cross, 41 S. W. 272, 19 Ky. L. Rep. 650.

Adjournments.—Where the adverse party fails to appear proceedings should begin on the day named in the notice; and if adjournments occur entries should be made each day of the proceedings of that day together with the adjournment, it not being sufficient for the officer to certify, where the depositions are taken after the day for which notice was given, that the taking has been adjourned "from day to day by reason of bad weather." Owens *v.* Peyton, 70 Mo. App. 50.

63. *Alabama.*—Jordan *v.* Hazard, 10 Ala. 221.

Louisiana.—Clark *v.* Hartwell, 11 Rob. 201; Gill *v.* Jett, 6 Mart. N. S. 279.

Maryland.—Young *v.* Mackall, 4 Md. 362; Collins *v.* Elliott, 1 Harr. & J. 1; Young *v.* Mackall, 3 Md. Ch. 398.

Michigan.—Stockton *v.* Williams, Walk. 120.

Missouri.—Kean *v.* Newell, 1 Mo. 754, 14 Am. Dec. 321.

North Carolina.—Harris *v.* Yarborough, 15 N. C. 166; Farrar *v.* Hamilton, 1 N. C. 105.

Vermont.—Johnson *v.* Perry, 54 Vt. 459.

Within specified hours.—The agent of the adverse party to defeat the deposition may testify that it was not taken within the hours specified in the notice. Whitehill *v.* Lousey, 2 Yeates (Pa.) 109.

One of two days.—A notice to take depositions on one of two days will not authorize a party to take them on the last day, unless he commence on the first day and continue over until the second. McNew *v.* Rogers, 1 Tenn. Cas. 17, Thomp. Cas. (Tenn.) 32.

64. Crittenden *v.* Woodruff, 11 Ark. 82; Morrill *v.* Moulton, 40 Vt. 242; Scharfenburg *v.* Bishop, 35 Iowa 60; Borders *v.* Barber, 81 Mo. 636; Bigoney *v.* Stewart, 68 Pa. St. 318; Sweitzer *v.* Meese, 6 Binn. (Pa.) 500; House *v.* Cash, 12 Fed. Cas. No. 6,736, 2 Cranch C. C. 73.

65. Herndon *v.* Givens, 16 Ala. 261; Veach *v.* Bailiff, 5 Harr. (Del.) 379; Wiggins *v.* Guier, 12 La. Ann. 177; Flower *v.* Swift, 8 Mart. N. S. (La.) 449.

66. Peterson *v.* Albach, 51 Kan. 150, 32 Pac. 917; *In re* Thomas, 35 Fed. 337.

Opportunity to adverse party.—There is no error in refusing to suppress depositions taken after the time agreed on where the moving party was allowed ample time to take additional evidence after the motion and before trial of the case. Gardner *v.* Trenary, 65 Iowa 646, 22 N. W. 912.

cause is pending.[67] To this general rule there are exceptions which permit depositions to be taken during term before the cause in which they are to be used is reached or called for trial,[68] or where it is necessary to take them[69] because of special circumstances arising during the term.[70] In the absence of any inhibitory statute or rule depositions may be taken in term as well as at any other time.[71] And they have been received where the party taking them has acted in good faith,[72] where there has been no unreasonable delay,[73] where the adverse party has not been surprised or prejudiced,[74] or where he was present and cross-examined without objection.[75]

7. EXTENSION OF TIME. In a proper case, as where the party has been unable to procure all his testimony, new evidence has been discovered, or the like, and he has not been guilty of laches, an extension or enlargement of the time for taking depositions may be granted.[76] The extension may be obtained *ex parte*,[77] and if

67. *Indiana.*— Smith *v.* Turner, 50 Ind. 367; Raymond *v.* Williams, 21 Ind. 241.

Kentucky.— Wilson *v.* Hocker, 15 Ky. L. Rep. 651.

Maine.— Stinson *v.* Walker, 21 Me. 211.

North Carolina.— Taylor *v.* Gooch, 50 N. C. 404.

Tennessee.— Stadler *v.* Hertz, 13 Lea 315.

Vermont.— Stephens *v.* Thompson, 28 Vt. 77.

United States.— Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Rob. Pat. Cas. 530, 2 Woodb. & M. 121.

See 16 Cent. Dig. tit. "Depositions," § 122.

Court not in session.— Where depositions may be taken in term only where they are taken in the town in which the court is held at a time when it is not actually in session unless by special order, a deposition taken out of town without such an order (Fuller *v.* Damon, 135 Mass. 586) or a deposition taken in town without an order when the court is in session for docket business (Rollins *v.* Rollins, (Me. 1886) 5 Atl. 264) is inadmissible.

Deposition not to be used at term.— It is discretionary with the court to admit or reject a deposition taken in term-time but not to be used at that term, in view of a custom that parties in court and their attorneys should not be required to attend the taking of depositions in term-time. Bemis *v.* Morrill, 38 Vt. 153.

During adjournment.— A deposition taken out of town during an adjournment of the court is not taken in term-time. Holmes *v.* Sawtelle, 53 Me. 179.

68. Dill *v.* Camp, 22 Ala. 249; Jordan *v.* Jordan, 17 Ala. 466. And see Union Pac. R. Co. *v.* Reese, 56 Fed. 288, 5 C. C. A. 510, where the deposition was admitted against an objection that it was taken during a term at which the case might be tried.

69. Phelps *v.* Hunt, 40 Conn. 97.

70. **Illness of witness.**— Dare *v.* McNutt, Smith (Ind.) 30, where a witness in court during the term was taken ill, and his deposition was taken, and the case being called again for trial during the same term, after the deposition had been taken, and the witness still being unable to attend, a motion to suppress the deposition on the ground that it was taken in term-time was held to have been properly overruled.

71. St. Louis, etc., R. Co. *v.* Morse, 38 Kan. 271, 16 Pac. 452; Northrup *v.* Hottenstein, 38 Kan. 263, 16 Pac. 445; Donovan *v.* Hibbler, (Nebr. 1902) 92 N. W. 637.

72. Phelps *v.* Hunt, 40 Conn. 97.

73. Fisher *v.* Dickenson, 84 Va. 318, 4 S. E. 737.

74. Carder *v.* Primm, 60 Mo. App. 423.

75. Fisher *v.* Dickenson, 84 Va. 318, 4 S. E. 737.

76. Kiefer *v.* Grand Trunk R. Co., 18 N. Y. Suppl. 646; Osgood *v.* Joslin, 3 Paige (N. Y.) 195; Fitch *v.* Hazeltine, 2 Paige (N. Y.) 416; Barnett *v.* Pardow, 1 Edw. (N. Y.) 11; Wooster *v.* Howe Mach. Co., 10 Fed. 666; The Ruby, 20 Fed. Cas. No. 12,103, 5 Mason 451; Darling *v.* Darling, 9 Ont. Pr. 560.

By consent depositions may be taken after the expiration of the statutory term. Sharpless *v.* Warren, (Tenn. Ch. App. 1899) 58 S. W. 407.

Irregular action of other party.— Where the applicant has been prevented from examining his witnesses by the irregular action of the other party, his application will not be rejected because the time allowed by rule for making it has expired. Osgood *v.* Joslin, 3 Paige (N. Y.) 195.

Effect on other cases.— The time will be extended to take testimony admissible under the answer, which applies equally to other cases in which the time to put in proofs has not expired. Wooster *v.* Howe Mach. Co., 10 Fed. 666.

Extension after return-day.— An order extending the return-day, made after it has already expired, will not render admissible testimony taken after the return-day. Wiggins *v.* Guier, 12 La. Ann. 177.

Extension by one inuring to benefit of other.— Where one party obtains an extension both parties may take testimony until the expiration of the enlarged time. Osgood *v.* Joslin, 3 Paige (N. Y.) 195.

Testimony after denial of extension.— Where a party has applied for an extension of time which has been refused, testimony thereafter taken on notice, which the other party disregards, forms no part of the record. Emerson Co. *v.* Nimocks, 88 Fed. 280.

77. Osgood *v.* Joslin, 3 Paige (N. Y.) 195; Fitch *v.* Hazeltine, 2 Paige (N. Y.) 416; Sayre *v.* Langton, 7 Wis. 214.

Existing agreement to extend.— An order

the applicant is entitled to the extension on the facts, it is improper to impose conditions.[78]

G. Attendance of Witnesses — 1. Power to Compel. Except as to letters rogatory there is no power to compel the attendance of witnesses or to compel them to depose before an officer or a commissioner appointed by the courts of another state, unless that power is expressly or impliedly conferred;[79] but where such power is expressly conferred on the court, an officer thereof, or the commissioner or officer before whom the deposition is to be taken, the attendance and testimony of the witness may be procured by order, subpœna, summons, or other process,[80] in like manner as the attendance of witnesses may be procured generally

enlarging the time may be obtained, after the time limited in the first order has expired, but before the expiration of the time as enlarged by an agreement. Fitch *v.* Hazeltine, 2 Paige (N. Y.) 416.

Necessary statements.— Where the time has already been extended by an agreement containing a stipulation that the defendant should have fifteen days to produce testimony after the examination of a certain witness on the part of the complainant had closed, the affidavit should state that fact also, so that a similar provision may be inserted in the order. Fitch *v.* Hazeltine, 2 Paige (N. Y.) 416.

78. Where the applicant has not been guilty of laches it is error to enforce as a condition the payment by plaintiff of money which plaintiff had theretofore been ordered to pay to defendant as a condition of opening a default in the action, which payment as a condition of opening the default the court had afterward held to have been waived by defendant. Kiefer *v.* Canada Grand-Trunk R. Co., 18 N. Y. Suppl. 646.

79. Cappeau *v.* Middleton, 1 Harr. & G. (Md.) 154; Kotz *v.* Eilenberger, 9 Pa. Co. Ct. 340.

Clerk of a United States circuit court has no power to require witnesses to appear and give depositions before a notary, except where the depositions are to be taken under a commission. Stevens *v.* Missouri, etc., R. Co., 104 Fed. 934.

Necessity of foreign commission.— A subpœna cannot issue to a witness in a suit pending in a foreign country, where no commission has issued, or other proceedings have been taken to procure his testimony. *In re* Savin, 9 N. Y. Civ. Proc. 175. A statute providing for the issue of a subpœna to a witness in an action pending in another state is inapplicable to a witness in a suit pending in a foreign country. *In re* Savin, 9 N. Y. Civ. Proc. 175.

Cal. Code Civ. Proc. §§ 203, 206, authorizing the court to issue a subpœna to appear and testify before a commissioner appointed by the court of a sister state applies only to proceedings by foreign commission and does not authorize an order of a state court requiring a witness to attend before a notary public appointed to take a deposition to be used in such court. Burns *v.* San Francisco, 140 Cal. 1, 73 Pac. 597.

80. *California.*— Burns *v.* San Francisco, 140 Cal. 1, 73 Pac. 597.

Louisiana.— Bernard *v.* Guidry, 109 La. 451, 33 So. 558.

Maryland.— Maccubbin *v.* Matthews, 2 Bland 250; Winder *v.* Diffenderffer, 2 Bland 166.

Massachusetts.— Com. *v.* Smith, 11 Allen 243.

Missouri.— *Ex p.* Munford, 57 Mo. 603.

New Hampshire.— Burnham *v.* Stevens, 33 N. H. 247.

New Jersey.— *In re* Edison, 68 N. J. L. 494, 53 Atl. 696.

New York.— Matter of Searls, 22 N. Y. App. Div. 140, 48 N. Y. Suppl. 60; Matter of United States Pipe Line Co., 16 N. Y. App. Div. 188, 44 N. Y. Suppl. 713; Matter of Lee, 41 Misc. 642, 88 N. Y. Suppl. 224.

Ohio.— Matter of Nushuler, 4 Ohio Dec. (Reprint) 299, Clev. L. Rep. 249, 3 Cinc. L. Bul. 739; *In re* Sims, 4 Ohio Dec. (Reprint) 473, 2 Clev. L. Rep. 210, 4 Cinc. L. Bul. 457.

Rhode Island.— *In re* Jenckes, 6 R. I. 18.

United States.— Henning *v.* Boyle, 112 Fed. 397; *In re* Rindskopf, 24 Fed. 542, 23 Blatchf. 302; *Ex p.* Humphrey, 12 Fed. Cas. No. 6,867, 2 Blatchf. 228.

England.— Wardel *v.* Dent, Dick. 334, 21 Eng. Reprint 297; Stuart *v.* Balkis Co., 53 L. J. Ch. 791, 50 L. T. Rep. N. S. 479, 32 Wkly. Rep. 676; Pepper *v.* Pepper, 4 L. J. Ch. O. S. 213.

See 16 Cent. Dig. tit. "Depositions," § 125.

A justice who is counsel in the cause may issue a summons returnable before another justice. Cutler *v.* Maker, 41 Me. 594.

Necessity of subpœna.— To compel the attendance of a witness, or a party whom it is sought to examine, he must be duly subpœnaed or served with an appointment eight days previous to the examination. McMurray *v.* Grand Trunk R. Co., 3 Ch. Chamb. (U. C.) 130.

Notice.— A witness is entitled only to such notice as is reasonable. *Re* North Wheal Exmouth Min. Co., 31 Beav. 628, 8 Jur. N. S. 1168, 7 L. T. Rep. N. S. 306, 1 New Rep. 42, 11 Wkly. Rep. 58.

Short notice.— A witness who attends at the appointed time in obedience to notice cannot object to being examined on the ground that the notice was too short. *Re* North Wheal Exmouth Min. Co., 31 Beav. 628, 8 Jur. N. S. 1168, 7 L. T. Rep. N. S. 306, 1 New Rep. 42, 11 Wkly. Rep. 58.

Unauthorized order.— Where the cause is pending within the state, and the witness

on the trial of an action, and if he disobey the same an attachment may issue against him.[81]

2. Application For Order or Subpœna. An application for an order or subpœna to compel the attendance and testimony of a witness before a commissioner appointed in another state need not present formal proof of the commission;[82] nor is the judge required to satisfy himself of its authenticity.[83] It must appear, however, that a cause is actually pending, that notice of the examination has been given,[84] that the commission is to be executed within the state,[85] and that the testimony of the witness is material.[86] If there is no authority to quash subpœnas in a proceeding to take depositions, they cannot be quashed because of the insufficiency of the affidavit.[87]

3. Letters Rogatory. The jurisdiction to require witnesses to attend and testify under letters rogatory rests on comity, or courtesy extended by one judicial tribunal to another;[88] and the court to which the letters are addressed is vested with a discretion to compel or refuse to compel a witness to attend and

has been subpœnaed by a notary to attend before him, an unauthorized order requiring his attendance will add nothing to the legal obligation to obey the subpœna. Burns *v.* San Francisco, 140 Cal. 1, 73 Pac. 597.

Entry of order.— An order directing the issue of a subpœna requiring a witness to appear and testify is not within a rule of court requiring orders to be entered on the minutes within ten days. *In re* Edson, 68 N. J. L. 494, 53 Atl. 696.

Excuse of witness.— A witness is not excused from giving his deposition on the ground that he is a resident of the county in which the action is pending, does not intend to depart, is in good health, and intends to be present at the trial. *In re* Nushuler, 4 Ohio Dec. (Reprint) 299, 1 Clev. L. Rep. 249, 3 Cinc. L. Bul. 739.

Review of order.— An order requiring a person to appear before a commissioner appointed in another state may be reviewed without certiorari. *In re* Edison, 68 N. J. L. 494, 53 Atl. 696.

81. Bowen *v.* Thornton, 9 Wkly. Notes Cas. (Pa.) 575; *Ex p.* Humphrey, 12 Fed. Cas. No. 6,867, 2 Blatchf. 228.

Cross-examination.— Where after examining his witness in chief and the taking of an adjournment the party attempts to withdraw the proceedings, a party in interest may by attachment compel the witness to appear and submit to cross-examination. *In re* Rindskopf, 24 Fed. 542, 23 Blatchf. 302.

Foreign commission — Power of court.— The court from which a subpœna is issued to a witness named in a foreign commission has no inherent power to compel him to attend. Matter of U. S. Pipe-Line, 16 N. Y. App. Div. 188, 44 N. Y. Suppl. 713.

Witness beyond jurisdiction.— A judge of the superior court, before whom depositions are to be taken in a suit in the federal courts, has no jurisdiction to compel by attachment the attendance as a witness of a non-resident of the state, who is beyond its boundaries, and who was served with a subpœna when temporarily within the state. State *v.* Kennan, (Wash. 1903) 74 Pac. 381.

82. *In re* Edison, 68 N. J. L. 494, 53 Atl. 696.

Non-resident commissioner.— It is no objection to a subpœna issued by the supreme court on a commission issued by a foreign court to take testimony within the state for use in an action pending in the foreign court that the commissioner named is a resident of the foreign state. Matter of Canter, 40 Misc. (N. Y.) 126, 81 N. Y. Suppl. 338 [order *reversed* on other grounds in 82 N. Y. App. Div. 103, 81 N. Y. Suppl. 416].

83. Matter of Garvey, 25 Misc. (N. Y.) 353, 54 N. Y. Suppl. 115.

Inquiry into validity of foreign commission.— A court within the jurisdiction where witnesses reside, whose aid is asked by the court out of which the commission issued, will not inquire into the regularity of the issue of the commission before compelling the witness to answer. *In re* Cole, 6 Fed. Cas. No. 2,975, 8 Reporter 1.

84. Henning *v.* Boyle, 112 Fed. 397.

85. Matter of Canter, 82 N. Y. App. Div. 103, 81 N. Y. Suppl. 416 [*reversing* 40 Misc. 126, 81 N. Y. Suppl. 338].

86. **Affidavit by attorney.**— At the request of the commissioner an attorney within the state may make the affidavit of materiality. Matter of Garvey, 33 N. Y. App. Div. 134, 53 N. Y. Suppl. 476, 28 N. Y. Civ. Proc. 14.

A general allegation of materiality is sufficient. Matter of Garvey, 33 N. Y. App. Div. 134, 53 N. Y. Suppl. 476, 28 N. Y. Civ. Proc. 14 [*affirming* 25 Misc. 353, 54 N. Y. Suppl. 115].

Sufficiency.— An affidavit that the action is brought to distribute a fund in which the persons sought to be examined claim an interest, and that plaintiff expects to prove by them that their claim is invalid and that he has no other witness by which he can prove that fact is sufficient. Matter of Heller, 41 N. Y. App. Div. 595, 58 N. Y. Suppl. 695.

The witness cannot question the sufficiency of the proof of materiality. Matter of Garvey, 33 N. Y. App. Div. 134, 53 N. Y. Suppl. 476, 28 N. Y. Civ. Proc. 14.

87. Pfister *v.* Santa Clara County Super. Ct., 64 Cal. 400, 1 Pac. 492.

88. State *v.* Bourne, 21 Oreg. 218, 27 Pac. 1048; *In re* McKenzie, 2 Pars. Eq. Cas. (Pa.) 227, 1 Pa. L. J. Rep. 356, 2 Pa. L. J. 343.

testify.[89] The jurisdiction of the court which issued the letters cannot be questioned by the witness.[90]

H. Production of Books and Papers. A witness may be compelled to produce books and papers which would be material and competent on the trial of the issues,[91] before a commissioner appointed by the court of another state where by statute such production may be compelled.[92] But their production cannot be required where the local tribunal is not empowered to compel the production of documentary evidence on the taking of a deposition.[93] The application must be founded on an affidavit showing the necessity for the production of the evidence and its materiality and must be made on notice.[94]

I. Presence of Party or Counsel. When not prohibited by statute the presence of a party or counsel at the examination is not objectionable; and if he has a right to be present it is error to exclude him.[95] However, the mere fact

89. Doubt *v.* Pittsburgh, etc., R. Co., 6 Pa. Dist. 238, 19 Pa. Co. Ct. 178; *In re* McKenzie, 2 Pars. Eq. Cas. (Pa.) 227, 1 Pa. L. J. Rep. 356, 2 Pa. L. J. 343.

Discretion judicial.— The discretion should not be exercised arbitrarily. *In re* McKenzie, 2 Pars. Eq. Cas. (Pa.) 227, 1 Pa. L. J. Rep. 356, 2 Pa. L. J. 343.

Interrogatories accompanying application. — A statute authorizing the issue of process in aid of letters rogatory does not deprive the court of jurisdiction to refuse the application where it is not accompanied with interrogatories filed in the foreign court and attached to the application. Doubt *v.* Pittsburgh, etc., R. Co., 6 Pa. Dist. 238, 19 Pa. Co. Ct. 178.

Sufficiency of process.— A writ which directs the appearance of the witness is sufficient, although not a subpœna in form. State *v.* Bourne, 21 Oreg. 218, 27 Pac. 1048.

90. State *v.* Bourne, 21 Oreg. 218, 27 Pac. 1048.

91. Eldridge *v.* Chapman, 13 Abb. Pr. (N. Y.) 68 note; *In re* Rauh, 65 Ohio St. 128, 61 N. E. 701 [*affirming* 21 Ohio Cir. Ct. 445, 12 Ohio Cir. Dec. 102, 11 Ohio S. & C. Pl. Dec. 69, 8 Ohio N. P. 142]; Murphy *v.* Morris, 2 Miles (Pa.) 60; Borton *v.* Streeper, 2 Miles (Pa.) 41; U. S. *v.* Tilden, 28 Fed. Cas. No. 16,522, 10 Ben. 566.

A commissioner cannot summarily issue a subpœna duces tecum. The power to compel the production of books and papers is in the court. Trimble *v.* Mulhollen, 8 Pa. Dist. 441, 32 Pa. Co. Ct. 471.

A notary public before whom a deposition is to be taken may issue a subpœna duces tecum to the witness. *In re* Rauh, 65 Ohio St. 128, 61 N. E. 701 [*affirming* 21 Ohio Cir. Ct. 445, 12 Ohio Cir. Dec. 102, 11 Ohio S. & C. Pl. Dec. 69, 8 Ohio N. P. 142].

A justice of the peace authorized to take testimony in an election case cannot require public officers to produce public records in their custody. State *v.* Peers, 33 Minn. 81, 21 N. W. 860.

For what purpose.— A witness cannot be compelled to produce his books and papers merely for the purpose of refreshing his memory. U. S. *v.* Tilden, 28 Fed. Cas. No. 16,522, 10 Ben. 566.

Proof conceded.— A witness whose interest is conceded cannot be compelled to produce a contract or agreement with his co-complainant to show such interest. Bullock Electric Mfg. Co. *v.* Crocker Wheeler Co., 121 Fed. 200.

Sending out of jurisdiction.— Books and documents produced in an action may when a proper case is made out be sent out of the jurisdiction for the purpose of the examination of witnesses before a foreign commission. But documents produced in another action which is *sub judice* will not be taken from the office for such purpose. Clarke *v.* Union F. Ins. Co., 10 Ont. Pr. 413.

Effect of refusal to produce.— The deposition of a nominal plaintiff will be stayed if he refuse to produce papers necessary to enable defendant to cross-examine. Murphy *v.* Morris, 2 Miles (Pa.) 60; Borton *v.* Streeper, 2 Miles (Pa.) 41.

92. **Purpose for which production may be compelled.**— N. Y. Code Civ. Proc. §§ 1914, 1915, authorizing an order for the production of books and papers does not authorize such an order for the purpose of putting them in evidence, but only that they may be used in connection with the testimony of the witness. Matter of Lee, 41 Misc. (N. Y.) 642, 88 N. Y. Suppl. 224.

Privileged communications.— An attorney cannot refuse to produce affidavits in his possession on the ground that they are privileged communications. The question of privilege is for the court. Press Pub. Co. *v.* Lefferts, 67 N. J. L. 172, 50 Atl. 342.

93. *In re* Edison, 68 N. J. L. 494, 53 Atl. 696; Matter of Strauss, 30 N. Y. App. Div. 610, 52 N. Y. Suppl. 392.

94. Trimble *v.* Mulhollen, 8 Pa. Dist. 441, 22 Pa. Co. Ct. 471.

Necessity of showing materiality.— A subpœna should not issue to compel the production of the books of a corporation unless it is shown that they are material on the issues presented and the purpose of producing them is not to use them as evidence but to refresh the memory of the witness. Matter of Lee, 41 Misc. (N. Y.) 642, 85 N. Y. Suppl. 224.

95. *In re* Arrowsmith, 206 Ill. 352, 69 N. E. 77; Evans *v.* Rothschild, 54 Kan. 747, 39 Pac. 701; Blair *v.* State Bank, 11 Humphr. (Tenn.) 84.

Cure of exclusion by permitting cross-examination.— The improper exclusion of the agent of the adverse party is not cured by

that a party was not present when a deposition was taken is no reason for excluding it, if he was duly notified and might have attended,[96] and no prejudice resulted from his absence.[97] On the other hand in some jurisdictions in view of possible prejudice to the opposite party, when he has had no notice of the examination,[98] or by statute, the parties, their attorneys, or agents are not permitted to be present at the taking of a deposition on interrogatories.[99] In others, and in the absence of statute or rule on the subject, the fact that the party or his representative was present will not require the rejection of the deposition, where it does not appear that the witness was prompted or influenced.[1]

J. Adjournments — 1. In General. For good cause the officer before whom a deposition is to be taken may adjourn the examination to another time or place,[2]

his subsequent cross-examination of the witness. Pratt *v.* Battles, 34 Vt. 391.

Execution of foreign commission.— A foreign commissioner is not bound to permit the attendance of parties or counsel. Harper *v.* Young, 17 Phila. (Pa.) 109, where the commissioner refused to allow the agent of the counsel of the adverse party to be present, and the exceptions were dismissed with a suggestion that the parties agree that the witness be recalled for further examination, and a statement that if a proposition to that effect were refused a rule would be granted to show cause why they should not be so examined.

Necessity of application.— An application for leave to appear and cross-examine is unnecessary. McCullough's Estate, 5 Pa. Co. Ct. 87, 20 Wkly. Notes Cas. (Pa.) 471, a claim against a decedent's estate.

Presence of master of vessel.— On the examination of the crew of a vessel libeled for damages caused by a collision, the master of the vessel, although himself a witness, has not only the privilege but it is his duty as the agent of the owners to be present, unless his exclusion becomes necessary, by reason of his contumacy. The Havre, 11 Fed. Cas. No. 6,232, 1 Ben. 295.

Presence of third parties.— An examiner has discretion to permit the presence of a shorthand writer. Wright *v.* Wilkin, 4 Jur. N. S. 804, 6 Wkly. Rep. 643.

The presence of the public is discretionary with the examiner. *In re* Western of Canada Oil, etc., Co., 6 Ch. D. 109, 46 L. J. Ch. 683, 25 Wkly. Rep. 787; Wright *v.* Mekin, 4 Jur. N. S. 804, 6 Wkly. Rep. 643.

Where the adverse party had a statutory right to be present, and on the appearance of his agent at the appointed place the justice had commenced to write out the deposition, and on the appearance of the agent defendant's agents, the justice, and the deponent all withdrew to another room, and completed the direct examination of the deponent, and would not allow the agent to be present, it was held that the deposition was improperly taken. Pratt *v.* Battles, 34 Vt. 391.

96. Waddingham *v.* Gamble, 4 Mo. 465 (where the hour of taking was reasonable and the adverse party did not arrive until after the deposition had been taken); Steele *v.* Nichols, 3 Pa. Dist. 517.

97. Blair *v.* State Bank, 11 Humphr. (Tenn.) 84.

98. Walker *v.* Barron, 4 Minn. 253; Hollister *v.* Hollister, 6 Pa. St. 449; Sayles *v.* Stewart, 5 Wis. 8.

Direction in commission.— A foreign commissioner may be directed not to allow the party or his counsel to appear before him. Cunningham *v.* Otis, 6 Fed. Cas. No. 3,485, 1 Gall. 166.

Evidence of presence.— The presence of a party is not shown by the headings in a deposition indicating that the witness was cross-examined and also examined on the redirect. Carpenter *v.* State, 58 Ark. 233, 24 S. W. 247.

99. Holmes *v.* Dobbins, 19 Ga. 630; Beverly *v.* Burke, 14 Ga. 70; Thomas *v.* Kinsey, 8 Ga. 421; Sheriff *v.* Hull, 37 Iowa 174 [*referring* to Nutter *v.* Ricketts, 6 Iowa 92, decided before the statute].

Evidence of presence.—If the commissioner is not positive whether or not counsel were present the deposition should be suppressed. Feagan *v.* Cureton, 19 Ga. 404.

Party within hearing of witness.— Where the party taking a deposition is within hearing of the witness, with the knowledge of the latter, the interrogatories are not properly executed. Mathis *v.* Colbert, 24 Ga. 384.

Witness a party.— The statute is not applicable where the witness is a party. Cutcher *v.* Jones, 41 Ga. 675.

1. *Iowa.*— Nutter *v.* Ricketts, 6 Iowa 92.

Massachusetts.—Farrow *v.* Commonwealth Ins. Co., 18 Pick. 53, 29 Am. Dec. 564.

Nebraska.— Gandy *v.* State, 24 Nebr. 716, 40 N. W. 302.

New Hampshire.— Marston *v.* Brackett, 9 N. H. 336.

New York.— Union Bank *v.* Torrey, 5 Duer 626; Steer *v.* Steer, Hopk. Ch. 362.

Pennsylvania.—Locwenstien *v.* Biernbaum, 6 Wkly. Notes Cas. 452; Otis *v.* Clark, 2 Miles 272; Kuehling *v.* Liberman, 9 Phila. 160.

Texas.— Houston *v.* McKenzie, (Civ. App. 1897) 41 S. W. 831.

See 16 Cent. Dig. tit. "Depositions," § 128.

2. Pindar *v.* Barlow, 31 Vt. 529; Edgell *v.* Lowell, 4 Vt. 405; Brown *v.* Vermuden, 1 Ch. Cas. 282; *In re* Metropolitan Electric Light, etc., Co., 54 L. J. Ch. 253, 51 L. T. Rep. N. S. 816.

After the first meeting there may be an adjournment to another time or place. Thornbrough *v.* Baker, 1 Ch. Cas. 283.

at the request of either party,[3] or unless in some way restricted he may adjourn it by consent of the parties.[4]

2. From Day to Day. Adjournments may be taken from day to day where the deposition cannot be completed on the day designated,[5] or the commission or notice provided for the taking of a deposition or depositions from day to day until they are completed.[6] The adjournments must be taken in good faith and for a sufficient reason, which should appear,[7] although it has been held that the reason or necessity for the continuance,[8] or that there was a formal adjournment need not be noted.[9] But authority to adjourn from day to day does not authorize an adjournment for a longer time, unless by consent,[10] or where the succeeding day falls on Sunday or a legal holiday.[11]

3. Notice of. Unless where the adverse party has disregarded the notice originally given,[12] notice of the adjournments must be given to the party or parties entitled thereto.[13]

3. Bueb *v.* Dreesen, 104 Ill. App. 409; Kelly *v.* Martin, 53 Kan. 380, 36 Pac. 705; Babb *v.* Aldrich, 45 Kan. 218, 25 Pac. 558; Jarboe *v.* Colvin, 4 Bush (Ky.) 70; Wixom *v.* Stephens, 17 Mich. 518, 97 Am. Dec. 205; Rutledge *v.* Read, 3 N. C. 242.

Neeessity of specifying adjourned day.— The time to which an adjournment is made must be speeified. Bennett *v.* Bennett, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. Rep. 47.

Presumption.— Where the notiee designates a certain time and plaee for the taking, and it appears from the eertifieate that the deposition was taken at another place on a subsequent date, it will be inferred that the taking was adjourned from the plaee and date mentioned in the notice. Lyon *v.* Ely, 24 Conn. 507.

4. Lewin *v.* Dille, 17 Mo. 64; Marshall *v.* Frisbie, 1 Munf. (Va.) 247.

5. Ulmer *v.* Austill, 9 Port. (Ala.) 157; Parker *v.* Hayes, 23 N. J. Eq. 186.

Necessity of commencing on day specified. —Adjournments from day to day are irregular, where the taking of the depositions was not commeneed on the day speeified by the notiee. Fox *v.* Carlisle, 3 Mo. 197.

Waiver of objections.— Objections to adjournments from day to day without any eause assigned is waived by appearance at eaeh adjournment without objeetion. Lingenfelser *v.* Simon, 49 Ind. 82.

Adjourning over next day.—Where the taking of a deposition is unfinished, and the witness eannot attend the next day, if the adverse party will not agree on an adjournment to a future day he may be notified of the taking of another deposition on the next day, and on that day an adjournment may be taken to the following day to complete the examination first commeneed. Jarboe *v.* Corvin, 4 Bush (Ky.) 70.

Where a commissioner of his own motion adjourns over a day on which he might have lawfully taken depositions without the consent of the adverse party, he is without authority to proceed further. Matter of Green, 86 Mo. App. 216.

6. Kelly *v.* Martin, 53 Kan. 380, 36 Pae. 705; Finlay *v.* Humble, 2 A. K. Marsh. (Ky.) 569; Knode *v.* Williamson, 17 Wall. (U. S.) 586, 21 L. ed. 670.

Necessity of provision in notice.— Adjournments from day to day cannot be taken unless so provided in the notiee. Brandon *v.* Mullenix, 11 Heisk. (Tenn.) 446.

Engagement of witness.— Where the deposition of one witness was completed on the day appointed, and the other could not be then examined because of his engagements elsewhere, it was held proper to adjourn until the next day, and to then take his deposition. Andrews *v.* Jones, 10 Ala. 460.

7. Kelly *v.* Martin, 53 Kan. 380, 36 Pae. 705; Kisskadden *v.* Grant, 1 Kan. 328; Bowman *v.* Branson, 111 Mo. 343, 19 S. W. 634; Bracken *v.* March, 4 Mo. 74.

The request of the party giving the notice is sufficient where the adverse party does not appear. Kelly *v.* Martin, 53 Kan. 380, 36 Pae. 705.

8. Glover *v.* Millings, 2 Stew. & P. (Ala.) 28; King *v.* State, 15 Ind. 64.

9. Glover *v.* Millings, 2 Stew. & P. (Ala.) 28.

10. Harding *v.* Merriek, 3 Ala. 60; Raymond *v.* Williams, 21 Ind. 241; Buddicum *v.* Kirk, 3 Cranch (U. S.) 293, 2 L. ed. 444.

11. Leach *v.* Leach, 46 Kan. 724, 27 Pac. 131; Stainbrook *v.* Drawyer, 25 Kan. 383; Helm *v.* Shaekleford, 5 J. J. Marsh. (Ky.) 390.

12. Dorranee *v.* Hutchinson, 22 Me. 357; Lowd *v.* Bowers, 64 N. H. 1, 3 Atl. 431.

13. Hamilton *v.* Menor, 2 Serg. & R. (Pa.) 70; Pindar *v.* Barlow, 31 Vt. 529.

Cognizance of party notified.— Where the original notiee speeifies that the taking of depositions will be begun on a designated day, and will be adjourned from day to day until completed, the party notified is bound to take cognizance of the adjournments. Knode *v.* Williamson, 17 Wall. (U. S.) 586, 21 L. ed. 670.

Sufficiency of notice.— The offieer may give notice verbally (Edgell *v.* Lowell, 4 Vt. 405), or by posting it on the front door of his office (Priee *v.* Caperton, 1 Duv. (Ky.) 207).

Verbal notice.— Where the adverse party attended and waited for some time and, the other party not appearing, the magistrate

K. Contempt[14] — **1. What Constitutes.** The disobedience of a subpœna or direction to appear before the commissioner or officer before whom the deposition is to be taken, or to testify,[15] to answer specific questions,[16] or to produce books and papers[17] may be punished as a contempt. The questions as to which there is a refusal to answer must be relevant[18] and material to the issue,[19] and their propriety must be determined by the officer in the first instance.[20] But a witness is not guilty of contempt where he cannot be rightfully subjected to an examination,[21] as where the object is to ascertain in advance what a party will testify to on the trial,[22] to discover facts to be used against the witness in another case,[23] or where there is no power to compel obedience to the order or direction.[24]

2. Power to Punish. The power to punish the contemner resides in the court which issued the subpœna or mandate,[25] unless that power is delegated to or conferred on the officer whose process or direction is disobeyed, or he has authority

dismissed the proceeding, a subsequent verbal notice by the attorney for such other party that the deposition would be taken at another hour, it was held that the adverse party had the right to disregard the notice. Hennessy *v.* Stewart, 31 Vt. 486.

14. Contempt generally see Contempt, 9 Cyc. 1 *et seq.*

15. *California.*— Burns *v.* San Francisco, 140 Cal. 1, 73 Pac. 597.

Georgia.— Smith *v.* Ferrario, 105 Ga. 51, 31 S. E. 38.

Missouri.— *Ex p.* Munford, 57 Mo. 603.

New York.— *In re* U. S. Pipe Line, 16 N. Y. App. Div. 188, 44 N. Y. Suppl. 713, 4 N. Y. Annot. Cas. 308; *In re* Bushnell, 19 Misc. 307, 44 N. Y. Suppl. 257.

Rhode Island.— *In re* Jenckes, 6 R. I. 18.

Vermont.— *In re* Turner, 71 Vt. 382, 45 Atl. 754.

Canada.— Fowler *v.* Boulton, 12 Grant Ch. (U. C.) 437.

See 16 Cent. Dig. tit. "Depositions," § 132; and 9 Cyc. 17.

Refusal to sign inaccurate deposition.— A witness is not guilty of contempt for refusing to sign a deposition which he claims to be inaccurate, where he is willing to sign it when corrected. *In re* Hafer, 65 Ohio St. 170, 61 N. E. 702.

16. *Indiana.*—Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88.

Kansas.— *In re* Merkle, 40 Kan. 27, 19 Pac. 401.

Missouri.— *Ex p.* Munford, 57 Mo. 603; *Ex p.* McKee, 18 Mo. 599; *Ex p.* Livingston, 12 Mo. App. 80.

Nevada.— Maxwell *v.* Rives, 11 Nev. 213.

New York.— Matter of Whitlock, 51 Hun 351, 3 N. Y. Suppl. 855.

Ohio.— *Ex p.* Miller, 11 Ohio S. & C. Pl. Dec. 69, 8 Ohio N. P. 142 [*affirmed* in 21 Ohio Cir. Ct. 445, 12 Ohio Cir. Dec. 102]; *Ex p.* Woodworth, 6 Ohio S. & C. Pl. Dec. 19, 29 Cinc. L. Bul. 315; Burnside *v.* Dewstoe, 9 Ohio Dec. (Reprint) 589, 15 Cinc. L. Bul. 197.

See 16 Cent. Dig. tit. "Depositions," § 132.

17. Press Pub. Co. *v.* Lefferts, 67 N. J. L. 172, 50 Atl. 342; Matter of Whitlock, 51 Hun (N. Y.) 351, 3 N. Y. Suppl. 855; *In re* Rauh, 65 Ohio St. 128, 61 N. E. 701.

18. *Ex p.* Turner, 11 Ohio S. & C. Pl. Dec. 251, 8 Ohio N. P. 241.

19. Ladenburg *v.* Pennsylvania R. Co., 66 N. J. L. 187, 48 Atl. 533.

20. *In re* Searls, 155 N. Y. 333, 49 N. E. 938 [*reversing* 22 N. Y. App. Div. 140, 48 N. Y. Suppl. 60]; Fobes *v.* Mecker, 3 Edw. (N. Y.) 452; *Ex p.* Woodworth, 6 Ohio S. & C. Pl. Dec. 19, 29 Cinc. L. Bul. 315; *Ex p.* Turner, 11 Ohio S. & C. Pl. Dec. 251, 8 Ohio N. P. 241.

Necessity of prior direction to answer.— The mere failure to answer a question is not a contempt. There must be a lawful order by the officer that the witness answer and a refusal by him to obey it. Burnside *v.* Dewstoe, 9 Ohio Dec. (Reprint) 589, 15 Cinc. L. Bul. 197.

Necessity of stating purpose of question.— To enable the officer to determine the materiality of the question or admissibility of the answer, counsel must state what he expects to prove by the inquiry. *Ex p.* Turner, 11 Ohio S. & C. Pl. Dec. 251, 8 Ohio N. P. 241.

Notary public has no power to determine the relevancy or competency of the question, but should commit the witness and leave the question of relevancy to be determined by the court on habeas corpus proceedings. *Ex p.* Miller, 11 Ohio S. & C. Pl. Dec. 69, 8 Ohio N. P. 142 [*affirmed* in 21 Ohio Cir. Ct. 445, 12 Ohio Cir. Dec. 102].

21. Flower *v.* McGinness, 112 Fed. 377, 50 C. C. A. 291; *Ex p.* Humphrey, 12 Fed. Cas. No. 6,867, 2 Blatchf. 228.

Right to take depositions see *supra*, II.

22. *In re* Pfirman, 1 Ohio S. & C. Pl. Dec. 177.

23. *Ex p.* Krieger, 7 Mo. App. 367.

24. Remington *v.* Peckham, 10 R. I. 550.

Commissioner without judicial authority.— As where the commission issued in another state to a person without judicial authority, and there is no statute on the subject. Martin *v.* People, 77 Ill. App. 311; *In re* Adams, 7 Mich. 452.

25. Crocker *v.* Conrey, (Cal. 1903) 73 Pac. 1006; Burns *v.* San Francisco Super. Ct., 140 Cal. 1, 73 Pac. 597; People *v.* Leubischer, 23 Misc. (N. Y.) 495, 51 N. Y. Suppl. 735. See Matter of Whitlock, 51 Hun (N. Y.) 351, 3 N. Y. Suppl. 855.

by reason of his general powers.[26] But there is no power to punish a witness for disobedience to an unauthorized order or direction.[27]

3. APPLICATION TO PUNISH. The application to punish a contumacious witness may be made *ex parte* unless the court direct notice to be given,[28] and must show the materiality of the questions which the witness refused to answer.[29]

4. PUNISHMENT AND COMMITMENT. If the contempt consists of the refusal to answer several questions all bearing on the same question, there is but one contempt, for which but one sentence can be imposed.[30] The commitment by an officer must show the pertinency and materiality of the questions which the witness refused to answer,[31] and also of what the contempt consisted.[32]

L. Conduct and Scope of Examination — 1. IN GENERAL. On an oral examination if no form is prescribed the testimony should be procured by questions and answers.[33] But in the absence of rules on the subject the mode of conducting the examination will not be deemed material.[34]

26. *Georgia.*— Smith *v.* Ferrario, 105 Ga. 51, 31 S. E. 38.

Missouri.— *Ex p.* Munford, 57 Mo. 603; *Ex p.* McKee, 18 Mo. 599; *Ex p.* Livingston, 12 Mo. App. 80.

New York.— Matter of Bushnell, 19 Misc. 307, 44 N. Y. Suppl. 257; *In re* U. S. Pipe Line, 16 N. Y. App. Div. 188, 44 N. Y. Suppl. 713, 4 N. Y. Annot. Cas. 308. See *In re* Searls, 155 N. Y. 333, 49 N. E. 938 [*reversing* 22 N. Y. App. Div. 140, 48 N. Y. Suppl. 60].

Ohio.— *In re* Rauh, 65 Ohio St. 128, 61 N. E. 701 [*affirming* 21 Ohio Cir. Ct. 445, 12 Ohio Cir. Dec. 102, 11 Ohio S. & C. Pl. Dec. 69, 8 Ohio N. P. 142]; *Ex p.* Woodworth, 6 Ohio S. & C. Pl. Dec. 19, 29 Cinc. L. Bul. 315; Burnside *v.* Dewstoe, 9 Ohio Dec. (Reprint) 589, 15 Cinc. L. Bul. 197.

Rhode Island.— *In re* Jenckes, 6 R. I. 18.

See 16 Cent. Dig. tit. "Depositions," § 132.

The Ohio statutes do not empower a notary public to punish disobedience to a subpœna duces tecum issued by him. *In re* Sims, 4 Ohio Dec. (Reprint) 473, 2 Clev. L. Rep. 210, 4 Cinc. L. Bul. 457.

In Rhode Island a magistrate taking depositions in perpetuam has not by implication the ancillary power to fine or imprison a recusant witness for contempt. Remington *v.* Peckham, 10 R. I. 550.

27. Martin *v.* People, 77 Ill. App. 311. See *In re* Adams, 7 Mich. 452.

Foreign commission.— The court cannot punish for contempt of a commissioner appointed in another state a witness who declines to submit himself to an examination unrestricted in its scope and without any judicial protection, and also refuses to produce the private books of account of a national bank, of which he is merely a clerk, for the experimental scrutiny of one who is either a stranger or an adversary, between whom and the bank there exists no relation. Simpler's Petition, 10 Pa. Dist. 141, 25 Pa. Co. Ct. 81.

In Missouri a notary has no power to commit a witness for his refusal to produce books. *Ex p.* Mallinkrodt, 20 Mo. 493.

28. Fowler *v.* Boulton, 12 Grant Ch. (U. C.) 437.

29. Ladenburg *v.* Pennsylvania R. Co., 66 N. J. L. 187, 48 Atl. 533.

30. Maxwell *v.* Rives, 11 Nev. 213.

31. *Ex p.* Woodworth, 6 Ohio S. & C. Pl. Dec. 19, 29 Cinc. L. Bul. 315; *Ex p.* Turner, 11 Ohio S. & C. Pl. Dec. 251, 8 Ohio N. P. 241.

32. The order should contain a finding by the notary that the witness was guilty of contempt for refusing to obey his order, and for the disobedience of that order the witness was in contempt. *Ex p.* Turner, 11 Ohio S. & C. Pl. Dec. 251, 8 Ohio N. P. 241.

33. Vincent *v.* Huff, 4 Serg. & R. (Pa.) 298; Beck *v.* Bethlehem, 2 Pa. Co. Ct. 511; Melendy *v.* Bradford, 56 Vt. 148.

Depositions may be taken in the third person. Dryden *v.* Frost, 8 Sim. 380, 8 Eng. Ch. 380.

34. Bell *v.* Bell, 14 Phila. (Pa.) 144; Melendy *v.* Bradford, 56 Vt. 148.

Division of duties by commissioners.—The deposition of one witness may be taken by one commissioner, and that of another by the other commissioner. Darling *v.* Darling, 8 Ont. Pr. 391.

Exhaustion of examination-in-chief.—In the oral examination of distant witnesses by commission, courts do not hold a party to the strict rule that a party must exhaust his examination-in-chief before dismissing his witness. Mahan *v.* U. S., 6 Ct. Cl. 331.

Impartiality.—Commissioners for one party must act impartially. Campbell *v.* Scougal, 19 Ves. Jr. 553, 34 Eng. Reprint 621.

Questions by officer.— A referee, when acting as a judicial officer, may put questions in the course of the examination, where no unfairness or intent to favor either party is shown. Brooks *v.* Schultz, 3 Abb. Pr. N. S. (N. Y.) 124. Commissioners may in their discretion decline to examine as to all the interrogatories. Whitelocke *v.* Baker, 13 Ves. Jr. 511, 9 Rev. Rep. 216, 33 Eng. Reprint 385.

Rights of parties.— The adverse party is not entitled to a list of the proposed witnesses (Smith *v.* Pincombe, 18 Jur. 91, 158, 18 L. J. Ch. 211, 16 Sim. 497), nor to have the interrogatories propounded exhibited to him by a complainant in a bill of discovery who has procured a commission to examine foreign

2. Pertinency of Questions and Answers. The witness must answer all proper and relevant questions;[35] but questions which are not pertinent and relevant to the issue should not be permitted.[36] Nor should the examination be extended to matters not germane to the subject of the action,[37] and answers having no bearing upon the issue may be rejected.[38]

3. Responsiveness of Answer. The answers of the witness must be responsive

witnesses (Butler *v.* Bulkeley, 2 Swanst. 373, 36 Eng. Reprint 658).

Special directions.—A commission authorizing additional questions by the commissioners, when it should appear to them to be necessary and proper, confers no authority on the agent of one of the parties to put such questions. Williamson *v.* Page, 1 C. B. 464, 3 D. & L. 14, 14 L. J. C. P. 172, 50 E. C. L. 464.

Summary examination.—A statute empowering the court to order testimony to be taken before such persons, upon such notice, and in such manner as the court in its discretion may direct authorizes the taking of testimony in a summary manner and free from many of the formal rules applying to testimony taken under a commission in the regular way. Belt *v.* Blackburn, 28 Md. 227.

The order of examining witnesses is discretionary and should be directed with a view to convenience. Stuart *v.* Balkis Co., 53 L. J. Ch. 791, 50 L. T. Rep. N. S. 479, 32 Wkly. Rep. 676. See also *Re* Doré Gallery, 62 L. T. Rep. N. S. 758, 38 Wkly. Rep. 491.

Witness may be recalled for further examination. Wood *v.* Searth, 3 Eq. Rep. 485, 24 L. J. Ch. 392, 3 Wkly. Rep. 305.

United States courts.—Congress has not conferred power upon the district and circuit courts of the United States to make rules touching the mode of taking testimony. Randall *v.* Venable, 17 Fed. 162.

35. See cases cited *infra*, this note; and, generally, Witnesses.

Compelling attendance and answer.—Where a defendant refused to answer questions not founded on any case or charge or allegation made in the bill, an application to compel him to attend and answer was refused with costs. Dickson *v.* Covert, 2 Ch. Chamb. (U. C.) 342.

Immaterial evidence.—A motion to suppress a deposition on the ground that the witness whose deposition had been taken had refused to answer cross interrogatories should be denied, where it does not appear that there was any collusion between the witness and the party in whose behalf the deposition was taken, and the questions not answered called for immaterial evidence. Michaelis *v.* Compania Metalurgica, 51 N. Y. App. Div. 470, 64 N. Y. Suppl. 753.

Privilege.—The New Hampshire public statutes providing that no "party" shall be compelled, in giving a deposition, to disclose the names of the witnesses by whom, nor the manner in which, he proposes to prove his case, nor to produce any writing which is material to his case or defense, being expressly limited to "parties," does not excuse the servants in charge of a street railway car, whose duty it was to procure the names of persons present at the time of an accident, and report the same in writing to the corporation, from answering questions relative thereto in the taking of their depositions in an action against the corporation. Bradley's Petition, 71 N. H. 54, 51 Atl. 264.

Questions calling for incriminating answers.—Commissioners may not ask questions, the answers to which may subject the witness to penalties or criminal punishment (Smith *v.* Beadnell, 1 Campb. 30); but the court will not restrain an examination on the ground that its object is to secure evidence as to penalties incurred by the witness for gaming (*Ex p.* Burlton, 1 Glyn & J. 30).

Suppression for refusal to answer.—A deposition may be suppressed if it appears that the witness refused to answer competent and material questions. Michaelis *v.* Compania Metalurgica, 51 N. Y. App. Div. 470, 64 N. Y. Suppl. 753.

The refusal must be deliberate. Michaelis *v.* Compania Metalurgica, 51 N. Y. App. Div. 470, 64 N. Y. Suppl. 753.

Witness objecting to interrogatories must demur and state his objection on oath. His demurrer may be then set down for argument. Parkhurst *v.* Lowten, 3 Madd. 121, 2 Swanst. 194, 19 Rev. Rep. 63, 36 Eng. Reprint 589; Bowman *v.* Rodwell, 1 Madd. 266. See Morgan *v.* Shaw, 4 Madd. 54.

In a foreign action the examination should not be limited to the rules of evidence prevailing in English courts. DeSilla *v.* Fells, 40 L. T. Rep. N. S. 423.

36. Orr, etc., Shoe Co. *v.* Hance, 44 Mo. App. 461; Lyon *v.* Tallmadge, 14 Johns. (N. Y.) 501; *Ex p.* Woodworth, 6 Ohio S. & C. Pl. Dec. 19, 29 Cinc. L. Bul. 315.

Commissioners may reject improper testimony (Whitelocke *v.* Baker, 13 Ves. Jr. 511, 9 Rev. Rep. 216, 33 Eng. Reprint 385. See Surr *v.* Walmsley, L. R. 2 Eq. 439, 14 L. T. Rep. N. S. 621, 14 Wkly. Rep. 888); but not until the time for closing evidence has expired (Wood *v.* Searth, 3 Eq. Rep. 485, 24 L. J. Ch. 392, 3 Wkly. Rep. 305).

Improper interrogatories or interrogatories which may deter a witness from giving evidence should be disallowed. Stocks *v.* Ellis, L. R. 8 Q. B. 454, 42 L. J. Q. B. 241, 29 L. T. Rep. N. S. 267, 22 Wkly. Rep. 17.

37. Orr, etc., Shoe Co. *v.* Hance, 44 Mo. App. 461.

38. Yarborough *v.* Hood, 13 Ala. 176.

Reference to account not produced.—Answers to interrogatories which refer to an alleged account are not pertinent, where no account is attached to the interrogatories or exhibited. Shockley *v.* Morgan, 103 Ga. 156, 29 S. E. 694.

to the interrogatories or questions propounded.[39] But an answer to the last or general interrogatory may state facts material to the issue[40] or not elicited by pre-

39. Marr *v.* Wetzel, 3 Colo. 2; Texas, etc., R. Co. *v.* Crowder, 70 Tex. 222, 7 S. W. 709; Chinn *v.* Taylor, 64 Tex. 385; The Peterhoff, 19 Fed. Cas. No. 11,024, Blatchf. Pr. Cas. 463.

The answers were held to be responsive in the following cases: Stern *v.* Filene, 14 Allen (Mass.) 9 (where to an interrogatory as to whether defendant did not on a certain occasion claim that there was something due him from plaintiff, the witness answered that certain goods were sold to defendant by plaintiff, who refused to deliver the same except on receipt of cash, on the strength of which refusal defendant objected to paying the bill in suit); Hall *v.* Mackay, 78 Tex. 248, 14 S. W. 615 (where in answer to the questions, "What was the personal appearance of the man you served as R. D. Hall? What is the appearance of the defendant?" the witness said: "His personal appearance [referring to the man served] was a man of medium height, dark complexion, and long, dark whiskers"); Waters Pierce Oil Co. *v.* Davis, 24 Tex. Civ. App. 508, 60 S. W. 453 (an action for injuries by the explosion of gasoline in a laundry, where one of the proprietors in her deposition was asked whether there were any regulations in force in regard to handling the gasoline, as to the time of drawing it, quantity and method of drawing it, and if so by whom the regulations were made, and whether they were acted upon or not; and answered that "the work of operating the laundry was in charge of the foreman; they were told to draw as much as possible in the morning"). And see Southern Home Bldg., etc., Assoc. *v.* Riddle, 129 Ala. 562, 29 So. 667, an action to set aside a conveyance, where an answer by the complainant that he sold to the parties defendant to the bill the goods under the firm-name of the partnership, as described in the bill, was held to be responsive to an inquiry in an interrogatory whether the witness was acquainted with the parties to and the subject-matter of the pending suit. In De Walt *v.* Houston, etc., R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534, the witness was asked, "Is it not true that you could not open the throttle of this large engine as quickly as the old locomotive without giving a sudden jerk to the whole train?" and he answered, "Yes, easier without sudden jerk," and it was held that the answer fairly conveyed the information sought, and was not so evasive or irresponsive that the deposition should have been suppressed.

An answer "I cannot remember" is sufficiently specific. Baals *v.* Stewart, 109 Ind. 371, 9 N. E. 403.

Answer to erroneous interrogatory.—Where by mistake an interrogatory was made to read "In whose car" was certain goods sent, instead of "In whose care," an answer stating who ordered the car is not prejudicial, where the fact of a certain person accompanying the car was not controverted. Richmond *v.* Sundburg, 77 Iowa 255, 42 N. W. 184.

"Belief" for "opinion."—Testimony by a subscribing witness to a will as to his "belief" as to the mental capacity of the testator is admissible, where the deposition shows that he used the word as synonymous with "opinion." Hughes *v.* Hughes, 31 Ala. 519.

Hearsay evidence should be suppressed, and a refusal to suppress affords ground for reversal, although legitimate evidence tending to prove the same facts was put into the case. Rooker *v.* Rooker, 83 Ind. 226.

Knowledge of rental value.—A witness, having answered interrogatories so as to show that his knowledge of the rental value of goods detained had been gained from an experience of eight years, replied to cross interrogatories as to specific instances of renting such goods, intended to ascertain the extent of such knowledge, and how obtained, that during the four years he was with a certain concern they never rented such goods. It was held that such reply was evasive, warranting a suppression of the entire deposition. Mobile Electric Lighting Co. *v.* Rust, 131 Ala. 484, 31 So. 486.

Partial answer.—The failure to answer one distinct part of a question will not condemn the answer to the other part. Western Union Tel. Co. *v.* Drake, 14 Tex. Civ. App. 601, 38 S. W. 632.

Personal injuries.—Direct testimony of a physician that he treated plaintiff for injuries is sufficient to sustain answers to cross interrogatories as to the extent of those injuries. Galveston, etc., R. Co. *v.* Baumgarten, 31 Tex. Civ. App. 253, 72 S. W. 78.

Responsive to subsequent interrogatory.—A deposition should not be suppressed because an answer is irresponsive to an interrogatory, where it is responsive to a subsequent interrogatory, in reply to which the witness stated that he had already in his previous answers told all that occurred. Houston, etc., R. Co. *v.* Bell (Tex. Civ. App. 1903) 73 S. W. 56 [*affirmed* in (Tex. Sup. 1903) 75 S. W. 484].

Extent of objection.—An objection for irresponsiveness is not available as to such parts of the answers as are admissible. Heintz *v.* O'Donnell, 17 Tex. Civ. App. 21, 42 S. W. 797. To same effect see Western Union Tel. Co. *v.* Drake, 14 Tex. Civ. App. 601, 38 S. W. 632.

40. Yarborough *v.* Hood, 13 Ala. 176.

Opposite party not put on notice.—An answer to a final general interrogatory may be excluded if it contains material and important testimony of the nature of which the opposite party was not reasonably put upon notice either by the question embraced in that particular interrogatory or by the same when taken in connection with preceding interrogatories. White v. Jones, 105 Ga. 26, 31 S. E. 119.

vious particular interrogatories which have been put to the witness prior to the general interrogatory.[41]

4. Necessity of Full Examination. In chancery the examination should be as exhaustive as the nature of the case requires or will admit.[42] Where a commission is taken out *ex parte*, the party procuring it may put such of the interrogatories as he sees fit;[43] but if the commission is joint all the interrogatories must be propounded.[44] The last or general interrogatory must always be put.[45]

5. Compelling Testimony — a. In General. A witness who refuses to testify or answer specific questions may be compelled to do so, by the court within whose jurisdiction the examination is pending,[46] or the officer before whom the deposition is to be taken;[47] and for the refusal to answer material questions or proper cross interrogatories, the entire deposition may be suppressed.[48] The power to compel the witness to testify in an action pending without the state is not inherent, but exists only when conferred by statute.[49]

41. Percival *v.* Hickey, 18 Johns. (N. Y.) 257, 9 Am. Dec. 210.

42. **Limiting supplemental proof.**— The parties should make their proofs as full before publication as the nature of the case requires or admits, so that supplementary proofs before the master may be as limited as the rights and responsibilities of the parties will admit. Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495.

43. Merrill *v.* Dawson, 17 Fed. Cas. No. 9,469, Hempst. 563.

A deposition cannot be impeached by the party on whose behalf it was taken, by evidence of declarations made by the witness, whose attention was not called to them on his examination. Cooper *v.* Hills Bros. Co., 50 N. Y. App. Div. 304, 63 N. Y. Suppl. 1046.

44. Union Bank *v.* Torrey, 5 Duer (N. Y.) 626; Brown *v.* Kimball, 25 Wend. (N. Y.) 259; Kimball *v.* Davis, 19 Wend. (N. Y.) 437; Hinkley *v.* Insurance Co., 4 Pa. St. 470; Withers *v.* Gillespy, 7 Serg. & R. (Pa.) 10; Dodge *v.* Israel, 7 Fed. Cas. No. 3,952, 4 Wash. 323; Merrill *v.* Dawson, 17 Fed. Cas. No. 9,469, Hempst. 563; Winthrop *v.* Union Ins. Co., 30 Fed. Cas. No. 17,901, 2 Wash. 7.

Interrogatory dependent on answer to prior interrogatory.— Where an interrogatory is to be put if a previous question is answered in a particular way, and that question is not answered in the manner indicated by the terms of the interrogatory, such interrogatory should not be put, or if put the answer thereto should not be admitted. Selden *v.* Bank of Commerce, 3 Minn. 166.

The witness may be examined on all parts of the case, whether direct or in rebuttal. Thurstin *v.* Luce, 61 Mich. 292, 28 N. W. 103.

45. Hinkley *v.* Insurance Co., 4 Pa. St. 470; Merrill *v.* Dawson, 17 Fed. Cas. No. 9,469, Hempst. 563.

46. State *v.* Ingerson, 62 N. H. 437; Matter of Kip, 1 Paige (N. Y.) 601; *In re* Allis, 44 Fed. 216; Gass *v.* Stinson, 10 Fed. Cas. No. 5,262, 3 Sumn. 98; Courtenay *v.* Hoskins, 2 Russ. 253, 3 Eng. Ch. 253, 38 Eng. Reprint 331.

Discretion as to letters rogatory.— It is discretionary with the court to which letters rogatory have issued to compel a witness to testify or not, but like any other judicial discretion it is not to be exercised arbitrarily. McKenzie's Case, 2 Pars. Eq. Cas. (Pa.) 227, 1 Pa. L. J. Rep. 356, 2 Pa. L. J. 343.

Application to compel — By whom made.— In Massachusetts an application to compel a witness to answer interrogatories attached to a commission from another state must be made by the commissioner and not by a party to the action. Chicago First Nat. Bank *v.* Graham, 175 Mass. 179, 55 N. E. 991.

Certifying refusal to answer.— The justice should certify at the foot of the deposition if the witness refuses to answer. Vincent v. Huff, 4 Serg. & R. (Pa.) 298.

47. *Ex p.* Gfeller, (Mo. Sup. 1903) 77 S. W. 552; De Camp *v.* Archibald, 50 Ohio St. 618, 35 N. E. 1056, 40 Am. St. Rep. 692; *In re* Jenekes, 6 R. I. 18.

Dedimus not delivered to officer.— The officer has no power to compel a witness to give his deposition, where the dedimus, although issued, has not been received by him. *In re* Nitsche, 14 Mo. App. 213.

Impertinent or irrelevant questions.— The commissioner cannot lawfully order the witness to answer impertinent or irrelevant questions. *Ex p.* Woodworth, 6 Ohio S. & C. Pl. Dec. 19, 29 Cinc. L. Bul. 315.

Passing on propriety of question in first instance.— On the execution of a foreign commission the pertineney and propriety of the questions should be passed on by the commissioner in the first instance. Matter of Dittman, 65 N. Y. App. Div. 343, 72 N. Y. Suppl. 886.

48. Mobile Electric Lighting Co. *v.* Rust, 131 Ala. 484, 31 So. 486.

Depositions received and opened by agreement.— The whole of a deposition may be suppressed on the ground that a witness has refused to answer a material question; but where no effort is made to compel him to answer, no notice given of an intention to move for suppression because of the refusal, and the depositions are subsequently received and opened by agreement, and two terms intervene before such a motion is made, it is then too late to urge it. Bird *v.* Halsy, 87 Fed. 671.

49. *Ex p.* Rueker, 108 Ala. 245, 19 So. 314; Matter of Dittman, 65 N. Y. App. Div. 343, 72 N. Y. Suppl. 886; Matter of U. S.

b. Excuses. A witness named in letters rogatory is not excused from testifying on the ground that they were improperly issued, where the foreign court has decided otherwise,[50] that the testimony sought is not relevant,[51] that he is not interested in the case, is within the county in which the action is pending, and does not intend to depart, and is in good health, and will be able to attend court as a witness when the case is reached for trial,[52] or by the fact that the parties have agreed to use a deposition made by him in a former suit.[53]

6. Examination Confined to Interrogatories — a. In General. Where the deposition is to be taken on written interrogatories, the examination of the witness must be restricted to them and cannot be general,[54] unless the parties otherwise agree.[55]

b. Adoption of Former Statements or Depositions. The testimony must be elicited by propounding the interrogatories, or by questions and answers,[56] and it is improper to permit the witness to adopt statements contained in books or papers,[57] to adopt answers made by him in other suits,[58] or, although there are decisions to the contrary, to permit him to adopt depositions or answers formerly made.[59]

Pipe Line Co., 16 N. Y. App. Div. 188, 44 N. Y. Suppl. 713; Matter of Bushnell, 19 Misc. (N. Y.) 307, 44 N. Y. Suppl. 257.

In executing a foreign commission the commissioner cannot compel a witness to examine books and papers in the custody of the latter, but not before the commissioner, in order to refresh his recollection. Matter of Dittman, 65 N. Y. App. Div. 343, 72 N. Y. Suppl. 886.

50. McKenzie's Case, 2 Pars. Eq. Cas. (Pa.) 227, 1 Pa. L. J. Rep. 356, 2 Pa. L. J. 343.

51. McKenzie's Case, 2 Pars. Eq. Cas. (Pa.) 227, 1 Pa. L. J. Rep. 356, 2 Pa. L. J. 343.

52. Shaw *v.* Ohio Edison Installation Co., 9 Ohio Dec. (Reprint) 809, 17 Cinc. L. Bul. 274; *Ex p.* Langford, 9 Ohio Dec. (Reprint) 597, 15 Cinc. L. Bul. 267; Matter of Nushuler, 4 Ohio Dec. (Reprint) 299, 1 Clev. L. Rep. 249, 3 Cinc. L. Bul. 739.

53. *Ex p.* Priest, 76 Mo. 229.

54. Stagg *v.* Pomroy, 3 La. Ann. 16; Maryland Ins. Co. *v.* Bossiere, 9 Gill & J. (Md.) 121; Miller *v.* Dowdle, 1 Yeates (Pa.) 404.

Bill to perpetuate.— The complainant is confined to the matters alleged in his bill to perpetuate testimony and to the interrogatories annexed thereto. Hickman *v.* Hickman, 1 Del. Ch. 133.

A prize commissioner is limited to putting the standing interrogatories or those specially framed by the court. The Peterhoff, 19 Fed. Cas. No. 11,024, Blatchf. Pr. Cas. 463. Under special circumstances the master of a vessel who has been examined *in preparatorio* may be reëxamined at the instance of the claimant on one of the standing interrogatories, on condition that he shall at the same time be examined on special interrogatories framed by the court, although all the testimony has been filed and an order for the opening of the proofs has been made. The Peterhoff, 19 Fed. Cas. No. 11,024, Blatchf. Pr. Cas. 463, 19 Fed. Cas. No. 11,022, Blatchf. Pr. Cas. 345.

Inability to execute commission abroad.— Where the local authorities refuse to permit the execution of a commission on interrogatories a deposition taken on questions propounded by a foreign tribunal in the presence of the commissioners may be read. Winthrop *v.* Union Ins. Co., 30 Fed. Cas. No. 17,901, 2 Wash. 7.

55. Stagg *v.* Pomroy, 3 La. Ann. 16.

Joining in commission.— Objection to an examination beyond the matters alleged in a bill to perpetuate testimony and the interrogatories is waived by defendant's joining in the commission and filing cross interrogatories. Hickman *v.* Hickman, 1 Del. Ch. 133.

56. Richardson *v.* Golden, 20 Fed. Cas. No. 11,782, 3 Wash. 109.

57. Bowman *v.* Sanborn, 25 N. H. 87; Richardson *v.* Golden, 20 Fed. Cas. No. 11,782, 3 Wash. 109.

58. Knox *v.* Strader, 1 Ohio Dec. (Reprint) 84, 2 West. L. J. 69.

Correctness of former answers.— The attention of the witness may be called to answers made in another proceeding, and he may be permitted to testify as to their correctness. Bixby *v.* Carskaddon, 63 Iowa 164, 18 N. W. 875.

59. Hull *v.* Alexander, 26 Iowa 569; Stevenson *v.* Myers, 1 Harr. & J. (Md.) 102. *Contra*, Samuel *v.* Hostetter, 118 Fed. 257, 55 C. C. A. 111.

A former deposition may be adopted as testimony in chief, where the witness is cross-examined. Robinson *v.* Hutchinson, 31 Vt. 443.

Copying former deposition.— In Underhill *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 339, the witness in a cross suit copied his deposition given in the original cause, and the court admitted it under the circumstances, notwithstanding its irregularity.

Second examination.— If a witness be examined a second time by the same party to correct a mistake in his answers to the former interrogatories, it is not improper to furnish the witness with a copy of his former answers. Heard *v.* McKee, 26 Ga. 332.

c. Prior Information by Witness. The deposition is not invalidated by the fact that before testifying the witness was furnished with or read the interrogatories and cross interrogatories in advance of his examination, where no attempt was made or influence brought to bear on him to affect his testimony, and the party complaining has not been prejudiced.[60]

d. Preparation in Advance. Although depositions or answers prepared by the witness in advance of the examination and adopted by the officer have been received,[61] the general rule is that such depositions are not admissible.[62]

7. Influence of Party or Counsel — a. In General. A deposition in equity will be suppressed where counsel assumes to pass on the admissibility of testimony, and in obedience to his instruction the witness refuses to answer.[63]

b. Consultation With Counsel. A witness may consult with counsel openly and in the presence of the officers;[64] but not privately so as to procure aid in framing his answers.[65]

c. Suggestion or Preparation of Answers. The suggestion to the witness or the preparation for his use by the party or his counsel of answers to the questions or interrogatories will invalidate the deposition,[66] or at least is highly

60. *Alabama.*— Goodrich *v.* Goodrich, 44 Ala. 670.

Maine.— Amee *v.* Wilson, 22 Me. 116.

New York.— Butler *v.* Flanders, 44 N. Y. Super. Ct. 531, 56 How. Pr. 312.

Wisconsin.— Allen *v.* Seyfried, 43 Wis. 414.

United States.—Warner *v.* Daniels, 29 Fed. Cas. No. 17,181, 1 Woodb. & M. 90; Western Div. R. Co. *v.* Drew, 29 Fed. Cas. No. 17,434, 3 Woods 691.

That the commission was sent to the witness is immaterial where he delivered it to the commissioner. Phelps *v.* Walkey, 84 Iowa 120, 50 N. W. 560.

61. Clement *v.* Hadlock, 13 N. H. 185; Missouri, etc., R. Co. *v.* Denton, 29 Tex. Civ. App. 284, 68 S. W. 336.

Reduction to writing see *infra*, XVII, L, 12.

Mere suspicion.— A deposition will not be rejected merely because some of the answers of the deponent lead to the belief that he had, before he answered certain interrogatories, read previous ones. Sabine *v.* Strong, 6 Metc. (Mass.) 270.

Witness not influenced.— A deposition is not objectionable, although the body of it was drawn up by the witness before his examination, if there is no other reason to suppose undue influence. Clement *v.* Hadlock, 13 N. H. 185.

62. *Alabama.*— Dreyspring *v.* Loeb, 119 Ala. 282, 24 So. 734.

Connecticut.— Daggett *v.* Tallman, 8 Conn. 168.

New Hampshire.— Foster *v.* Foster, 20 N. H. 208; Clement *v.* Hadlock, 13 N. H. 185.

New York.— Underhill *v.* Van Cortlandt, 2 Johns. Ch. 339.

Pennsylvania.— McEntire *v.* Henderson, 1 Pa. St. 402; Carmalt *v.* Post, 8 Watts 406.

Texas.— Greening *v.* Keel, 84 Tex. 326, 19 S. W. 435.

Wisconsin.— Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737.

United States.— U. S. *v.* Smith, 27 Fed. Cas. No. 16,332, Brunn. Col. Cas. 82, 4 Day (Conn.) 121. See Edmondson *v.* Barrell, 8 Fed. Cas. No. 4,284, 2 Cranch C. C. 228; Vasse *v.* Smith, 28 Fed. Cas. No. 16,896, 2 Cranch C. C. 31.

Preparing answers from interrogatories.— A deposition consisting of answers, not made from the witness' own recollection, but made by reading answers prepared beforehand, should be suppressed. Dreyspring *v.* Loeb, 119 Ala. 282, 24 So. 734.

63. Thomson-Houston Electric Co. *v.* Jeffrey Mfg. Co., 83 Fed. 614.

Where a witness upon advice of his counsel refuses to testify, the fact that the same counsel two years before acted as counsel for defendant is insufficient to justify the inference that defendant through counsel is tampering with the witness. Abbott *v.* Pearson, 130 Mass. 191.

64. Stewart *v.* Turner, 3 Edw. (N. Y.) 458.

65. Stewart *v.* Turner, 3 Edw. (N. Y.) 458.

But a private consultation will not vitiate the deposition, but is a circumstance that goes to the credibility of the witness. So held in New Jersey Express Co. *v.* Nichols, 33 N. J. L. 434, 97 Am. Dec. 722; New Jersey Express Co. *v.* Nichols, 32 N. J. L. 166.

66. *Massachusetts.*— Amory *v.* Fellowes, 5 Mass. 219.

New Hampshire.— Clement *v.* Hadlock, 13 N. H. 185.

New York.— *In re* Eldridge, 82 N. Y. 161, 37 Am. Rep. 558; Stewart *v.* Turner, 3 Edw. 458.

Pennsylvania. — Summers *v.* McKim, 12 Serg. & R. 405.

Texas.— Rice *v.* Ward, 93 Tex. 532, 56 S. W. 747 [*reversing* (Civ. App. 1899) 54 S. W. 318]; Avocato *v.* Dell Ara, (Civ. App. 1900) 57 S. W. 296; Phœnix Assur. Co. *v.* Freedman, (Sup. 1892) 19 S. W. 1010. See Greening *v.* Keel, 84 Tex. 326, 19 S. W. 435.

Instructing witness to tell the truth.— A witness is not disqualified because of having received a letter from one of the parties, requesting him to tell the whole truth, without any suggestions as to what the writer con-

objectionable, and will affect the credibility of the witness, and weight of the evidence.[67]

8. Reference to Books or Papers. Written statements as to which the witness is interrogated should be exhibited to him,[68] and to refresh his memory or to enable him to testify accurately he may refer to books, papers, or memoranda not in evidence;[69] but he will not be permitted to make abstracts from books of account of the adverse party and have them verified by the officer,[70] nor can he be examined with respect to papers or instruments not referred to in the notice or interrogatories, or as to which there is no opportunity to cross-examine.[71]

9. Cross-Examination — a. Right to Cross-Examine. Unless he has waived the right, the adverse party is entitled to cross-examine or have his cross interrogatories propounded and answered, and if he is deprived of this right or it is denied him the deposition will be rejected.[72] However, the refusal to answer unimpor-

sidered the truth to be. Warner *v.* Daniels, 29 Fed. Cas. No. 17,181, 1 Woodb. & M. 90.

Posting witness.—That the attorney of the party was with the witness for three or four days and drank with him, and endeavored "to post him up in regard to the case," it not appearing that the witness was influenced thereby, will not exclude the deposition. Nutter *v.* Ricketts, 6 Iowa 92.

67. Commercial Bank *v.* Union Bank, 11 N. Y. 203 [*affirming* 19 Barb. 391]; Pratt *v.* Battles, 34 Vt. 391; Dawson *v.* Poston, 28 Fed. 606; Western Div. R. Co. *v.* Drew, 29 Fed. Cas. No. 17,434, 3 Woods 691. In Moore *v.* Robertson, 17 N. Y. Suppl. 554 [*distinguishing* Graham *v.* Carleton, 9 N. Y. Suppl. 392], it appeared that prior to the examination the witnesses had read the interrogatories and cross interrogatories and talked about them with one another, and with their solicitor and others, and some of them had prepared written answers thereto; but such written answers were not used in taking the depositions, and they testified that their replies were not given by the advice or dictation of any one, and it was held that the depositions were admissible, and that their value was not affected.

Exhibiting document.— Although not contempt, it is highly improper for a solicitor in the cause to exhibit to a witness under examination a document touching which the examination is taking place. Wright *v.* Wilkin, 4 Jur. N. S. 804, 6 Wkly. Rep. 643.

68. Nelson *v.* Chicago, etc., R. Co., 38 Iowa 564.

69. Dreyspring *v.* Loeb, 119 Ala. 282, 24 So. 734; Du Bois City First Nat. Bank *v.* Williamsport First Nat. Bank, 114 Pa. St. 1, 6 Atl. 366.

Books in custodia legis.— A witness may refresh his recollection from books in the custody of a United States court. Southern Bldg., etc., Assoc. *v.* Pennsylvania F. Ins. Co., 23 Pa. Super. Ct. 88.

70. Savage *v.* Birkhead, 20 Pick. (Mass.) 167.

Necessity of introducing books.— If the books may be used at all the adverse party is entitled to the benefit of having the whole contents of them introduced, so far as pertinent to the same subject. Savage *v.* Birckhead, 20 Pick. (Mass.) 167.

71. Smith *v.* Ellison, 6 Colo. App. 207, 40 Pac. 502.

A paper not sent with the commission nor referred to in the interrogatories cannot be read to the witness to refresh his memory. Floyd *v.* Mintsey, 7 Rich. (S. C.) 181.

Note not denied.— A deposition should not be rejected because a note sued on and not denied was shown by the magistrate to the deponent, and annexed by him to his deposition, although not referred to in the interrogatories, and although the adverse party had no notice that it would be shown to the deponent or attached to the deposition. Smith *v.* Castles, 1 Gray (Mass.) 108.

72. *Alabama.*— Payne *v.* Long, 121 Ala. 385, 25 So. 780.

Delaware.— Stille *v.* Layton, 2 Harr. 149.

Missouri.— Dannefelser *v.* Weigel, 27 Mo. 45.

New York.— Hewlett *v.* Wood, 7 Hun 227; Brown *v.* Kimball, 25 Wend. 259; Kimball *v.* Davis, 19 Wend. 437; Bogert *v.* Bogert, 2 Edw. 399.

Pennsylvania.— Bigoney *v.* Stewart, 68 Pa. St. 318; Pringle *v.* Pringle, 59 Pa. St. 281; Stonebreaker *v.* Short, 8 Pa. St. 155.

Texas.— New York, etc., R. Co. *v.* Green, 90 Tex. 257, 38 S. W. 31 [*reversing* (Civ. App. 1896) 36 S. W. 812]; Shelton *v.* Paul, (Civ. App. 1894) 27 S. W. 172.

Utah.— Hadra *v.* State Nat. Bank, 9 Utah 412, 35 Pac. 508; Newton *v.* Brown, 1 Utah 287.

Virginia.— Jeter *v.* Taliaferro, 4 Munf. 80.

United States.— The Jacob Brandow, 33 Fed. 160; Gilpins *v.* Consequa, 10 Fed. Cas. No. 5,452, Pet. C. C. 85, 3 Wash. 184.

England.— Glover *v.* Ellison, 41 L. J. Ch. 288, 26 L. T. Rep. N. S. 234, 20 Wkly. Rep. 408; Anonymous, 6 L. J. Ch. 21; Stanney *v.* Walmsley, 1 Myl. & C. 361, 40 Eng. Reprint 413; Anonymous, 1 Vern. Ch. 253, 23 Eng. Reprint 449; Turner *v.* Burleigh, 17 Ves. Jr. 354, 34 Eng. Reprint 137.

Canada.— Crandell *v.* Moon, 6 Can. L. J. 143; Colville *v.* Johnston, 5 Ont. Pr. 462. See Plews *v.* Mutton, 9 Can. L. J. N. S. 259.

See 16 Cent. Dig. tit. "Depositions," § 142 *et seq.*

Interference by commissioner.— Where the right to cross-examine a witness appears to have met with unreasonable interference on

tant cross interrogatories or interrogatories not pertinent to the issue will not require the rejection or suppression of the deposition.[73] This general rule is subject to the exception, in equity at least, that a deposition is admissible, where the direct interrogatories have been answered, but because of death or inevitable accident and without the fault of either party, cross-examination has been prevented.[74] But if a party might have cross-examined or filed or submitted cross interrogatories but did not, the effect is the same as if there had been a cross-examination.[75] And where he has not filed cross interrogatories he cannot cross-examine orally.[76]

b. Time of. The cross interrogatories may be propounded before[77] or after all the direct interrogatories have been answered;[78] but the witness should not be allowed to read his direct examination before he is cross-examined.[79] If a party omits to cross-examine at the proper time he may be permitted to do so at a subsequent day.[80]

the part of the commissioner, the deposition will be suppressed. Hacker *v.* U. S., 37 Ct. Cl. 86. In People *v.* Restell, 3 Hill (N. Y.) 289, a prisoner was taken to the house of the complaining witness, a prepared affidavit was read to the witness, who was sworn to its truth, and then the prisoner was invited to cross-examine, which she did, but the questions and answers were not taken down, the magistrate stating that the questions had been fully answered in the direct examination, and it was held that the affidavit was not admissible as a deposition taken before a committing magistrate.

Parties interested in a proceeding to award dower should have an opportunity to cross-examine. Ewell *v.* Tye, 76 S. W. 875, 25 Ky. L. Rep. 976.

Withdrawing proceedings to preclude cross-examination.—After a party has examined his witness in chief and an adjournment has been taken he cannot withdraw the proceedings and preclude a cross-examination. *In re* Rindskopf, 24 Fed. 542, 23 Blatchf. 302.

The failure to put the last general cross interrogatory will not vitiate the deposition, if no objection was made. Kimball *v.* Davis, 19 Wend. (N. Y.) 437 [*reversed* in 25 Wend. 259], where the deposition was signed without objection in the presence of the counsel for both parties.

Cross interrogatories under former notice.—The failure to propound cross interrogatories served under a former notice will not require suppression of the deposition. Chadron *v.* Glover, 43 Nebr. 732, 62 N. W. 62.

In equity if the witness secrete himself to avoid cross-examination, the deposition will be suppressed. Flavell *v.* Flavell, 20 N. J. Eq. 211; Flowerday *v.* Collet, Dick. 288, 21 Eng. Reprint 279.

Treating witness as hostile.—Unless so directed by the court an examiner has no right to treat a witness as hostile, and cross-examine or permit him to be cross-examined. Ohlsen *v.* Terrero, L. R. 10 Ch. 127, 44 L. J. Ch. 155, 31 L. T. Rep. N. S. 811, 23 Wkly. Rep. 195; Wright *v.* Wilkin, 4 Jur. N. S. 804, 6 Wkly. Rep. 643.

Cross interrogatories must be filed before the direct examination of the witness is closed. Keogh *v.* Pentland, 2 Hog. 121, 3 Molloy 44; Aylward *v.* Hickson, 2 Hog. 1, 2 Molloy 391. And see Hickson *v.* Aylward, 3 Molloy 37; Sandford *v.* Seymour, 2 Molloy 392.

73. New York, etc., R. Co. *v.* Green, (Tex. Civ. App. 1896) 36 S. W. 812; Cohen *v.* Oliver, 9 Tex. Civ. App. 35, 29 S. W. 81.

Matter covered by answer on direct.—A deposition will not be quashed for the failure to answer cross interrogatories, where the matters inquired about were covered by the answer to the direct interrogatories. Cook *v.* Carroll Land, etc., Co., (Tex. Civ. App. 1897) 39 S. W. 1006.

74. Fuller *v.* Rice, 4 Gray (Mass.) 343; Gass *v.* Stinson, 10 Fed. Cas. No. 5,262, 3 Sumn. 98; Arundel *v.* Arundel, Ch. Rep. 90, 21 Eng. Reprint 516; Nolan *v.* Shannon, 1 Molloy 157; O'Callaghan *v.* Murphy, 2 Sch. & Lef. 158. But see Pringle *v.* Pringle, 59 Pa. St. 281, holding that if a cross-examination is precluded because of the sick or dying condition of the witness his deposition cannot be admitted.

Death of witness during adjournment.—Where the adverse party procured the cross-examination to be postponed and the witness died before the adjourned day, his deposition was admitted. Celluloid Mfg. Co. *v.* Arlington Mfg. Co., 47 Fed. 4.

Sickness of witness.—Where, sickness preventing the cross-examination of a witness *in perpetuam*, on the day to which an adjournment was taken for that purpose, the examination was closed, the deposition was ordered to be taken from the files and returned to the examining judge to proceed with the cross-examination. Hewlett *v.* Wood, 7 Hun (N. Y.) 227.

75. Rider *v.* Smith, 3 Ohio Dec. (Reprint) 347; Gass *v.* Stinson, 10 Fed. Cas. No. 5,262, 3 Sumn. 98; Cazenove *v.* Vaughan, 1 M. & S. 4, 14 Rev. Rep. 377.

76. Shepard *v.* Missouri Pac. R. Co., 85 Mo. 629, 55 Am. Rep. 390; Neeves *v.* Gregory, 86 Wis. 319, 56 N. W. 909.

77. Bell *v.* Bell, 14 Phila. (Pa.) 144.

78. Gilpins *v.* Consequa, 10 Fed. Cas. No. 5,462, Pet. C. C. 85, 3 Wash. 184.

79. Derby *v.* Derby, 21 N. J. Eq. 36.

Credibility affected.—Such an irregularity seriously affects the credibility of the witness, but will not require suppression of the deposition. Derby *v.* Derby, 21 N. J. Eq. 36.

80. Carter *v.* Draper, 2 Sim. 52, 2 Eng. Ch. 52.

c. Further Cross-Examination. Where the circumstances warrant it, a further cross-examination may be permitted on a proper application and showing therefor,[81] although it has been held that after the return of a commission, further cross interrogatories cannot be filed, but the party must file direct interrogatories and give notice.[82]

d. Sufficiency of Answers. It is sufficient if cross interrogatories are answered according to a reasonable understanding of their object and meaning, and the answers are as full and specific as the interrogatory naturally and fairly interpreted requires,[83] or it will be sufficient if the witness answer by referring to answers to the direct interrogatories.[84]

10. Interpreter. The depositions may be taken in a foreign language and translated when introduced in evidence.[85] If the witness does not understand the English language and the commissioner does and also understands the language of the witness, he may interpret and translate;[86] but where the services of an interpreter are necessary one may be appointed or employed, and be duly sworn to interpret and translate the questions and answers.[87]

81. Deuterman *v.* Ruppel, 103 Ill. App. 106; The Normandie, 40 Fed. 590.

Reëxamination on same subject.— Where a witness was called and examined by plaintiff, and cross-examined by defendants, they have no right subsequently to recall, and, under the form of a direct examination, reëxamine him on the identical matter that was previously the subject of their cross interrogatories. Atocha *v.* U. S., 6 Ct. Cl. 95.

82. Ector *v.* Wiggins, 30 Tex. 55.

83. Schaefer *v.* Georgia R. Co., 66 Ga. 39; Bailey *v.* New, 32 Ga. 546; Wilkes *v.* McClung, 32 Ga. 507; Thomas *v.* Kinsey, 8 Ga. 421; Turner *v.* Latorre, 18 La. 74; McMahon *v.* Davidson, 12 Minn. 357.

Several questions in one interrogatory.— When a number of questions are asked in a single cross interrogatory, the court will not scan the answers as closely as if each was a separate interrogatory. If the whole answer taken together is a substantial reply to the whole interrogatory, it will be held to be sufficiently full, although each question is not separately answered. Shorter *v.* Marshall, 49 Ga. 31.

Where the answer clearly implies a full response, although not in express terms, the want of express terms will not oblige the court to exclude the direct examination. Powell *v.* Augusta, etc., R. Co., 77 Ga. 192, 3 S. E. 757.

84. Schaefer *v.* Georgia R. Co., 66 Ga. 39; Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258. *Contra*, Union Bank *v.* Torrey, 5 Duer (N. Y.) 626.

85. Christman *v.* Ray, 42 Ill. App. 111; Union Square Bank *v.* Reichmann, 9 N. Y. App. Div. 596, 41 N. Y. Suppl. 602; Cavasos *v.* Gonzales, 33 Tex. 133.

Translation for purposes of trial see *infra*, XX, B, 4.

Judicial proceedings in English.— A constitutional provision requiring all judicial proceedings to be in English does not prevent the taking of a deposition in a foreign country in the language of that country. Christman *v.* Ray, 42 Ill. App. 111.

In England the depositions must not be taken in a foreign language but must be interpreted into English and so taken down. Belmore *v.* Anderson, 4 Bro. Ch. 90, 29 Eng. Reprint 793, 2 Cox, Ch. 288, 30 Eng. Reprint 134. In Fauquier *v.* Tynte, 7 Ves. Jr. 292, 32 Eng. Reprint 119, the court refused to permit depositions in the French language to be delivered out for translation.

86. Meyer *v.* Rothe, 13 App. Cas. (D. C.) 97; Hartford City F. Ins. Co. *v.* Carrugi, 41 Ga. 660; State *v.* Cardinas, 47 Tex. 250; Munk *v.* Weidner, 9 Tex. Civ. App. 491, 29 S. W. 409; Smith *v.* Kirkpatrick, Dick. 103, 21 Eng. Reprint 207; Loughman *v.* Novals, 6 Price 108.

Presumption.— It will be presumed in the absence of proof to the contrary, that the commissioners understood the language of the witness. Hartford City F. Ins. Co. *v.* Carrugi, 41 Ga. 660. An objection that the commissioner and the witness did not understand the language of each other is untenable, as the commissioner will be presumed to have done his duty. McKinney *v.* O'Connor, 26 Tex. 5.

87. *Massachusetts.*— Amory *v.* Fellowes, 5 Mass. 219.

Michigan.— Campau *v.* Dewey, 9 Mich. 381.

New York.— Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518.

Texas.— Cavasos *v.* Gonzales, 33 Tex. 133; Davis *v.* Migliavaca, 16 Tex. Civ. App. 42, 41 S. W. 91.

England.— Gasson *v.* Wordsworth, Ambl. 108, 27 Eng. Reprint 70, 2 Ves. 325, 336, 23 Eng. Reprint 209, 217; Smith *v.* Kirkpatrick, Dick. 103, 21 Eng. Reprint 207; Atkins *v.* Palmer, 4 B. & Ald. 377, 6 E. C. L. 525.

Canada.— Darling *v.* Darling, 8 Ont. Pr. 391.

See 16 Cent. Dig. tit. "Depositions," § 135.

Attorney for party.— It is irregular to permit the attorney of the party in whose behalf a deposition is being taken to act as interpreter, but it is not a ground for suppression that the attorney so acted, because he could write English with greater facility than the officer who, himself familiar with both languages after comparing the work, which was done in his presence, assured the witness

11. Objections and Exceptions — a. In General. On an oral examination the officer has no authority to determine the competency of the witness, the propriety of questions or the admissibility of evidence, but must take down the questions and answers,[88] and note the objections and exceptions,[89] for subsequent determination by the court.[90] The examination will not be suspended to procure such a determination,[91] unless the objection is by the witness for cause.[92]

b. Leading Questions. The allowance or refusal to allow answers to leading questions is discretionary with the trial court,[93] which will not reject a deposition because the magistrate declined to take the question and objections thereto,[94] and the refusal to strike out a question as leading will not be disturbed where the answer is not prejudicial.[95]

c. Stipulations. The parties may stipulate as to objections, and unless the

that his answers were correctly translated. Schunior *v.* Russell, 83 Tex. 83, 18 S. W. 484.

The interpreter is not an agent or correspondent of the party taking the deposition. Darling *v.* Darling, 8 Ont. Pr. 391.

Proof of employment of interpreter.—When not apparent on the face of the deposition, it may be shown by oral proof that an interpreter was employed and duly sworn. People *v.* Dowdigan, 67 Mich. 95, 38 N. W. 920.

Oath.— When the commissioner acts as interpreter, he need not be sworn in that capacity. Meyer *v.* Rothe, 13 App. Cas. (D. C.) 97.

The answers must be taken down as translated by the sworn interpreter. Euberweg *v.* La Compagnie Generale Transatlantique, 35 Fed. 530.

88. Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561; Carpenter *v.* Dame, 10 Ind. 125; Howell's Estate, 14 Phila. (Pa.) 329. See People *v.* Keith, 50 Cal. 137.

The court will not instruct an examiner as to the rejection of testimony. Howell's Estate, 14 Phila. (Pa.) 329.

Excluding question.— The action of a magistrate in excluding a question on cross-examination cannot be sustained on the ground that if intended to affect the credibility of the witness counsel should have so stated when the objection was made. Nichols *v.* Harris, 18 Fed. Cas. No. 10,243, McArthur Pat. Cas. 302.

Exclusion of improper question.—The erroneous assumption of authority by an officer in excluding a question which sought to elicit immaterial evidence is not prejudicial. People *v.* Keith, 50 Cal. 137.

Refusing re-cross-examination.— A deposition will not be suppressed because on an oral examination the commissioner refused to permit a re-cross-examination as to matter called out on the redirect, which was not new. Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561.

89. *California.*— People *v.* Riley, 75 Cal. 98, 16 Pac. 544. See People *v.* Keith, 50 Cal. 137.

Maryland.— Winder *v.* Diffenderffer, 2 Bland 166.

New York.— Putnam *v.* Ritchie, 6 Paige 390. See Stewart *v.* Turner, 3 Edw. 458.

Pennsylvania.— Beck *v.* Bethlehem, 2 Pa. Co. Ct. 511. See Howell's Estate, 14 Phila. 329.

United States.— Appleton *v.* Ecaubert, 45 Fed. 281.

See 16 Cent. Dig. tit. "Depositions," § 146.

Grounds for overruling question.— The ground on which the question was overruled must be stated. People *v.* Riley, 75 Cal. 98, 16 Pac. 544, where it was held to be sufficient to state that the question was overruled because "immaterial and irrelevant."

90. *Alabama.*— Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561.

Indiana.— Carpenter *v.* Dame, 10 Ind. 125.

Maryland.— Winder *v.* Diffenderffer, 2 Bland 166.

New York.— Stewart *v.* Turner, 3 Edw. 458.

Pennsylvania.— Beck *v.* Bethlehem, 2 Pa. Co. Ct. 511.

United States.— Appleton *v.* Ecaubert, 45 Fed. 281; *In re* Allis, 44 Fed. 216. See Gass *v.* Stinson, 10 Fed. Cas. No. 5,261, 2 Sumn. 605.

See 16 Cent. Dig. tit. "Depositions," § 146.

Taking subject to objection at trial.— Where statutes do not regulate the manner of taking depositions without the state, but relate to the admission of depositions as evidence, they may be taken subject to such objections as to the competency of the evidence when offered, as if they were taken within the state. Horton *v.* Arnold, 18 Wis. 212.

91. Winder *v.* Diffenderffer, 2 Bland (Md.) 166; Appleton *v.* Ecaubert, 45 Fed. 281. But see Matter of Dittman, 65 N. Y. App. Div. 343, 72 N. Y. Suppl. 886.

92. Winder *v.* Diffenderffer, 2 Bland (Md.) 166.

93. Chicago State Bank *v.* Carr, 130 N. C. 479, 41 S. E. 876; Coates *v.* Canaan, 51 Vt. 131.

Leading cross interrogatories.— Where the party taking out the commission declines to have the answers taken, and the adverse party does so, answers to leading cross interrogatories will not be suppressed on objection. International, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1895) 30 S. W. 501.

94. Coates *v.* Canaan, 51 Vt. 131.

95. Chicago State Bank *v.* Carr, 130 N. C. 479, 41 S. E. 876.

terms of the agreement are violated or the testimony is immaterial the deposition should not be rejected.[96]

12. Reduction to Writing — a. What Constitutes. A typewritten deposition substantially complies with a statute requiring it to be reduced to writing;[97] but it has been doubted whether a deposition taken in pencil would be sufficient.[98]

b. Taking in Shorthand. A deposition is not objectionable because the testimony was taken in shorthand, if the notes were thereafter transcribed into longhand and read to the witness before their subscription by him.[99] But testimony taken stenographically in the absence of the officer,[1] and not reduced to writing in the presence of the witness,[2] or read to him after its transcription,[3] does not constitute a valid deposition.

c. Who May Reduce to Writing — (i) *The Officer or His Appointee.* The deposition should be written down by the commissioner or officer,[4] but may be written by a clerk appointed for that purpose[5] or by any other disinterested person selected.[6]

96. Black *v.* Bowman, 9 Ark. 501. So where they stipulate and agree on objections to be reserved all others are waived. A statutory provision which reserves to the parties every objection to the competency or relevancy of any question put to, or answer given by, a witness examined upon commission, is not applicable to a case in which the parties have expressly stipulated and agreed upon the objections which are reserved. Morse *v.* Cloyes, 11 Barb. (N. Y.) 100.

97. Stoddard *v.* Hill, 38 S. C. 385, 17 S. E. 138.

Taking with typewriter.— The fact that a deposition is taken with a typewriter does not show that it was not "reduced to writing," as required by statute. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

98. People *v.* White, 22 Wend. (N. Y.) 167.

99. Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791; Saunders *v.* Kinchler, 8 Ohio Dec. (Reprint) 386, 7 Cinc. L. Bul. 270; Wolfert *v.* Stiebel, 6 Ohio S. & C. Pl. Dec. 388, 4 Ohio N. P. 336; Zehner *v.* Lehigh Coal, etc., Co., 187 Pa. St. 487, 41 Atl. 464, 67 Am. St. Rep. 586. See Clark *v.* Manhattan R. Co., 102 N. Y. 656, 6 N. E. 111.

Oath to stenographer.— The Iowa code requires that the stenographer shall be sworn to take the testimony correctly, and to make correct extension thereof into longhand. Slocum *v.* Brown, 105 Iowa 209, 74 N. W. 936.

1. *Ex p.* Miller, 11 Ohio S. & C. Pl. Dec. 69, 8 Ohio N. P. 142 [*affirmed* in 21 Ohio Cir. Ct. 445, 12 Ohio Cir. Dec. 102].

2. Moller *v.* U. S., 57 Fed. 490, 6 C. C. A. 459.

3. Shepherd *v.* Snodgrass, 47 W. Va. 79, 34 S. E. 879.

4. Union Bank *v.* La Mothe, 6 Rob. (La.) 5; Maes *v.* Gillard, 7 Mart. N. S. (La.) 314; Key *v.* O'Daniel, 10 Mart. (La.) 441; Summers *v.* McKim, 12 Serg. & R. (Pa.) 405; Beck *v.* Bethlehem, 2 Pa. Co. Ct. 511; Edmondson *v.* Barrell, 8 Fed. Cas. No. 4,284, 2 Cranch C. C. 228; Marstin *v.* McRea, 16 Fed. Cas. No. 9,141, Hempst. 688; Rainer *v.* Haynes, 20 Fed. Cas. No. 11,536, Hempst. 689. And see Darling *v.* Darling, 8 Ont. Pr. 391.

Special direction.— In Piddock *v.* Brown, 3 P. Wms. 288, 24 Eng. Reprint 1069, a deposition was ordered to be taken by the master in person where, because defendant was a weak man, it was necessary that he should be examined in this mode lest he should unwarily admit something against himself which was not true.

Under 15 & 16 Vict. c. 86, § 34, examiners must take depositions in their own handwriting. Stobart *v.* Todd, 2 Eq. Rep. 1144, 18 Jur. 618, 23 L. J. Ch. 956, 2 Wkly. Rep. 617. But see Bolton *v.* Bolton, 2 Ch. D. 217, 34 L. T. Rep. N. S. 123, 24 Wkly. Rep. 426; Cooper *v.* Macdonald, 36 L. J. Ch. 304.

Deposition apparently regular.— Where there was nothing to indicate that a deposition taken on oral interrogatories did not contain all of the deponent's testimony, or that it was not written down at the time and in his presence, a motion to quash the deposition on such grounds was properly overruled. Chippewa Valley Bank *v.* Asheville Nat. Bank, 116 N. C. 815, 21 S. E. 688.

Inspection of papers to determine identity of handwriting.— On exception to depositions that it is evident from an inspection of the papers that they were not written by the commissioner, the judge may refuse to hear the opinion of experts, and decide on his own inspection the identity of the handwriting. Bailey *v.* Brooks, 11 Heisk. (Tenn.) 1.

5. Read *v.* Randel, 2 Harr. (Del.) 500; Crossgrove *v.* Himmelrich, 54 Pa. St. 203.

Clerk unnecessary.— It is not necessary that commissioners should appoint a clerk. Beard *v.* Heide, 2 Harr. & J. (Md.) 442.

6. *Iowa.*— Tuthill Spring Co. *v.* Smith, 90 Iowa 331, 57 N. W. 853.

Louisiana.— Union Bank *v.* La Mothe, 6 Rob. 5; Maes *v.* Gillard, 7 Mart. N. S. 314; Key *v.* O'Daniel, 10 Mart. 441.

New Hampshire.— See Cushman *v.* Wooster, 45 N. H. 410.

New York.— McDonald *v.* Garrison, 9 Abb. Pr. 34, 18 How. Pr. 249.

(11) *The Witness.* The witness may write out his answers to the interrogatories or questions.[7]

(111) *The Party, His Attorney or Agent.* Although there are decisions to the contrary,[8] the general rule is that the reduction to writing of the testimony by the party at whose instance it is taken, his attorney or agent, is improper, and will require the rejection of the deposition,[9] unless the other party consent.[10]

Pennsylvania.— Crossgrove *v.* Himmelrich, 54 Pa. St. 203.

Tennessee.—Bedford *v.* Ingram, 5 Hayw. 155.

United States.— Bell *v.* Morrison, 1 Pet. 371, 7 L. ed. 174.

See 16 Cent. Dig. tit. "Depositions," § 151.

Handwriting immaterial.— It is immaterial in whose handwriting the depositions are. Meade *v.* Keene, 3 Pet. (U. S.) 1, 7 L. ed. 581 [*affirming* 16 Fed. Cas. No. 9,373, 3 Cranch C. C. 51].

Where commissioner required to certify as to interest.— A third person cannot reduce the testimony to writing, where the commissioner is required to certify that he is not of kin or counsel to either of the parties, since such a certificate will not include the impossibility that the third person may have occupied one or both relations. East Tennessee, etc., R. Co. *v.* Arnold, 89 Tenn. 107, 14 S. W. 439.

7. *Georgia.*— Shropshire *v.* Stevenson, 17 Ga. 622.

Illinois.— Wood *v.* Shaw, 48 Ill. 273.

Iowa.— Burrows *v.* Goodhue, 1 Greene 48.

Louisiana.—Dwight *v.* Splane, 11 Rob. 487. And see Union Bank *v.* La Moihe, 6 Rob. 5; Maes *v.* Gillard, 7 Mart. N. S. 314; Key *v.* O'Daniel, 10 Mart. 441.

Texas.— Missouri, etc., R. Co. *v.* Denton, (Civ. App. 1902) 68 S. W. 336.

Wisconsin.— Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737; Carlyle *v.* Plumer, 11 Wis. 96.

United States.— Bussard *v.* Catalino, 4 Fed. Cas. No. 2,228, 2 Cranch C. C. 421; Edmondson *v.* Barrell, 8 Fed. Cas. No. 4,284, 2 Cranch C. C. 228; Marstin *v.* McRea, 16 Fed. Cas. No. 9,141, Hempst. 688; Rainer *v.* Haynes, 20 Fed. Cas. No. 11,536, Hempst. 689; Vasse *v.* Smith, 28 Fed. Cas. No. 16,896, 2 Cranch C. C. 226.

See 16 Cent. Dig. tit. "Depositions," § 150.

A witness unable from sickness to answer orally may write out his answers. Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. (Del.) 233.

8. *Alabama.*— Wynn *v.* Williams, Minor 136.

Kentucky.— McGinley *v.* McLaughlin, 2 B. Mon. 302; Ray *v.* Walton, 2 A. K. Marsh. 71.

Maine.— Fuller *v.* Hodgdon, 25 Me. 243.

Mississippi.— Donoho *v.* Petit, Walk. 440.

United States.— Nicholls *v.* White, 18 Fed. Cas. No. 10,235, 1 Cranch C. C. 58.

See 16 Cent. Dig. tit. "Depositions," § 151.

A party who is a witness may write his own answers. Wood *v.* Shaw, 48 Ill. 273.

Reduction by attorney objectionable.—Although it will not exclude the deposition, the practice of counsel writing down the testimony should be rebuked. McGinley *v.* McLoughlin, 2 B. Mon. (Ky.) 302.

Attorney writing own testimony.— The attorney of a party may write down his own testimony. Burrows *v.* Goodhue, 1 Greene (Iowa) 48.

Bill of items written by attorney.— A deposition is not objectionable because the bill of items of plaintiff's account annexed thereto, and sworn to by the deponent, is in the handwriting of plaintiff's attorney. Marvin *v.* Raigan, 12 Cush. (Mass.) 132.

9. *Alabama.*— Steele *v.* Dart, 6 Ala. 798.

Arkansas.— Crittenden *v.* Woodruff, 11 Ark. 82.

Connecticut.— Allen *v.* Rand, 5 Conn. 322; Bunnel *v.* Taintor, 4 Conn. 568; Griswold *v.* Griswold, 1 Root 259; Smith *v.* Huntington, 1 Root 226.

Illinois.— King *v.* Dale, 2 Ill. 513.

Indiana.— Snyder *v.* Snyder, 50 Ind. 492.

Iowa.— Hurst *v.* Larpin, 21 Iowa 484.

Kentucky.— See McGinley *v.* McLaughlin, 2 B. Mon. 302.

Louisiana.— Union Bank *v.* La Mothe, 6 Rob. 5; Maes *v.* Gillard, 7 Mart. N. S. 314; Key *v.* O'Daniel, 10 Mart. 441.

Michigan.— Burtch *v.* Hogge, Harr. 31.

North Carolina.— Mosely *v.* Mosely, 1 N. C. 568.

Pennsylvania.— Wertz *v.* May, 21 Pa. St. 274; Farmers', etc., Bank *v.* Woods, 11 Pa. St. 99; Grayson *v.* Bannon, 8 Watts 524; Swearingen *v.* Pendleton, 3 Penr. & W. 41; Patterson *v.* Patterson, 2 Penr. & W. 200; Addleman *v.* Masterson, 1 Penr. & W. 454.

Vermont.— Burgess *v.* Grafton, 10 Vt. 321. And see Moulton *v.* Hall, 27 Vt. 233.

United States.— U. S. *v.* Pings, 4 Fed. 714.

See 16 Cent. Dig. tit. "Depositions," § 151.

Person acting for party or agent.— A person copying a deposition in the absence of a witness at the suggestion of the party or his agent is the attorney of the party within the statute. Moulton *v.* Hall, 27 Vt. 233.

Partly written by officer.— The part of the testimony which is in the handwriting of the officer may be read. Patterson *v.* Patterson, 2 Penr. & W. (Pa.) 200.

Copying, supplying omissions.— A statute providing that "no agent or attorney . . . shall write or draw up the deposition of any witness" does not extend to a mere copying and filling up words accidentally omitted, or elliptical forms not affecting the meaning. Moulton *v.* Hall, 27 Vt. 233.

Caption written by party.— That the caption of the interrogatories is in the handwriting of the party, the answers having been written by the witness, does not indicate such fraud as will vitiate the deposition. Shropshire *v.* Stevenson, 17 Ga. 622.

10. Steele *v.* Dart, 6 Ala. 798; McGinley *v.* McLaughlin, 2 B. Mon. (Ky.) 302; Wertz *v.* May, 21 Pa. St. 274; Farmers', etc., Bank

But the questions to be propounded may be written by the party or his attorney.[11]

(iv) *Person Interested or Related to Party.* An interested person or a person related to the party taking the testimony should not be permitted to write out the deposition or the answers of the witness.[12]

d. Presence of Commissioner or Officer. Where the testimony is reduced to writing by the witness, a clerk, or an indifferent person, it must be written down in the presence of the commissioner or officer authorized to take the deposition.[13]

e. Erasures and Interlineations. Erasures or interlineations in a deposition, existing when the commission was returned, will be presumed to have been made with the knowledge of the witness, at the time the testimony was taken.[14]

f. Two or More Witnesses. While it is more regular to take separately the depositions of two or more witnesses, it is not improper to permit them to make a single deposition,[15] and one witness may adopt the answers of the other.[16]

g. Irregularities in Form. Irregularities in preparing a deposition, which are in no wise prejudicial and consist of the failure to incorporate the interrogatories,[17] or to put them down in their order,[18] followed by the answers thereto,[19] or in taking the testimony in the third person,[20] or in narrative form,[21] may

v. Woods, 11 Pa. St. 99; Addleman *v.* Masterson, 1 Penr. & W. (Pa.) 454.

11. Murray *v.* Phillips, 59 Ind. 56; Snyder *v.* Snyder, 50 Ind. 492.

12. The deposition cannot be reduced to writing by the brother of the party for whose benefit it is taken. Bryant *v.* Ingraham, 16 Ala. 116.

Person charged with assisting party in fraud.— Evidence is admissible to show that interlineations are in the handwriting of one of the parties from whom plaintiff derived title, and who was charged, by implication at least, with assisting plaintiff in a fraud, to affect plaintiff's credibility. Bunzel *v.* Maas, 116 Ala. 68, 22 So. 568.

13. *Delaware.*— Porter *v.* Beltzhoover, 2 Harr. 484.

New Hampshire.— Foster *v.* Foster, 20 N. H. 208.

New York.— McDonald *v.* Garrison, 9 Abb. Pr. 34, 18 How. Pr. 249.

Ohio.— *Ex p.* Miller, 11 Ohio S. & C. Pl. Dec. 69, 8 Ohio N. P. 142 [*affirmed* in 21 Ohio Cir. Ct. 445, 12 Ohio Cir. Dec. 102].

Pennsylvania.— Grayson *v.* Bannon, 8 Watts 524; Summers *v.* McKim, 12 Serg. & R. 405.

Tennessee.— Bedford *v.* Ingram, 5 Hayw. 155.

United States.— Bell *v.* Morrison, 1 Pet. 351, 7 L. ed. 174; Edmondson *v.* Barrell, 8 Fed. Cas. No. 4,284, 2 Cranch C. C. 228; Marstin *v.* McRea, 16 Fed. Cas. No. 9,141, Hempst. 688; Rainer *v.* Haynes, 20 Fed. Cas. No. 11,536, Hempst. 689; Vasse *v.* Smith, 28 Fed. Cas. No. 16,896, 2 Cranch C. C. 226. But see Bussard *v.* Catalino, 4 Fed. Cas. No. 2,228, 2 Cranch C. C. 421.

See 16 Cent. Dig. tit. "Depositions," § 153.

Contra.— Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737, where the answers were written by the witness in the absence of the commissioner.

Consent to taking by typewriter in absence of examiner.— Where, under equity rule 67, counsel have agreed that the deposition of a witness may be taken down by a typewriter in their presence, at the office of one of them, in the absence of the examiner, but under his constructive direction, if one of the counsel abandons such examination without adequate cause the testimony of the witness will be closed. Ballard *v.* McCluskey, 52 Fed. 677.

Cross-examination as waiver of objection. — If the adverse party cross-examines, and the informality is not objected to, the deposition may be read. Logan *v.* Steele, 3 Bibb (Ky.) 230.

14. Wallace *v.* McElevy, 2 Grant (Pa.) 44.

They will not require the exclusion of the deposition unless there is a reasonable ground to believe that it has been tampered with. Johnston *v.* Beckham, 3 Grant (Pa.) 267; Ballard *v.* Perry, 28 Tex. 347.

Interlineations by interested party.— Evidence is admissible to show that the interlineations were made by a party interested. Bunzel *v.* Maas, 116 Ala. 68, 22 So. 568.

15. May *v.* Norton, 11 La. Ann. 714; Clark *v.* Clark, 14 La. 270.

16. David *v.* David, 66 Ala. 139; Howe *v.* Rogers, 32 Tex. 218.

17. Clark *v.* Benford, 22 Pa. St. 353.

Reference to interrogatories.— It is sufficient if the interrogatories are intelligibly referred to. Hawks *v.* Lands, 8 Ill. 227.

18. Miller *v.* Breedlove, 1 La. 321.

19. Giles *v.* Paxson, 36 Fed. 882, where the interrogatories were numbered and the answers were written down separately with corresponding numbers.

20. Hahn *v.* Bettingen, 81 Minn. 91, 83 N. W. 467, 50 L. R. A. 669; Neill's Estate, 6 Wkly. Notes Cas. (Pa.) 256.

Such an irregularity is waived by the failure to move to suppress within the time limited by statute. Hahn *v.* Bettingen, 81 Minn. 91, 83 N. W. 467.

21. Pralus *v.* Pacific Gold, etc., Min. Co., 35 Cal. 30; Myers *v.* Murphy, 60 Ind. 282; Campau *v.* Dewey, 9 Mich. 381.

be disregarded. But statements required by the statutes or rules should appear.[22]

13. ANNEXING EXHIBITS — a. Necessity. Books, papers, or documents offered in evidence[23] identified or referred to by the witness, should be annexed to the deposition,[24] and accompany it, with proper reference and identification,[25] or where they cannot be annexed because of their bulk they may be sealed up with the deposition;[26]

22. A deposition should state that the witness is not related, allied, or next of kin to any of the parties to the case, or should state the degree of relationship. Lauzon *v.* Stuart, 4 L. C. Jur. 126.

The omission of the usual words "y persiste" at the end of a deposition is not fatal. Carden *v.* Finley, 3 L. C. Jur. 232.

23. Jackson *v.* Shepherd, 6 Cow. (N. Y.) 444; Clarissa *v.* Edwards, 1 Overt. (Tenn.) 393.

A book containing the entry of a cash payment need not be produced, where parol evidence of that fact is admissible. Keene *v.* Meade, 3 Pet. (U. S.) 1, 7 L. ed. 581 [*affirming* 16 Fed. Cas. No. 9,373, 3 Cranch C. C. 51].

Letters annexed to a deposition in answer to interrogatories are not thereby made competent evidence, if otherwise incompetent, and not inspected by the party interrogating. Ashley *v.* Wolcott, 3 Gray (Mass.) 571.

Photograph of instrument.— Introduction of a deposition containing a witness' opinion of the identity of handwriting of an instrument in suit, a photograph of which is annexed to the deposition, is not justified by the facts that the witness is a resident of another state, and that the instrument is on file in a court of the state where the cause is pending. Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315.

Merits not affected by failure to annex.— The failure to annex exhibits may be disregarded, where the failure has had no effect on the merits of the case. Tyrell *v.* Cairo, etc., R. Co., 7 Mo. App. 294.

When not required by statute papers testified to need not accompany the deposition. Stoddard *v.* Hill, 38 S. C. 385, 17 S. E. 138.

24. Crary *v.* Carradine, 4 Ark. 216; Augusta, etc., R. Co., *v.* Randall, 85 Ga. 297, 11 S. E. 706; Renn *v.* Samos, 33 Tex. 760; Giles *v.* Paxson, 36 Fed. 882.

Admissibility immaterial.— The admissibility or inadmissibility of the instrument at the trial is immaterial. Giles *v.* Paxson, 36 Fed. 882.

Proof viva voce.— An exhibit referred to in a deposition, and filed with the bill, may be proved *viva voce* notwithstanding the provision of the statute requiring exhibits to be attached to the depositions, and sealed up, and returned with them. Nicks *v.* Rector, 4 Ark. 251.

The annexation of a memorandum referred to by the witness is not erroneous. Langham *v.* Grigsby, 9 Tex. 493.

The failure to annex papers referred to only vitiates so much of the deposition as refers to them. Myers *v.* Anderson, Wright (Ohio) 513.

25. *Alabama.*—Apfel *v.* Crane, 83 Ala. 312, 3 So. 863; Mobley *v.* Leophart, 51 Ala. 587.

Arkansas.— Atkins *v.* Guice, 21 Ark. 164.

California.— Toby *v.* Oregon Pac. R. Co., 98 Cal. 490, 33 Pac. 550.

Kentucky.— Miller *v.* Miller, 7 Ky. L. Rep. 359.

New Hampshire.— Gardner *v.* Kimball, 58 N. H. 202.

Pennsylvania.— Susquehanna, etc., R., etc., Co. *v.* Quick, 61 Pa. St. 328.

South Carolina.— See Stoddard *v.* Hill, 38 S. C. 385, 17 S. E. 138.

United States.— Bird *v.* Halsy, 87 Fed. 671. See 16 Cent. Dig. tit. "Depositions," § 157.

Exhibits annexed to deposition in another case.— Where a witness testified that certain exhibits had been already attached to his answers in a deposition taken in another case, "and are hereto again referred to, affirmed, and made part of my foregoing answers in this case," the exhibits were properly received in evidence, although the first depositions were taken in a suit between other parties. Pope *v.* Anthony, 29 Tex. Civ. App. 298, 68 S. W. 521.

Imperfect reference.— That an account testified to is described as annexed and marked "A," when it is not so marked in fact, is not a valid objection to the deposition, if no other account is annexed. Marvin *v.* Raigan, 12 Cush. (Mass.) 132.

Identification by commissioner.—No formal certificate of the commissioner is necessary, but it will be sufficient if the indorsements on the exhibits and depositions be made by the same person, and the exhibits are so described and marked by the commissioner that their identity is unmistakably established. Bird *v.* Halsy, 87 Fed. 671.

Return for identification — Right to examine further.— Where exhibits are not identified and attached to a deposition as required by the instructions, and the deposition is returned for that purpose, the right of the adverse party to further examine as to the identity of such exhibits is waived, if no request therefor is made. U. S. *v.* Fifty Boxes, etc., of Lace, 92 Fed. 601.

Writings to be proved by two witnesses may be attached to the deposition of one and suitably referred to and identified in the deposition of the other. Mobley *v.* Leophart, 51 Ala. 587.

26. Shaw *v.* McGregory, 105 Mass. 96.

Annexation after opening.— A deposition will not be suppressed where the commissioner certified "that the annexed deed of conveyance, hereunto attached, marked 'A,' was shown to the witness, and by him examined, and recognized to be the original deed by him signed and delivered," when in fact

and if their identification is clear, for convenience or any other reason, they may be transmitted in a separate package.[27]

b. Originals or Copies. In lieu of the originals copies or transcripts of books or papers testified or referred to may be annexed to or accompany the deposition,[28] especially where the original is in the custody of the law and cannot be procured.[29]

14. Reading to Witness. To constitute a valid deposition the testimony must be read to the witness prior to its subscription by him.[30]

15. Signature of Witness — a. Necessity. The failure of the witness to sign or subscribe his deposition after its reduction to writing requires its rejection.[31] Under some circumstances, however, as where the witness refused to sign,[32] or the witness has been duly sworn, or the commissioner so certifies, the deposition may be admitted although not signed;[33] or the adverse party may waive the signature

the deed was marked "A," was inclosed in the package containing the deposition, and was attached to the interrogatories after the deposition had been opened. Humphries *v.* Dawson, 38 Ala. 199.

27. Bird *v.* Halsy, 87 Fed. 671.

28. *Alabama.*— Talladega First Nat. Bank *v.* Chaffin, 118 Ala. 246, 24 So. 80.

Georgia.— Augusta, etc., R. Co. *v.* Randall, 79 Ga. 304, 4 S. E. 674; Petersburg Sav., etc., Co. *v.* Manhattan F. Ins. Co., 66 Ga. 446.

Indiana.— Gimbel *v.* Hufford, 46 Ind. 125.

Iowa.— Overman *v.* Hibbard, 30 Iowa 115.

Mississippi.— Hauenstein *v.* Gillespie, 73 Miss. 742, 19 So. 673, 55 Am. St. Rep. 569.

New York.— Commercial Bank *v.* Union Bank, 19 Barb. 391.

See 16 Cent. Dig. tit. "Depositions," § 155.

Such extracts as relate to the subject of inquiry will be sufficient. Amherst Bank *v.* Conkey, 4 Metc. (Mass.) 459; Lee *v.* Thorndike, 2 Metc. (Mass.) 313; Howard *v.* Orient Mut. Ins. Co., 9 Bosw. (N. Y.) 645.

29. Iglehart *v.* Jernegan, 16 Ill. 513; Jackson *v.* Shepherd, 6 Cow. (N. Y.) 444.

30. Louisville, etc., R. Co. *v.* Carter, 66 S. W. 508, 23 Ky. L. Rep. 2017; Looker *v.* Looker, 46 Mich. 68, 8 N. W. 723; Martin *v.* U. S., 3 Ct. Cl. 384.

Deposition not read received with caution. —A deposition which was not read to the witness should be received with great caution, and other conflicting evidence properly taken will prevail. Looker *v.* Looker, 46 Mich. 68, 8 N. W. 723.

Presumption.— A deposition signed and sworn to will be presumed to have been read. Darby *v.* Heagerty, 2 Ida. (Hasb.) 282, 13 Pac. 85; People *v.* Moore, 15 Wend. (N. Y.) 419. The signature of the witness and the certificate of the officer that the interrogatories and answers were carefully read authorizes a presumption that the statute was complied with. Cheney *v.* Woodworth, 13 Colo. App. 176, 56 Pac. 979.

Evidence to overcome presumption.—Where neither the justice before whom the deposition was taken nor any one else can swear whether it was read to the witness or not, the evidence is not sufficient to show that he did not understand what he was signing. People *v.* Dowdigan, 67 Mich. 95, 38 N. W. 920.

31. *Alabama.*— Bell *v.* Chambers, 38 Ala. 660.

Illinois.— Eisenmeyer *v.* Sauter, 77 Ill. 515.

Kentucky.— Louisville, etc., R. Co. *v.* Carter, 66 S. W. 508, 23 Ky. L. Rep. 2017.

Louisiana.— Unter *v.* Metropolitan Nat. Bank, 48 La. Ann. 238, 19 So. 158; Lee *v.* Lee, 1 La. Ann. 318.

New Jersey.— Flavell *v.* Flavell, 20 N. J. Eq. 211.

Pennsylvania.— Zehner *v.* Lehigh Coal, etc., Co., 187 Pa. St. 487, 41 Atl. 464, 67 Am. St. Rep. 586.

Vermont.— Winooskie Turnpike Co. *v.* Ridley, 8 Vt. 404, 30 Am. Dec. 476.

West Virginia.— See Shepherd *v.* Snodgrass, 47 W. Va. 79, 34 S. E. 879, holding that regularly the witness should sign.

See 16 Cent. Dig. tit. "Depositions," § 159.

A witness may refuse to sign an inaccurate deposition until it is corrected. *In re* Hafer, 65 Ohio St. 170, 61 N. E. 702.

Removal of cause before deposition signed. — A federal court to which a cause has been removed has no jurisdiction to compel a witness to sign a deposition taken in shorthand in the state court before removal, and written out thereafter. Arnold *v.* Kearney, 29 Fed. 820.

32. Clarke *v.* Sawyer, 3 Sandf. Ch. (N. Y.) 351.

33. *Alabama.*— Wiggins *v.* Pryor, 3 Port. 430.

Kentucky.— Mobley *v.* Hamit, 1 A. K. Marsh. 590; Graham *v.* Hackwith, 1 A. K. Marsh. 423.

North Carolina.— Rutherford *v.* Nelson, 2 N. C. 105.

Pennsylvania.— Moulson *v.* Hargrave, 1 Serg. & R. 201.

Virginia.— Barnett *v.* Watson, 1 Wash. 372.

West Virginia.— Shepherd *v.* Snodgrass, 47 W. Va. 79, 34 S. E. 879.

United States.— Giles *v.* Paxson, 36 Fed. 882.

See 16 Cent. Dig. tit. "Depositions," § 159.

An unsigned deposition should be cautiously received, and subordinated to conflicting evidence properly taken. Looker *v.* Looker, 46 Mich. 68, 8 N. W. 723.

Transcription of shorthand notes.— A statute providing that when depositions are taken in shorthand the writer shall be duly sworn to take the same correctly, and to make correct extension thereof into longhand, and that the notes shall be signed by the witness

expressly and permit the deposition to be taken by a stenographer or typewriter, after the witness has been sworn.[34]

b. Sufficiency. It is sufficient if the witness sign by his initials[35] or affix his mark,[36] or if another signs at his instance or in his behalf,[37] at the end or close of all the interrogatories and answers thereto.[38] But unless so required by statute the witness need not sign in the presence of the officer.[39]

c. Identification of Signature. The signature is sufficiently identified by the certificate of the commissioner or officer,[40] or the mark of the witness may be attested by the magistrate's signature as subscribing witness,[41] or the question of identity may be submitted to the jury.[42]

16. Oath to Witness — a. Necessity. Unless otherwise stipulated[43] the failure to affirm or duly administer a sufficient oath to the witness will invalidate his deposition.[44]

after being read over to him, and be filed with the extension, does not require that the translation of the notes be signed. Slocum *v.* Brown, 105 Iowa 209, 74 N. W. 936.

34. Shoemaker *v.* Smith, 80 Iowa 655, 45 N. W. 744; Steckman *v.* Harber, 55 Mo. App. 71.

Extent of waiver.— A waiver of the signature will not extend to a copy of a deposition intended for use in another action. Louisville, etc., R. Co. *v.* Carter, 66 N. W. 508, 23 Ky. L. Rep. 2017.

35. Payne *v.* June, 92 Ind. 252; Texas, etc., R. Co. *v.* Walker, 25 Tex. Civ. App. 216, 60 S. W. 796.

Identity not questioned.— The deposition will not be suppressed, although the initials of the witness do not correspond with the name of the person to whom the interrogatories were addressed, when there is no question as to the identity of the signer as the witness. Galveston, etc., R. Co. *v.* Morris, (Tex Civ. App. 1901) 60 S. W. 813 [*affirmed* in 94 Tex. 505, 61 S. W. 709].

36. Lee *v.* Lee, 1 La. Ann. 318; Britton *v.* Berry, 20 Nebr. 325, 30 N. W. 254; State *v.* Depoister, 21 Nev. 107, 25 Pac. 1000. See Darling *v.* Darling, 8 Ont. Pr. 391.

37. State *v.* Carlisle, 57 Mo. 102.

Death of witness before signing.—In Maryland the rules in equity authorize the examiner to sign the deposition of a witness who dies before affixing his signature. Scott *v.* McCann, 76 Md. 47, 24 Atl. 536.

38. Lord *v.* Horsey, 5 Harr. (Del.) 317; Westcott *v.* Allston, 1 Del. Ch. 74; Bishop *v.* Ferguson, 46 N. Y. 688.

Deposition must be completed before it can be subscribed. Hewlett *v.* Wood, 7 Hun (N. Y.) 227.

Signing answers to direct interrogatories.— In Missouri, etc., R. Co. *v.* Denton, 29 Tex. Civ. App. 284, 68 S. W. 336, the deposition was received, it appearing that the witness having signed his answers to the direct interrogatories, they were sworn to by him before the officer, and the officer's certificate was attached to the interrogatories, and recited that the answers were signed and sworn to before him.

Signing in the wrong place will not necessarily invalidate the deposition. Moss *v.* Booth, 34 Mo. 316.

Signature at the end of the officer's certificate and above his attestation is sufficient. Read *v.* Patterson, 11 Lea (Tenn.) 430.

Memorandum below signature.— A memorandum, made by the magistrate below the signature of the witness, that the witness had requested him to change a mistake in a date in the redirect examination, but that the opposite counsel objected, forms a part of the redirect. Sabins *v.* Jones, 119 Mass. 167.

Signing separate sheets.— An irregularity consisting of the omission to sign each separate sheet may be disregarded where there is no suggestion that the deposition is not full and complete, or that it was not returned in the same condition in which it was taken. Smith *v.* Groneweg, 40 Minn. 178, 41 N. W. 939.

Signature on loose sheet.— A deposition written out from phonographic notes after its return by the commissioner with a loose sheet bearing the signature of the witness, previously obtained, attached, will be suppressed on the court's own motion. Martin *v.* U. S., 3 Ct. Cl. 384.

39. Harzburg *v.* Southern R. Co., 65 S. C. 539, 44 S. E. 75.

Subscription in absence of counsel.—Where it is agreed by counsel that the stenographer's notes be written out, and subscribed by the witness on a subsequent day, the deposition will not be suppressed because of their absence. Clark *v.* Manhattan R. Co., 102 N. Y. 656, 6 N. E. 111.

40. Sonneborn *v.* Southern R. Co., 65 S. C. 502, 44 S. E. 77; Darling *v.* Darling, 8 Ont. Pr. 391.

Depositions authenticated by the seal of the commissioner will be sufficient, although the witnesses failed to sign them. Hodges *v.* Cobb, L. R. 2 Q. B. 652, 8 B. & S. 583, 36 L. J. Q. B. 265, 16 L. T. Rep. N. S. 792, 15 Wkly. Rep. 1038.

41. State *v.* Depoister, 21 Nev. 107, 25 Pac. 1000, where it was held to be immaterial that the attestation was written below the jurat.

42. Williams *v.* Rawlins, 33 Ga. 117, where the signature appeared to be in the handwriting of the commissioner.

43. Shoemake *v.* Smith, 80 Iowa 655, 45 N. W. 744.

44. Payne *v.* Long, 121 Ala. 385, 25 So. 780; Bond *v.* Ward, Wright (Ohio) 747;

b. Form. If the form of the oath to be administered to the witness is prescribed conformity with the requirements is necessary to the validity of the deposition;[45] and when the deposition is taken by commission, the witness must be sworn according to the law of the forum from which the commission issued.[46] It has been held sufficient, however, to administer the oath according to the law of the state where it is taken.[47]

c. By Whom Administered. It is not necessary that the commissioner or commissioners should themselves administer the oath, but the witness may be sworn in their presence by an officer duly authorized to administer oaths,[48] unless by statute it is required that the witness shall be sworn by the commissioners personally.[49]

d. Time of Administration. A requirement that the witness shall be sworn before he is examined should be observed,[50] although in the discretion of the court the deposition may be admitted, if the oath was administered after the testimony

Jones *v.* Ross, 2 Dall. (Pa.) 143, 1 L. ed. 324; Zehner *v.* Lehigh Coal, etc., Co., 20 Pa. Co. Ct. 29; Smith *v.* Cokefair, 1 Pa. Co. Ct. 48; Luther *v.* The Merritt Hunt, 15 Fed. Cas. No. 8,610, Newb. Adm. 4.

Declaration by witness.— A statute requiring answers to interrogatories to be verified by the affidavit of the party making them that they are true is not satisfied by subjoining thereto by a notary public over his hand and seal the words "subscribed and sworn to before me," etc., there being no declaration by the person making the answers. Averill *v.* Boyles, 52 Iowa 672, 3 N. W. 731.

Date of jurat.— A jurat dated some days later than the date fixed for taking the deposition will not vitiate it. Indiana, etc., R. Co. *v.* Wilson, 77 Ill. App. 603.

Cautioning witness.— A statute requiring the witness to be "carefully examined, cautioned, and sworn" renders it necessary that the witness should be cautioned as well as sworn. Luther *v.* The Merritt Hunt, 15 Fed. Cas. No. 8,610, Newb. Adm. 4. Where a deposition is taken on commission without the state, he need not be cautioned, but it will be sufficient if he is sworn according to law. Crowther *v.* Lloyd, 31 N. J. L. 395.

Swearing appointees to office.— An act prescribing that if any person whose name is inserted in a commission of dedimus potestatem shall not make return of the oaths administered by him to appointees to office, within a prescribed time, he shall forfeit, etc., does not apply to persons not named in the dedimus. Bell *v.* Dole, 11 Johns. (N. Y.) 173.

45. Fabyan *v.* Adams, 15 N. H. 371; Phelps *v.* Panama, 1 Wash. Terr. 615; Wilson Sewing Mach. Co. *v.* Jackson, 30 Fed. Cas. No. 17,853, 1 Hughes 295.

An oath more comprehensive than the statute requires is not objectionable. Ballance *v.* Underhill, 4 Ill. 453.

In Wisconsin the rules require the commissioner to certify "that the witnesses were duly sworn or affirmed before giving their evidence." Bacon *v.* Bacon, 33 Wis. 147.

In the courts of the United States, in taking depositions *de bene esse*, the witness must be sworn to testify the whole truth on the entire subject and not as to each interrogatory. Wilson Sewing Mach. Co. *v.* Jackson, 30 Fed. Cas. No. 17,853, 1 Hughes 295.

46. Com. *v.* Smith, 11 Allen (Mass.) 243; Cross *v.* Barnett, 61 Wis. 650, 21 N. W. 832; Bacon *v.* Bacon, 33 Wis. 147; Jones *v.* Oregon Cent. R. Co., 13 Fed. Cas. No. 7,486, 3 Sawy. 523.

47. Vail *v.* Nickerson, 6 Mass. 262.

Following state statute.—In taking a deposition *de bene esse* for use in the federal courts the requirements of the state statute may be followed. Wilson Sewing Mach. Co. *v.* Jackson, 30 Fed. Cas. No. 17,853, 1 Hughes 295.

48. Glover *v.* Millings, 2 Stew. & P. (Ala.) 28; Ander *v.* Ross, 2 Harr. (Del.) 276; Vaughan *v.* Blanchard, 2 Dall. (Pa.) 192, 1 L. ed. 344. See Lincoln *v.* Battelle, 6 Wend. (N. Y.) 475.

It will be presumed in the absence of anything to the contrary that the oath was administered in the presence of the commissioners (Vaughan *v.* Blanchard, 2 Dall. (Pa.) 192, 1 L. ed. 344) by a duly qualified officer (Glover *v.* Millings, 2 Stew. & P. (Ala.) 28).

49. Perry *v.* Thompson, 16 N. J. L. 72.

Inability to administer oath.— Depositions taken under commission will be received, although the oaths to the witnesses were not administered by the commissioners, if it appears that the commissioners were prohibited by the law from administering them, and the oaths were in fact administered by local authority. Lincoln *v.* Battelle, 6 Wend. (N. Y.) 475.

50. People *v.* Restell, 3 Hill (N. Y.) 289; Putnam *v.* Larimore, Wright (Ohio) 746; Stonebreaker *v.* Short, 8 Pa. St. 155; Armstrong *v.* Burrows, 6 Watts (Pa.) 266; Bacon *v.* Bacon, 33 Wis. 147.

Deposition in shorthand.— Under the Iowa statute the witness need not swear to the translation of his testimony taken in shorthand by a shorthand writer duly sworn. Slocum *v.* Brown, 105 Iowa 209, 74 N. W. 936.

Effect of stipulation.— Where the witness is sworn before testifying as required by statute, his deposition will not be suppressed for non-compliance with a stipulation that he shall be sworn to the deposition after it has been given and transcribed. Knapp *v.* American Hand-Sewed Shoe Co., 63 Kan. 698, 66 Pac. 996.

was taken;[51] and it has been held to be unimportant whether a witness is sworn before or after his deposition is reduced to writing.[52]

XVIII. THE RETURN.

A. In General. All the papers which properly constitute the return must be transmitted or delivered in due form to the court in which the deposition is intended to be used or to its clerk,[53] within the time prescribed;[54] and they must show that the deposition was taken or the commission executed, and the mode or manner of the taking or execution so as to leave nothing to conjecture.[55] But the omission to return immaterial matters may be disregarded,[56] as may unnecessary papers, memoranda, or statements.[57]

B. Form and Requisites — 1. In General.[58] The return should be sufficient

51. Wight *v.* Stiles, 29 Me. 164; Wurzburg *v.* Andrews, 28 Nova Scotia 387.

52. Barron *v.* Pettes, 18 Vt. 385; Tooker *v.* Thompson, 24 Fed. Cas. No. 14,097, 3 McLean 92. See Donovan *v.* Hibbler, (Nebr. 1902) 92 N. W. 637.

53. Edleman *v.* Byers, 75 Ill. 367.

Commission and interrogatories must be returned with the deposition to show that it was taken by the proper person and in a proper manner. Woods *v.* Clark, 24 Pick. (Mass.) 35.

Failure of an examiner to sign a deposition is a mere irregularity (Stephens *v.* Wanklin, 19 Beav. 585), and when he has died before affixing his signature, the deposition may be filed and read (Felthouse *v.* Bailey, 14 Wkly. Rep. 827; Bryson *v.* Warwick, etc., Canal Co., 1 Wkly. Rep. 124).

Return by one of two commissioners.— Where a commission issued to two commissioners for the examination of witnesses, and some evidence was taken before both, one may return the commission, and is not bound to wait an indefinite time for the examination of other witnesses. Burpee *v.* Carvill, 16 N. Brunsw. 141.

Where proper stamps could not be affixed to a deposition taken abroad, they may be supplied after the return. Chitty *v.* East India Co., 2 Cox Ch. 190, 30 Eng. Reprint 87.

54. McGregor *v.* Topham, 2 Hare 516, 24 Eng. Ch. 516; Anonymous, 2 Ld. Ken. 30; Wake *v.* Franklin, 1 Sim. & St. 95, 1 Eng. Ch. 95; Jones *v.* Mitchell, 2 Vern. Ch. 197, 23 Eng. Reprint 728.

Additional time for mailing.— In England where depositions are taken in the country, in addition to the time prescribed, such additional time as may be necessary for mailing is allowed. *Ex p.* Henderson, Coop. 227, 35 Eng. Reprint 540.

A return delayed by accidental circumstances may be received. Townsend *v.* Lowe, Cox Ch. 410, 29 Eng. Reprint 1225.

Extension of time.— The court cannot extend the time prescribed by the commission. Hall *v.* De Tastet, 6 Madd. 269.

55. Bailis *v.* Cochran, 2 Johns. (N. Y.) 417; Scott *v.* Horn, 9 Pa. St. 407.

Deposition taken by commissioner.— It is sufficiently shown that a deposition was taken by a commissioner where it appears from its caption that it was taken before him at his office, and from the jurat that it was sworn to and subscribed before him. Bailey *v.* Wiggins, 1 Houst. (Del.) 299.

Pursuant to commission.— It is sufficient to state that the deposition was taken pursuant to the commission. King *v.* King, 28 Ala. 315.

Several commissioners.— Under a rule providing that should any commissioner appointed to take testimony fail to attend for that purpose after notification the other commissioners may proceed to execute the same, the return to a commission issued to several persons must show that all were present, or were notified of the time and place of executing it. Mair *v.* January, 4 Minn. 239.

What may be considered.— The commission, interrogatories, caption of the answers, and certificate may be looked at together to ascertain if the commissioner performed his duty, and a defect in one part of the return may be supplied by another part. King *v.* King, 28 Ala. 315.

56. The commissioner need not note a request of counsel to be present and a refusal of the request. Harper *v.* Young, 17 Phila. (Pa.) 109.

57. Interrogatories not signed by counsel or filed in the clerk's office or served on the opposite party, returned with a deposition taken *de bene esse* on commission, will be treated as mere memoranda made by or for the commissioner, and may be disregarded. Dill *v.* Camp, 22 Ala. 249.

Extra-official statement.— The certificate of the magistrate that a party made no objection is extra-official. Hall *v.* Houghton, 37 Me. 411.

58. **Form of deposition** see Dwyer *v.* Dunbar, 5 Wall. (U. S.) 318, 18 L. ed. 489.

Form of deposition in perpetuam see Couch *v.* Sutton, 1 Grant (Pa.) 114.

Form of return see Street *v.* Andrews, 115 N. C. 417, 20 S. E. 450; Moore *v.* Willard, 30 S. C. 615, 9 S. E. 273.

Form of separate examination of married woman to prove deed see *Ex p.* Bryant, 1 Ves. & B. 506, 12 Rev. Rep. 213, 35 Eng. Reprint 197.

as to form and should comply with the requirements of rules and statutes in relation thereto.[59]

2. Indorsement of Return on Commission.[60] A statutory requirement that the commissioner shall indorse his return on the commission is substantially complied with by an indorsement on any part of the commission,[61] or where it is securely attached thereto on the deposition,[62] the interrogatories,[63] or on a separate paper attached with the depositions to the commission.[64]

C. Caption — Certificate — 1. In General.[65] Unless a caption is dispensed with by statute[66] or a certificate is waived or its necessity obviated by the act of the parties,[67] there should be a caption to the deposition,[68] which should also be

59. Creamer *v.* Jackson, 4 Abb. Pr. (N. Y.) 413.

A deposition returned mutilated, several pages being missing, cannot be received. Dangerfield *v.* Thruston, 8 Mart. N. S. (La.) 232.

Answers in foreign language.— Where interrogatories annexed to a commission to be executed abroad are in English, a return of the answers in the language of the foreign country, annexed to a translation of the questions into such language, is not objectionable. Kuhtman *v.* Brown, 4 Rich. (S. C.) 479.

Contingencies entitling deposition to be used.— The deposition need not recite the contingencies on which it is to be used. Johnson *v.* Fowler, 4 Bibb (Ky.) 521.

Date — Presumption.—Depositions, although dated a day after the date of the execution of a warrant of resurvey in an ejectment suit, will, if returned with the plats, be considered *prima facie* as having been taken on the survey. Steuart *v.* Mason, 3 Harr. & J. (Md.) 507.

Reference to order for taking.— An objection that a deposition is not expressed to be taken under a rule of court is not tenable when it is attached to a certified copy of the rule of court under which it was taken. Vincent *v.* Huff, 8 Serg. & R. (Pa.) 381.

Setting out questions.— Although properly the deposition should set out the questions, an omission in that respect is immaterial. Read *v.* Patterson, 11 Lea (Tenn.) 430.

That the answers are on a separate sheet attached to interrogatories, but not at the end of each one is immaterial, if the whole is above the signature of the commissioner. Street *v.* Andrews, 115 N. C. 417, 20 S. E. 450.

60. **Form of address** or direction on return see Glover *v.* Millings, 2 Stew. & P. (Ala.) 28; Homer *v.* Martin, 6 Cow. (N. Y.) 156.

Form of indorsement on return see Homer *v.* Martin, 6 Cow. (N. Y.) 156.

61. A rule requiring the commissioner to indorse on the commission the time and place of executing it is not complied with by a certificate as to those facts annexed to the deposition. Beatty *v.* Ambs, 11 Minn. 331, which fails to notice Tyson *v.* Kane, 3 Minn. 287, which is directly to the contrary.

On second leaf.— The return is properly indorsed on the commission, where it appears on the second leaf of the same sheet of that paper. Tyson *v.* Kane, 3 Minn. 287.

The indorsement should be on the back of the commission and not on the envelope inclosing it. Philips *v.* Philips, 4 Jur. 599.

62. In Hall *v.* Barton, 25 Barb. (N. Y.) 274, it was held sufficient to write the return on the deposition which was securely fastened to the commission, in such a manner that the return could not be separated from the evidence.

63. McCleary *v.* Edwards, 27 Barb. (N. Y.) 239.

64. Cook *v.* Bell, 18 Mich. 387; Pendell *v.* Coon, 20 N. Y. 134. But see *contra*, Fleming *v.* Hollenback, 7 Barb. (N. Y.) 271, holding that the statute was not complied with by a return made on a separate paper annexed to the commission. However the later New York cases declined to follow this holding.

65. **Forms of caption** to deposition see Eaton *v.* Peck, 26 Mich. 57; Currier *v.* Boston, etc., R. Co., 31 N. H. 209; Street *v.* Andrews, 115 N. C. 417, 20 S. E. 450; Nye *v.* Spalding, 11 Vt. 501.

Forms of certificate to return see the following cases:

Alabama.— Roberts *v.* Fleming, 31 Ala. 683.

California.— People *v.* Riley, 75 Cal. 98, 16 Pac. 544.

Connecticut.— Lyon *v.* Ely, 24 Conn. 507.

Kansas.— Knapp *v.* American Hand-Sewed Shoe Co., 63 Kan. 698, 66 Pac. 996.

Massachusetts.— Amherst Bank *v.* Root, 2 Metc. 522; Reed *v.* Boardman, 20 Pick. 441.

Michigan.— Eaton *v.* Peck, 26 Mich. 57.

Minnesota.— Tyson *v.* Kane, 3 Minn. 287.

Missouri.— Mo. Rev. St. 1889, p. 2260.

New Hampshire.— Currier *v.* Boston, etc., R. Co., 31 N. H. 209.

South Carolina.— Stoddart *v.* Hill, 38 S. C. 385, 17 S. E. 138; Moore *v.* Willard, 30 S. C. 615, 9 S. E. 273.

Texas.— Neill *v.* Cody, 26 Tex. 286.

Vermont.— Nye *v.* Spalding, 11 Vt. 501.

United States.— Dick *v.* Runnels, 5 How. 7, 12 L. ed. 26; Bell *v.* Morrison, 1 Pet. 351, 7 L. ed. 174.

66. **In Georgia** no caption or preamble to the answers is necessary. Flournoy *v.* Jeffersonville First Nat. Bank, 79 Ga. 810, 2 S. E. 547.

67. Lockhart *v.* Mackie, 2 Nev. 294.

Failure to properly object.— The omission of a certificate is waived by the failure to interpose a proper objection at the trial. Darby *v.* Heagerty, 2 Ida. (Hasb.) 282, 13 Pac. 85.

68. Statutory requirements as to the caption need not be precisely followed. Bates *v.* Maeck, 31 Vt. 456. But see *contra*, Sanders *v.* Howe, 1 D. Chipm. (Vt.) 363.

Incorporation with certificate.— The cap-

authenticated by the certificate of the officer before whom it was taken,[69] conforming to all statutory requirements and rules of court substantially at least.[70]

2. Several Depositions. A separate certificate need not be annexed to each deposition; but a single certificate will suffice for several.[71]

3. Time of Making. The caption or the certificate may be drawn up or executed a reasonable time after the examination.[72]

4. Conclusiveness. The certificate and the caption thereto are *prima facie* evi-

tion may be incorporated with the certificate. Hauxhurst *v.* Hovey, 26 Vt. 544.

Erroneous designation of court.— Where there is no doubt as to the commissioner's authority, an erroneous statement as to the court out of which the commission issued may be disregarded, where other recitals in the caption, and the commission correctly designate the court. Henderson *v.* Cargill, 31 Miss. 367.

Proof of form of caption in sister state.— In Vermont the form of a caption required by the laws of another state may be shown by parol. Danforth *v.* Reynolds, 1 Vt. 259.

69. People *v.* Mitchell, 64 Cal. 85, 27 Pac. 862; Harvey *v.* Osborn, 55 Ind. 535; Davis *v.* State, 9 Tex. App. 363.

The omission of a certificate may be cured by a reference to the report of the master who took the deposition. Smith *v.* Profitt, 82 Va. 832, 1 S. E. 67.

70. *California.*— People *v.* Morine, 54 Cal. 575; Dye *v.* Bailey, 2 Cal. 383.

Illinois.— Greene County *v.* Bledsoe, 12 Ill. 267.

Louisiana.— Connolley's Succession, 6 La. Ann. 479.

Texas.— Houston, etc., R. Co. *v.* Larkin, 64 Tex. 454.

Vermont.— McCrillis *v.* McCrillis, 38 Vt. 135; Hard *v.* Brown, 18 Vt. 87.

United States.—Bussard *v.* Catalino, 4 Fed. Cas. No. 2,228, 2 Cranch C. C. 421; Thorpe *v.* Simmons, 23 Fed. Cas. No. 14,007, 2 Cranch C. C. 195.

See 16 Cent. Dig. tit. "Depositions," § 166.

In Texas the authentication of the testimony on the examination into a criminal charge requires no special form of certificate. Kerry *v.* State, 17 Tex. App. 178, 50 Am. Rep. 122; Gregg *v.* State, (App. 1889) 12 S. W. 732; Clark *v.* State, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817.

Under federal judiciary act.— A magistrate who takes a deposition under the federal judiciary act must certify all the facts necessary to permit the introduction of the deposition as evidence. Jones *v.* Knowles, 13 Fed. Cas. No. 7,474, 1 Cranch C. C. 523. It should plainly appear from the certificate that the requirements of the statute have been complied with, and presumptions will not be indulged to supply defects in the taking. Bell *v.* Morrison, 1 Pet. (U. S.) 351, 7 L. ed. 174.

Appointment of clerk.—A certificate by the commissioners that they administered the oath to a person named "the clerk we are going to employ" sufficiently shows that they appointed a clerk and swore him. Keene *v.* Meade, 3 Pet. (U. S.) 1, 7 L. ed. 581 [*reversing* 16 Fed. Cas. No. 9,373, 3 Cranch C. C. 51].

Deposition on commission.— The requirements of the statute need not be precisely followed where the deposition is taken under a commission. Bates *v.* Maeck, 31 Vt. 456.

Opinion of commissioner.— A certificate otherwise good is not affected by appending thereto the commissioner's opinion as to the sufficiency of the proof. Lee *v.* Burke, 10 La. 534.

Place of certificate.—The certificate is sufficient if it appears at the end of all the interrogatories and answers. Westcott *v.* Allston, 1 Del. Ch. 74.

Revenue stamps.— The absence of revenue stamps from the certificate of a notary will not invalidate the deposition. Magic Packing Co. *v.* Stone-Ordean-Wells Co., 158 Ind. 538, 64 N. E. 11.

Stipulation.—If a deposition is taken in accordance with a stipulation, the failure to certify as required by statute is immaterial. Knight *v.* Emmons, 4 Mich. 554.

The making of two certificates will not invalidate the deposition if the requisites of the statute are complied with. Currier *v.* Boston, etc., R. Co., 31 N. H. 209.

The return may be made part of the certificate by reference thereto. Dean *v.* Millard, 1 R. I. 283.

What law governs.— Depositions taken in other states must be certified according to their laws; but in the absence of proof of what these laws are the certificate will be judged of by the laws of the state where they are to be used. Coopwood *v.* Foster, 12 Sm. & M. (Miss.) 718.

71. *Alabama.*— Gulf City Ins. Co. *v.* Stephens, 51 Ala. 121.

California.— Pralus *v.* Pacific Gold, etc., Min. Co., 35 Cal. 30.

Minnesota.— Day *v.* Raguet, 14 Minn. 273.

Missouri.— Lord *v.* Siegel, 5 Mo. App. 582.

Pennsylvania.— Morss *v.* Palmer, 15 Pa. St. 51.

Vermont.—Pingry *v.* Washburn, 1 Aik. 264, 15 Am. Dec. 676.

See 16 Cent. Dig. tit. "Depositions," § 166.

There may be one caption to a deposition of several witnesses. Howe *v.* Pierson, 12 Gray (Mass.) 26.

72. Lee *v.* Burke, 10 La. 534; Sayre *v.* Sayre, 14 N. J. L. 487.

The omission to date the certificate may be disregarded (Dill *v.* Camp, 22 Ala. 249), where it is shown by another certificate appended (Elgin *v.* Hill, 27 Cal. 372), or by the time that the witness subscribed and swore to the deposition (Tyson *v.* Kane, 3 Minn. 287).

dence of the facts therein stated,[73] and have been held conclusive as to the cause of taking the deposition,[74] or as to the facts required by law to be stated.[75] On the other hand it has been held that they are not conclusive, but may be impeached or controverted,[76] especially where the officer certifies to facts not required to be stated.[77] But a statement as to who reduced the testimony to writing cannot be controverted by a person unacquainted with the handwriting of the officer or the witness;[78] nor can the genuineness of the certificate be determined by a comparison of handwriting.[79]

5. Who May Certify. The return to a commission authorizing a specified number of the commissioners to act must be certified by that number at least.[80] But the certificate cannot be made by a justice who has gone out of office since taking the deposition[81] although it may be by a justice having no authority to take depositions, where the testimony is taken by stipulation.[82] A deputy clerk having authority may certify in his own name,[83] and it is immaterial that the body of the certificate was written by the party procuring the testimony.[84]

6. Identification of Cause — a. In General. The cause in which the deposition was taken should be identified, by correctly settting forth the court in which it is pending, and the names of the parties.[85]

73. *Alabama.*— Ulmer *v.* Austill, 9 Port. 157.

Louisiana.— Bowman *v.* Flowers, 2 Mart. N. S. 267.

Massachusetts.— Littlehall *v.* Dix, 11 Cush. 364; Savage *v.* Birckhead, 20 Pick. 167.

New Hampshire.— Wyman *v.* Perkins, 39 N. H. 218.

New Jersey.— Ludlam *v.* Broderick, 15 N. J. L. 269.

United States.— Fowler *v.* Merrill, 11 How. 375, 13 L. ed. 736 [*affirming* 17 Fed. Cas. No. 9,469, Hempst. 563]; Bell *v.* Morrison, 1 Pet. 351, 7 L. ed. 174; Elliot *v.* Hayman, 8 Fed. Cas. No. 4,388, 2 Cranch C. C. 678; Smith *v.* Williams, 22 Fed. Cas. No. 13,127.

See 16 Cent. Dig. tit. "Depositions," § 168.

Use of deposition in other suit.— The certificate is insufficient to render the statements of the witness made in the deposition admissible in another suit. Ross *v.* Cobb, 9 Yerg. (Tenn.) 463.

74. West Boylston *v.* Sterling, 17 Pick. (Mass.) 126; Wheaton *v.* Love, 29 Fed. Cas. No. 17,485, 1 Cranch C. C. 451.

75. Medcalf *v.* Seccomb, 36 Me. 71.

76. Wilson *v.* Campbell, 33 Ala. 249, 70 Am. Dec. 580; Wyman *v.* Perkins, 39 N. H. 218; Pingrey *v.* Washburn, 1 Aik. (Vt.) 264, 25 Am. Dec. 676.

Authority of officer.— The superior court has power to make a rule that when a deposition is taken and certified by any person purporting to be an officer authorized by the commission to take the deposition, "if it shall be objected that the person so taking and certifying the same was not such officer, the burden of proof shall be on the party so objecting." McKinney *v.* Wilson, 133 Mass. 131.

Distance of witness' residence.— A certificate of the distance which the witness lived from the place of trial is not conclusive. Carter *v.* Beals, 44 N. H. 408.

Testimony on information and belief is insufficient to overcome a certificate of the officer that he was not an attorney of either party or otherwise interested in the case. Wagstaff *v.* Challiss, 31 Kan. 212, 1 Pac. 631.

77. Consent of parties.— As that the deposition was taken by consent of the parties. Clarke *v.* Goode, 6 J. J. Marsh. (Ky.) 637; Johnson *v.* Rankin, 3 Bibb (Ky.) 86; Gillespie *v.* Gillespie, 2 Bibb (Ky.) 89.

78. Daniel *v.* Toney, 2 Metc. (Ky.) 523.

Inspection by court.— The court may inspect the depositions and certificate to ascertain if they were written by the commissioner. Bailly *v.* Brooks, 11 Heisk. (Tenn.) 1.

79. Darnell *v.* Bullock, 7 Heisk. (Tenn.) 365; Elliot *v.* Hayman, 8 Fed. Cas. No. 4,388, 2 Cranch C. C. 678.

80. Marshall *v.* Frisbie, 1 Munf. (Va.) 247.

81. Gaillard *v.* Anceline, 10 Mart. (La.) 479, 13 Am. Dec. 338.

82. Knight *v.* Emmons, 4 Mich. 554.

83. Allen *v.* Hoxey, 37 Tex. 320.

84. Partch *v.* Spooner, 57 Vt. 583.

85. Slaughter *v.* Rivenbark, 35 Tex. 68; Southern Pac. R. Co. *v.* Royal, (Civ. App. 1893) 23 S. W. 316; Plimpton *v.* Somerset, 42 Vt. 35; Haskins *v.* Smith, 17 Vt. 263; Swift *v.* Cobb, 10 Vt. 282; Donahue *v.* Roberts, 19 Fed. 863; Buckingham *v.* Burgess, 4 Fed. Cas. No. 2,088, 3 McLean 368; Centre *v.* Keene, 5 Fed. Cas. No. 2,553, 2 Cranch C. C. 198; Murray *v.* Marsh, 17 Fed. Cas. No. 9,965, Brunn. Col. Cas. 22, 3 N. C. 290; Peyton *v.* Veitch, 19 Fed. Cas. No. 11,057, 2 Cranch C. C. 123; Smith *v.* Coleman, 22 Fed. Cas. No. 13,029, 2 Cranch C. C. 237; Waskern *v.* Diamond, 29 Fed. Cas. No. 17,248, Hempst. 701; Doe *v.* McLaughlin, 10 N. Brunsw. 54.

The depositions should be properly entitled. Pritchard *v.* Foulkes, 4 Jur. 1006, 10 L. J. Ch. 17, 5 Myl. & C. 301, 41 Eng. Reprint 385 [*affirming* 2 Beav. 133]; Campbell *v.* Dickens, 9 L. J. Exch. Eq. 33, 3 Y. & C. Exch. 720; O'Hara *v.* Creagh, 2 Ir. Eq. 419.

Where the venue of an action is changed intermediate the issue of a commission and its execution, the papers should be entitled

b. Sufficiency. The cause is sufficiently identified by indicating the court in which it is pending and naming the parties litigant in the caption or certificate, or by otherwise therein suitably referring to it;[86] but omissions in this particular or imperfect or erroneous statements therein may be disregarded if the cause is sufficiently identified elsewhere in the return.[87] The parties may be designated by the initial letters of their given names,[88] or a middle name or initial thereof may be omitted.[89] So misnomer of the parties will not invalidate the deposition, where the mistake is apparent or is corrected by other parts of the return or is not misleading,[90] and if there is no uncertainty as to the cause in which the deposition was taken its imperfect or incorrect designation is immaterial.[91]

7. Nature or Character of Action. Although sometimes required,[92] it is not generally necessary to state the nature or character of the action.[93]

8. Time and Place of Using. There must be a substantial compliance with a requirement that the caption shall designate the tribunal where the cause is to be

in the court out of which the commission issued. Helm *v.* Shackleford, 5 J. J. Marsh. (Ky.) 390.

86. Knight *v.* Nichols, 34 Me. 208; Henderson *v.* Cargill, 31 Miss. 367.

Actions similarly entitled.— A certificate that the witness was sworn in a pending action, naming the parties thereto, is sufficient to permit it to be read in an action bearing that title, although another action similarly entitled is pending in the same court. Hall *v.* Silloway, 3 Allen (Mass.) 358.

All the parties need not be named (Egbert *v.* Citizens' Ins. Co., 7 Fed. 47, 2 McCrary 386, where the caption named the first plaintiff and defendant, adding to their names the word and abbreviation *et al.*); but the deposition may be read against those named (Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716). Merely naming one plaintiff and one defendant and adding to each the words "and others" is sufficient. Lincoln *v.* Wright, 4 Beav. 166, 10 L. J. Ch. 331.

Dismissal as to parties.— The name of a party who has been dismissed from the suit may be omitted in the title to depositions taken after the dismissal. Prince Albert *v.* Strange, 2 De G. & Sm. 652.

Reference to commission.— A recital that the deposition was taken "in compliance with the annexed commission" is insufficient. Slaughter *v.* Rivenbark, 35 Tex. 68; Southern Pac. R. Co. *v.* Royal, (Tex. Civ. App. 1893) 23 S. W. 316.

Revived action.— A title applicable to the suit as originally brought or as revived is sufficient. Jones *v.* Smith, 6 Jur. 1078, 12 L. J. Ch. 432, 2 Y. & Coll. 42, 21 Eng. Ch. 42. See Brydges *v.* Branfil, 11 L. J. Ch. 12, 12 Sim. 334, 35 Eng. Ch. 283.

87. *Georgia.*— Louisville, etc., R. Co. *v.* Chaffin, 84 Ga. 519, 11 S. E. 891; Mathis *v.* Colbert, 24 Ga. 384; Johnson *v.* Clarke, 22 Ga. 541.

Tennessee.— Dixon *v.* Steele, 5 Hayw. 28.

Texas.— Cook *v.* Carroll Land, etc., Co., (Civ. App. 1897) 39 S. W. 1006.

Wisconsin.— Bowman *v.* Van Kuren, 29 Wis. 209, 9 Am. Rep. 554.

United States.—Merrill *v.* Dawson, 17 Fed. Cas. No. 9,469, Hempst. 563 [*affirmed* in 11 How. 375, 13 L. ed. 736].

See 16 Cent. Dig. tit. "Depositions," § 170.

Attaching deposition to rule for taking.— Attaching a deposition to a certified copy of a rule of court under which it was taken sufficiently identifies the cause in which it was taken. Vincent *v.* Huff, 8 Serg. & R. (Pa.) 381.

A variance between the title of the deposition and that of the cause may be disregarded where the cause in which the depositions were taken is clearly identified. Harford *v.* Rees, 9 Hare (App.) lxviii, lxx, 41 Eng. Ch. lxviii, lxx.

88. Grimes *v.* Martin, 10 Iowa 347; Adams *v.* Flanagan, 36 Vt. 400; Walbridge *v.* Kibbee, 20 Vt. 543.

89. Allen *v.* Taylor, 26 Vt. 599; Hopkinson *v.* Watson, 17 Vt. 91.

90. *Texas.*— Anderson *v.* Jackson, (Sup. 1889) 13 S. W. 30.

Vermont.— Mann *v.* Birchard, 40 Vt. 326, 94 Am. Dec. 398; Hayward Rubber Co. *v.* Duncklee, 30 Vt. 29.

Virginia.— Bartley *v.* McKinney, 28 Gratt. 750.

West Virginia.— Hunter *v.* Robinson, 5 W. Va. 272.

United States.— Van Ness *v.* Heineke, 28 Fed. Cas. No. 16,866, 2 Cranch C. C. 259; Voce *v.* Lawrence, 28 Fed. Cas. No. 16,979, 4 McLean 203.

See 16 Cent. Dig. tit. "Depositions," § 171.

Where the party objecting appeared and cross-examined, the deposition will not be suppressed, although entitled with the names of the parties reversed. Rockford, etc., R. Co. *v.* Coppinger, 66 Ill. 510.

91. Buckingham *v.* Burgess, 4 Fed. Cas. No. 2,088, 3 McLean 368; Van Ness *v.* Heineke, 29 Fed. Cas. No. 16,866, 2 Cranch C. C. 259.

92. Unlawful detainer.—The description of a proceeding for an unlawful detainer as a proceeding for forcible entry and detainer will not vitiate the deposition. Cales *v.* Miller, 8 Gratt. (Va.) 6.

93. Cotten *v.* Rutledge, 33 Ala. 110; Scott *v.* Perkins, 28 Me. 22, 48 Am. Dec. 470; Dupy *v.* Wickwire, 1 D. Chipm. (Vt.) 237, 1 Am. Dec. 729.

tried, or to which the deposition is returnable,[94] or the time and place of the trial or session of the court.[95]

9. Cause or Reason For Taking. If so required by statute or otherwise the reason or cause of taking the testimony must be certified.[96] If not so required a

94. Plimpton *v.* Somerset, 42 Vt. 35; Pike *v.* Blake, 8 Vt. 400; Sanders *v.* Howe, 1 D. Chipm. (Vt.) 363.

Clerical error.— Although there is a clerical error in the name of the court to which a deposition is returnable, it may in the discretion of the court be admitted. State *v.* Kimball, 50 Me. 409.

Location of court.— A caption naming the city and county in which the court in which the deposition is to be used is situated, but naming no state, is sufficient if it describes plaintiff as a resident of the same city and county and names the state. Spaulding *v.* Robbins, 42 Vt. 90.

Presumption.— Where a deposition taken within any county in the state is by its caption returnable before the court at a time and place appointed by law within such county, it will not be presumed that such deposition is or may be returnable before the court in any other county and state. Kidder *v.* Blaisdell, 45 Me. 461.

95. Plimpton *v.* Somerset, 42 Vt. 35; Pike *v.* Blake, 8 Vt. 400. See McCrillis *v.* McCrillis, 38 Vt. 135.

Adjourned term.— A statement that the deposition is to be used at a court to be held on a day specified which is the first day of an adjourned term is sufficient. Martin *v.* Farnham, 25 N. H. 195.

Deposition taken pending trial.— Such a statement is unnecessary where the deposition is taken pending the trial in pursuance of a stipulation. Bates *v.* Maeck, 31 Vt. 456.

Court "next to be holden," etc.— A statement that the deposition is to be used at a court "next to be holden," etc., sufficiently designates the time and place of trial. Churchill *v.* Briggs, 24 Vt. 498; Clark *v.* Brown, 15 Vt. 658.

Term of court intervening.— It is no objection to a deposition that a term of the court intervenes between the time of taking and the term of court at which it is stated in the caption it is taken to be used. Gallup *v.* Spencer, 19 Vt. 327, where the caption of a deposition stated that it was taken to be used at the term "next to be holden on the first Tuesday of May next," and the last word "next" was rejected as surplusage and the deposition received.

Where the disposition is to be used in the county court it is sufficient to designate the county in which it is to be used and the time of holding the session. Chandler *v.* Spear, 22 Vt. 388.

96. *California.*—People *v.* Mitchell, 64 Cal. 85, 27 Pac. 862.

Connecticut.— Reading *v.* Weston, 7 Conn. 143, 18 Am. Dec. 89.

Massachusetts.— Littlehale *v.* Dix, 11 Cush. 364.

New Jersey.— Chase *v.* Garretson, (Sup. 1891) 22 Atl. 787 [*affirmed* in 54 N. J. L. 42, 23 Atl. 353].

South Carolina.— Bulwinkle *v.* Cramer, 30 S. C. 153, 8 S. E. 689; Featherston *v.* Dagnell, 29 S. C. 45, 6 S. E. 897.

United States.— Woodward *v.* Hall, 30 Fed. Cas. No. 18,005, 2 Cranch C. C. 235.

See 16 Cent. Dig. tit. "Depositions," § 173.

Conclusiveness of the certificate as to the cause of taking see *supra*, XVIII, C, 4.

Sufficiency.— Statements in the caption that the witness resides beyond the jurisdiction of the court (McCrillis *v.* McCrillis, 38 Vt. 135), that he appears to reside more than one hundred miles from the place of taking (Banks *v.* Miller, 2 Fed. Cas. No. 963, 1 Cranch C. C. 543), that he resides at a place which is known in fact to be more than that distance (Egbert *v.* Citizens' Ins. Co., 7 Fed. 47, 2 McCrary 386), or a statement of the residence in the body of the deposition, although omitted in the certificate (Houghton *v.* Slack, 10 Vt. 520) sufficiently show that the cause of taking is non-residence within the jurisdiction, or a residence which authorizes the deposition to be taken.

Time of existence of cause.— A certificate of the residence of the witness at a prescribed distance from the place of caption means at the time of caption. Mattocks *v.* Bellamy, 8 Vt. 463. The cause of caption is sufficiently set forth, if the magistrate certifies that the deposition is taken for the purpose of being used at the trial, if any of the grounds upon which it may be admitted, pursuant to the provisions of statute, shall then exist. Dole *v.* Erskine, 37 N. H. 316.

Pursuant to notice.— It is sufficient to state that the deposition was taken pursuant to an annexed notice, which states the reasons for taking it. Henderson *v.* Williams, 57 S. C. 1, 35 S. E. 261; Bulwinkle *v.* Cramer, 30 S. C. 153, 8 S. E. 689.

Where the deposition was taken without objection, it is immaterial that the reason assigned for taking it was insufficient. Cook *v.* Blair, 50 Iowa 128.

But it is insufficient to state the presence of the witness at a place more than the prescribed distance from the place of trial, without further stating that he lives there (Barron *v.* Pettes, 18 Vt. 385) or that the witness is in feeble health (Lund *v.* Dawes, 41 Vt. 370) or about to leave the state (Robbins *v.* Lincoln, 12 Wis. 1), without adding that he will be unable to attend the trial.

The clerical omission of a jurisdictional word in the statement cannot be supplied by the court (Dunkle *v.* Worcester, 8 Fed. Cas. No. 4,162, 5 Biss. 102), nor by intendment or the body of the deposition (Barron *v.* Pettes, 18 Vt. 385).

Oral proof at the trial is insufficient. Chase *v.* Garretson, (N. J. Sup. 1891) 22

statement in that respect is unnecessary and if made it may be disregarded, or treated as surplusage.[97]

10. On Whose Behalf Taken. It must appear in the caption that the deposition was taken at the request of one of the parties to the suit in which it is to be used.[98]

11. Authority and Qualification of Officer — a. In General. The certificate must identify the person[99] by whom the deposition was taken as the commissioner or officer authorized or qualified to act and show him to be the person intended,[1] and that he acted within his jurisdiction.[2]

b. Interest or Bias. If not required by statute or rule the certificate need not state that the commissioner or officer is not of kin or related to the parties or their counsel, or is not of counsel or interested in the cause.[3] But if such requirements exist the certificate must contain such a statement.[4]

Atl. 787 [*affirmed* in 54 N. J. L. 42, 23 Atl. 353]; Pingry *v.* Washburn, 1 Aik. (Vt.) 264, 15 Am. Dec. 676.

97. Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168. See Dole *v.* Erskine, 37 N. H. 316, where it is said that the act of Dec. 26, 1848, so far as it relates to depositions *de bene esse*, repeals chapter 188, section 20, of the Revised Statutes, which requires the cause of caption to be certified.

98. Welles *v.* Fish, 3 Pick. (Mass.) 74; Whitney *v.* Sears, 16 Vt. 587. *Contra*, Knight *v.* Nichols, 34 Me. 208.

Request of "plaintiff."— It is sufficient to state that the deposition was taken at the request of plaintiff, if his name appears in the caption of the action. Harrison *v.* Nichols, 31 Vt. 709.

Request of firm.— Where plaintiffs sue in their firm-name it is proper to state that the deposition was taken at the request of the firm, so styling it. Carr *v.* Manahan, 44 Vt. 246.

It is sufficient if the notice shows on whose behalf the deposition was taken, although the caption does not. Read *v.* Patterson, 11 Lea (Tenn.) 430.

99. But the official character of the officer need not be stated in the caption or the certificate (Hayes *v.* Frey, 54 Wis. 503, 11 N. W. 695), if it appears by his signature (Read *v.* Patterson, 11 Lea (Tenn.) 430), or a recital in the certificate (Moore *v.* Willard, 30 S. C. 615, 9 S. E. 273).

1. Porter *v.* Beltzhoover, 2 Harr. (Del.) 484; Gartside Coal Co. *v.* Maxwell, 20 Fed. 187.

Abbreviation of the commissioners' names is permissible. Feagin *v.* Beasley, 23 Ga. 17; Curtiss *v.* Martin, 20 Ill. 557; Byington *v.* Moore, 62 Iowa 470, 17 N. W. 644.

Acting pursuant to commission.— A certificate of a person that he acted pursuant to the commission which was issued to him by the designation of an office held by him is evidence of his identity, as the officer to whom the commission was directed. Brown *v.* Luehrs, 79 Ill. 575.

Addition to his signature of his official title by a commissioner who has certified that the deposition was taken pursuant to the commission will be regarded as *verba persona* merely. Griffin *v.* Isbell, 17 Ala. 184; Hobart *v.* Jones, 5 Wash. 385, 31 Pac. 879.

Clerk's certificate signed by deputy.— A certificate reciting that the witness appeared before the clerk who signed by his deputy shows that the deposition was taken by the deputy. Allen *v.* Hoxey, 37 Tex. 320. A certificate purporting to have been taken before the clerk and signed in the clerk's name by a deputy is to be construed as the certificate of the clerk. Trout *v.* Williams, 29 Ind. 18.

Proof by magistrate's clerk.— Where the examining magistrate is necessarily absent in the discharge of his duties, proof by the clerk of the court to which the deposition was returned that he was present when the deposition was taken, that it was written down by the magistrate, and that the deposition returned to his office and offered in evidence is in the proper handwriting of the magistrate, is sufficient. State *v.* Valentine, 29 N. C. 225.

2. Payne *v.* Briggs, 8 Nebr. 75.

Supplying omission by caption.— The omission of a justice to designate in his certificate the state of his jurisdiction may be supplied by the caption. Atkinson *v.* Starbuck, 6 Blackf. (Ind.) 353.

3. Moore *v.* Booker, 4 N. D. 543, 62 N. W. 607; Looper *v.* Bell, 1 Head (Tenn.) 373; Blair *v.* State Bank, 11 Humphr. (Tenn.) 84; Giles *v.* Paxson, 36 Fed. 882; Miller *v.* Young, 17 Fed. Cas. No. 9,596, 2 Cranch C. C. 53; Peyton *v.* Veitch, 19 Fed. Cas. No. 11,057, 2 Cranch C. C. 123.

The Tennessee act of 1801, requiring such a statement by justices of the peace, refers exclusively to depositions taken in equity. Looper *v.* Bell, 1 Head (Tenn.) 373.

4. Bickley *v.* Bickley, 136 Ala. 548, 34 So. 946; Boykin *v.* Smith, 65 Ala. 294; Wilson *v.* Smith, 5 Yerg. (Tenn.) 379; Carter *v.* Ewing, 1 Tenn. Ch. 212; American Exch. Nat. Bank *v.* Spokane Falls First Nat. Bank, 82 Fed. 961, 27 C. C. A. 274; Gartside Coal Co. *v.* Maxwell, 20 Fed. 187; Donahue *v.* Roberts, 19 Fed. 863.

Sufficiency.— It is enough to certify that the commissioner is not of counsel or next of kin to either party. He need not state "that he is not of counsel or of kin to any one or either of the parties to the cause" in which the depositions were taken. Bickley *v.* Bickley, 136 Ala. 548, 34 So. 946.

Deposition taken in shorthand by disinterested person.— An incomplete statement is

c. Qualification by Oath. In the absence of proof to the contrary it will be presumed that the commissioner duly qualified by oath.[5] Likewise the authority of the officer to administer the oath to him may be presumed from the officer's signature,[6] or shown *aliunde*.[7] So, although it has been held that the name of the officer who administered the oath and the time and place of its administration should appear,[8] the weight of authority is to the effect that the certificate of the commissioners that they qualified is sufficient evidence of that fact and of the authority of the officer to administer the oath to them.[9]

12. Notice to Adverse Party. The fact that due notice of the taking of the deposition or execution of the commission was given to the adverse party or others entitled thereto must appear by the certificate,[10] or by annexing thereto the notice or a copy thereof with due proof of service,[11] or sufficient reasons must be assigned for not giving notice.[12] However, the omission to state the reason is

not sufficient cause to suppress the deposition, where it appears that by consent the testimony was taken in shorthand by a disinterested person. Stewart *v.* Townsend, 41 Fed. 121.

Impeaching certificate.— A certificate that the officer was not an attorney for either party or otherwise interested cannot be overcome by testimony on information and belief. Wagstaff *v.* Challiss, 31 Kan. 212, 1 Pac. 631.

5. Doe *v.* Draper, 2 Houst. (Del.) 126; Tussey *v.* Behmer, 9 Lanc. Bar (Pa.) 45.

6. Saltar *v.* Applegate, 23 N. J. L. 115.

7. Lawrence *v.* Finch, 17 N. J. Eq. 234.

8. Massachusetts Mut. Acc. Assoc. *v.* Dudley, 15 App. Cas. (D. C.) 472.

9. Walkup *v.* Pratt, 5 Harr. & J. (Md.) 51; Wilson *v.* Mitchell, 3 Harr. & J. (Md.) 91; State *v.* Levy, 3 Harr. & M. (Md.) 591; Williams *v.* Richardson, 12 S. C. 584; Winter *v.* Simonton, 30 Fed. Cas. No. 17,894, 3 Cranch C. C. 104. See Massachusetts Mut. Acc. Assoc. *v.* Dudley, 15 App. Cas. (D. C.) 472.

10. Gibson *v.* Smith, 1 Harr. & J. (Md.) 253; Unis *v.* Charlton, 12 Gratt. (Va.) 484; Pentleton *v.* Forbes, 19 Fed. Cas. No. 10,966, 1 Cranch C. C. 507.

Certificate must set out the notice. Gittings *v.* Hall, 1 Harr. & J. (Md.) 14, 2 Am. Dec. 502; Weems *v.* Disney, 4 Harr. & M. (Md.) 156; Johnson *v.* Kraner, 2 Harr. & M. (Md.) 243.

General statement that notice was given is insufficient. Gittings *v.* Hall, 1 Harr. & J. (Md.) 14, 2 Am. Dec. 502; Weems *v.* Disney, 4 Harr. & M. (Md.) 156; Johnson *v.* Kraner, 2 Harr. & M. (Md.) 243. But see Brown *v.* King, 5 Metc. (Mass.) 173.

Proof aliunde.— The return need not show the fact of notice which may be proved by affidavit. Doane *v.* Farrow, 9 Mart. (La.) 222.

Service.— A commission merely certifying that timely notice was given defendant, without showing how or on whom served, will be rejected. Smelser *v.* Williams, 4 Rob. (La.) 152.

11. Horner *v.* Brainerd, 15 Me. 54; Carlton *v.* Patterson, 29 N. H. 580. *Contra*, Steward *v.* Townsend, 41 Fed. 121.

Inclosure in same envelope.—It is not sufficient to fold the notice with the deposition and inclose it in the same envelope, directed to the court. Cushman *v.* Wooster, 45 N. H. 410.

12. Chase *v.* Garretson, (N. J. Sup. 1891) 22 Atl. 787 [*affirmed* in 54 N. J. L. 42, 23 Atl. 353]; Hopkinson *v.* Watson, 17 Vt. 91; Chipman *v.* Tuttle, 1 D. Chipm. (Vt.) 179; Pentleton *v.* Forbes, 19 Fed. Cas. No. 10,966, 1 Cranch C. C. 507.

Distance of residence from place of taking. — The distance of the places of residence of a party or his attorney from that at which a deposition is taken need not be certified. Voce *v.* Lawrence, 28 Fed. Cas. No. 16,979, 4 McLean 203.

If the certificate state facts which dispense with notice it need not state further that notice was not given because of the existence of those facts. Dinsmore *v.* Maroney, 7 Fed. Cas. No. 3,920, 4 Blatchf. 416.

Inability to ascertain interested person.— Under a statute requiring notice of the perpetuation of testimony to be given by the judges to persons within the county whom they know to be interested, or if without the county to the attorney, if any, a certificate by the judges that they did not know any person interested nor their attorney in the county is sufficient. Myers *v.* Anderson, Wright (Ohio) 513.

Judicial notice.— The court cannot judicially take notice of any facts, as a reason for omitting to notify the party, which do not appear from the certificate. Hopkinson *v.* Watson, 17 Vt. 91; Chipman *v.* Tuttle, 1 D. Chipm. (Vt.) 179.

Right to notice dependent on residence.— The federal judiciary act requires notice to the adverse party or his attorney, as either may be nearer, if either is within one hundred miles of the place of caption, and under this provision it has been held sufficient to state that neither of them lived within one hundred miles of such place (Dick *v.* Runnels, 5 How. (U. S.) 7, 12 L. ed. 26) or that the witness lived more than one hundred miles from the place of trial, and that the adverse party had no agent known to the commissioner within one hundred miles of the place of caption (Tooker *v.* Thompson, 24 Fed. Cas. No. 14,097, 3 McLean 92).

To controvert the certificate.— Proof may be given that the party did in fact reside

not fatal, but the party offering the deposition may show that notice was unnecessary.[13]

13. Time and Place of Taking — a. Necessity. Although there are a few cases to the contrary,[14] it is the general rule that the certificate or caption must state the time and place of taking the deposition,[15] or that it was taken at the time and place designated by the notice or commission.[16]

b. Sufficiency. The certificate will be sufficient if it states that the deposition was taken pursuant or agreeably to notice or to the commission, or employs language importing that fact, where the commission or notice indicates the time and place;[17] or where, although not explicitly set forth in the body of the certificate, the time and place can be ascertained by reasonable construction thereof,[18] by reference to its date,[19] to the caption,[20] or to other parts of the return;[21] and where it appears that the deposition was taken on the day named in the notice of taking, it will be presumed in the absence of anything to the contrary, that it was taken between the hours therein named.[22]

within the prescribed limit. Dick *v.* Runnels, 5 How. (U. S.) 7, 12 L. ed. 26.

13. Smith *v.* Coleman, 22 Fed. Cas. No. 13,029, 2 Cranch C. C. 237; Travers *v.* Bell, 24 Fed. Cas. No. 14,149, 2 Cranch C. C. 160.

14. Hanby *v.* Tucker, 23 Ga. 132, 68 Am. Dec. 514; Phelps *v.* Young, 1 Ill. 327; Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737.

15. Flournoy *v.* Jeffersonville First Nat. Bank, 79 Ga. 810, 2 S. E. 547; Wannack *v.* Macon, 53 Ga. 162; Payne *v.* Briggs, 8 Nebr. 75; Boudereau *v.* Montgomery, 3 Fed. Cas. No. 1,694, 4 Wash. 186.

Clerical error.— Where the caption states that a deposition was taken under a dedimus which issued over ten months later, the statement may be treated as a clerical error, corrected by a statement in the certificate showing that it was taken less than two months after the issue of the commission. Jones *v.* Smith, 6 Iowa 229.

16. *Alabama.*— Collins *v.* Fowler, 4 Ala. 647.

Arkansas.— Fancher *v.* Armstrong, 5 Ark. 187.

California.— Dye *v.* Bailey, 2 Cal. 383.

Nebraska.— Dawson *v.* Dawson, 26 Nebr. 716, 42 N. W. 744.

North Carolina.— English *v.* Camp, 2 N. C. 358; Dunham *v.* Halloway, 2 Okla. 78, 35 Pac. 949.

Pennsylvania.— McClcary *v.* Sankey, 4 Watts & S. 113; Vickroy *v.* Skelley, 14 Serg. & R. 372; Selin *v.* Snyder, 7 Serg. & R. 166.

United States.— Rhoades *v.* Selin, 20 Fed. Cas. No. 11,740, 4 Wash. 715.

See 16 Cent. Dig. tit. "Depositions," § 179.

Commencement of taking.— It is not necessary to set forth in the caption that the taking commenced at the hour designated in the notice. It is sufficient if it be certified that it was taken at that hour. Scammon *v.* Scammon, 33 N. H. 52.

17. *Alabama.*— Stetson *v.* Lyons, 34 Ala. 140; Olds *v.* Powell, 7 Ala. 652, 42 Am. Dec. 605; Comstock *v.* Meek, 7 Ala. 528; Luckie *v.* Carothers, 5 Ala. 290; Sandford *v.* Spence, 4 Ala. 237.

Illinois.— Illinois Cent. R. Co. *v.* Cowles, 32 Ill. 116.

Indiana.— Atkinson *v.* Starbuck, 6 Blackf. 353.

Kansas.— Whittaker *v.* Voorhees, 38 Kan. 71, 15 Pac. 874.

Kentucky.— Maxwell *v.* McIlvoy, 2 Bibb 211.

Maryland.— Clogg *v.* MacDaniel, 89 Md. 416, 43 Atl. 795; Calvert *v.* Coxe, 1 Gill 95.

Missouri.— Walley *v.* Gentry, 68 Mo. App. 298.

South Carolina.— Wallingford *v.* Western Union Tel. Co., 60 S. C. 201, 38 S. E. 443, 629.

See 16 Cent. Dig. tit. "Depositions," § 178.

Presumption.— A return showing that the deposition was taken on the day, at the place, and by the person designated, authorizes a presumption that the commission was properly executed. Street *v.* Andrews, 115 N. C. 417, 20 S. E. 450.

Statement of time and place of using.— Where it appears from the deposition and the commissioner's authentication that it was taken at the place provided, the fact that the name of the state and county at which it is to be used appears at the commencement, as though it might have been taken there, is immaterial. Locke *v.* Tuttle, 41 Mich. 407, 1 N. W. 1039.

The omission of the venue will not invalidate the deposition, where it appears in the body of the certificate. Glidden *v.* Moore, 14 Nebr. 84, 15 N. W. 326, 45 Am. Rep. 98.

18. Rogers *v.* Truett, 73 Ga. 386; Vawter *v.* Hultz, 112 Mo. 633, 20 S. W. 689.

19. Birmingham Union R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525.

20. Nye *v.* Spalding, 11 Vt. 501; Tooker *v.* Thompson, 24 Fed. Cas. No. 14,097, 3 McLean 92.

21. Flournoy *v.* Jeffersonville First Nat. Bank, 79 Ga. 810, 2 S. E. 547; Cain *v.* Loeb, 26 La. Ann. 616.

County designated in margin of deposition. — The place of taking is shown if the name of the county appears in the margin of the deposition. Nussear *v.* Arnold, 13 Serg. & R. (Pa.) 323.

22. Dearman *v.* Dearman, 5 Ala. 202; Street *v.* Andrews, 115 N. C. 417, 20 S. E. 450.

c. Adjournments.[23] The failure of the certificate to show the adjournments is a non-prejudicial irregularity, where there is no surprise nor any injury sustained.[24]

14. Presence of Party or Counsel. The certificate must comply with statutory provisions requiring the officer to certify as to the presence of the parties or either of them, or the presence of persons representing them as attorneys, or agents,[25] as where neither party is permitted to be present in the absence of the other, on propounding written interrogatories;[26] or to certify that the adverse party being present he did or did not object.[27]

15. Appearance and Identification of Witness. The caption or certificate should name the witness,[28] recite his appearance,[29] and sufficiently identify him as the person intended to be examined,[30] either by stating the personal knowledge of the officer or that his identity was proven.[31]

23. **Form of adjournment** indorsed on return see Moore *v.* Willard, 30 S. C. 615, 9 S. E. 273.

24. Indiana, etc., R. Co. *v.* Wilson, 77 Ill. App. 603.

25. Madison, etc., R. Co. *v.* Whitesel, 11 Ind. 55; Thieband *v.* Sebastian, 10 Ind. 454.

Necessity of indicating whether party or attorney present.—If a party was present the certificate should show whether he was present in person or by attorney. Hopkins *v.* Myers, 10 Ky. L. Rep. 39. A statement that a party to the action had not appeared "in person or by attorney" is sufficient. Hay *v.* State, 58 Ind. 337.

"Party," included his attorney.— A statement that a party was not present means that he was not present either in person or by attorney. Hopkins *v.* Myers, 10 Ky. L. Rep. 39.

Clerical omission.— A caption stating that "the adverse party was duly notified to attend and was not" (omitting the word present) will be taken to mean that the adverse party was not present. Kidder *v.* Blaisdell, 45 Me. 461.

26. See Iowa Code, § 4704.

Certificate silent.— It will be presumed that neither party was present where the certificate is silent and there is no showing to the contrary. Turner *v.* Hardin, 80 Iowa 691, 45 N. W. 758.

Reduction to writing by third person.— A recital that the deposition was reduced to writing by a person other than the officer does not show the presence of a party or his agent. Cook *v.* Gilchrist, 82 Iowa 277, 48 N. W. 84.

27. Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

Sufficiency.— A certificate that "the adverse party was present and did not object to the taking" sufficiently complies with a statute requiring the magistrate to certify that the adverse party "did or did not object." Carter *v.* Beals, 44 N. H. 408.

28. Amick *v.* Holman, 71 Mo. 445; Lund *v.* Dawes, 41 Vt. 370.

Designating the witness by his christian name only is not defective. Braley *v.* Braley, 16 N. H. 426.

Misnomer of the witness in the caption will not vitiate the deposition, where it appears that the answers were those of the witness certified. Cain *v.* Loeb, 26 La. Ann. 616.

Reference to deposition.— If the witnesses are named in the depositions it will be sufficient to refer to them as "the above-named deponents" (Prather *v.* Pritchard, 26 Ind. 65) or to certify that "the foregoing depositions" were taken (Shepherd *v.* Snodgrass, 47 W. Va. 79, 34 S. E. 879).

29. A certificate that the witness "personally made oath" before the officer sufficiently shows that the witness personally appeared. Streeter *v.* Evans, 44 Vt. 27. See Clark *v.* Ellis, 9 Oreg. 128.

30. Emberson *v.* McKenna, (Tex. App. 1890) 16 S. W. 419.

Sufficiency.— It will be sufficient if it appears that a person of the same name as the witness whose deposition was to be taken was taken at the place of his indicated residence, and that he appeared before the officer and subscribed and swore to the deposition. Giles *v.* Paxson, 36 Fed. 882.

Initial of middle name.— The deposition is admissible, although the certificate indicates the middle name of the witness by an initial letter (Curtiss *v.* Martin, 20 Ill. 557) or omits it (Reeder *v.* Holcomb, 105 Mass. 93).

Business or profession of witness.—A deposition stating that the witness is a boy sixteen years of age, living with his brother on a place in the mountains, contains a sufficient designation of deponent's business or profession. People *v.* Grundell, 75 Cal. 301, 17 Pac. 214.

Presumption.— It will not be presumed that commissioners examined the wrong witness, although they fail to return expressly that the one examined was the one named in the commission. Flournoy *v.* Jeffersonville First Nat. Bank, 79 Ga. 810, 2 S. E. 547.

Where the answers show that they were written by the witness, and the certificate states that they were taken by virtue of the commission, he is sufficiently identified. Missouri, etc., R. Co. *v.* Denton, 29 Tex. Civ. App. 284, 68 S. W. 336.

31. Buford *v.* Gould, 35 Ala. 265; Farrelly *v.* Maria Louisa, 34 Ala. 284. See Stetson *v.* Lyons, 34 Ala. 140; Roberts *v.* Fleming, 31 Ala. 683.

Presumption.—As it will be presumed that the officer did his duty, and nothing to the contrary appears, the omission to state that he personally knew the witness will not vitiate the deposition. Lauve's Succession, 6 La. Ann. 530.

16. EMPLOYMENT OF INTERPRETER. The employment of an interpreter and the necessity therefor must be certified.[32]

17. REDUCTION TO WRITING. The commissioner or officer must certify that the testimony of the witness was reduced to writing by himself, the witness, or some disinterested person;[33] although if the required statement is not made, in the absence of suspicious circumstances, it will be presumed that the officer properly performed his duty.[34] If the deposition was not reduced to writing by the officer his certificate must show that it was written in his presence;[35] and it is sometimes required that the certificate should also show that the testimony was written down in the presence of the witness.[36] These statements are unnec-

32. Amory *v.* Fellowes, 5 Mass. 219, also holding that the omission of such a certification cannot be supplied by an affidavit of the commissioner subsequently made.

33. *Indiana.*— Thieband *v.* Sebastian, 10 Ind. 454.

Kansas.— Atchison, etc., R. Co. *v.* Pearson, 6 Kan. App. 825, 49 Pac. 681.

New York.—Bailis *v.* Cochran, 2 Johns. 417.

Tennessee.— Wilson *v.* Smith, 5 Yerg. 379.

United States.— Cook *v.* Burnley, 11 Wall. 659, 20 L. ed. 29; Blake *v.* Smith, 3 Fed. Cas. No. 1,502; Pettibone *v.* Derringer, 19 Fed. Cas. No. 11,043, 1 Robb. Pat. Cas. 152, 4 Wash. 215; Rainer *v.* Haynes, 20 Fed. Cas. No. 11,536, Hempst. 689; U. S. *v.* Smith, 27 Fed. Cas. No. 16,332, Brunn. Col. Cas. 82, 4 Day (Conn.) 121.

See 16 Cent. Dig. tit. "Depositions," § 182.

A false certificate as to the person by whom the deposition was reduced to writing will render the deposition inadmissible. U. S. *v.* Smith, 27 Fed. Cas. No. 16,332, Brunn. Col. Cas. 82, 4 Day (Conn.) 121.

Clerical mistake.— A statement that the "deponent" was reduced to writing is an immaterial error. Payne *v.* West, 99 Ind. 390.

Omission of statement.—The court has discretion to admit a deposition, although it omits to state by whom it was written. State *v.* Kimball, 50 Me. 409.

Testimony in shorthand.— Where it is provided that a deposition taken down by a stenographer, and written out in longhand, and certified as being a correct statement of the testimony and proceedings, shall be *prima facie* evidence thereof, a certificate that the "foregoing is a correct transcript of the examination in the above-entitled case" is sufficient. People *v.* Riley, 75 Cal. 98, 16 Pac. 544.

Transcription into typewriting.— A certificate that the testimony was reduced to writing and thereafter transcribed into typewriting from the direct dictation of the officer sufficiently shows that the typewriter wrote what was dictated, and thus reduced the deposition to writing. Minard *v.* Stillman, 35 Oreg. 259, 57 Pac. 1022.

34. Thrasher *v.* Ingram, 32 Ala. 645; Blair *v.* Collins, 15 La. Ann. 683; Imboden *v.* Richardson, 15 La. Ann. 534; Bolte *v.* Van Rooten, 4 Johns. (N. Y.) 130; Horton *v.* Arnold, 18 Wis. 212.

Handwriting unlike that of officer.— The mere fact that the handwriting in the body of the deposition does not appear to be that of the justice, without some proof to rebut the presumption of regularity arising from the certificate, is insufficient to exclude it. Piper *v.* White, 56 Pa. St. 90.

The burden of proof is on the party objecting. Imboden *v.* Richardson, 15 La. Ann. 534.

35. Hammond *v.* Freeman, 9 Ark. 62; New Kentucky Coal Co. *v.* Union Pac. R. Co., 52 Nebr. 127, 71 N. W. 948; Cook *v.* Burnley, 11 Wall. (U. S.) 659, 20 L. ed. 29; Bell *v.* Morrison, 1 Pet. (U. S.) 351, 7 L. ed. 174; Blake *v.* Smith, 3 Fed. Cas. No. 1,502; Edmondson *v.* Barrell, 8 Fed. Cas. No. 4,284, 2 Cranch C. C. 228; Pettibone *v.* Derringer, 19 Fed. Cas. No. 11,043, 1 Robb. Pat. Cas. 152, 4 Wash. 215; Rainer *v.* Haynes, 20 Fed. Cas. No. 11,536, Hempst. 689.

Reduction by third person.— A deposition will not be suppressed because the notary's certificate recites that it was reduced to writing by another person in the officer's presence, unless it is shown that such person was a party, or the agent or attorney of a party. Cook *v.* Gilchrist, 82 Iowa 277, 48 N. W. 84.

Subscription in officer's presence.— A certificate that the deposition was reduced to writing by a person named and subscribed by the witness in the presence of the officer shows that it was written in his presence. Bobilya *v.* Priddy, 68 Ohio St. 373, 67 N. E. 736.

If the certificate is silent on the subject it will be presumed that the deposition was written in the presence of the officer, where it was taken in the presence of the adverse party who cross-examined. Winton *v.* Little, 94 Pa. St. 64.

Clerical omission.— A certificate that the deposition "was reduced to writing in my, and by the said deponent sworn to and subscribed in my presence" (Stone *v.* Stillwell, 23 Ark. 444) or that it was reduced to writing by a person named and subscribed by the witness "in my presence" (Bobilya *v.* Priddy, 68 Ohio St. 373, 67 N. E. 736) is sufficient.

It may be proven aliunde that the deposition was written in the presence of the magistrate. Vasse *v.* Smith, 28 Fed. Cas. No. 16,896, 2 Cranch C. C. 31.

Effect of certificate.—A commissioner's certificate that depositions were taken in his presence is evidence that everything on their face was done in his presence. Bowman *v.* Flowers, 2 Mart. N. S. (La.) 267.

36. Johnson *v.* Booth, 1 Handy (Ohio) 42, 12 Ohio Dec. (Reprint) 17; Donahue *v.* Rob-

essary, however, where there is no requirement of their incorporation in the certificate.[37]

18. Reading to Witness. Except where not so required by statute or otherwise,[38] it should affirmatively appear by the certificate that the deposition was read over to or by the witness and an opportunity afforded him to correct it before signing.[39]

19. Signing by Witness. Where the officer is required to certify that the deposition was signed or subscribed by the witness,[40] in his presence or under his supervision,[41] the omission of such a certification will require the rejection of the

erts, 19 Fed. 863. But see Van Ness *v.* Heineke, 28 Fed. Cas. No. 16,866, 2 Cranch C. C. 259; Vasse *v.* Smith, 28 Fed. Cas. No. 16,896, 2 Cranch C. C. 31, in which such a statement was held unnecessary.

Written as given by witness.—Where the certificate states that the deposition was written by the officer as it came from the witness, an additional statement that it was written in the witness' presence is unnecessary. Timms *v.* Wayne, 1 Handy (Ohio) 400, 12 Ohio Dec. (Reprint) 204. It is sufficient to state that the answers were reduced to writing as nearly as possible in the words of the witness (Boykin *v.* Smith, 65 Ala. 294), or that the witness "testified as set down" (Gulf City Ins. Co. *v.* Stephens, 51 Ala. 121).

37. Morrison *v.* White, 16 La. Ann. 100; Blair *v.* Collins, 15 La. Ann. 683; Jolliffe *v.* Collins, 21 Mo. 338; Bulwinkle *v.* Cramer, 30 S. C. 153, 8 S. E. 689; Keene *v.* Meade, 3 Pet. (U. S.) 1, 7 L. ed. 581 [*reversing* 16 Fed. Cas. No. 9,373, 3 Cranch C. C. 51]; Giles *v.* Paxson, 36 Fed. 882; Wilkinson *v.* Yale, 29 Fed. Cas. No. 17,678, 6 McLean 16.

38. *California.*— St. Vincent's Inst., etc. *v.* Davis, 129 Cal. 20, 61 Pac. 477.

Idaho.—Darby *v.* Heagerty, 2 Ida. (Hasb.) 260, 13 Pac. 85.

Indiana.— Guthrie *v.* Buckeye Cannel Coal Co., 66 Ind. 543.

Louisiana.— Morrison *v.* White, 16 La. Ann. 100.

Mississippi.— Henderson *v.* Cargill, 31 Miss. 367.

Nebraska.— Britton *v.* Berry, 20 Nebr. 325, 30 N. W. 254.

Nevada.— Blackie *v.* Cooney, 8 Nev. 41.

See 16 Cent. Dig. tit. "Depositions," § 183.

39. *California.*—People *v.* Mitchell, 64 Cal. 85, 27 Pac. 862; Williams *v.* Chadbourne, 6 Cal. 559.

Iowa.— Ball *v.* Sykes, 70 Iowa 525, 30 N. W. 929.

Kentucky.— Greer *v.* Ludlow, 7 Ky. L. Rep. 290.

Montana.— McCormick *v.* Largey, 1 Mont. 158.

New York.— Faith *v.* Ulster, etc., R. Co., 70 N. Y. App. Div. 303, 75 N. Y. Suppl. 420, 10 N. Y. Annot. Cas. 449; Foster *v.* Bullock, 12 Hun 200.

Utah.— Homberger *v.* Alexander, 11 Utah 363, 40 Pac. 260.

Wisconsin.— Goodhue *v.* Grant, 1 Pinn. 556.

See 16 Cent. Dig. tit. "Depositions." § 183.

Literal compliance with the statute see Vaughn *v.* Smith, 58 Iowa 553, 12 N. W. 604.

Substantial compliance with the statute is sufficient. Beckett *v.* Gridley, 67 Minn. 37, 69 N. W. 622; Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267.

Correction as requested.— A certificate that depositions were corrected as requested by the witnesses is sufficient. Higgins *v.* Wortell, 18 Cal. 330.

Omission cured by cross-examination.—The omission of such a statement will not invalidate the deposition, where both parties appeared and examined the witness. Lockhart *v.* Mackie, 2 Nev. 294.

Supplying omission.— The party offering the deposition will be afforded an opportunity of showing that the testimony was read to the witness in fact. Faith *v.* Ulster, etc., R. Co., 70 N. Y. App. Div. 303, 75 N. Y. Suppl. 420, 10 N. Y. Annot. Cas. 449.

40. Foster *v.* Bullock, 12 Hun (N. Y.) 200; Sabine, etc., R. Co. *v.* Brousard, 69 Tex. 617, 7 S. W. 374; Trammell *v.* McDade, 29 Tex. 360; Thompson *v.* Haile, 12 Tex. 139. See Vaughn *v.* Smith, 58 Iowa 553, 12 N. W. 604, where the certificate is in literal compliance with the statute.

By mark.— A certificate that the witness signed "by making his mark and sign" is sufficient. Neill *v.* Cody, 26 Tex. 286.

Deposition signed in fact.— The deposition is admissible, although the act of signing is not certified, if the certificate states that "the witness, being sworn, deposeth and saith that the answers as written out to the foregoing interrogatories and cross interrogatories are correct and true," and the deposition is in fact signed by the witness. Henderson *v.* Cargill, 31 Miss. 367.

"Signed interrogatories."— A certificate that the witness signed the interrogatories will be construed to mean that he signed the answers thereto. San Antonio, etc., R. Co. *v.* Gillum, (Tex. Civ. App. 1895) 31 S. W. 356 [*affirming* (Civ. App. 1895) 30 S. W. 697].

Subscription by interpreter.— A certificate that "the examination was subscribed by the sworn interpreter" is immaterial, and not ground for suppressing the deposition, where the certificate shows that the interpreter was sworn, and the deposition is in fact subscribed by him. U. S. *v.* Fifty Boxes, etc., of Lace, 92 Fed. 601.

A general statement of subscription is sufficient. Beal *v.* Brandt, 7 La. 583. See also Bobilya *v.* Priddy, 68 Ohio St. 373, 67 N. E. 736.

41. Foster *v.* Bullock, 12 Hun (N. Y.) 200; Beidell *v.* Cook, 1 Handy (Ohio) 94, 12

deposition. But if not required such a statement is unnecessary and may be disregarded.[42]

20. Administration of Oath to Witness — a. Necessity. The certificate or the caption must affirmatively show that the witness was sworn or affirmed and that the affirmation or oath administered was in the form prescribed by statute or sufficient in law.[43]

b. Sufficiency. It has been held sufficient to certify generally that the witness was sworn,[44] or affirmed according to law,[45] duly sworn,[46] or that he

Ohio Dec. (Reprint) 45; Johnson *v.* Booth, 1 Handy (Ohio) 42, 12 Ohio Dec. (Reprint) 17; Bush *v.* Barron, 78 Tex. 5, 14 S. W. 238; Bacon *v.* Lloyd, 1 Tex. App. Civ. Cas. § 284.

Necessity of other proof.— A proper certification is sufficient without the statement of witnesses to the same effect. Pressler *v.* Joffrion, 39 La. Ann. 1116, 2 So. 795.

Where the deposition is silent on the subject, it will be presumed that it was subscribed in the presence of the officer, the parties having been present and examined the witness. Winton *v.* Little, 94 Pa. St. 64.

42. Lewis *v.* Morse, 20 Conn. 211; Centre *v.* Keene, 5 Fed. Cas. No. 2,553, 2 Cranch C. C. 198; Van Ness *v.* Heineke, 28 Fed. Cas. No. 16,866, 2 Cranch C. C. 259; Voce *v.* Lawrence, 28 Fed. Cas. No. 16,979, 4 MeLean 203.

43. *Indiana.*— Thieband *v.* Sebastian, 10 Ind. 454.

Kansas.— Western Union Tel. Co. *v.* Collins, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515; Atchison, etc., R. Co. *v.* Pearson, 6 Kan. App. 825, 49 Pac. 681.

Louisiana.— Connolly's Succession, 6 La. Ann. 479.

Maine.— Call *v.* Perkins, 68 Me. 158; Parsons *v.* Huff, 38 Me. 137; Brighton *v.* Walker, 35 Me. 132.

Massachusetts.— Simpson *v.* Carlton, 1 Allen 109, 79 Am. Dec. 707.

New Hampshire.— Fabyan *v.* Adams, 15 N. H. 371.

New Jersey.— Stewart *v.* Bowne, 3 N. J. L. 959.

New York.— Bailis *v.* Cochran, 2 Johns. 417.

Ohio.— Warring *v.* Martin, Wright 380.

Pennsylvania.— Bowman *v.* Paulhamus, 20 Pa. Co. Ct. 600.

Texas.— Sabine, etc., R. Co. *v.* Brousard, 69 Tex. 617, 7 S. W. 374; Trammel *v.* McDade, 29 Tex. 360; Missouri, etc., R. Co. *v.* Hennesey, (Civ. App. 1899) 49 S. W. 917.

Utah.— Homberger *v.* Alexander, 11 Utah 363, 40 Pac. 260.

Vermont.— Shed *v.* Leslie, 22 Vt. 498; Burroughs *v.* Booth, 1 D. Chipm. 106. See Barlow *v.* Bowne, Brayt. 135.

Wisconsin.— Baxter *v.* Payne, 1 Pinn. 501.

United States.— Garrett *v.* Woodward, 10 Fed. Cas. No. 5,253, 2 Cranch C. C. 190; Marstin *v.* McRea, 16 Fed. Cas. No. 9,141, Hempst. 688; Pentleton *v.* Forbes, 19 Fed. Cas. No. 10,966, 1 Cranch C. C. 507; Rainer *v.* Haynes, 20 Fed. Cas. No. 11,536, Hempst. 689.

See 16 Cent. Dig. tit. "Depositions," § 185.

Form.— The certificate should state that the witness was examined on oath upon the interrogatories annexed. Bailis *v.* Cochran, 2 Johns. (N. Y.) 417.

Form of oath defective.— A deposition taken out of the state on commission will not be rejected, although the certificate does not show the administration of the oath in the prescribed form. Stiles *v.* Allen, 5 Allen (Mass.) 320; Quinley *v.* Atkins, 9 Gray (Mass.) 370.

44. *Iowa.*— Vaughn *v.* Smith, 58 Iowa 553, 12 N. W. 604.

Louisiana.— Beal *v.* Brandt, 7 La. 583.

Michigan.— Van Sickle *v.* Gibson, 40 Mich. 170.

New York.— Bishop *v.* Ferguson, 46 N. Y. 688; Bolte *v.* Van Rooten, 4 Johns. 130.

North Carolina.— Wellborn *v.* Younger, 10 N. C. 205.

Texas.— Carroll *v.* Weleh, 26 Tex. 147.

United States.— Keene *v.* Meade, 3 Pet. 1, 7 L. ed. 581 [*reversing* 16 Fed. Cas. No. 9,373, 3 Cranch C. C. 51].

See 16 Cent. Dig. tit. "Depositions," § 187.

Conformity to statute.— A certificate by the officer that the witness came before him, and being first duly sworn made the following answers, etc., adding, "Sworn to and subscribed before me this first day," etc.; "In testimony," etc., is in strict conformity with the statute. Dikes *v.* De Cordova, 17 Tex. 618. To same effect see Gregg *v.* State, (Tex. App. 1889) 12 S. W. 732; Clark *v.* State, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817.

Swore to interrogatories.— A certificate that deponent swore to the attached interrogatories will be construed to mean that he swore to the answers to them. San Antonio, etc., R. Co. *v.* Gillum, (Tex. Civ. App. 1895) 31 S. W. 356 [*affirming* (Civ. App. 1895) 30 S. W. 697].

Sworn and examined.— A statement that the witness was "sworn and examined" justifies a presumption that the commissioner swore the witness by virtue of the commission returned. King *v.* King, 28 Ala. 315.

45. Atkinson *v.* St. Croix Mfg. Co., 24 Me. 171; Horne *v.* Haverhill, 113 Mass. 344.

Conscientious scruples as to oath.— A certificate stating the affirmation of the witness and that the witness was conscientiously scrupulous of taking an oath is sufficient evidence of that fact. Elliot *v.* Hayman, 8 Fed. Cas. No. 4,388, 2 Cranch C. C. 678.

46. *Alabama.*— Gulf City Ins. Co. *v.* Stephens, 51 Ala. 121.

Connecticut.— Stocking *v.* Sage, 1 Conn. 519.

qualified,[47] and in the case of several witnesses that each separately and severally made solemn oath.[48] Likewise it has been held sufficient to state that the witness was sworn to tell the truth, the whole truth, and nothing but the truth.[49] So it will be sufficient if it appears by reference or from the deposition that a suitable oath was administered,[50] or that there was a substantial compliance with the terms of the statute;[51] and to show that the oath was publicly administered as required by the commission it is sufficient to state that the oath was administered as prescribed by that writ.[52]

c. By Whom Administered. The certificate or caption should state that the oath was administered by the officer before whom the deposition was taken,[53] or in his presence, by an officer qualified to administer oaths.[54]

d. Time of Administration. The time when the witness was sworn, that is, whether before or at the close of his examination should be stated.[55]

Louisiana.— Blair *v.* Collins, 15 La. Ann. 683.

Mississippi.— Martin *v.* King, 3 How. 125.

New Jersey.— New Jersey Express Co. *v.* Nichols, 32 N. J. L. 166 [*affirmed* in 33 N. J. L. 434, 97 Am. Dec. 722]; Steward *v.* Bowne, 3 N. J. L. 959.

New York.— Bishop *v.* Ferguson, 46 N. Y. 688.

Oregon.— Minard *v.* Stillman, 35 Oreg. 259, 57 Pac. 1022.

South Carolina.— Moore *v.* Willard, 30 S. C. 615, 9 S. E. 273.

See 16 Cent. Dig. tit. "Depositions," § 187.

47. Williams *v.* Richardson, 12 S. C. 584.

48. Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

49. Brown *v.* King, 5 Metc. (Mass.) 173, where it was further certified that the witness "made oath to the truth of the foregoing deposition," etc. Blakeslee *v.* Rossman, 44 Wis. 550.

50. Stetson *v.* Lyons, 34 Ala. 140; Broadnax *v.* Sullivan, 29 Ala. 320; Ulmer *v.* Austill, 9 Port. (Ala.) 157; Kendall *v.* Limberg, 69 Ill. 355; Greene County *v.* Bledsoe, 12 Ill. 267; Field *v.* Tenney, 47 N. H. 513.

51. *Indiana.*— Welborn *v.* Swain, 22 Ind. 194.

Louisiana.— Tollett *v.* Jones, 3 Rob. 274; Winn *v.* Twogood, 9 La. 422.

Maine.— Bachelder *v.* Merriman, 34 Me. 69.

Mississippi.— Baker *v.* Kelly, 41 Miss. 696, 93 Am. Dec. 274; Henderson *v.* Cargill, 31 Miss. 367.

Missouri.— Borders *v.* Barber, 81 Mo. 636.

Nebraska.— Jameson *v.* Butler, 1 Nebr. 115.

Oregon.— Clark *v.* Ellis, 9 Oreg. 128.

Texas.— Neill *v.* Cody, 26 Tex. 286.

United States.— See Bussard *v.* Catalino, 4 Fed. Cas. No. 2,228, 2 Cranch C. C. 421.

See 16 Cent. Dig. tit. "Depositions," § 187.

52. Ford *v.* Cheever, 105 Mich. 679, 63 N. W. 975.

53. Powers *v.* Shepard, 21 N. H. 60, 53 Am. Dec. 168; Patton *v.* King, 26 Tex. 685, 84 Am. Dec. 596; Emberson *v.* McKenna, (Tex. App. 1890) 16 S. W. 419.

"By virtue of commission."— A certificate that the witness was sworn by virtue of the commission authorizes a presumption that the oath was administered by the commissioners. Bolte *v.* Van Rooten, 4 Johns. (N. Y.) 130.

"In due form of law."— A certificate that the witness was sworn before the commissioner "in due form of law" is sufficient. Neill *v.* Cody, 26 Tex. 286.

Presumption.— A certificate stating that the witness was "carefully examined and cautioned and sworn to speak the whole truth" authorizes the inference that he was sworn by the officer. Edmondson *v.* Barrell, 8 Fed. Cas. No. 4,284, 2 Cranch C. C. 228.

Reference to prior certificate.— Where it is certified to the first deposition that the witness was duly sworn by the commissioner, it is sufficient to certify to the depositions following that the witnesses were "duly sworn as before mentioned." Cooper *v.* Stinson, 5 Minn. 201.

54. Where the certificate shows that the oath was administered to the witness by a justice of the peace, it will be presumed to have been in the presence of the commissioners. Vaughan *v.* Blanchard, 2 Dall. (Pa.) 192, 1 L. ed. 344.

Sufficiency.— If no technical form of certificate is required it will be sufficient if it shows that the answers of the witness were made under oath in the presence of the officer taking the deposition. Ballard *v.* Perry, 28 Tex. 347.

Certificate of officer administering oath.— A justice of the peace who administers the oath in the presence of the officer need not certify to that fact. Vaughan *v.* Blanchard, 2 Dall. (Pa.) 192, 1 L. ed. 344.

55. Erskine *v.* Boyd, 35 Me. 511; Atkinson *v.* St. Croix Mfg. Co., 24 Me. 171; McCormick *v.* Largey, 1 Mont. 158; House *v.* Elliott, 6 Ohio St. 497.

Instances — Sufficiency.— It has been held sufficient to state that the witness was "first sworn" (Ferriber *v.* Latting, 9 La. Ann. 169; Lewis *v.* Soper, 44 Me. 72; Dennison *v.* Benner, 41 Me. 332; Palmer *v.* Fogg, 35 Me. 368, 58 Am. Dec. 708), "as above set forth," where the deposition states that the witness was "first sworn" (Timms *v.* Wayne, 1 Handy (Ohio) 400, 12 Ohio Dec. (Reprint) 204); or, "was duly sworn before giving his evidence (Bowman *v.* Van Kuren,

21. Cautioning Witness. Where it is required that the witness be cautioned before his examination, the certificate must show that the statute was complied with in this respect.[56]

22. Compliance With Commission or Notice. The certificate should state the manner of taking the deposition, that it was taken in pursuance of the commission or other authority, and that all the statutory essentials have been substantially complied with,[57] and will be sufficient if it appears that all the requirements of law, instructions, or directions have been duly observed.[58]

23. Signature, Seal, and Authentication — a. Signature. The deposition must be authenticated or the certificate signed by the commissioner or officer before whom the deposition was taken.[59]

29 Wis. 209, 9 Am. Rep. 554). And see Minard *v.* Stillman, 35 Oreg. 259, 57 Pac. 1022; Carroll *v.* Welch, 26 Tex. 147.

Before and after testifying.— It is no objection that the officer does not certify that the witnesses were sworn as well after as before testifying. Donovan *v.* Hibbler, (Nebr. 1902) 92 N. W. 637.

The omission of the statement, where the deposition is taken out of the state, will not require its rejection, where by statute the court is vested with discretion to admit it. Freeland *v.* Prince, 41 Me. 105; Burt *v.* Allen, 103 Mass. 41.

Reference to notice.— Where a justice certified that the witness was sworn and examined at the place specified in the notice, on the day and between certain hours, specified in the notice which was attached, it is sufficient evidence that the witness was sworn before he was examined, there being no evidence to the contrary. Sample *v.* Robb, 16 Pa. St. 305.

56. Phelps *v.* Panama, 1 Wash. Terr. 615; Garrett *v.* Woodward, 10 Fed. Cas. No. 5,253, 2 Cranch C. C. 190; Luther *v.* The Merritt Hunt, 15 Fed. Cas. No. 8,610, Newb. Adm. 4; Pentleton *v.* Forbes, 19 Fed. Cas. No. 10,966, 1 Cranch C. C. 507. *Contra,* Burley *v.* Kitchell, 20 N. J. L. 305.

The omission to certify that the witness was cautioned is immaterial where it is stated that witness was "sworn in pursuance of the act" (Moore *v.* Nelson, 17 Fed. Cas. No. 9,771, 3 McLean 383), was "duly examined and solemnly affirmed" (Brown *v.* Piatt, 4 Fed. Cas. No. 2,026, 2 Cranch C. C. 253), or was "carefully examined and cautioned," etc. (Edmondson *v.* Barrell, 8 Fed. Cas. No. 4,284, 2 Cranch C. C. 228).

57. Connolly's Succession, 6 La. Ann. 479; Davis *v.* Allen, 14 Pick. (Mass.) 313; Homberger *v.* Alexander, 11 Utah 363, 40 Pac. 260.

Compliance as to time and place of taking depositions see *supra,* XVIII, C, 13.

58. Boykin *v.* Smith, 65 Ala. 294; Stetson *v.* Lyons, 34 Ala. 140; Roberts *v.* Fleming, 31 Ala. 683; Ferriber *v.* Latting, 9 La. Ann. 169; Thomas *v.* Wheeler, 47 Mo. 363; Moss *v.* Booth, 34 Mo. 316; Hill *v.* Hill, 42 Pa. St. 198.

59. *Alabama.*— Dozier *v.* Joyce, 8 Port. 303.

Louisiana.— Price *v.* Emerson, 16 La. Ann. 95.

New Hampshire.— Burnham *v.* Porter, 24 N. H. 570.

New York.— Jackson *v.* Stiles, 3 Cai. 128, Col. & C. Cas. 468.

Pennsylvania.— Waln *v.* Freedland, 2 Miles 161.

Vermont.— Shed *v.* Leslie, 22 Vt. 498.

England.— Staniland *v.* Willatt, 12 Jur. 392, 17 L. J. Ch. 373.

See 16 Cent. Dig. tit. "Depositions," § 191.

Abbreviation of christian names.— It is immaterial that the commissioners abbreviated their christian names. Feagin *v.* Beasley, 23 Ga. 17.

Addition of official title.—The officer should add his official title. Jackson *v.* Stiles, 3 Cai. (N. Y.) 128, Col. & C. Cas. (N. Y.) 468.

By commissioner.— It is immaterial that a commissioner adds his official title to his signature. Davis *v.* Madden, 27 La. Ann. 632; Munroe *v.* Woodruff, 17 Md. 159; Delaware, etc., Canal Co. *v.* Webster, 18 Wkly. Notes Cas. (Pa.) 339.

Place of signing.—The interrogatories need not be signed on every leaf. Brydges *v.* Branfil, 11 L. J. Ch. 12, 12 Sim. 334, 35 Eng. Ch. 283.

Several caption and certificate.— The certificate of the oath administered to the deponent and the caption must be severally signed by the magistrate before whom the deposition is taken. Shed *v.* Leslie, 22 Vt. 498.

Several depositions.— It is sufficient if the commissioner authenticate several depositions by a single signature. Boston *v.* Bradley, 4 Harr. (Del.) 524.

Signature by acting commissioners.— The depositions need only be signed by the commissioners who acted. Brydges *v.* Branfil, 11 L. J. Ch. 12, 12 Sim. 334, 35 Eng. Ch. 283.

Signature of a caption containing a certificate to the oath of the witness and another to the taxation of costs will be sufficient, where it is apparent that the signature was intended to apply to both. Jackson *v.* Barron, 37 N. H. 494.

Signature on cover of return.— A commission and return will be received, although the signatures of the commissioners appear only on the cover inclosing it. State *v.* Levy, 3 Harr. & M. (Md.) 591.

Signature to combined caption and certificate.— A deposition is admissible where the

b. Seal — (i) *Necessity.* Where a commission directs a return under seal,[60] or it is required that the certificate of the officer shall be authenticated by his seal,[61] an omission of the seal will preclude the reading of the deposition, unless his authority or official character is otherwise proved or authenticated.[62] But if a seal is not required by statute, or the commission issued to the commissioners as such, and not as officials, none need be affixed.[63]

(ii) *Sufficiency.* An impression on the paper,[64] the word "seal,"[65] or the abbreviations "L. S." will be sufficient;[66] as will the seal of a consular agent;[67] so a deputy may affix the clerk's seal;[68] and the return will be received, although the seal is misplaced.[69] Again a proper seal will be presumed to have been affixed where the officer so certifies;[70] and the omission of a seal will be regarded as an informality which by statute may be disregarded.[71]

D. Authority of Commissioner or Officer[72] — 1. Necessity of Proof. Unless where a person is specially directed by name,[73] agreed on by the parties,[74] or is a commissioner, appointed by state authority to act generally in another state,[75] his official character or authority to take the deposition or execute the commission must be apparent or be established by competent proof.[76]

certificate and caption are drawn together and the official signature of the commissioner is affixed to that statement. Hauxhurst *v.* Hovey, 26 Vt. 544.

Where there are two commissioners both should sign. Waln *v.* Freedland, 2 Miles (Pa.) 161.

60. Brewer *v.* Bowersox, 92 Md. 567, 48 Atl. 1060. See Henderson *v.* Cargill, 31 Miss. 367, where the statute not requiring it the omission of a seal was held immaterial, although the commission directed a return under seal.

61. Harvey *v.* Osborn, 55 Ind. 535; Neese *v.* Farmer's Ins. Co., 55 Iowa 604, 8 N. W. 450; Stephens *v.* Williams, 46 Iowa 540; Rochelle *v.* Alvarez, 4 La. 218; Barfield *v.* Hewlett, 4 La. 118; Ingraham *v.* White, 2 La. 294; Paul *v.* Lowry, 18 Fed. Cas. No. 10,844, 2 Cranch C. C. 628. See Waln *v.* Freedland, 2 Miles (Pa.) 161.

Form of seal.— The seal must conform to the statutes of the state from which the commission issued. Neese *v.* Farmer's Ins. Co., 55 Iowa 604, 8 N. W. 450.

62. Ashcraft *v.* Chapman, 38 Conn. 230; Curtis *v.* Curtis, 131 Ind. 489, 30 N. E. 18; Pape *v.* Wright, 116 Ind. 502, 19 N. E. 459; Paul *v.* Lowry, 18 Fed. Cas. No. 10,844, 2 Cranch C. C. 628.

63. *Alabama.*— Dozier *v.* Joyce, 8 Port. 303.

Indiana.— Dumont *v.* McCracken, 6 Blackf. 355.

Louisiana.— Davis *v.* Madden, 27 La. Ann. 632; Morrison *v.* White, 16 La. Ann. 100.

Mississippi.— Henderson *v.* Cargill, 31 Miss. 367.

New Jersey.— Crowther *v.* Lloyd, 31 N. J. L. 395.

North Carolina.— Ward *v.* Ely, 12 N. C. 372.

United States.— Brown *v.* Ellis, 103 Fed. 834.

See 16 Cent. Dig. tit. "Depositions," § 192.

Return under seal required by commission. — It is immaterial that the commission requires a return under seal. Henderson *v.* Cargill, 31 Miss. 367.

Seal on envelope.— Where a deposition taken under a joint and several commission was signed on each page by one of the commissioners, and the execution of the commission was certified by him, and the whole was inclosed in an envelope sealed and properly directed, with the signature of the commissioner over the seal, it was admitted, although there was no official seal inside. Wright *v.* Wood, 23 Pa. St. 120.

64. Meyers *v.* Russell, 52 Mo. 26.

65. Wallingford *v.* Western Union Tel. Co., 60 S. C. 201, 38 S. E. 443, 629.

66. Baker *v.* Kelly, 41 Miss. 696, 93 Am. Dec. 274.

67. Schunior *v.* Russell, 83 Tex. 83, 18 S. W. 484, where the seal contained the words, "United States Commercial Agency."

But the official seal of the consulate should not be used where the consul is a party to the suit. Massachusetts Mut. Acc. Assoc. *v.* Dudley, 15 App. Cas. (D. C.) 472.

68. Simons *v.* Morris, 53 Mich. 155, 18 N. W. 625.

69. State *v.* Levy, 3 Harr. & M. (Md.) 591; Osgood *v.* Sutherland, 36 Minn. 243, 31 N. W. 211. See Nussear *v.* Arnold, 13 Serg. & R. (Pa.) 323, where it was held to be sufficient to seal the envelope.

70. Bissel *v.* Terrell, 18 La. Ann. 45.

71. Rachac *v.* Spencer, 49 Minn. 235, 51 N. W. 920.

72. **Form of certificate of official character** see Thomas *v.* Dunaway, 30 Ill. 373.

73. Kendall *v.* Limberg, 69 Ill. 355; Morrison *v.* White, 16 La. Ann. 100; Rembert *v.* Whitworth, 14 La. Ann. 608; Adams *v.* Graves, 18 Pick. (Mass.) 355; Allen *v.* Perkins, 17 Pick. (Mass.) 369.

74. Morrison *v.* White, 16 La. Ann. 100.

75. Tedrowe *v.* Esher, 56 Ind. 443; Palmer *v.* Fogg, 35 Me. 368, 58 Am. Dec. 708.

76. *Colorado.*—Argentine Falls Silver Min. Co. *v.* Molson, 12 Colo. 405, 21 Pac. 190.

Louisiana.— Pendery *v.* Crescent Mut. Ins. Co., 21 La. Ann. 410; Baine *v.* Wilson, 18 La. 59; McMicken *v.* Stewart, 10 Mart. 571.

Ohio.— Bond *v.* Ward, Wright 747.

2. Sufficiency of Proof — a. Certificate, Signature, or Seal. The authority of the officer to act in the premises is sufficiently shown by his certificate, official signature, or seal.[77]

b. Certificate of Other Officer. Where depositions are taken before a commissioner or officer in another state or jurisdiction, his official character may and in many jurisdictions must be authenticated by the certificate of an officer having official knowledge of the facts.[78]

Pennsylvania.— Waugh *v.* Shunk, 20 Pa. St. 130.

Vermont.— Bown *v.* Bean, 1 D. Chipm. 176.

See 16 Cent. Dig. tit. "Depositions," § 194.

Reason for rule.— The rule requiring that the party offering a deposition taken out of the state, and not under a commission, must prove the official character of the person who took it, was made to prevent management and imposition, and to afford reasonable satisfaction to the court that the transaction was correct and fair. Savage *v.* Balch, 8 Me. 27.

Vice-consul.— A commission to a United States vice-consul or commissioner named, returned executed under his signature as such, is admissible on proof of his signature, and that he was reputed and acted as vice-consul before executing the commission. Stiff *v.* Nugent, 5 Rob. (La.) 217.

Extradition.— A vice-consul may as acting consul certify depositions for extradition. *In re* Herris, 33 Fed. 165.

Presumption as to acquaintance with officer.— Where the adverse party living in an adjoining town attended the examination without objection it will be presumed that he was acquainted with the magistrate and knew his official character. Savage *v.* Balch, 8 Me. 27.

77. *Arkansas.*— Johnson *v.* Cocks, 12 Ark. 672.

Indiana.— Harvey *v.* Osborn, 55 Ind. 535; Earl *v.* Hurd, 5 Blackf. 248.

Kentucky.— Waters *v.* Brown, 3 A. K. Marsh. 557; Talbott *v.* Bradford, 2 Bibb 316.

Maine.— State *v.* Kimball, 50 Me. 409; Bullen *v.* Arnold, 31 Me. 583; Clement *v.* Durgin, 5 Me. 9.

Massachusetts.—Adams *v.* Graves, 18 Pick. 355; Allen *v.* Perkins, 17 Pick. 369.

Minnesota.— Tancre *v.* Reynolds, 35 Minn. 476, 29 N. W. 171.

Nebraska.— Yarnal *v.* Hupp, (1902) 90 N. W. 645; Martin *v.* Coppock, 4 Nebr. 173.

Nevada.— Blackie *v.* Cooney, 8 Nev. 41; Sargent *v.* Collins, 3 Nev. 260.

New Jersey.— McNeal *v.* Braun, 53 N. J. L. 617, 23 Atl. 687, 26 Am. St. Rep. 441.

Pennsylvania.— Wright *v.* Waters, 32 Pa. St. 514; Berks County *v.* Ross, 3 Binn. 539.

Tennessee.— Hoover *v.* Rawlings, 1 Sneed 287.

Texas.— Greenwood *v.* Woodward, 18 Tex. 1; Barber *v.* Greer, 26 Tex. Civ. App. 89, 63 S. W. 934; Linskie *v.* Kerr, (Civ. App. 1896) 34 S. W. 765.

Virginia.— Hobbs *v.* Shumates, 11 Gratt. 516; Pollard *v.* Lively, 2 Gratt. 216.

United States.— Dinsmore *v.* Maroney, 7 Fed. Cas. No. 3,920, 4 Blatchf. 416; Jasper *v.* Porter, 13 Fed. Cas. No. 7,229, 2 McLean 579; Lindsay *v.* Riggs, 15 Fed. Cas. No. 8,366; Price *v.* Morris, 19 Fed. Cas. No. 11,414, 5 McLean 4; Ruggles *v.* Bucknor, 20 Fed. Cas. No. 12,115, 1 Paine 358; Vasse *v.* Smith, 28 Fed. Cas. No. 16,896, 2 Cranch C. C. 31; Whitney *v.* Huntt, 29 Fed. Cas. No. 17,589, 5 Cranch C. C. 120.

See 16 Cent. Dig. tit. "Depositions," § 195.

Failure to state official title.— The acts of a justice in perpetuating testimony under the Maryland act of July, 1779, chapter 8, are not invalidated by his failure to style himself a justice. Bryden *v.* Taylor, 2 Harr. & J. (Md.) 396, 3 Am. Dec. 554.

The burden of proving a want of authority is on the party objecting. Adams *v.* Graves, 18 Pick. (Mass.) 355.

78. *Arkansas.*— Jenkins *v.* Tobin, 31 Ark. 306.

Connecticut.— Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168.

Illinois.— Scott *v.* Bassett, 186 Ill. 98, 57 N. E. 835; Wheeler *v.* Shields, 3 Ill. 348.

Indiana.— Baber *v.* Rickart, 52 Ind. 594.

Louisiana.— McDonald *v.* Wells, 23 La. Ann. 189; Wardwell *v.* Sterne, 22 La. Ann. 28; Grant's Succession, 14 La. Ann. 765; Barelli *v.* Lytle, 4 La. Ann. 557; Yeatman *v.* Erwin, 5 La. 264; Barfield *v.* Hewlett, 4 La. 118.

Michigan.— Thompson *v.* Clay, 60 Mich. 627, 27 N. W. 699.

Montana.— Fredericks *v.* Davis, 3 Mont. 251; McCormick *v.* Largey, 1 Mont. 158.

New Hampshire.— Dunlap *v.* Waldo, 6 N. H. 450.

North Carolina.— State *v.* Valentine, 29 N. C. 225.

Ohio.— Bond *v.* Ward, Wright 747.

See 16 Cent. Dig. tit. "Depositions," § 196.

A certificate of the clerk of a foreign court sealed with the seal of the court is a sufficient authentication of the officer's authority to administer oaths and take depositions. Levitt *v.* Levitt, 2 Hem. & M. 626.

The seal of the county, affixed by its clerk, is a sufficient authentication of the magistrate's certificate, with extrinsic evidence of its genuineness. Dunlap *v.* Waldo, 6 N. H. 450.

In Louisiana the official character of the officer must be shown by the attestation of the governor under the great seal of the state (Wardwell *v.* Sterne, 22 La. Ann. 28; Grant's Succession, 14 La. Ann. 795; Thatcher *v.* Goff, 13 La. 360). The certificate of the county clerk is not sufficient (McDonald *v.* Wells, 23 La. Ann. 189; Yeatman *v.* Erwin, 5 La. 264; Barfield *v.* Hewlett, 4 La. 118). Where there is no internal

E. Inclosing and Sealing — 1. **In General.** The commission, notice, interrogatories, answers, and all other papers constituting the return must be inclosed in a suitable wrapper or envelope,[79] and securely sealed.[80] But compliance with these formalities is unnecessary, where the commissioner personally delivers the papers to the clerk.[81]

2. **Attaching Papers Returned.** The papers returned should be attached or fastened together;[82] but there are decisions directly holding that the omission to attach or connect the papers returned may be disregarded where the formalities respecting inclosure, sealing, and superscription have been complied with.[83]

F. Indorsement and Superscription — 1. **In General.** Statutory requirements as to the indorsement or superscription of the return must be complied with; but a substantial compliance will ordinarily be sufficient.[84]

evidence that the certificate of the officer was ever seen by the governor, the officer's capacity is not shown. Barelli *v.* Lytle, 4 La. Ann. 557; Edmondson *v.* Mississippi, etc., R. Co., 13 La. 282.

Time of authentication.— The official character of the notary may be authenticated at any time before the deposition is read. Scott *v.* Bassett, 186 Ill. 98, 57 N. E. 835.

79. Smith *v.* Moody, 94 Ga. 534, 21 S. E. 157; Philibert *v.* Wood, 2 Mart. (La.) 204; Moran *v.* Green, 21 N. J. L. 562; Bascom *v.* Bascom, Wright (Ohio) 632.

80. *Illinois.*— Gage *v.* Brown, 125 Ill. 522, 17 N. E. 754.

New Jersey.— Moran *v.* Green, 21 N. J. L. 562.

North Carolina.— Ward *v.* Ely, 12 N. C. 372.

South Carolina.— Travers *v.* Jennings, 39 S. C. 410, 17 S. E. 849.

United States.— *In re* Thomas, 35 Fed. 337; Shankwiker *v.* Reading, 21 Fed. Cas. No. 12,704, 4 McLean 240.

See 16 Cent. Dig. tit. "Depositions," § 198.

Where there are two commissioners the seals of both should appear. Waln *v.* Freedland, 2 Miles (Pa.) 161.

Sufficiency of sealing.— Securing the flap of the envelope with gum is a sufficient sealing. Morgan *v.* Jones, 44 Conn. 225; Van Sickle *v.* Gibson, 40 Mich. 170.

The seal of an express company may be used by the commissioners when they write their names across it. *In re* Thomas, 35 Fed. 337.

Presumption as to seal.— Where the envelope is properly directed and sealed up it will be presumed that the seal is that of the commissioner who took the deposition. Doe *v.* Hughes, 18 N. Brunsw. 296.

Evidence of sealing.— It is sufficient evidence that the deposition was sealed up by the magistrate if the envelope is sealed and the name of the magistrate is written across the seal, although he certify only that he "intended" to seal it up. Thorp *v.* Orr, 23 Fed. Cas. No. 14,006, 2 Cranch C. C. 335.

Failure to seal.— A deposition will not be rejected because not inclosed in a sealed envelope, where the magistrate who took it properly certifies and identifies it. Cowell *v.* State, 16 Tex. App. 57.

Non-compliance with rule.— The failure to inclose the papers in a packet bound with tape, and sealed at the crossings of the tape, as required by chancery rule 52, §§ 5, 6, is a mere irregularity, which will be deemed immaterial, in the absence of any suspicion that the deposition has been tampered with, or that wrong has been done. Chadwick *v.* Chadwick, 59 Mich. 87, 26 N. W. 288.

Commissioner clerk of the court.— It is not a good objection that a deposition taken by a commissioner who is also clerk of the court was not sealed up. Nelson *v.* Woodruff, 1 Black (U. S.) 156, 17 L. ed. 97.

Necessity of certificate.— The officer need not certify that he closed and directed the return. Moran *v.* Green, 21 N. J. L. 562.

81. Hutson *v.* Hutson, 9 Lea (Tenn.) 354.

82. Gage *v.* Brown, 125 Ill. 522, 17 N. E. 754, where the depositions were pinned together, and the pins had evidently been removed one or more times.

Use of wafers.— It is sufficient to connect the papers by wafers. Gordon *v.* Nelson, 16 La. 321; Williams *v.* Eldridge, 1 Hill (N. Y.) 249.

83. Parker *v.* Brashaer, 16 La. 69; Downs *v.* Hawley, 112 Mass. 237; Savage *v.* Birckhead, 20 Pick. (Mass.) 167; Kingston *v.* Lesley, 10 Serg. & R. (Pa.) 383.

Answers not attached to commission.— Answers to interrogatories, so designated, will be received, although not attached to the commission, if they are returned with it in the same package, indorsed as the depositions of the persons whose testimony was to be taken. Texas, etc., R. Co. *v.* Walker, (Tex. Civ. App. 1901) 60 S. W. 796.

84. Babb *v.* Aldrich, 45 Kan. 218, 25 Pac. 558.

The caption need not appear on the wrapper inclosing the deposition, but may be on a separate paper. Nye *v.* Spalding, 11 Vt. 501.

Inclosing indorsed envelope.— An envelope properly indorsed may be returned in an envelope merely containing the direction. Evans *v.* Reynolds, 32 Ohio St. 163; Barber *v.* Geer, (Tex. Civ. App. 1901) 63 S. W. 1007.

Indorsed envelope furnished by attorney.— The officer may use an envelope prepared by the attorneys and in doing so he adopts the indorsements and superscription. Missouri, etc., R. Co. *v.* St. Clair, 21 Tex. Civ. App. 345, 51 S. W. 666.

2. TITLE OF CAUSE — NAMES OF PARTIES. When so required the names of the parties or title of the cause should be properly indorsed,[85] but it will be sufficient if they substantially appear, although informally,[86] and omissions in this respect may in the discretion of the court be supplied by the officer.[87] However, such an indorsement is unnecessary if not required by statute,[88] or where the statute is merely directory.[89]

3. NAMES OF WITNESSES. The indorsement of the names of the witnesses is a mere matter of practice, and convenience and errors therein or even its omission may be disregarded especially where the witnesses are properly designated in the papers returned.[90]

4. NAME OF OFFICER. A substantial compliance with provisions that the officer or commissioner shall indorse his name on the envelope or wrapper or write it across the seal thereon is necessary.[91] However, where there is no suspicion of unfairness, if the name of the commissioner is written on the envelope, although not across the seals, it will be sufficient.[92]

5. ADDRESS OR DIRECTION. Regularly the return should be addressed or directed in accordance with the instructions to the court in which the deposition is to be used, or to the clerk thereof;[93] but a misdirection will not require the exclusion of

85. Pelzer Mfg. Co. *v.* Sun Fire Office, 36 S. C. 213, 15 S. E. 562.

86. Indiana, etc., R. Co. *v.* Wilson, 77 Ill. App. 603; St. Louis, etc., R. Co. *v.* French, 56 Kan. 584, 44 Pac. 12; Whittaker *v.* Voorhees, 38 Kan. 71, 15 Pac. 874; Field *v.* Tenney, 47 N. H. 513; Knoxville F. Ins. Co. *v.* Hird, 4 Tex. Civ. App. 82, 23 S. W. 393.

The indorsement of the firm-name of a party is sufficient. Forsyth *v.* Baxter, 3 Ill. 9.

87. Marsalis *v.* Texas Cactus Hedge Co., 2 Tex. Unrep. Cas. 292.

88. Wise *v.* Collins, 121 Cal. 147, 53 Pac. 640.

89. Cole *v.* Choteau, 18 Ill. 439.

90. Henderson *v.* Williams, 57 S. C. 1, 35 S. E. 261; Nye *v.* Spalding, 11 Vt. 501.

An error in the initials of the witness is immaterial where the indorsement is extra-official. Wise *v.* Collins, 121 Cal. 147, 53 Pac. 640.

Identification by reference to commission and certificate.—An indorsement that the envelope contains the depositions of "S. *et al.* witnesses" is sufficient, where they may be identified by reference to the commission and certificate. Gulf, etc., R. Co. *v.* Lyman, (Tex. Civ. App. 1901) 65 S. W. 69.

The officer may supply the omission by permission of the court. Marsalis *v.* Texas Cactus Hedge Co., 2 Tex. Unrep. Cas. 292.

91. *Georgia.*— Smith *v.* Moody, 94 Ga. 534, 21 S. E. 157.

New York.— Brown *v.* Southworth, 9 Paige 351.

Pennsylvania.— Waln *v.* Freedland, 2 Miles 161.

South Carolina.— Travers *v.* Jennings, 39 S. C. 410, 17 S. E. 849.

United States.— *In re* Thomas, 35 Fed. 337.

Indorsement by magistrate to whom delivered.— Where an inclosed return which has not been indorsed is delivered to the magistrate in open court, he may as authorized by statute indorse thereon the name of the person from whom it is received and the time of its reception. Keys *v.* Flemister, 111 Ga. 874, 36 S. E. 948.

Indorsement on inner envelope.— If the officer's name is written across the seals of the envelope inclosing the return, it will be sufficient, although the outside envelope in which that envelope and its contents are inclosed is not so indorsed. Barber *v.* Geer, (Tex. Civ. App. 1901) 63 S. W. 934.

Where there are several commissioners, each should indorse his name on the envelope (Brown *v.* Southworth, 9 Paige (N. Y.) 351; Waln *v.* Freedland, 2 Miles (Pa.) 161), although a deposition undoubtedly genuine may be read, where but one commissioner signs (Brown *v.* Southworth, 9 Paige (N. Y.) 351).

92. Park *v.* Bancroft, 12 Ala. 468; McKenzie *v.* Barnes, 12 Rich. (S. C.) 205, where the names of the commissioners appeared on one side of the envelope and the seals on the other.

93. Clarke *v.* Benford, 22 Pa. St. 353.

The form of the direction is immaterial, if the package reaches its destination, and the manner of the return is provided for by a stipulation which has been complied with. Williams *v.* Eldridge, 1 Hill (N. Y.) 249.

Address to the court.— Depositions sealed up and indorsed "in the supreme court," with the title of the cause, the date and the commissioner's name, are sufficiently addressed to the court. Waterhouse *v.* New Brunswick Mar. Assur. Co., 5 N. Brunsw. 639.

Delivery to clerk.— It is no objection to a commission returned by stipulation to one of the counsel, and by him delivered to the clerk of the court, that the clerk's residence was not indorsed on the commission pursuant to statute. Williams *v.* Eldridge, 1 Hill (N. Y.) 249.

Necessity of certificate.—The commissioner need not certify that he directed the return. Moran *v.* Green, 21 N. J. L. 562.

the deposition where the return has reached the proper officer or tribunal, and no prejudice has or will result.[94]

G. Exhibits. Exhibits admitted in evidence or refused admission should be returned,[95] attached to or inclosed with the commission or deposition,[96] and properly identified.[97]

H. Transmission or Delivery — 1. In General. In some jurisdictions after depositions are taken the officer must retain them in his possession until they are delivered or transmitted by him;[98] and requirements of this character or requirements or instructions as to the transmission of the deposition must as a rule be strictly complied with.[99] But irregularities in transmission may be

94. *Connecticut.*— Scripture *v.* Newcomb, 16 Conn. 588; Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168.

Georgia.—Louisville, etc., R. Co. *v.* Chaffin, 84 Ga. 519, 11 S. E. 891.

Michigan.— Locke *v.* Tuttle, 41 Mich. 407, 1 N. W. 1039.

Pennsylvania.— Clarke *v.* Benford, 22 Pa. St. 353; New York State Bank *v.* Western Bank, 2 Miles 16.

Texas.— Eakin *v.* Morris, 1 Tex. App. Civ. Cas. § 883.

United States.— Frevall *v.* Bache, 9 Fed. Cas. No. 5,113, 5 Cranch C. C. 463; Thorpe *v.* Orr, 23 Fed. Cas. No. 14,006, 2 Cranch C. C. 335.

See 16 Cent. Dig. tit. "Depositions," § 199.

95. Edelman *v.* Byers, 75 Ill. 367.

The Missouri statute requiring exhibits proved or referred to to be inclosed, sealed up, and directed to the clerk is mandatory. Crane Co. *v.* Neel, (Mo. App. 1903) 77 S. W. 766.

A copy of a receipt, the original of which was produced for examination, should be inclosed with the commission. Hauenstein *v.* Gillespie, 73 Miss. 742, 19 So. 673, 55 Am. St. Rep. 569.

Failure to return.— If there is clear evidence to identify papers as those referred to in the depositions taken by the commissioners they may be received in evidence, although not returned with the depositions. Thompson *v.* Reed, 10 N. Brunsw. 7.

96. Edelman *v.* Byers, 75 Ill. 367; Thompson *v.* Reed, 10 N. Brunsw. 7.

Originals or copies.— There may be exceptions where the document cannot by law be removed from its place of custody; in such case an office copy or an examined copy should be returned with the commission. Thompson *v.* Reed, 10 N. Brunsw. 7.

Exhibits which are properly identified may be used, although not attached to the deposition. Black *v.* Webber, (Nebr. 1901) 96 N. W. 606; Lawton *v.* Tarratt, 9 N. Brunsw. 1.

Withdrawing deposition to attach exhibit. —A deposition may be withdrawn before trial for the purpose of attaching an exhibit which was not returned under seal. Crane Co. *v.* Neel, (Mo. App. 1903) 77 S. W. 766.

97. It will be presumed that a commission is in the same state in which it came from the commissioners, and that the exhibits inclosed are those referred to in the depositions. Lawton *v.* Tarratt, 9 N. Brunsw. 1.

Necessity of certificate of annexation.— When the execution of notes is proved by a commission, it is not essential, the notes being otherwise clearly described and identified, that the commissioners should distinctly certify in their return that the notes produced on the examination and sworn to by the witnesses were annexed to and returned with the commission. Brumskill *v.* James, 11 N. Y. 294.

The mere proof of the handwriting of one of the commissioners upon a paper purporting to have been referred to in the depositions is not sufficient evidence of identity. Thompson *v.* Reed, 10 N. Brunsw. 7.

98. Jones *v.* Neale, 13 Fed. Cas. No. 7,483, 1 Hughes 268; Shankwiker *v.* Reading, 21 Fed. Cas. No. 12,704, 4 McLean 240.

Presumption.— It will be presumed that commissioners have done their duty in keeping depositions until they were forwarded, unless the contrary appears. Glover *v.* Millings, 2 Stew. & P. (Ala.) 28.

Immediate transmission.— Unless so required a deposition need not be immediately transmitted. Ukiah Bank *v.* Mohr, 130 Cal. 268, 62 Pac. 511.

Return by mail or express.— Retention need not be shown where the return is made by mail or express under the seal of the officer. Bulwinkle *v.* Cramer, 30 S. C. 153, 8 S. E. 689; Stewart *v.* Townsend, 41 Fed. 121.

99. Dwinelle *v.* Howland, 1 Abb. Pr. (N. Y.) 87; Richardson *v.* Gere, 21 Wend. (N. Y.) 156; Jones *v.* Neale, 13 Fed. Cas. No. 7,483, 1 Hughes 268; Shankwiker *v.* Reading, 21 Fed. Cas. No. 12,704, 4 McLean 240.

A substantial compliance with the statute will be sufficient. Garner *v.* Cleveland, 35 Tex. 74.

To clerk of court in which action is pending.— A statute requiring delivery or transmission by the officer to the clerk of the court in which the action is pending is complied with by transmission to the clerk of the court in which the action originated, and delivery by him to the clerk of the court in which the trial was ordered. Waterman *v.* Chicago, etc., R. Co., 82 Wis. 613, 52 N. W. 247.

Time of return.— Where a party is likely to be prejudiced from the late return of a deposition, the proper practice is to interpose a motion for continuance over the term, or

waived;[1] and if the return is erroneously transmitted to a party or counsel if no prejudice has resulted the irregularity may be disregarded.[2]

2. PERSONAL DELIVERY — a. By Officer. The return may be delivered by the officer before whom the deposition was taken.[3]

b. By Party. While it has been held that a return delivered by the party on whose behalf the deposition was taken, or by his attorney is irregular and improper,[4] it has also been held that a return delivered under such circumstances is not objectionable, if it is in the condition in which it left the hands of the commissioner or officer, and due proof of that fact is made.[5]

c. By Special Messenger. The return may be delivered by a private person or a special messenger who received it from the commissioner for that purpose.[6]

3. MAILING — a. In General. The most usual and convenient mode of transmitting the return is by mailing it properly directed, and this mode may be resorted to unless other methods are specifically required.[7]

b. Proof of. In some jurisdictions by statute proof of transmission by mail must appear by the certificate or receipt of the postmaster at the place of mail-

for delay until preparation for trial can be made. Marsh *v.* French, 82 Ill. App. 76.

Day set for trial.— A deposition will not be suppressed because not returned until the day set for trial. Marsh *v.* French, 82 Ill. App. 76.

Presumption of regularity.— It will be presumed that commissioners performed their duty in forwarding depositions. Glover *v.* Millings. 2 Stew. & P. (Ala.) 28.

Proof.—The reception of a commission executed abroad must be proved by affidavit. Bourdillon *v.* Alleyne, 4 Bro. Ch. 100, 29 Eng. Reprint 799.

Depositions taken after a premature return may be added thereto, and annexed to the commission. Irving *v.* Viana, I Y. & J. 416.

Where the depositions are returned without the commission, it having been carried off by the commissioners of one party, a subpœna duces tecum may issue to them for its return. Anonymous, Pr. Reg. 126.

1. Opening the package by agreement of the parties is a waiver of irregularities in transmission. Killian *v.* Augusta, etc., R. Co., 78 Ga. 749, 3 S. E. 621.

2. Kennedy *v.* Kennedy, 1 Hog. 311.

A return received by one of the parties, submitted to and examined by the attorney for the other and then filed will not be excluded. Clarke *v.* Benford, 22 Pa. St. 353.

A return improperly received by counsel may be directed to be filed. New York State Bank *v.* Western Bank, 2 Miles (Pa.) 16.

3. Hutson *v.* Hutson, 9 Lea (Tenn.) 354; Andrews *v.* Parker, 48 Tex. 94; Jones *v.* Neale, 13 Fed. Cas. No. 7,483, 1 Hughes 268; Shankwiker *v.* Reading, 21 Fed. Cas. No. 12,704, 4 McLean 240; 3 Blackstone Comm. 447.

Statutory requirement of mailing or delivery by messenger.— Personal delivery by the officer is good, although the statute directs transmission by mail or special messenger. Andrews *v.* Parker, 48 Tex. 94.

4. Breeding *v.* Stamper, 18 B. Mon. (Ky.) 175; Sayre *v.* Sayre, 14 N. J. L. 487.

Retention by attorney.— Depositions delivered to the attorneys and kept by them until the trial, and then presented unsealed, etc., are irregular and not admissible. Louisville, etc., R. Co. *v.* Heilprin, 95 Ill. App. 402.

5. Logan *v.* Hodges, 7 Ala. 66; Veach *v.* Bailiff, 5 Harr. (Del.) 379; Dwinelle *v.* Howland, 1 Abb. Pr. (N. Y.) 87; Homer *v.* Martin, 6 Cow. (N. Y.) 156; Doty *v.* Strong, 1 Pinn. (Wis.) 313, 40 Am. Dec. 773.

6. Dill *v.* Camp, 22 Ala. 249, holding that it is not incumbent on the party offering the deposition to prove that the messenger was disinterested.

A third person by whom the return was received from the person to whom it was delivered by the officer is not a competent messenger. Sayre *v.* Sayre, 14 N. J. L. 487.

Under the former English practice, where depositions were taken in the country, the answer was sealed up and taken to the court by one of the commissioners, or was sent by a messenger who swore he received it from one of the commissioners, and that it had not been opened nor altered since he received it. 3 Blackstone Comm. 447.

Proof of unchanged condition.— Where the return is intrusted for delivery to an express company, compliance with a statute requiring that the agent to whom the return is delivered by the commissioner must show that it had not been opened nor altered since its receipt is indispensable. Dwinelle *v.* Howland, 1 Abb. Pr. (N. Y.) 87.

7. Crawford *v.* Loper, 25 Barb. (N. Y.) 449; Brown *v.* Southworth, 9 Paige (N. Y.) 351; Bulwinkle *v.* Cramer, 30 S. C. 153, 8 S. E. 689; Waton *v.* Bostwick, 2 Bay (S. C.) 312; Garner *v.* Cleveland, 35 Tex. 74; U. S. *v.* Fifty Boxes, etc., of Lace, 92 Fed. 601; Egbert *v.* Citizens' Ins. Co., 7 Fed. 47, 2 McCrary 386.

Substantial compliance with a directory statute prescribing the mode in which the return may be transmitted by mail will be sufficient. Garner *v.* Cleveland, 35 Tex. 74.

Indirect mailing.— It is immaterial that foreign depositions, directed to be addressed to the clerk and returned by mail, were forwarded through the embassy bag by mail to Washington, and thence to the clerk, to

ing,[8] and by an indorsement of the fact of its reception at the point of its destination by the postmaster there,[9] otherwise the deposition cannot be read. Notwithstanding such statutes[10] the commissioner may prove the fact of mailing himself,[11] or where the commission has been executed abroad,[12] the course pursued may be shown by extrinsic proof.[13]

c. Presumptions. Where the depositions are received by mail, and there is no evidence of irregularity, it will be presumed that the commissioner or officer duly deposited them in the proper post-office, although no indorsement or certificate to that effect appears.[14]

I. Filing or Recording[15]— **1. Necessity.** Depositions when taken and completed should be returned to the court in which they are to be used, placed on its files, or recorded as required by law;[16] and neither the commissioners nor the par-

whom they were properly addressed, instead of being forwarded direct. U. S. *v.* Fifty Boxes, etc., of Lace, 92 Fed. 601.

8. Babcock *v.* Huntington, 9 Ala. 869; Findlay *v.* Mineralized Rubber Co., 98 Ga. 275, 25 S. E. 456; Laird *v.* Ivens, 45 Tex. 621; Greenwood *v.* Woodward, 18 Tex. 1; Anderson *v.* Rogge, (Tex. Civ. App. 1894) 28 S. W. 106; Central, etc., R. Co. *v.* Hancock, 2 Tex. Unrep. Cas. 301.

Identification of postmaster.—The addition to the name of the party who receipts for the return of the initials P. M. sufficiently indicate that he is the postmaster. Central, etc., R. Co. *v.* Hancock, 2 Tex. Unrep. Cas. 301.

Receipt by postal clerk.— A postmaster's clerk with whom a return is deposited may certify its receipt. Greenwood *v.* Woodward, 18 Tex. 1.

Postmark.— The office at which the depositions were mailed may be shown by the postmark. Anderson *v.* Rogge, (Tex. Civ. App. 1894) 28 S. W. 106; Central, etc., R. Co. *v.* Hancock, 2 Tex. Unrep. Cas. 301.

9. Findlay *v.* Mineralized Rubber Co., 98 Ga. 275, 25 S. E. 456; Killian *v.* Augusta, etc., R. Co., 78 Ga. 749, 3 S. E. 621.

Postmark.— The arrival in due course of the mail is shown by the postmark of the receiving office, and by the receipt of the clerk to the mail carrier. Killian *v.* Augusta, etc., R. Co., 78 Ga. 749, 3 S. E. 621.

Receipt by deputy clerk.— That a deputy clerk instead of the clerk himself received the returns from the postmaster is no cause for suppressing it. Louisville, etc., R. Co. *v.* Chaffin, 84 Ga. 519, 11 S. E. 891.

If the package reaches its destination intact it is *prima facie* evidence that it was fairly transmitted. Babcock *v.* Huntington, 9 Ala. 869.

10. Winston *v.* Miller, 1 Stew. (Ala.) 508.

11. The certificate of a notary that the depositions were retained by him until they were placed in the post-office properly addressed, and that he personally plaeed them in the post-office is sufficient, and it makes no difference whether he prepared the certificate before or after placing the depositions in the envelope. Riser *v.* Southern R. Co., (S. C. 1903) 46 S. E. 47.

12. A deposition taken beyond the limits of the United States is sufficiently verified *prima facie* by the certificate of the commissioner that he placed it on board a vessel, naming it, destined to a port of the United States, or in some post-office, to be sent by mail to some place in the United States, if the deposition afterward come to hand postmarked accordingly. Innerarity *v.* Mims, 1 Ala. 660.

13. Innerarity *v.* Mims, 1 Ala. 660.

14. Hall *v.* Barton, 25 Barb. (N. Y.) 274; Waton *v.* Bostwick, 2 Bay (S. C.) 312. See Egbert *v.* Citizens' Ins. Co., 7 Fed. 47, 2 McCrary 386.

Certificate of mailing.— The commissioner need not certify that the return was deposited in the post-office indicated by the directions forwarded with the commission. Brumskill *v.* James, 11 N. Y. 294.

15. **Form of motion** requiring clerk to file deposition see California *v.* Southern Pac. Co., 153 U. S. 239, 14 S. Ct. 1138, 38 L. ed. 702.

Form of order for filing return see New York State Bank *v.* Western Bank, 2 Miles (Pa.) 16.

16. *Kentucky.*— White *v.* Moyers, 31 S. W. 280, 17 Ky. L. Rep. 402.

Maine.— Witzler *v.* Collins, 70 Me. 290, 35 Am. Rep. 327; Folan *v.* Lary, 65 Me. 11; Webster *v.* Calden, 55 Me. 165; Winslow *v.* Mosher, 19 Me. 151.

Massachusetts.— Simpson *v.* Dix, 131 Mass. 179; Bradstreet *v.* Baldwin, 11 Mass. 229.

New Jersey.—Emmett *v.* Briggs, 21 N. J. L. 53.

New York.— Jackson *v.* Hobby, 20 Johns. 357.

Ohio.— Myers *v.* Anderson, Wright 513.

Pennsylvania.— Lour *v.* Vandermark, 4 Kulp 425; Smith *v.* Austin, 4 Brewst. 89.

Tennessee.—Maultsby *v.* Carty, 11 Humphr. 361.

United States.— Grand Haven First Nat. Bank *v.* Forest, 44 Fed. 246; Gould *v.* Gould, 10 Fed. Cas. No. 5,637, 3 Story 516.

See 16 Cent. Dig. tit. "Depositions," § 203.

Depositions used in argument before the court become part of the case and must be filed. Rogers *v.* Gilmore, 13 Wkly. Notes Cas. (Pa.) 193.

Presumption as to shorthand notes.—If the record does not show affirmatively that the shorthand reporters' original notes were not filed with the transcript, it will be presumed in favor of the judgment that they were. People *v.* Grundell, 75 Cal. 301, 17 Pac. 214.

ties have the right to retain them.[17] If they are improperly retained, the party having them in possession may be compelled to produce, file, or record them.[18] Under some circumstances, however, the failure to file a deposition will not render it inadmissible, as where its filing is not required by rule or statute,[19] or the failure to file it was due to the inadvertence of the judge by whom it was received, or the neglect of the clerk with whom it was deposited.[20] And in a proper case a rule of court requiring depositions to be filed may be relaxed or disregarded.[21]

2. TIME OF. The depositions must be filed or recorded within the time prescribed by statute or rule,[22] or if no time is prescribed they must be filed a reason-

Failure to file — Death of witness.— The right to use a deposition in the lifetime of the witness which is lost by the failure to file it is not revived by his death. Folan *v.* Lary, 65 Me. 11.

If papers referred to in depositions in perpetuam are not recorded, those parts of the depositions which refer to the papers will be rejected, and the papers themselves received as independent evidence. Myers *v.* Anderson, Wright (Ohio) 513.

17. Howe *v.* Mutual Reserve Fund L. Assoc., 115 Iowa 285, 88 N. W. 338; Simpson *v.* Dix, 131 Mass. 179; Shankwiker *v.* Reading, 21 Fed. Cas. No. 12,704, 4 McLean 240. See Rambler *v.* Tryon, 7 Serg. & R. (Pa.) 90, 10 Am. Dec. 444.

18. Carr *v.* Adams, 70 N. H. 622, 45 Atl. 1084; Bennett *v.* Williams, 57 Pa. St. 404; New York State Bank *v.* Western Bank, 2 Miles (Pa.) 16; Lour *v.* Vandermark, 4 Kulp (Pa.) 425; Johnston *v.* Pennsylvania R. Co., 5 Wkly. Notes Cas. (Pa.) 360; Vanarsdalen *v.* Dickerson, 2 Wkly. Notes Cas. (Pa.) 111; Martin *v.* Dearie, 9 Phila. (Pa.) 186.

Right to require filing.— Where a will contest has been compromised and depositions taken therein are left by consent with counsel, their filing will not be ordered at the instance of a party who accepted the benefits, but took no part in the contest. Pepper's Estate, 3 Pa. Dist. 175, 34 Wkly. Notes Cas. (Pa.) 65.

Production on trial.— A party who has taken a deposition which the law does not require to be filed in court is not obliged to produce it at the request of the other party on the trial, notwithstanding the opposite party appeared when it was taken and cross-examined the deponent, and although it has been filed with the clerk of the court by the party taking it. Wait *v.* Brewster, 31 Vt. 516.

A party who has taken depositions by consent will not be compelled to produce them at the instance of the other party where the consent does not appear of record. Moore *v.* Dulany, 17 Fed. Cas. No. 9,758, 1 Cranch C. C. 341.

Costs.—On granting an application to compel a party on whose behalf depositions were taken to file them, the moving party may be required to pay the costs of taking (Martin *v.* Dearie, 9 Phila. (Pa.) 186), unless where original papers desired by the applicant have been attached to the depositions (Johnston *v.* Pennsylvania R. Co., 5 Wkly. Notes Cas. (Pa.) 360).

19. Emmett *v.* Briggs, 21 N. J. L. 53; Ladd *v.* Lord, 36 Vt. 194; Skinner *v.* Tucker, 22 Vt. 78; Wainwright *v.* Webster, 11 Vt. 576, 34 Am. Dec. 707.

Stipulation.— A deposition taken under an agreement that it might be read in the event of the death of the witness may be so read, although not filed. Sehroeder *v.* Frey, 60 Hun (N. Y.) 58, 14 N. Y. Suppl. 71 [*affirming* 12 N. Y. Suppl. 625].

20. Moran *v.* Green, 21 N. J. L. 562.

Neglect of clerk.— Where depositions have been regularly taken and delivered to the clerk in proper time to be filed, and it is discovered after the case has been opened that the depositions have not been filed, although in the clerk's office, they may be read. Cravens *v.* Harrison, 3 Litt. (Ky.) 92. Where the clerk has neglected to file a deposition, the party offering it may prove the return of the commission executed to the clerk of the court from whence it is sued, and its transmission by the latter to the clerk of the court in which the action was then pending. Gee *v.* Bolton, 17 Wis. 604.

21. Phelps *v.* Hunt, 40 Conn. 97.

Depositions in another cause.— The rule requiring depositions taken in another cause to be filed before they are read may be dispensed with when the ends of justice require it. Cabanne *v.* Walker, 31 Mo. 274.

22. *Kentucky.*— White *v.* Moyers, 31 S. W. 280, 17 Ky. L. Rep. 402.

Maine.— Witzler *v.* Collins, 70 Me. 290, 35 Am. Rep. 327.

Massachusetts.— Simpson *v.* Dix, 131 Mass. 179; Bradstreet *v.* Baldwin, 11 Mass. 229; Braintree *v.* Hingham, 1 Pick. 245.

New York.— Faith *v.* Ulster, etc., R. Co., 70 N. Y. App. Div. 303, 75 N. Y. Suppl. 420, 10 N. Y. Annot. Cas. 449.

Pennsylvania.— Shoemaker *v.* Stiles, 102 Pa. St. 549; Ulrich *v.* Getz, 2 Lanc. L. Rev. 137. See Rambler *v.* Tryon, 7 Serg. & R. 90, 10 Am. Dec. 444.

Tennessee.—Maultsby *v.* Carty, 11 Humphr. 361.

Texas.— Evans *v.* Hardgrove, 11 Tex. 210.

See 16 Cent. Dig. tit. "Depositions," § 204.

Directory statute.—If the statute prescribing the time of filing is merely directory it will be sufficient if the deposition is filed within a reasonable time. People *v.* Grundell, 75 Cal. 301, 17 Pac. 214.

able time before they are to be used.[23] However, where the failure to file depositions within the time prescribed is due to inadvertence, accident, or mistake of the officer or the party the court may direct them to be filed[24] *nunc pro tunc*,[25] or may permit the deposition to be read.[26]

3. INDORSEMENT OR FILE-MARK. The absence of an indorsement or file-mark will not preclude the reading of a deposition, where it sufficiently appears or is shown that it was filed in fact.[27]

4. NOTICE OF. Where so required notice of the filing of a deposition should be duly given,[28] although it is held that the only effect of the omission is to per-

Repeal of statute.— That a deposition was not filed within the time prescribed by a statute in force at the time of taking, but repealed before the trial, is no ground for its rejection. Armstrong *v.* Griswold, 28 Vt. 376.

Abolition of term to which deposition returnable.— Where depositions when taken were to be returned to a term which was afterward abolished, and its business transferred to a subsequent term, they may be opened and filed at such subsequent term. Palmer *v.* Fogg, 35 Me. 368, 58 Am. Dec. 708.

In Vermont under a statute requiring a deposition to be filed thirty days previous to the session of the court in which it is to be offered, it need not be filed thirty days before the next session after it is taken when a term intervenes between the times of taking and of using the testimony (Clark *v.* Brown, 15 Vt. 658), and an *ex parte* deposition filed less than thirty days before the term may be used at the next term (Smith *v.* Woods, 3 Vt. 485).

Ex parte depositions are not required to be filed thirty days before the hearing, as in the case of trials in the county court. Churchill *v.* Briggs, 24 Vt. 498; Brigham *v.* Abbott, 21 Vt. 455.

Computation of time.— A provision that "every deposition intended to be read in evidence on the trial must be filed at least one day before the day of trial" requires that one entire day shall elapse between the day of filing and the day of trial. Garvin *v.* Jennerson, 20 Kan. 371. A requirement of filing within sixty days after taking is complied with by filing the deposition on the sixtieth day. Myers *v.* Anderson, Wright (Ohio) 513.

Excusing failure to file.— The trial court may permit an explanation as to why the deposition was not filed in time. Faith *v.* Ulster, etc., R. Co., 70 N. Y. App. Div. 303, 75 N. Y. Suppl. 420, 10 N. Y. Annot. Cas. 449.

Effect of denying motion to record.— Where a motion to have a deposition *in perpetuam* recorded after the prescribed time is denied, it has no validity and a subsequent recording without authority will not render it admissible. Simpson *v.* Dix, 131 Mass. 179.

Right of adverse party to continuance.— If not filed one day previous to the day the cause is set for trial the adverse party is entitled to a continuance. Dare *v.* McNutt, 1 Ind. 148, Smith (Ind.) 30.

23. Morgan *v.* Jones, 44 Conn. 225; Livingston *v.* Pratt, 15 Fed. Cas. No. 8,417, Brown Adm. 66.

What constitutes a reasonable time depends on the attendant circumstances. Morgan *v.* Jones, 44 Conn. 225, where a deposition retained for ten months by a foreign commissioner and sent to the clerk on the day the trial began was admitted, it appearing that the deposition was intact and that no one was prejudiced by the delay.

Depositions filed after a continuance taken because of their absence from the files may be read under a rule requiring filing within a reasonable time. Ankrim *v.* Sturges, 9 Pa. St. 275.

Second day of term.— A deposition may be filed on the second day of the term, although taken several months before. Doty *v.* Strong, 1 Pinn. (Wis.) 313, 40 Am. Dec. 773.

Jury impaneled.— It is too late to file depositions after the jury has been impaneled. Kentucky Union Co. *v.* Lovely, 110 Ky. 295, 61 S. W. 272, 22 Ky. L. Rep. 1742.

Testimony closed.— Depositions taken by plaintiff may be filed after the testimony for defendant has been closed. Gulf, etc., R. Co. *v.* Bell, 24 Tex. Civ. App. 579, 58 S. W. 614.

The receipt or filing of the deposition may be shown by the certificate of the justice who received it (Hildreth *v.* Overseers of Poor, 13 N. J. L. 5) or the clerk with whom it was filed (Rodn *v.* Hapgood, 8 Gray (Mass.) 394).

24. Corcoran *v.* Batchelder, 147 Mass. 541, 18 N. E. 420.

25. Israel *v.* Israel, 46 N. Y. App. Div. 89, 61 N. Y. Suppl. 328; Burdell *v.* Burdell, 1 Duer (N. Y.) 625; New York State Bank *v.* Western Bank, 2 Miles (Pa.) 16.

26. Smith *v.* Cokefair, 8 Pa. Co. Ct. 45.

27. *Kentucky.*— Burns *v.* Ingersoll, 6 Ky. L. Rep. 737.

New Jersey.— Moran *v.* Green, 21 N. J. L. 562.

North Carolina.— Hill *v.* Bell, 61 N. C. 122, 93 Am. Dec. 583.

Pennsylvania.— Summers *v.* Wallace, 9 Watts 161; *In re* Carpenter, 1 Lack. Leg. N. 159.

Tennessee.— Wisener *v.* Maupin, 2 Baxt. 342.

See 16 Cent. Dig. tit. "Depositions," § 205.

Date of receipt.— An indorsement of the receipt of the deposition and the date of its reception is a sufficient substitute for a file-mark. Hogendobler *v.* Lyon, 12 Kan. 276; Stone *v.* Crow, 2 S. D. 525, 51 N. W. 335.

28. Ewing *v.* Alcorn, 40 Pa. St. 492.

Neglect of clerk.— Where the parties are without fault, the neglect of the clerk to give notice will not deprive them of the right to

mit the adverse party to make such objections at the trial as he could have made on a motion to suppress.[29]

5. Withdrawal From Files. Ordinarily after a deposition has been filed with the clerk it should remain in his custody, except when taken from the files for use at the trial;[30] and its removal for any other purpose or its possession by a party or his counsel after removal will ordinarily necessitate its rejection,[31] or the court may compel the party in possession of the deposition to return it to the files,[32] and punish him as for a contempt if he fails to do so.[33] However this general rule will not affect the right to withdraw a deposition from the files temporarily by permission of the clerk for necessary purposes as inspection or to make copies,[34] or the depositions or accompanying papers may be permitted to be taken from the files for amendment or correction.[35]

XIX. Proceedings After Return.

A. Opening — 1. Who May Open. Depositions must be opened by the court or its clerk or other duly authorized officer acting on its behalf.[36]

have the deposition read. Gee *v.* Bolton, 17 Wis. 604; Carlyle *v.* Plumer, 11 Wis. 96.

29. Knight *v.* Emmons, 4 Mich. 554; Osgood *v.* Sutherland, 36 Minn. 243, 31 N. W. 211; Tancre *v.* Reynolds, 35 Minn. 476, 29 N. W. 171.

Objections untenable.— The failure to give notice is not material, where objections to the deposition would not have availed, had exceptions been taken within the time prescribed. Hagey *v.* Detweiler, 35 Pa. St. 409.

30. To "remain on record."—Although the statute prescribes that a deposition must be filed in the clerk's office, there to remain "on record," it may be removed therefrom to be used in the case. Moran *v.* Green, 21 N. J. L. 562.

Refiling.— Depositions withdrawn to be read on the trial must be refiled. Peycke *v.* Shinn, (Nebr. 1903) 94 N. W. 135.

31. Collins *v.* Schaffer, 78 Hun (N. Y.) 512, 29 N. Y. Suppl. 574; Ross *v.* Barker, 5 Watts (Pa.) 391. See *contra*, Langsdale *v.* Woollen, 99 Ind. 575.

Death of witness.— A deposition inadmissible in the lifetime of the witness because taken from the files may be used after his death. Maine Stage Co. *v.* Longley, 14 Me. 444.

Second trial.— Where a deposition may be used in a second trial whether filed or not, it is immaterial that it was withdrawn from the files for use on the first trial, was not used, and was never restored to the files. Bartlett *v.* Hoyt, 33 N. H. 151.

32. Barker *v.* Wilford, Kirby (Conn.) 232; Howes *v.* Mutual Reserve Fund L. Assoc., 115 Iowa 285, 88 N. W. 338.

33. Barker *v.* Wilford, Kirby (Conn.) 232.

34. Harris' Appeal, 58 Conn. 492, 20 Atl. 617; Hogaboom *v.* Price, 53 Iowa 703, 6 N. W. 43; Dailey *v.* Green, 15 Pa. St. 118.

35. They may be withdrawn for the purpose of attaching an exhibit (Crane Co. *v.* Neel, (Mo. App. 1903) 77 S. W. 766); supplying formal requisites (Wallace *v.* Byers, 14 Tex. Civ. App. 574, 38 S. W. 228); amending the certificate (Leatherberry *v.* Radcliffe, 15 Fed. Cas. No. 8,163, 5 Cranch C. C. 550); supplying a seal (Hale *v.* Matthews, 118 Ind. 527, 21 N. E. 43) or a new certificate (Barelli *v.* Lytle, 8 La. Ann. 28); or that they may be properly authenticated (Calmes *v.* Stone, 7 La. Ann. 133; Calmes *v.* Duplantier, 6 La. Ann. 221).

An unauthorized withdrawal for the purpose of enabling the officer to correct his certificate will require the rejection of the deposition. Creager *v.* Douglass, 77 Tex. 484, 14 S. W. 150.

36. Sullivan *v.* Eddy, 164 Ill. 391, 45 N. E. 837; Ecker *v.* McAllister, 54 Md. 362; Strike *v.* McDonald, 2 Harr. & G. (Md.) 191; Skinner *v.* Tucker, 22 Vt. 78; *In re* Thomas, 35 Fed. 337; U. S. *v.* Price, 27 Fed. Cas. No. 16,089, 2 Wash. 356.

By agent of party.— In the discretion of the court a deposition opened by mistake by the agent or attorney of the party in whose behalf it was taken may be read. Burrall *v.* Andrews, 16 Pick. (Mass.) 551; Goff *v.* Goff, 1 Pick. (Mass.) 475.

By counsel.— In New Hampshire the fact that a deposition was opened by counsel in the cause before it was filed is not a legal objection. Spear *v.* Richardson, 37 N. H. 23.

By special master.— Depositions taken under order of a special master cannot be opened by him, although they are in his hands as clerk of the court. *In re* Thomas, 35 Fed. 337.

In vacation.—A commission may be opened by a judge of the court in vacation. Den *v.* Wood, 10 N. J. L. 62.

Presumption as to opening by judge.— In Ecker *v.* McAllister, 54 Md. 362, it appeared that the commission, together with the return and the evidence, were received at the clerk's office, in an envelope addressed to the clerk; that papers so addressed were upon receipt at the office opened by the clerk or one of his deputies; that the indorsement of filing on the envelope was in the handwriting of the chief deputy; that neither the clerk nor any of the deputies recollected opening the envelope; and that it was not opened by the judge; and this was held to authorize a presumption that the commission was opened by

2. Opening Out of Court. Unless by consent depositions cannot be opened out of court.[37]

3. Notice of Opening. A deposition cannot be read, where a statutory provision that it shall be opened and passed on by the clerk after a prescribed notice to the parties or their attorneys has not been complied with.[38]

4. Necessity of Order. When not opened by the court they should not be opened by the clerk or any other person except upon a special order.[39]

5. Time of Opening. Unless otherwise expressly provided depositions may be opened at any time after they are received and filed and before trial.[40]

6. Certificate of Opening. The opening of a commission or deposition by a duly authorized officer may be shown by his certificate of that fact;[41] but it is not indispensable if not expressly required by statute.[42]

B. Publication — 1. What Constitutes. The filing and opening of depositions is equivalent to a publication.[43]

2. Exhibition to Adverse Party. Unless so required by statute or an order to publish depositions has been made the party on whose behalf they were taken is

the clerk or one of his deputies, and hence in contemplation of law opened by the judge.

37. Beale *v.* Thompson, 8 Cranch (U. S.) 70, 3 L. ed. 491; The Roscius, 20 Fed. Cas. No. 12,042, Brown Adm. 442. See Foster *v.* Foster, 20 N. H. 208.

Mistake.— On affidavit of the fact a deposition opened out of court by mistake may be received and filed. Law *v.* Law, 4 Me. 167.

38. Berry *v.* Hall, 105 N. C. 154, 10 S. E. 903; Bryan *v.* Jeffreys, 104 N. C. 242, 10 S. E. 167.

Proof of notice.— Before a deposition can be read the party offering it must prove that the adverse party had statutory notice of the opening of the depositions or show facts tantamount to a waiver of the requirement. Berry *v.* Hall, 105 N. C. 154, 10 S. E. 903.

39. *Delaware.*— Hall *v.* Stout, 4 Del. Ch. 269.

Illinois.— Sullivan *v.* Eddy, 164 Ill. 391, 45 N. E. 837.

Washington.— Phelps *v.* Panama, 1 Wash. Terr. 615.

United States.— U. S. *v.* Tilden, 28 Fed. Cas. No. 16,520, 10 Ben. 170.

England.— Bernsdale *v.* Lowe, 2 Russ. & M. 142, 11 Eng. Ch. 142, 39 Eng. Reprint 348; Morrison *v.* Arnold, 19 Ves. Jr. 670, 34 Eng. Reprint 664.

See 16 Cent. Dig. tit. "Depositions," § 208 *et seq.*

Application.— An order for the opening of depositions taken *in perpetuam* must be based on an affidavit showing the death or absence of the witness or his inability to attend the trial. Hall *v.* Stout, 4 Del. Ch. 269; Bernsdale *v.* Lowe, 2 Russ. & M. 142, 11 Eng. Ch. 142, 39 Eng. Ch. 348; Morrison *v.* Arnold, 19 Ves. Jr. 670, 34 Eng. Reprint 664.

Who may apply.— Either party in a divorce suit may apply for an order. Mumford *v.* Mumford, 13 R. I. 19.

Presumption of order.—Where the envelope containing the return is found open in the clerk's office, it will be presumed to have been opened by him in pursuance of an order. Ecker *v.* McAllister, 45 Md. 290.

Opening without order.— A deposition improperly opened by the clerk without a special order of the court, may be read where no harm has been done by such action. Hughes *v.* Humphreys, 102 Ill. App. 194.

Opening by mistake.— In its discretion the court may admit depositions which were by mistake opened by the clerk without an order of court, and subsequently resealed by him. Mendenhall *v.* Kratz, 14 Wash. 453, 44 Pac. 872.

40. Skinner *v.* Tucker, 22 Vt. 78; U. S. *v.* Tilden, 28 Fed. Cas. No. 16,520, 10 Ben. 170; Walton *v.* Apjohn, 5 Ont. 65.

In Canada without the consent of the parties a judge has no power to open the commission before the jury is sworn. Burpee *v.* Carvill, 16 N. Brunsw. 141.

Conditions.— In permitting a foreign commission to be opened before the trial the court will not impose restrictions as to the use to be made of the knowledge of the evidence which would be acquired by the solicitors by such opening. Smith *v.* Greey, 11 Ont. Pr. 238.

41. Rodn *v.* Hapgood, 8 Gray (Mass.) 394.

To entitle an exemplification of a commission and deposition to be read they must be accompanied by the certificate of the judge or other officer who opened them. Oneida Mfg. Soc. *v.* Lawrence, 4 Cow. (N. Y.) 440.

42. Moran *v.* Green, 21 N. J. L. 562; Hildreth *v.* Overseers of Poor, 13 N. J. L. 5.

Preferable practice.— A certificate of the justice who received the deposition need not show that he opened it and delivered it to the clerk, although preferably he should do so. Hildreth *v.* Overseers of Poor, 13 N. J. L. 5.

43. Charles River Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 344. See *supra*, VII, A, 9; VII, B, 4.

Publication is the open showing of depositions and giving copies of them to the parties by the clerks or examiners in whose custody they are. Daniell Ch. Pr. 945.

In Maryland there is no publication, but objections may be taken at the hearing. Strike's Case, 1 Bland (Md.) 57.

under no obligation to exhibit them to the adverse party;[44] nor is the latter entitled to inspect the exhibits of the former.[45]

3. How Obtained.[46] Publication is passed by consent or by rule or order of the court,[47] made on due notice to the opposite party,[48] which, when the commission is joint, may be moved for by either party and the other cannot object.[49] Where neither party is under any obligation to publish, delay in moving is immaterial.[50]

4. Enlargement. The time of publication will not be enlarged of course;[51] but may be on special cause shown,[52] if the applicant has not been guilty of

44. Rand *v.* Dodge, 17 N. H. 343.

A party taking a deposition on notice is under no obligation to exhibit it to the adverse party or to permit him to have access to it. Lord *v.* Bishop, 16 Vt. 110.

The Georgia common-law rule (47) of practice in the superior courts, requiring testimony taken by commission to be communicated to the adverse party before the cause is called for trial, is directory merely. Veverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351; Brooks *v.* Ashburn, 9 Ga. 297.

On request it is the duty of a party to exhibit depositions he intends to use, and if he decline he may be compelled to file them. But his refusal to exhibit them before a rule is made to compel him will not preclude their use on the trial. Rand *v.* Dodge, 17 N. H. 343.

45. Troup *v.* Haight, 6 Johns. Ch. (N. Y.) 335.

46. Form of order of publication see Atty.-Gen. *v.* Ray, 2 Hare 518, 24 Eng. Ch. 518; Abergavenny *v.* Powell, 1 Meriv. 434, 35 Eng. Reprint 733; Barnsdale *v.* Lowe, 2 Russ. & M. 142, 11 Eng. Ch. 142, 39 Eng. Reprint 348.

47. Brown *v.* Ricketts, 3 Johns. Ch. (N. Y.) 63; Daniell Ch. Pr. 946.

Expiration of rule to show cause.— Where the time for publication designated in a rule to show cause has expired, the opposite party cannot pass publication on the rule. Brown *v.* Ricketts, 3 Johns. Ch. (N. Y.) 63.

Expiration of order enlarging.— Where a rule to pass publication is previously to its expiration enlarged by order when the time limited by the order expires publication passes, without the necessity of a further rule. Moody *v.* Payne, 3 Johns. Ch. (N. Y.) 294.

When publication passes.— When a court is set down for the examination of witnesses publication passes at the end of the ensuing examination term, although issue may have been joined less than three weeks before the commencement of that term. Wallace *v.* McKay, 1 Ch. Chamb. (U. C.) 67.

Motion to strike a cause from the calendar of cases for hearing on the ground that the cause was set down without taking out a rule to produce and pass publication will not be granted, although an order to open publication has been made. Hamilton *v.* Street, 3 Grant Ch. (U. C.) 122.

48. Billings *v.* Rattoon, 5 Johns. Ch. (N. Y.) 189.

In Washington no notice is necessary. Mendenhall *v.* Kratz, 14 Wash. 453, 44 Pac. 872.

49. Petrie *v.* Columbia, etc., R. Co., 27 S. C. 63, 2 S. E. 837; Walton *v.* Bostick, 1 Brev. (S. C.) 162. It is error to refuse plaintiff publication of testimony taken on behalf of defendant until the latter has manifested an intention not to use it, either by moving for a nonsuit or by declining to introduce it when it came his turn to offer testimony. Petrie *v.* Columbia, etc., R. Co., 27 S. C. 63, 2 S. E. 837.

50. Mitten *v.* Kitt, 118 Ind. 145, 20 N. E. 724, where the motion was made after commencement of the trial.

51. Hamersly *v.* Brown, 2 Johns. Ch. (N. Y.) 428; Underhill *v.* Van Cortlandt, 1 Johns. Ch. (N. Y.) 500.

To enlarge publication is to stay or postpone the rule for passing publication. Hamersly *v.* Lambert, 2 Johns. Ch. (N. Y.) 432.

52. Hamersly *v.* Lambert, 2 Johns. Ch. (N. Y.) 432; Hamersly *v.* Brown, 2 Johns. Ch. (N. Y.) 428; McKay *v.* McKay, 6 Grant Ch. (U. C.) 279; Blain *v.* Terryberry, 1 Ch. Chamb. (U. C.) 104.

Grounds for obstruction by one party.— A party who has been prevented from examining his witnesses by an order irregularly entered by the adverse party is entitled to an extension. Osgood *v.* Joslin, 3 Paige (N. Y.) 195.

Evidence of a conversation.—The court refused to open publication in order to obtain evidence of an alleged conversation between a person mentioned in the pleadings and one of the defendants. Malloch *v.* Pinhey, 1 Ch. Chamb. (U. C.) 105.

Imputation of laches repelled.— The time for publication will be enlarged after publication has passed, although not in fact made, on good cause shown by affidavit, such as surprise, accident, or other circumstances which repel any imputation of laches. Wood *v.* Mann, 29 Fed. Cas. No. 17,953, 2 Sumn. 316.

Interest of witness.— Where the application is made on the ground of the interest of a material witness, the applicant may be permitted to give evidence to establish the fact of interest in the witness, in order that in the event of the cause going to appeal, his evidence should not appear there as the evidence of an unbiased witness. Waterhouse *v.* Lee, 10 Grant Ch. (U. C.) 176.

To enable answer to cross bill.— The court will enlarge the rule to pass publication in the original cause, until plaintiff puts in an answer to a cross bill filed by defendant. Underhill *v.* Van Cortlandt, 1 Johns. Ch. (N. Y.) 500.

laches and no injury or prejudice will result to the opposite party because of the extension sought by the application.[53]

5. Proof After. Exhibits in the cause may be proved after publication, and even *viva voce* at the hearing, when there has been an omission of the proof in due season, and they are applicable to the merits.[54]

C. Amendment and Correction — 1. In General. Errors of omission, misstatements, or mistakes may ordinarily be corrected by amendment;[55] but jurisdictional defects cannot be cured by parol evidence or amendment at the trial.[56]

2. The Commission. A commission duly issued may be amended by inserting the name or title of the commissioner in a blank address,[57] or correcting a misnomer of one of the parties to the cause,[58] or when omitted, an allowance of the interrogatories and a direction as to the return may be indorsed thereon.[59]

3. Correcting or Explaining Testimony — a. In General. In the discretion of the court a witness may be permitted to explain[60] or correct answers in his deposition,[61] where a mistake has been made in taking them down.[62] However, it has been held that a deposition cannot be corrected in this respect after the cause comes on for hearing or trial;[63] nor can it be corrected by an affidavit,[64] or by an *ex parte* deposition taken without an order therefor.[65]

Effect of order.— An order to enlarge publication is in effect an order for leave to examine witnesses notwithstanding publication has passed. Anonymous, 5 Beav. 92; Strickland *v.* Strickland, 4 Beav. 120, 5 Jur. 319; Carr *v.* Appleyard, 2 Myl. & C. 476, 14 Eng. Ch. 476; Daniell Ch. Pr. 947.

Effect of permitting examination.— An order made on motion to dismiss, giving leave to go to examination, has the effect of opening publication. Weir *v.* Weir, 1 Ch. Chamb. (U. C.) 194.

53. Underhill *v.* Van Cortlandt, 1 Johns. Ch. (N. Y.) 500; Smith *v.* Brush, 1 Johns. Ch. (N. Y.) 459; Colonial Trusts *v.* Cameron, 21 Grant Ch. (U. C.) 70 [*affirmed* in 21 Grant Ch. (U. C.) 76]; Waters *v.* Shade, 2 Grant Ch. (U. C.) 218.

Delay from poverty of party.—Where publication had passed shortly before a motion to open was made by plaintiff, and it appeared on the motion that defendant had examined witnesses, but plaintiff had not examined any; and plaintiffs and others swore that their evidence was material, and that the delay had arisen from the poverty of plaintiff, publication was opened on payment of costs. Taylor *v.* Shoff, 3 Grant Ch. (U. C.) 153.

No proof taken.— Where a commission to take testimony in an equity cause has been out several years, and has been returned without proof, the parties having failed to offer any, and the cause is set down for final hearing, the court ought not, on motion of the complainant, to remand the commission to the commissioners. Somerville *v.* Marbury, 7 Gill & J. (Md.) 275.

54. Wood *v.* Mann, 30 Fed. Cas. No. 17,953, 2 Sumn. 316. See *infra*, XIX, F.

55. Keeler *v.* Vanderpool, Code Rep. N. S. (N. Y.) 289; Wallace *v.* Byers, 14 Tex. Civ. App. 574, 38 S. W. 228.

Notice of interrogatories.— Where the return fails to show that notice of the interrogatories was given, it may be amended so as to show that notice was given in fact. Stuckey *v.* Bellah, 41 Ala. 700.

Identification of exhibits.— Where exhibits are not identified and attached to a deposition, as required by the instructions, it is proper to order the deposition returned for that purpose. U. S. *v.* Fifty Boxes, etc., of Lace, 92 Fed. 601.

Attachment of exhibits.— Depositions may be taken from the files for the purpose of attaching exhibits not returned. Crane Co. *v.* Neel, (Mo. App. 1903) 77 S. W. 766.

Correction by appending affidavit.—A sealed deposition cannot be opened for the purpose of correction. An affidavit should be appended setting forth the facts. Foster *v.* Foster, 20 N. H. 208.

56. Saunders *v.* Erwin, 2 How. (Miss.) 732.

57. Nick *v.* Rector, 4 Ark. 251; Irvin *v.* Bevil, 80 Tex. 332, 16 S. W. 21.

58. Boone *v.* Janney, 3 Fed. Cas. No. 1,642, 2 Cranch C. C. 312.

59. Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518.

60. Eggspieller *v.* Nockles, 58 Iowa 649, 12 N. W. 708.

61. Baltzer *v.* Chicago, etc., R. Co., 89 Wis. 257, 60 N. W. 716.

62. Denton *v.* Jackson, 1 Johns. Ch. (N. Y.) 526; Graham *v.* McReynolds, 90 Tenn. 673, 18 S. W. 272, where counsel who was present at the examination was permitted to testify as to the mistake. *Contra*, witnesses claiming that their depositions are inaccurate will not be permitted to correct them. Hord *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1903) 76 S. W. 227.

63. Graves *v.* Clark, 101 Iowa 738, 69 N. W. 1046; Tellico Mfg. Co. *v.* Mitchell, (Tenn. Sup. 1886) 1 S. W. 514.

64. Graves *v.* Clark, 101 Iowa 738, 69 N. W. 1046.

65. Such a deposition taken a year and a half after the final hearing and decree in the cause cannot be used at a rehearing to explain the deponent's testimony read at the former hearing. Gray *v.* Murray, 4 Johns. Ch. (N. Y.) 412.

b. Alterations or Additions. Interlineations in the absence of counsel will be stricken out.[66] And a material alteration by the officer after the witness has signed and sworn to the deposition made without his assent will invalidate it.[67] If the deposition has been altered or additions made thereto after it has been subscribed and sworn to it must be resworn.[68]

4. Certificate or Caption. An omitted certificate may be permitted to be supplied,[69] and the caption or certificate of the officer may be amended or corrected to conform to the facts.[70] Thus mere clerical errors may be corrected;[71] and amendments and corrections have been permitted with respect to misstatements or omissions as to the cause in which the depositions were taken,[72] or where pending;[73] the reasons for or cause of taking;[74] the time and place of taking;[75] the mode of taking;[76] the reading of the deposition[77] and administration of the oath to the witness;[78] the reduction to writing in the presence of the witness;[79]

66. Shrewsbury *v.* U. S., 9 Ct. Cl. 333.

67. Winooskie Turnpike Co. *v.* Ridley, 8 Vt. 404, 30 Am. Dec. 476.

68. *In re* Walther, 29 Fed. Cas. No. 17,126.

Necessity of reswearing and new certificate. — Where after commissioners had certified to a deposition, the witness was permitted to add to his answers, and it did not affirmatively appear that the new jurat and certificate were made at the same time and place as the principal examination, or as part of the same transaction, it was held that the addition was not properly a portion of the return. Western, etc., R. Co. *v.* Harris, 46 Ga. 602.

69. An uncertified deposition may be rendered admissible by the affidavit of the officer that it was regularly taken before him, and that the deponent is dead. Wood *v.* The Fleetwood, 19 Mo. 529.

70. *Arkansas.*— Conger *v.* Cotton, 37 Ark. 286.

Kentucky.— Mullins *v.* Bullock, 19 S. W. 8, 14 Ky. L. Rep. 40; Dills *v.* May, 3 Ky. L. Rep. 765.

Massachusetts.— Hitchings *v.* Ellis, 1 Allen 475.

Missouri.— Borders *v.* Barber, 81 Mo. 636.

New Hampshire.—Brown *v.* Clark, 41 N. H. 242.

Pennsylvania.— Purviance *v.* Dryden, 3 Serg. & R. 402.

Tennessee.— Bewley *v.* Ottinger, 1 Heisk. 354.

Texas.—Wallace *v.* Byers, 14 Tex. Civ. App. 574, 38 S. W. 288; Price *v.* Horton, 4 Tex. Civ. App. 526, 23 S. W. 501. See Creager *v.* Douglass, 77 Tex. 484, 14 S. W. 150.

Vermont.— Oatman *v.* Andrew, 43 Vt. 466.

United States.— Gartside Coal Co. *v.* Maxwell, 20 Fed. 187; Donahue *v.* Roberts, 19 Fed. 863; Leatherberry *v.* Radcliffe, 15 Fed. Cas. No. 8,163, 5 Cranch C. C. 550.

See 16 Cent. Dig. tit. "Depositions," § 215.

The correct practice is to return the deposition to the magistrate for a new certificate or proper amendment, to be by him annexed to the deposition, sealed up with it, duly certified, and directed to the court where the deposition is to be used. Brown *v.* Clark, 41 N. H. 242.

Attachment of certificate in absence of officer.— It is improper to allow a corrected certificate, made by the notary and sent to the attorney for the party on whose behalf the deposition was taken, to be attached thereto, where the notary is not present to identify the deposition, and there is nothing in the defective certificate to identify it as the deposition referred to in the corrected certificate. Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573.

Parol evidence is inadmissible to supply defects in a certificate. Pingry *v.* Washburn, 1 Aik. (Vt.) 264, 15 Am. Dec. 676.

71. Borders *v.* Barber, 81 Mo. 636; Purviance *v.* Dryden, 3 Serg. & R. (Pa.) 402, holding that the supreme court will consider a mere clerical mistake as amended below.

72. Bewley *v.* Ottinger, 1 Heisk. (Tenn.) 354; Donahue *v.* Roberts, 19 Fed. 863.

73. Rand *v.* Dodge, 17 N. H. 343.

74. Oatman *v.* Andrew, 43 Vt. 466; Leatherberry *v.* Radcliffe, 15 Fed. Cas. No. 8,163, 5 Cranch C. C. 550.

At trial.— The party cannot supply at the trial an omission to state the cause, by proving the existence of a sufficient cause. Harris *v.* Wall, 7 How. (U. S.) 693, 12 L. ed. 875.

75. Conger *v.* Cotton, 37 Ark. 286; Rand *v.* Dodge, 17 N. H. 343; Anonymous, 3 N. C. 241; Eller *v.* Richardson, 89 Tenn. 575, 15 S. W. 650.

76. Wolfe *v.* Underwood, 97 Ala. 375, 12 So. 234.

Separate examination of witnesses.—Where the defect consists of the failure to insert that an instruction that the witnesses be examined separately and apart was complied with, and it appears from an affidavit of the commissioner that the witnesses were examined as instructed, the commission will not be sent back for correction. Arnold *v.* Lightner, 1 Pa. Dist. 791, 11 Pa. Co. Ct. 641.

77. McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748.

78. Conger *v.* Cotton, 37 Ark. 286; Hitchings *v.* Ellis, 1 Allen (Mass.) 475; Rand *v.* Dodge, 17 N. H. 343.

The omission cannot be supplied by a subsequent affidavit of the officer (Amory *v.* Fellowes, 5 Mass. 219) or by a certificate in no way connected with the depositions or with the original certificate (Dana *v.* Mace, 37 N. H. 533).

79. Donahue *v.* Roberts, 19 Fed. 863.

and whether or not the adverse party was present and objected.[80] So defects as to the official character of the officer,[81] as to his qualification as a disinterested person,[82] or as to his personal acquaintance with the witness[83] have been corrected by amendment; and he has been allowed to supply an omitted seal.[84]

5. TIME OF AMENDMENT. Although applications for amendment or correction have been refused when not made until the hearing or trial,[85] they have been granted after the deposition has been returned and filed,[86] before trial,[87] at a subsequent term,[88] after publication passed,[89] and even at the trial,[90] after submission of the cause,[91] after verdict,[92] or on appeal.[93]

6. NECESSITY OF ORDER. After the deposition had been returned or filed it can only be amended, corrected, or withdrawn and returned for that purpose by order or leave of the court,[94] or a judge having jurisdiction in the premises.[95]

D. Withdrawal. It has been held that a deposition cannot be withdrawn

80. Rand *v.* Dodge, 17 N. H. 343.

81. Florence Oil, etc., Co. *v.* Reeves, 13 Colo. App. 95, 56 Pac. 674; Barelli *v.* Lytle, 8 La. Ann. 28; Calmes *v.* Stone, 7 La. Ann. 133; Calmes *v.* Duplantier, 6 La. Ann. 221; Jenkins *v.* Anderson, (Pa. 1887) 11 Atl. 558; Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889.

Alteration after filing.— A deposition which at the time it was filed purported to have been taken by an incompetent officer, but which was altered in the jurat after it was filed, ought not to be received in evidence. Emmett *v.* Briggs, 21 N. J. L. 53.

82. Dunlap *v.* Horton, 49 Ala. 412; Eller *v.* Richardson, 89 Tenn. 575, 15 S. W. 650; Gartside Coal Co. *v.* Maxwell, 20 Fed. 187; Donahue *v.* Roberts, 19 Fed. 863.

83. Dunlap *v.* Horton, 49 Ala. 412.

84. Hale *v.* Matthews, 118 Ind. 527, 21 N. E. 43; Byington *v.* Moore, 62 Iowa 470, 17 N. W. 644; Borders *v.* Barber, 81 Mo. 636.

85. Graves *v.* Clark, 101 Iowa 738, 69 N. W. 1046; Tellico Mfg. Co. *v.* Mitchell, (Tenn. Sup. 1886) 1 S. W. 514; Chapman *v.* Allen, 15 Tex. 278; Harris *v.* Wall, 7 How. (U. S.) 693, 12 L. ed. 875.

86. Conger *v.* Cotton, 37 Ark. 286; Hale *v.* Matthews, 118 Ind. 527, 21 N. E. 43; Crane Co. *v.* Neel, (Mo. App. 1903) 77 S. W. 766; Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518.

Necessity of authority of court.— After depositions are filed they cannot be altered or amended by the officer who took them, but may be by authority of the court. Hall *v.* Renfro, 3 Metc. (Ky.) 51; Oatman *v.* Andrew, 43 Vt. 466.

87. Bewley *v.* Ottinger, 1 Heisk. (Tenn.) 354.

88. Where depositions have been suppressed because defectively certified, the court may permit an amendment at a subsequent term and at the next term set aside the order of suppression. Mullins *v.* Bullock, 19 S. W. 8, 14 Ky. L. Rep. 40.

89. Denton *v.* Jackson, 1 Johns. Ch. (N. Y.) 526.

90. Hitchings *v.* Ellis, 1 Allen (Mass.) 475.

91. Eggspieller *v.* Nockles, 58 Iowa 649, 12 N. W. 708.

92. If the deposition contain in itself the materials for the amendment. Rand *v.* Dodge, 17 N. H. 343.

93. Nick *v.* Rector, 4 Ark. 251; Barelli *v.* Lytle, 8 La. Ann. 28.

94. *Alabama.*— Wolfe *v.* Underwood, 97 Ala. 375, 12 So. 234.

Kentucky.— Hall *v.* Renfro, 3 Metc. 51.

Louisiana.— Calmes *v.* Stone, 7 La. Ann. 133; Calmes *v.* Duplantier, 6 La. Ann. 221.

New York.— Keeler *v.* Vanderpool, Code Rep. N. S. 289.

North Carolina.— Anonymous, 3 N. C. 241.

Tennessee.— Eller *v.* Richardson, 89 Tenn. 575, 15 S. W. 650; Bewley *v.* Ottinger, 1 Heisk. 354.

Texas.— Creager *v.* Douglass, 77 Tex. 484, 14 S. W. 150. See Price *v.* Horton, 4 Tex. Civ. App. 526, 23 S. W. 501.

Vermont.— Oatman *v.* Andrew, 43 Vt. 466.

United States.— Leatherberry *v.* Radcliffe, 15 Fed. Cas. No. 8,163, 5 Cranch C. C. 550.

See 16 Cent. Dig. tit. "Depositions," § 213 *et seq.*

Ratification.— The court may ratify an unauthorized amendment. Oatman *v.* Andrew, 43 Vt. 466.

Order unnecessary.— A deposition may be returned for proper certification without an order. Barelli *v.* Lytle, 8 La. Ann. 28. Under a statute providing that "if the examining officer's certificate be defective, whether exceptions have been sustained or filed or not," the party for whom the deposition was taken may require the clerk to deliver the deposition or mail it under seal to the examining officer, an order of court is not necessary to the return of a deposition to the examining officer for correction, after an exception to the deposition because of the defective character of the certificate has been sustained. Dills *v.* May, 3 Ky. L. Rep. 765.

95. A judge empowered to amend a commission before it leaves the court may do so after its execution and return. Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518.

A judge at circuit cannot allow an amendment to a deposition taken under a commission issued from the supreme court. Emmett *v.* Briggs, 21 N. J. L. 53.

after it has been returned and filed,[96] or after its production and reading;[97] and that a party cannot withdraw his cross interrogatories and the answers thereto if the other party desires to use them,[98] or after they have been read.[99] On the other hand it has been held that a party taking it may decline to use a deposition filed, and impeach or discredit the witness [1] or withdraw it [2] after he has read it.[3]

E. Suppression — 1. Grounds. The usual grounds for suppressing depositions are irregularities in issuing the commission, in executing it, or in taking or returning the depositions;[4] or because of grounds for believing that the return has been tampered with before reaching the court;[5] and in the discretion of the court a deposition regularly taken may be suppressed where injustice must necessarily or will probably result from using the testimony.[6] So a deposition may be sup-

96. The party who takes a deposition cannot withdraw it (Hale *v.* Gibbs, 43 Iowa 380); nor can either party withdraw a deposition taken on interrogatories propounded by both (Pelamourges *v.* Clark, 9 Iowa 1). And see Carpenter *v.* Dame, 10 Ind. 125.

97. Henshaw *v.* Clark, 2 Root (Conn.) 103.

98. Pulaski *v.* Ward, 2 Rich. (S. C.) 119.

99. Anderson *v.* Brown, 72 Ga. 713.

1. Elliot *v.* Shultz, 10 Humphr. (Tenn.) 234; Nichols *v.* Jones, 36 Tex. 448.

2. Peycke *v.* Shinn, (Nebr. 1903) 94 N. W. 135.

Withdrawal for amendment see XVII, I, 5.

3. Washington Bank *v.* Walker, 2 Fed. Cas. No. 956, 1 Hayw. & H. 601.

4. *Alabama.*—Harris *v.* Miller, 30 Ala. 221.

Arkansas.— Davis *v.* Hare, 32 Ark. 386; Vangine *v.* Taylor, 18 Ark. 65.

Colorado.— Gibbs *v.* Gibbs, 6 Colo. App. 368, 40 Pac. 781.

Illinois.— Hughes *v.* Humphreys, 102 Ill. App. 194; Zink *v.* Wells, 72 Ill. App. 605.

Maryland.— Barnum *v.* Barnum, 42 Md. 251.

Mississippi.— Gordon *v.* Watkins, Sm. & M. Ch. 37.

Missouri.— Moore *v.* McCullough, 6 Mo. 444.

New York.— Newton *v.* Porter, 69 N. Y. 133, 25 Am. Rep. 152; Harting *v.* American Malting Co., 74 N. Y. App. Div. 140, 77 N. Y. Suppl. 533 [*affirmed* in 175 N. Y. 489, 67 N. E. 1083]; Benedict *v.* Richardson, 68 Hun 202, 22 N. Y. Suppl. 839; Mason, etc., Organ Co. *v.* Pugsley, 19 Hun 282; Denny *v.* Horton, 11 Daly 358, 3 N. Y. Civ. Proc. 255. See Howard *v.* Orient Mut. Ins. Co., 9 Bosw. 645.

Ohio.— Jonas *v.* Smith, 2 Cinc. Super. Ct. 63.

Pennsylvania.— Wallace *v.* McElevy, 2 Grant 44; Machine Co. *v.* Shillow, 14 Lanc. Bar 58.

Texas.— Hord *v.* Gulf, etc., R. Co., (Civ. App. 1903) 76 S. W. 227; Chicago, etc., R. Co. *v.* Long, (Civ. App. 1901) 65 S. W. 882; McGrew *v.* Wilson, (Civ. App. 1900) 57 S. W. 63; McCown *v.* Terrell, (Civ. App. 1897) 40 S. W. 54; Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079.

United States.— Dunkle *v.* Worcester, 8 Fed. Cas. No. 4,162, 5 Biss. 102; Hacker *v.* U. S., 37 Ct. Cl. 86.

England.— Grill *v.* General Iron Screw Collier Co., L. R. 1 C. P. 600, 12 Jur. N. S. 227, 35 L. J. C. P. 321, 14 L. T. Rep. N. S. 711, 14 Wkly. Rep. 893; Hareforth *v.* Gates, Cary 91, 21 Eng. Reprint 49.

See 16 Cent. Dig. tit. "Depositions, § 219 *et seq.*

Inadmissibility of testimony as a ground for suppression see *infra*, XIX, E, 1; XXII, C, 3, e, h, i, j.

Insufficient notice.—The suppression of several depositions for want of sufficient notice will not require the suppression of another deposition properly taken at the same time and place. Carpenter *v.* Dame, 10 Ind. 125.

Taking deposition contrary to notice.— A deposition taken on written interrogatories may be suppressed where subsequent to the notice therefor, the opposite party, as permitted by statute, gave notice of his election to take the deposition orally. Lewis *v.* Fish, 40 Ill. App. 372.

The failure to examine all the witnesses named in the commission is not a ground of suppression. Schunior *v.* Russell, 83 Tex. 83, 18 S. W. 484.

5. Smith *v.* Moody, 94 Ga. 534, 21 S. E. 157.

Opening or mutilation.— An executed commission will not be suppressed because, when received by the clerk the envelope containing the testimony was open at one end, presenting the appearance of having been worn in the mail, the clerk having noted the facts on the package and filed it, since which time it remained undisturbed in his office. Eiffert *v.* Craps, 44 Fed. 164. Where all legal requisites have been complied with in sealing and indorsing depositions to be transmitted by mail, and where such depositions are actually received by the district clerk without being separated or mutilated, the mere fact that the envelope containing such depositions has been broken or injured during transmission will not justify a court in suppressing the depositions. Commercial Nat. Bank *v.* Atkinson, 62 Kan. 775, 64 Pac. 617.

A deposition not inclosed in a sealed wrapper will not be rejected where the court is justified in finding that the covering had been opened by the clerk at the request of the objector on order of the court, and the wrapper destroyed. Robinson *v.* Savage, 124 Ill. 266, 15 N. E. 850.

6. Cullum *v.* Smith, 6 Ala. 625; Wallace *v.* McElevy, 2 Grant (Pa.) 44; Machine Co. *v.* Shillow, 14 Lanc. Bar (Pa.) 58.

pressed for fraud,[7] or where a new issue is formed by amendment whereby testimony taken by deposition becomes inapplicable;[8] and the whole deposition may be suppressed for the refusal of the witness to answer a material question.[9] But in the absence of bad faith or injury depositions will not be suppressed for noncompliance with mere matters of form[10] or for defects purely technical.[11] Nor should depositions or evidence therein contained be suppressed, because not admissible in the first instance, if they or it would be admissible in rebuttal,[12] or in any conceivable way can be made competent.[13]

2. Motion to Suppress — a. In General. The mode of suppressing a deposition is by motion[14] made in the mode prescribed by statute.[15] The irregularity or defect must be specifically stated,[16] and also that injury or prejudice resulted.[17]

b. Time of Making. A motion to suppress must be made within the time prescribed by statute.[18] If the time is not prescribed the motion should be made at the earliest opportunity after the cause for suppression has been ascertained,[19]

7. As where one paper is substituted for another. Carter *v.* Mannings, 7 Ala. 851.

8. Vincent *v.* Conklin, 1 E. D. Smith (N. Y.) 203.

Where the amendment is technical and the issue remains substantially the same this rule does not obtain. Vincent *v.* Conklin, 1 E. D. Smith (N. Y.) 203.

Striking out party.— A deposition will not be suppressed because after it was taken the writ and declaration were amended by striking out a party, where the issue is not thereby varied. Jenison *v.* Smith, 37 Ala. 185.

9. Bird *v.* Halsy, 87 Fed. 671.

10. Partridge *v.* Stocker, 36 Vt. 108, 84 Am. Dec. 664.

The failure to indorse the return upon a foreign commission is not a ground for suppressing a deposition, although it might require its rejection at the trial. Creamer *v.* Jaekson, 4 Abb. Pr. (N. Y.) 413.

11. Blair *v.* Harris, 75 Mich. 167, 42 N. W. 790.

Presence of parties.— Especially where it appears that counsel for both parties were present, and participated in the examination of the witnesses. Kansas City, etc., R. Co. *v.* Stoner, 51 Fed. 649, 2 C. C. A. 437.

12. Indianapolis, etc., R. Co. *v.* Anthony, 43 Ind. 183.

13. Covey *v.* Campbell, 52 Ind. 157; Pittsburgh, etc., R. Co. *v.* Theobald, 51 Ind. 246.

14. McFarlane *v.* Howell, 16 Tex. Civ. App. 246, 43 S. W. 315; Carr *v.* Wright, 1 Wyo. 157.

Consent to a second commission does not operate to suppress the first. Beeker *v.* Winne, 7 Hun (N. Y.) 458.

The renewal of a motion to suppress on the ground of newly discovered evidence showing that the deposition was improperly taken is addressed to the sound discretion of the trial court. Hicks *v.* Lawson, 39 Ala. 90.

15. **An oral motion** will not be entertained where the statute requires exceptions to depositions to be in writing. St. Louis, etc., R. Co. *v.* Morse, 38 Kan. 271, 16 Pac. 452.

16. Hunt *v.* Bailey, 4 Ind. 630.

The motion must be directed to all the exceptions, which must be raised and argued at the same time. Carr *v.* Wright, 1 Wyo. 157.

17. Cameron *v.* Clarke, 11 Ala. 259.

18. Casley *v.* Mitchell, (Iowa 1903) 96 N. W. 725; Harris Mfg. Co. *v.* Marsh, 49 Iowa 11.

After prescribed time.—Under a statute requiring exceptions other than for incompetency to be filed by noon of the third day after the deposition is filed, a motion made ten days after such filing comes too late. Casley *v.* Mitchell, (Iowa 1903) 96 N. W. 725.

At first term after deposition filed.— A requirement that the motion must be made at the first term after the depositions are filed is complied with by moving at the term next succeeding the term during which they were filed. McCown *v.* Terrell, (Tex. Civ. App. 1897) 40 S. W. 54.

Change in statute.— A statute prescribing the time of moving is inapplicable to a motion made before its adoption. Mayton *v.* Sonnefield, (Tex. Civ. App. 1898) 48 S. W. 608.

Great delay.— A motion filed but not acted on for two years and eight months thereafter is properly denied because not brought up at the first term of the court after the deposition was filed. Waters-Pieree Oil Co. *v.* Davis, (Tex. Civ. App. 1900) 60 S. W. 453.

19. Harris *v.* Miller, 30 Ala. 221; Hughes *v.* Humphreys, 102 Ill. App. 194; Newton *v.* Porter, 69 N. Y. 133, 25 Am. Rep. 152; Hartwig *v.* American Malting Co., 74 N. Y. App. Div. 140, 77 N. Y. Suppl. 533 [*affirmed* in 175 N. Y. 489, 67 N. E. 1083]; Dennison *v.* Brown, 51 Hun (N. Y.) 642, 4 N. Y. Suppl. 257; Mason, etc., Organ Co. *v.* Pugsley, 19 Hun (N. Y.) 282; Swift *v.* Dean, 6 Johns. (N. Y.) 523; Bibb *v.* Allen, 149 U. S. 481, 13 S. Ct. 950, 37 L. ed. 819; Bird *v.* Halsy, 87 Fed. 671; Danville Bank *v.* Travers, 2 Fed. Cas. No. 886, 4 Biss. 507.

The motion is in time when made on the day preceding the trial and presented for hearing on the next day and before the commencement of the trial (Adams Express Co. *v.* McConnell, 27 Kan. 238); two days before the case is called for trial (Everingham *v.* Lord, 19 Ill. App. 565); or where there is

and at least before the trial,[20] especially where the objections are to matters of form, so that if sustained the defects may be remedied before trial.[21]

3. HEARING AND DETERMINATION — a. In General. The regularity of the order for the depositions and the competency of the witnesses may be considered.[22] Where the motion is based on irregularity or matters not affecting the admissibility of the testimony,[23] it should be determined before the hearing or trial to afford an opportunity to retake them; but where the motion is based on the irrelevancy, immateriality, or incompetency of the testimony or of the witness, or grounds of that nature the court may hold the matter under advisement until the hearing or trial.[24]

b. Discretion. Unless the objection is urged the judge to whom the motion is addressed is vested with a discretion to grant or deny it,[25] which is not reviewable on appeal.[26]

c. The Order. The order of suppression may be made by any judge having

but a brief delay (Benedict *v.* Richardson, 68 Hun (N. Y.) 202, 22 N. Y. Suppl. 839).

Failure to explain delay.— The motion may be entertained, although the delay in making it is not explained. Jonas *v.* Smith, 2 Cinc. Super. Ct. 63.

20. *Alabama.*— Electric Lighting Co. *v.* Rust, 131 Ala. 484, 31 So. 486.

Illinois.— Tri-City R. Co. *v.* Brennan, 108 Ill. App. 471; Evcringham *v.* Lord, 19 Ill. App. 565.

Indiana.— Glenn *v.* Clore, 42 Ind. 60.

Kansas.— St. Louis, etc., R. Co. *v.* Morse, 38 Kan. 271, 16 Pac. 452; Adams Express Co. *v.* McConnell, 27 Kan. 238.

Texas.— McGrew *v.* Wilson, (Civ. App. 1900) 57 S. W. 63; McFarlane *v.* Howell, 16 Tex. Civ. App. 246, 43 S. W. 315; Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079.

Wyoming.— Carr *v.* Wright, 1 Wyo. 157.

See 16 Cent. Dig. tit. "Depositions," § 223.

Before the announcement of "ready" for trial the motion should be made. Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079.

When trial "commenced."— The commencement of the trial is when the jury is sworn. Glenn *v.* Clore, 42 Ind. 60.

Where the party has no knowledge of the irregularity a sufficient time before the trial to make the motion he may urge his objections at the trial. Newton *v.* Porter, 69 N. Y. 136, 25 Am. Rep. 152; Mason, etc., Organ Co. *v.* Pugsley, 19 Hun (N. Y.) 282.

21. Tri-City R. Co. *v.* Brennan, 108 Ill. App. 471.

22. Eslava *v.* Mazange, 8 Fed. Cas. No. 4,527, 1 Woods 623.

23. As where suppression is sought because the depositions were irregularly or imperfectly taken, or were taken in violation of the privileges of either of the parties (Williams *v.* Vreeland, 30 N. J. Eq. 576; Wood *v.* Chetwood, 27 N. J. Eq. 311); or where the testimony was elicited by leading questions (Wood *v.* Chetwood, 27 N. J. Eq. 311).

Formal defects.—Where the motion is made for formal defects, on notice, the court may act on it before or after the commencement of the trial. Southern Pac. R. Co. *v.* Royal, (Tex. Civ. App. 1893) 23 S. W. 316.

"Ready for trial."— Where notice of a motion to suppress is waived, and consent given to its consideration, the motion should be passed upon, although both parties have announced "Ready for trial," and the jury is being drawn. Coleman *v.* Colgate, 69 Tex. 88, 6 S. W. 553.

Necessity of moving before trial see *infra*, XIX, E, 3, b.

24. Taylor *v.* Elliott, 52 Ind. 588; Nichol *v.* McCalister, 52 Ind. 586; Williams *v.* Vreeland, 30 N. J. Eq. 576; Wood *v.* Chetwood, 27 N. J. Eq. 311; Williamson *v.* More, 1 Barb. (N. Y.) 229.

Before or at trial.— When suppression of but part of a deposition is sought, the court should wait until the deposition is offered in evidence before passing on the objections; but where nothing but irrelevant evidence is sought to be stricken out, it is without prejudice whether it is stricken out before or after the deposition is offered. Stull *v.* Stull, (Nebr. 1901) 96 N. W. 196.

At trial.— Where the motion is made on the ground that deponent refused to answer certain interrogatories, the deposition should be read upon the trial, and the admissibility of the unanswered questions then decided. Palmer *v.* Great Western Ins. Co., 47 N. Y. Super. Ct. 455. Where evidence may be introduced on the trial which will make the answers to certain interrogatories in a deposition material, it is proper that a motion to suppress should not be decided until on the trial the court is informed whether or not such evidence will be offered. Baltimore, etc., R. Co. *v.* McWhinney, 36 Ind. 436.

25. Thus where the deposition of a witness showed no desire to conceal anything, but that her failure to fully answer a question as to whether any one had talked to her concerning her testimony, etc., was unintentional, and her testimony was corroborated by other witnesses, the refusal of the trial judge to suppress the deposition for failure to answer such question was not an abuse of discretion. Galveston, etc., R. Co. *v.* Baumgarten, 31 Tex. Civ. App. 253, 72 S. W. 78. So the action of a chancellor in suppressing a deposition after allowing a witness to be examined provisionally is discretionary. Hall *v.* Pegram, 85 Ala. 522, 5 So. 209, 6 So. 612.

26. Hall *v.* Pegram, 85 Ala. 522, 5 So. 209, 6 So. 612.

competent authority.[27] Where there is more than one deposition of the same witness, the order must indicate the particular one suppressed.[28]

d. Objections and Exceptions. The determination must be excepted to at the time,[29] and the ruling must be assigned as error on appeal,[30] or as ground for a new trial.[31] The refusal to suppress is immaterial where the deposition was not offered in evidence.[32] Nor can a party complain of the suppression of a deposition which contained nothing which would benefit him,[33] or where the witness personally testified to the facts stated in his deposition.[34] Neither will a judgment be reversed because the court erroneously suppressed a deposition, where the party taking it did not ask a continuance to retake it or to obtain the attendance of the witnesses.[35]

4. Effect of Suppression. After a deposition has been suppressed it cannot be used in any subsequent trial.[36]

F. Retaking or Reëxamination — 1. Right to Retake or Reëxamine. Although a commission has been executed, or a deposition has been taken and completed, a party on good cause shown may be permitted to reëxamine the witness, procure additional testimony, or take the depositions anew.[37]

27. A justice of a district court in the city of New York has jurisdiction to suppress a deposition taken under an irregular commission. Denny *v.* Horton, 11 Daly (N. Y.) 358, 3 N. Y. Civ. Proc. 255.

28. An order insufficient in this particular will not justify the exclusion of either deposition. Hays *v.* Hynds, 28 Ind. 531.

29. Houston *v.* Bruner, 59 Ind. 25.

The action of the clerk in rejecting depositions taken by a justice of the peace is conclusive unless excepted to and appealed from. Hawkins *v.* McNamara, 1 Heisk. (Tenn.) 352.

30. Houston *v.* Bruner, 59 Ind. 25.

31. Hatton *v.* Jones, 78 Ind. 466, where without noticing Houston *v.* Bruner, 59 Ind. 25, it is said that the ruling cannot be assigned as error.

The suppression of parts of a deposition can only be urged as reason for a new trial. Patterson *v.* Lord, 47 Ind. 203.

32. Buffington *v.* Cook, 39 Ala. 64.

33. Cowen *v.* Eartherly Hardware Co., 95 Ala. 324, 11 So. 195.

34. Curry *v.* Allen, 60 Iowa 387, 14 N. W. 733.

35. Gardner *v.* Girtin, 69 Ill. App. 422 [*affirmed* in 169 Ill. 40, 48 N. E. 307].

36. Gross *v.* Coffey, 111 Ala. 468, 20 So. 428; House *v.* Camp, 32 Ala. 541; Moore *v.* McCullough, 6 Mo. 444.

37. *Alabama.*— Milton *v.* Rowland, 11 Ala. 732.

Colorado.— Gibbs *v.* Gibbs, 6 Colo. App. 368, 40 Pac. 781.

Georgia.— Heard *v.* McKee, 26 Ga. 332; Parker *v.* Chambers, 24 Ga. 518; Davis *v.* Moody, 13 Ga. 188.

Illinois.— Beach *v.* Schmultz, 20 Ill. 185; Hughes *v.* Humphreys, 102 Ill. App. 194; Zink *v.* Wells, 72 Ill. App. 605.

Indiana.— Davis *v.* Davis, 119 Ind. 511, 21 N. E. 1112; Addleman *v.* Swartz, 22 Ind. 249.

Kentucky.— Todd *v.* Wickliffe, 12 B. Mon. 289.

Maryland.— Barnum *v.* Barnum, 42 Md. 251; Matthews *v.* Dare, 20 Md. 248.

Nebraska.— Peycke *v.* Shinn, (1903) 94 N. W. 135.

New York.— Vincent *v.* Conklin, 1 E. D. Smith 203; Beach *v.* Fulton Bank, 3 Wend. 573; Hallock *v.* Smith, 4 Johns. Ch. 649.

Tennessee.— McNew *v.* Rogers, 1 Tenn. Cas. 17, Thomps. Cas. 32.

Texas.— Wallace *v.* Byers, 14 Tex. Civ. App. 574, 38 S. W. 228.

Virginia.— Carter *v.* Edmonds, 80 Va. 58.

West Virginia.— McKell *v.* Collins Colliery Co., 46 W. Va. 625, 33 S. E. 765; Vance *v.* Snyder, 6 W. Va. 24.

Canada.— Covert *v.* Upper Canada Bank, 1 Grant Ch. (U. C.) 566.

See 16 Cent. Dig. tit. "Depositions," § 227 *et seq.*

Against defaulting defendants.— Under the Maryland statute a complainant may under his commission in chief take testimony against defaulting as well as other defendants, and such a commission dispenses with an *ex parte* commission against the defendants in default. Higgins *v.* Horwitz, 9 Gill (Md.) 341.

Failure to make out case.— A master may refuse to open a case where the evidence was closed, on the ground that the applicant had not made such a case as entitled him to a new trial at law. Waddell *v.* Smyth, 3 Ch. Chamb. (U. C.) 412.

Prior commission not returned.— A new commission may issue, although one previously issued for the examination of the same witness has not been returned. Lee *v.* Lee, 1 La. Ann. 318.

Refusal to sign inaccurate deposition.— Where a witness refuses to sign a deposition because it is inaccurate, but is willing to sign when the errors pointed out by him have been corrected, his deposition cannot be retaken on a new subpœna. *In re* Hafer, 65 Ohio St. 170, 61 N. E. 72.

Validity of new deposition.— There is no right to exclude a second deposition, unless the first contains a complete examination as

2. GROUNDS. A deposition may be allowed to be retaken or the witnesses may be reëxamined in the following cases: Where irregularities in procuring it to be taken or in the taking or returning of it are shown;[38] where an outstanding commission has not been executed;[39] where through inadvertence the witness has not been examined as to a material fact[40] or exhaustively examined;[41] to permit further testimony to explain or correct that already given;[42] or to procure testimony as to the credit of other witnesses whose depositions have been published.[43] So too this may be done where injustice is likely to arise from the manner of issuing or executing a commission,[44] where there has been unfair or overreaching conduct to the prejudice of the adverse party,[45] where the deposition has been suppressed as scandalous[46] or because taken on leading interrogatories,[47] where the pleadings have been amended so as to change the issue,[48] where the deposition has been lost or destroyed,[49] or where there is reason to believe that it will

to the same subject-matter, and there is no valid objection to it. Scott *v.* Bullion Min. Co., 2 Nev. 81.

38. Brown *v.* Bulkley, 14 N. J. Eq. 294; McNew 5. Rogers, 1 Tenn. Cas. 17, Thomps. Cas. (Tenn.) 32; Boone *v.* Miller, 73 Tex. 557, 11 S. W. 551. As where the deposition was taken without notice (Vanee *v.* Snyder, 6 W. Va. 24) or by an unauthorized person (Wallace *v.* Byers, 14 Tex. Civ. App. 574, 38 S. W. 228); the witness was influenced or led by dictation (Allison *v.* Allison, 7 Dana (Ky.) 90); the testimony was not correctly taken down by the officer (Kingston *v.* Tappin, 1 Johns. Ch. (N. Y.) 368; Darling *v.* Staniford, Dick. 358, 21 Eng. Reprint 308 [*citing* Griells *v.* Gansell, 2 P. Wms. 646, 24 Eng. Reprint 899]); the right to cross-examine has been denied (Zink *v.* Wells, 72 Ill. App. 605), or cross interrogatories have not been answered (Davis *v.* Moody, 13 Ga. 188; Ruckert *v.* Bursley, 51 N. Y. App. Div. 377, 64 N. Y. Suppl. 622); the failure of the commissioner to qualify by oath (Bollen *v.* Milladew, 10 C. B. 898, 20 L. J. C. P. 172, 70 E. C. L. 898); or where his certificate is insufficient (*In re* Thomas, 35 Fed. 822). In Gasson *v.* Wordsworth, Ambl. 108, 27 Eng. Reprint 70, 2 Ves. 325, 336, 23 Eng. Reprint 209, 217, a commission to a foreign country having been returned improperly executed, the court refused to send another.

Criminal prosecution.— In People *v.* Lindquist, 84 Cal. 23, 24 Pac. 153, a trial for homicide, it appeared that by agreement with the prosecution there were admitted at the former trial informal depositions of certain witnesses residing in Sweden, to the effect that defendant's mother was subject to epilepsy and died insane, and his brother was an idiot, and that the prosecution had notified the defense that such depositions would be objected to at the next trial, and it was held that the accused was entitled to the issuance of a commission to take the depositions of such persons in proper legal form.

39. Copeland *v.* Mears, 2 Sm. & M. (Miss.) 519.

40. Carter *v.* Edmonds, 80 Va. 58; Covert *v.* Upper Canada Bank, 1 Grant Ch. (U. C.) 566. *Contra*, Patterson *v.* Scott, 1 Grant Ch. (U. C.) 582.

41. Moody *v.* McCann, 1 Ch. Chamb. (U. C.) 88. *Contra*, Pratt *v.* Mosetter, 9 N. Y. Civ. Proc. 351.

A witness who was examined at a former trial may be examined *de bene esse*, where the applicant presents an affidavit that the previous testimony did not present all the facts within his knowledge material and relevant to the issue. August *v.* Fourth Nat. Bank, 9 N. Y. Suppl. 270.

Where the jury disagreed a new commission will issue on an affidavit that a reëxamination would probably remove some of the doubts which existed at the trial. Parker *v.* Chambers, 24 Ga. 518; Fisher *v.* Dale, 17 Johns. (N. Y.) 343; Nichol *v.* Columbian Ins. Co., 1 Cai. (N. Y.) 345.

42. Parker *v.* Chambers, 24 Ga. 518; Rogers *v.* Manning, 8 Ont. Pr. 2, where it was further held that a strong suspicion of an improper motive on the part of the witness would not defeat the application. *Contra*, Abergavenny *v.* Powell, 1 Meriv. 434, 35 Eng. Reprint 733.

After hearing and decision a further examination for this purpose will not be permitted. Gray *v.* Murray, 4 Johns. Ch. (N. Y.) 412.

43. Wood *v.* Mann, 30 Fed. Cas. No. 17,953, 2 Sumn. 316.

44. Wallace *v.* McElevy, 2 Grant (Pa.) 44; Machine Co. *v.* Shillow, 14 Lane. Bar (Pa.) 58.

Stipulation preventing retaking.—The court may grant a rehearing and permit the retaking of suppressed depositions on a showing that there was an understanding with opposing counsel that the depositions might be read, which prevents their retaking, and it appears that injustice may be done if a rehearing is not granted. Young *v.* Young, (Tenn. Ch. App. 1900) 64 S. W. 319.

45. Graham *v.* Carleton, 9 N. Y. Suppl. 392, where the party taking out the commission supplied the witness with a copy of the interrogatories and cross interrogatories.

46. Brown *v.* Bulkley, 14 N. J. Eq. 294.

47. Brown *v.* Bulkley, 14 N. J. Eq. 294.

48. Vincent *v.* Conklin, 1 E. D. Smith (N. Y.) 203.

49. Lee *v.* Lee, 1 La. Ann. 318; Follett *v.* Murray, 17 Vt. 530. See *infra*, XIX, G.

not be executed.[50] But retaking or a reëxamination will not be permitted to procure more definite testimony on a particular point.[51]

3. Application[52]— a. Necessity. There must be a special application to reëxamine a witness or retake a deposition.[53]

b. Time of. The application must be made with due diligence and so soon as the necessity of retaking the deposition or reëxamining the witness is apparent.[54]

c. Requisites and Sufficiency. An application for a second commission must show some good reason for its issue.[55]

4. Necessity of Order.[56] Although there are numerous decisions to the contrary,[57] it is the general rule that a deposition cannot be taken or a witness reëxamined without the sanction of the court or its formal order.[58]

50. Lee *v.* Lee, 1 La. Ann. 318.

51. Raney *v.* Weed, 1 Barb. (N. Y.) 220, where it was sought to reëxamine one of two witnesses, the other having died.

The examination will not be reopened because of the refusal of a party to produce an instrument and submit to an examination thereon for the purpose of showing his interest. Bullock Electric Mfg. Co. *v.* Crocker Wheeler Co., 121 Fed. 200.

52. Form of application to take further testimony see California *v.* Southern Pac. Co., 153 U. S. 239, 14 S. Ct. 1138, 38 L. ed. 702.

53. Vincent *v.* Conklin, 1 E. D. Smith (N. Y.) 203; Beach *v.* Fulton Bank, 3 Wend. (N. Y.) 573; Addleman *v.* Swartz, 22 Ind. 249.

In Illinois no application to retake a deposition is necessary. A party may take as many as he pleases, and the court will determine which or how many may be read. Beach *v.* Schmultz, 20 Ill. 185.

54. Davis *v.* Hall, 52 Md. 673.

After a cause has been set for hearing a new commission will not be permitted unless on special order made on special circumstances shown. Salmon *v.* Clagett, 3 Bland (Md.) 125.

After hearing and decree.— The Virginia act which provides that, from the filing of a bill in equity "to the final hearing of the cause, either party may, without order of court, obtain commissions to take depositions to be read therein," should receive a limited construction. A party cannot, after the hearing of a cause and a decree settling the merits of the controversy, take new testimony as to matter that was fairly in issue and decided upon. If he has new matter or newly-discovered evidence, he must resort to his supplemental bill of review, or to a petition for a rehearing in the nature of a supplemental bill. Moore *v.* Hilton, 12 Leigh (Va.) 1.

After publication has passed witnesses cannot be examined unless under very special circumstances (Hamersly *v.* Lambert, 2 Johns. Ch. (N. Y.) 432), as to impeach witnesses whose depositions have been taken (Wood *v.* Mann, 30 Fed. Cas. No. 17,953, 2 Sumn. 316).

Announcing ready for trial.— A party may be permitted to retake, although the other party has announced himself ready for trial. Milton *v.* Rowland, 11 Ala. 732.

Necessity of waiting for waiver of objection.— When a deposition has been defectively taken and is liable to be suppressed, it is proper to proceed to have it retaken, without waiting to see whether the objection will be waived. Boone *v.* Miller, 73 Tex. 557, 11 S. W. 551.

55. Salmon *v.* Clagett, 3 Bland (Md.) 125.

Where it is desired to examine additional witnesses after publication, it must appear that the depositions taken have not been resorted to for the purpose of the application. Carlisle *v.* Rust, 1 Del. Ch. 72.

56. Form of order for reëxamination see Hanover *v.* Wheatley, 4 Beav. 78, 10 L. J. Ch. 253.

57. Beach *v.* Schmultz, 20 Ill. 185; Peycke *v.* Shinn, (Nebr. 1903) 94 N. W. 135; Martin *v.* Kaffroth, 16 Serg. & R. (Pa.) 120; Fox *v.* Jones, 1 W. Va. 205, 91 Am. Dec. 383.

Where a reference is sent back to the master to review his report, the master is at liberty to receive further evidence. Morley *v.* Matthews, 3 Can. L. J. N. S. 21. Where the court on a reference back to the master does not mean that he shall take further evidence, the order should contain a direction to that effect, unless the reference back is expressed to be for a purpose on which further evidence could be material. Morley *v.* Matthews, 3 Can. L. J. N. S. 21.

58. *Alabama.*— Bonner *v.* Young, 68 Ala. 35.

Indiana.—Woodruff *v.* Garner, 39 Ind. 246; Addleman *v.* Swartz, 22 Ind. 249; Kirby *v.* Cannon, 9 Ind. 371.

Kentucky.— Newman *v.* Kendall, 2 A. K. Marsh. 234.

Michigan.— Sawyer *v.* Sawyer, Walk. 48.

Pennsylvania.—McKinney *v.* Dows, 3 Watts 250.

Texas.— Evansich *v.* Gulf, etc., R. Co., 61 Tex. 24.

Virginia.— Booth *v.* McJilton, 82 Va. 827, 1 S. E. 137.

West Virginia.—McKell *v.* Collins Colliery Co., 46 W. Va. 625, 33 S. E. 765; Vance *v.* Snyder, 6 W. Va. 24.

United States.— Thurber *v.* Cecil Nat. Bank, 52 Fed. 513; Gass *v.* Stinson, 10 Fed. Cas. No. 5,261, 2 Sumn. 605; Phettiplace *v.* Sayles, 19 Fed. Cas. No. 11,083, 4 Mason 312.

Leave to retake in presence of counsel.— On motion to suppress leave granted in the presence of counsel to retake depositions is sufficient. Galveston, etc., R. Co. *v.* Croskell, 6 Tex. Civ. App. 160, 25 S. W. 486.

5. PROCEDURE ON RETAKING. Statutory requirements respecting the taking of depositions generally must be strictly observed,[59] and it has been held that the original[60] or additional interrogatories,[61] which, when the examination is as to the credit of witnesses, must be so framed as to exclude testimony to overcome that already taken,[62] may be used. Due notice must be given,[63] and the scope of the examination may be restricted.[64]

6. RIGHT TO USE ORIGINAL DEPOSITION. The retaking of a deposition will not preclude the reading of the deposition originally taken.[65]

G. Lost or Destroyed Depositions — 1. SUBSTITUTION OF COPY. Where a deposition has been lost or destroyed a properly identified or authenticated copy may be substituted and read as the original,[66] or the contents may be proved as

Merits unaffected by unauthorized retaking. — That a deposition taken without leave was erroneously permitted to be read is not a ground for reversal where it did not affect the decision of the case. Hickey *v.* Young, 1 J. J. Marsh. (Ky.) 1.

The admission or rejection of such a deposition taken without leave or order of the court is addressed to its discretion. Bogan *v.* Hamilton, 90 Ala. 454, 8 So. 186; McDonald *v.* Jacobs, 77 Ala. 524; Meyer *v.* Mitchell, 77 Ala. 312; Broadnax *v.* Sullivan, 29 Ala. 320; Herbert *v.* Hanrick, 16 Ala. 581; Hester *v.* Lumpkin, 4 Ala. 509; Crossett *v.* Carleton, 49 N. Y. App. Div. 367, 63 N. Y. Suppl. 409; Lawson *v.* Zinn, 48 W. Va. 312, 37 S. E. 612.

59. Gibbs *v.* Gibbs, 6 Colo. App. 368, 40 Pac. 781.

60. Barnum *v.* Barnum, 42 Md. 251.

Detaching the interrogatories from a deposition defectively executed after it has been filed and attaching them to a second commission is harmless irregularity. Boone *v.* Miller, 73 Tex. 557, 11 S. W. 551.

Refiling. — The original interrogatories may be refiled. Foster *v.* Smith, 2 Coldw. (Tenn.) 474, 88 Am. Dec. 604.

Where depositions are not taken under a commission a new commission may issue without new interrogatories. Copeland *v.* Mears, 2 Sm. & M. (Miss.) 519.

61. Foster *v.* Smith, 2 Coldw. (Tenn.) 474, 88 Am. Dec. 604.

Supplementary interrogatories are irregular unless the other party assents or has notice, or they are permitted by the commission. Matthews *v.* Dare, 20 Md. 248.

62. Gass *v.* Stinson, 10 Fed. Cas. No. 5,261, 2 Sumn. 605.

63. Foster *v.* Smith, 2 Coldw. (Tenn.) 474, 88 Am. Dec. 604; Wallace *v.* Byers, 14 Tex. Civ. App. 574, 38 S. W. 228.

The court cannot abridge the statutory time of giving notice or of service of the interrogatories. Gibbs *v.* Gibbs, 6 Colo. App. 368, 40 Pac. 781.

64. A witness cannot be reëxamined as to the same facts, but may be as to other facts, or new matter arising out of the testimony of other witnesses. Sawyer *v.* Sawyer, Walk. (Mich.) 48.

New witnesses. — An order is not irregular because not restricting the reëxamination to witnesses not before examined on the same subject-matter. Forbes *v.* Forbes, 9 Hare (App.) lxxvii, 41 Eng. Ch. lxxvii.

Witness to credit. — A witness examined to the mere credit of the other witnesses, whose depositions have been already taken and published, will not be allowed to be examined to prove or disprove any fact material to the merits of the case. Wood *v.* Mann, 30 Fed. Cas. No. 17,953, 2 Sumn. 316.

The adverse party may question the witness upon all matters as to which he testified in his first deposition. Evanisch *v.* Gulf, etc., R. Co., 61 Tex. 24.

65. *Kentucky.* — Strader *v.* Graham, 7 B. Mon. 633; Deneal *v.* Allensworth, 2 J. J. Marsh. 446.

New York. — Becker *v.* Winne, 7 Hun 458.

Pennsylvania. — Schoneman *v.* Fegley, 7 Pa. St. 433; Watson *v.* Brewster, 1 Pa. St. 381.

Tennessee. — Susong *v.* Ellis, 11 Heisk. 80.

Texas. — Ballard *v.* Perry, 28 Tex. 347.

Vermont. — Downer *v.* Dana, 19 Vt. 338.

See 16 Cent. Dig. tit. "Depositions," § 231.

Contra. — Straas *v.* Marine Ins. Co., 23 Fed. Cas. No. 13,518, 1 Cranch C. C. 343.

Former depositions may be used where the witnesses refer to and reaffirm them (Strader *v.* Graham, 7 B. Mon. (Ky.) 633); or where after a plea of infancy was added, the new depositions were taken to explain and qualify the facts stated in the former depositions of the same witnesses, and to prove defendant's age (Watson *v.* Brewster, 1 Pa. St. 381). The original deposition is not objectionable on the ground that the witness cannot be contradicted by previous statements made by him without his attention being first called to them. Becker *v.* Winne, 7 Hun (N. Y.) 458.

A deposition taken when a witness was incompetent cannot be read, where a second deposition was taken after restoration to competency, although it states that the facts stated in the first deposition are true. Scales *v.* Desha, 16 Ala. 308.

66. *Georgia.* — Central R. Co. *v.* Wolff, 74 Ga. 664.

Illinois. — Gage *v.* Eddy, 167 Ill. 102, 47 N. E. 200; Aulger *v.* Smith, 34 Ill. 534.

Kansas. — Gilmore *v.* Butts, 61 Kan. 315, 59 Pac. 645.

Missouri. — Carter *v.* Davis, 81 Mo. 668; Donnell *v.* Byern, 80 Mo. 332; Finney *v.* St. Charles College, 13 Mo. 266.

Texas. — Jury *v.* Shearman, 2 Tex. Unrep. Cas. 201.

Vermont. — Low *v.* Peters, 36 Vt. 177.

United States. — Stebbins *v.* Duncan, 108

in the case of other lost papers.[67] So a copy may be read where a party takes a deposition from the files and refuses to produce it.[68]

2. Preliminary Proof. To authorize the use of a copy under such circumstances the loss or destruction must be shown,[69] and it must also appear that the proposed substitute is a true copy of the original,[70] and that a new deposition could not be procured.[71]

XX. Use of Depositions and Their Admissibility in Evidence.[72]

A. Parties Entitled to Use. A valid and competent deposition taken and filed in the cause is the common property of the litigants therein, and either is entitled to use it.[73] Especially is this so where the deposition is taken on interroga-

U. S. 32, 2 S. Ct. 313, 27 L. ed. 641; Burton *v.* Driggs, 20 Wall. 125, 22 L. ed. 299.

See 16 Cent. Dig. tit. "Depositions," § 233.

The original must have been returned and filed. Carter *v.* Davis, 81 Mo. 668. But see *contra*, Low *v.* Peters, 36 Vt. 177.

A copy of a copy cannot be read. Bovard *v.* Wallace, 4 Serg. & R. (Pa.) 499.

Going to trial without.— A party who has taken depositions, part of which have been lost, may if he so elect go to trial without them, and the adverse party has no ground of complaint. Thompson *v.* Commercial Bank, 3 Coldw. (Tenn.) 46.

67. Aulger *v.* Smith, 34 Ill. 534.

Lost papers generally see Lost Instruments.

68. Polleys *v.* Ocean Ins. Co., 14 Me. 141.

69. Aulger *v.* Smith, 34 Ill. 534; Pipher *v.* Lodge, 16 Serg. & R. (Pa.) 214.

Mere proof that search was made for the original is insufficient. Pipher *v.* Lodge, 16 Serg. & R. (Pa.) 214.

70. Gilmore *v.* Butts, 61 Kan. 315, 59 Pac. 645; Pipher *v.* Lodge, 16 Serg. & R. (Pa.) 214; Low *v.* Peters, 36 Vt. 177.

A copy transcribed and attested by the witness is sufficient. Gilmore *v.* Butts, 61 Kan. 315, 59 Pac. 645.

A purported copy cannot be used where the witness cannot remember whether he transcribed it from the original or from a copy. Pipher *v.* Lodge, 16 Serg. & R. (Pa.) 214.

71. Aulger *v.* Smith, 34 Ill. 534; McCally *v.* Franklin, 2 Yeates (Pa.) 340; Low *v.* Peters, 36 Vt. 177; Follett *v.* Murray, 17 Vt. 530. In McCally *v.* Franklin, 2 Yeates (Pa.) 340, parol evidence of the contents of a lost deposition was rejected, although the witness was dead, it appearing that there was ample opportunity to take it before his death. It has been held, however, that where the lost depositions are offered to be proved by copies admittedly true and not by oral evidence, it is not necessary to retake the deposition or to prove the death of the witnesses or their incapacity to testify. Gilmore *v.* Butts, 61 Kan. 315, 59 Pac. 645; Stebbins *v.* Duncan, 108 U. S. 32, 2 S. Ct. 313, 27 L. ed. 641.

72. **Admissibility of evidence** generally see Criminal Law; Evidence.

73. *Arkansas.*— Sexton *v.* Brock, 15 Ark. 345.

Georgia.— Bond *v.* Carter, 14 Ga. 697.

Illinois.— Adams *v.* Russell, 85 Ill. 284.

Indiana.— Woodruff *v.* Garner, 39 Ind. 246.

Iowa.— Brown *v.* Byam, 65 Iowa 374, 21 N. W. 684; Hale *v.* Gibbs, 43 Iowa 380; Wheeler *v.* Smith, 13 Iowa 564 [*following* Crick *v.* McClintic, 4 Greene 290]; Pelamourges *v.* Clark, 9 Iowa 1.

Louisiana.— Godfrey *v.* Hall, 4 La. 158; Dwight *v.* Linton, 3 Rob. 57.

Minnesota.— Lougee *v.* Bray, 42 Minn. 323, 44 N. W. 194; *In re* Smith, 34 Minn. 436, 26 N. W. 234.

Missouri.— McClintock *v.* Curd, 32 Mo. 411; Watson *v.* Race, 46 Mo. App. 546 [*citing* Greene *v.* Chickering, 10 Mo. 109].

Nebraska.— Ulrich *v.* McConaughey, 63 Nebr. 10, 88 N. W. 150.

Ohio.— Devinny *v.* Jelly, Tapp. 159.

Pennsylvania.— O'Connor *v.* American Iron Mountain Co., 56 Pa. St. 234; Lour *v.* Vandermark, 4 Kulp 425. And see Smith *v.* Austin, 4 Brewst. 89.

Tennessee.— Brandon *v.* Mullenix, 11 Heisk. 446.

Wisconsin.— Hazleton *v.* Union Bank, 32 Wis. 34.

United States.— Yeaton *v.* Fry, 9 U. S. 335, 3 L. ed. 117.

England.— Sturgis *v.* Morse, 26 Beav. 562; Procter *v.* Lainson, 7 C. & P. 629, 32 E. C. L. 793.

See 16 Cent. Dig. tit. "Depositions," § 237 *et seq.* 276.

Analogy to ordinary evidence.— In Echols *v.* Staunton, 3 W. Va. 574, 578 [*quoted* in Ulrich *v.* McConaughey, 63 Nebr. 10, 88 N. W. 150], the court said: "It is as competent for one party to read on his own behalf a deposition regularly taken and filed by the other party, as it would be to introduce a witness summoned on behalf of such other party."

No previous notice necessary.— Either party to a suit has the right to read in evidence the depositions taken by the opposite party if offered at the proper time, without giving previous notice of his intention. McClintock *v.* Curd, 32 Mo. 411.

Texas statute.— Where depositions are taken by one party and no cross interrogatories are filed the statutory rule is that the person not crossing the interrogatories cannot read the depositions over the objections of the party taking them. San Antonio, etc., R. Co. *v.* Harrison, 72 Tex. 478, 10 S. W. 556.

tories propounded by both parties.[74] And while the use of a deposition by the adverse party is somewhat a matter of practice, and governed in most instances by statute or rules of court,[75] yet it may be stated as a general rule that where a deposition has been taken by one party and filed in the cause his adversary is entitled to use it in evidence,[76] although the first party refuses to introduce it in his own behalf;[77] and even where there is a subsequent trial of a former action

74. Pelamourges *v.* Clark, 9 Iowa 1.

Deposition of same witness by both parties. — In Woodruff *v.* Garner, 39 Ind. 246, it was held that where both parties had taken the deposition of the same witness either might use both depositions in evidence.

75. Polleys *v.* Ocean Ins. Co., 14 Me. 141; Radelyffe *v.* Barton, 161 Mass. 327, 37 N. E. 373; Ford *v.* Ford, 17 Pick. (Mass.) 418; Johnson *v.* State, 27 Tex. 758.

76. *Illinois.*—Adams *v.* Russell, 85 Ill. 284.

Iowa.— Hale *v.* Gibbs, 43 Iowa 380; Wheeler *v.* Smith, 13 Iowa 564 [*following* Pelamourges *v.* Clark, 9 Iowa 1]; Criek *v.* McClintic, 4 Greene 290; Nash *v.* State, 2 Greene 286.

Maryland.— Little *v.* Edwards, 69 Md. 499, 16 Atl. 134.

Minnesota.— *In re* Smith, 34 Minn. 436, 26 N. W. 234.

Missouri.— Greene *v.* Chickering, 10 Mo. 109.

New York.— Jordan *v.* Jordan, 3 Thomps. & C. 269; Weber *v.* Kingsland, 8 Bosw. 415.

Ohio.— Wilson *v.* Runyon, Wright 651.

Pennsylvania.— O'Connor *v.* American Iron Mountain Co., 56 Pa. St. 234.

West Virginia.— Echols *v.* Staunton, 3 W. Va. 574.

United States.— Park *v.* Willis, 18 Fed. Cas. No. 10,716, 1 Cranch C. C. 357.

See 16 Cent. Dig. tit. "Depositions," § 238 *et seq.*

Compare Wing *v.* Hall, 47 Vt. 182 [*following* Waite *v.* Brewster, 31 Vt. 516].

Admission of exhibits.— Where, in answer to the general interrogatory in a deposition, evidence is given consisting of original letters material to the issue, defendant, although not the party at whose instance the deposition was taken, is entitled to offer them in evidence, independently of the deposition to which they are attached as exhibits. Hazleton *v.* Union Bank, 32 Wis. 34.

After rejection.— A party who has procured the rejection of a deposition filed by his adversary cannot be permitted afterward to read it without the consent of the party filing it. Thomas *v.* Davis, 7 B. Mon. (Ky.) 227.

Competency of evidence.—In Young *v.* Wood, 11 B. Mon. (Ky.) 123, it was held that where a deposition of a witness taken by one party was repudiated by him before trial, and was offered and admitted on the other side, that the only effect of it was to preclude the party taking the deposition from disputing its competency, and impeaching the general character of the witness for truth.

Deposition by both parties.— A deposition taken by one party in which he has embodied by way of interrogatory a copy of a deposition of the same witness previously taken in the same action by the other party, but which the other party does not see fit to use, is not admissible. Dana *v.* Underwood, 19 Pick. (Mass.) 99.

Entire deposition.— Where a deposition which had been taken by plaintiff in an action was not used by him at the trial, and the court allowed defendant to read the cross-examination only, it was held that the whole deposition should have been admitted. Juneau Bank *v.* McSpedon, 15 Wis. 629.

Showing as to absence or disability.—Where the party at whose instance a deposition is taken fails to use it, his adversary cannot use it without making the showing as to death, absence, or inability to attend that would be required of the party taking. Gordon *v.* Little, 8 Serg. & R. (Pa.) 533, 11 Am. Dec. 632.

77. *Florida.*— Broughton *v.* Crosby, 9 Fla. 254.

Iowa.— Hale *v.* Gibbs, 43 Iowa 380.

Kansas.— Rucker *v.* Reid, 36 Kan. 468, 13 Pac. 741.

Kentucky.— Weil *v.* Silverstone, 6 Bush 698.

Maryland.— Little *v.* Edwards, 69 Md. 499, 16 Atl. 134.

Minnesota.— Byers *v.* Orensstein, 42 Minn. 386, 44 N. W. 129.

Missouri.— Watson *v.* Race, 46 Mo. App. 546.

New York.— Weber *v.* Kingsland, 8 Bosw. 415.

West Virginia.— Echols *v.* Staunton, 3 W. Va. 574.

See 16 Cent. Dig. tit. "Depositions," § 238.

Competent evidence.— A deposition taken but not used by defendant cannot be read in evidence by plaintiff if the testimony would not have been competent or legal for plaintiff if it had been taken on his part. Hallett *v.* O'Brien, 1 Ala. 585; Reid *v.* Hodgson, 20 Fed. Cas. No. 11,667, 1 Cranch C. C. 491.

Exception by adverse party.— Where defendant declines to read a deposition taken by him and plaintiff offers it, it is subject to objection by defendant that the testimony therein is hearsay. Elliott *v.* Shultz, 29 Tenn. 234.

Impeachment of credit.—A deposition taken to impeach the credit of a witness cannot be read by the adverse party if the party taking it declines to read it, and also fails to assail the character of the witness intended to be impeached by the deposition. Sullivan *v.* Norris, 8 Bush (Ky.) 519. But if the character of the witness had been assailed by the party taking the deposition, and he had declined to read it, then the adverse party would have had the right to use the deposi-

the deposition may be again introduced in evidence at the latter trial.[78] Again in some jurisdictions the right of the adverse party to read a deposition is affected by the fact that he cross-examined.[79]

B. Admissibility — 1. In General. To allow proof by depositions in actions militates against the principles of ancient common law,[80] which required the personal attendance of witnesses that the truth might be more readily and fully elicited in open court, and their credibility and statements more accurately weighed and thoroughly sifted; hence the authority to take testimony in this mode being in derogation of the rules of the common law has always been construed strictly. It is necessary to show that legal notice,[81] and all the other requirements of the statute have been strictly complied with before the deposition can be admitted in

tion for the purpose of sustaining the witness. Sullivan *v.* Norris, 8 Bush (Ky.) 519.

78. Hallett *v.* O'Brien, 1 Ala. 585; Turner *v.* McIlhaney, 8 Cal. 575. *Compare* Sexton *v.* Brock, 15 Ark. 345.

Death of witness.—Where a deposition was taken by one party on notice, and both parties examined the witness at the caption, but the deposition had not been used upon trial, and the witness died, it was held that the adverse party was not entitled to use the deposition against the will of the party taking it. George *v.* Fisk, 32 N. H. 32.

Deposition by request.— The deposition of a party to an action on trial, taken at the request of the other party, which was intended to be used, and was filed by such other party in another suit, cannot be read as evidence against the party at whose request it was taken. Hovey *v.* Hovey, 9 Mass. 216.

79. Where the adverse party has cross-examined a witness, he acquires the right to use such deposition as if it had been taken on his own behalf (Louisville, etc., R. Co. *v.* Brown, 56 Ala. 411; Stewart *v.* Hood, 10 Ala. 600; Rogers *v.* Barnett, 4 Bibb (Ky.) 480; San Antonio, etc., R. Co. *v.* Harrison, 72 Tex. 478, 10 S. W. 556; King *v.* Russell, 40 Tex. 124; Refugio *v.* Byrne, 25 Tex. 193; Norvell *v.* Oury, 13 Tex. 31; John P. King Mfg. Co. *v.* Solomon, (Tex. Civ. App. 1894) 25 S. W. 449. *Compare* Dwight *v.* Linton, 3 Rob. (La.) 57; Straw *v.* Dye, 2 Ohio Dec. (Reprint) 312, 2 West. L. Month. 388); yet where he has failed to cross-examine no such right will be allowed him (Watson *v.* Miller, 82 Tex. 279, 17 S. W. 1053; San Antonio, etc., R. Co. *v.* Harrison, 72 Tex. 478, 10 S. W. 556; Brandon *v.* McNelly, 43 Tex. 76; Refugio *v.* Byrne, 25 Tex. 193; Harris *v.* Leavitt, 16 Tex. 340; Norvell *v.* Oury, 13 Tex. 31).

80. Crary *v.* Barlow, 5 Ark. 210; Hunt *v.* Lowell Gas Light Co., 1 Allen (Mass.) 343; Brewer *v.* Beckwith, 35 Miss. 467; Hayward *v.* Barron, 38 N. H. 366.

Depositions are regarded as secondary evidence, but may be read when duly taken, if the witness be dead or out of the jurisdiction of the court. Sexton *v.* Brock, 15 Ark. 345; Haupt *v.* Henninger, 37 Pa. St. 138.

Deposition of expert.— There is no distinction between the deposition of an ordinary witness and that of an expert, so far as their admissibility is concerned. Camp *v.* Averill, 54 Vt. 320.

Copy of deposition.— In Alcock *v.* Royal Exch. Assur. Corp., 13 Q. B. 292, 13 Jur. 445, 18 L. J. Q. B. 121, 66 E. C. L. 292, it was held that a copy of a deposition was inadmissible in evidence. In Robinson *v.* Davies, 5 Q. B. D. 26, 49 L. J. Q. B. 218, 28 Wkly. Rep. 255, it was held, however, that where copies of certain documents and answers of witnesses with regard to the contents thereof were received in evidence without objection on the part of the adverse party who joined in the commission and such documents were appended to the deposition and returned therewith, that it was too late to make objection that the original documents were not produced after the case had been referred to an arbitrator.

The English statutes as well as our own that authorize a departure from this salutary principle certainly never intended to allow depositions to be read in actions at law, unless the personal attendance of the witnesses could not be procured by reasonable exertions, and their absence first satisfactorily accounted for, or unless some stringent reason is shown to the satisfaction of the court why the witnesses could not be produced at the trial and their evidence given *viva voce*. Crary *v.* Barlow, 5 Ark. 210; Hayward *v.* Barron, 38 N. H. 366.

81. American Union Tel. Co. *v.* Daughtry, 89 Ala. 191, 7 So. 660; Craft *v.* Jackson, 4 Ga. 360; Dunlop *v.* Munroe, 8 Fed. Cas. No. 4,167, 1 Cranch C. C. 536 [*affirmed* in 7 Cranch 242, 3 L. ed. 329]. See *supra*, XVI, A.

Commission by consent.— A deposition taken without notice and not upon interrogatories, under a commission issued by consent, cannot be read in evidence. Dunlop *v.* Munroe, 8 Fed. Cas. No. 4,167, 1 Cranch C. C. 536 [*affirmed* in 7 Cranch 242, 3 L. ed. 329].

Criminal prosecutions.— Under N. C. Acts (1891), c. 522, authorizing defendant in criminal actions, upon giving notice to the state and complying with certain other requirements, to take depositions, the deposition of the deceased, taken by one of the defendants in an indictment for murder without notice to his co-defendant, being otherwise in form, is admissible in evidence, with instructions to the jury that it was not to be taken as evidence against the other defendant. State *v.* Finley, 118 N. C. 1161, 24 S. E. 495.

evidence.[82] It is also necessary to show that the deponent comes within some of the provisions of the statute authorizing the admission of his testimony.[83] And it may be said that the general rule now is that depositions which have been regularly taken and filed in a cause in compliance with statutory provisions may be used as evidence therein, provided some statutory ground for their admission is shown,[84] and they contain evidence pertinent to the issue.[85]

2. DISCRETION OF COURT. If the deposition was taken in conformity with the statute and rules it is admissible of course, irrespective of objections to the testimony;[86] but immaterial infractions of the statute may be disregarded, and the court in its discretion may permit the deposition to be read.[87]

3. CONTENTS OF DEPOSITION. The mere fact that a deposition contains statements outside of the evidence will not render it inadmissible unless they are prejudicial.[88]

82. Hendrieks *v.* Craig, 5 N. J. L. 567; Lawrence *v.* Finch, 17 N. J. Eq. 234; Garner *v.* Cutler, 28 Tex. 175; Bell *v.* Morrison, 1 Pet. (U. S.) 351, 7 L. ed. 174.

Deposition taken under stipulation.—Where a deposition is taken under stipulation which provides for the admission of the deposition without conditions, it is to be governed by the stipulation and not by statutory provisions. People *v.* Grundell, 75 Cal. 301, 17 Pac. 214.

Reporter's transcript of testimony.— The admission of the reporter's certified transcript of the testimony of a deposing witness is not error, under Cal. Pen. Code, § 864, placing such a transcript when properly filed on the same footing as depositions, and section 1345, providing that depositions may be read in evidence by either party in a criminal trial, etc. People *v.* Grundell, 75 Cal. 301, 17 Pac. 214.

83. Craft *v.* Jackson, 4 Ga. 360. In Meredith *v.* Kent, 3 N. C. 17, it was held that the deposition of a witness residing outside of the state would be admitted, although he was served with a subpœna before he left the state.

Where a deposition is competent as to one party it is competent as to all parties who are sued jointly and who have filed joint exceptions thereto. Allen *v.* Russell, 78 Ky. 105.

84. Adams *v.* Russell, 85 Ill. 284.

An erroneous rejection of a deposition is no ground for new trial, where the minutes of counsel containing the testimony of the witness on a former trial went to the jury, and for aught which appeared contained all that was material in his deposition. Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Woodb. & M. 121.

Exhibits excluded.— A deposition may be admitted, and the exhibits annexed to it if in themselves incompetent may be excluded. Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737.

Judicial notice.— A referee need not take judicial notice of depositions filed with the papers of the case but not offered in evidence. Myers *v.* Roberts, 35 Fla. 255, 17 So. 358.

The declarations of a party to a suit contained in his deposition taken by the other party may be read in evidence against him in the same case, although he is present at the trial. Bogie *v.* Nolan, 96 Mo. 85, 9 S. W. 14 [*overruling* Priest *v.* Way, 87 Mo. 16].

The object of taking a rule to show cause why testimony taken by commission should not be read on the trial is to enable the party, in case of irregularity or informality not attributable to himself, to remedy the defect before trial. Tarleton *v.* Bringier, 15 La. Ann. 419.

85. Adams *v.* Russell, 85 Ill. 284.

It is no objection to reading a deposition taken abroad that the witnesses had previously been examined and cross-examined under a commission in the United States. Winthrop *v.* Union Ins. Co., 30 Fed. Cas. No. 17,901, 2 Wash. 7. So it is not a valid objection to the reading of a deposition taken in the country where the cause is tried that the testimony of the same witness had been previously taken upon a commission in another state. Hoffman *v.* Kissinger, 1 Watts & S. (Pa.) 277.

86. **In Maine** the question whether a deposition taken within the state is or is not admissible is merely a question of law, and no discretionary power to admit or reject it is lodged in the court. Cooper *v.* Bakeman, 33 Me. 376; Stinson *v.* Walker, 21 Me. 211.

In Wisconsin it has been held that the court has no discretionary power to admit in evidence a deposition not taken and certified according to the provisions of the statute. Lightfoot *v.* Cole, 1 Wis. 26.

87. Freeland *v.* Prince, 41 Me. 105; Clark *v.* Pishon, 31 Me. 503; Stinson *v.* Walker, 21 Me. 211; Haley *v.* Godfrey, 16 Me. 305; Blake *v.* Blossom, 15 Me. 394; O'Conner *v.* Layton, 2 Am. L. Reg. 121.

88. Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168.

Appeal to sympathy of jury.— The fact that defendant in giving her reasons for not appearing as a witness states that the condition of her health prevents it does not render her deposition inadmissible as apt to work on the sympathy of the jury. Arnold *v.* Penn, 11 Tex. Civ. App. 325, 32 S. W. 353.

Where such statements are prejudicial to parties in the cause the deposition will usually be rejected as evidence. Knight *v.* Coleman, 19 N. H. 118, 49 Am. Dec. 147; The Peterhoff, 19 Fed. Cas. No. 11,024, Blatchf. Pr. Cas. 463 [*reversed* in 5 Wall. 28, 18 L. ed. 564].

4. Translation. A deposition taken and returned in a foreign language may, by direction of the court, be translated into English before or at the trial.[89]

5. Part of Deposition — a. Where Whole Is Competent — (i) *In General.* The question whether a party has a right to use only a part of the deposition or must introduce it as a whole is one upon which courts have not been uniform in their decisions. In some cases the courts have allowed the deposition to be read in part[90] leaving the remainder to be read by the adverse party if he so desires;[91] but the better rule seems to be that a part of a deposition cannot be read and part omitted, but the entire deposition competent and pertinent to the issues involved should be read;[92] and especially is this so where a party introduces a deposition taken in his own behalf.[93] Where a party reads in evidence a part of a deposition

89. Christman *v.* Ray, 42 Ill. App. 111; Ilelmes *v.* Franciscus, 2 Bland (Md.) 544, 20 Am. Dec. 402; Kuhtman *v.* Brown, 4 Rich. (S. C.) 479; Cavasos *v.* Gonzales, 33 Tex. 133.

90. *Connecticut.*— Ansonia *v.* Cooper, 66 Conn. 184, 33 Atl. 905.

Missouri.— Norris *v.* Brunswick, 73 Mo. 256.

Nebraska.— Converse *v.* Meyer, 14 Nebr. 190, 15 N. W. 340.

New York.— Smith *v.* Crocker, 3 N. Y. App. Div. 471, 38 N. Y. Suppl. 268; Gellatly *v.* Lowery, 6 Bosw. 113.

Wisconsin.— Morrison *v.* Wisconsin Odd Fellows' Mut. L. Ins. Co., 59 Wis. 162, 18 N. W. 13.

See 16 Cent. Dig. tit. "Depositions," § 276.

Entire statement of deponent.— A portion of a deposition is admissible in evidence without the remainder, if the portion as introduced is all deponent said on the subject to which such portion relates, and in the absence of a showing to the contrary it will be presumed that such was the case. Mecartney *v.* Smith, (Kan. App. 1900) 62 Pac. 540.

91. Smith *v.* Crocker, 3 N. Y. App. Div. 471, 38 N. Y. Suppl. 268; Gellatly *v.* Lowery, 6 Bosw. (N. Y.) 113; Morrison *v.* Wisconsin Odd Fellows' Mut. L. Ins. Co., 59 Wis. 162, 18 N. W. 13.

92. *Iowa.*— Kilbourne *v.* Jennings, 40 Iowa 473.

Maine.— Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598.

Missouri.— Norris *v.* Brunswick, 73 Mo. 256; Edwards *v.* Crenshaw, 30 Mo. App. 510.

Nebraska.— Hamilton Brown Shoe Co. *v.* Milliken, 62 Nebr. 116, 86 N. W. 913.

North Carolina.— Barton *v.* Morphis, 15 N. C. 240.

Pennsylvania.— Logan *v.* McGinnis, 12 Pa. St. 27; Southwark Ins. Co. *v.* Knight, 6 Whart. 327; Pittsburg, etc., Pass. R. Co. *v.* Boyd, 4 Pennyp. 110.

England.— Temperley *v.* Scott, 5 C. & P. 341, 24 E. C. L. 596.

See 16 Cent. Dig. tit. "Depositions," § 276.

Demand of adverse party.— It is error to permit the reading of a part of a deposition and to refuse to compel the party reading it to read the whole on demand of the adverse party. State *v.* Rayburn, 31 Mo. App. 385.

Deposition read as admission.— In Kritzer *v.* Smith, 21 Mo. 296, it was held that where a deposition was read as an admission the party reading it should read the whole.

Extracts from depositions are inadmissible in evidence unless the whole deposition is before the court. U. S. Trust Co. *v.* Lanahan, 50 N. J. Eq. 796, 27 Atl. 1032; Lanahan *v.* Lawton, 50 N. J. Eq. 276, 23 Atl. 476. So a party cannot be allowed to take out a portion of a deposition and a part of a sentence, leaving what stands to convey a different meaning from what it would if read with the context. Miles *v.* Stevens, 3 Pa. St. 21, 45 Am. Dec. 621.

No prejudice resulting.— Where the deposition of a defendant, taken in another action against him by third persons, is put in evidence as an admission of his liability on the cause of action being sued on, although the whole deposition should be read the omission to read a part will not be considered a good reason for reversal of judgment, if the party complaining of the omission was not thereby really prejudiced. Kritzer *v.* Smith, 21 Mo. 296.

Refusal to read entire deposition.— In Grant *v.* Pendery, 15 Kan. 236, defendant offered in evidence the deposition of a witness. Plaintiff objected. The court overruled the objection. Defendant then read in evidence the examination in chief of the witness, and refused to read the cross-examination. Plaintiff then moved the court to strike out that portion of the deposition which had been read unless defendant would offer and read in evidence the balance of the deposition. Defendant still refusing to read the balance of the deposition, the court struck out what had been read and instructed the jury not to consider the same.

Special notice.— If one party takes a deposition on interrogatories, a part of which is for the purpose of meeting certain expected testimony from the adverse party, and does not otherwise intend to use such part, he must accompany the interrogatories with a distinct notice in writing of his purpose in taking it, or such adverse party may require the whole to be read to the jury, although he has not introduced the testimony to meet which the deposition was taken. Linfield *v.* Old Colony R. Corp., 10 Cush. (Mass.) 562, 57 Am. Dec. 124.

93. Kilbourne *v.* Jennings, 40 Iowa 473; Logan *v.* McGinnis, 12 Pa. St. 27; Southwark Ins. Co. *v.* Knight, 6 Whart. (Pa.) 327; Pittsburg, etc., Pass. R. Co. *v.* Boyd, 4 Pennyp. (Pa.) 110. *Compare* Thomas *v.* Miller, 151 Pa. St. 482, 25 Atl. 127 [*distinguish-*

taken at the instance of his adversary, he thereby makes it his own testimony to the same extent as if he had taken it, and his adversary is entitled to read the whole.[94]

(II) *Right of Adversary to Use Remainder.* Where only part of a deposition is introduced or read in evidence, the adverse party has the right to read the whole deposition,[95] so far as it is competent evidence for him in the cause;[96] and where a deposition regularly taken and filed in a cause is not used by

ing Calhoun *v.* Hays, 8 Watts & S. (Pa.) 127, 42 Am. Dec. 275].

Abandonment of interrogatory.—In Wheeler *v.* Atkins, 5 Esp. 246, it was held that a party could not abandon an interrogatory in part, but must abandon the whole.

No prejudice resulting.— Where defendants offered in evidence the cross-examination in the deposition of a witness, taken on his own behalf, and the court below, under plaintiff's objection unless the whole deposition be read, admitted it, and ruled that any part of the deposition that was necessary plaintiff might offer, it was held that, although the court below erred in its ruling, yet if the error was not hurtful to plaintiff the court would not reverse, but that as the examination in chief showed the witness to have been in the employ of defendant plaintiff was entitled to have it go to the jury. Pittsburg, etc., Pass. R. Co. *v.* Boyd, 4 Pennyp. (Pa.) 110.

A party who has caused a deposition to be taken on his own behalf does not necessarily, by offering and reading parts of it in evidence, bind himself to read it all, nor make the whole of it evidence offered and put in by himself, nor make answers which are irrelevant or incompetent admissible. Gellatly *v.* Lowery, 6 Bosw. (N. Y.) 113. In this respect the deposition of a party taken on his own behalf stands on the same footing as any other deposition. If the answers which the party taking the deposition declines to read are relevant and competent, the other party may read them or cause them to be read and use them as evidence in his own favor. Gellatly *v.* Lowery, 6 Bosw. (N. Y.) 113.

94. Herring *v.* Skaggs, 73 Ala. 446 [*citing* Jewell *v.* Center, 25 Ala. 498].

Time of introduction.— Whether it shall be read while the party offering a part of it is introducing his evidence, or the reading of it shall be deferred until the introduction of evidence by the other party, is a matter of discretion in the primary court. Herring *v.* Skaggs, 73 Ala. 446.

95. *Alabama.*— Herring *v.* Skaggs, 73 Ala. 446.

Missouri.— State *v.* Phillips, 24 Mo. 475.

Ohio.— Great Western Despatch South Shore Line *v.* Glenny, 41 Ohio St. 166.

Pennsylvania.— Calhoun *v.* Hays, 8 Watts & S. 127, 42 Am. Dec. 275.

Texas.— Ferguson *v.* Luce, 1 Tex. App. Civ. Cas. § 537.

See 16 Cent. Dig. tit. "Depositions," § 277.

Declining to read.— The party putting interrogatories or cross interrogatories for the deposition of a witness pursuant to stipulation may decline to read any of them and the answers, but if he does the other party may read them. Byers *v.* Orensstein, 42 Minn. 386, 44 N. W. 129 [*citing In re* Smith, 34 Minn. 436, 26 N. W. 234]. So in Edgar *v.* McArn, 22 Ala. 796, where a letter or account current was attached to the deposition of a witness in answer to a cross interrogatory, it was held that if the party calling for them declined to read them the opposite party might read them in evidence to the jury.

For the purpose of contradiction.— When a party is permitted to read part of a deposition the opposite party cannot be allowed to read the other part for the sole purpose of contradicting the testimony. Logan *v.* McGinnis, 12 Pa. St. 27. In Webster *v.* Calden, 55 Me. 165, where defendant reads an answer to a certain interrogatory in a deposition given by a deponent to be used in a former suit between the parties, in order to contradict such deponent's statements in a deposition in the present suit, it was held that plaintiff had the right to read such parts only of the rest of the deposition as related to the subject-matter of the interrogatory or qualified the answer. In Neilon *v.* Marinette, etc., Paper Co., 75 Wis. 579, 44 N. W. 772, however, where plaintiff, employed in defendant's paper-mill, was injured by having his fingers caught in the gearing of a paper-machine which he was wiping while it was in motion, it was held that defendant having introduced a portion of the deposition of a witness taken at its own instance to show that it was not customary to wipe the gearing while in motion, it was competent for plaintiff to introduce other portions of the same deposition to contradict the testimony of other witnesses of defendant that it was not customary to wipe the gearing at any time.

Interest of deponent.— Where a part of a deposition has been used by defendant in an action for injuries to show that plaintiff's witness had intimated to deponent that he would make a corrupt bargain with him for defendant railroad, it was proper to allow plaintiff to read the rest of the deposition to show deponent's temper toward the witness, and his interest in the prosecution of the witness for alleged perjury in another case against the railroad arising out of the same accident. Gulf, etc., R. Co. *v.* Coon, 69 Tex. 730, 7 S. W. 492.

96. Great Western Despatch South Shore Line *v.* Glenny, 41 Ohio St. 166; Calhoun *v.* Hays, 8 Watts & S. (Pa.) 127, 42 Am. Dec. 275.

the party taking it, it may be offered and read by the adverse party, whether he participated in taking it or not.[97]

b. Where Part Is Incompetent. A deposition may be good in part and bad in part.[98] The party proposing to use it must use it only to prove that part which it is competent for him to prove,[99] and in introducing or reading it in evidence, he may omit incompetent or irrelevant facts or statements therein contained, and answers that are not responsive;[1] and where part of the evidence is admissible, it is error to reject the whole.[2]

6. Presumptions and Burden of Proof. To establish the right of a party to use testimony taken under a commission, it is incumbent upon him to show that the commission has been executed in compliance with the terms of the commission or the terms of the statute under which it was granted.[3] Where a legal cause exists for the taking of a deposition, such cause will be presumed to exist when the deposition is offered in evidence, unless such cause shall be shown to have ceased, by the party objecting to the admissibility of the deposition.[4] Where,

97. Broughton *v.* Crosby, 9 Fla. 254; Ulrich *v.* McConaughey, 63 Nebr. 10, 88 N. W. 150.

98. *Indiana.*— Estep *v.* Larsh, 21 Ind. 183.
Kentucky.— Finlay *v.* Humble, 2 A. K. Marsh. 569.
Louisiana.— Moore *v.* Nicholls, 5 La. 488.
Missouri.— Hamilton *v.* Scull, 25 Mo. 165, 69 Am. Dec. 460.
United States.— Alsop *v.* Commercial Ins. Co., 1 Fed. Cas. No. 262, 1 Sumn. 451.

99. Edgar *v.* McArn, 22 Ala. 796; Forbes *v.* Snyder, 94 Ill. 374; Gellatly *v.* Lowery, 6 Bosw. (N. Y.) 113; Great Western Despatch South Shore Line *v.* Glenny, 41 Ohio St. 166.
Reference to previous depositions.— When the last of a series of depositions is read by the party taking it he thereby makes the previous depositions evidence, and they may be referred to by either party for the purpose of sustaining or discrediting the witness. Carville *v.* Stout, 10 Ala. 796.

1. Hill *v.* Sturgeon, 28 Mo. 323; Gellatly *v.* Lowery, 6 Bosw. (N. Y.) 113; Downey *v.* Murphey, 18 N. C. 82.
Irresponsive answers.—A party reading in evidence a deposition taken by his adversary, although he thereby makes the evidence his own, may omit irresponsive answers. Fountain *v.* Ware, 56 Ala. 558.
Proof of declarations.— Where a plaintiff introduces in evidence a portion of a deposition taken by him, omitting a part relating to a conversation of one of the defendants, they have no right to insist upon the whole deposition being read in evidence, to prove declarations, which are incompetent as evidence on their own part. Forbes *v.* Snyder, 94 Ill. 374.

2. *Kentucky.*— Finlay *v.* Humble, 2 A. K. Marsh. 569.
Louisiana.—Moore *v.* Nicholls, 5 La. 488.
Maryland.— Hatton *v.* McClish, 6 Md. 407. See also Waters *v.* Dashiell, 1 Md. 455; Budd *v.* Brooke, 3 Gill 198, 43 Am. Dec. 321.
Minnesota.— Lowry *v.* Harris, 12 Minn. 255.
Missouri.— Hamilton *v.* Scull, 25 Mo. 165, 19 Am. Dec. 460.
New York.— Commercial Bank *v.* Union Bank, 11 N. Y. 203.
Tennessee.— Mt. Olivet Cemetery Co. *v.* Shubert, 2 Head 116.
Texas.— Ector *v.* Wiggins, 30 Tex. 55.
See 16 Cent. Dig. tit. "Depositions," § 244.
Where a direct interrogatory is excluded the cross interrogatories and answers depending thereon must also be excluded. Olds *v.* Powell, 7 Ala. 652, 42 Am. Dec. 605; Fleming *v.* Hollenback, 7 Barb. (N. Y.) 271; McBride *v.* Ellis, 9 Rich. (S. C.) 269, 67 Am. Dec. 700.
Where an entire deposition is offered in evidence, the court is not bound to separate the legal from the illegal evidence which it contains, but may exclude it altogether. Crutcher *v.* Memphis, etc., R. Co., 38 Ala. 579; Hiscox *v.* Hendree, 27 Ala. 216. See also Jeans *v.* Lawler, 33 Ala. 340.

3. Young *v.* Mackall, 4 Md. 362; State *v.* Jones, 7 Nev. 408; Shepherd *v.* Thompson, 4 N. H. 213; Butts *v.* Blunt, 1 Rand. (Va.) 255. *Contra,* Moran *v.* Green, 21 N. J. L. 562.
But the certificate of an officer duly authorized is sufficient evidence of the facts stated, so as to entitle the deposition to be read to the jury, if all the necessary facts are there sufficiently disclosed. Bell *v.* Morrison, 1 Pet. (U. S.) 351, 7 L. ed. 174.
It will be presumed that the commissioner discharged his duty by doing all those things in the execution of the commission which he is not bound to return specifically as done. Darby *v.* Heagerty, 2 Ida. (Hasb.) 282, 13 Pac. 85; Williams *v.* Eldridge, 1 Hill (N. Y.) 249.

4. *Maine.*— Brown *v.* Burnham, 28 Me. 38; Logan *v.* Monroe, 20 Me. 257.
New Jersey.—Burley *v.* Kitchell, 20 N. J. L. 305.
Vermont.— Randolph *v.* Woodstock, 35 Vt. 291; Pierson *v.* Catlin, 18 Vt. 77.
Washington.— Hennessy *v.* Niagara F. Ins. Co., 8 Wash. 91, 35 Pac. 585, 40 Am. St. Rep. 892.
United States.— Merrill *v.* Dawson, 17 Fed. Cas. No. 9,469, Hempst. 563; Ridgeway *v.* Ghequier, 20 Fed. Cas. No. 11,813, 1 Cranch C. C. 4; Russell *v.* Ashley, 21 Fed. Cas. No. 12,150, Hempst. 546.
See 16 Cent. Dig. tit. "Depositions," § 247.
Statement of witness.— Where it appears

however, it appears that the witness whose deposition is offered in evidence is within the jurisdiction of the court, it has been held the duty of the party offering the deposition to show a sufficient cause for using it.[5]

7. GROUNDS OF ADMISSIBILITY — a. In General. The grounds upon which a deposition is admissible are usually regulated by statute.[6]

b. Absence of Witness — (i) *IN GENERAL.* In the absence of agreement or waiver the deposition of a witness will not be admitted when he is present and capable of being examined.[7] While, however, this is the general rule on this

from a deposition that the witness is a nonresident of the state it shows a sufficient reason for taking the same; and it will not be suppressed, although the witness may answer that he intends to be personally present at the term of court at which the cause is to be tried, unless it be shown that the witness is present in court. Nevan *v.* Roup, 8 Iowa 207.

Witness about to leave state.— A deposition *de bene esse,* the witness deposing that he was about to leave the state, may be used, where proof that he has not returned to his residence raises a presumption of his continued absence. Stockton *v.* Graves, 10 Ind. 294.

Witness presumed to be at home.— Where the residence of the witness is in another state it will be presumed in the absence of proof to the contrary that he is at home. Scott *v.* Province, 1 Pittsb. (Pa.) 189, 2 Pittsb. Leg. J. (Pa.) 134. So where a witness in his deposition states that his residence is at a point out of the state, the party taking may rely on the presumption that the witness is beyond the jurisdiction of the court, and need not show service or attempted service of a subpœna on him to render the deposition admissible. Waters *v.* Wing, 59 Pa. St. 211.

5. Morgan *v.* Halverson, 9 Wis. 271.

Less stringent proof required.— In Mills *v.* Mills, 30 L. J. P. & M. 183, 4 L. T. Rep. N. S. 479, 2 Swab. & Tr. 310, it was held that proof to satisfy the court that a witness whose evidence has been taken abroad under a commission is out of the jurisdiction when the evidence is tendered is less stringent when he is a resident abroad than when the evidence has been taken upon his leaving the jurisdiction for a temporary purpose.

Under N. C. Code, § 1378, providing that if a witness has been summoned and at the time of trial is more than seventy-five miles from the place of trial his deposition may be read, a party opposing the introduction of a deposition may show that the witness lives less than seventy-five miles from the court. Sparrow *v.* Blount, 90 N. C. 514.

6. See *infra,* XX, B, 7, b, *et seq.*

7. *Alabama.*— Humes *v.* O'Bryan, 74 Ala. 64.

Connecticut.— Neilson *v.* Hartford St. R. Co., 67 Conn. 466, 34 Atl. 820.

Georgia.— East Tennessee, etc., R. Co. *v.* Kane, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315.

Kansas.— Chicago, etc., R. Co. *v.* Prouty, 55 Kan. 503, 40 Pac. 909; Fullenwider *v.* Ewing, 30 Kan. 15, 1 Pac. 300.

Kentucky.— Kentucky Tobacco Assoc. *v.* Ashley, 5 Ky. L. Rep. 184; Beall *v.* Bethel, 3 Ky. L. Rep. 693.

Michigan.— Dunn *v.* Dunn, 11 Mich. 284.

Missouri.— Schmidt *v.* St. Louis, etc., R. Co., 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; Chapman *v.* Kerr, 80 Mo. 158; Ihl *v.* St. Joseph Bank, 26 Mo. App. 129; Carter *v.* Prior, 8 Mo. App. 577 [*affirmed* in 78 Mo. 222].

New Hampshire.— Clark *v.* Congregational Soc., 44 N. H. 382; Hayward *v.* Barron, 38 N. H. 366 [*following* Clough *v.* Bowman, 15 N. H. 504].

Pennsylvania.—Stiles *v.* Bradford, 4 Rawle 394.

Tennessee.— Puryear *v.* Reese, 6 Coldw. 21.

Texas.— McClure *v.* Sheck, 68 Tex. 426, 4 S. W. 552; Randall *v.* Collins, 52 Tex. 435; Elliot *v.* Mitchell, 28 Tex. 105; Boetge *v.* Landa, 22 Tex. 105; Willis *v.* Moore, (Civ. App. 1895) 33 S. W. 691. *Compare* Schmick *v.* Noel, 64 Tex. 406.

Vermont.— Doe *v.* Adams, 1 Tyler 197.

United States.— Whitford *v.* Clark County, 119 U. S. 522, 7 S. Ct. 306, 30 L. ed. 500; Texas, etc., R. Co. *v.* Watson, 112 Fed. 402, 50 C. C. A. 230.

Compare Bradley *v.* Geiselman, 17 Ill. 571; Phenix *v.* Baldwin, 14 Wend. (N. Y.) 62.

See 16 Cent. Dig. tit. "Depositions," § 258.

Appearance after deposition is read.— Although a deposition cannot be read when the witness is present at the trial, the appearance of such witness in court after his deposition has been read will not justify its exclusion. Benjamin *v.* Metropolitan St. R. Co., 133 Mo. 274, 34 S. W. 590.

Expectation of witness.— Where a deposition was taken before the clerk of the court, and in it the witness stated that he was a resident of another state, but that he expected to be present at the trial of the case some six months hence, it was held that the deposition would not be excluded unless it was shown that he was present in court. Nevan *v.* Roup, 8 Iowa 207. So in Eby *v.* Winters, 51 Kan. 777, 33 Pac. 471, where it appeared that a certain witness did not reside in a county where a trial was to be held, and his deposition was regularly taken in the county of his residence and filed in the district court of the proper county, it was held not a good objection, when the deposition was offered, merely to state "that the witness has been in attendance upon the court, and is at present, it is believed, on his way to the place of trial."

Person in jail.— Where the deposition of a person in jail under sentence has been taken,

subject and the one most universally followed, yet where the opposite party is allowed the right of cross-examination or to examine the witness as his own the right of admission has not been denied;[8] and especially is this the case where declarations or admissions are evidence against the deponent.[9] Matters of practice in this regard rest largely within the discretion of the court.[10]

(II) *Deponent Within Jurisdiction of Court.* Where the presence of the witness beyond a prescribed distance from the place of trial is a prerequisite to the right to introduce his deposition in evidence, preliminary proof sufficient to satisfy the court of that fact[11] must be made before the deposition can be

but upon proper affidavit the attendance of the deponent has been procured, the deposition will be suppressed. Webb *v.* Kelly, 37 Ala. 333.

Production in court.— Where a witness was in court the day on which his deposition was read, but the record does not show that he was "produced in court" at the time his deposition was read, or that he could have been compelled to attend, or that his absence was due to any fault of plaintiff, it was held that as the deposition was properly taken it could be read in evidence, under Ind. Rev. St. (1881), so providing where the witness is not "produced in court." Louisville, etc., R. Co. *v.* Hubbard, 116 Ind. 193, 18 N. E. 611.

Where witness' mind is affected.— Where a witness who became a resident of the county after his deposition was taken was present at the trial, but stated that he had recently been sick, and that his mind and recollection were affected; that his mind was not in a condition then to remember what really occurred; and that he was well and his memory was better when the deposition was taken, it was held that the deposition was admissible, it appearing that his testimony contained in it was clear and positive, while that given on the trial was doubtful, hesitating, and uncertain. Tift *v.* Jones, 74 Ga. 469. See also Jack *v.* Woods, 29 Pa. St. 375, where the question arose but was not decided.

Under Cal. Code Civ. Proc. § 2021, subd. 1, a deposition may be read, although the deponent is present in court, as section 2032 expressly provides "if the deposition be taken under subdivisions 2, 3, and 4 of section 2021, proof must be made at the trial that the witness continues absent or infirm, or is dead;" and the only reason for enumerating these subdivisions is to permit the depositions taken under subdivision 1 to be read, although the deponent be in court. Newell *v.* Desmond, 74 Cal. 46, 47, 15 Pac. 369. See also Johnson *v.* McDuffie, 83 Cal. 30, 23 Pac. 214.

8. *Delaware.*— Flinn *v.* Philadelphia, etc., R. Co., 1 Houst. 469.

Georgia.— Hartford City F. Ins. Co. *v.* Carrugi, 41 Ga. 660.

Illinois.— Frink *v.* Potter, 17 Ill. 406.

Iowa.— Tabor *v.* Foy, 56 Iowa 539, 9 N. W. 897.

Kentucky.— Louisville, etc., R. Co. *v.* Steenberger, 69 S. W. 1094, 24 Ky. L. Rep. 761.

South Carolina.— McLaurin *v.* Wilson, 16 S. C. 402.

Tennessee.— Turney *v.* Officer, 3 Head 567; Ford *v.* Ford, 11 Humphr. 89.

Texas.— Dillingham *v.* Hodges, (Civ. App. 1894) 26 S. W. 86.

United States.— Whitford *v.* Clark County, 13 Fed. 837.

See 16 Cent. Dig. tit. "Depositions," § 258 *et seq.*

On appeal.— A deposition which comes up in a case from the inferior court may be read, although the witness is also present in court. Oliver *v.* Sale, Quincy (Mass.) 29.

Witness declining to testify.— As a general rule, where the deposition of a witness has been properly taken, to be used at the trial of an action, but at the time of trial the witness is in court and called to the stand, the deposition is excluded. If, however, when called to the stand, the witness declines to testify, on the ground that he cannot do so without criminating himself, and is thereupon excused from testifying, the deposition is not thereby rendered admissible. Hayward *v.* Barron, 38 N. H. 366.

9. Moore *v.* Brown, 23 Kan. 269; Bogie *v.* Nolan, 96 Mo. 85, 9 S. W. 14 [*overruling* Priest *v.* Way, 87 Mo. 16]; State *v.* Chatham Nat. Bank, 80 Mo. 626. And see Gilchrist *v.* Partridge, 73 Me. 214.

Impeachment of testimony.— When a witness is present in court, his deposition used on a former trial of the same case can be read in evidence only to impeach him after the proper foundation has been laid. Moline Plow Co. *v.* Gilbert, 3 Dak. 239, 15 N. W. 1.

10. Grigsby *v.* Schwarz, 82 Cal. 278, 22 Pac. 1041; Western, etc., R. Co. *v.* Bussey, 95 Ga. 584, 23 S. E. 207; O'Connor *v.* Andrews, 81 Tex. 28, 16 S. W. 628; Schmick *v.* Noel, 64 Tex. 406; O'Connor *v.* Curtis, (Tex. Sup. 1892) 18 S. W. 953; Hittson *v.* State Nat. Bank, (Tex. Sup. 1890) 14 S. W. 780; Galveston, etc., R. Co. *v.* Gormley, (Tex. Civ. App. 1896) 35 S. W. 488; Thayer *v.* Gallup, 13 Wis. 539.

Judgment will not be reversed unless it is made to appear that such discretion has been abused in such a way as to prejudice the case of the party complaining. Schmick *v.* Noel, 64 Tex. 406.

11. Johnson *v.* McDuffee, 83 Cal. 30, 23 Pac. 214 (testimony of counsel); Golding *v.* The America, 20 La. Ann. 455 (deponent in the naval service); Golden *v.* State, 22 Tex. App. 1, 2 S. W. 531 (absence by procurement).

Removal of objection.— Where the objection to depositions on the ground that there is no proof that the witnesses are not within

used unless the adverse party has dispensed with the necessity of such proof by expressly or impliedly waiving it.[12]

(III) *Departure After Deposition Taken.* Whether or not the deposition of a witness should be received in evidence must be determined from the facts in existence at the time of the trial, and if at that time it is shown that the witness does not reside in or has removed from the county or state where the trial is proceeding, his deposition, otherwise unobjectionable, is receivable in evidence.[13]

(IV) *Failure to Depart.* Where a deposition is taken for the reason that the deponent is about to depart from the jurisdiction of the court, and he fails to do so, such deposition cannot be used in evidence at the time of trial.[14]

(V) *Removal Within Reach of Process.* A deposition will not be competent evidence, where it is shown that the witness had, after it was taken, removed within the jurisdiction of the court, and that his attendance might have

the process of court is not made until they are offered in evidence, plaintiff may be allowed to remove that objection by proof. Lepper *v.* Chilton, 7 Mo. 221.

12. *Alabama.*— Memphis, etc., R. Co. *v.* Maples, 63 Ala. 601.

Arkansas.— Branch *v.* Mitchell, 24 Ark. 431.

Indiana.— O'Conner *v.* O'Conner, 27 Ind. 69; Hazlett *v.* Gambold, 15 Ind. 303.

Kentucky.— Gregg *v.* Woods, 3 Ky. L. Rep. 526.

Missouri.— Folks *v.* Burnett, 47 Mo. App. 564.

Pennsylvania.— Parker *v.* Farr, 1 Browne 252.

Texas.— Stafford *v.* King, 30 Tex. 257, 94 Am. Dec. 304. *Compare* Houston, etc., R. Co. *v.* Ray, (Civ. App. 1894) 28 S. W. 256.

United States.— Sergeant *v.* Biddle, 4 Wheat. 508, 4 L. ed. 627; Bowie *v.* Talbot, 3 Fed. Cas. No. 1,732, 1 Cranch C. C. 247; Hope *v.* Eastern Transp. Line, 12 Fed. Cas. No. 6,680 [*affirmed* in 95 U. S. 297, 24 L. ed. 477]; Park *v.* Willis, 18 Fed. Cas. No. 10,716, 1 Cranch C. C. 357; Weed *v.* Kellogg, 29 Fed. Cas. No. 17,345, 6 McLean 44.

See 16 Cent. Dig. tit. "Depositions," § 248 *et seq.*

Consent of parties.— The deposition of a resident of an adjoining county, taken by consent of parties, may be read, without accounting for the non-production of the witness. Griffin *v.* Templeton, 17 Ind. 234.

Knowledge of parties.— It is no objection to reading the deposition of a witness, taken under a rule of court, who lives in another state, more than one hundred miles from the place of trial, that he had been in the city during the session of the court, the fact not being known to the party. Pettibone *v.* Derringer, 19 Fed. Cas. No. 11,043, 1 Robb Pat. Cas. 152, 4 Wash. 215.

Temporary absence.— A temporary absence is sufficient to support a deposition taken on affidavit that the witness was about to leave the state, etc., and it is admissible in evidence, although it appear that the witness still resides or has his home in the state. Eddins *v.* Wilson, 1 Ala. 237.

13. *Connecticut.*— Spear *v.* Coon, 32 Conn. 292.

Massachusetts.— See Livesey *v.* Bennett, 14 Gray 130.

Nebraska.— William B. Grimes Dry Goods Co. *v.* Shaffer, 41 Nebr. 112, 59 N. W. 741.

New York.— Markoe *v.* Aldrich, 1 Abb. Pr. 55.

North Carolina.— Barnhardt *v.* Smith, 86 N. C. 473; Alexander *v.* Walker, 35 N. C. 13.

Vermont.— Johnson *v.* Sargent, 42 Vt. 195.

See 16 Cent. Dig. tit. "Depositions," § 254½.

Temporary absence.— Under N. C. Rev. St. c. 31, § 68, the deposition of an absent witness may be received in evidence whenever the witness has left the state, either with an intention of changing his domicile or under the expectation of being absent for a time which will include two terms of court, say six months; but it cannot be received when the witness is absent temporarily for a short time, as in the case of a seaman on a voyage to New York or Charlestown, when his return may be expected in two or three months at furthest. Alexander *v.* Walker, 35 N. C. 13.

Where a witness is within the jurisdiction up to within a short time of trial and disappears before he can be examined, it must be shown that his absence is without the consent, connivance, or collusion of the party offering the deposition. Mobile L. Ins. Co. *v.* Walker, 58 Ala. 290; Carpenter *v.* Lippitt, 77 Mo. 242; Huthsing *v.* Maus, 36 Mo. 101.

14. Commercial Bank *v.* Whitehead, 4 Ala. 637; Goodwyn *v.* Lloyd, 8 Port. (Ala.) 237; Morse *v.* Bugbee, 28 Wis. 683. In Larkin *v.* Avery, 23 Conn. 304, objection was made to the admission of a deposition on the ground that the deponent did not leave the jurisdiction of the court at the time the deposition was taken, and there was a controversy between the parties as to whether the deponent was within or without the state. Under such circumstances, the court refused to postpone the trial in order to allow further evidence as to the absence of the deponent, on the ground that parties were bound to have proof of such facts in court.

The reason is that no deposition should be used, where it appears that the reason for taking it no longer exists. Morse *v.* Bugbee, 28 Wis. 683; Morgan *v.* Halverson, 9 Wis. 271.

been procured at the trial.[15] It seems, however, that some knowledge of the change of residence must be brought home to the party proposing to introduce the deposition in evidence.[16]

(VI) *Showing of Absence* — (A) *In General.* In order to render a deposition admissible in evidence some sufficient grounds must first be produced, accounting for the absence of the party at the time of trial,[17] and especially is this the case where a deposition is taken *de bene esse*.[18]

15. Brewer *v.* Beckwith, 35 Miss. 467. *Compare* Ables *v.* Miller, 12 Tex. 109, 111, 62 Am. Dec. 520, where the court said: "It would be unreasonable to require a party to keep his eye on the witness after his testimony had been taken, and to make it his duty to put the witness under subpœna, should he move into the county."

Indiana statute.—It is provided that "when a deposition is offered to be read in evidence, it must appear to the satisfaction of the court that the cause for taking and reading it still exists." Indianapolis, etc., R. Co. *v.* Stout, 53 Ind. 143, 159 [*citing* Haun *v.* Wilson, 28 Ind. 296; O'Conner *v.* O'Conner, 27 Ind. 69; Shirts *v.* Irons, 37 Ind. 98].

16. Gallup *v.* Spencer, 19 Vt. 327.

Notorious residence.—Depositions taken under the statute on account of the non-residence of the witness cannot be read at the trial providing the witness has notoriously resided within the county where the cause is pending for some time previously, and his attendance could have been coerced by a subpœna. Hammock *v.* McBride, 6 Ga. 178.

Temporary presence.—No person can be compelled to attend for examination on the trial of a civil action except in the county of his residence; and hence the fact that a witness is temporarily in or passing through another county at the time and place of the trial therein is no objection to the reading of his deposition previously taken for use at such trial. Waite *v.* Teeters, 36 Kan. 604, 14 Pac. 146.

United States practice.— After a deposition is taken, and before trial, if the witness moves within one hundred miles, still the deposition may be read, unless the party objecting shall show that fact, and that it was known to the opposite party in time to have had the witness subpœnaed. Patapsco Ins. Co. *v.* Southgate, 5 Pet. (U. S.) 604, 8 L. ed. 243; Merrill *v.* Dawson, 17 Fed. Cas. No. 9,469, Hempst. 563; Russell *v.* Ashley, 21 Fed. Cas. No. 12,150, Hempst. 546.

17. *Kansas.*— Frankhouser *v.* Neally, 54 Kan. 744, 39 Pac. 700; Chicago, etc., R. Co. *v.* Brown, 44 Kan. 384, 24 Pac. 497.

Kentucky.—Tolly *v.* Price, 17 B. Mon. 410; Gilly *v.* Singleton, 3 Litt. 249; Johnson *v.* Fowler, 4 Bibb 521.

Louisiana.— Hawkins *v.* Brown, 3 Rob. 310.

Minnesota.—Davison *v.* Sherburne, 57 Minn. 355, 59 N. W. 316, 47 Am. St. Rep. 618; Atkinson *v.* Nash, 56 Minn. 472, 58 N. W. 39.

Missouri.— Hollfield *v.* Black, 20 Mo. App. 328.

Nebraska.— Munro *v.* Callahan, 41 Nebr. 849, 60 N. W. 97; Everett *v.* Tidball, 34 Nebr. 803, 52 N. W. 816.

Nevada.— State *v.* Parker, 16 Nev. 79.

New York.— Gardner *v.* Bennett, 38 N. Y. Super. Ct. 197; People *v.* Hadden, 3 Den. 220.

Pennsylvania.—Vickroy *v.* Skelley, 14 Serg. & R. 372; Dietrich *v.* Dietrich, 1 Penr. & W. 306.

Tennessee.— Coulter *v.* Purcell, 1 Overt. 479.

Virginia.— Lawrence *v.* Swann, 5 Munf. 332.

United States.— Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604, 8 L. ed. 243; Brown *v.* Galloway, 4 Fed. Cas. No. 2,006, Pet. C. C. 291; Penns *v.* Ingraham, 19 Fed. Cas. No. 10,944, 2 Wash. 487; The Thomas and Henry *v.* U. S., 23 Fed. Cas. No. 13,919, 1 Brock. 367.

England.— Procter *v.* Lainson, 7 C. & P. 629, 32 E. C. L. 793; Mills *v.* Mills, 30 L. J. P. & M. 183, 4 L. T. Rep. N. S. 479, 2 Swab. & Tr. 310; Robinson *v.* Markis, 2 M. & Rob. 375.

See 16 Cent. Dig. tit. "Depositions," § 249.

Inability to attend.— A deposition taken under a rule of court to be read in case of the inability of the witness to attend cannot be read unless such inability be shown, or that the witness lives beyond the reach of a subpœna. Read *v.* Bertrand, 20 Fed. Cas. No. 11,603, 4 Wash. 558.

No home or family.— Where a witness has no home or family his deposition taken out of the jurisdiction at a place where he was at work when last heard of may be read. Gould *v.* Crawford, 2 Pa. St. 89.

Summons insufficient.— The fact that a witness has been summoned and fails to attend is not sufficient to authorize the reading of his deposition taken *de bene esse*, but it must be proved that he is dead, or if living unable to attend, or has been sought for and cannot be found. Minnis *v.* Ecohls, 2 Hen. & M. (Va.) 31.

Admiralty practice.— Depositions cannot be read in admiralty any more than at common law without some sufficient showing why the witness was not produced at the hearing. Rutherford *v.* Geddes, 4 Wall. (U. S.) 220, 18 L. ed. 343.

18. Gardner *v.* Bennett, 38 N. Y. Super. Ct. 197; Coulter *v.* Purcell, 1 Overt. (Tenn.) 479; Lawrence *v.* Swann, 5 Munf. (Va.) 332; Minnis *v.* Ecohls, 2 Hen. & M. (Va.) 31; Patapsco Ins. Co. *v.* Southgate, 5 Pet. (U. S.) 604, 8 L. ed. 243; Brown *v.* Galloway, 4 Fed. Cas. No. 2,006, Pet. C. C. 291; Penns *v.* Ingraham, 19 Fed. Cas. No. 10,944, 2 Wash. 487; Pettibone *v.* Derringer, 19 Fed. Cas. No. 11,043, 1 Robb Pat. Cas. 152, 4 Wash. 215; Read *v.* Bertrand, 20 Fed. Cas. No. 11,603, 4 Wash. 558; The Thomas and Henry *v.* U. S., 23 Fed. Cas. No. 13,919, 1 Brock. 367.

(B) *Attempt to Procure Attendance.* In order to render a deposition admissible in evidence on account of the absence of a party, due diligence to procure his attendance must be shown,[19] yet such rule does not extend so far as to demand service or issuance of a subpœna, when such service or issuance would be ineffectual.[20] All that is required is a reasonable presumption that the witness is dead or outside of the jurisdiction of the court;[21] and while such presumption may arise from the deposition itself,[22] yet mere statements on the part of the deponent will not warrant the introduction of his deposition without other evidence.[23]

(C) *Sufficiency of Showing.* The question as to what will constitute a sufficient showing of absence is one upon which no absolute rule can be laid down,[24] except that the absence of the witness should be shown by someone who can

19. *Maryland.*— Howard *v.* Moale, 2 Harr. & J. 249; Darnall *v.* Goodwin, 1 Harr. & J. 282.

Minnesota.— State *v.* Gut, 13 Minn. 341.

Mississippi.— Ellis *v.* Planters' Bank, 7 How. 235; Rowan *v.* Odenheimer, 5 Sm. & M. 44.

New York.— Gardner *v.* Bennett, 38 N. Y. Super. Ct. 197.

Pennsylvania.— Mifflin *v.* Bingham, 1 Dall. 272, 1 L. ed. 133; Bibbey *v.* Metropolitan L. Ins. Co., 3 Pa. Dist. 234.

Virginia.— Tompkins *v.* Wiley, 6 Rand. 242.

United States.— Pettibone *v.* Derringer, 19 Fed. Cas. No. 11,043, 1 Robb Pat. Cas. 152, 4 Wash. 215.

See 16 Cent. Dig. tit. "Depositions," § 253.

Where a witness is out of the reach of the court's process, so that plaintiff cannot enforce his attendance by summons, plaintiff is entitled to his deposition at the trial. Matthews *v.* Dare, 20 Md. 248.

20. Jenkins *v.* Richardson, 6 J. J. Marsh. (Ky.) 441, 22 Am. Dec. 82; Sparrow *v.* Blount, 90 N. C. 514; Pennock *v.* Freeman, 1 Watts (Pa.) 401; Rankin *v.* Cooper, 2 Browne (Pa.) 13; Leatherberry *v.* Radcliffe, 15 Fed. Cas. No. 8,163, 5 Cranch C. C. 550.

21. O'Shea *v.* Twohig, 9 Tex. 336.

Question for the court.— Upon the preliminary question of the admissibility of a deposition, evidence to show that the alleged deponent was not a resident of the county or did not exist is for the court. Garner *v.* Cutler, 28 Tex. 175.

Where a special referee admits a deposition it must be presumed that it appeared to his satisfaction that the witness was then dead or removed without the state, was more than one hundred miles from the place of trial, or was unable to travel, which the statute prescribes shall be necessary to render a deposition admissible. Stoddard *v.* Hill, 38 S. C. 385, 17 S. E. 138.

22. Todd *v.* Bishop, 136 Mass. 386. See also Gilly *v.* Singleton, 3 Litt. (Ky.) 249.

Under Nebr. Code Civ. Proc. § 372, which makes a deposition admissible when the witness is a non-resident of the county, and section 386, which provides that it must be shown that the attendance of the witness cannot be procured, it is not necessary for the party offering the deposition to prove that the witnesses cannot be present in court, when it appears from the deposition itself that they are non-residents of the state. Lowe *v.* Vaughan, 48 Nebr. 651, 67 N. W. 464; Sells *v.* Haggard, 21 Nebr. 357, 32 N. W. 66.

23. Livermore *v.* Eddy, 33 Mo. 547; Wetherell *v.* Patterson, 31 Mo. 458; Grinnan *v.* Mockbee, 29 Mo. 345; Gardner *v.* Bennett, 38 N. Y. Super. Ct. 197; People *v.* Hadden, 3 Den. (N. Y.) 220; Procter *v.* Lainson, 7 C. & P. 629, 32 E. C. L. 793. *Compare* Pollard *v.* Lively, 2 Gratt. (Va.) 216.

Further proof.— Where a witness stated in his deposition that he was "going to leave the State for Europe tomorrow," it was held that under the act concerning depositions such deposition is not admissible at the trial three months afterward without some further proof of absence. Gaul *v.* Wenger, 19 Mo. 541.

24. An affidavit that the witnesses "reside out of the State of Texas, and are residents of the Indian Territory" is a sufficient predicate for the introduction of a deposition taken before the committing magistrate. Ballinger *v.* State, 11 Tex. App. 323. So in Ward *v.* Wells, 1 Taunt. 461, 10 Rev. Rep. 581, it was held that where a witness had been examined on the ground that he was about to leave the kingdom, his deposition might be read if he had actually sailed, although his vessel had been driven back into port by contrary winds.

Affidavit for continuance.— Where a deposition was objected to for want of proof that the witness resided out of the county, but an affidavit for continuance in the case showed that the witness lived in an unorganized county which had been attached for judicial purposes to the county where the trial was had, it was held that the showing was sufficient. Wright *v.* Reed, 37 Tex. 265.

Competency of evidence of absence.—A deposition taken *de bene esse* may be read where it appears that the deponent resides in another state, has been seen there since he was examined, and that according to the information of the witness he is there at the time of the trial; the competency of this evidence to prove his absence not being questioned. Donnell *v.* Walsh, 6 Bosw. (N. Y.) 621.

Review by appellate court.— The reviewing court will not disturb the trial court's finding, having some evidence in support thereof, that a witness whose deposition is offered in evidence was absent from the state. Branton *v.* O'Briant, 93 N. C. 99.

Setting out for another state.— Proof that a witness whose testimony has been taken by

speak to the fact of his own knowledge.[25] It has been held a sufficient showing that reasonable effort has been made to serve the deponent with subpœna,[26] that inquiry has been made at the deponent's usual place of business or abode,[27] and that letters have been received from the deponent from another state or country.[28] On the other hand the mere issuance of a subpœna or attachment,[29] evidence as to letters,[30] or the uncorroborated statement of witnesses[31] are not sufficient to allow the introduction of the deposition in evidence, where any uncertainty as to the deponent's real whereabouts may arise.

c. Disability of Witnesses — (i) *In General.* Where a witness is unable to attend the trial for reasons beyond the control of himself or the parties to the action, it has usually been considered good ground for introducing his deposition in evidence, whether such disability arises from old age and infirmity,[32] from illness,[33] or from some other cause which presents a reasonable and sufficient

commission *de bene esse* started before court with his family to a neighboring state is sufficient to authorize the reading of the deposition. McCutchen *v.* McCutchen, 9 Port. (Ala.) 650.

The uncorroborated testimony of an interested witness that shortly before the trial he saw in the state a person proved by other testimony to be a resident of another state is not sufficient to authorize the exclusion of a deposition of such person taken *de bene esse.* Nixon *v.* Palmer, 10 Barb. (N. Y.) 175.

25. Procter *v.* Lainson, 7 C. & P. 629, 32 E. C. L. 793; Robinson *v.* Markis, 2 M. & Rob. 375.

26. Kelly *v.* Benedict, 5 Rob. (La.) 138, 39 Am. Dec. 530; Kinney *v.* Berran, 6 Cush. (Mass.) 394; Roberts *v.* Carter, 28 Barb. (N. Y.) 462.

A return of non est inventus to a subpœna issued to the sheriff of one county is not sufficient to admit the reading of a deposition, under a statute providing for the reading of depositions taken *de bene esse* only when the witness has departed from the state, when it appears that the witness resided in another county. Hirons *v.* Griffin, 2 Harr. (Del.) 479.

27. Renton *v.* Monnier, 77 Cal. 449, 19 Pac. 820; Kinney *v.* Berran, 6 Cush. (Mass.) 394; Bronner *v.* Fraucnthal, 37 N. Y. 166.

Nature of employment.— Evidence preliminary to the introduction of a deposition taken *de bene esse,* that the party offering it believed that the witness was absent from the state, that he told the party at the examination that he expected to leave the state, that previously the party was accustomed to seeing him, but had not since seen him, is sufficient, it appearing that the witness is a journeyman carpenter without fixed habitation and in pursuit of employment. Guyon *v.* Lewis, 7 Wend. (N. Y.) 26. See also Fleming *v.* Fleming, 8 Blackf. (Ind.) 234.

28. Carman *v.* Kelly, 5 Hun (N. Y.) 283; Parker *v.* State, 18 Tex. App. 72; Post *v.* State, 10 Tex. App. 579; Varicas *v.* French, 2 C. & K. 1008, 61 E. C. L. 1008.

29. Barron *v.* People, 1 N. Y. 386; Pinkney *v.* State, 12 Tex. App. 352.

Criminal prosecutions.— The return of attachments for a witness, issued to every county in the state, not executed because no such person resided in those counties, is not sufficient evidence of his removal out of the state to render his deposition admissible in a criminal prosecution, under Tex. Code Cr. Proc. arts. 772–774, providing for proof of such removal by the prosecuting attorney or other credible person. Martinas *v.* State, 26 Tex. App. 91, 9 S. W. 356.

30. Keller *v.* Labaugh, 11 Pa. Co. Ct. 633.

31. Collins *v.* Lowry, 2 Wash. (Va.) 75. See also Carruthers *v.* Graham, C. & M. 5, 41 E. C. L. 9; Procter *v.* Lainson, 7 C. & P. 629, 32 E. C. L. 793. And *compare* Fry *v.* Bennett, 4 Duer (N. Y.) 247, 1 Abb. Pr. (N. Y.) 289.

Party's own depositions.— A party who offers his own deposition on the ground that he resides more than forty miles from the county-seat must be held to stricter proof of such fact than if he had offered the deposition of a disinterested witness. Turner *v.* Laubagh, 6 Kulp (Pa.) 368.

32. *Alabama.*— Henry *v.* Northern Bank, 63 Ala. 527; Worthy *v.* Patterson, 20 Ala. 172.

Delaware.— Doe *v.* Draper, 2 Houst. 126.

Indiana.— Norris *v.* Norris, 3 Ind. App. 500, 28 N. E. 1014.

Kentucky.— Cantrell *v.* Hewlett, 2 Bush 311.

New York.— Jackson *v.* Perkins, 2 Wend. 308.

Virginia.— Tayloe *v.* Smith, 10 Gratt. 557; Pollard *v.* Lively, 2 Gratt. 216; Lynch *v.* Thomas, 3 Leigh 682.

United States.— Banert *v.* Day, 2 Fed. Cas. No. 836, 3 Wash. 243.

See 16 Cent. Dig. tit. "Depositions," § 256.

Diminished infirmities.— Where the deposition of a witness has been taken because he was too old and infirm to attend court, it may be read without proving at the trial that his infirmities have not diminished so as to permit him to attend. Weaver *v.* Peteet, 26 Ga. 292.

33. *Maine.*— Chase *v.* Springvale Mills Co., 75 Me. 156; Goodwin *v.* Musscy, 4 Me. 88.

Maryland.— Rogers *v.* Raborg, 2 Gill & J. 54.

New York.— Sheldon *v.* Wood, 2 Bosw. 267; Clark *v.* Dibble, 16 Wend. 601.

North Carolina.— Barton *v.* Morphis, 15 N. C. 240.

Pennsylvania.— Covanhovan *v.* Hart, 21 Pa.

excuse for his absence, since the right to use his deposition necessarily depends on his inability to attend and testify.[34]

(II) *Sufficiency of Showing.* To introduce a deposition in evidence, competent proof of the inability of the witness to attend must be produced,[35] and as a general rule the presumption of inability to attend arising from the advanced age of the witness should not be relied upon.[36] Proof of inability to attend on account of disability is usually presented by affidavit,[37] or other competent evidence, sufficient to satisfy the court that reason exists for the admission of the deposition.[38] While the decision of the trial court in this regard is subject

St. 495, 60 Am. Dec. 57; Beitler *v.* Study, 10 Pa. St. 418.

Texas.— Stewart *v.* State, (Cr. App. 1894) 26 S. W. 203.

See 16 Cent. Dig. tit. "Depositions," § 256.

Continuance of cause of taking.— When the deposition of a witness who resides in a county adjoining the place of trial is taken on account of his sickness without an order of court or an agreement of the parties, it cannot be used on the trial unless it then appears that the cause for taking and reading the deposition still continues. Haun *v.* Wilson, 28 Ind. 296.

Permanent sickness.— Under the English statute requiring that in order to admit depositions in evidence it should appear to the satisfaction of the judge that the deponent is unable from permanent sickness to attend the trial, it has been held that it is not necessary to show that such sickness is incurable, but it must be shown to be of that degree of permanency as to make it last beyond the impending trial. Beaufort *v.* Crawshay, L. R. 1 C. P. 699, 1 Harr. & R. 638, 12 Jur. N. S. 709, 35 L. J. C. P. 342, 14 L. T. Rep. N. S. 729, 14 Wkly. Rep. 989.

Georgia statute.— In Brooks *v.* Ashburn, 9 Ga. 297, a witness who resided in the county in which the suit was pending was in attendance under a subpœna on the first day of the court, and on that day his testimony was taken by commission. On the day of the trial he was unable to attend the court from bodily indisposition, and it was held that the testimony could not be read as that of a witness who was unable to attend the court from age or bodily infirmity, as contemplated by the Georgia act of 1838.

34. Avery *v.* Woodruff, 1 Root (Conn.) 76 (sick child); Coons *v.* Thompson, 4 Blackf. (Ind.) 8 (official duties).

35. *Indiana.*— Norris *v.* Norris, 3 Ind. App. 500, 28 N. E. 1014.

Iowa.— Sax *v.* Davis, 71 Iowa 406, 32 N. W. 403.

Kentucky.— Ails *v.* Sublit, 3 Bibb 204; Gillespie *v.* Gillespie, 2 Bibb 89.

Mississippi.— Neeley *v.* Planters' Bank, 4 Sm. & M. 113.

New York.— Sheldon *v.* Wood, 2 Bosw. 267; Jackson *v.* Rice, 3 Wend. 180, 20 Am. Dec. 683; Jackson *v.* Perkins, 2 Wend. 308.

Pennsylvania.— Pipher *v.* Lodge, 16 Serg. & R. 214.

South Carolina.— Sims *v. Sims*, 3 Brev. 252.

Virginia.— Tayloe *v.* Smith, 10 Gratt. 557; Nuckols *v.* Jones, 8 Gratt. 267; Pollard *v.* Lively, 2 Gratt. 216.

United States.— Banert *v.* Day, 2 Fed. Cas. No. 836, 3 Wash. 243.

England.— Beaufort *v.* Crawshay, L. R. 1 C. P. 699, 1 Harr. & R. 338, 12 Jur. N. S. 709, 35 L. J. C. P. 342, 14 L. T. Rep. N. S. 729, 14 Wkly. Rep. 989.

See 16 Cent. Dig. tit. "Depositions," § 257.

Certificate of the justice taking a deposition *de bene esse* is not sufficient evidence of the inability of the witness to attend. Taylor *v.* Whiting, 4 T. B. Mon. (Ky.) 364.

Evidence of pregnancy.— Evidence that a woman is in an advanced state of pregnancy, so as to render it unsafe for her to attend the trial, is sufficient evidence of sickness to justify the reading of her deposition taken conditionally. Clark *v.* Dibble, 16 Wend. (N. Y.) 601; Barton *v.* Morphis, 15 N. C. 240; Beitler *v.* Study, 10 Pa. St. 418. *Compare* Abraham *v.* Newton, 8 Bing. 274, 1 Dowl. P. C. 266, 1 L. J. C. P. 91, 1 Moore & S. 384, 21 E. C. L. 538. In Davies *v.* Lowdnes, 1 Arn. 379, 7 Dowl. P. C. 101, 2 Jur. 945, 8 L. J. C. P. 10, 6 Scott 738, it was held that it must be shown by competent evidence that the delivery will occur about the time set for trial. See also Pond *v.* Dimes, 3 Moore & S. 161, 30 E. C. L. 494.

Return of non est upon a subpœna issued only a few days before the sitting of the court is not sufficient evidence that the witness is "unable" to attend, so as to enable the party to read his deposition taken *de bene esse*, under the Virginia statute. Jones *v.* Greenolds, 13 Fed. Cas. No. 7,464, 1 Cranch C. C. 339.

36. Ails *v.* Sublit, 3 Bibb (Ky.) 204; Jackson *v.* Rice, 3 Wend. (N. Y.) 180, 20 Am. Dec. 683; Banert *v.* Day, 2 Fed. Cas. No. 836, 3 Wash. 243. *Compare* Worthy *v.* Patterson, 20 Ala. 172.

37. Sims *v.* Sims, 3 Brev. (S. C.) 252, 1 Treadw. (S. C.) 131; Tayloe *v.* Smith, 10 Gratt. (Va.) 557; Nuckols *v.* Jones, 8 Gratt. (Va.) 267 [*following* Pollard *v.* Lively, 2 Gratt. (Va.) 216].

Ex parte affidavits of the witness' indisposition and consequent inability to attend are sufficient proof of the fact to admit his deposition taken *de bene esse*. Sims *v.* Sims, 3 Brev. (S. C.) 252, 1 Treadw. (S. C.) 131.

38. Gillespie *v.* Gillespie, 2 Bibb (Ky.) 89.

Cause of taking no longer existing.— In Emlaw *v.* Emlaw, 20 Mich. 11, a deposition taken *de bene esse* was excluded, the witness

to review,[39] yet the matter is one resting in the sound discretion of the court to be exercised with reference to the circumstances of the particular case.[40]

d. Death of Witnesses Pending Action. While as a general rule testimony taken *in perpetuam rei memoriam* cannot ordinarily be used in pending suits,[41] yet there are circumstances which render its admission as necessary and proper in such cases as in suits subsequently instituted.[42] The death of a witness pending a suit will render his deposition admissible in evidence,[43] but in such cases there must be some proof of death,[44] and that the deposition was legally taken.[45] Where a witness has been examined in chief, but dies before he can be cross-examined, his deposition is nevertheless admissible in evidence.[46] Where, however, the death of the witness happens before his examination-in-chief is completely finished, no use can be made of such testimony.[47]

e. Death of Parties to Action. The admission of depositions in an action after the death of one of the parties is usually a matter of statutory regulation.[48] The rule in chancery is that if the testimony was competent when the deposition was taken and filed it remains competent, and the subsequent death of the party does not affect its use on the trial.[49] This rule, while not universally

being in a condition to be sworn, and the cause of the taking *de bene esse* no longer existing.

Lapse of time before trial.— Where the deposition of a witness who was sick and did not expect to be able to attend the next session of the court was taken, but the case was not tried for a year afterward, when the deposition was admitted without showing that the witness could not have been present in court, it was held error. Sax *v.* Davis, 71 Iowa 406, 32 N. W. 403.

39. Beaufort *v.* Crawshay, L. R. 1 C. P. 699, 1 Harr. & R. 638, 12 Jur. N. S. 709, 35 L. J. C. P. 342, 14 L. T. Rep. N. S. 729, 14 Wkly. Rep. 989.

40. Parks *v.* Dunkle, 3 Watts & S. (Pa.) 291.

The appellate court will not exercise such jurisdiction unless it is satisfied that the court below has been misled by fraudulent representations or that injustice would otherwise be done. Beaufort *v.* Crawshay, L. R. 1 C. P. 699, 1 Harr. & R. 638, 12 Jur. N. S. 709, 35 L. J. C. P. 342, 14 L. T. Rep. N. S. 729, 14 Wkly. Rep. 989.

41. Greenfield *v.* Cushman, 16 Mass. 393; Dearborn *v.* Dearborn, 10 N. H. 473; Johnson *v.* Clark, 1 Tyler (Vt.) 449.

42. Dearborn *v.* Dearborn, 10 N. H. 473. See also Apthorp *v.* Eyres, Quincy (Mass.) 229.

43. *Alabama.*— Goodwyn *v.* Lloyd, 8 Port. 237.

Arkansas.— Lawrence *v.* La Cade, 46 Ark. 378.

Maine.— Maine Stage Co. *v.* Longley, 14 Me. 444.

Minnesota.— Lamberton *v.* Windom, 18 Minn. 506.

New Hampshire.— Dearborn *v.* Dearborn, 10 N. H. 473.

New Jersey.— Lawrence *v.* Finch, 17 N. J. Eq. 234.

New York.— Schroeder *v.* Frey, 60 Hun 58, 14 N. Y. Suppl. 71 [*affirmed* in 12 N. Y. Suppl. 625].

North Carolina.— State *v.* Valentine, 29 N. C. 225; Carver *v.* Mallet, 4 N. C. 562.

Vermont.— Starksboro *v.* Hinesburgh, 15 Vt. 200.

Virginia.— Keran *v.* Trice, 75 Va. 690.

United States.— Sheidley *v.* Aultman, 18 Fed. 666.

See 16 Cent. Dig. tit. "Depositions," § 245.

A deposition illegally taken cannot be read after the deponent's death upon the principle that it is the best evidence that can be produced. Johnson *v.* Clark, 1 Tyler (Vt.) 449.

Evidence of pedigree.— Where the deposition of a person of advanced age was taken under a bill in chancery, it was held that such deposition was admissible fifty years later as evidence of pedigree, as the presumption was that the witness was dead. Colvert *v.* Millstead, 5 Leigh (Va.) 88.

44. Davis *v.* Batty, 1 Harr. & J. (Md.) 264.

45. Johnson *v.* Clark, 1 Tyler (Vt.) 449.

46. Arundel *v.* Arundel, 1 Ch. Rep. 90, 21 Eng. Reprint 516; Nolan *v.* Shannon, 1 Molloy 157.

Especially is this the case where the cross interrogatories do not go to any point to which the witness has been examined in chief nor to his credit, but to matters capable of proof by other witnesses. O'Callaghan *v.* Murphy, 2 Sch. & Lef. 158.

47. Nolan *v.* Shannon, 1 Molloy 157.

Death before signature of deposition.— Copeland *v.* Stanton, 1 P. Wms. 414, 24 Eng. Reprint 451.

48. *Iowa.*— Quick *v.* Brooks, 29 Iowa 484.

Mississippi.— Hewlett *v.* George, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682.

Missouri.— Parsons *v.* Parsons, 45 Mo. 265.

New York.— Rice *v.* Motley, 24 Hun 143.

Ohio.— Neville *v.* Hambo, 1 Disn. 517, 12 Ohio Dec. (Reprint) 768; Meader *v.* Root, 11 Ohio Cir. Ct. 81, 5 Ohio Cir. Dec. 61.

Pennsylvania.— Speyerer *v.* Bennett, 79 Pa. St. 445.

Virginia.— Keran *v.* Trice, 75 Va. 690.

West Virginia.— Zane *v.* Fink, 18 W. Va. 693.

See 16 Cent. Dig. tit. "Depositions," § 263.

49. Vattier *v.* Hinde, 7 Pet. (U. S.) 252, 8 L. ed. 675; Sheidley *v.* Aultman, 18 Fed.

accepted,[50] seems to be the better one on this subject;[51] and especially is this the case where the deposition of the adverse party has also been taken in the cause.[52]

f. Incompetency of Witness — (i) *In General.* The competency of a witness at the time the deposition was taken or at the time it is offered at the trial is a matter of evidence pure and simple and must be governed by the recognized rules of evidence on this subject.[53] As a general rule the status of the witness at the time of trial governs the question of his competency,[54] for in contemplation of law the deposition itself is the witness[55] and the witness is presumed to testify when the deposition is used.[56]

666. In McMullen *v.* Ritchie, 64 Fed. 253, it was held that a deposition of a party as to transactions with another party, taken while the latter is alive, might be used when the suit is revived in the name of his executors, although one of the parties died without giving his deposition as he could have done.

50. St. Clair *v.* Orr, 16 Ohio St. 220; Neville *v.* Hambo, 1 Disn. (Ohio) 517, 12 Ohio Dec. (Reprint) 768; Bettman *v.* Hunt, 9 Ohio Dec. (Reprint) 396, 12 Cinc. L. Bul. 286; Beaty *v.* McCorkle, 11 Heisk. (Tenn.) 593; Zane *v.* Fink, 18 W. Va. 693.

51. *Michigan.*—Matson *v.* Melchor, 42 Mich. 477, 4 N. W. 200.

Missouri.— Parsons *v.* Parsons, 45 Mo. 265; La Fayette Mut. Bldg. Assoc. *v.* Kleinhoffer, 40 Mo. App. 388.

New Jersey.— Marlatt *v.* Warwick, 19 N. J. Eq. 439.

Pennsylvania.— Galbraith *v.* Zimmerman, 100 Pa. St. 374.

Rhode Island.— King *v.* Patt, 13 R. I. 132.

See 16 Cent. Dig. tit. "Depositions," § 263.

Effect of death.— In Keran *v.* Trice, 75 Va. 690, it was held that the deposition of a party to a suit might be read, although his death had rendered his adversary's deposition, subsequently taken, inadmissible as evidence. So also in King *v.* Patt, 13 R. I. 132, it was held that the deposition of a party might be read at the trial, although his death before the trial has precluded the opposite party from testifying.

Evidence of admissions.— In Matson *v.* Melchor, 42 Mich. 477, 4 N. W. 200, it was held that the death of a party to a suit before it is brought up for hearing does not affect the validity of a deposition taken during his lifetime, nor exclude evidence of his own admissions.

Use on appeal.— A deposition read on the trial cannot be suppressed on appeal because since the trial an adverse party has died. Hinkson *v.* Ervin, 40 W. Va. 111, 20 S. E. 849.

52. Hardin *v.* Taylor, 78 Ky. 593, 1 Ky. L. Rep. 322. See also Lear *v.* Smith, 6 Ky. L. Rep. 657. In Rice *v.* Motley, 24 Hun (N. Y.) 143, plaintiff and defendant were examined as witnesses before trial, each upon the application of the other. Before trial defendant died. It was held that plaintiff's examination was admissible upon the trial, notwithstanding N. Y. Code Civ. Proc. § 829.

Proof of personal transactions.— In McDonald *v.* Woodbury, 30 Hun (N. Y.) 35, 65 How. Pr. (N. Y.) 226, plaintiff and defendant were examined before trial, each at the instance of the other, pursuant to a stipulation that they might be used at the trial. The parties were cross-examined and their examinations were reduced to writing and signed. Defendant died before the trial. It was held that plaintiff's deposition was admissible in evidence to prove personal transactions between plaintiff and defendant, as to which, after defendant's death, plaintiff could not have given oral testimony.

53. See generally Evidence; and *infra*, XXII, C, 3, e.

Opportunity for cross-examination.—Where a party is present at the execution of a commission, and has the right to cross-examine the witness, the question of competency should be then and there determined, and where the witness swears on cross-examination that he is disinterested, his deposition should not be excluded. Segond's Succession, 2 La. Ann. 138. So in King *v.* Upton, 4 Me. 387, 16 Am. Dec. 266, where the witness testified that he had no interest in the suit, it was held that this was an election of the mode of proof, and that the party would not be permitted to show such interest *aliunde* at the trial.

54. *Alabama.*— Jones *v.* Scott, 2 Ala. 58.

Arkansas.— St. Louis, etc., R. Co. *v.* Harper, 50 Ark. 157, 6 S. W. 720, 7 Am. St. Rep. 86.

Missouri.— Messimer *v.* McCray, 113 Mo. 382, 21 S. W. 17.

New Jersey.— Marlatt *v.* Warwiek, 18 N. J. Eq. 108, 19 N. J. Eq. 439.

New York.— Fielden *v.* Lahens, 2 Abb. Dec. 111, 3 Transcr. App. 218, 6 Abb. Pr. N. S. 341.

Ohio.— Neville *v.* Hambo, 1 Disn. 517, 12 Ohio Dec. (Reprint) 768.

Pennsylvania.— Galbraith *v.* Zimmerman, 100 Pa. St. 374.

Tennessee.—Oliver *v.* Moore, 12 Heisk. 482.

Texas.— Webster *v.* Mann, 56 Tex. 119, 42 Am. Rep. 688.

West Virginia.—Seabright *v.* Seabright, 28 W. Va. 412.

See 16 Cent. Dig. tit. "Depositions," § 261.

55. Jones *v.* Scott, 2 Ala. 58; St. Louis, etc., R. Co. *v.* Harper, 50 Ark. 157, 6 S. W. 720, 7 Am. St. Rep. 86; Neville *v.* Hambo, 1 Disn. (Ohio) 517, 12 Ohio Dec. (Reprint) 768; Messimer *v.* McCray, 113 Mo. 382, 21 S. W. 17. See also Kramer *v.* Kramer, 80 N. Y. App. Div. 20, 80 N. Y. Suppl. 184.

56. St. Louis, etc., R. Co. *v.* Harper, 50 Ark. 157, 6 S. W. 720, 7 Am. St. Rep. 86; Park *v.* Lock, 48 Ark. 133, 2 S. W. 696;

(II) *Change in Status of Witness.* Where there has been a change in the status of the witness since the deposition was taken and when it is offered in evidence, the rules governing its admissibility in evidence are in hopeless conflict.[57] Some of the courts hold that incompetency on the part of the witness at the time of taking the deposition, which cannot be removed or released after the deposition has been taken,[58] will render the deposition inadmissible in evidence.[59] Other courts have held that where the witness is competent at the time the deposition was taken, it may be admitted, although he was incompetent at the time of trial.[60] While still others have followed the more general rule that the competency or incompetency of the witness at the time of trial is the true test without regard to his prior status.[61]

(III) *Acquirement of Interest.* Whatever may be the variations of the rule of competency as a general proposition, the rule as to the acquirement of interest seems better settled, and where a deposition has been taken in good faith and a subsequent interest accrues to the deponent, his deposition will not thereby be rendered incompetent in evidence.[62]

Quick *v.* Brooks, 29 Iowa 484; Neville *v.* Hambo, 1 Disn. (Ohio) 517, 12 Ohio Dec. (Reprint) 768; Fagin *v.* Cooley, 17 Ohio 44; Zane *v.* Fink, 18 W. Va. 693.

57. **Indictment for criminal offense.**— The offense of forgery renders the one guilty of it so infamous as to disqualify him from testifying in a court of justice. And if his deposition be taken after indictment for that offense, although before conviction, it cannot be read in evidence if objected to. McFarland *v.* Mooring, 56 Tex. 118. In St. Louis, etc., R. Co. *v.* Harper, 50 Ark. 157, 6 S. W. 720, 7 Am. St. Rep. 86, it was held that a deposition taken while the witness was imprisoned awaiting trial on a charge of murder was not admissible after deponent had been convicted and executed. But *compare* State *v.* Valentine, 29 N. C. 225, where it was held that a deposition taken after the witness had been convicted of murder but before judgment was admissible after judgment and execution.

58. Johnson *v.* Roland, 2 Baxt. (Tenn.) 203; Ford *v.* Greishaber, 2 Head (Tenn.) 435.

Release after deposition.— A deposition does not become admissible by a release of the deponent's interest in the suit in which it is offered, when such release was not executed till after the deposition was taken. Bell *v.* Woodward, 46 N. H. 315; Reed *v.* Rice, 25 Vt. 171.

Release of interest.— In Wolfinger *v.* Forsman, 6 Pa. St. 294, it was held that a son's deposition for his father might be read at the trial, after the father's death, where the son had previously released all the interest that had accrued to him to the other children.

Removal of disqualifications.— The depositions of a witness who was incompetent at the time he was sworn, on the ground of interest, cannot be purged by removing the disqualification on the trial. Ellis *v.* Smith, 10 Ga. 253.

59. Burton *v.* Baldwin, 61 Iowa 283, 16 N. W. 110; Ford *v.* Grieshaber, 2 Head (Tenn.) 435. Where a witness is disqualified by reason of interest from being liable over to a party the fact that the party by calling him to testify at the trial is estopped to claim against him will not make his deposition previously taken admissible. Schuylkill Nav. Co. *v.* Harris, 5 Watts & S. (Pa.) 28.

60. Hitchcock *v.* Skinner, Hoffm. (N. Y.) 21; Smith *v.* Profitt, 82 Va. 832, 1 S. E. 67 [*following* Keran *v.* Trice, 75 Va. 690]; Cameron *v.* Cameron, 15 Wis. 1, 82 Am. Dec. 652. Where the depositions of two of the eye-witnesses to a crime had been taken and stipulated to be read, subject to legal exceptions, and afterward the prosecution procured their indictment on the same charge for the purpose of excluding their testimony as accomplices, the depositions were none the less admissible. Doughty *v.* State, 18 Tex. App. 179, 51 Am. Rep. 303. In Baker *v.* Fairfax, 1 Str. 101, on an issue out of chancery, the depositions of a witness who became interested after they were taken were not allowed to be read, but the depositions were under similar circumstances admitted in chancery in Haws *v.* Hand, 2 Atk. 615; Goss *v.* Tracy, 1 P. Wms. 287, 24 Eng. Reprint 392; Callow *v.* Mince, 2 Vern. Ch. 472, 23 Eng. Reprint 904. See also Tilley's Case, 1 Salk 286 and note.

61. Jones *v.* Scott, 2 Ala. 58; St. Louis, etc., R. Co. *v.* Harper, 50 Ark. 157, 6 S. W. 720, 7 Am. St. Rep. 86; Haddix *v.* Haddix, 5 Litt. (Ky.) 201; Seabright *v.* Seabright, 28 W. Va. 412.

Objection to competency of witnesses see *infra*, XXII, C, 3, e.

62. *Kentucky.*— Smithpeters *v.* Griffin, 10 B. Mon. 259.

Massachusetts.— Sabine *v.* Strong, 6 Metc. 270; Gold *v.* Eddy, 1 Mass. 1.

New Jersey.— Mulford *v.* Minch, 11 N. J. Eq. 16, 64 Am. Dec. 472.

Ohio.— Lanman *v.* Piatt, 1 Ohio Dec. (Reprint) 135, 2 West. L. J. 426.

Pennsylvania.— Hay's Appeal, 91 Pa. St. 265; Pratt *v.* Patterson, 81 Pa. St. 114; Evans *v.* Reed, 78 Pa. St. 415; Wolfinger *v.* Forsman, 6 Pa. St. 294.

Texas.— Lobdell *v.* Fowler, 33 Tex. 346.

See 16 Cent. Dig. tit. "Depositions," § 264.

(iv) *Change in Law.* Although the admissibility of a deposition, dependent upon the competency of the deponent as a witness, is usually to be determined by the statutes in force when the deposition was taken,[63] yet where the rules of evidence have been modified by law, rendering the witness incompetent by the change, his deposition offered after the law has taken effect may be excluded, although when it was taken he was competent.[64]

8. Irregularities in Taking or Return. While as a general rule depositions must be taken and returned in conformity to the statute or rules of court,[65] yet it is not every defect or irregularity that will constitute a good ground for their

Equity suit.— After a deposition was taken in an equity suit concerning land one of the parties died and the witness became interested in the subject-matter of the suit. It was held that the deposition was admissible in an ejectment afterward brought for the same land. Galbraith *v.* Zimmerman, 100 Pa. St. 374.

Examination on immaterial point.— A witness competent at the time of his examination in chief afterward became interested, and was subsequently examined upon a reference in the cause, but to a point having no influence upon the final decree. It was held that the use of these depositions at the hearing was no ground for interfering with the decree. Livingston *v.* Van Rensselaer, 6 Wend. (N. Y.) 63.

Interest after beginning of action.— The depositions of witnesses in full life who became interested after the beginning of the action and after their depositions were taken are not admissible in evidence. Irwin *v.* Reed, 4 Yeates (Pa.) 512.

Interest during examination.— Where a death by which a witness becomes interested occurs during the cross but before the redirect examination, his deposition will be allowed to stand as to the direct and cross-examination but will be stricken as to the redirect. Fream *v.* Dickinson, 3 Edw. (N. Y.) 300.

63. Allen *v.* Russell, 78 Ky. 105; Fielden *v.* Lahens, 2 Abb. Dec. (N. Y.) 111, 3 Transcr. App. (N. Y.) 218, 6 Abb. Pr. N. S. (N. Y.) 341.

Need not be retaken.— The competency of evidence depends upon the state of the law when the evidence is offered. A deposition which owing to the interest of the witness was as the law then stood incompetent when taken became competent, and did not need to be retaken when by a change in the law the disqualification of interest was removed. Oliver *v.* Moore, 12 Heisk. (Tenn.) 482.

64. Mitchell *v.* Haggenmeyer, 51 Cal. 108; Fielden *v.* Lahens, 9 Bosw. (N. Y.) 436 [*modified* in 2 Abb. Dec. 111, 3 Transcr. App. 218, 6 Abb. Pr. N. S. 341]; Oliver *v.* Moore, 12 Heisk. (Tenn.) 482; Vanscoy *v.* Stinchcomb, 29 W. Va. 263, 11 S. E. 927.

Mississippi statute.— Objections cannot be made, on a trial had since the adoption of the code of 1871, to the reading of depositions of parties to the suit, taken before the adoption of the code of 1871, on account of the incompetency of the parties to so testify. If any objection is sustainable, it is the specific objection to the taking of the depositions — that they were taken at a time when parties could not testify by deposition. Hartford F. Ins. Co. *v.* Green, 52 Miss. 332.

Removal of disability.— If a witness be disqualified by reason of interest at the time of giving his deposition, and at the time of trial that disqualification is removed by statute, the deposition is admissible. Haynes *v.* Rowe, 40 Me. 181; Oliver *v.* Moore, 12 Heisk. (Tenn.) 482.

65. *Alabama.*— Bryant *v.* Ingraham, 16 Ala. 116.

Indiana.— Truman *v.* Scott, 72 Ind. 258; Bolds *v.* Woods, 9 Ind. App. 657, 36 N. E. 933.

Massachusetts.— Bacon *v.* Rogers, 8 Allen 146.

Minnesota.— Walker *v.* Barron, 4 Minn. 253.

New York.— Fleming *v.* Hollenback, 7 Barb. 271; Bailis *v.* Cochran, 2 Johns. 417.

Pennsylvania.— Wallace *v.* Mease, 4 Yeates 520.

Vermont.— Farmers', etc., Bank *v.* Hathaway, 36 Vt. 539.

See 16 Cent. Dig. tit. "Depositions," § 266.

Taking deposition generally see *supra*, XVII.

Return generally see *supra*, XVIII.

Objection for irregularities see *infra*, XXII.

Copy of examination.— In Clay *v.* Stephenson, 7 A. & E. 185, 1 Jur. 448, 6 L. J. K. B. 211, 2 N. & P. 189, W. W. & D. 537, 34 E. C. L. 116, it was held that where evidence was returned as an extract from the records of the court, with examination of the witnesses in German, for which a translation was made and put in at the trial, that such evidence was inadmissible, if it purported to be a copy of and was not the examination itself. See also Atkins *v.* Palmer, 4 B. & Ald. 377, 6 E. C. L. 525.

Not legally certified.— The deposition of a deceased witness, signed by him, is inadmissible in evidence, when it does not appear that the adverse party had notice of the time and place of the taking of it, or that there was any opportunity for cross-examination, and the deposition is not certified as the law requires, but as an affidavit merely. Perry *v.* Siter, 37 Mo. 273.

Officer without jurisdiction.— Where a justice of the peace has no jurisdiction to swear witnesses and take depositions in a murder case, his attestation to a deposition taken in such a proceeding, the witness having signed by mark, and there being no other proof of its authenticity, will not authorize the introduction of such deposition in evidence on a subsequent trial in contradiction of such wit-

rejection.[66] Mere formal defects or irregularities in the examination of witnesses out of court or upon commission will be disregarded upon the trial,[67] or at least it is within the discretion of the court whether the deposition shall be admitted.[68]

9. Sufficiency of Answers — a. In General. While the deponent must answer substantially all the interrogatories, as it is otherwise impossible to show whether he has told the whole truth,[69] yet an objection to the reading of a deposition on the ground that some question contained therein is not fully or properly answered is not tenable, if the answer is as full and minute as the interrogatory naturally and fairly interpreted calls for.[70] General answers to general

ness' testimony. State *v.* Valere, 39 La. Ann. 1060, 3 So. 186.

United States practice.— Depositions not taken in accordance with the rules of the United States courts cannot be used in such courts, although taken in accordance with the practice prevalent in the state courts, unless the parties expressly waive the objection or by previous consent agree to have them taken and made evidence. Evans *v.* Eaton, 7 Wheat. (U. S.) 356, 5 L. ed. 472.

66. Tyng *v.* Thayer, 8 Allen (Mass.) 391; Goodyear *v.* Vosburgh, 41 How. Pr. (N. Y.) 421; Leaphart *v.* Leaphart, 1 S. C. 199; Rhoades *v.* Selin, 20 Fed. Cas. No. 11,740, 4 Wash. 715.

Depositions taken out of the state.— Tyng *v.* Thayer, 8 Allen (Mass.) 391. In Bostwick *v.* Lewis, 1 Day (Conn.) 33, it was held that depositions taken in another state, in a manner not authorized by the laws of such state, were admissible in Connecticut, if they would have been admissible had they been taken in Connecticut.

Discrepancy in names of witnesses.— Rust *v.* Eckler, 41 N. Y. 488.

Foreign language.— Zanssig *v.* Western Union Tel. Co., 9 Wkly. Notes Cas. (Pa.) 510.

No commission with papers.— Givens *v.* Manns, 6 Munf. (Va.) 191.

Taken over by opposite party.— Aiken *v.* Bemis, 1 Fed. Cas. No. 109, 2 Robb Pat. Cas. 644, 3 Woodb. & M. 348.

67. *Alabama.*— Reese *v.* Beck, 24 Ala. 651.

Georgia.— Central R., etc., Co. *v.* Gamble, 77 Ga. 584, 3 S. E. 287.

New York.— Hewlett *v.* Wood, 67 N. Y. 394; Rust *v.* Eckler, 41 N. Y. 488; Forrest *v.* Kissam, 7 Hill 463; Kimball *v.* Davis, 19 Wend. 437.

Wisconsin.— Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889.

United States.— Stegner *v.* Blake, 36 Fed. 183.

England.— Rickards *v.* Hough, 51 L. J. Q. B. 361, 30 Wkly. Rep. 676.

See 16 Cent. Dig. tit. "Depositions," § 266 *et seq.*

But any matter of substance affecting the rights of the parties, especially any act of the party or of the witness, by which a party is deprived of the right of cross examination, will be good reason for rejecting the deposition. Hewlett *v.* Wood, 67 N. Y. 394; Rust *v.* Eckler, 41 N. Y. 488; Forrest *v.* Kissam, 7 Hill (N. Y.) 463; Kimball *v.* Davis, 19 Wend. (N. Y.) 437.

68. State *v.* Kimball, 50 Me. 409; Blake *v.* Blossom, 15 Me. 394; Tyng *v.* Thayer, 8 Allen (Mass.) 391; Stiles *v.* Allen, 5 Allen (Mass.) 320; Rhees *v.* Fairchild, 160 Pa. St. 555, 28 Atl. 928; Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889; Wanzer *v.* Hardy, 4 Wis. 229.

Failure to put or answer interrogatory.— It is doubtful if there is no appearance on the other side and no cross interrogatories, whether the opposite party can complain of the omission to answer the last interrogatory. The reason given for the strict rule is that unless this last general interrogatory is answered, it is impossible to say that the witness has told the whole truth. Where it is clearly apparent that the witness could not have testified to anything further unless to contradict evidence in answer to the specific interrogatories, which certainly is not to be presumed, the omission is harmless. Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889. Where a commission to take testimony is sued out by plaintiff, in which defendant joins and furnishes cross interrogatories, and the commission with the depositions of the witnesses is returned, and it does not appear that the last general cross interrogatory has been put to and answered by the witnesses, and defendant on that ground objects to the reading of the depositions in evidence, the objection in general is fatal. Kimball *v.* Davis, 19 Wend. (N. Y.) 437; Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889. Plaintiff, however, is at liberty in such case to show that the commission was executed and the depositions signed by the witnesses in the presence of the counsel of both parties, and that no objection was made at the time by the counsel for defendant, that all the interrogatories were not answered, and on such facts appearing the depositions will be received notwithstanding the objection. Kimball *v.* Davis, 19 Wend. (N. Y.) 437.

Where the statute has been substantially complied with in the return, the deposition should not be excluded except upon the clearest grounds of error amounting to something more than a mere irregularity. Goodyear *v.* Vosburgh, 41 How. Pr. (N. Y.) 421.

69. Dodge *v.* Israel, 7 Fed. Cas. No. 3,952, 4 Wash. 323. See *supra*, XVI, L.

70. *Alabama.*— Aicardi *v.* Strang, 38 Ala. 326; Buckley *v.* Cunningham, 34 Ala. 69.

Georgia.— Clopton *v.* Norris, 28 Ga. 188; Heard *v.* McKee, 26 Ga. 332.

Massachusetts.— Todd *v.* Bishop, 136 Mass. 386.

interrogatories are usually regarded as sufficient,[71] but where the cross interrogatories are only generally answered, the deposition should not be admitted in evidence.[72]

b. Immaterial Questions. The refusal of a party to depose or to answer a cross interrogatory which does not appear to be material in the cause will not render his deposition inadmissible in evidence.[73]

c. Evasive or Incomplete Answers. While evasive or incomplete answers do not render the entire deposition inadmissible in evidence, any more than such answers given by a witness on a cross-examination on the stand,[74] yet where from the circumstances of the case it appears that the deponent has some motive for evasion,[75] or where the answers are so imperfect or evasive as to induce the court

Minnesota.— McMahon *v.* Davidson, 12 Minn. 357.

New York.— Baker *v.* Spencer, 47 N. Y. 562.

Pennsylvania.— Tussey *v.* Behmer, 9 Lanc. Bar 45.

United States.— Nelson *v.* U. S., 17 Fed. Cas. No. 10,116, Pet. C. C. 235.

See 16 Cent. Dig. tit. "Depositions," § 269 *et seq.*

No understanding on part of deponent.— It is not error to admit in evidence the answer to an interrogatory in a deposition that witness did not understand the first part of the interrogatory. Kuechler *v.* Wilson, 82 Tex. 638, 18 S. W. 317.

Part of answer inadmissible.— In Steinkeller *v.* Newton, 9 C. & P. 313, 8 Dowl. P. C. 579, 9 L. J. C. P. 262, 6 M. & G. 30 note, 1 Scott N. R. 148, 38 E. C. L. 190, a witness who had been examined in a foreign country stated in one of his answers the contents of a letter which was not produced. It was held on the trial of the cause in England that so much of the answer as related to the contents of the letter could not be received.

In England the courts have gone so far as to hold that answers to lost interrogatories may be read as admissions by the answering party, although some of the answers are unintelligible in themselves. Rowe *v.* Brenton, 8 B. & C. 737, 3 M. & R. 271, 15 E. C. L. 363. In Brabant *v.* Perne, 2 Ch. Rep. 36, 21 Eng. Reprint 609, it was held, however, that where there had been several trials of a land case, in which certain witnesses had sworn contrary to their depositions given thirty years before, the court would not order copies of such depositions to be recorded and exemplified where the originals had been lost.

71. Chapin *v.* Clapp, 29 Ind. 614. So if a general interrogatory is limited by the next one an answer to it as limited is sufficient. Arnold *v.* Oslin, 26 Ga. 434.

72. Withers *v.* Gillespy, 7 Serg. & R. (Pa.) 10.

73. Goodrich *v.* Goodrich, 44 Ala. 670; Bullard *v.* Lambert, 40 Ala. 204; Black *v.* Black, 38 Ala. 111; Nicholson *v.* Desobry, 14 La. Ann. 81; Franklin's Succession, 7 La. Ann. 395; White *v.* Solomon, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537.

Where an impertinent interrogatory is put to a witness, it does not lie with the party putting it to object that a part of the answer thereto is impertinent, if the part complained of is necessary to prevent an improper inference being drawn from that part of the answer which is responsive. Putnam *v.* Ritchie, 6 Paige (N. Y.) 390. A deposition will not be excluded because the deponent has omitted to answer one of the interrogatories which is *prima facie* impertinent, and a direct answer to which could not benefit the party who proposed it. Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592.

74. Cole *v.* Choteau, 18 Ill. 439; Lurty *v.* Maryman, 12 La. Ann. 180. And *compare* Robinson *v.* Boston, etc., R. Corp., 7 Allen (Mass.) 393.

Expert testimony.— St. Anthony Falls Water-Power Co. *v.* Eastman, 20 Minn. 277.

Oral interrogatories.— Where a deposition is taken on oral interrogatories, upon notice, and the adverse party is not represented by attorney, but depends upon written interrogatories sent to the examining officer, the mere fact that some of the cross interrogatories are evasively answered, by reason of the neglect of such officer to press vigorously for full and exact answers, is not sufficient ground for suppressing the deposition. Trowbridge *v.* Sickler, 54 Wis. 306, 11 N. W. 581.

75. Tompkins *v.* Williams, 19 Ga. 569; Lurty *v.* Maryman, 12 La. Ann. 180; Fulton *v.* Golden, 28 N. J. Eq. 37; Terry *v.* McNiel, 58 Barb. (N. Y.) 241; Willis *v.* Welch, 2 Code Rep. (N. Y.) 64. In Bullard *v.* Lambert, 40 Ala. 204, 208, the court said: "Several of the answers, to which objections are made, are not so full as to defy extreme criticism, and are yet capable of standing the test of the doctrine announced in Buckley *v.* Cunningham, 34 Ala. 69, in the following words: 'The answers to the cross-interrogatories are certainly not chargeable with redundancy; but, upon a careful examination of them, it appears that all the questions receive a substantial answer; and as we can discover nothing which would justify us in concluding that the witness was seeking to evade the disclosure of facts within his knowledge, we think that the court committed no error in refusing to suppress his deposition. Nelson *v.* Iverson, 24 Ala. 9, 60 Am. Dec. 442; Spence *v.* Mitchell, 9 Ala. 744.' A deposition should not be suppressed, when the question was not pertinent to the issue; nor when the answer could not have affected the result. Yarborough *v.* Hood, 13 Ala. 176; Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592."

to believe that he has wilfully kept back material facts within his knowledge, the deposition should not be admitted in evidence.[76]

d. Irresponsive Answers. An answer to an interrogatory which is irrelevant or not responsive may be objected to by either party at the trial and should be excluded.[77] Where, however, a deposition has been filed in the cause, and the parties in the cause have had ample opportunity for examination of the same, or for further examination of the deponent before trial, they should proceed to obtain such examination instead of seeking to suppress the deposition upon the trial.[78]

e. Failure to Answer. Where a witness has failed or refused to answer a proper interrogatory, it has been considered good ground for refusing to receive the deposition in evidence,[79] and it has usually been considered a fatal objection to the whole deposition where there has been a refusal to answer a general interrogatory.[80] In all such cases, however, the reasons for accepting or rejecting the deposition must depend upon the circumstances of the particular case[81] and the

76. Stratford *v.* Ames, 8 Allen (Mass.) 577.

Knowledge of deponent.— Where it appears that statements in a deposition were not made on the knowledge of the witness, and that the witness evaded stating the means of his knowledge, the deposition should be suppressed. Chisholm *v.* Beaver Lake Lumber Co., 33 Ill. App. 253. See also Williamson *v.* Dillon, 1 Harr. & G. (Md.) 444.

77. *Iowa.*— Hendricks *v.* Wallis, 7 Iowa 224; McCarver *v.* Nealey, 1 Greene 360.

New Jersey.— Fulton *v.* Golden, 28 N. J. Eq. 37.

New York.— Lansing *v.* Coley, 13 Abb. Pr. 272.

Ohio.— State *v.* Finney, 7 Ohio Dec. (Reprint) 22, 1 Cinc. L. Bul. 30.

South Carolina.— Stepp *v.* National L., etc., Assoc., 37 S. C. 417, 16 S. E. 134.

Tennessee.—Smithwick *v.* Anderson, 2 Swan 573.

See 16 Cent. Dig. tit. "Depositions," § 273.

Annexed documents.— See Ryan *v.* Bryant, 42 Ill. 78.

Evidence material to issue.— Statements in a deposition not responsive to any question asked of the deponent will be ruled out on objection of the party at whose instance the deposition was taken; but evidence material to the issue, given in answer to a general interrogatory, although not favorable to the party propounding such interrogatory, will not be suppressed on his objection, when the deposition is put in evidence by the opposite party. Hazleton *v.* Union Bank, 32 Wis. 34.

78. Fassin *v.* Hubbard, 55 N. Y. 465.

79. *Alabama.*— Harris *v.* Miller, 30 Ala. 221.

Georgia.— Williams *v.* Turner, 7 Ga. 348; McCleskey *v.* Leadbetter, 1 Ga. 551.

Illinois.— Clough *v.* Kyne, 40 Ill. App. 234.

Kansas.— Simpson *v.* Smith, 27 Kan. 565.

Louisiana.— Nicholson *v.* Desobry, 14 La. Ann. 81; Le Baron *v.* Dupont, 11 La. Ann. 140; Kyle *v.* Van Bibber, 7 La. Ann. 575; Baker *v.* Voorhies, 6 Mart. N. S. 312.

Maine.— Chase *v.* Kenniston, 76 Me. 209.

New York.— Goldmark *v.* Metropolitan Opera House Co., 22 N. Y. Suppl. 136; Smith *v.* Griffith, 3 Hill 333, 38 Am. Dec. 639.

North Carolina.— Mosely *v.* Mosely, 1 N. C. 568.

Pennsylvania.— Cullen's Estate, 16 Phila. 385, 15 Wkly. Notes Cas. 271.

Texas.— Houston, etc., R. Co. *v.* Shirley, 54 Tex. 125.

United States.— Bell *v.* Davidson, 3 Fed. Cas. No. 1,248, 3 Wash. 328; Ketland *v.* Bissett, 14 Fed. Cas. No. 7,742, 1 Wash. 144.

See 16 Cent. Dig. tit. "Depositions," § 270.

Answer after refusal.— A deposition should not be suppressed because witness at first refused to answer questions, if he subsequently answered. Tedrowe *v.* Esher, 56 Ind. 443.

Evidence of fraud.— Where a son nineteen years old claims to have paid six thousand dollars for land conveyed to him by his father, and creditors of the father seek to impeach the conveyance as fraudulent, the son may be compelled to disclose the source from which his payment was made, and if he fails to answer fully questions on this point his deposition will be suppressed. Aultman, etc., Mfg. Co. *v.* Joy, 9 Ill. App. 32.

Pertinency of questions.— Where a witness has refused without plaintiff's fault to answer cross interrogatories on the ground that they were not pertinent, and it appears that the questions may become pertinent at the trial, the depositions will not be entirely suppressed, but it will be ordered that the unanswered questions be read at the trial, and if it then appears that they are pertinent the deposition shall be suppressed, otherwise not; or plaintiff may at his option submit to a suppression. Palmer *v.* Great Western Ins. Co., 47 N. Y. Super. Ct. 455.

80. Withers *v.* Gillespy, 7 Serg. & R. (Pa.) 10; Dodge *v.* Israel, 7 Fed. Cas. No. 3,952, 4 Wash. 323; Richardson *v.* Golden, 20 Fed. Cas. No. 11,782, 3 Wash. 109.

81. Thill *v.* Perkins Electric Lamp Co., 63 Conn. 478, 29 Atl. 13; Miller *v.* Craig, 23 Ill. App. 128; Savage *v.* Birckhead, 20 Pick. (Mass.) 167; Palmer *v.* Great Western Ins. Co., 47 N. Y. Super. Ct. 455.

No prejudice to opponent.— A deposition will not be suppressed because a final gen-

nature of the question which the deponent has failed or refused to answer.[82] So a deposition will not be suppressed as evidence on account of a failure to answer a question, if the facts sought to be elicited can be ascertained from other parts of the deposition.[83]

f. Failure to Produce Documents. Where the evidence shows that a document is outside of the jurisdiction of the court, or without the power of a witness to produce, the fact of non-production is no objection to the admissibility of the deposition in evidence.[84] A deposition should not be rejected as of course because a certain paper referred to therein or which should have been annexed thereto is not produced,[85] yet when the production of such papers goes to the very gist of the action, the deposition will not be allowed in evidence unless such papers are annexed.[86]

eral interrogatory was not answered, where it appears that the opposite party could not be prejudiced by such omission. Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889.

Presence of parties.— Where in the return of a commission issued on behalf of a defendant to take a deposition no answers were given to certain interrogatories, but it appeared that plaintiff was present at the taking, and that the commission was returned in due form, it was held that it might be admitted in evidence. Stewart *v.* Ross, 1 Yeates (Pa.) 148, 2 Dall. (Pa.) 157, 1 L. ed. 330.

82. Akers *v.* Demond, 103 Mass. 318; Allen *v.* Hoxey, 37 Tex. 320.

83. *Alabama.*— Goodrich *v.* Goodrich, 44 Ala. 670; Black *v.* Black, 38 Ala. 111; Buckley *v.* Cunningham, 34 Ala. 69; Spence *v.* Mitchell, 9 Ala. 744; Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592.

Georgia.— Georgia R. Co. *v.* Thomas, 68 Ga. 744.

Louisiana.—Dwight *v.* Splane, 11 Rob. 487.

New York.— Gates *v.* Beecher, 60 N. Y. 518, 19 Am. Rep. 207; McCarty *v.* Edwards, 24 How. Pr. 236.

Pennsylvania.— Tussey *v.* Behmer, 9 Lanc. Bar 45.

See 16 Cent. Dig. tit. "Depositions," § 270.

84. Barnhart *v.* Sternberger, 68 Ga. 341; Petersburg Sav., etc., Co. *v.* Manhattan F. Ins. Co., 66 Ga. 446; Winans *v.* New York, etc., R. Co., 21 How. (U. S.) 88, 16 L. ed. 68.

Copy of an account.— In Burnham *v.* Wood, 8 N. H. 334, where a witness annexed to his deposition a copy of an account for articles charged on the books of a corporation which was without the state, and where the corporation had no interest in the suit, it was held that the evidence was admissible, as the books were beyond the control of the court and the witness.

Destruction of papers.— A deposition referring to papers not produced is admissible if it appear that these papers were likely to be speedily destroyed. Tilghman *v.* Fisher, 9 Watts (Pa.) 441.

Immaterial papers.— Where notes and a deed are incidentally referred to by a witness in a deposition and the witness states that the deed is not in his possession or control, and they are not the basis of the action, nor are their contents in dispute, the fact that they are not annexed as exhibits does not invalidate the deposition. Lyon *v.* Barrows, 13 Iowa 428.

The word "copy" generally presupposes an original, but not always. A deposition ought not therefore to be rejected which speaks of a telegraphic despatch as a "copy," on the ground that an original was necessarily implied, which was not produced, nor its absence accounted for. Banks *v.* Richardson, 47 N. C. 109.

85. *New Hampshire.*— Lobdell *v.* Marshall, 58 N. H. 342.

New York.— Kelley *v.* Weber, 9 Abb. N. Cas. 62.

North Carolina.— Jones *v.* Herndon, 29 N. C. 79.

Texas.— Bailey *v.* Laws, 3 Tex. Civ. App. 529, 23 S. W. 20.

England.— Robinson *v.* Davies, 5 Q. B. D. 26, 49 L. J. Q. B. 218, 28 Wkly. Rep. 255; Steinkeller *v.* Newton, 2 M. & Rob. 372.

Return of exhibits see *supra*, XVIII, G.

Accidental omission.— Where an interrogatory in a deposition is founded upon a deed "inclosed," the accidental omission to include the deed will not exclude the deposition. Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

Private letters.— Amherst Bank *v.* Conkey, 4 Metc. (Mass.) 459.

Recollection of witness.— Where a witness in his deposition speaks of a fact as within his recollection, but to fix the time of its recurrence is obliged to refer to letters in his possession, the fact that he does not produce the letters will not render his answer inadmissible. Henderson *v.* Ilsley, 11 Sm. & M. (Miss.) 9, 49 Am. Dec. 41.

86. Coleman *v.* Colgate, 69 Tex. 88, 6 S. W. 553. And *compare* Fulton *v.* Golden, 28 N. J. Eq. 37.

Books of account.— When a deposition refers to books of account, copies of them at least should be produced, properly authenticated, to entitle the whole deposition to be read in evidence. Christie *v.* Nagel, 2 Yeates (Pa.) 213.

Execution of document.— The deposition of a witness to prove the execution of a paper cannot be read in evidence unless the paper be particularly described, identified, and annexed to the deposition. Petriken *v.* Collier, 7 Watts & S. (Pa.) 392.

10. AMENDMENT OF PROCESS. The fact that process in a cause has been amended either as to mere title[87] or by the addition or withdrawal of parties[88] will not as a general rule render a deposition regularly taken prior to such amendment inadmissible in evidence, provided there has been no surprise or injustice resulting to the newly made parties. While the general rule is believed to be as above stated there is creditable authority to the contrary, holding that where process has been amended so as to bring a new party into the action depositions previously taken cannot be used in evidence against him,[89] on the ground that the newly introduced party has had no right of cross-examination.[90]

11. AMENDMENT OF PLEADINGS. Where an amendment of the pleadings has been allowed it has been held that unless the issues have been substantially affected a deposition previously taken is admissible in evidence,[91] but depositions

87. Central R. Co. *v.* Sanders, 73 Ga. 513; Abshire *v.* Mather, 27 Ind. 381; Davis *v.* Prout, 7 Beav. 288, 29 Eng. Ch. 288; Haynes *v.* Jackson, 4 Jur. 457.

88. *Indiana.*— Maxwell *v.* Brooks, 54 Ind. 98.

Kentucky.— Johnson *v.* Norton, 3 B. Mon. 429.

Louisiana.— Late *v.* Armorer, 14 La. Ann. 826.

Nebraska.— Holmes *v.* Boydston, 1 Nebr. 346.

United States.— Pannill *v.* Eliason, 18 Fed. Cas. No. 10,707, 3 Cranch C. C. 358.

England.— Milligan *v.* Mitchell, 1 Jur. 888, 7 L. J. Ch. 37, 3 Myl. & C. 72, 40 Eng. Reprint 852.

Action against copartners.— A deposition taken in an action against copartners before one of the defendants appeared can be used in the trial after that defendant appears as against those who had appeared at the time it was taken, and also as against the one who had not appeared, to the same extent that it would have affected him as a partner of the others if he had not appeared at all. Patterson *v.* Stettauer, 40 N. Y. Super. Ct. 54.

Action continued by survivor.— Testimony taken conditionally is admissible on the trial, although one of the original plaintiffs has died and the suit is continued by the survivor. Markoe *v.* Aldrich, 1 Abb. Pr. (N. Y.) 55.

After discontinuance.— A deposition taken to be used against all the defendants in the action may after a discontinuance as to one be used against the rest. Medcalf *v.* Seccomb, 36 Me. 71. So in Holdridge *v.* Farmers', etc., Bank, 16 Mich. 66, it was held that an amendment of a declaration by striking out one defendant, but not altering the substance of the issue, would not render previously taken depositions inadmissible.

Contest of will.— Depositions of the subscribing witnesses to a will duly taken before the surrogate in open court do not cease to be evidence by reason of the subsequent filing of objections by a contestant, and the proponent need not recall the witnesses. Downey *v.* Downey, 16 Hun (N. Y.) 481 [*distinguishing* Collier *v.* Idley, 1 Bradf. Surr. (N. Y.) 94].

Guardian ad litem.—Depositions taken upon notice to a corresponding attorney appointed for non-resident infant defendants before a guardian *ad litem* was appointed to defend for them may be read in evidence against such defendants after the appointment of a guardian and defense made by him. Covington, etc., R. Co. *v.* Bowler, 9 Bush (Ky.) 468.

Who may object.— Where during the pendency of an action brought by a copartnership one of the partners dies, and before his representatives had been made parties a commission on behalf of plaintiffs was issued, and a copy of the interrogatories served on defendant, it was held on appeal that the testimony taken under the commission should be received; and that none but the widow and legal representatives of deceased plaintiff had the right to object to it. Roth *v.* Moore, 19 La. Ann. 86.

89. *Kentucky.*— Kerr *v.* Gibson, 8 Bush 129.

Louisiana.—Coulter *v.* Cresswell, 7 La. Ann. 367.

Maryland.— Clary *v.* Grimes, 12 Gill & J. 31.

Pennsylvania.— Horbach *v.* Knox, 6 Pa. St. 377.

Tennessee.— State *v.* Nashville Sav. Bank, 16 Lea 111.

Virginia.—Jones *v.* Williams, 1 Wash. 230; Williams *v.* Jacob, Wythe 145.

See 16 Cent. Dig. tit. "Depositions," § 278.

After objection.— The attorney of one of two defendants should not be allowed, on his argument of the cause and against objection, to read to the jury a part of a deposition taken before the other defendant was made a party to the suit as originally brought. Smith *v.* Milwaukee Builders', etc., Exch., 91 Wis. 360, 64 N. W. 1041, 51 Am. St. Rep. 912, 30 L. R. A. 504.

90. Horbach *v.* Knox, 6 Pa. St. 377: State *v.* Nashville Sav. Bank, 16 Lea (Tenn.) 111. See also Coulter *v.* Cresswell, 7 La. Ann. 367.

Notice and opportunity of cross-examination.— A deposition cannot be used in evidence against one made a party to the action after it was taken, without notice or an opportunity to cross-examine. Dalsheimer *v.* Morris, 8 Tex. Civ. App. 268, 28 S. W. 240.

91. *Alabama.*—Goldsmith *v.* Picard, 27 Ala. 142.

California.— Pico *v.* Cuyas, 47 Cal. 174.

proving matters not in the original bill when taken cannot be admitted to support substantive matters in an amended bill subsequently filed.[92]

XXI. ACTIONS AND PROCEEDINGS IN WHICH USED.

A. In General. Where a deposition has been regularly taken in a cause it is as a general rule admissible throughout the subsequent stages or proceedings had in the action.[93] So where a trial of issues is directed depositions taken in the original cause are admissible,[94] provided sufficient reason exists for offering such deposition in evidence.[95] Where, however, issues are directed out of equity, it has been held necessary, in accordance with the English practice, that there

Illinois.— Doyle *v.* Wiley, 15 Ill. 576.

Massachusetts.— Weatherby *v.* Brown, 106 Mass. 338.

Mississippi.—Cooper *v.* Granberry, 33 Miss. 117.

New York.— Vincent *v.* Conklin, 1 E. D. Smith 203.

Utah.— Anthony *v.* Savage, 3 Utah 277, 3 Pac. 546.

See 16 Cent. Dig. tit. "Depositions," § 279.

Compare Clarke *v.* Tinsley, 4 Rand. (Va.) 250.

Depositions taken ex parte after default and order pro confesso do not become inadmissible by defendants afterward appearing and answering so that the *pro confesso* is taken off; but defendants may obtain a commission to take the depositions of the same witnesses on a proper showing and on terms to protect the complainant. Planters', etc., Bank *v.* Walker, 7 Ala. 926.

92. Edgell *v.* Smith, 50 W. Va. 349, 40 S. E. 402.

93. See *infra*, XXI, B, C. Thus a deposition which has been used upon an interlocutory proceeding or previous motion in the cause may be subsequently used upon the trial of the action (Spear *v.* Coon, 32 Conn. 292; Holcombe *v.* Holcombe, 10 N. J. Eq. 284; Bonnet *v.* Dickson, 14 Ohio St. 434; Riegel *v.* Wilson, 60 Pa. St. 388; Haupt *v.* Henninger, 37 Pa. St. 138; Walton *v.* Walton, 63 Vt. 513, 22 Atl. 617; Lubiere *v.* Genou, 2 Ves. 579, 28 Eng. Reprint 369), provided that such prior proceedings were part of the proceedings in the action (Spear *v.* Coon, 32 Conn. 292; Holcombe *v.* Holcombe, 10 N. J. Eq. 281. See also King *v.* Hutchins, 28 N. H. 561. And see Underhill *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 339); and depositions taken to be used in the trial of a cause may be subsequently used at a hearing before a referee or auditor to whom the cause may have been referred (Ellis *v.* Lull, 45 N. H. 419; King *v.* Hutchins, 28 N. H. 561; Perry *v.* Whitney, 30 Vt. 390; Skinner *v.* Tucker, 22 Vt. 78. And see Cox *v.* Pearce, 7 Johns. (N. Y.) 298; Zimmerman *v.* Grotenkemper, 6 Ohio Dec. (Reprint) 832, 8 Am. L. Rec. 364; Walton *v.* Walton, 63 Vt. 513, 22 Atl. 617).

Texas statute.—The use of the words "upon the trial of any suit in which they are taken" in the Texas statute has been held to limit the use of depositions to that suit alone in which they are taken. People's Nat. Bank *v.* Mulkey, (Tex. Civ. App. 1901) 61 S. W. 528; People's Nat. Bank *v.* Mulkey, 94 Tex. 395, 60 S. W. 753.

Where a cause is removed from one court to another depositions taken in the original court are admissible in the court of removal (Pelamourges *v.* Clark, 9 Iowa 1. See also Earl *v.* Hurd, 5 Blackf. (Ind.) 248); and this whether the case be removed from a state to a federal court or *vice versa* (Missouri Pac. R. Co. *v.* White, 80 Tex. 202, 15 S. W. 808; Gravelle *v.* Minneapolis, etc., R. Co., 16 Fed. 435, 3 McCrary 385).

Where depositions taken in an original action are admitted to be read in a cross action, only such portions should be admitted as were pertinent to the issues in the original action. Underhill *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 339. A deposition admissible in the original suit is also admissible upon the hearing of a cross bill filed after it was taken, under an order afterward entered that all depositions taken in the original suit should be read in evidence in the cross suit also, with the same effect and subject to the same exceptions. Smith *v.* Profitt, 82 Va. 832, 1 S. E. 67.

94. Hall *v.* Dougherty, 5 Houst. (Del.) 435; Earl *v.* Hurd, 5 Blackf. (Ind.) 248; Austin *v.* Winston, 1 Hen. & M. (Va.) 33, 3 Am. Dec. 583; Cahoon *v.* Ring, 4 Fed. Cas. No. 2,292, 1 Cliff. 592.

Devisavit vel non.— A deposition taken before the register of wills in support of an alleged will, in consequence of a caveat by one of the persons interested in preventing the probate, is evidence on the issue of *devisavit vel non*, ordered by the register's court on an appeal afterward entered by another person interested, not a party to the original proceedings. Ottinger *v.* Ottinger, 17 Serg. & R. (Pa.) 142.

95. Dietrich *v.* Dietrich, 1 Penr. & W. (Pa.) 306.

Purpose of contradiction.— Where the complainant in an equity cause took the depositions of defendants, and issues were afterward framed and tried before a jury, it was held that it was not error for the court to refuse to allow complainant, after closing his evidence, and upon the cross-examination of defendants, who testified in their own behalf, to read their depositions "as evidence" or for any purpose other than for the purpose of contradicting them. Pearce *v.* Suggs, 85 Tenn. 724, 4 S. W. 526.

should be an order from the chancery court directing the use of the deposition upon the trial of the issues at law.[96]

B. Use on New Trial. Because a deposition has been read on a former trial it does not follow that it may be read at every subsequent trial of the cause, since the reason for its former admission may have ceased to exist in the interim.[97] While in most cases such deposition is admissible in evidence,[98] yet it seems that there must be some showing of absence, death, or disability.[99]

C. Use on Appeal. A deposition which has been taken with all necessary formality in a cause may be used upon an appeal in the same case,[1] provided the same is properly transmitted to the higher jurisdiction.[2]

96. Cahoon *v.* Ring, 4 Fed. Cas. No. 2,292, 1 Cliff. 592, in which case it was held that the court would not make such an order after the record on the equity side is made up and the case is already in the law court.

97. Chapize *v.* Bane, 1 Bibb (Ky.) 612.

Limitation under New York statute.— The reading of the testimony of a deceased witness given on the trial of an action or hearing of a special proceeding is limited, by N. Y. Code Civ. Proc. § 830, to a new trial or hearing of the same action or proceeding; and the deposition of a witness which was taken to be used in one action cannot be read in another after the death of the witness. People *v.* Brugman, 3 N. Y. App. Div. 155, 38 N. Y. Suppl. 193.

98. Emig *v.* Diehl, 76 Pa. St. 359; Oliver *v.* Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307.

In assumpsit for goods sold and delivered, plaintiff having read in evidence the deposition of a witness, it is competent for defendant to read the testimony of the same witness taken upon a former trial of the cause, and made a part of the record by bill of exception, not only to contradict the facts stated in the deposition, but to prove other facts material to the issue. Parker *v.* Donaldson, 6 Watts & S. (Pa.) 132.

Order of court unnecessary.— Under Minn. Rev. St. c. 95, § 21, which provides that depotions taken for use on the trial of a cause may be used upon a subsequent trial of the same cause, an order of the court allowing them to be so used is unnecessary. Chouteau *v.* Parker, 2 Minn. 118.

99. Emig *v.* Diehl, 76 Pa. St. 359.

In New York the broad doctrine has been laid down that in order to render such testimony admissible it must be shown that the witness is dead. Weeks *v.* Lowerre, 8 Barb. 530 [*citing* Wilbur *v.* Selden, 6 Cow. (N. Y.) 162; Powell *v.* Waters, 17 Johns. (N. Y.) 176].

1. *Delaware.*— Hall *v.* Dougherty, 5 Houst. 435.

Illinois.— Jarrett *v.* Phillips, 90 Ill. 237.

Massachusetts.— Steele *v.* Carson, 22 Pick. 309.

Nebraska.— Keens *v.* Robertson, 46 Nebr. 837, 65 N. W. 897.

North Carolina.— Kaighn *v.* Kennedy, 1 N. C. 60.

Vermont.— Walton *v.* Walton, 63 Vt. 513, 22 Atl. 617; Perry *v.* Whitney, 30 Vt. 390.

Virginia.— Alexander *v.* Morris, 3 Call 89.

See 16 Cent. Dig. tit. "Depositions," § 284.

Certified case.— A deposition taken in a chancery suit certified to the supreme court is admissible, although taken before the case was removed. Earl *v.* Hurd, 5 Blaekf. (Ind.) 248.

Deposition not used in lower court.— It is no reason for refusing to either party the right to use a deposition in the appellate court that it was not used by the party taking the same in the lower court. Pelamourges *v.* Clark, 9 Iowa 1.

Depositions taken by consent.— In Forney *v.* Hallagher, 11 Serg. & R. (Pa.) 203, a deposition taken by consent before arbitrators was sought to be introduced in evidence on appeal from their award. In passing upon the question the court said: "When a cause is brought into the common pleas by an appeal from the award of arbitrators, the proceedings are *de novo*. This deposition, therefore, is to be considered, as if taken in another suit, between the same parties for the same cause of action. This is putting it in as strong a point of light for the plaintiff as it will bear, for the consent of the plaintiff was only that the deposition should be taken in the cause then pending, viz.: before the arbitrators, and in such case, the general rule is, that the deposition would be evidence, if the witness were dead. Richardson *v.* Stewart, 2 Serg. & R. (Pa.) 84; Miles *v.* O'Hara, 4 Binn. (Pa.) 108. In the case of Magill *v.* Kauffman, 4 Serg. & R. (Pa.) 317, 8 Am. Dec. 713, this court went one step further, and decided that the deposition was evidence, though the witness were living, provided he were not within the state. But there was no ground for admitting the deposition in the case before us, because the witness was living within the state, and within the jurisdiction of the court."

A New Jersey statute providing that on appeal from justice's court no other documents, proofs, and witnesses shall be produced and examined than such as were previously examined in the trial below is not violated by the introduction of depositions taken *de bene esse* of witnesses since unable to testify. Ramsey *v.* Dumars, 19 N. J. L. 66.

2. Stockett *v.* Jones, 10 Gill & J. (Md.) 276.

No certificate attached.— Hobby *v.* Wiseonsin Bank, 17 Wis. 167.

Not certified with papers.— Clarissa *v.* Edwards, 1 Overt. (Tenn.) 393.

D. Other Actions Between Same Parties — 1. In General. Depositions taken in a former suit between the same parties, involving the same question or subject-matter, are usually admissible when the question again arises for judicial determination.[3] It is not material that the parties be identical, or that there be complete mutuality in respect to their relation to each other.[4] The rule for allowing depositions taken in one cause to be read in another seems to derive its support from necessity rather than principle, and is justly subject to several restrictions. The following may be considered as the usual tests by which the admissibility of such testimony is to be determined: (1) The parties must be the same, or in privity;[5] (2) the question in controversy must be the

Not preserved on record.— Bean *v.* Valle, 2 Mo. 126.

3. *Alabama.*— Long *v.* Davis, 18 Ala. 801; Holman *v.* Norfolk Bank, 12 Ala. 369.

California.— Briggs *v.* Briggs, 80 Cal. 253, 22 Pac. 334.

Connecticut.— Ray *v.* Bush, 1 Root 81.

Delaware.—Dawson *v.* Smith, 3 Houst. 335.

Georgia.— Crawford *v.* Word, 7 Ga. 445.

Illinois.— McConnel *v.* Smith, 23 Ill. 611, 27 Ill. 232; Wade *v.* King, 19 Ill. 301.

Indiana.— Maxwell *v.* Brooks, 54 Ind. 98.

Iowa.— Searle *v.* Richardson, 67 Iowa 170, 25 N. W. 113; Atkins *v.* Anderson, 63 Iowa 739, 19 N. W. 323; Shaul *v.* Brown, 28 Iowa 37, 4 Am. Rep. 151.

Kentucky.— Com. *v.* Merrigan, 8 Bush 131; Kercheval *v.* Ambler, 4 Dana 166; Taylor *v.* Illinois Bank, 7 T. B. Mon. 576; Brooks *v.* Cannon, 2 A. K. Marsh. 525.

Louisiana.— Cannon *v.* White, 16 La. Ann. 85.

Missouri.—Lohmann *v.* Stocke, 94 Mo. 672, 8 S. W. 9; Parsons *v.* Parsons, 45 Mo. 265; Tindall *v.* Johnson, 4 Mo. 113.

New Hampshire.— Leviston *v.* French, 45 N. H. 21.

New Jersey.— Evans *v.* Evans, 28 N. J. Eq. 180.

North Carolina.— Stewart *v.* Register, 108 N. C. 588, 13 S. E. 234; Bryan *v.* Malloy, 90 N. C. 508.

Ohio.— Zimmerman *v.* Grotenkemper, 6 Ohio Dec. (Reprint) 832, 8 Am. L. Rec. 364.

Pennsylvania.—Berg *v.* McLafferty, (1888) 12 Atl. 460; Evans *v.* Reed, 78 Pa. St. 415; Haupt *v.* Henninger, 37 Pa. St. 138; Hobart *v.* McCoy, 3 Pa. St. 419; Cooper *v.* Smith, 8 Watts 536; Kohler *v.* Henry, 4 Phila. 61.

Texas.— Emerson *v.* Navarro, 31 Tex. 334, 98 Am. Dec. 534.

United States.— Philadelphia, etc., R. Co. *v.* Howard, 13 How. 307, 14 L. ed. 157; Grunninger *v.* Philpot, 11 Fed. Cas. No. 5,853, 5 Biss. 104; McCormick *v.* Howard, 15 Fed. Cas. No. 8,719.

England.— Nevil *v.* Johnson, 2 Vern. Ch. 447, 23 Eng. Reprint 886.

See 16 Cent. Dig. tit. "Depositions," § 288 *et seq.*

Stipulation as to additional evidence.— Where a stipulation provided that a deposition taken by a special master in the former suit might be read in evidence, and that either party should have the right to use such additional evidence as either might desire and as should be held competent under the pleas, no objection could be raised on the trial to the admissibility of the deposition, but only to the additional evidence. Parlin, etc., Co. *v.* Hutson, 198 Ill. 389, 65 N. E. 93.

4. It is sufficient if the same matter was in issue in both cases, and if those against whom the depositions were offered or those under whom they claim the right or estate in question had an opportunity of cross-examining the witnesses and testing the truth of their testimony.

Delaware.—Dawson *v.* Smith, 3 Houst. 335.

Illinois.— Wade *v.* King, 19 Ill. 301.

Louisiana.— Cannon *v.* White, 16 La. Ann. 85.

Missouri.— Parsons *v.* Parsons, 45 Mo. 265.

Pennsylvania.—Haupt *v.* Henninger, 37 Pa. St. 138.

See 16 Cent. Dig. tit. "Depositions," § 290.

Even at common law complete mutuality is not required. A deposition taken in one suit and offered in another is admissible if the matters in issue are the same and the party against whom the deposition is offered had full power to cross-examine. Haupt *v.* Henninger, 37 Pa. St. 138.

Claim under different title.— In an ejectment by A for the use of the heirs of B a deposition taken in a former ejectment by B against the same defendants for the same land, but in which plaintiff claimed under a different title cannot be read in evidence. Cluggage *v.* Duncan, 1 Serg. & R. (Pa.) 111.

Real party in interest.— Depositions taken in another case will not be excluded where the objecting party was the real party in interest in that case, the subject-matter was the same, and he then had opportunity to cross-examine. McCormick *v.* Howard, 15 Fed. Cas. No. 8,719. Depositions taken in a suit with the factor may be read in evidence in a suit with the principal for the same cause. Ritchie *v.* Lyne, 1 Call (Va.) 489.

Where the parties in interest are the same and the land is the same, a deposition taken in a former suit may be read in evidence, although the parties to the suit are not the same. Cooper *v.* Smith, 8 Watts (Pa.) 536.

5. *Alabama.*— Long *v.* Davis, 18 Ala. 801; Holman *v.* Norfolk Bank, 12 Ala. 369.

Indiana.— Maxwell *v.* Brooks, 54 Ind. 98.

Iowa.— Searle *v.* Richardson, 67 Iowa 170, 25 N. W. 113; Atkins *v.* Anderson, 63 Iowa 739, 19 N. W. 323.

Kentucky.— Kerr *v.* Gibson, 8 Bush 129; Com. *v.* Merrigan, 8 Bush 131; Taylor *v.* Illinois Bank, 7 T. B. Mon. 576; Oliver *v.* Louis-

same;[6] (3) that had the testimony been different, it would have been prejudicial to the party introducing it;[7] (4) that the judgment and verdict rendered in one case would be evidence in the other;[8] and (5) the legal existence of the first

ville, etc., R. Co., 32 S. W. 759, 17 Ky. L. Rep. 840.

Maryland.— Jones *v.* Jones, 45 Md. 144.

Massachusetts.— Yale *v.* Comstock, 112 Mass. 267 [*citing* Warren *v.* Nicholas, 6 Metc. (Mass.) 261].

Mississippi.— Harrington *v.* Harrington, 2 How. 701; Merrill *v.* Bell, 6 Sm. & M. 730.

Missouri.— Allen *v.* Chouteau, 102 Mo. 309, 14 S. W. 869.

New Jersey.— Evans *v.* Evans, 28 N. J. Eq. 180.

New York.— Jackson *v.* Crissey, 3 Wend. 251; Jackson *v.* Lawson, 15 Johns. 539.

North Carolina.— Stewart *v.* Register, 108 N. C. 588, 13 S. E. 234.

Ohio.— Zimmerman *v.* Grotenkemper, 6 Ohio Dec. (Reprint) 832, 8 Am. L. Rec. 364.

Pennsylvania.— Evans *v.* Reed, 78 Pa. St. 415; Haupt *v.* Henninger, 37 Pa. St. 138; Hobart *v.* McCoy, 3 Pa. St. 419; Kohler *v.* Henry, 4 Phila. 61.

United States.— The John H. Starin, 13 Fed. Cas. No. 7,351 [*distinguishing* Grunninger *v.* Philpot, 16 Fed. Cas. No. 5,853, 5 Biss. 104].

See 16 Cent. Dig. tit. "Depositions," § 290.

Meaning of term "parties."— Briggs *v.* Briggs, 80 Cal. 253, 22 Pac. 334.

Interest — When acquired.— Bryan *v.* Malloy, 90 N. C. 508; Good *v.* Good, 7 Watts (Pa.) 195.

New parties before court.— Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307, 14 L. ed. 157.

Only one party interested.— Walker *v.* Walker, 16 Serg. & R. (Pa.) 379.

Personal representatives.— Benzein *v.* Robenett, 16 N. C. 444.

6. *Alabama.*— Long *v.* Davis, 18 Ala. 801; Holman *v.* Norfolk Bank, 12 Ala. 369.

California.— Briggs *v.* Briggs, 80 Cal. 253, 22 Pac. 334.

Delaware.—Dawson *v.* Smith, 3 Houst. 335.

Illinois.— Pratt *v.* Kendig, 128 Ill. 293, 21 N. E. 495; Wade *v.* King, 19 Ill. 301.

Iowa.— Atkins *v.* Anderson, 63 Iowa 739, 19 N. W. 323.

Kentucky.— Taylor *v.* Illinois Bank, 7 T. B. Mon. 576.

Louisiana.— Cannon *v.* White, 16 La. Ann. 85.

Maryland.— Jones *v.* Jones, 45 Md. 144.

Mississippi.— Harrington *v.* Harrington, 2 How. 701.

Missouri.— Parsons *v.* Parsons, 45 Mo. 265.

Nevada.— Scott *v.* Bullion Min. Co., 2 Nev. 81.

New Jersey.— Camden, etc., Transp. Co. *v.* Stewart, 21 N. J. Eq. 484.

North Carolina.— Stewart *v.* Register, 108 N. C. 588, 13 S. E. 234.

Pennsylvania.— Evans *v.* Reed, 78 Pa. St. 415; Haupt *v.* Henninger, 37 Pa. St. 138; Hobart *v.* McCoy, 3 Pa. St. 419; Cooper *v.* Smith, 8 Watts 536; Kohler *v.* Henry, 4 Phila. 61.

Texas.— People's Nat. Bank *v.* Mulkey, (Sup. 1901) 60 S. W. 753.

United States.— Philadelphia, etc., R. Co. *v.* Howard, 13 How. 307, 14 L. ed. 157; The John H. Starin, 13 Fed. Cas. No. 7,351; McCormick *v.* Howard, 15 Fed. Cas. No. 8,719.

See 16 Cent. Dig. tit. "Depositions," § 291.

Action discontinued.— Woolenslagle *v.* Runals, 76 Mich. 545, 43 N. W. 454.

Issues in two actions.— Smith *v.* Lane, 12 Serg. & R. (Pa.) 80.

Order in equity.— Where the chief matter in controversy in two suits between the same parties is the same, and if that was settled there would be no substantial difference between them, and no possible injury can result an order will be made that the testimony taken in either suit may be used in the other. Evans *v.* Evans, 28 N. J. Eq. 180.

Original cause of action.— Where plaintiff, after being examined as a witness in his own behalf before trial in an action for personal injury, died and his executor brought suit, under the statute, it was held that, as this was a new action, not a revival of the old one, the prior deposition could not be used. Murphy *v.* New York Cent., etc., R. Co., 31 Hun (N. Y.) 358.

Probate proceedings.— In proceedings to probate a will a deposition taken in the contest of another will executed by the same person, which was rejected, is not admissible, although the parties are the same. Sewall *v.* Robbins, 139 Mass. 164, 29 N. E. 650.

Production of record.— To admit depositions taken in another suit for any other purpose than to contradict the present statements of the deponent or where he is a party, the record of the former suit should be produced so as to show what points were in controversy, and then the deposition is to be admitted only where and so far as it relates to a material matter to the former issue, and as to which the party against whom it is offered had opportunity to cross-examine. Heth *v.* Young, 11 B. Mon. (Ky.) 278.

Tenant in possession.— A deposition taken by defendant in a real action may, the witness being dead, be used in an action for the same land thereafter brought by the same plaintiffs against the same defendant and his tenant, nonsuit having been taken in the first action on defendant's interposing a plea that he was not in actual possession at the time suit was brought, but that his tenant actually occupied the land. Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13.

7. Harrington *v.* Harrington, 2 How. (Miss.) 701.

Deposition not read in evidence.—Weston *v.* Stammers, 1 Dall. (Pa.) 2, 1 L. ed. 11.

8. Harrington *v.* Harrington, 2 How. (Miss.) 701.

Board not a court.— A deposition taken on a caveat before the board of property will not be allowed in evidence in ejectment, al-

suit.[9] The general rules above laid down have been held applicable, notwithstanding the fact that one suit is at law and the other in equity.[10] Because a deposition has been taken regularly in a former cause between the same parties it does not necessarily follow that such fact of itself is a sufficient reason for admitting such deposition in evidence in a subsequent cause between the same parties;[11] there should be some showing of the death, absence, or disability of the witness whose deposition is desired;[12] and in some jurisdictions his death is considered a prerequisite.[13] The admission of depositions taken in a former suit between the same parties is a matter somewhat within the discretion of the court,[14] and one which will

though the witness was cross-examined by the adverse party and is since dead. Such boards are not considered courts within the application of the rule of recovering testimony in cases between the same parties, etc. Kirkpatrick *v.* Vanhorn, 32 Pa. St. 131; Packer *v.* Gonsalus, 1 Serg. & R. (Pa.) 526; Sherman *v.* Dill, 4 Yeates (Pa.) 295, 2 Am. Dec. 408; De Haas *v.* Galbreath, 2 Yeates (Pa.) 315; Montgomery *v.* Snodgrass, 2 Yeates (Pa.) 230.

9. Jones *v.* Jones, 45 Md. 144; Harrington *v.* Harrington, 2 How. (Miss.) 701.

Action discontinued.— Solms *v.* McCulloch, 5 Pa. St. 473.

Court without jurisdiction.—Cunningham *v.* Hall, 86 Mass. 268.

Dismissal for want of jurisdiction.— Commissioners in Equity *v.* McWhorter, 2 McMull. (S. C.) 254.

Nonsuit in former action.— Acme Mfg. Co. *v.* Reed, 197 Pa. St. 359, 47 Atl. 205, 80 Am. St. Rep. 832.

No pleadings filed.— Bryan *v.* Malloy, 90 N. C. 508.

10. *Illinois.*— Miller *v.* Chrisman, 25 Ill. 269.

Kentucky.— Grigsby *v.* Daniel, 5 B. Mon. 435.

Massachusetts.— Yale *v.* Comstock, 112 Mass. 267.

New Hampshire.—Gove *v.* Lyford, 44 N. H. 525.

New Jersey.— Wanner *v.* Sisson, 29 N. J. Eq. 141.

Pennsylvania.— Eckman *v.* Eckman, 68 Pa. St. 460; Winch *v.* James, 68 Pa. St. 297; Fulton *v.* Sellers, 4 Brewst. 42.

See 16 Cent. Dig. tit. "Depositions," § 292.

Original suit dismissed.— Depositions taken in a chancery case which was dismissed for want of jurisdiction cannot be used in a subsequent suit at law between the same parties over the same subject-matter, although the witness has since died. Equity Com'rs *v.* McWhorter, 2 McMull. (S. C.) 254.

Special order of court.— It is within the power of the court by special order to allow depositions, taken in another suit between the same parties, to be read at the hearing of a cause in equity. Leviston *v.* French, 45 N. H. 21; Evans *v.* Evans, 23 N. J. Eq. 180; Nevil *v.* Johnson, 2 Vern. Ch. 447, 23 Eng. Reprint 886.

11. Trimmer *v.* Larrison, 8 N. J. L. 56; Camden, etc., R., etc., Co. *v.* Stewart, 21 N. J. Eq. 484; Sadler *v.* Anderson, 17 Tex. 245. And see Broach *v.* Kelly, 71 Ga. 698; O'Harra *v.* Hunt, 19 Ohio 460.

Proof required.— A deposition of a deceased or foreign witness appended to an injunction bill is not competent, in the absence of proof that the suit in which such deposition was taken was between the same parties and related to the same subject-matter. Camden, etc., R., etc., Co. *v.* Stewart, 21 N. J. Eq. 484.

12. *Alabama.*— Long *v.* Davis, 18 Ala. 801; Duval *v.* McLoskey, 1 Ala. 708.

Georgia.— Bowie *v.* Findly, 55 Ga. 604.

Kentucky.— Roots *v.* Merriwether, 8 Bush 397.

Maine.— Chase *v.* Springvale Mills Co., 75 Me. 156.

Maryland.— Steuart *v.* Mason, 3 Harr. & J. 507; Hopkins *v.* Stump, 2 Harr. & J. 301.

New Jersey.— Wanner *v.* Sisson, 29 N. J. Eq. 141.

Pennsylvania.— Carpenter *v.* Groff, 5 Serg. & R. 162.

Texas.— Sadler *v.* Anderson, 17 Tex. 245.

Virginia.— Pleasants *v.* Clements, 2 Leigh 474.

United States.— Brewer *v.* Caldwell, 4 Fed. Cas. No. 1,848, 13 Blatchf. 361.

See 16 Cent. Dig. tit. "Depositions," § 293.

Greenleaf says that such proof is received "if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane, or sick, and unable to testify, or has been summoned, but appears to have been kept away by the adverse party." 1 Greenleaf Ev. § 163 [*cited* in Long *v.* Davis, 18 Ala. 801].

Loss of memory.— The deposition of a witness, once regularly taken in a pending cause, may afterward be read in evidence in another cause between the same parties in regard to the same subject-matter, when in the interval the witness has lost his memory by reason of ill-health and old age. Rothrock *v.* Gallaher, 91 Pa. St. 108.

Use in criminal case.— A deposition given in a civil cause by the state against defendant and his bondsmen is not rendered admissible on defendant's prosecution for false pretenses growing out of the same matters by the fact that the deponent was summoned as a witness and is dead. Woodruff *v.* State, 61 Ark. 157, 32 S. W. 102.

13. Weeks *v.* Lowerre, 8 Barb. (N. Y.) 530; Shepherd *v.* Willis, 19 Ohio 142. See also Long *v.* Davis, 18 Ala. 801.

14. Kercheval *v.* Ambler, 4 Dana (Ky.) 166; Grnuninger *v.* Philpot, 11 Fed. Cas. No. 5,853, 5 Biss. 104.

not be reviewed unless there has been a palpable abuse of the discretion as exercised.[15]

2. Necessity of Order or Notice. As a general rule where a case has been dismissed before any trial has been had the entire case is out of court, including the interrogatories taken in that case which have not been read in evidence, unless there is some order of the court or agreement of the parties that the same may be used and read in another case.[16] In order to take a case out of such general rule, and to allow the interrogatories taken in the dismissed case to be read in another case upon substantially the same issue and between substantially the same parties, some good reason should be at least shown, either that the witness is dead, disqualified, or not accessible.[17] Under such circumstances the depositions should be either filed with the papers in the new cause[18] or reasonable notice should be given by the party seeking to introduce it to the adverse party of his intention to do so and of the grounds therefor;[19] but it has been held that where the notice sufficiently informed the party, the commission issued for, and the deposition was entitled of, both actions, it might be used in both.[20] Ordinarily in the absence of agreement, depositions cannot be noticed for two

15. Kercheval *v.* Ambler, 4 Dana (Ky.) 166.

Whether the issue in the two cases is the same or not is in the first instance a question for the presiding judge to decide, and a ruling or finding by him on that point can be reversed by the law court only when the case discloses an error therein; just as the question "whether the witness who is called as an expert has the requisite qualifications and knowledge to enable him to testify, is a preliminary question for the court. The decision of this question is conclusive, unless it appears upon the evidence to have been erroneous, or to have been founded upon some error in law." Chase *v.* Springvale Mills Co., 75 Me. 156, 160 [*citing* Perkins *v.* Stickney, 132 Mass. 217].

16. Bowie *v.* Findly, 55 Ga. 604; Phipps *v.* Caldwell, 1 Heisk. (Tenn.) 349.

Agreement in record.— The surveys and depositions used in one cause may be admitted as evidence in another cause between the same parties; an agreement to that effect being shown in the record of the first cause. McIlhenny *v.* Biggerstaff, 3 Litt. (Ky.) 155.

17. Bowie *v.* Findly, 55 Ga. 604.

18. Searle *v.* Richardson, 67 Iowa 170, 25 N. W. 113 [*distinguishing* Shaul *v.* Brown, 28 Iowa 37, 4 Am. Rep. 151].

The Indiana statute authorizes the use in evidence of depositions taken in a former suit where it appears: First, that they have been duly filed in the court where the previous suit was pending; second, that they have remained on file from the dismissal of the previous suit until the time at which it is proposed to use them. The courts cannot annul this enactment by annexing conditions precedent to the use of such evidence, which the legislature has not required. Maggart *v.* Freeman, 27 Ind. 531. See also Whitcomb *v.* Stewart, Smith (Ind.) 135.

19. Bowie *v.* Findly, 55 Ga. 604.

No surprise to opposite party.— Where a deposition of one deceased, taken in a suit for the possession of land between A and B, was offered in evidence in an action of ejectment for the same land between B and C, who derived his title from A, it was held that it was admissible without having been filed, or notice given of its intended use, if there was no surprise to the opposite party. Adams *v.* Raigner, 69 Mo. 363, 364. In this case the court said: "It is true that in Samuel *v.* Withers, 16 Mo. 532, it was said that the deposition should be filed in the case where it was proposed to use it, or notice should be given of its intended use, but in Cabanne *v.* Walker, 31 Mo. 274, this rule was not considered indispensable, and was thought to be merely intended to guard against surprise."

Proceedings to render deposition competent.— In Stewart *v.* Register, 108 N. C. 588, 591, 13 S. E. 234, it was objected on the part of defendants to a deposition read in evidence in a subsequent suit that it "had not been regularly taken in this action, and no proceeding in law or equity had been taken to make" the same competent. In passing upon this question, the court said: "Nor was it necessary that any proceeding should be taken in a Court of law or equity to render it competent as evidence in this action. It was sufficient to take it from the files to which it properly belonged and introduce it on the trial, properly identifying it with the former action. It could not be changed, modified or amended; it, as it appeared on file, was sufficient or insufficient, competent or incompetent. Why, therefore, should any proceeding be taken in Court to render it competent? Any proper objection might have been made to it at the time it was put in evidence. It might have been objected that it was not taken in another action between the parties, or that it was taken in respect to a different matter or cause of action; it might have been objected further that it was in no way material to the former action."

20. Scott *v.* Bullion Min. Co., 2 Nev. 81.

separate actions,[21] although the parties to the action in which they are to be taken are the same.[22]

XXII. OBJECTIONS.

A. In General. In order to be available all defects, irregularities, or illegal evidence in depositions must be objected to or they will be considered waived.[23]

B. Who May Object — 1. In General. The question as to who may object to the taking or admission in evidence of a deposition depends upon the nature of the objection and the time when the same is raised.[24] Except in specified cases[25] either party has a right to object where the admission of the deposition would result in prejudice to his rights,[26] and to have such question passed upon by the court;[27] but a party will not be allowed to object to defects and irregularities which pertain to parties to the action other than himself.[28]

2. Party Taking. Where both parties appear and cross-examine at the taking of a deposition, the party causing the same to be taken cannot object to its being used by the opposite party on the ground of any irregularity[29] or on the ground of the incompetency of the witness.[30]

21. Phipps *v.* Caldwell, 1 Heisk. (Tenn.) 349.

22. Bemis *v.* Morrill, 38 Vt. 153.

23. Pelamourges *v.* Clark, 9 Iowa 1.

Waiver of objections see *infra*, XXIII.

24. An intervener will not be heard to object to depositions already taken on the ground that he had no opportunity to propound cross interrogatories. Rainbolt *v.* March, 52 Tex. 246.

Answers not responsive.— Where a witness, examined on deposition, instead of answering direct interrogatories as they are put, replies by introducing new and distinct facts not inquired about, and which favor the party on whose behalf the questions are put, the opposite party and not merely the party propounding direct questions may object that the answers are not responsive. Greenman *v.* O'Connor, 25 Mich. 30.

Competency of witness.— Where both parties in a suit obtain a special commission to take the deposition of a person, and only one of them acts under the commission and takes the deposition, the other is not precluded from objecting to the competency of the deponent. Beverley *v.* Brooke, 2 Leigh (Va.) 425.

Stipulation.— In French *v.* Canada, etc., R. Co., 42 Mich. 64, 3 N. W. 257, which was an action to enforce a joint liability, summons was served on only one of the defendants, who stipulated for taking a deposition. The other afterward appeared and the deposition was excluded on the trial, on his objection that it was taken without notice to him. It was held that defendant who stipulated could not bring error on account of such objection.

The cross-examining party to a deposition cannot object that direct questions were not answered by the deponent. Feagan *v.* Cureton, 19 Ga. 404.

25. See *infra*, XXII, D, 8, 9.

26. Ramsey *v.* Erie R. Co., 8 Abb. Pr. N. S. (N. Y.) 174, 39 How. Pr. (N. Y.) 62.

A statement in the bill of exceptions that "defendant then asked to read the deposition of E. F., but the court refused, she being in Madison County, as shown at the bar" is not an exception to the ruling of the court. Bronson *v.* Green, 2 Duv. (Ky.) 234.

Exceptions not taken in time.— Exceptions to depositions for want of a formal jurat and for the reason that an interrogatory is not according to law cannot be considered, when not taken in the time and manner prescribed by the rules of court. Marsh *v.* Nordyke, etc., Co., (Pa. 1888) 15 Atl. 875.

Surprise.— Nicholson *v.* Desobry, 14 La. Ann. 81; Walker *v.* Devlin, 2 Ohio St. 593.

27. Kisskadden *v.* Grant, 1 Kan. 328; Verret *v.* Bonvillain, 32 La. Ann. 29; Nicholson *v.* Desobry, 14 La. Ann. 81; Williams *v.* Eldridge, 1 Hill (N. Y.) 249.

Argument on appeal.— An objection to the admission of a part of a deposition that the form of an interrogatory does not give notice of the substance of the answer thereto so as to permit cross-examination thereon cannot be taken on argument in an appellate court, when the entire deposition is not before the court. Kershaw *v.* Wright, 115 Mass. 361. Where the record shows a failure on the part of the trial court to pass on the exceptions to depositions, this is evidence to the appellate court that the exceptions were not urged. Patrick *v.* Day, 1 S. W. 477, 8 Ky. L. Rep. 349.

28. Glenn *v.* Glenn, 17 Iowa 498; Linskie *v.* Kerr, (Tex. Civ. App. 1896) 34 S. W. 765.

In a suit against a husband and wife to set aside as fraudulent a deed made by the husband to the wife, the wife cannot object to depositions taken on notice to her on the ground that notice was not also given to her husband. Silverman *v.* Greaser, 27 W. Va. 550.

29. Andrews *v.* Graves, 1 Fed. Cas. No. 376, 1 Dill. 108.

30. Gilkey *v.* Peeler, 22 Tex. 663.

Where a party uses a deposition taken by his opponent he makes it his own, and his adversary has the right to object to interrogatories even when propounded by himself,

C. Time to Object — 1. In General. While the time to object to the admissibility of a deposition in evidence may depend upon the nature of the objection urged and the opportunity for previous objection,[31] it is usually a matter regulated by the statute or rules of court;[32] but it may be stated as a general rule that objection should always be taken at the earliest opportunity[33] or it will be considered waived.[34] The most universally observed rule on this subject is that defects in a deposition must be objected to before the cause comes on for trial,[35]

or as if the deposition had been taken on the part of the party offering it. Hatch *v.* Brown, 63 Me. 410; *In re* Smith, 34 Minn. 436, 26 N. W. 234.

31. See *infra*, XXII, C, 3.

32. *California.*— Myers *v.* Casey, 14 Cal. 542.

Georgia.— Treadaway *v.* Richards, 92 Ga. 264, 18 S. E. 25.

Iowa.— Turner *v.* Hardin, 80 Iowa 691, 45 N. W. 758; Johnson *v.* Chicago, etc., R. Co., 51 Iowa 25, 50 N. W. 543.

Kentucky.— Moore *v.* Smith, 88 Ky. 151, 10 S. W. 380, 10 Ky. L. Rep. 729; Cooksey *v.* Cassidy, 79 Ky. 392; Dills *v.* May, 3 Ky. L. Rep. 765.

Louisiana.—Porter *v.* Hornsby, 32 La. Ann. 337; Groves *v.* Steel, 2 La. Ann. 480, 46 Am. Dec. 551.

Missouri.— Bowman *v.* Branson, 111 Mo. 343, 19 S. W. 634; Leslie *v.* Rich Hill Coal Min. Co., 110 Mo. 31, 19 S. W. 308; Cator *v.* Collins, 2 Mo. App. 225.

Pennsylvania.— Perkins *v.* Johnson, 19 Pa. St. 510; Cunningham *v.* Jordan, 1 Pa. St. 442.

Texas.— McMahon *v.* Veasey, (Civ. App. 1900) 60 S. W. 333.

United States.— Nelson *v.* Woodruff, 1 Black 156, 17 L. ed. 97.

See 16 Cent. Dig. tit. "Depositions," § 302.

In admiralty an objection to a deposition on the ground of the incompetency of a witness must be made at the hearing, and comes too late if it is deferred until argument. Nelson *v.* Woodruff, 1 Black (U. S.) 156, 17 L. ed. 97.

33. Jordan *v.* Jordan, 17 Ala. 466; Jones *v.* Love, 9 Cal. 68; Newton *v.* Porter, 69 N. Y. 133, 25 Am. Rep. 152; Vilmar *v.* Schall, 35 N. Y. Super. Ct. 67.

Competency of witnesses see *supra*, XXII, B, 3, e.

Objection to interrogatories see *infra*, XXII, B, 3, b.

34. Waiver of objections see *infra*, XXIII.

35. *Alabama.*—Alabama Great Southern R. Co. *v.* Bailey, 112 Ala. 167, 20 So. 313; National Fertilizer Co. *v.* Holland, 107 Ala. 412, 18 So. 170, 54 Am. St. Rep. 101; Moody *v.* Alabama Great Southern R. Co., (1892) 10 So. 905, 99 Ala. 553, 13 So. 233; Morgan *v.* Wing, 58 Ala. 301.

Colorado.— Cowan *v.* Cowan, 16 Colo. 335, 26 Pac. 934.

District of Columbia.— Claxton *v.* Adams, 1 MacArthur 496.

Georgia.— Central R., etc., Co. *v.* Gamble, 77 Ga. 584, 3 S. E. 287; Gholston *v.* Gholston, 31 Ga. 625; Feagin *v.* Beasley, 23 Ga. 17.

Illinois.— Illinois Cent. R. Co. *v.* Foulks, 191 Ill. 57, 60 N. E. 890; Stowell *v.* Moore, 89 Ill. 563; Merchants' Despatch Transp. Co. *v.* Leysor, 89 Ill. 43; Kassing *v.* Mortimer, 80 Ill. 602; Toledo, etc., R. Co. *v.* Baddeley, 54 Ill. 19, 5 Am. Rep. 71; Winslow *v.* Newlan, 45 Ill. 145; Corgan *v.* Anderson, 30 Ill. 95; Thomas *v.* Dunaway, 30 Ill. 373; Kimball *v.* Cook, 6 Ill. 423; Pittsburgh, etc., R. Co. *v.* Story, 104 Ill. App. 132; B. S. Green Co. *v.* Smith, 52 Ill. App. 158; Sheldon *v.* Burry, 39 Ill. App. 154; Kent *v.* Mason, 1 Ill. App. 466.

Indiana.—National Bank, etc., Co. *v.* Dunn, 106 Ind. 110, 6 N. E. 131; Newman *v.* Manning, 89 Ind. 422; McGinnis *v.* Gabe, 78 Ind. 457; Robinius *v.* Lister, 30 Ind. 142, 95 Am. Dec. 674; Stull *v.* Howard, 26 Ind. 456; Graydon *v.* Gaddis, 20 Ind. 515; Barber *v.* Lyon, 8 Blackf. 215; Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146.

Iowa.— Cathcart *v.* Rogers, 115 Iowa 30, 87 N. W. 738; Tuthill Spring Co. *v.* Smith, 90 Iowa 331, 57 N. W. 853; Bays *v.* Herring, 51 Iowa 286, 1 N. W. 558; Alverson *v.* Bell, 13 Iowa 308; Frazier *v.* Smith, 10 Iowa 591.

Kansas.— Rockford Ins. Co. *v.* Farmers' State Bank, 50 Kan. 427, 31 Pac. 1063; Kansas Pac. R. Co. *v.* Pointer, 9 Kan. 620.

Kentucky.— Estham *v.* Curd, 15 B. Mon. 102; Beatty *v.* Thompson, 66 S. W. 384, 23 Ky. L. Rep. 1850; Dean *v.* Phillips, 61 S. W. 10, 22 Ky. L. Rep. 1621.

Maine.— Leavitt *v.* Baker, 82 Me. 26, 19 Atl. 86; Lord *v.* Moore, 37 Me. 208.

Maryland.— Barnum *v.* Barnum, 42 Md. 251.

Massachusetts.— Gould *v.* Hawkes, 1 Allen 170.

Missouri.— Delventhal *v.* Jones, 53 Mo. 460; Brooks *v.* Boswell, 34 Mo. 474; Greene *v.* Chickering, 10 Mo. 109.

New York.— Denny *v.* Horton, 3 N. Y. Civ. Proc. 255.

North Carolina.— Brittain *v.* Hitchcock, 127 N. C. 400, 37 S. E. 474; Davenport *v.* McKee, 98 N. C. 500, 4 S. E. 545; Carroll *v.* Hodges, 98 N. C. 418, 4 S. E. 199; Wasson *v.* Linster, 83 N. C. 575.

Ohio.— Crosby *v.* Hill, 39 Ohio St. 100 [*affirming* 8 Ohio Dec. (Reprint) 663, 9 Cinc. L. Bul. 156]; Cowan *v.* Ladd, 2 Ohio St. 322.

Pennsylvania.— Couch *v.* Sutton, 1 Grant 114; Withers *v.* Gillespy, 7 Serg. & R. 10.

Tennessee.— Campbell *v.* Baird, 95 Tenn. 345, 32 S. W. 194.

Texas.— Rule 23, 47 Tex. 621; Allen *v.* Hoxey, 37 Tex. 320; Pauska *v.* Daus, 31 Tex. 67; Texas, etc., R. Co. *v.* Burnes, 2 Tex.

unless the ground of objection was unknown before it was offered in evidence[36] or does not appear on the face of the deposition itself.[37] The swearing of the jury has been held the legal commencement of the trial within the meaning of the rule requiring objections to be interposed before the commencement of the trial;[38] but the rule in this regard is usually a matter of practice which is regulated by the statute or rules of court.[39]

2. On Appeal — a. In General. It is a well-settled rule that objections to the admission of depositions in evidence cannot be raised for the first time when the case is taken to the appellate court,[40] whether the failure to make such objection

Unrep. Cas. 239; Miller *v.* Schneider, 2 Tex. App. Civ. Cas. § 369.

Virginia.— Foster *v.* Sutton, 4 Hen. & M. 401.

Wisconsin.— Wausau Boom Co. *v.* Plumer, 49 Wis. 118, 5 N. W. 53.

United States.— Samuel *v.* Hostetter Co., 118 Fed. 257, 55 C. C. A. 111; Smith *v.* The Serapis, 49 Fed. 393; Holladdy's Case, 27 Fed. 830; Brooks *v.* Jenkins, 4 Fed. Cas. No. 1,953, 3 McLean 432; Hitchcock *v.* Shoninger Melodeon Co., 12 Fed. Cas. No. 6,537; U. S. *v.* One Case of Hair Pencils, 27 Fed. Cas. No. 15,924, 1 Paine 400.

England.— Coles *v.* Morris, 36 L. J. Ch. 833, 17 L. T. Rep. N. S. 155, 15 Wkly. Rep. 1157; Richards *v.* Hough, 51 L. J. Q. B. 361, 30 Wkly. Rep. 676.

See 16 Cent. Dig. tit. "Depositions," § 309.

Accidental omission.— McArthur *v.* Carrie, 32 Ala. 75, 70 Am. Dec. 529.

Depositions not filed.— Where defendant was not made a party to proceedings to perpetuate testimony, and the depositions taken were not filed in court, defendant lost no rights by its failure to file its motion to suppress the depositions before the cause was reached for trial, as required by Iowa Code (1873), § 3751. Accola *v.* Chicago, etc., R. Co., 70 Iowa 185, 30 N. W. 503.

Illegal testimony.— Where a deposition contains a question and answer which discloses illegal testimony, it may be objected to on the trial. Wall *v.* Williams, 11 Ala. 826.

Not a party to the suit.— It is not necessary for a party before the trial commences to file exceptions to the reading of depositions taken before he was made a party to the suit. Kerr *v.* Gibson, 8 Bush (Ky.) 129.

36. Barber *v.* Lyon, 8 Blackf. (Ind.) 215; U. S. *v.* One Case of Hair Pencils, 27 Fed. Cas. No. 15,924, 1 Paine 400.

37. Tuskaloosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635; Robinius *v.* Lister, 30 Ind. 142, 95 Am. Dec. 674; Stull *v.* Howard, 26 Ind. 456; Hazlett *v.* Gambold, 15 Ind. 303. See also Graydon *v.* Gaddis, 20 Ind. 515. *Compare* Truman *v.* Scott, 72 Ind. 258.

38. Glenn *v.* Clore, 42 Ind. 60.

39. *Colorado.*— Cowan *v.* Cowan, 16 Colo. 335, 26 Pac. 934.

Georgia.— Central R., etc., Co. *v.* Gamble, 77 Ga. 584, 3 S. E. 287.

Illinois.— Corgan *v.* Anderson, 30 Ill. 95.

North Carolina.— Carroll *v.* Hodges, 98 N. C. 418, 4 S. E. 199.

Texas.— Texas, etc., R. Co. *v.* Burnes, 2 Tex. Unrep. Cas. 239.

See 16 Cent. Dig. tit. "Depositions," § 309 *et seq.*

Announcement as ready for trial.— National Fertilizer Co. *v.* Holland, 107 Ala. 412, 18 So. 170, 54 Am. St. Rep. 101. See also Houston, etc., R. Co. *v.* Burke, 55 Tex. 323, 40 Am. Rep. 808.

Exceptions filed a few minutes before trial see Herndon *v.* Bryant, 39 Miss. 335.

Jury in the box.— In Alabama Great Southern R. Co. *v.* Bailey, 112 Ala. 167, 20 So. 313, it was held that the motion came after the trial was commenced and was too late after a struck jury was selected and was in the box, but before the case was put to the jury by plaintiff, and defendant moved to suppress.

40. *Alabama.*— Dill *v.* Camp, 22 Ala. 249; Jordon *v.* Jordan, 17 Ala. 466; Eldridge *v.* Turner, 11 Ala. 1049.

Arkansas.— Allen *v.* Hightower, 21 Ark. 316; McCarron *v.* Cassidy, 18 Ark. 34; Pelham *v.* Floyd, 9 Ark. 530.

California.— Hobbs *v.* Duff, 43 Cal. 485.

Florida.— Tuten *v.* Gazan, 18 Fla. 751.

Illinois.— Merchants' Despatch Transp. Co. *v.* Leysor, 89 Ill. 43; Morgan *v.* Corlies, 81 Ill. 72; McCoy *v.* People, 71 Ill. 111; Walker *v.* Dement, 42 Ill. 272; Lockwood *v.* Mills, 39 Ill. 602; Moshier *v.* Knox College, 32 Ill. 155; Shedd *v.* Dalzell, 30 Ill. App. 356.

Iowa.— Medland *v.* Walker, 96 Iowa 175, 64 N. W. 797; Byington *v.* Moore, 62 Iowa 470, 17 N. W. 644.

Kansas.— Missouri Pac. R. Co. *v.* Neiswanger, 41 Kan. 621, 21 Pac. 582, 13 Am. St. Rep. 304.

Kentucky.— Crabb *v.* Larkin, 9 Bush 154; Chiles *v.* Boon, 3 B. Mon. 82; Alexander *v.* Commonwealth Bank, 7 J. J. Marsh. 580; Jones *v.* Chappell, 5 T. B. Mon. 422; Paul *v.* Rogers, 5 T. B. Mon. 164; Roberts *v.* Jones, 2 Litt. 88; Brand *v.* Webbs, 2 A. K. Marsh. 574; Gibbs *v.* Cook, 4 Bibb 535; Johnson *v.* Rankin, 3 Bibb 86; Respass *v.* Morton, Hard. 226; Gallagher *v.* Loeb, 15 Ky. L. Rep. 572; Hampton *v.* Bailey, 5 S. W. 383, 9 Ky. L. Rep. 423.

Maryland.— Bullitt *v.* Musgrave, 3 Gill 31; Fitzhugh *v.* McPherson, 9 Gill & J. 51.

Massachusetts.— Cobb *v.* Rice, 130 Mass. 231.

Michigan.— Boxheimer *v.* Gunn, 24 Mich. 372.

Mississippi.— Coopwood *v.* Foster, 12 Sm. & M. 718; Neeley *v.* Planters' Bank, 4 Sm. & M. 113.

applies to the taking of the deposition itself,[41] the competency of the witnesses,[42] notice of the time and place of taking,[43] or irregularities in the granting of the commission.[44] So an objection to a deposition on the ground that the cause for taking the same was not shown to exist at the time of the hearing will not be considered when presented for the first time upon an appeal.[45]

b. Changing Objections. As has been before stated a party must definitely specify his grounds of objection before appeal,[46] and having once done so he will

Missouri.— Bell *v.* Jamison, 102 Mo. 71, 14 S. W. 714; Dutro *v.* Walter, 31 Mo. 516.

Nebraska.— Converse *v.* Meyer, 14 Nebr. 190, 15 N. W. 340.

Nevada.— Lockhart *v.* Mackie, 2 Nev. 294.

New York.—Sheldon *v.* Wood, 2 Bosw. 267; Clark *v.* Dibble, 16 Wend. 601.

North Carolina.— Stewart *v.* Register, 108 N. C. 588, 13 S. E. 234.

Oregon.— State *v.* Bourne, 21 Oreg. 218, 27 Pac. 1048.

Pennsylvania.— Newlin *v.* Newlin, 8 Serg. & R. 41.

Tennessee.— Birdsong *v.* Birdsong, 2 Head 289; Gunn *v.* Mason, 2 Sneed 637; Pillow *v.* Shannon, 3 Yerg. 508.

Texas.— Wright *v.* Wren, (Sup. 1891) 16 S. W. 996.

Vermont.— Van Namee *v.* Groot, 40 Vt. 74.

Virginia.— Brown *v.* Brown, (1896) 24 S. E. 238; Burkholder *v.* Ludlam, 30 Gratt. 255, 32 Am. Rep. 668; Baxter *v.* Moore, 5 Leigh 219; Dickenson *v.* Davis, 2 Leigh 401.

Wiseonsin.— Cameron *v.* Cameron, 15 Wis. 1, 82 Am. Dec. 652; Whiting *v.* Gould, 1 Wis. 195.

See 16 Cent. Dig. tit. "Depositions," § 339.

A non-resident defendant against whom a warning order, which is substituted for publication, is regularly taken, is constructively in court, and depositions taken against such a one, not objected to in the court below, cannot be objected to in the appellate court for the first time. Taylor *v.* Gibbs, 3 B. Mon. (Ky.) 316.

Testimony before master.— An exception that the master refused to suppress certain depositions, and treated the testimony as competent, and relied on it in making his findings, is unavailing, where it does not appear by the record that any objection was made before the master to that testimony, that any motion was made before him to suppress such depositions, or that any motion was made before the court to suppress them. Goodwin *v.* Fox, 129 U. S. 601, 9 S. Ct. 367, 32 L. ed. 805.

41. *Arkansas.*— Pelham *v.* Floyd, 9 Ark. 530.

Kentucky.— Roberts *v.* Jones, 2 Litt. 88; Brand *v.* Webbs, 2 A. K. Marsh. 574.

New York.— Clark *v.* Dibble, 16 Wend. 601.

Pennsylvania.— Newlin *v.* Newlin, 8 Serg. & R. 41.

Virginia.—Dickenson *v.* Davis, 2 Leigh 401.

See 16 Cent. Dig. tit. "Depositions," § 339.

42. *Arkansas.*—Allen *v.* Hightower, 21 Ark. 316; McCarron *v.* Cassidy, 18 Ark. 34.

Illinois.— Walker *v.* Dement, 42 Ill. 272; Moshier *v.* Knox College, 32 Ill. 155.

Kentucky.— Alexander *v.* Commonwealth Bank, 7 J. J. Marsh. 580; Respass *v.* Morton, Hard. 226.

Tennessee.— Birdsong *v.* Birdsong, 2 Head 289; Pillow *v.* Shannon, 3 Yerg. 508.

Virginia.— Baxter *v.* Moore, 5 Leigh 219.

See 16 Cent. Dig. tit. "Depositions," § 314.

Contra.— See Rose *v.* Brown, 11 W. Va. 122.

43. Dill *v.* Camp, 22 Ala. 249; McCoy *v.* People, 71 Ill. 111; Wright *v.* Wren, (Tex. Sup. 1891) 16 S. W. 996; Cameron *v.* Cameron, 15 Wis. 1, 82 Am. Dec. 652.

No notice of record.— Where the certificate of a commissioner who took a deposition did not state that it was taken pursuant to notice and, although the deposition was excepted to on the ground that there was no commission and that the certificate did not state the parties to the suit in which it was taken, no objection was taken to it in the court below for want of notice, it was held that, although there was no notice or evidence of notice on record, the objection for want of notice could not be taken in the appellate court. Steptoe *v.* Read, 19 Gratt. (Va.) 1.

44. Roberts *v.* Jones, 2 Litt. (Ky.) 88; Brand *v.* Webb, 2 A. K. Marsh. (Ky.) 574; Coopwood *v.* Foster, 12 Sm. & M. (Miss.) 718; Dickenson *v.* Davis, 2 Leigh (Va.) 401.

Objection to certificate.— An objection to a deposition for want of a proper certificate by the magistrate cannot be raised in the appellate court for the first time. Morgan *v.* Corlies, 81 Ill. 72; Comeron *v.* Cameron, 15 Wis. 1, 82 Am. Dec. 652.

Objection to form of interrogatories.— An objection to the form of interrogatories cannot be made for the first time in the supreme court. Jordan *v.* Jordan, 17 Ala. 466; Merchants' Despatch Transp. Co. *v.* Leysor, 89 Ill. 43; Van Namee *v.* Groot, 40 Vt. 74.

45. *Kansas.*— Missouri Pac. R. Co. *v.* Neiswanger, 41 Kan. 621, 21 Pac. 582, 13 Am. St. Rep. 304.

Massachusetts.— Cobb *v.* Rice, 130 Mass. 231.

Mississippi.— Neeley *v.* Planters' Bank, 4 Sm. & M. 113.

Missouri.— Bell *v.* Jamison, 102 Mo. 71, 14 S. W. 714.

Nebraska.— Converse *v.* Meyer, 14 Nebr. 190, 15 N. W. 340.

Nevada.— Lockhart *v.* Mackie, 2 Nev. 294.

See 16 Cent. Dig. tit. "Depositions," § 339.

46. See *supra*, XXI, C, 4, a.

It is not the duty of the appellate court to point out objections to the admissibility of evidence. Bullitt *v.* Musgrave, 3 Gill (Md.) 31.

be confined to the objections alleged and will not be permitted to rely upon other grounds in the appellate court.[47]

3. As Dependent on Nature of Objection — a. Formal Defects in General. The courts have drawn the distinction between mere formal objections that vitiate the deposition itself and objections to the evidence therein contained. In the former case objection must be made before trial,[48] yet substantial objections that go to the very gist and legality of the deposition itself may be urged even at the trial.[49] Where a deposition has been taken in conformity with the statute, a

47. *Alabama.*— Saltmarsh *v.* Bower, 34 Ala. 613; Bartee *v.* James, 33 Ala. 34; Agee *v.* Williams, 30 Ala. 636.

Illinois.— King *v.* Chicago, etc., R. Co., 98 Ill. 376.

Mississippi.— Love *v.* Stone, 56 Miss. 449.

New Hampshire.— City Bank *v.* Young, 43 N. H. 457.

South Carolina.— Hall *v.* Hall, 45 S. C. 166, 22 S. E. 818.

Agreement of parties.— Where at a trial the parties agreed that they would not object to the evidence taken under commission, except as noted on the return, unless for reasons to be satisfactory to the court, and one party has under the agreement introduced illegal testimony without objection, he will not on appeal be allowed to object to evidence of the same general character as the incompetent testimony introduced by him, unless his objections were specific at the trial and, as to the sufficiency of such objections the trial court is the final judge under such agreement. *In re* Bull, 111 N. Y. 624, 19 N. E. 503.

Motion for new trial.— Where it was claimed on a motion for a new trial that a deposition which had been admitted by the court below should have been rejected because the notary public before whom it was taken had no power to exercise his office in the county where it was taken, but the admission of such deposition had been objected to entirely on other grounds, it was held that it must be assumed that such notary public had authority to act in the county where the deposition was taken. Lyon *v.* Ely, 24 Conn. 507.

Proof of absence of witness.— In Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267, a deposition offered in evidence before referees was objected to as being inadmissible generally. The absence of the witness was proved, and no objection made to the sufficiency of the certificate. The referees adjourned pending the question, and at the next meeting the general objection was repeated and overruled and the deposition admitted. On the appeal the objection was raised for the first time that the absence of the witness was not sufficiently proved and that the certificate was defective in form. It was held that these objections came too late.

Where a general objection is made to the reading of a deposition which appears regular on its face, the supreme court will not notice any specific objections made for the first time in that court. Donnell *v.* Thompson, 13 Ala. 440; Worthington *v.* Curd, 15 Ark. 491.

Waiver of other grounds.— A motion to suppress for the reason that witness is a resident of the county, although properly denied, is a waiver of other grounds of objection. Potts *v.* Coleman, 86 Ala. 94, 5 So. 780.

48. *Alabama.*— Moody *v.* Alabama Great Southern R. Co., 99 Ala. 553, 13 So. 233; Moody *v.* Alabama Great Southern R. Co., (1892) 10 So. 905.

Georgia.— Gholston *v.* Gholston, 31 Ga. 625; Feagin *v.* Beasley, 23 Ga. 17.

Illinois.— Stowell *v.* Moore, 89 Ill. 563; Merchants' Despatch Transp. Co. *v.* Leysor, 89 Ill. 43; Winslow *v.* Newlan, 45 Ill. 145; Thomas *v.* Dunaway, 30 Ill. 373; Kimball *v.* Cook, 6 Ill. 423; B. S. Green Co. *v.* Smith, 52 Ill. App. 158; Sheldon *v.* Burry, 39 Ill. App. 154; Kent *v.* Mason, 1 Ill. App. 466.

Iowa.— Tuthill Spring Co. *v.* Smith, 90 Iowa 331, 57 N. W. 853; Alverson *v.* Bell, 13 Iowa 308.

Kansas.— Rockford Ins. Co. *v.* Farmers' State Bank, 50 Kan. 427, 31 Pac. 1063; Kansas Pac. R. Co. *v.* Pointer, 9 Kan. 620.

Kentucky.— Estham *v.* Card, 15 B. Mon. 82.

Maryland.— Barnum *v.* Barnum, 42 Md. 251.

Massachusetts.— Gould *v.* Hawkes, 1 Allen 170.

Missouri.—Delventhal *v.* Jones, 53 Mo. 460; Brooks *v.* Boswell, 34 Mo. 474.

New York.— Rust *v.* Eckler, 41 N. Y. 488; Denny *v.* Horton, 11 Daly 358, 3 N. Y. Civ. Proc. 255.

North Carolina.— Davenport *v.* McKee, 98 N. C. 500, 4 S. E. 545.

Ohio.— Crosby *v.* Hill, 39 Ohio St. 100 [*affirming* 8 Ohio Dec. (Reprint) 663, 9 Cinc. L. Bul. 156]; Cowan *v.* Ladd, 2 Ohio St. 322.

Pennsylvania.— Couch *v.* Sutton, 1 Grant 114; Withers *v.* Gillespy, 7 Serg. & R. 10.

Tennessee.— Campbell *v.* Baird, 95 Tenn. 345, 32 S. W. 194.

Texas.— Pauska *v.* Daus, 31 Tex. 67; Miller *v.* Schneider, 2 Tex. App. Civ. Cas. § 369.

Wisconsin.— Wausau Boom Co. *v.* Plumer, 49 Wis. 118, 5 N. W. 53.

United States.— Holladay's Case, 27 Fed. 830; Brooks *v.* Jenkins, 4 Fed. Cas. No. 1,953, 3 McLean 432.

49. Southern Home Bldg., etc., Assoc. *v.* Riddle, 129 Ala. 562, 29 So. 667; Swift *v.* Castle, 23 Ill. 209; Frink *v.* McClung, 9 Ill. 569; Howard *v.* Folger, 15 Me. 447; Polleys *v.* Ocean Ins. Co., 14 Me. 141.

Rule to show cause why depositions should not be read.— When a rule taken upon the adverse party to show cause why certain depositions should not be read has been made

motion to suppress it at the trial is somewhat within the discretion of the court;[50] but if the deposition be not taken in conformity with the rules of law it is then illegal evidence and must be rejected when offered if a motion for that purpose is made.[51]

b. Objections to Interrogatories. An objection to a deposition on the ground that the interrogatories are improper should be made before the commission issues, at the time of taking,[52] or in any event before the trial of the cause.[53] So an objection to the form of an interrogatory must be made in the first instance, and where a party was present with the privilege of cross-examination and made no objection at the time, a subsequent objection will not be considered.[54]

c. Objection to Notice. In order that a party shall avail himself of the fact that no notice or insufficient notice was given of the taking of a deposition he

absolute, as shown by the minutes of the court, it is too late to urge objection to the service of the rule after the trial has begun and the evidence has been offered. The proper practice is to take a rule to have the minutes corrected so as to conform to the facts. Baldey *v.* Brackenridge, 39 La. Ann. 660, 2 So. 410.

Answer to rule to show cause.— Objections for various irregularities in answer to a rule to show cause why depositions should not be read under the Louisiana statute, of which no disposition has been made, may be urged on the trial of the cause, when the commission is offered. Hall *v.* Acklen, 9 La. Ann. 219; Ferriber *v.* Latting, 9 La. Ann. 169.

50. Spence *v.* Mitchell, 9 Ala. 744; Mills *v.* Dunlap, 3 Cal. 94.

51. Bryant *v.* Ingraham, 16 Ala. 116; Walker *v.* Barron, 4 Minn. 253.

Right of counsel to be present at the execution of commission.— In Union Bank *v.* Torrey, 2 Abb. Pr. (N. Y.) 269, it was held that parties have the same right to appear by counsel on the execution of a commission as on the trial of a cause, and notice of their intention to do so is no more necessary to be given in one case than in the other, but no reasons were given for such ruling. See also Brown *v.* Kimball, 25 Wend. (N. Y.) 259. An objection that an attorney was present on the part of plaintiff at the execution of a commission was raised in Farrow *v.* Commonwealth Ins. Co., 18 Pick. (Mass.) 53, 29 Am. Dec. 564, and was held untenable. In this case, however, the court admitted the evil of the practice and declined to interfere on the ground that the rules they had framed had not been promulgated, at the same time stating that there was another substantial reason for overruling the objection in the delay of some two years that had occurred after the filing of the deposition and before the objection was taken. In Walker *v.* Barron, 4 Minn. 253, it was held that neither party had a right to have any one present for him (unless by consent), at the execution of a commission, and if the return to the commission showed that a person was present at its execution on behalf of one of the parties, the deposition should be excluded even when the objection was raised on the trial.

52. *Alabama.*— Alabama, etc., R. Co. *v.* Bailey, 112 Ala. 167, 20 So. 313.

Iowa.— Jones *v.* Smith, 6 Iowa 229.

Maine.— Polleys *v.* Ocean Ins. Co., 14 Me. 141.

Massachusetts.— Adams *v.* Wadleigh, 10 Gray 360; Anonymous, 2 Pick. 165.

United States.— Cocker *v.* Franklin Hemp, etc., Co., 5 Fed. Cas. No. 2,930, 1 Story 169.

See 16 Cent. Dig. tit. "Depositions," § 311.

53. *Alabama.*— Bryant *v.* Ingraham, 16 Ala. 116; Kyle *v.* Bostwick, 10 Ala. 589.

California.— Lawrence *v.* Fulton, 19 Cal. 683.

Colorado.— Love *v.* Tomlinson, 1 Colo. App. 516, 29 Pac. 666.

Connecticut.— Butte Hardware Co. *v.* Wallace, 59 Conn. 336, 22 Atl. 330.

Delaware.— Goslin *v.* Cannon, 1 Harr. 3.

Georgia.— Richardson *v.* Roberts, 23 Ga. 215.

Iowa.— Mumma *v.* McKee, 10 Iowa 107.

Massachusetts.— Potter *v.* Tyler, 2 Metc. 58.

Missouri.— Patton *v.* St. Louis, etc., R. Co., 87 Mo. 117, 56 Am. Rep. 446; Walsh *v.* Agnew, 12 Mo. 520.

New Hampshire.— Willey *v.* Portsmouth, 35 N. H. 303.

New York.— Weber *v.* Kingsland, 8 Bosw. 415.

Pennsylvania.— Strickler *v.* Todd, 10 Serg. & R. 63, 13 Am. Dec. 649; Sheeler *v.* Speer, 3 Binn. 130.

Texas.— International, etc., R. Co. *v.* Cock, (Sup. 1890) 14 S. W. 242; International, etc., R. Co. *v.* Prince, 77 Tex. 560, 14 S. W. 171, 19 Am. St. Rep. 795; Marx *v.* Heidenheimer, 63 Tex. 304; Davidson *v.* Wallingford, (Civ. App. 1895) 30 S. W. 286; Kean *v.* Zundelowitz, 9 Tex. Civ. App. 350, 29 S. W. 930; Brunswig *v.* Kramer, 2 Tex. App. Civ. Cas. § 803.

Virginia.— Jones *v.* Lucas, 1 Rand. 268.

See 16 Cent. Dig. tit. "Depositions," § 311.

There is no difference in this respect between evidence taken by deposition, and the oral examination of witnesses in court. In either case the objection must be made when the question is propounded to the witness, or it will be considered waived. Kyle *v.* Bostwick, 10 Ala. 589.

54. Jones *v.* Jones, 36 Md. 447; Fox *v.* Webster, 46 Mo. 181; Glasgow *v.* Ridgeley, 11 Mo. 34; Lesinsky *v.* Great Western Despatch, 14 Mo. App. 598.

must avail himself of such privilege before the deposition is offered in evidence at the trial; an objection on such grounds comes too late at such a stage of the proceedings.[55] Where, however, a deposition is taken without authority or notice, and in contravention of the rules of law and evidence, an objection thereto may be taken when it is offered as evidence to the jury.[56]

d. Objections to Authority of Person Taking. An objection to the authority of the commissioner or the person taking the deposition must always be made before trial,[57] and especially is this so where the party objecting had knowledge of such defect prior to the trial, and made no objection on that account.[58]

e. Objections to Competency of Witness. The time when objections should be made to the competency of a witness or evidence is a question which is usually regulated by statute[59] or by rules of court.[60] Although it has been held in some jurisdictions that the objections to competency can be made when the deposition is produced in the same manner as when the witness is tendered for examination on the trial,[61] especially where the incompetency cannot be removed or

Waiver of objections see *infra*, XXIII.

55. *Alabama.*— Cornelius *v.* Partain, 39 Ala. 473; McGill *v.* Monette, 37 Ala. 49; Hudson *v.* Howlett, 32 Ala. 478.

Illinois.— Rockford, etc., R. Co. *v.* McKinley, 64 Ill. 338; Winslow *v.* Newlan, 45 Ill. 145. And see Kuhl *v.* Illinois Staats Zeitung Co., 20 Ill. App. 658.

Iowa.— Pilmer *v.* Des Moines Branch State Bank, 16 Iowa 321.

Michigan.— Palms *v.* Richardson, 51 Mich. 84, 16 N. W. 243.

Missouri.— Holman *v.* Bachus, 73 Mo. 49. See also Bell *v.* Jamison, 102 Mo. 71, 14 S. W. 714; State *v.* Dunn, 60 Mo. 64.

Texas.— Kottwitz *v.* Bagby, 16 Tex. 656. And see Grigsby *v.* May, 57 Tex. 255.

Virginia.— Unis *v.* Charlton, 12 Gratt. 484.

Wisconsin.— Notre Dame du Lac University *v.* Shanks, 40 Wis. 352.

United States.— Buddicum *v.* Kirk, 3 Cranch 293, 2 L. ed. 444.

England.—Whyte *v.* Hallett, 28 L. J. Exch. 208, 7 Wkly. Rep. 408; Cazenove *v.* Vaughan, 1 M. & S. 4, 14 Rev. Rep. 377.

56. Unis *v.* Charlton, 12 Gratt. (Va.) 484; Steinkeller *v.* Newton, 9 C. & P. 313, 8 Dowl. P. C. 579, 9 L. J. C. P. 262, 6 M. & G. 30 note, 1 Scott N. R. 148, 38 E. C. L. 190; Fitzgerald *v.* Fitzgerald, 3 Swab. & Tr. 397 [*affirmed* in 3 Swab. & Tr. 400].

A rule of court requiring that exceptions to depositions be filed a certain period before the trial will not serve to render admissible a deposition taken on insufficient notice in contravention of law. Williams *v.* Gilchrist, 3 Bibb (Ky.) 49.

57. *Alabama.*— Jordan *v.* Jordan, 17 Ala. 466; Potier *v.* Barclay, 15 Ala. 439; Scott *v.* Baber, 13 Ala. 182.

Louisiana.—Holmes *v.* Lacroix, 10 La. Ann. 105.

Maryland.— Sewell *v.* Gardner, 48 Md. 178.

New Hampshire.— Whicher *v.* Whicher, 11 N. H. 348.

New York.— Newton *v.* Porter, 69 N. Y. 133, 25 Am. Rep. 152.

North Carolina.— Kerchner *v.* Reilly, 72 N. C. 171.

Texas.— Bracken *v.* Neill, 15 Tex. 109; McMahan *v.* Veasey, (Civ. App. 1900) 60 S. W. 333.

See 16 Cent. Dig. tit. "Depositions," § 313.

58. Jordan *v.* Jordan, 17 Ala. 466; Whicher *v.* Whicher, 11 N. H. 348; Newton *v.* Porter, 69 N. Y. 133, 25 Am. Rep. 152.

59. *Alabama.*— Thompson *v.* Rawles, 33 Ala. 29.

Illinois.— Albers Commission Co. *v.* Sessel, 193 Ill. 153, 61 N. E. 1075.

Indiana.— Pence *v.* Waugh, 135 Ind. 143, 34 N. E. 860.

Kansas.— Crebbin *v.* Jarvis, 64 Kan. 885, 67 Pac. 531.

Kentucky.— Allen *v.* Russell, 78 Ky. 105.

Maine.— Parsons *v.* Huff, 38 Me. 137.

Massachusetts.— Talbot *v.* Clark, 8 Pick. 51.

Michigan.— Angell *v.* Rosenbury, 12 Mich. 241; Bliss *v.* Paine, 11 Mich. 92.

See 16 Cent. Dig. tit. "Depositions," § 314.

Indiana statute.— An objection to the deposition of an attorney that specified answers are privileged communications from his client is an objection to the competency of deponent, within the meaning of Rev. St. (1881) § 438, which permits such objections to be taken at the trial and is not within section 439, which requires all objections to the validity of any deposition or its admissibility in evidence to be taken before the trial. Pence *v.* Waugh, 135 Ind. 143, 34 N. E. 860.

60. Webster *v.* Hopkins, 1 Del. Ch. 70; Gregory *v.* Dodge, 14 Wend. (N. Y.) 593; Nelson *v.* Woodruff, 1 Black (U. S.) 156, 17 L. ed. 97.

Disposition of objection on appeal.— The rule that an exception to a deposition for want of notice or other irregularity, if not brought to the notice of the court before the hearing of the cause, will be considered as waived, and will not be noticed in the appellate court, does not apply when the exception is to the competency of the party to the cause; and the court may pass upon such an exception at the hearing, and if it does not do so it may be passed upon by the appellate court. Statham *v.* Ferguson, 25 Gratt. (Va.) 28.

61. *Florida.*— Walls *v.* Endel, 17 Fla. 478.

objection at the time of taking would be of no avail;[62] yet the better rule on this subject seems to be that objections to the competency of a witness should be made when the deposition is taken,[63] if such incompetency was known at the time;[64] and especially does this rule obtain where a party was present or had the

Illinois.— Albers Commission Co. *v.* Sessel, 193 Ill. 153, 61 N. E. 1075.

Indiana.— Pence *v.* Waugh, 135 Ind. 143, 34 N. E. 860.

Iowa.— Burton *v.* Baldwin, 61 Iowa 283, 16 N. W. 110.

Maine.— Parsons *v.* Huff, 38 Me. 137.

Massachusetts.— Whitney *v.* Heywood, 6 Cush. 82; Talbot *v.* Clark, 8 Pick. 51.

Michigan.— Angell *v.* Rosenbury, 12 Mich. 241; Bliss *v.* Paine, 11 Mich. 92.

New York.— Fleming *v.* Hollenback, 7 Barb. 271 [*following* Williams *v.* Eldridge, 1 Hill 249].

North Carolina.— Bell *v.* Jasper, 37 N. C. 597.

Tennessee.— Barton *v.* Trent, 3 Head 167; Mason *v.* Willhite, (Ch. App. 1900) 61 S. W. 298.

Virginia.— Statham *v.* Ferguson, 25 Gratt. 28 [*citing* Beverley *v.* Brooke, 2 Leigh 425].

See 16 Cent. Dig. tit. "Depositions," § 314.

62. Albers Commission Co. *v.* Sessel, 193 Ill. 153, 61 N. E. 1075 [*citing* Lockwood *v.* Mills, 39 Ill. 602; Clauser *v.* Stone, 29 Ill. 114, 81 Am. Dec. 299].

63. *Alabama.*— Brice *v.* Lide, 30 Ala. 647, 68 Am. Dec. 148; Hair *v.* Little, 28 Ala. 236; Hudson *v.* Crow, 26 Ala. 515; Gray *v.* Brown, 22 Ala. 262; Lyde *v.* Taylor, 17 Ala. 270.

California.— Jones *v.* Love, 9 Cal. 68.

Illinois.— Lockwood *v.* Mills, 39 Ill. 602; Goodrich *v.* Hanson, 33 Ill. 498.

Iowa.— Greedy *v.* McGee, 55 Iowa 759, 8 N. W. 651.

Kentucky.— Weil *v.* Silverstone, 6 Bush 698.

Louisiana.— Goldenbow *v.* Wright, 13 La. 371.

New York.— Gregory *v.* Dodge, 14 Wend. 593; Town *v.* Needham, 3 Paige 545, 24 Am. Dec. 246; Mohawk Bank *v.* Atwater, 2 Paige 54.

West Virginia.— Detwiler *v.* Green, 1 W. Va. 109.

United States.— U. S. *v.* One Case of Hair Pencils, 27 Fed. Cas. No. 15,924, 1 Paine 400.

England.— See Ogle *v.* Paleski, Holt 485, 3 E. C. L. 193; Beeching *v.* Gower, Holt 313, 17 Rev. Rep. 644, 3 E. C. L. 129.

See 16 Cent. Dig. tit. "Depositions," § 314.

Election to admit interested testimony.— A party has a right at his election to admit an interested witness to testify against him, but the election must be made as soon as the opportunity is presented for making it; and failing to make it at that time he must be considered as having waived it forever. Donelson *v.* Taylor, 8 Pick. (Mass.) 390.

Reservation of right to except.— If the interest of a witness in the cause is of such a nature that it might have been released by the party calling him if no objection on that account has been made before his testimony was closed it is too late to raise the objection at the hearing; and a reservation by the opposing counsel made at the commencement of the examination of a right to except to the testimony thereafter on the ground of interest is unavailing. Gregory *v.* Dodge, 4 Paige (N. Y.) 557. In Gregory *v.* Dodge, 14 Wend. (N. Y.) 593, the examiner made a note that the opposite counsel reserved "all objection to the competency of the witness," but no objection was made before the hearing of the cause. It was held that under the rule of court (No. 85) the objection was too late.

Second cross-examination.— A party who has twice before the commissioner cross-examined a witness cannot at the trial object that he was incompetent because black and so presumed to be a slave. Goldenbow *v.* Wright, 13 La. 371.

64. *Alabama.*— Hair *v.* Little, 28 Ala. 236; Gray *v.* Brown, 22 Ala. 262; Lyde *v.* Taylor, 17 Ala. 270.

Louisiana.— McIlvaine *v.* Franklin, 2 La. Ann. 622.

Massachusetts.— Farrow *v.* Commonwealth Ins. Co., 18 Pick. 53, 29 Am. Dec. 564; *In re* Ross, 2 Pick. 165 and note.

New York.— Gregory *v.* Dodge, 4 Paige 557; Mohawk Bank *v.* Atwater, 2 Paige 54.

Vermont.— Holden *v.* Crawford, 1 Aik. 390, 15 Am. Dec. 700.

United States.— Gass *v.* Stinson, 10 Fed. Cas. No. 5,261, 2 Sumn. 605; U. S. *v.* One Case of Hair Pencils, 27 Fed. Cas. No. 15,924, 1 Paine 400.

See 16 Cent. Dig. tit. "Depositions," § 314.

Interest of witness previously known.— An objection to a deposition on account of interest cannot be raised for the first time when it is offered on the trial, if the party objecting knew of the interest when the deposition was taken. Gray *v.* Brown, 22 Ala. 262; Segond's Succession, 2 La. Ann. 138; King *v.* Upton, 4 Me. 387, 16 Am. Dec. 266. But if the objection is made as soon as may be after the interest is discovered it will be heard. Gray *v.* Brown, 22 Ala. 262.

Newly discovered interest.— After a party has taken a deposition and given it to the jury he cannot ask the court to instruct the jury that they are not to regard it because the witness is incompetent from interest, there being no pretense that the interest is newly discovered. Walters *v.* Munroe, 17 Md. 154, 77 Am. Dec. 328; Whiteford *v.* Munroe, 17 Md. 135.

Objection reserved.— Where it does not appear that a party was aware at the time of crossing his adversary's interrogatories that the witness had an interest in the event of the suit the objection may be made, although not reserved. McClure *v.* King, 13 La. Ann. 141.

right of cross-examination, and objections to the competency of the evidence were made for the first time at the hearing.[65]

f. Objections to Irregularities in Taking. While as a general rule objections to defects and irregularities in the taking of a deposition must be objected to before the same is offered in evidence at the trial,[66] yet it has been held that a motion to suppress a deposition not taken in conformity with law is not addressed to the discretion of the court for it is illegal evidence, and a motion to reject it may be made when it is offered to be read.[67] In some states it is provided by statute[68] or by rules of court that objections to depositions on the ground of

65. *Alabama.*— Thompson *v.* Rawles, 33 Ala. 29; Gray *v.* Brown, 22 Ala. 262.

Illinois.— Walker *v.* Dement, 42 Ill. 272; Lockwood *v.* Mills, 39 Ill. 602; Fash *v.* Blake, 38 Ill. 363; Goodrich *v.* Hanson, 33 Ill. 498.

Louisiana.— Goldenbow *v.* Wright, 13 La. 371.

New York.— Roosevelt *v.* Ellithorp, 10 Paige 415.

Virginia.— Smith *v.* Proffitt, 82 Va. 832, 1 S. E. 67 [*following* Hord *v.* Colbert, 28 Gratt. 49]; Neilson *v.* Bowman, 29 Gratt. 732.

West Virginia.— Detwiler *v.* Green, 1 W. Va. 109.

United States.— U. S. *v.* One Case of Hair Pencils, 27 Fed. Cas. No. 15,924, 1 Paine 400.

England.— Ogle *v.* Paleski, 1 Holt 485, 3 E. C. L. 193.

See 16 Cent. Dig. tit. "Depositions," § 314.

Cross-examination on the merits.— If upon cross-examination of a witness in taking his deposition he appears to be interested and therefore incompetent, the objection to his competency is not waived by pursuing the cross-examination upon the merits of the case. Rogers *v.* Dibble, 3 Paige (N. Y.) 238; Walker *v.* Parker, 29 Fed. Cas. No. 17,082, 5 Cranch C. C. 639.

Discovery of interest.— An objection to the competency of a witness from interest can be taken at any time before the trial is concluded, if taken as soon as the interest is discovered. Johnson *v.* Alexander, 14 Tex. 382.

Removal of interest.— If the deposition of an interested witness be taken and filed to be used in chancery, and the opposite party does not move to suppress it before trial, the exception if taken at the trial may still be sustained; but the party offering the deposition may remove the interest and avail himself of the testimony of the witness. Holden *v.* Crawford, 1 Aik. (Vt.) 390, 15 Am. Dec. 700.

66. *Alabama.*— Boykin *v.* Collins, 20 Ala. 230; Beattie *v.* Abercrombie, 18 Ala. 9; Washington *v.* Cole, 6 Ala. 212.

Georgia.— Treadaway *v.* Richards, 92 Ga. 264, 18 S. E. 25; Central R., etc., Co. *v.* Gamble, 77 Ga. 584, 3 S. E. 287; Galceran *v.* Noble, 66 Ga. 367; Central R., etc., Co. *v.* Rogers, 57 Ga. 336.

Indiana.— Truman *v.* Scott, 72 Ind. 258; Lingenfelser *v.* Simon, 49 Ind. 82.

Iowa.— Johnson *v.* Chicago, etc., R. Co., 51 Iowa 25, 50 N. W. 543.

Kentucky.— Moore *v.* Smith, 88 Ky. 151, 10 S. W. 380, 10 Ky. L. Rep. 729.

Maryland.— Cover *v.* Smith, 82 Md. 586, 34 Atl. 465; De Sobry *v.* De Laistre, 2 Harr. & J. 191, 3 Am. Dec. 555.

Michigan.— Palms *v.* Richardson, 51 Mich. 84, 16 N. W. 243.

Missouri.— State *v.* Dunn, 60 Mo. 64.

Montana.— Murray *v.* Larabie, 8 Mont. 208, 19 Pac. 574.

New York.— Becker *v.* Winne, 7 Hun 458; Gates *v.* Beecher, 3 Thomps. & C. 404; Union Bank *v.* Torrey, 2 Abb. Pr. 269.

North Carolina.— Katzenstein *v.* Raleigh, etc., R. Co., 78 N. C. 286; Carson *v.* Mills, 69 N. C. 32.

Tennessee.— Shea *v.* Mabry, 1 Lea 319.

Texas.— Missouri Pac. R. Co. *v.* Smith, 84 Tex. 348, 19 S. W. 509; McMahan *v.* Veasey, (Civ. App. 1900) 60 S. W. 333.

Wisconsin.— Goodland *v.* Le Clair, 78 Wis. 176, 47 N. W. 268.

United States.— Doane *v.* Glenn, 21 Wall. 33, 22 L. ed. 476; Samuel *v.* Hostetter Co., 118 Fed. 257, 55 C. C. A. 111.

See 16 Cent. Dig. tit. "Depositions," § 315.

Joining in commission.— Howard *v.* Stillwell, etc., Mfg. Co., 139 U. S. 199, 11 S. Ct. 500, 35 L. ed. 147.

Motion at chambers.— Walker *v.* Barron, 4 Minn. 253.

New trial on ground of surprise.— Thompson *v.* Porter, Litt. Sel. Cas. (Ky.) 194.

67. Bryant *v.* Ingraham, 16 Ala. 116; Walker *v.* Barron, 4 Minn. 253.

The distinction which seems to be recognized is this: If the deposition is regularly taken in conformity with the rules of law, but under circumstances that would induce the court to think that injustice would be done by using it, the court in its discretion may suppress it, but should not do so if a motion for that purpose is not made before the deposition is offered to be read. Bryant *v.* Ingraham, 16 Ala. 116; Cullum *v.* Smith, 6 Ala. 625.

68. *Georgia.*— Treadaway *v.* Richards, 92 Ga. 264, 18 S. E. 25; Central R., etc., Co. *v.* Gamble, 77 Ga. 584, 3 S. E. 287; Galceran *v.* Noble, 66 Ga. 367; Davis *v.* Central R. Co., 60 Ga. 329.

Iowa.— Turner *v.* Hardin, 80 Iowa 691, 45 N. W. 758; Johnson *v.* Chicago, etc., R. Co., 51 Iowa 25, 50 N. W. 543.

Kentucky.— Moore *v.* Smith, 88 Ky. 151, 10 S. W. 380, 10 Ky. L. Rep. 729.

Nebraska.— Sioux City, etc., R. Co. *v.* Finlayson, 16 Nebr. 578, 20 N. W. 860, 49 Am. Rep. 724.

irregularity in the taking thereof must be made prior to the trial of the cause.[69]

g. Objections to Authentication, Certificate, or Return. It has always been the rule that objections to the authentication,[70] certificate, or return of a deposition,[71] and such other minor matters that do not go to the gist of the evidence itself, but which may be considered formal,[72] must be taken before the trial or they will be deemed to have been waived.

h. Objections to Leading Questions. An objection to a leading question in a deposition should be made at the time that the deposition is taken;[73] or, where

North Carolina.— Carson *v.* Mills, 69 N. C. 32.

Texas.— Missouri Pac. R. Co. *v.* Smith, 84 Tex. 348, 19 S. W. 509; Gulf, etc., R. Co. *v.* Richards, 83 Tex. 203, 18 S. W. 611; Lee *v.* Stowe, 57 Tex. 444; Houston, etc., R. Co. *v.* Burke, 55 Tex. 323, 40 Am. Rep. 808; Hagerty *v.* Scott, 10 Tex. 525; Croft *v.* Rains, 10 Tex. 520; Taylor, etc., R. Co. *v.* Warner, (Civ. App. 1900) 60 S. W. 442; International, etc., R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58.

Wisconsin.— Cross *v.* Barnett, 61 Wis. 650, 21 N. W. 832. And see Goodland *v.* Le Clair, 78 Wis. 176, 47 N. W. 268.

Wyoming.—Laramie Coal, etc., Co. *v.* Eastman, 5 Wyo. 148, 38 Pac. 680.

Indiana statute.— Where a party made objection to a deposition on the ground that it was written by the attorney of the party offering it in his office in Indiana and not in Ohio, where it purported to have been taken, and offered to prove such fact, it was held that the objection was clearly to the validity of the deposition and could not, under Code, § 266, cl. 1, be made after the commencement of the trial. Truman *v.* Scott, 72 Ind. 258.

69. Palms *v.* Richardson, 51 Mich. 84, 16 N. W. 243; Faccy *v.* Otis, 11 Mich. 213; Murray *v.* Larabie, 8 Mont. 208, 19 Pac. 574; Perkins *v.* Johnson, 19 Pa. St. 510.

Motion at chambers.— Union Bank *v.* Torrey, 2 Abb. Pr. (N. Y.) 269.

Under a rule of court requiring any objection to the execution and return of a commission to take depositions to be filed by the third day of the term following the giving of notice of the return and opening of the commission, an objection to the deposition of "Charles H. Platt," on the ground that the person named in the commission was "P. H. Platt," could not be raised for the first time on the trial two years after notice of the return and opening of the commission. Cover *v.* Smith, 82 Md. 586, 34 Atl. 465.

70. Dean Steam Pump Co. *v.* Green, 31 Mo. App. 269.

Under the Georgia act of 1854 an objection to a deposition because the commissioners did not sign their names in full must be taken and determined before the trial. Feagin *v.* Beasley, 23 Ga. 17.

71. *Alabama.*— Tuskaloosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635; Irby *v.* Kitchell, 42 Ala. 438; May *v.* May, 28 Ala. 141; Reese *v.* Beck, 24 Ala. 651.

Colorado.— Walker *v.* Steel, 9 Colo. 388, 12 Pac. 423.

Georgia.— Dawson *v.* Callaway, 18 Ga. 573.

Kentucky.— Moore *v.* Smith, 88 Ky. 151, 10 S. W. 380, 10 Ky. L. Rep. 729; Dills *v.* May, 3 Ky. L. Rep. 765.

Mississippi.— Ratliff *v.* Thomson, 61 Miss. 71.

Missouri.— Little Rock Grain Co. *v.* Brubaker, 89 Mo. App. 1.

Oregon.— Sugar Pine Lumber Co. *v.* Garrett, 28 Oreg. 168, 42 Pac. 129.

Utah.— American Pub. Co. *v.* C. E. Mayne Co., 9 Utah 318, 34 Pac. 247.

Wisconsin.— Notre Dame du Lac University *v.* Shanks, 40 Wis. 352.

United States.— Stegner *v.* Blake, 36 Fed. 183.

Amendment of certificate.—In Hall *v.* Renfro, 3 Metc. (Ky.) 51, it appeared that an exception to a deposition had been taken and sustained more than two years prior to the trial. No leave of court had been obtained or even asked to have the certificate amended, but, without the knowledge of defendant and without authority from the court, the deposition was withdrawn from the papers, sent to a distant state, where, an amendment of the certificate having been attempted, it was placed among the papers of the cause, after the parties had announced themselves ready for trial. It was held that an exception to such a deposition, although not taken until after the jury was sworn, was under the circumstances properly sustained.

72. Christman *v.* Ray, 42 Ill. App. 111 (interpreter not sworn); Edwards *v.* Heuer, 46 Mich. 95, 8 N. W. 717 (interest of notary); Straw *v.* Dye, 2 Ohio Dec. (Reprint) 312, 2 West. L. Month. 388 (time of filing); Leaphart *v.* Leaphart, 1 S. C. 199 (commission bearing foreign postmark).

73. *Alabama.*— Memphis, etc., R. Co. *v.* Bibb, 37 Ala. 699; Kyle *v.* Bostick, 10 Ala. 589.

Connecticut.— Butte Hardware Co. *v.* Wallace, 59 Conn. 336, 22 Atl. 330.

Delaware.— Goslin *v.* Cannon, 1 Harr. 3.

Georgia.— Richardson *v.* Roberts, 23 Ga. 215.

Illinois.— Goodrich *v.* Hanson, 33 Ill. 498.

Iowa.— Wolverton *v.* Ellis, 18 Iowa 413; Mumma *v.* McKee, 10 Iowa 107.

Kentucky.— Craddock *v.* Craddock, 3 Litt. 77.

Louisiana.— Winn *v.* Twogood, 9 La. 422; Sowers *v.* Flower, 2 Mart. N. S. 617.

Maine.— Brown *v.* Foss, 16 Me. 257; Rowe *v.* Godfrey, 16 Me. 128; Woodman *v.* Coolbroth, 7 Me. 181.

the party is not present, within a reasonable time thereafter,[74] for to hold otherwise would license parties to experiment and greatly hinder ascertainment of the truth.[75]

i. Objections to Answers. An objection that an answer is not responsive to interrogatories[76] or that the interrogatories have not been fully answered must always be taken before the cause comes on for hearing;[77] but an objection that the answer is illegal, irrelevant, or incompetent may be taken even after the trial has

Maryland.— Kerby *v.* Kerby, 57 Md. 345; Smith *v.* Cooke, 31 Md. 174, 100 Am. Dec. 58.

Massachusetts.— Akers *v.* Demond, 103 Mass. 318; Potter *v.* Tyler, 2 Metc. 58.

Missouri.— Patton *v.* St. Louis, etc., R. Co., 87 Mo. 117, 56 Am. Rep. 446. And see Walsh *v.* Agnew, 12 Mo. 520.

New Hampshire.— Whipple *v.* Stevens, 22 N. H. 219.

New Jersey.—Chambers *v.* Hunt, 22 N. J. L. 552.

New York.— Sturm *v.* Atlantic Mut. Ins. Co., 63 N. Y. 77; Weber *v.* Kingsland, 8 Bosw. 415; Kimball *v.* Davis, 19 Wend. 437.

Pennsylvania.— Hill *v.* Canfield, 63 Pa. St. 77 [*following* Overton *v.* Tracey, 14 Serg. & R. 311]; Strickler *v.* Todd, 10 Serg. & R. 63, 13 Am. Dec. 649; Sheeler *v.* Speer, 3 Binn. 130.

Texas.— Marx *v.* Heidenheimer, 63 Tex. 304; Gill *v.* First Nat. Bank, (Civ. App. 1901) 61 S. W. 146; Davidson *v.* Wallingford, (Civ. App. 1895) 30 S. W. 286; Kean *v.* Zundelowitz, 9 Tex. Civ. App. 350, 29 S. W. 930; Brunswig *v.* Kramer, 2 Tex. App. Civ. Cas. § 803.

Vermont.— Boardman *v.* Wood, 3 Vt. 570.

Virginia.— McCandlish *v.* Edloe, 3 Gratt. 330; Jones *v.* Lucas, 1 Rand. 268.

United States.— Alexandria Mechanics Bank *v.* Seton, 1 Pet. 299, 7 L. ed. 152.

Written objections.— In Hugo, etc., Co. *v.* Hirsch, (Tex. Civ. App. 1901) 63 S. W. 163, it was held that an objection that questions were leading go to the manner and form of taking and would not be considered unless in writing. See also Wade *v.* Love, 69 Tex. 522, 7 S. W. 225.

74. Kyle *v.* Bostick, 10 Ala. 589; McCandlish *v.* Edloe, 3 Gratt. (Va.) 330.

75. Memphis, etc., R. Co. *v.* Bibb, 37 Ala. 699; Craddock *v.* Craddock, 3 Litt. (Ky.) 77.

Rule not absolute.— Rogers *v.* Diamond, 13 Ark. 474. See also Fleming *v.* Hollenback, 7 Barb. (N. Y.) 271.

Discretion of the court.—In Small *v.* Nairne, 13 Q. B. 840, 66 E. C. L. 840, it was held that the court is not bound to reject an interrogatory and answer merely because the question is a leading one, but may exercise a discretion as to excluding or admitting the whole or part of the answer obtained by the leading question.

76. Whilden *v.* Merchants', etc., Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1; Moore *v.* Robinson, 62 Ala. 537; Grey *v.* Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729; Clement *v.* Cureton, 36 Ala. 120; Park *v.* Wooten, 35 Ala. 242; Wilkinson *v.* Moseley, 30 Ala. 562; McCreary *v.* Turk, 29 Ala. 244; Nelson *v.* Iverson, 24 Ala. 9, 60 Am. Dec. 442; Sioux City, etc., R. Co. *v.* Finlayson, 16 Nebr. 578, 20 N. W. 860, 49 Am. Rep. 724; Gulf, etc., R. Co. *v.* Richards, 83 Tex. 203, 18 S. W. 611; Wright *v.* Wren, (Tex. Sup. 1891) 16 S. W. 996; Harris *v.* Nations, 79 Tex. 409, 15 S. W. 262; Parker *v.* Chancellor, 78 Tex. 524, 15 S. W. 157; Brown *v.* Mitchell, 75 Tex. 9, 12 S. W. 606; Missouri Pac. R. Co. *v.* Ivy, 71 Tex. 409, 9 S. W. 346, 10 Am. St. Rep. 758, 1 L. R. A. 500; Lee *v.* Stowe, 57 Tex. 444; Missouri Pac. R. Co. *v.* Peay, 7 Tex. Civ. App. 400, 26 S. W. 768; International, etc., R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58; Gulf, etc., R. Co. *v.* Shearer, 1 Tex. Civ. App. 343, 21 S. W. 133.

Deposition of adversary.— Rhea *v.* Tucker, 56 Ala. 450; Louisville, etc., R. Co. *v.* Brown, 56 Ala. 411.

Ga. Code, § 3892, providing that where a deposition has been in the clerk's office for twenty-four hours prior to the trial exceptions to the execution and return thereof must be made in writing, and notice thereof given to the opposite party before the case is submitted to the jury, has no application where the parties have in writing waived commission, commissioners, and notice, and have stipulated that answers to interrogatories written out by the witness and sworn to before a notary should be received as though taken in the regular way. In such case an objection to the reading of the answers for insufficiency must be made before the trial. Davis *v.* Central R. Co., 60 Ga. 329.

77. Vilmar *v.* Schall, 61 N. Y. 564 [*affirming* 35 N. Y. Super. Ct. 67]; Sturm *v.* Atlantic Mut. Ins. Co., 38 N. Y. Super. Ct. 281; Zellweger *v.* Caffe, 5 Duer (N. Y.) 87; Francis *v.* Ocean Ins. Co., 6 Cow. (N. Y.) 404; Lindsay *v.* Jaffray, 55 Tex. 626; Scott *v.* Delk, 14 Tex. 341.

After rule to show cause.— The objection that all the cross interrogatories were not answered will be too late after a rule to show cause, under the Louisiana act of March 20, 1839, section 17, No. 53, is made absolute. It should have been made on the trial of the rule. Anderson *v.* Dinn, 17 La. 168.

Refusal of witness to answer.—Where upon the taking of a deposition of a witness *de bene esse* the opposing party is present in person or is represented by counsel, and the witness refuses to answer proper and material questions, the objection must be availed of upon the examination, or afterward by motion before the trial. The party cannot wait until the trial and then object

begun,[78] since the practice is well settled that illegal and irrelevant evidence may be assailed by a general objection and excluded at any stage of the proceedings.

j. Objections to Evidence. Where objection is made to the form or nature of the evidence contained in or attached to the deposition,[79] the time for taking such objection depends in a great measure upon the nature of the objection and the situations of the parties prior to the time when the objection is sought to be urged.[80] Statements in a deposition which are not legitimate evidence, like

to the reading of the deposition or move to suppress it. Sturm *v.* Atlantic Mut. Ins. Co., 38 N. Y. Super. Ct. 281 [*affirmed* in 63 N. Y. 77].

Statement of conclusion.— It is not reversible error for the trial court to refuse to strike out a portion of the answer of a witness in a deposition, because it stated a conclusion as to the effect of language, instead of repeating the language, where the answer was probative in its character, and material to the issues, and the objection was not made until the deposition was read at the trial. Woodworth *v.* Thompson, 44 Nebr. 311, 62 N. W. 450.

78. *Alabama.*— Southern Home Bldg., etc., Assoc. *v.* Riddle, 129 Ala. 562, 29 So. 667; Bush *v.* Jackson, 24 Ala. 273; Boykin *v.* Collins, 20 Ala. 230.

California.— Lawrence *v.* Fulton, 19 Cal. 683.

Iowa.— Horseman *v.* Todhunter, 12 Iowa 230.

Kansas.— Tays *v.* Carr, 37 Kan. 141, 14 Pac. 456; Johnson *v.* Mathews, 5 Kan. 118.

Massachusetts.— Palmer *v.* Crook, 7 Gray 418; Heywood *v.* Reed, 4 Gray 574; Atlantic Mut. F. Ins. Co. *v.* Fitzpatrick, 2 Gray 279.

New Hampshire.— Page *v.* Parker, 40 N. H. 47.

South Carolina.— McBride *v.* Ellis, 9 Rich. 269, 67 Am. Dec. 553.

England.— Hutchinson *v.* Bernard, 2 M. & Rob. 1.

See 16 Cent. Dig. tit. "Depositions," § 317.

Correctness of answers.— Where a witness and the stenographer differ as to the correctness of answers taken down, the proper practice is to add the correction of the witness to the deposition, and leave the question to the jury to determine whether credence shall be given to the witness or to the stenographer. *Ex p.* Miller, 11 Ohio S. & C. Pl. Dec. 69, 8 Ohio N. P. 142 [*affirmed* in 21 Ohio Cir. Ct. 445, 12 Ohio Cir. Dec. 102].

Illegal proof.— An incompetent answer to the concluding interrogatory of an otherwise competent deposition should be excluded on objection thereto, whether its exclusion was moved before the trial or not, as it is the duty of the court in any stage of a cause to exclude illegal proof. Bush *v.* Jackson, 24 Ala. 273.

Motion to strike out.— Incompetent testimony in a deposition, although not objected to when the deposition is taken or when it is read, may properly be objected to by motion to strike out after the party reading it has rested. Sailors *v.* Nixon-Jones Printing Co., 20 Ill. App. 509.

79. *Maryland.*— Helms *v.* Franciscus, 2 Bland 544, 20 Am. Dec. 402, translation of deposition.

New York.— Wright *v.* Cabot, 89 N. Y. 570, annexation of papers.

South Carolina.— Kuhtman *v.* Brown, 4 Rich. 479, translation of deposition.

West Virginia.— Dickinson *v.* Clarke, 5 W. Va. 280 [*citing* Fant *v.* Miller, 17 Gratt. 187], copy annexed.

United States.— Blackburn *v.* Crawford, 3 Wall. 175, 18 L. ed. 186; York Mfg. Co. *v.* Illinois Cent. R. Co., 3 Wall. 107, 18 L. ed. 170 (copy annexed); Winans *v.* New York, etc., R. Co., 21 How. 88, 16 L. ed. 68 (annexation of papers).

See 16 Cent. Dig. tit. "Depositions," § 318.

It is difficult to lay down any general rule covering all cases. Evidence may be proper for one purpose and improper for another. It may be admissible as independent evidence or only as dependent evidence. It may be admissible as tending to establish the issue or it may be admissible as rebutting or supporting evidence. It may prove a fact or it may only be a link in a chain which proves the fact. And if the court must on a motion interposed before the hearing to suppress evidence examine into all the facts proved in the case to determine its materiality it would amount to the labor of a trial of the cause on each motion, and if all the evidence was not then taken the court in many cases could not know but evidence might still be taken which would render what then appeared to be immaterial highly important on the hearing. Swift *v.* Castle, 23 Ill. 209.

80. **An amplified explanation of a witness' answers** to interrogatories attached to his deposition, in which he swears to its truth, although not signed by him or certified by the commissioner, will not be excluded on objection first raised at the trial. Ratliff *v.* Thomson, 61 Miss. 71.

Corrected evidence.— An objection to the testimony of a witness when giving his deposition, which might have been corrected if seasonably made, will not be listened to for the first time upon the trial. Wilson Sewing Mach. Co. *v.* Lewis, 10 Ill. App. 191.

Parol evidence.— In assumpsit for goods sold and delivered an objection to parol evidence that the goods were shipped to defendant by her written instructions, in the absence of the writing itself, may be raised for the first time when the evidence is offered on the trial, although a deposition of the witness was in possession of defendant's counsel twenty-four hours before the trial, and no notice had been given to plaintiff to produce the writing. Boykin *v.* Collins, 20 Ala. 230.

hearsay[81] or opinion evidence, may be objected to at the trial;[82] but those which are objectionable merely because secondary evidence should be excepted to before trial.[83]

4. Failure to Make Timely Objection. Objection to a deposition should be made when the opportunity first presents itself or it will be considered waived;[84] and especially is this the case where there has been a former trial of the cause and no objection was therein noted.[85] By allowing a deposition to be read once without objection, a party waives all objections to any formality or irregularity in the taking of which he has knowledge; and thereafter he can only raise objections to the competency of the witness or the subject-matter of the deposition.[86]

D. Sufficiency and Scope — 1. In General. It is a well-settled rule that where objection to the introduction of a deposition in evidence is made the par-

81. Myers *v.* Casey, 14 Cal. 542; Cooke *v.* Orne, 37 Ill. 186; Pittman *v.* Gaty, 10 Ill. 186; Woolsey *v.* MsMahan, 46 Tex. 62; Clark *v.* Employers' Liability Assur. Co., 72 Vt. 458, 48 Atl. 639. *Compare* Ector *v.* Welsh, 29 Ga. 443.

82. Moore *v.* Monroe Refrigerator Co., 128 Ala. 621, 29 So. 447; Bridger *v.* Asheville, etc., R. Co., 25 S. C. 24; Purnell *v.* Gandy, 46 Tex. 190. See also McBride *v.* Ellis, 9 Rich. (S. C.) 269, 67 Am. Dec. 553.

Cross-examination without objection.— Wilkinson *v.* Moseley, 30 Ala. 562.

83. Boykin *v.* Collins, 20 Ala. 230; Cooke *v.* Orne, 37 Ill. 186; Dunbar *v.* Gregg, 44 Ill. App. 527. *Compare* Woolsey *v.* McMahan, 46 Tex. 62.

Proof of passage of ordinance.— Where no objection before trial was made to a deposition in which deponent testified to the passage of a certain ordinance by a city, on the ground that it was an attempt to prove the passage of the ordinance by parol instead of by record, the objection is waived. Louisville, etc., R. Co. *v.* Shires, 108 Ill. 617.

84. *Connecticut.*— Spear *v.* Coon, 32 Conn. 292.

Idaho.— Darby *v.* Heagerty, 2 Ida. (Hasb.) 282, 13 Pac. 85.

Indiana.— Pape *v.* Wright, 116 Ind. 502, 19 N. E. 459.

Iowa.— Hood *v.* Chicago, etc., R. Co., 95 Iowa 331, 64 N. W. 261.

Kentucky.— Hampton *v.* Meek, 15 S. W. 521, 12 Ky. L. Rep. 790.

New York.— Grissen *v.* Southworth, 64 Hun 488, 19 N. Y. Suppl. 437, 22 N. Y. Civ. Proc. 184.

Pennsylvania.— Helfrich *v.* Stem, 17 Pa. St. 143.

South Carolina.— Nobles *v.* Hogg, 36 S. C. 322, 15 S. E. 359.

Texas.— Texas, etc., R. Co. *v.* Edins, (Civ. App. 1896) 35 S. W. 953.

Vermont.— Walsh *v.* Pierce, 12 Vt. 130.

West Virginia.— Hunter *v.* Robinson, 5 W. Va. 272.

Wisconsin.— Hill *v.* Sherwood, 3 Wis. 343.

United States.— Uhle *v.* Burnham, 44 Fed. 729; Evans *v.* Hettick, 8 Fed. Cas. No. 4,562, 1 Robb Pat. Cas. 166, 3 Wash. 408 [*affirmed* in 7 Wheat. 453, 5 L. ed. 496].

Waiver of objections see *infra*, XXIII.

Refusal to remand commission.— Where testimony taken under a commission had been filed more than eight months and had been before an auditor to whose report exceptions had been filed, the commission will not be remanded on the ground that the commissioner had by mistake written down incorrectly the testimony of one of the defendants who was examined as a witness. Tolson *v.* Tolson, 4 Md. Ch. 119.

85. Wendell *v.* Abbott, 45 N. H. 349; Bartlett *v.* Hoyt, 33 N. H. 151; Hill *v.* Meyers, 43 Pa. St. 170; Randolph *v.* Woodstock, 35 Vt. 291; Pettibone *v.* Rose, Brayt. (Vt.) 77.

Issue of law.— In directing an issue at law the chancellor ordered that all testimony previously taken in the case should be read at the trial of the issue. Certain parts of depositions had been objected to at the time of taking, but no objection was made to them when the order was granted authorizing them to be read on the trial of the issue. Under such circumstances it was held that it was too late to renew the objections when the depositions were offered on the trial, and that by failing to object when the order was made the objections were waived. Black *v.* Lamb, 12 N. J. Eq. 108.

Proof of notice.— If depositions are read on a trial without objection, or if objection is made without an exception taken to their admission, upon another trial they will not be excluded for the failure to prove notice to take them, unless the party objecting has given notice to the other party of his intention to object to them in time to enable the party offering them to take them again, and the witnesses are alive at the time of such notice. Peshine *v.* Shepperson, 17 Gratt. (Va.) 472, 94 Am. Dec. 468.

Time limited by rule of court.— Syphers *v.* Meighen, 22 Pa. St. 125.

86. Randolph *v.* Woodstock, 35 Vt. 291.

Depositions read on former trial.— Interrogatories which have been read on a previous trial without exception to their execution cannot be excepted to on a subsequent trial. The failure to except in the first instance is a waiver of the objection. Thomas *v.* Kinsey, 8 Ga. 421; Spence *v.* Smith, 18 N. H. 587. And so in Kincaid *v.* Kincaid, 1 J. J. Marsh. (Ky.) 100, it was held that the rejection without notice of objection to depo-

ticular defect relied upon should be pointed out in the objection,[87] otherwise it will be considered as waived and cannot be urged on the hearing[88] or on appeal.[89] Mere vague and indefinite objections[90] or general objections going to the entire deposition without specification or detail will be rejected as not worthy of consideration.[91]

sitions which had been read on a former trial of the same suit without objection was sufficient cause for a new trial.

87. *Alabama.*— Tuskaloosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635; Donnell *v.* Thompson, 13 Ala. 440.

Arkansas.— Clark *v.* Moss, 11 Ark. 736.

California.— Gassen *v.* Hendrick, 74 Cal. 444, 16 Pac. 242; Higgins *v.* Wortell, 18 Cal. 330.

Connecticut.— Lee *v.* Stiles, 21 Conn. 500.

Illinois.— Merchants' Despatch Transp. Co. *v.* Leysor, 89 Ill. 43.

Indiana.— Scott *v.* Indianapolis Wagon Works, 48 Ind. 75; Maggart *v.* Freeman, 27 Ind. 531. And see Murray *v.* Phillips, 59 Ind. 56.

Iowa.— Whitaker *v.* Sigler, 44 Iowa 419.

Kansas.— Neosho Valley Invest. Co. *v.* Hannum, 63 Kan. 621, 66 Pac. 631; Gano *v.* Wells, 36 Kan. 688, 14 Pac. 251.

Kentucky.— Wickliffe *v.* Ensor, 9 B. Mon. 253.

Louisiana.—Morrison *v.* White, 16 La. Ann. 100.

Mississippi.— Wesling *v.* Noonan, 31 Miss. 599.

Missouri.— Duvall *v.* Ellis, 13 Mo. 203; Chapman *v.* Spicer, 10 Mo. 689; State Bank *v.* Merchants' Bank, 10 Mo. 123.

New Hampshire.— Whipple *v.* Stevens, 22 N. H. 219; Bellows *v.* Copp, 20 N. H. 492.

New Mexico.—Rosenthal *v.* Chisum, 1 N. M. 633.

New York.— Zellweger *v.* Caffe, 5 Duer 87; Brooks *v.* Shultz, 3 Abb. Pr. N. S. 124.

North Dakota.— Ueland *v.* Dealy, 11 N. D. 529, 89 N. W. 325.

Pennsylvania.— Peters *v.* Horbach, 4 Pa. St. 134.

Tennessee.— Mt. Olivet Cemetery Co. *v.* Shubert, 2 Head 116; Looper *v.* Bell, 1 Head 373; Oliver *v.* State Bank, 2 Swan 59; Whitley *v.* Davis, 1 Swan 333; Hodges *v.* Nance, 1 Swan 57.

Texas.— Neyland *v.* Bendy, 69 Tex. 711, 7 S. W. 497; Ford *v.* Clements, 13 Tex. 592.

Virginia.— Harriman *v.* Brown, 8 Leigh 697; Buster *v.* Wallace, 4 Hen. & M. 82.

Wisconsin.— Southwick *v.* Berry, 1 Pinn. 559.

United States.— Walker *v.* Parker, 30 Fed. Cas. No. 17,082, 5 Cranch C. C. 539.

See 16 Cent. Dig. tit. "Depositions," § 323 *et seq.*

Reference to number of question and answer.— An exception to the admission of certain evidence in a deposition by reference to the questions and answers in the deposition by their numbers is sufficient, without setting out the evidence in the exceptions. Pence *v.* Waugh, 135 Ind. 143, 34 N. E. 860 [*citing* Elliott *v.* Russell, 92 Ind. 526; Ball *v.* Balfe, 41 Ind. 221].

88. Tuskaloosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635; Dryer *v.* Lewis, 57 Ala. 551; Dickerson *v.* Chrisman, 28 Mo. 134; Brooks *v.* Schultz, 3 Abb. Pr. N. S. (N. Y.) 124.

89. *Illinois.*—King *v.* Chicago, etc., R. Co., 98 Ill. 376.

Indiana.— Scott *v.* Indianapolis Wagon Works, 48 Ind. 75.

Mississippi.— Wesling *v.* Noonan, 31 Miss. 599.

Missouri.— Dickerson *v.* Chrisman, 28 Mo. 134; Duvall *v.* Ellis, 13 Mo. 203; State Bank *v.* Merchants' Bank, 10 Mo. 123.

North Carolina.— Smith *v.* McGregor, 96 N. C. 101, 1 S. E. 695.

Tennessee.— Oliver *v.* State Bank, 2 Swan 59; Whitley *v.* Davis, 1 Swan 333; Hodges *v.* Nance, 1 Swan 57.

United States.— Camden *v.* Doremus, 3 How. 515, 11 L. ed. 705.

See 16 Cent. Dig. tit. "Depositions," § 324 *et seq.*

Stringent construction.— A general motion to suppress a deposition which does not specify any particular grounds of objection, if it can be considered at all in the appellate court, will receive the strongest construction that it reasonably admits of against the objecting party. Walker *v.* Smith, 28 Ala. 569.

Part of deposition in evidence.— A motion below to suppress parts of certain depositions will not be considered on appeal, when the record shows that a part only of the depositions objected to were read in evidence and fails to designate what portions were so read and what were not. Scott *v.* Indianapolis Wagon Works, 48 Ind. 75.

90. Tuskaloosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635; Jordan *v.* Jordan, 17 Ala. 466; Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59; Fitzpatrick *v.* Papa, 89 Ind. 17. And see Murdock *v.* McNeely, 1 Ohio Cir. Ct. 16; Hartstein *v.* Hartstein, 74 Wis. 1, 41 N. W. 721.

Discretion of court.— Valton *v.* National Loan Fund L. Assur. Soc., 22 Barb. (N. Y.) 9 [*affirmed* in 20 N. Y. 32].

91. *Alabama.*— Tuskaloosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635; Howard *v.* Coleman, 36 Ala. 721; Saltmarsh *v.* Bower, 34 Ala. 613; Gray *v.* Brown, 22 Ala. 262; Milton *v.* Rowland, 11 Ala. 732; Wallis *v.* Rhea, 10 Ala. 451.

Arkansas.—Blunt *v.* Williams, 27 Ark. 374; Blackburn *v.* Morton, 18 Ark. 384; Clark *v.* Moss, 11 Ark. 726.

California.— Gassen *v.* Hendrick, 74 Cal. 444, 16 Pac. 242.

Connecticut.— Lee *v.* Stiles, 21 Conn. 500.

2. Part of Deposition Admissible. When objections are taken to the whole of a deposition, a general exception may be good; but when a part only is exceptionable, the exceptionable part should be specified, for on a general objection to the entire deposition, if any part thereof contain legal evidence, the objection should be overruled.[92]

Illinois.— Thomas *v.* Dunaway, 30 Ill. 373.
Indiana.— Manning *v.* Gasharie, 27 Ind. 399.
Kentucky.— Wiekliffe *v.* Ensor, 9 B. Mon. 253; Graham *v.* Hackwith, 1 A. K. Marsh. 423.
Louisiana.— Follain *v.* Dupre, 11 Rob. 454.
Massachusetts.—Waters *v.* Gilbert, 2 Cush. 27.
Mississippi.— Wesling *v.* Noonan, 31 Miss. 599.
Missouri.— Dickey *v.* Malechi, 6 Mo. 177, 34 Am. Dec. 130.
New Hampshire.—Bellows *v.* Copp, 20 N. H. 492.
New Jersey.— Moran *v.* Green, 21 N. J. L. 562; Ludlam *v.* Broderick, 15 N. J. L. 269.
New Mexico.—Rosenthal *v.* Chisum, 1 N. M. 633.
New York.— Zellweger *v.* Caffe, 12 Duer 87; Brooks *v.* Schultz, 3 Abb. Pr. N. S. 124.
North Carolina.— Smith *v.* McGregor, 96 N. C. 101, 1 S. E. 695.
Pennsylvania.— Wojcieckowski *v.* Johnkowski, 16 Pa. Super. Ct. 444.
South Carolina.— Bulwinkle *v.* Cramer, 30 S. C. 153, 8 S. E. 689.
Tennessee.— Mt. Olivet Cemetery Co. *v.* Shubert, 2 Head 116.
Texas.— Wells, etc., Express *v.* Waites, (Civ. App. 1900) 60 S. W. 582.
Vermont.— Hurlburt *v.* Hurlburt, 63 Vt. 667, 22 Atl. 850.
United States.— Camden *v.* Doremus, 3 How. 515, 11 L. ed. 705.

See 16 Cent. Dig. tit. "Depositions," § 326.

Admission of objection.— When a party offers a deposition, accompanied by a release of the witness, admitting that he is incompetent without a release, and the opposite party objects to the deposition on the ground that it did not appear that the release was known to the witness, the objection is sufficiently definite and specific. Fitzpatrick *v.* Baker, 31 Ala. 563.

Failure of record to show authority for taking.— Where objection is taken generally to the admission of depositions without specifying the objection, if the record does not show a state of facts authorizing the taking of depositions the judgment will be reversed for admitting them. Crary *v.* Barlow, 5 Ark. 210.

92. *Alabama.*—Saltmarsh *v.* Bower, 34 Ala. 613; Walker *v.* Walker, 34 Ala. 469; Ward *v.* Reynolds, 32 Ala. 384; Walker *v.* Forbes, 31 Ala. 9; Chamberlain *v.* Masterson, 29 Ala. 299; Hudson *v.* Crow, 26 Ala. 515; Love *v.* Dargan, 21 Ala. 583; Melton *v.* Troutman, 15 Ala. 535; Hatchett *v.* Gibson, 13 Ala. 587; Borland *v.* Walker, 7 Ala. 269; Litchfield *v.* Falconer, 2 Ala. 280.
Arkansas.— Hempstead *v.* Johnston, 18 Ark. 123, 65 Am. Dec. 458; Hemphill *v.* Miller, 16 Ark. 271; Clark *v.* Moss, 11 Ark. 736.
California.— Higgins *v.* Wortell, 18 Cal. 330.
Connecticut.— Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865; Merriam *v.* Hartford, etc., R. Co., 20 Conn. 354, 52 Am. Dec. 344.
Illinois.— Steel *v.* Shafer, 39 Ill. App. 185.
Indiana.— Lee *v.* Hills, 66 Ind. 474.
Iowa.— Adae *v.* Zangs, 41 Iowa 536.
Kentucky.— Louisville, etc., R. Co. *v.* Graves, 78 Ky. 74; Walker *v.* Goodloe, 6 Ky. L. Rep. 588; Priest *v.* Taylor, 6 Ky. L. Rep. 216; Hedger *v.* Reed, 5 Ky. L. Rep. 513; McMahan *v.* Gibbons, 4 Ky. L. Rep. 266.
Minnesota.— Day *v.* Raguet, 14 Minn. 273.
Pennsylvania.— Peters *v.* Horbach, 4 Pa. St. 134.
Tennessee.— Johnson *v.* Patterson, 13 Lea 626.
Texas.— Ford *v.* Clements, 13 Tex. 592.
Vermont.— Hurlburt *v.* Hurlburt, 63 Vt. 667, 22 Atl. 850; Webb *v.* Richardson, 42 Vt. 465.
Virginia.— Harriman *v.* Brown, 8 Leigh 697; Buster *v.* Wallace, 4 Hen. & M. 82.

This distinction is grounded not in form merely, but has its support in substance; and indeed a departure from this rule would be attended with the charge of doing manifest injustice. In many cases an appellate court sitting as a court of error would be called on to reverse on exceptions, of which the court and the opposite party never heard, and which if pointed out at the time would have been remedied or waived. Peters *v.* Horbach, 4 Pa. St. 134.

It would be an absurd practice to permit a party to throw upon the court the burden of scrutinizing the entire proceedings, from the making of the affidavit to the return of the deposition into court, in quest of a fatal objection; while the party stood by forbearing to direct the attention of the court to any points of objection. Saltmarsh *v.* Bower, 34 Ala. 613.

Answers to particular questions.— Gassen *v.* Hendrick, 74 Cal. 444, 16 Pac. 242.

Irrelevant matter.— Where a deposition containing irrelevant matter is offered in evidence, objection should be made to the irrelevant portions specifically and not to the whole deposition (Hamaker *v.* Whitecar, 1 Walk. (Pa.) 120), and although a deposition offered in evidence may contain some irrelevant and improper matter, and a general objection is made to its admission by the party against whom it is offered, it is still not error for the court to allow the whole deposition to be read to the jury, but particularly instructing them in the charge to regard only those parts of the deposition which tend

3. Questions Raised by General Objection. A general objection to a deposition reaches the relevancy, competency, or legal effect of the testimony;[93] but will not be considered as extending to any matter of form or question of regularity or authority in respect to the taking of such deposition.[94]

E. Necessity For Notice of Objection. The mode of making objection to the admission of depositions in evidence depends upon the specific objection urged at the time when the objection is taken.[95] In some states the law requires a notice in writing of exceptions to the depositions to be filed before the time of trial;[96]

to prove a particular point which it is material for the party to prove (Northfield *v.* Plymouth, 20 Vt. 582).

Leading interrogatories.—Neyland *v.* Bendy, 69 Tex. 711, 7 S. W. 497.

Partly hearsay.—Tussey *v.* Behmer, 9 Lanc. Bar (Pa.) 45. See also Ward *v.* Reynolds, 32 Ala. 384; Charlton *v.* Unis, 4 Gratt. (Va.) 58.

Several depositions.— One motion to suppress several depositions is well overruled if either be good. Bartee *v.* James, 33 Ala. 34; Thomas *v.* De Graffenreid, 27 Ala. 651. An objection "to each sentence of each deposition" is nothing more than a general objection to each deposition, and where each deposition so objected to contained some legal evidence the objections were held to be properly overruled. Taylor *v.* Strickland, 37 Ala. 642.

93. Blackburn *v.* Morton, 18 Ark. 384; Parsons *v.* Huff, 38 Me. 137; Fuchs *v.* Morris, 81 Hun (N. Y.) 536, 3 N. Y. Suppl. 1017; Taylor *v.* Mayhew, 11 Heisk. (Tenn.) 596; Barton *v.* Trent, 3 Head (Tenn.) 167. But *compare* Preslar *v.* Stallworth, 37 Ala. 402; Gray *v.* Brown, 22 Ala. 262; Frederick *v.* Ballard, 16 Nebr. 559, 20 N. W. 870; State *v.* Jones, 7 Nev. 408.

Where a defendant by his cross-examination of a co-defendant elicits facts additional to his deposition, and which will operate against the party cross-examining, he cannot get rid of their effect by objecting to the competency of the witness. Bailey *v.* Cooper, 5 Humphr. (Tenn.) 400.

94. Blackburn *v.* Morton, 18 Ark. 384; Parsons *v.* Huff, 38 Me. 137; Garvin *v.* Luttrell, 10 Humphr. (Tenn.) 16 [*citing* Sexton *v.* Brock, 15 Ark. 345; Duvall *v.* Ellis, 13 Mo. 203; Hughes *v.* Nance, 1 Swan (Tenn.) 57].

Certified objection.— Where it was certified in the caption of a deposition that "the defendant objects to the foregoing deposition, both as to the form in which it is taken and the matter testified to by the witness," it was held that the objection was too general, and could not avail defendant as an objection to the leading character of an interrogatory contained in the deposition, the grounds thereof not being specified. Whipple *v.* Stevens, 22 N. H. 219.

Opinion of deponent.— A general objection to the admission of a deposition is not sufficient to warrant the exclusion of an answer to an interrogatory therein on the ground that it called for an opinion of deponent. Merchants' Despatch Transp. Co. *v.* Leysor, 89 Ill. 43.

95. Defect apparent on face of deposition. — Where a defect or omission is apparent on the face of depositions, it is a usual practice in chancery to move to suppress them, but not to exclude them for irrelevancy or on account of the matter deposed to. Vaugine *v.* Taylor, 18 Ark. 65.

Instructions of court.— An objection to parts of a deposition as being hearsay may be made by a request to instruct the jury to disregard such parts. Pittman *v.* Gaty, 10 Ill. 186. So where a deposition is offered, part of which is admissible and part not, the objector should if possible confine his objection to the inadmissible part; but if the matters are so blended as to be inseparable he may accomplish his object by asking an instruction as to the applicability of the evidence. Pettigrew *v.* Barnum, 11 Md. 434, 69 Am. Dec. 212.

Upon a motion to arrest the reading of the depositions of a witness who testified that he was the agent of the party plaintiff, upon the ground that his authority as agent was in writing and ought to be produced, and upon the introduction of other evidence to prove that his authority was in writing, it was held that whether the fact that the authority was in writing was sufficiently proved was a fact for the finding of the court which tried the case; that the supreme court would not interfere with the finding of the court below under such circumstances, except in a clear, strong case; and that a motion thus to arrest the reading of depositions or the examination of a witness was irregular, the better practice being to let the reading or examination proceed, and upon proof that the testimony was illegal to move afterward to withdraw it from the jury. Crenshaw *v.* Jackson, 6 Ga. 509, 50 Am. Dec. 361.

96. *California.*— Myers *v.* Casey, 14 Cal. 542.

Delaware.— Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. 233; Woodlin *v.* Hynson, 1 Harr. 224.

Georgia.— Rogers *v.* Truett, 73 Ga. 386; Davis *v.* Central R. Co., 60 Ga. 329.

Michigan.— Facey *v.* Otis, 11 Mich. 213.

North Carolina.— Woodley *v.* Hassell, 94 N. C. 157.

Texas.— Gulf, etc., R. Co. *v.* Richards, 83 Tex. 203, 18 S. W. 611; Harris *v.* Nations, 79 Tex. 409, 15 S. W. 262; Brown *v.* Mitchell, 75 Tex. 9, 12 S. W. 9; Wade *v.* Love, 69 Tex. 522, 7 S. W. 225; Jones *v.* Ford, 60 Tex. 127; Lee *v.* Stowe, 57 Tex. 444; Sheegog *v.* James, 26 Tex. 501; Scott *v.* Delk, 14 Tex. 341; Davidson *v.* Wallingford, (Civ. App. 1895) 30

but an objection may be filed with the papers in the case or by indorsement of objection upon the deposition itself.[97]

F. Renewal of Objections at Trial. Although a party has objected to the deposition at the time of taking or prior to the time when it is offered in evidence, yet in order to render his objection available it must, save in the case of incompetent evidence,[98] be renewed at the trial or it will be considered waived[99] and will not be considered on appeal.[1]

S. W. 286; Kean *v.* Zundelowitz, 9 Tex. Civ. App. 350, 29 S. W. 930; Snow *v.* Price, 1 Tex. App. Civ. Cas. § 1342.

See 16 Cent. Dig. tit. "Depositions," § 322.

Interrogatories by consent.— Where interrogatories are taken by consent without commission in a justice's court, they will not be excluded on mere written objection to the same, founded upon refusal of the witness to answer some of the cross interrogatories, it not appearing that any notice of the objection was given to the opposite party or his counsel, nor that the answers had not been in the office for twenty-four hours before the trial. Baker *v.* Thompson, 89 Ga. 486, 15 S. E. 644.

No venue shown.—Where the interrogatories are rejected on the ground that no venue is shown, objection to them will not be overruled on a subsequent trial, on the ground that notice of the objection was not given in writing, as is required when interrogatories have been on file twenty-four hours. Cecil *v.* Gazan, 71 Ga. 631.

Objection apparent on face of deposition.— In Myers *v.* Casey, 14 Cal. 542, it was held that the rule that "all exceptions to depositions . . . unless appearing on the face thereof, must be filed," etc., meant not that the objectionable matter must appear, but that the objection must appear on the face of the depositions.

Objection resulting in nonsuit.—Where reasonable notice to the adverse party of formal objections to a deposition is not given, the court will set aside a nonsuit entered in consequence of such objections to the deposition without costs. Dodge *v.* Israel, 7 Fed. Cas. No. 3,952, 4 Wash. 323.

97. See East Tennessee, etc., R. Co. *v.* Aiken, 89 Tenn. 245, 14 S. W. 1082.

98. *Kentucky.*—Scott *v.* Cook, 4 T. B. Mon. 280.

Michigan.— Parsons *v.* Dickinson, 23 Mich. 56.

Tennessee.— Whitley *v.* Davis, 1 Swan 333.

Virginia.— Fant *v.* Miller, 17 Gratt. 187; Beverly *v.* Brooke, 2 Leigh 425.

West Virginia.— Middletown *v.* White, 5 W. Va. 572.

See 16 Cent. Dig. tit. "Depositions," § 320.

Chancery practice.— When the deposition of a party in a suit in chancery is taken under a special commission, subject to all just exceptions, whether the deposition be excepted against on the ground of incompetency or not, it behooves the court to examine and decide the question of competency; and although the deposition be read at the hearing in the court of chancery without exception, yet if on an appeal from the decree the appellate court finds the deposition incompetent evidence by reason of this deponent's interest in the event, it will pay no regard to the deposition. Beverley *v.* Brooke, 2 Leigh (Va.) 425.

Change of judges.— Where a motion was made before trial to suppress portions of a deposition on the ground of incompetency and irrelevancy, which was overruled, but the motion was renewed when the deposition was offered in evidence, it was held that, although there had been a change of judges, the decision first made was not a bar to the second. Hellman *v.* Wright, 1 Wyo. 190.

Refusal to suppress on motion.— Objections to depositions on the ground of incompetency and irrelevancy should be made on the trial, and this, although the court has previously refused to suppress them on motion. Hellman *v.* Wright, 1 Wyo. 190.

99. *Nebraska.*— Dawson *v.* Dawson, 26 Nebr. 716, 42 N. W. 744.

New Hampshire.— Adams *v.* Adams, 64 N. H. 224, 9 Atl. 100; Lisbon *v.* Bath, 23 N. H. 1.

New Jersey.— Black *v.* Lamb, 12 N. J. Eq. 108.

Wisconsin.— Kasson *v.* Noltner, 43 Wis. 646.

United States.— Northern Pac. R. Co. *v.* Urlin, 158 U. S. 271, 15 S. Ct. 840, 39 L. ed. 977; Ray *v.* Smith, 17 Wall. 411, 21 L. ed. 666.

See 16 Cent. Dig. tit. "Depositions," § 320.

Objection on argument.— Where an objection was made to a deposition admitted by the court, but the party agreed that the deposition might rest until the argument, to be then pursued if he should think fit, and on the argument no allusion was made to it, the objection was waived. Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240.

Omission of objections in reading.— If one against whom on a trial a deposition is read would object to the omission in the reading of objections noted to certain of the interrogatories he must do so at the time of the omission. After the reading he cannot demand the exclusion of the deposition. Valentine *v.* Middlesex R. Co., 137 Mass. 28.

1. *California.*— Parrott *v.* Byers, 40 Cal. 614.

Illinois.— Winona First Nat. Bank *v.* Pierce, 99 Ill. 272; King *v.* Chicago, etc., R. Co., 98 Ill. 376.

Iowa.— Neimeyer *v.* Cass County Bank, 42 Iowa 124.

Kentucky.— Armstrong *v.* Mudd, 10 B. Mon. 144, 50 Am. Dec. 545; Scott *v.* Cook, 4 T. B. Mon. 280.

Missouri.— Webster *v.* Canmann, 40 Mo. 156.

XXIII. WAIVER OF OBJECTIONS.

A. In General. Where a party has appeared and cross-examined the deponent, but at the time makes no objections to the proceedings or evidence, he will be considered as having waived his right to object.[2] Thus by appearing and cross-examining without objection he waives irregularities in the issuance of the commission,[3] the authority of the commissioner,[4] the form or nature of the interrogatories,[5] and the competency of the witness to testify to the matter in con-

Nebraska.— Starring *v.* Mason, 4 Nebr. 367.

New Jersey.— Black *v.* Lamb, 12 N. J. Eq. 108.

New York.— Martin *v.* Silliman, 53 N. Y. 615.

Tennessee.— Whitley *v.* Davis, 1 Swan 333.

Virginia.— Summers *v.* Darne, 31 Gratt. 791; Fant *v.* Miller, 17 Gratt. 187.

United States.— Ray *v.* Smith, 17 Wall. 411, 21 L. ed. 666.

See 16 Cent. Dig. tit. "Depositions," § 320.

No objection in lower court.— Where a deposition after a motion has been unsuccessfully made at one time to suppress it as irregularly taken is at another read on trial without objection or exception, it cannot be objected to in the supreme court of the United States on the grounds that were made for its suppression or for any cause. Brown *v.* Tarkington, 3 Wall. (U. S.) 377, 18 L. ed. 255.

2. *Delaware.*— Anderson *v.* Thoroughgood, 5 Harr. 199.

Kentucky.— Frazier *v.* Malcolm, 62 S. W. 13, 22 Ky. L. Rep. 1876; Dean *v.* Phillips, 61 S. W. 10, 22 Ky. L. Rep. 1621. And see Flowers *v.* Miller, 16 S. W. 705, 13 Ky. L. Rep. 250.

Maryland.— Boteler *v.* Beall, 7 Gill & J. 389.

New Hampshire.— Free *v.* Buckingham, 59 N. H. 219.

New York.— Rushmore *v.* Hall, 12 Abb. Pr. 420; Barrow *v.* Rhinelander, 1 Johns. Ch. 550.

North Carolina.— Barnhardt *v.* Smith, 86 N. C. 473.

United States.— Shutte *v.* Thompson, 15 Wall. 151, 21 L. ed. 123; Brown *v.* Ellis, 103 Fed. 834.

See 16 Cent. Dig. tit. "Depositions," § 329.

Manner of inclosure.— In *In re* Noble, 22 Ill. App. 535, a party moved to open the depositions, and then after they were opened moved to suppress them on the ground that they were not properly inclosed as required by the statute. Upon a denial of the motion, it was held that the motion to open the depositions was a waiver of any visible defect in the manner in which they were inclosed.

Second deposition.— If a deposition be improperly suppressed, the party waives the error by introducing another deposition of the same witness testifying to the same facts. Sanders *v.* Johnson, 6 Blackf. (Ind.) 50, 36 Am. Dec. 564.

3. *Alabama.*— Birmingham Union R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525.

Maryland.— Scott *v.* Scott, 17 Md. 78; Cherry *v.* Baker, 17 Md. 75.

Ohio.— Woods *v.* Dille, 11 Ohio 455.

Wisconsin.— Dudley *v.* Beck, 3 Wis. 274.

United States.— Rich *v.* Lambert, 12 How. 347, 13 L. ed. 1017.

See 16 Cent. Dig. tit. "Depositions," § 332.

Objection to commission see *supra*, X, D.

Consent to commission.— If a commission issue by consent the want of an affidavit of the materiality of the testimony cannot be urged. Clay *v.* Kirkland, 4 Mart. (La.) 405.

Fundamental objections.— If a party without notice of taking deposition attends and cross-examines a witness, while it might be considered a waiver of notice, it is not a waiver of such fundamental objections as the want of a commission and the failure to make affidavit, as required by statute. Ragan *v.* Cargill, 24 Miss. 540. So, in Seymour *v.* Farrell, 51 Mo. 95, it was held that the appearance of an opposing party at the taking of depositions is not a waiver of a dedimus.

4. Crowther *v.* Rowlandson, 27 Cal. 376; Phillipi *v.* Bowen, 2 Pa. St. 20. In Sewell *v.* Gardner, 48 Md. 178, plaintiff applied for a commission and named a commissioner, but defendant failed to name one, whereupon the commission issued to the commissioner designated, and was executed and returned by him, and filed in the case. Defendant afterward filed affidavits and made motions for various purposes, filed amended pleas, and demanded a bill of particulars. It was held that whatever objection he had to there being but one commissioner was waived.

More than one commissioner.— Where a commission to take a deposition issues to three persons, before whom the parties appear, and examine and cross-examine defendant without objection, they cannot afterward object to the competency of one of the commissioners to act. Douge *v.* Pearce, 13 Ala. 127.

Signature to citation.— If a person authorized to take a deposition by commission signs his citation as a justice of the peace, and the party attended at the taking, it being objected that it did not appear by the citation that said justice was acting as commissioner, it was held that the objection if valid was waived by defendant attending the taking of the deposition. Kelton *v.* Montaut, 2 R. I. 151.

5. Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863; Walker *v.* Walker, 34 Ala. 469; Wilkinson *v.* Moseley, 30 Ala. 562; Olds *v.* Powell, 10 Ala. 393; Overton *v.* Tracey, 14 Serg. & R. (Pa.)

troversy,[6] as well as all irregularities in taking the deposition[7] or in filing the same.[8] It seems, however, that appearing and putting interrogatories to the witness waives only objections as to the form of the question or the manner of examination if not taken at the time, but does not preclude objections to the legal character of the testimony.[9]

B. Waiver of Notice. Where a party to an action appears and cross-examines the deponent and it so appears in the deposition, regularly certified,

311; Patten *v.* Darling, 18 Fed. Cas. No. 10,812, 1 Cliff. 254. See also Townsend *v.* Jeffries, 24 Ala. 329. *Compare* Angell *v.* Rosenbury, 12 Mich. 241. In Morse *v.* Cloyes, 11 Barb. (N. Y.) 100, 107, the court said: "The statute . . . reserves to the parties every objection to the competency or relevancy of any question put to, or answer given by, a witness examined upon commission; but that is not applicable to a case in which the parties have expressly stipulated and agreed upon the objections which are reserved, thus by implication waiving every other. In Massachusetts and Pennsylvania the rule is that objections to the form of the interrogatories must be taken before they are annexed to the commission and go to the commissioner." See also Anonymous, 2 Pick. (Mass.) 165; Potter *v.* Leeds, 1 Pick. (Mass.) 309; Strickler *v.* Todd, 10 Serg. & R. (Pa.) 63, 13 Am. Dec. 649.

6. *Alabama.*— Brice *v.* Lide, 30 Ala. 647, 68 Am. Dec. 148.

Illinois.— Warren *v.* Warren, 105 Ill. 568.

Kentucky.— Weil *v.* Silverstone, 6 Bush 698.

Michigan.— Hasey *v.* White Pigeon Beet Sugar Co., 1 Dougl. 193.

Virginia.— Smith *v.* Proffitt, 82 Va. 832, 1 S. E. 67; Neilson *v.* Bowman, 29 Gratt. 732.

See 16 Cent. Dig. tit. "Depositions," § 335.

Competency of witness see *supra*, XVII, L.

Knowledge of incompetency.— Where a party in a chancery suit proceeds to examine a witness whom he knows to be interested, the deposition cannot be excluded at his instance on the sole ground of the incompetency of the witness. Lyde *v.* Taylor, 17 Ala. 270.

7. Williams *v.* Banks, 5 Md. 198; Northern Pac. R. Co. *v.* Urlin, 158 U. S. 271, 15 S. Ct. 840, 39 L. ed. 977; Mechanics' Bank *v.* Seton, 1 Pet. (U. S.) 299, 7 L. ed. 152; Uhle *v.* Burnham, 44 Fed. 729; *In re* Thomas, 35 Fed. 822; Van Hook *v.* Pendleton, 28 Fed. Cas. No. 16,852, 2 Blatchf. 85.

Irregularity after testimony taken.— Testimony, being in writing, and the certificate of the officer not showing whose writing it was, should be suppressed, as the exceptant could not be deemed by appearing to have waived an irregularity committed after the testimony was taken. *In re* Thomas, 35 Fed. 822.

No objections noted.— Where the attorneys for both parties agree that a deposition may be used in evidence, subject to the objections noted, and no objections are noted, it is error to reject a part of the deposition at the instance of one of the attorneys, although the part rejected is not legal evidence. Erwin *v.* English, 57 Conn. 562, 19 Atl. 238.

Testimony of several witnesses the same.— The practice, where the testimony of several witnesses is the same, of including the answers of all in one, instead of taking down the answer of each separately, is one of doubtful propriety; but depositions should not be suppressed on that account at the hearing of the cause, where the testimony has been published, and the party who makes the objection, having been in default, is let in to defend, and on leave granted proceeds, without noticing the objection to cross-examine the witnesses. Jordan *v.* Jordan, 17 Ala. 466.

Under the Alabama practice, by chancery rule 62, when a party files interrogatories he must give the names and places of residence of the witnesses or make affidavit that the same are unknown; otherwise no proceedings in the interrogatories shall be had except by consent. It was held that objection to the omission to give notice of residence is waived where no objection is noted, and as to one of the witnesses consent is given that a commission issue at once, and the question is first raised by motion to suppress the depositions. Farmer *v.* Farmer, 86 Ala. 322, 5 So. 434.

8. Sharpless *v.* Warren, (Tenn. Ch. App. 1899) 58 S. W. 407.

9. Lord *v.* Horsey, 5 Harr. (Del.) 317; Howard *v.* Folger, 15 Me. 447; Polleys *v.* Ocean Ins. Co., 14 Me. 141.

Cause not at issue.— So where evidence is taken under a special order before the cause was at issue as to one of defendants and in his absence, it cannot be used against him, and the fact that defendants noticed a cause "for hearing on pleadings and proof" is not an admission of the competency of a deposition taken before the cause was at issue. Lee *v.* Huntoon, 1 Hoffm. (N. Y.) 447.

Deposition unauthorized.— It is only when a civil suit is pending that depositions not *in perpetuam* are authorized to be taken, and so the appearance before the magistrate of the adverse party and his cross-examination of the witness do not waive his right to object on the trial that the deposition was taken before suit began. Howard *v.* Folger, 15 Me. 447.

Irregular practice.— Where defendant had taken sundry depositions for the purpose of discrediting a deposition taken by plaintiff, all of which had been taken from the files contrary to a rule of the court, and before the trial plaintiff's counsel told defendant's counsel that he should object to defendant's

such party will not at the hearing of the cause be permitted to object that no legal notice has been served upon him.[10] The appearance and cross-examination is not confined to the party himself. Such action on the part of his attorney[11] or duly authorized agent will have the same effect.[12] A waiver of notice in this

depositions because they had been taken from the files, to which defendant's counsel replied that plaintiff's deposition was liable to the same objection, plaintiff's counsel, at the trial, having read his deposition without any objection from defendant's counsel, was considered as having waived his objection to defendant's depositions. Potter *v.* Leeds, 1 Pick. (Mass.) 309.

10. *Alabama.*— Potts *v.* Coleman, 86 Ala. 94, 5 So. 780; Aicardi *v.* Strang, 38 Ala. 326.

Arkansas.— Caldwell *v.* McVicar, 9 Ark. 418.

California.— Jones *v.* Love, 9 Cal. 68.

Colorado.— Ryan *v.* People, 21 Colo. 119, 40 Pac. 755.

Illinois.— Greene County *v.* Bledsoe, 12 Ill. 267.

Indiana.— Long *v.* Straus, 124 Ind. 84, 24 N. E. 664; Doe *v.* Brown, 8 Blackf. 443; Connersville *v.* Wadleigh, 7 Blackf. 102, 41 Am. Dec. 214.

Iowa.— Mumma *v.* McKee, 10 Iowa 107; Nevan *v.* Roup, 8 Iowa 207.

Kentucky.— Brooks *v.* Clay, 2 Bibb 499; Talbot *v.* Bradford, 2 Bibb 316; Beatty *v.* Thompson, 66 S. W. 384, 23 Ky. L. Rep. 1850.

Maine.— George *v.* Nichols, 32 Me. 179.

Maryland.— Waters *v.* Waters, 35 Md. 531.

Minnesota.— Waldron *v.* St. Paul, 33 Minn. 87, 22 N. W. 4.

Mississippi.— Ragan *v.* Cargill, 24 Miss. 540.

Missouri.— Seymour *v.* Farrell, 51 Mo. 95; Goodfellow *v.* Landis, 36 Mo. 168; Tayon *v.* Ladew, 33 Mo. 205.

New Jersey.—Newell *v.* Bassett, 33 N. J. L. 26.

New York.— Rushmore *v.* Hall, 12 Abb. Pr. 420; Wait *v.* Whitney, 7 Cow. 69; Jackson *v.* Kent, 7 Cow. 59; Charruaud *v.* Charruaud, 3 Edw. 273.

North Carolina.— Kea *v.* Robeson, 39 N. C. 427.

Pennsylvania.— McCormick *v.* Irwin, 35 Pa. St. 111; American Ins. Co. *v.* Francia, 9 Pa. St. 390; Porter *v.* Johnston, 2 Yeates 92.

Rhode Island.— Kelton *v.* Montaut, 2 R. I. 151.

South Dakota.— Bem *v.* Bem, 4 S. D. 138, 55 N. W. 1102.

Wisconsin.— Benham *v.* Purdy, 48 Wis. 99, 4 N. W. 133; Cameron *v.* Cameron, 15 Wis. 1, 82 Am. Dec. 652; Miller *v.* McDonald, 13 Wis. 673.

United States.— Dinsmore *v.* Maroney, 7 Fed. Cas. No. 3,920, 4 Blatchf. 416. See also Buddicum *v.* Kirk, 3 Cranch 293, 2 L. ed. 444.

See 16 Cent. Dig. tit. "Depositions," § 336.

Doubt as to time of notice.— Where a notice is issued on the day of the date of the writ, and served upon defendant on the day of the service of the same writ, there being no evidence as to which service was in fact first made, and defendant attends at the taking of the deposition and takes part in the examination of the deponent he cannot at the trial deny that he had sufficient notice. Crooker *v.* Appleton, 25 Me. 131.

Evidence of presence.— An alleged error in overruling an exception to a deposition for want of sufficient notice cannot be considered on appeal, when it does not appear from the officer's certificate or otherwise that the party excepting was not present at the taking. Bailey *v.* Nichols, 8 Ky. L. Rep. 64.

Notice not shown by record.— A deposition is admissible in evidence, although the record does not find that notice was given to the adverse party, if such party cross-examined the witness. Rogers *v.* Wilson, Minor (Ala.) 407, 12 Am. Dec. 61.

Ohio Code Civ. Proc. § 313, providing that a party cannot testify in the action unless his adversary have notice of his intention to do so, cannot be invoked against the deposition of a party taken in the presence of his adversary, although the adversary was not legally notified. Brown *v.* A Raft of Timber, 1 Handy (Ohio) 13, 12 Ohio Dec. (Reprint) 1.

11. Latham *v.* Latham, 30 Gratt. (Va.) 307.

Waiver by attorney.— It is no objection to the admission of a deposition *de bene esse* that the notice of taking it was given to the attorney of record for the party, the statute requiring that it should be given to the party to the suit, when the attorney appeared at the taking of the deposition, this being equivalent to waiver of notice upon the client, which the attorney was competent to waive. Hunt *v.* Crane, 33 Miss. 669, 69 Am. Dec. 381.

Criminal cases.— Defects in the manner of issuing or serving notice of the taking of a deposition to be used on a criminal trial, as provided by Colo. Acts (1889), p. 475, § 2, are waived, when the attorney for the accused appears and subjects the witness to a searching cross-examination, although the accused himself elects to stay away. Ryan *v.* People, 21 Colo. 119, 40 Pac. 775.

12. Bedford *v.* Ingram, 5 Hayw. (Tenn.) 155; McNew *v.* Rogers, 1 Tenn. Cas. 17, Thomps. Cas. (Tenn.) 32. But where there is no proof that the adversary had notice of the taking of a deposition, the fact that a person styled an "agent" asked the witness a question will not dispense with notice, as such person might have acted without authority. Taylor *v.* Whiting, 4 T. B. Mon. (Ky.) 364.

regard is not entirely confined to appearance and cross-examination, for wherever a party by himself or attorney has appeared, objected to questions, the competency of witnesses, or to taking the deposition, or has done any substantial act connected with the taking of the deposition, he thereby forfeits his right to complain of notice at the time of trial,[13] unless his substantial rights have been prejudiced.[14]

XXIV. COSTS.[15]

A. In General. The question of costs in taking a deposition is usually a matter of statute.[16]

B. Who Liable. While as a general rule the prevailing party in an action is

Questions by commissioner.— Where a justice of the peace before whom a deposition is taken, at the request of a party, puts questions to the witness, such party cannot afterward complain of a want of notice. Barnet *v.* School Directors, 6 Watts & S. (Pa.) 46.

13. Miller *v.* McDonald, 13 Wis. 673.

Appearance and objection.— A notice defective because not given in full time as required by law is cured if the party appear and object to taking the deposition for want of legal notice. Beal *v.* Brandt, 7 La. 583.

Consent of party.—Where the adverse party is present at the taking of a deposition and consents to the taking at a given place he cannot afterward object to the sufficiency of the notice as to the place of taking. Prather *v.* Pritchard, 26 Ind. 65.

Reading deposition in evidence.— By reading in evidence a deposition taken and returned into court by the adverse party, the reader admits notice and waives all objections to it. Devinny *v.* Jelly, Tapp. (Ohio) 159. So where depositions taken by one party and filed in court were read by the other party, it was held that on a second trial they might be read by the party who took them without proof that notice was given of the taking. Collier *v.* Jeffries, 3 N. C. 400.

14. Hunt *v.* Lowell Gas Light Co., 1 Allen (Mass.) 343.

Extra-official act.— A statement at the foot of a deposition, thus: "To all of which testimony, the said James McVicar, by James Yell, his attorney, objected as being illegal: Attest, H. Scull, J. P.," was held to be an extra-official act of the justice, and to furnish no evidence of such an appearance as constituted a waiver of notice. Caldwell *v.* McVicar, 9 Ark. 418.

No authority to waive.— A deposition under a rule of court, taken without notice, is inadmissible, although a party interested, but without authority from the other defendants in the cause, attended and cross-examined the witness. Vincent *v.* Huff, 4 Serg. & R. (Pa.) 298.

Unreasonable notice.— Where defendants' counsel appears and objects to the taking of the depositions on the ground that the notice is unreasonable, in that notice for the taking at several distant places is given for the same day, the fact that he afterward proceeded to cross-examine the witnesses is not a waiver of the objection. Uhle *v.* Burnham, 44 Fed. 729.

15. See, generally, COSTS, 11 Cyc. 121.

Amount, rate, and items.— See COSTS, 11 Cyc. 122; and the following cases:

Kentucky.— Kentucky Seminary *v.* Wallace, 15 B. Mon. 35.

New Hampshire.— Voght *v.* Ticknor, 47 N. H. 543; Wilson *v.* Knox, 12 N. H. 347.

New York.— Corlies *v.* Cummings, 7 Cow. 154; Jackson *v.* Hooker, 1 Cow. 586; Kenney *v.* Vanhorne, 2 Johns. 107.

Pennsylvania.— McWilliams *v.* Hopkins, 1 Whart. 276.

South Carolina.— Vickers *v.* La Bruce, 2 Hill 366; Kirkley *v.* Nolly, 1 Hill 398; Ramsay *v.* Marsh, Harp. 472.

Vermont.— Phillips *v.* Post, 55 Vt. 568.

See 16 Cent. Dig. tit. "Depositions," § 340 *et seq.*

One charge.— A deposition taken before trial for use on such trial, but which is in fact used on two or three trials of the action, does not entitle the prevailing party to tax the costs for each time it is used, since it can be charged for but once. Mobile Bank *v.* Phœnix Ins. Co., 8 N. Y. Civ. Proc. 212.

Witness not examined.— An order for the examination of a witness *de bene esse* cannot be taxed if the witness was not examined. Jewell *v.* Jewell, 8 Cow. (N. Y.) 109.

Necessity for use of depositions as a ground of allowance.— See COSTS, 11 Cyc. 124; and Furman *v.* Peay, 2 Bailey (S. C.) 612; Gulf, etc., R. Co. *v.* Evansich, 61 Tex. 3.

16. William Skinner Mfg. Co. *v.* Sinsheimer, 37 Ill. App. 467; Voght *v.* Ticknor, 47 N. H. 543; Powers *v.* Hall, 25 N. H. 145; Gould *v.* Kelley, 16 N. H. 551; Wilson *v.* Knox, 12 N. H. 347; O'Brien *v.* Commercial F. Ins. Co., 38 N. Y. Super. Ct. 4; Johnson *v.* Chappell, 7 Daly (N. Y.) 43; Dunham *v.* Sherman, 19 How. Pr. (N. Y.) 572; Finch *v.* Calvert, 13 How. Pr. (N. Y.) 13; Jackson *v.* Hooker, 1 Cow. (N. Y.) 586. And see Newman *v.* Greiff, 3 N. Y. Civ. Proc. 362.

Where a statute makes the party giving notice to take a deposition responsible for the cost if he "shall fail to take the same accordingly, unless such failure be on account of the nonattendance of the witness, not occasioned by the fault of the party giving the notice, or some other unavoidable cause," such party must not only show the non-attendance of the witness, but the reason why he did not attend. The liability for

entitled to the costs and expenses of taking depositions,[17] yet it seems that the parties are primarily liable to the commissioner to the extent that his services have been engaged,[18] and the court may apportion the expenses accordingly.[19] So where depositions have been taken unnecessarily or in bad faith a party will not be allowed costs for taking the same;[20] and where it is shown that the purpose for taking a deposition is to oppress the adverse party by increasing the costs, the court may impose the cost of the deposition on the party in fault, if such purpose is clearly shown to the satisfaction of the court.[21]

DEPOSITOR. One who makes a deposit;[1] a person who pays money into a bank to be placed to his credit and to be subject to his check;[2] one who places his money on deposit for safe-keeping, to be paid out on demand on his check or draft therefor.[3] As defined by statute, the person who gives possession of personal property to another to keep for the benefit of the depositor or of a third party;[4] the person giving a deposit.[5] (See DEPOSIT; and, generally, BAILMENTS; BANKS AND BANKING; DEPOSITARIES; DEPOSITS IN COURT; WAREHOUSEMEN.)

costs is not absolute, but is contingent upon some fault of the party to be charged. William Skinner Mfg. Co. *v.* Sinsheimer, 37 Ill. App. 467, 468.

17. See COSTS, 11 Cyc. 121; and Sinsheimer *v.* William Skinner Mfg. Co., 43 Ill. App. 608; Gould *v.* Kelley, 16 N. H. 551.

18. Perry *v.* Griffin, 7 How. Pr. (N. Y.) 263; Kinsman *v.* Tucker, 2 Miles (Pa.) 426; Cullen's Estate, 18 Wkly. Notes Cas. (Pa.) 199. And see Perry *v.* Griffin, 7 How. Pr. (N. Y.) 263.

Payment of costs not a condition precedent. — The adverse party cannot object to the reception in evidence of depositions, on the ground that the fees for taking the same have not been paid by the party offering them, since it is only for the officer taking the deposition to object to the non-payment of the fees, and since their ultimate payment would be a question of costs at the determination of the suit. Stone *v.* Crow, 2 S. D. 525, 51 N. W. 335. And so in Roumage *v.* Mechanics' Ins. Co., 12 N. J. L. 95, it was held that the court would not impose the payment of costs upon the party as a condition of granting a commission.

19. Melvin *v.* Handley, 1 Wilcox (Pa.) 235, 6 Lanc. L. Rev. 47.

If a party persist in calling witnesses to show something that can have no bearing on the case, the examiner's fees as to that portion of the deposition will be imposed on him. Howell's Estate, 14 Phila. (Pa.) 329.

20. Wilson *v.* Knox, 12 N. H. 347.

Irrelevant questions. — Where the successful party has issued a commission to take evidence on irrelevant matters, he cannot tax the expense thereof against his adversary. Teague *v.* South Carolina R. Co., 8 Rich. (S. C.) 154.

Previous questions. — The court will not impose the costs of cross-examination on the party cross-examining before the conclusion of the depositions, at which time they will consider the question, and if the questions are frivolous the costs will in part be imposed on the cross-examiner. Long *v.* Drummond, 22 Wkly. Notes Cas. (Pa.) 11. See also Howell's Estate, 14 Phila. (Pa.) 329.

Recovery by action at law. — Where defendants have fraudulently procured false depositions and put plaintiff to great expense to controvert them, the court will not tax such expense against defendants in the case, but will tax under the regular rule and leave plaintiff to his action at law to recover the excess. Barker *v.* Wilford, Kirby (Conn.) 232.

Unnecessary prolixity. — The successful party will not be allowed to tax the full costs of taking depositions, when there has been unnecessary prolixity. Sanborn *v.* Braley, 47 Vt. 170.

21. Gulf, etc., R. Co. *v.* Evansich, 61 Tex. 3.

Depositions rendered unnecessary. — So, in Furman *v.* Peay, 2 Bailey (S. C.) 612, a party was held entitled to tax the costs of commissions issued for the examination of witnesses whose testimony is material, although their depositions were not read at the trial in consequence of their having been rendered unnecessary by evidence introduced in anticipation by the opposite party.

1. Parkesburg Bank's Appeal, 1 Chest. Co. Rep. (Pa.) 433.

2. Com. *v.* Sponsler, 16 Pa. Co. Ct. 116, 119, where it is said: "The man who pays off his note pays as a debtor; the friend who gives money is a donor; neither can properly be designated as a depositor."

3. Brandywine Bank's Estate, 1 Chest. Co. Rep. (Pa.) 431, 432 [*quoting* Parkesburg Bank's Appeal, 1 Chest. Co. Rep. (Pa.) 433, 434]. See also Kimball *v.* Norton, 59 N. H. 1, 6, 47 Am. Rep. 171 note, where it is said: "A depositor is a beneficiary of a fund held by the bank as trustee."

4. N. D. Civ. Code (1899), § 4001; S. D. Civ. Code (1903), § 1353.

5. S. D. Civ. Code (1903), § 1353.

DEPOSITS IN COURT

By Everett V. Abbot

CROSS-REFERENCES

For Matters Relating to:

Acceptance of Fund as Waiver of Right of Review, see Appeal and Error.

Deposit as Affecting Right to Costs, see Costs.

Deposit as Condition Precedent:

To Condemnation of Lands, see Eminent Domain.

To Dissolution of Injunction Against Nuisance, see Nuisances.

For Matters Relating to — (*continued*)
Deposit as Condition Precedent — (*continued*)
To Injunction Against Judgment, see JUDGMENTS.
To New Trial, see NEW TRIAL.
To Redemption, see EXECUTIONS; MORTGAGES.
To Specific Performance, see SPECIFIC PERFORMANCE.
Deposit as Incident:
To Offer of Judgment, see JUDGMENTS.
To Tender, see TENDER.
Deposit as Security:
For Appearance, see BAIL; RECOGNIZANCES.
For Costs, see COSTS.
For Release of Attachment, see ATTACHMENT.
On Appeal, see APPEAL AND ERROR.
Deposit as Stopping Running of Interest, see INTEREST.
Deposit by Particular Persons, see EXECUTORS AND ADMINISTRATORS; GARNISHMENT; RECEIVERS; SHERIFFS AND CONSTABLES; TRUSTS; UNITED STATES MARSHALS.
Deposit in Particular Proceedings, see EMINENT DOMAIN; GARNISHMENT; INTERPLEADER; MORTGAGES; SPECIFIC PERFORMANCE; TRUSTS.
Deposit in Satisfaction of Judgment Generally, see JUDGMENTS.
Deposit of Proceeds of Judicial Sales, see EXECUTIONS; EXECUTORS AND ADMINISTRATORS; JUDICIAL SALES; PARTITION; RECEIVERS; SEQUESTRATION; SHERIFFS AND CONSTABLES.
Deposit to Remove Interest as Witness, see WITNESSES.
Subjection of Fund:
To Attorney's Fees, see ATTORNEY AND CLIENT.
To Costs, see COSTS.
To Process, see ATTACHMENT; EXECUTIONS; GARNISHMENT.
To Taxation, see TAXATION.

I. EXISTENCE OF PRACTICE.

If a specific fund in the possession of a party to a cause is the subject of conflicting claims, the court may in certain cases either allow or compel him to pay it into court subject to further order in the cause. The practice of allowing or requiring deposits in court prevails not only in courts of equity, where the practice seems to have originated,[1] but also in courts of law[2] and courts of admiralty.[3]

II. GROUNDS OF DEPOSIT.

A. In General. The grounds which justify or require a payment into court of a fund in dispute are various.[4] Those deposits which are the subject of the

1. The practice of ordering property to be deposited in court to secure its safety pending litigation seems to be of considerable antiquity. There is record of an order prior to 1715 requiring deeds, securities, and jewels to be lodged with a master in chancery (Packer *v.* Wyndham, Gilb. 98, Prec. Ch. 412, 24 Eng. Reprint 184), and money had been ordered into court prior to 1727 (Finch *v.* Winchelsea, 1 Eq. Cas. Abr. 2, 21 Eng. Reprint 828). Lord Eldon, however, said in 1803, "I remember, when the practice was introduced of making a Defendant pay in money appearing by his answer or examination to be in his hands." Mills *v.* Hanson, 8 Ves. Jr. 91, 32 Eng. Reprint 286.

2. See cases cited *infra*, note 4 *et seq.*

3. See ADMIRALTY, 1 Cyc. 870.

4. Cowles *v.* Andrews, 39 Ala. 125; Hafker *v.* Henry, 5 N. Y. App. Div. 258, 39 N. Y. Suppl. 134; Clarkson *v.* Dunning, 4 N. Y. Suppl. 432; Mansfield *v.* Whatcom First Nat. Bank, 6 Wash. 603, 34 Pac. 143; being cases where deposits of money were made by one of the parties to stand in lieu of the property in litigation. So where defendant asserts an equitable defense by reason of the receipt, on behalf of plaintiffs, of money proceeding from defendant's predecessor in title, to which plaintiffs were not entitled, plaintiffs may be permitted to pay back the money into court. Requa *v.* Holmes, 26 N. Y. 338.

present discussion fall, however, under two general heads, namely: (1) A desire on the part of the party in possession of the fund to be relieved of the burden of caring for it;[5] and (2) a danger of loss or depletion of the fund.[6]

B. Relief From Care of Fund. If a party to a cause in possession of a fund to which there are conflicting claims desires to be relieved from the burden of caring for it and from the burden of the litigation, the court may authorize him to pay the fund into court to be disposed of as the rights of the parties interested may appear.[7]

C. Preservation of Fund From Danger. If a party to a cause is in possession of a fund to which there are conflicting claims, and it appears to the court that the fund is in danger of loss or depletion, or that the rights of the parties in interest may be endangered if the fund is allowed to remain in possession of the party holding it, that party may be compelled to pay the fund into court to abide its further order.[8]

5. See *infra*, II, B.

6. See *infra*, II, C.

7. De Camp Lumber Co. *v.* Tolhurst, 99 Cal. 631, 34 Pac. 438; Calmbacher *v.* Newman, 60 N. Y. Super. Ct. 404, 18 N. Y. Suppl. 198; Mills *v.* Pittman, 1 Paige (N. Y.) 490; Mundy *v.* Louisville, etc., R. Co., 67 Fed. 633, 14 C. C. A. 583; Francis *v.* Collier, 5 Madd. 75.

Doubt as to ownership of fund.— It is only when the holder of a fund is unable to determine to whom the same rightfully belongs or who is rightfully entitled to the possession of it that he may, on action being begun therefor by one claimant, deposit it in court and give notice to the other claimants. Lien *v.* Sioux Falls Sav. Bank, 12 S. D. 317, 81 N. W. 628.

Statutes.—In some states it is provided by statute that, upon affidavit by defendant, in an action on contract or for the recovery of personal property, that a third person, without collusion with him, has or makes claim to the subject of the action, and that defendant is ready to pay or dispose of the same as the court may direct, the court may make an order for its safe-keeping or its payment or deposit in court, or its delivery to such person as the court may direct, and also an order requiring the claimant to appear in a reasonable time and maintain or relinquish his claim against defendant; and if the claimant, having been served with a copy of the order, fails to appear, the court may declare him barred of all claim in respect to the subject of the action as against defendant; but if he appears he shall be allowed to make himself a defendant in the action in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect of the subject of the action on his compliance with the order of court for the payment, deposit, or delivery thereof. Colo. Code, § 1531; Nebr. Code Civ. Proc. § 48; Wyo. Rev. St. § 3490.

Deposit on bill of interpleader see INTERPLEADER.

8. *Idaho.*— Reid *v.* Steele, 7 Ida. 571, 64 Pac. 892.

Louisiana.— Thompson's Succession, 14 La. Ann. 810; Hermann *v.* Louisiana State Ins. Co., 7 La. 502.

Maryland.— McKim *v.* Thompson, 1 Bland 150.

New York.— Lewis *v.* Dodge, 17 How. Pr. 229.

Pennsylvania.— Dietrich *v.* Dietrich, 154 Pa. St. 92, 25 Atl. 1080.

United States.— Texas *v.* White, 131 U. S. Appendix xcv, 19 L. ed. 532, 533; Nusbaum *v.* Emery, 18 Fed. Cas. No. 10,381, 5 Biss. 393.

England.— Yates *v.* Farebrother, 4 Madd. 239; Annesley *v.* Muggridge, 1 Madd. 593, 16 Rev. Rep. 273; Parry *v.* Ashley, 3 Sim. 97, 30 Rev. Rep. 132, 6 Eng. Ch. 97.

Canada.— Campbell *v.* Dunn, 22 Ont. 98.

See 16 Cent. Dig. tit. "Deposits in Court," § 1 *et seq.*

Unknown parties.— If the persons entitled to a fund are unknown, it will be ordered into court until their identity can be established. Walters-Cates *v.* Wilkinson, 92 Iowa 129, 60 N. W. 514.

Merits of conflicting claims.—The fact that several claims are interposed to the fund is sufficient to justify an order requiring it to be paid into court. The court will not stop to investigate their merit. Deckerman *v.* Edinger, 13 Pa. Co. Ct. 541. However, an order to bring a fund into court to remain *in medio* will not be made upon a mere allegation in a bill that there is a question to be tried at the hearing, but the court must see whether there is really anything to be tried. Gunn *v.* Bolckow, L. R. 10 Ch. 491, 44 L. J. Ch. 732, 32 L. T. Rep. N. S. 781, 23 Wkly. Rep. 739.

An assignee for creditors may be required to pay funds of the estate into court. Haggerty *v.* Duane, 1 Paige (N. Y.) 321. See, however, Chaffers *v.* Headlam, 17 Jur. 754, 22 L. J. Ch. 1038.

Statutes.— In many states it is provided by statute that when it is admitted by the pleadings or examination of a party that he has in his possession or under his control any money or other thing capable of delivery which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same upon motion to be deposited in court or delivered to the party en-

III. NATURE OF FUND.

Ordinarily a court will not order the deposit of money unless it forms a specific fund.[9] A mere debt will not as a rule be ordered in.[10] If, however, the debt is for a sum wrongfully obtained or withheld from plaintiff, defendant may be ordered to pay it in.[11]

IV. WHO MAY COMPEL DEPOSIT.

The party who moves for the payment of money into court by another must show that he has a clear *prima facie* right to the fund or a part of it.[12]

titled to it upon such conditions as may be just, subject to the further direction of the court.

Arizona.— Rev. St. § 1528.

Arkansas.—St. § 5980. See also St. § 7428.

California.— Code Civ. Proc. § 572.

Colorado.— Code Civ. Proc. § 162. See also Civ. Code, § 18.

Dakota.— Terr. Code Civ. Proc. § 225 [Comp. Laws, § 5021]. See also Terr. Code Civ. Proc. §§ 91, 569 [Comp. Laws, §§ 4887, 5383].

Hawaii.— Civ. Laws, § 1268.

Idaho.— Code, § 3325.

Indian Territory.— Anno. St. § 3498.

Iowa.— Anno. Code, § 368.

Minnesota.— Gen. St. § 5352.

Montana.— Code Civ. Proc. § 970.

Nevada.— Comp. Laws, § 3240.

New York.— Code Civ. Proc. § 717.

Ohio.— Anno. St. § 5592.

Utah.— Code Civ. Proc. § 3120.

Washington.— Code Civ. Proc. § 5460.

Wisconsin.— St. § 2793.

9. Shotwell *v.* Wendover, 1 Johns. (N. Y.) 65, holding that specific chattels which are the subject of an action of trover cannot be brought into court. *Contra,* Fisher *v.* Prince, 3 Burr. 1363. See Packer *v.* Wyndham, Gilb. 98, Prec. Ch. 412, 24 Eng. Reprint 184.

Deposit of collateral by surety who has been paid see PRINCIPAL AND SURETY.

Deposit of document as means of accomplishing discovery see DISCOVERY.

10. Hexter *v.* Pennsylvania R. Co., 43 N. Y. App. Div. 113, 59 N. Y. Suppl. 453, holding that the court cannot order a judgment debtor to pay the amount of the judgment into court merely because there are liens upon and assignments of the cause of action. So a bank cannot be compelled to pay money into court and abide the event of an action brought against it by a receiver of an insolvent depositor to recover the balance due on a deposit. Balestier *v.* Metropolitan Nat. Bank, 43 Hun (N. Y.) 564. And where the holder of a fund which has been attached borrows it and gives bond as security and afterward loans it to another, his claim against the borrower cannot be collected by compelling him to bring the fund into court. Harvey *v.* Hughes, 9 Baxt. (Tenn.) 556. However, where a purchaser of property defends an action for the price because an action to recover the property has been instituted against him by a third person, the court may render an interlocutory judgment, ordering defendant to deposit in court the balance due on the price, to await the decision of the other suit. Jacobs *v.* Sauvé, 15 La. Ann. 424.

On a bill for an accounting this rule has but a limited application, and the balance apparently due may be ordered into court. Foster *v.* Donald, 1 Jac. & W. 252, 21 Rev. Rep. 157; Gordon *v.* Rothley, 3 Ves. Jr. 572, 30 Eng. Reprint 1161. However, after the issue of a decree for an account, an order on motion to pay into court the amount of the principal sums admitted to be due by examination upon interrogatories will not be extended to interest. Wood *v.* Downes, 1 Ves. & B. 49, 35 Eng. Reprint 19.

Voluntary deposit.— R. I. Pub. Laws (1899), c. 651, providing that whenever any executor, administrator, guardian, trustee, or any other person holds any sum of money payable to, or the property of, another, and the person entitled thereto cannot give proper receipt or discharge therefor, and such executor, etc., desires to free himself from further liability therefor, he may pay the fund into the registry of the court on a bill in equity stating the circumstances, was intended to cover only official relations where a trust was created, and does not apply to the ordinary relation of debtor and creditor; as for instance banker and depositor. Providence Sav. Inst. *v.* Dailey, 22 R. I. 239, 47 Atl. 319.

11. Rebhan *v.* Fuhrman, 50 S. W. 976, 21 Ky. L. Rep. 17; Dillon *v.* Connecticut Mut. L. Ins. Co., 44 Md. 386; Matter of Swerarton, 20 N. Y. Wkly. Dig. 378; Foster *v.* Donald, 1 Jac. & W. 252, 21 Rev. Rep. 157.

12. Hopkins *v.* McEldery, 4 Md. Ch. 23; Freeman *v.* Fairlie, 3 Meriv. 29, 17 Rev. Rep. 7; St. Victor *v.* Devereux, 13 Sim. 641, 36 Eng. Ch. 641; Corbett *v.* Meyers, 10 Grant Ch. (U. C.) 36. Thus money will not be ordered to be brought into court on motion before decree, unless it clearly appears upon the answer to belong to plaintiff. Hagell *v.* Currie, L. R. 2 Ch. 449, 36 L. J. Ch. 448, 16 L. T. Rep. N. S. 307, 15 Wkly. Rep. 605.

Unclaimed funds.— The only persons having a right to move the court with reference to unclaimed chancery funds are the owners or their legal representatives and the state as custodian. Matter of Corning Foundation, 16 Misc. (N. Y.) 309, 39 N. Y. Suppl. 385.

V. Who Must Make Deposit.

The court will not ordinarily order a person to deposit property which is not in his possession at the time.[13] And a fund will not be ordered in unless it appears that the possessor has no equitable right to it whatever.[14] Thus money will not be ordered into court when the party holding it claims a lien upon it.[15] However an undisputed balance will be ordered in without prejudice to rights in the remainder.[16]

VI. Application For Order of Deposit.

A. Parties Applicant. All parties interested should unite in an application for leave to pay a fund into court.[17] The question whether a stranger to the suit may successfully apply for leave to pay a fund into court is not definitely settled.[18] He cannot apply for an order compelling another to make the deposit, however.[19]

B. Parties Defendant. The cases are in conflict as to whether an order to

13. Crompton, etc., Union Bank *v.* Burton, [1895] 2 Ch. 711, 64 L. J. Ch. 811, 73 L. T. Rep. N. S. 181, 13 Reports 792, 44 Wkly. Rep. 60; Anonymous, 1 L. J. Ch. O. S. 21.

Constructive possession.— Property in the possession of a partner is for this purpose in the possession of a copartner so that the latter may in a proper case be required to deposit it in court. Johnson *v.* Aston, 1 Sim. & St. 73, 1 Eng. Ch. 73.

14. McKim *v.* Thompson, 1 Bland (Md.) 150; Hopkins *v.* McEldery, 4 Md. Ch. 23; McClennaghan *v.* Buchanan, 7 Grant Ch. (U. C.) 92. Thus a partner insisting that the balance of the account is in his favor is not ordinarily obliged to bring into court what is in his hands unless the other partners do the same. Foster *v.* Donald, 1 Jac. & W. 252, 21 Rev. Rep. 157.

Admission in plaintiff's pleading that he holds money subject to order of court was held to justify an order to pay the money into court, under Ida. Rev. St. § 4339. Reid *v.* Steele, 7 Ida. 571, 64 Pac. 892. It has been held, however, that after a decree for an account a motion by plaintiff for a payment of money into court by defendant, grounded on an admission in his answer alone, will not be entertained. Wright *v.* Lukes, 13 Beav. 107, 20 L. J. Ch. 32; Binns *v.* Parr, 7 Hare 288, 27 Eng. Ch. 288; Burn *v.* Bowes, 6 L. J. Ch. 275.

Books of account.— On a bill for an accounting the court will not order into court money appearing as a balance due on the books in the master's office. Roe *v.* Gudgon, Coop. 304, 10 Eng. Ch. 304. An order on a bill for an accounting requiring defendant to pay money into court on casting up books must be upon the ground of admission by reference sufficient to make the books part of the examination. Mills *v.* Hanson, 8 Ves. Jr. 91, 32 Eng. Reprint 286.

Report of master.— If exceptions are taken to the master's report, money shown to be due thereby will not be ordered in on motion. Creak *v.* Capell, 6 Madd. 114, 22 Rev. Rep. 252. But where a sum was found due from defendant by the report and defendant acquiesced in it, the money was ordered in to the credit of the cause, although plaintiff had excepted to the report. Clarkson *v.* De Peyster, Hopk. (N. Y.) 274. See, however, Campbell *v.* Braxton, 4 Hen. & M. (Va.) 446. And it is competent for the court, at the same time it allows an exception to be taken by defendant, and directs the master to review his report generally, to order defendant to pay a sum of money into court, if the court is satisfied that ultimately that sum will be found due from him. Brown *v.* De Tastet, 4 Russ. 126, 28 Rev. Rep. 25, 4 Eng. Ch. 126.

15. Texas *v.* White, 10 Wall. (U. S.) 483, 19 L. ed. 992; Law *v.* Hunter, 1 L. J. Ch. O. S. 222.

16. Wanklyn *v.* Wilson, 35 Ch. D. 180, 56 L. J. Ch. 209, 56 L. T. Rep. N. S. 52, 35 Wkly. Rep. 332; London Syndicate *v.* Lord, 8 Ch. D. 84, 38 L. T. Rep. N. S. 329, 26 Wkly. Rep. 427; Yates *v.* Farebrother, 4 Madd. 239.

17. Marriage *v.* Royal Exch. Assur. Co., 18 L. J. Ch. 216. *Contra*, Wilton *v.* Hill, 2 De G. M. & G. 807, 51 Eng. Ch. 632. Thus where moneys paid into court were invested in a bond secured by mortgage to pay interest to a widow during her life the owner of the land was not allowed to pay the amount of the bond into court because the persons entitled to the principal and interest had not joined in the application. *In re* Shockley, 1 Pennew. (Del.) 273, 40 Atl. 113. However, an order for payment into court of funds in the hands of a stakeholder within the state may be made in a suit in which one of two parties, each of whom claims the fund under a person residing abroad, is plaintiff, and the other a defendant, although the absentee may not be effectually made a party to the suit. Ward *v.* Booth, L. R. 14 Eq. 195, 41 L. J. Ch. 729, 27 L. T. Rep. N. S. 364, 20 Wkly. Rep. 880.

18. Belbee *v.* Belbee, 6 Madd. 28 (permission will be denied, it seems); Francis *v.* Collier, 5 Madd. 75 (permission will be granted).

19. Newton *v.* Askew, 11 Beav. 446, 12 Jur. 330, 551, 766, 18 L. J. Ch. 42.

pay money into court may be granted against a person who is not a party to the suit.[20]

C. Notice. Notice of an application for an order of deposit must ordinarily be given all parties concerned.[21]

D. Supporting Affidavit. A motion for a rule *nisi* to show cause why defendant should not be required to pay a fund into court should generally be accompanied by an affidavit verifying the facts on which that relief is asked.[22]

E. Time of Making Order. The order for payment into court may be made at various stages in the progress of the cause according to the nature of the particular suit and the practice prevailing in the particular court.[23]

F. Service of Order. An order requiring a person not a party to the cause to pay in a sum of money within a certain time must be served on him before the expiration of that time.[24]

G. Conclusiveness of Order.[25] An order on a motion to require money to be deposited in court is conclusive on the parties in subsequent proceedings.[26]

VII. ESSENTIALS OF DEPOSIT.

A. Delivery to Court. The fund must ordinarily come into the actual physical possession of the court else there is no effective deposit.[27]

20. See Townsend *v.* Sykes, 38 La. Ann. 862; Belbee *v.* Belbee, 6 Madd. 28, both holding that a tenant from whom rents are adversely claimed by the parties may be ordered to deposit the same as they mature. But see Francis *v.* Collier, 5 Madd. 75; Johnson *v.* Chippindall, 2 Sim. 55, 29 Rev. Rep. 58, 2 Eng. Ch. 55, both holding that the order will not issue against a stranger.

21. Abegg *v.* Peoples' Trust Co., 58 N. Y. App. Div. 611, 68 N. Y. Suppl. 755. However an order may be made to pay money into court at the hearing without a notice of motion for that purpose. Isaacs *v.* Weatherstone, 10 Hare Appendix xxx, 4 Eng. Ch. 744.

Notice of hearing.— A final order on a petition asking defendant to bring money into court for the purpose of investment cannot be passed without notice to, or a hearing of, the opposite party, where he has answered the petition and objected to the application. Brooks *v.* Dent, 4 Md. Ch. 473.

Waiver of notice.— By paying money to a clerk, pursuant to a decree requiring him to do so, a stranger to a cause waives the objection that he had no notice of the suit in which the decree was rendered. Elliott *v.* Jones, 47 Iowa 124.

22. Texas *v.* White, 131 U. S. Appendix xcv, 19 L. ed. 532, 533, holding, however, that where due notice has been given to defendant, and he has appeared and admitted that he has received the fund in question, and stated that he is ready to answer on the merits, the court will grant the rule, giving leave to the parties to file their affidavits on the hearing.

23. Requa *v.* Holmes, 26 N. Y. 338, holding that the order may be made at the trial.

Before answer.— On a bill for partnership accounting defendant may be ordered to pay money into court before answer in a case of gross fraud appearing on an affidavit filed by plaintiff and the answer of defendant thereto. Jervis *v.* White, 6 Ves. Jr. 738, 6 Rev. Rep. 26, 31 Eng. Reprint 1284.

Before report a court will not order in a balance allowed against defendant on an accounting before the master. Fox *v.* Mackreth, 1 Ves. Jr. 69, 30 Eng. Reprint 234.

Before further consideration.— A defendant whose affidavit filed on an inquiry discloses that he has money in his hands may be ordered to pay it into court after decree and before further consideration. Dunne *v.* English, L. R. 18 Eq. 524.

Before further directions.— Plaintiff may, on an examination admitting money due, and before the cause is set down for further directions, move for payment of the fund into court. Hatch *v.* ——, 19 Ves. Jr. 116.

24. Duffield *v.* Elwes, 2 Beav. 268, 17 Eng. Ch. 268.

25. Finality of order of deposit for purpose of appeal see APPEAL AND ERROR, 2 Cyc. 604 note 49.

26. Elliott *v.* Jones, 47 Iowa 124, holding that where money is ordered into court to be paid by the clerk to defendant, the order cannot be attacked by answer and cross bill in a proceeding to compel the clerk to pay the money in accordance with it. So a motion to compel payment into court will be denied where a former motion for substantially the same relief was denied. Harris *v.* Elliott, 49 N. Y. Suppl. 916.

27. Myers *v.* Baker, 60 S. W. 521, 22 Ky. L. Rep. 1325, holding that, where a party is adjudged to pay a sum to the court commissioner, an unexecuted agreement by the commissioner to give him credit by an amount which the commissioner was ordered in another action to collect and pay to the party does not entitle him to a credit therefor; no receipts being executed and the estate of the commissioner being insolvent. However, in lieu of appointing a receiver, the court may permit the fund in dispute to remain in the possession of a bank as depositary, to be held as a fund in court, subject to its orders

B. Consent of Court. In order to complete a deposit, the money must be delivered pursuant to an order of the court. Otherwise the delivery will have no legal effect.[28]

VIII. CUSTODY AND CONTROL OF FUND.

A. Powers, Duties, and Liabilities of Custodian.[29] The powers and duties of the custodian of a fund deposited in court with reference to the investment of the money are generally defined by order of court in the cause. In the absence of an order of instructions his powers and duties are usually controlled by statute or general rule of court.[30] The power and duty to invest the fund carries with it the power to do all things incidentally necessary or proper to effectuate the investment,[31] and to realize upon the securities taken by him.[32] The custodian is not liable to the parties in interest for loss or depletion of the fund, where he invests it in accordance with his powers and duties.[33] The custodian may pay out the fund upon a claim of ownership only upon order of court.[34]

B. Withdrawal of Fund by Depositor.[35] A deposit in court cannot ordinarily be taken out of court by the depositor;[36] but if it was made on a condition

and demand. Continental Nat. Bank *v.* Myerly, 24 N. Y. App. Div. 154, 48 N. Y. Suppl. 718. See also, generally, DEPOSITARIES.

28. Brown *v.* People, 3 Colo. 115; Davidson *v.* Lamprey, 16 Minn. 445.

The clerk may refund a deposit made without order of court or subsequent ratification of court. Hammer *v.* Kaufman, 39 Ill. 87; Baker *v.* Hunt, 1 Wend. (N. Y.) 103.

29. Powers, duties, and liabilities of: Clerks of court see CLERKS OF COURTS, 7 Cyc. 224, 235. Depositaries in general see DEPOSITARIES. Officers generally see OFFICERS. Receivers see RECEIVERS. Sheriffs and constables see SHERIFFS AND CONSTABLES. United States marshals see UNITED STATES MARSHALS.

30. Chesterman *v.* Eyland, 81 N. Y. 398, holding that rule 180 of the former court of chancery, providing that where no direction for the investment of funds paid into court is contained in the decree, and the money is not applied for within six months thereafter, it shall be the duty of the custodian without any special order to invest it in public stocks or other permanent securities, is still in force, modified only by supreme court rules No. 82 of 1871 and 1874, and No. 73 of 1877, prescribing the place of deposit of the funds while on deposit.

31. Baldwin *v.* Crary, 30 Hun (N. Y.) 422, holding that where a fund is paid to a county treasurer, to be invested by him for the benefit of the parties, it is his duty to continue the investment, and that he has all power necessary to deal with it for that purpose; that he may receive payment in part or in whole; that if the investment be taken in the form of a mortgage, he has power, on payment, to discharge the same, and in case of part payment to release portions of the premises from its operation; and that where he invests the fund in a mortgage and afterward releases a part of the premises without receiving payment from the mortgagor, the release will be sustained in favor of persons subsequently making loans to the mortgagor on the faith of them and taking a mortgage on the released premises by way of security.

Mode of investment.— The chamberlain of the city of New York may aggregate in one mortgage several funds which it is his duty to invest. Chesterman *v.* Eyland, 81 N. Y. 398.

Transfer of securities.— The powers of a county treasurer in the control of funds paid into court are the same as other trustees, and he may transfer securities taken upon investment of the fund according to his best judgment without order of court, and the transferee takes a good title thereto notwithstanding the treasurer has used the money received from the transfer to replace court moneys wrongfully converted by him. Tompkins County *v.* Ingersoll, 81 N. Y. App. Div. 344, 81 N. Y. Suppl. 242.

32. Baldwin *v.* Crary, 30 Hun (N. Y.) 422.

Foreclosure suits.— If funds are deposited with the chamberlain of the city of New York for investment, and he invests them in a mortgage, it is his duty to realize on the security in the ordinary way, and he may accordingly foreclose the mortgage without order of court. Chesterman *v.* Eyland, 81 N. Y. 398.

33. People *v.* Randall, 73 N. Y. 416, holding that an order of court is a sufficient protection to the officer for his dealing with the fund.

Violation of rules of court.— No liability attaches to the chamberlain of the city of New York for violation of supreme court rule 82, of 1871 and 1874, prescribing the place of deposit of funds, where no harm resulted from the violation, and the fund was subsequently invested and lost without his fault. Chesterman *v.* Eyland, 81 N. Y. 398.

34. See CLERKS OF COURTS, 7 Cyc. 225. See also Tompkins County *v.* Ingersoll, 81 N. Y. App. Div. 344, 81 N. Y. Suppl. 242, construing N. Y. Code Civ. Proc. § 751.

35. Return of fund to depositor see *supra*, note 28; *infra*, IX, B, 2.

36. Clarkson *v.* Dunning, 4 N. Y. Suppl. 423, 22 Abb. N. Cas. (N. Y.) 439, holding

with which the other party refuses to comply, the depositor may withdraw the fund as a matter of right.[37]

C. Compelling Restitution of Fund. If a deposit be withdrawn without right, the court may summarily order its restoration to the official custodian,[38] and the statutes of limitations are not a bar to such a proceeding.[39]

D. Collection of Investment.[40] If a deposit in court is loaned out by order of court, and the borrower is in default, judgment may be rendered against him on motion without notice.[41] The statutes of limitations do not apply to a proceeding in the cause to collect an investment of funds in court,[42] although they may apply to an independent action for that purpose.[43]

that where the parties stipulated that a deposit should be made with a third person to stand for the subject-matter of the dispute, subject to order of court until after determination of final appeal, the depositor could not withdraw the sum before appeal. So a property-owner who pays the amount of a municipal lien into court to release his land therefrom cannot withdraw it until it is determined whether the claim of the city can be sustained; and neither the statute of limitations nor delay in procedure can bar the city of its rights. Philadelphia *v.* Wellens, 19 Pa. Super. Ct. 379.

Unauthorized deposit.—Where money is deposited with the clerk without order of court, however, the depositor may withdraw it at any time before the court recognizes it as a fund under its control or the party for whom it was intended manifests a willingness to receive it on the terms upon which it was deposited. Hammer *v.* Kaufman, 39 Ill. 87.

37. Cummins *v.* Rapley, 17 Ark. 381, holding that where a debtor, having executed a deed of trust for the benefit of his creditors, files a bill to enjoin a creditor from enforcing his judgment at law and to coerce his acceptance of the deed of trust, depositing in court the amount then due, according to its provisions, for the payment of the judgment, and the creditor refuses to receive the money except as an unconditional payment, or to accept the deed of trust, and upon a hearing the bill is dismissed, plaintiff may withdraw the fund.

38. Uhl *v.* Kohlmann, 52 N. Y. App. Div. 455, 65 N. Y. Suppl. 197; Clarkson *v.* Dunning, 4 N. Y. Suppl. 432; Hogaboom *v.* Receiver Gen., 28 Can. Supreme Ct. 192 [*affirming* 24 Ont. App. 470].

Motion for restitution.— Where moneys in court have been improperly paid out in an action, a motion to compel restoration of the fund is the proper procedure. Hafker *v.* Henry, 5 N. Y. App. Div. 258, 29 N. Y. Suppl. 134; Allstadt *v.* Gortner, 31 Ont. 495.

Enforcement of order.— Where a party in whose favor judgment has been rendered obtains a fund from the depositary of the court thereunder, an order requiring him to restore the fund, made on a subsequent reversal of the judgment, is not enforceable only by execution against the party's property; but he is punishable as for contempt by commitment or by striking out his answer, or by both, for failing to comply with the order directing him to restore the money. Devlin *v.* Hinman, 161 N. Y. 115, 55 N. E. 386.

Restitution of fund erroneously paid out to attorney see also ATTORNEY AND CLIENT, 4 Cyc. 1021 note 31.

39. Allstadt *v.* Gortner, 31 Ont. 495. See also Hafker *v.* Henry, 5 N. Y. App. Div. 258, 39 N. Y. Suppl. 134.

Limitations as to proceeding to collect: Claim against fund see *infra*, IX, C, 2; Investment of fund see *infra*, VIII, D.

40. **Power of custodian** as to investments see *supra*, VIII, A.

41. Vaughn *v.* Tealey, (Tenn. Ch. App. 1896) 39 S. W. 868, holding that a borrower of funds in court is a party to the cause to which the funds belong, and that an order that the funds be collected is notice to him upon which judgment may be entered on motion.

Waiver of objection to remedy.— Where funds in court were loaned by the clerk and master on a note, and before judgment was taken thereon on motion of the clerk and master the makers appeared and defended the motion, they cannot afterward object that they should have been sued in an action at law or by a bill in equity. Fisher *v.* Cunningham, (Tenn. Ch. App. 1899) 58 S. W. 399.

Estoppel to deny liability.— A surety on a note given to the clerk and master which states that the money is borrowed in a certain pending case cannot deny liability because the clerk and master was not authorized by court to make the loan, or because at the time the loan was made the fund had been exhausted by previous loans. Weaver *v.* Ruhm, (Tenn. Ch. App. 1897) 47 S. W. 171. See also Fisher *v.* Cunningham, (Tenn. Ch. App. 1899) 58 S. W. 399.

42. Weaver *v.* Ruhm, (Tenn. Ch. App. 1897) 47 S. W. 171, holding that a surety on a note given for funds in the custody of the clerk and master which states that it was given for funds belonging to a specified case makes himself a party to the case, and he may not avail himself of the statute of limitations to defeat collection of the note pending suit.

Limitations as to proceeding: To compel restitution of fund see *supra*, VIII, C. To enforce claim against fund see *infra*, IX, C, 2.

43. Bowen *v.* Helm, 41 S. W. 289, 19 Ky. L. Rep. 486, holding that the limitation provided by Ky. Gen. St. c. 71, art. 6, § 2, as

E. Loss of Fund.[44] Where several funds have been invested in one security a loss arising from depreciation in value should be borne by all the funds *pro rata*.[45] The party upon whom the loss of a particular fund shall fall depends upon the nature and purpose of the deposit.[46]

IX. DISTRIBUTION OF FUND.[47]

A. Jurisdiction of Court. The court in which a fund has been deposited has power to order distribution of it;[48] and when jurisdiction is once obtained it is not lost either by the abatement of the suit,[49] or by the dismissal of the bill.[50] After the fund has been distributed, however, the court has no further jurisdiction over it[51] in the absence of fraud.[52] The court in which the fund is deposited has exclusive jurisdiction of the question of the right to the moneys, and all claims against the deposit must be asserted there.[53]

B. Persons Entitled to Fund — 1. In General. In a proper case the court will recognize and enforce the rights of an assignee of a fund in court[54] or of a

to the surety in a bond executed to the master commissioner for money loaned under order of court runs from the maturity of the bond, and not from the time the court orders the money to be collected, although the bond provides that payment is to be enforceable as the court may direct, and that the fact that one of the beneficiaries of the fund is an infant does not extend the period of limitation as to the surety.

For statutes of limitations generally see LIMITATIONS OF ACTIONS.

44. Liability of government to claimant in case of loss by failure of depositary see DEPOSITARIES.

45. Elkin *v.* Elkin, 29 Misc. (N. Y.) 513, 61 N. Y. Suppl. 947.

46. De Peyster *v.* Clarkson, 2 Wend. (N. Y.) 77 [*affirming* Hopk. 505], holding that where money is paid into court on a bill for an accounting, pursuant to order for the balance admitted to be due, and it is paid to the credit of the cause generally, and not in satisfaction of plaintiff's demand *pro tanto*, and the money is invested in public stocks on which a loss subsequently happens, the loss must be borne by defendant, especially where plaintiffs were willing to receive the money on account, and such appropriation was objected to by defendant. Where, however, goods in suit are converted into money, which is by consent of all parties placed in the hands of an officer of the court, it is at the risk of one party as much as the other. Mansfield *v.* Whatcom First Nat. Bank, 6 Wash. 603, 34 Pac. 143.

Priority over claim of county.— If there is a shortage in the funds of the clerk of a county not operating under the fee system, litigants having claims against a fund deposited with him are entitled to payment from the amount on hand in preference to the clerk's successor in office. *In re* Hobson, 8 Ohio S. & C. Pl. Dec. 700, 7 Ohio N. P. 630.

47. Distribution pending appeal see APPEAL AND ERROR, 2 Cyc. 895 note 8, 908 note 51.

48. Davis *v.* Watkins, 2 Bush (Ky.) 224.

49. Finch *v.* Winchelsea, 1 Eq. Cas. Abr. 2, 21 Eng. Reprint 828; Roundell *v.* Currer, 6 Ves. Jr. 250, 31 Eng. Reprint 1036.

50. Wright *v.* Mitchell, 18 Ves. Jr. 293.

51. Hammer *v.* Kaufman, 39 Ill. 87; Meehan *v.* Blodgett, 91 Wis. 63, 64 N. W. 429, holding that after the money has been refunded to the depositor in a proper case it is beyond the control of the court.

52. Keiley *v.* Dusenbury, 42 N. Y. Super. Ct. 238, holding that where a wrongful payment of money out of court is procured by fraud, the distributee acquires no title to the fund, and the person rightfully entitled to it has his remedy by action, and in some cases by proceeding summarily against the distributee.

53. Gregory *v.* Merchants' Nat. Bank, 171 Mass. 67, 50 N. E. 520; Gregory *v.* Boston Safe-Deposit, etc., Co., 144 U. S. 665, 12 S. Ct. 783, 36 L. ed. 585; Jones *v.* Merchants' Nat. Bank, 76 Fed. 683, 22 C. C. A. 483, 35 L. R. A. 698, which cases hold that where moneys have been paid into court, and, pending litigation, have been placed by order of court with a depositary, neither party may maintain a bill against the depositary to compel it to pay over the fund to him. So the claimant of a fund cannot resort to a court other than that in which the fund is on deposit, and recover of the clerk and master and his sureties the amount of the deposit. Craig *v.* Governor, 3 Coldw. (Tenn.) 244.

54. Phillips *v.* Edsall, 127 Ill. 535, 20 N. E. 801, holding that equity has jurisdiction, upon the filing of a supplemental bill by attorneys alleging that they are assignees of a portion of a fund in court, to enter a decree preserving the equitable lien of the assignment by directing payment of the assigned amount out of the fund, as in such case the assignment being of only a portion of the fund and therefore not recognized at law, only a court of equity can afford adequate relief.

Title by estoppel.— Where a person purports to convey one sixth of a fund in court representing real estate, although only entitled to one ninth, and he afterward becomes entitled to one sixth, the assignment

creditor[55] of the person otherwise entitled to the fund, and decree distribution accordingly. One who is not entitled to participate in the distribution of the fund cannot urge objections to the right of others to share in it.[56]

2. DEPOSITOR. The court may also in a proper case order a return of the fund to the depositor,[57] as where for example the deposit is made on a condition which is not performed,[58] or on a contingency which does not happen.[59]

C. Procedure — 1. REMEDY OF CLAIMANTS. The remedy of a person interested in a fund which has been paid into court to the credit of a cause depends in a measure upon the nature of that cause and the extent to which progress has been made in it.[60] As a rule, however, the claimant may for the purpose of asserting

is effectual to pass the one-sixth interest. *Re* Hoffe, 82 L. T. Rep. N. S. 556, 48 Wkly. Rep. 507.

Notice of assignment.— The court and not the accountant is the custodian of a fund in court. Consequently notice to the accountant of an assignment of the fund is not tantamount to notice to a private trustee of the assignment of a trust fund. Cottingham *v.* Cottingham, 11 Ont. 294.

55. Minnesota Bank *v.* Hayes, 11 Mont. 533, 29 Pac. 90, holding that where money has been paid into court on a judgment in favor of a certain person as plaintiff, the court may, upon a hearing analogous to supplementary proceedings, all persons interested being present, order the money to be paid to a creditor of that person who has obtained a judgment against him in the same court. So if the claimant of a fund in court brings in a person interested in another portion of the fund, to whom the claimant is indebted, the court may order the fund paid to the creditor. Butler *v.* Butler, 67 S. C. 211, 45 S. E. 184. However a creditor who has neither an assignment of the interest of a distributee nor a lien thereon cannot intervene by petition in the suit in which the money is deposited for the purpose of reaching the distributee's interest and having it applied on his debt. Tuck *v.* Manning, 150 Mass. 211, 22 N. E. 1001, 5 L. R. A. 666.

56. Munroe *v.* Sedro Lumber, etc., Co., 16 Wash. 694, 48 Pac. 405, a case where persons whose claims were unquestioned were entitled to the entire fund as against the person making objection.

57. Donohoo *v.* Howard, (Indian Terr. 1902) 69 S. W. 927.

Termination of suit in depositor's favor.— Where, in a proceeding under Battle Rev. c. 65, §§ 19, 20, to secure agricultural advances, the money received from the sale of a crop has been paid into court and the proceeding dismissed, the court has power to order a return of the money to defendant, and is under no obligation to plaintiff to order its continued detention, although plaintiff has instituted another action and files an affidavit that defendant is insolvent. Cottingham *v.* McKay, 86 N. C. 241.

Deposit on illegal contract.— If plaintiff deposits money on an illegal contract, and the court below orders it paid to defendant, the court on appeal may order a judgment for plaintiff for the amount so paid with interest from the date of the decree, in order that the parties may be placed in the position they were in when the action was brought. Horseman *v.* Horseman, 43 Oreg. 83, 72 Pac. 698.

Return of deposit: By clerk of court without order see *supra*, note 28. To respondent on dismissal of appeal see APPEAL AND ERROR, 3 Cyc. 200 note 37.

Withdrawal of deposit by depositor without order see *supra*, VIII, B.

58. Sutton *v.* Baldwin, 146 Ind. 361, 45 N. E. 518, holding that where defendant deposits money in court pending trial, to be returned to him unless plaintiff surrenders a certain check, to be held by the clerk subject to order of court, and the check is not surrendered, the court may order the money returned to defendant.

59. Donohoo *v.* Howard, (Indian Terr. 1902) 69 S. W. 927, holding that where plaintiff in ejectment alleged title through a sale to his grantor by an intervener, and admits non-payment of certain instalments of the price due the intervener, and pays them into court on the express stipulation that they are to be paid the intervener only in the event of plaintiff's recovery, it is proper, on sustaining a demurrer to the complaint, to order the money to be repaid to plaintiff.

60. Winslow *v.* Carthage, etc., R. Co., 82 Hun (N. Y.) 220, 32 N. Y. Suppl. 56, holding that where defendant, in an action to foreclose a trust mortgage, has paid the amount of the mortgage debt to the county treasurer, and the court has held that the payment was a sufficient tender and dismissed the complaint on the merits, it is improper for the treasurer, before he is authorized by an order to pay over the fund, and before an adjudication has been made discharging the lien of the trustees on the fund, to move for an order "adjusting his fees as county treasurer in the receiving and paying out" of the money; but he should apply for instructions, and ask for an allowance of such fees as he may be entitled to.

Motion by party to cause.— Where property is attached and sold and the proceeds paid into court, an independent petition in equity subsequently filed in the same court and before the same judge, to which the parties in the main suit are joined, to obtain payment of costs and attorney's fees out of the fund in court, to which the judgment in the main action entitled petitioner

his right either intervene in the cause in which the fund was deposited[61] or proceed by a bill in equity.[62]

2. STATUTES OF LIMITATIONS. The statutes of limitations do not afford a bar to proving a claim against a fund in court.[63]

3. NOTICE. All persons who may be interested in the disposition of a fund in court are entitled to notice of a proceeding to obtain a distribution of the money.[64]

4. PARTIES. All persons who are interested in the distribution of the fund should be made parties to a petition for distribution.[65]

5. PLEADING. In a contest over a fund in court the parties need not file formal pleadings.[66]

6. PROOF OF CLAIM. Before an order of distribution can be made proof should be made before the court or a referee of the facts on which the application is based.[67]

7. EXECUTION OF ORDER OF DISTRIBUTION. Execution is not necessary to enable a party to collect, out of a fund in court, a sum to which he has been adjudged entitled in the action in which the fund was deposited.[68]

may be treated as a motion in that action. Hornish *v.* Ringen Stove Co., 116 Iowa 1, 89 N. W. 95.

Motion by stranger to cause.—Where there is a dispute as to the ownership of a fund paid into court upon a judgment, the remedy of a claimant not a party to the cause is by a proceeding at law or in equity, and not by rule of court directing payment to him. Lewis *v.* Cockrell, 31 Ill. App. 476. And where a preliminary injunction is granted to restrain defendant from collecting a judgment against plaintiff for money deposited with a clerk of court until a judgment against defendant has been established as a set-off, persons claiming a lien on the deposit who have not intervened and are not parties to the suit cannot have their right to the lien adjudicated on motion supported by affidavits in advance of the trial. Frye-Bruhn Co. *v.* Meyer, 121 Fed. 533, 58 C. C. A. 529.

61. Phillips *v.* Blatchford, 26 Ill. App. 606. See, however, Tuck *v.* Manning, 150 Mass. 211, 22 N. E. 1001, 5 L. R. A. 666.

62. Phillips *v.* Edsall, 127 Ill. 535, 20 N. E. 801, holding that a bill by an assignee of a part of the fund may be filed before the decree of distribution is entered in order that the court may have notice of claimant's rights, and although the notes to secure which the assignment was made are not due.

Injunction.— A stranger who claims the fund may sue in the same court for an injunction to restrain the withdrawal of the money until a determination of the suit. Mann *v.* Flower, 26 Minn. 479, 5 N. W. 365.

63. Allstadt *v.* Gortner, 31 Ont. 495. See also Philadelphia *v.* Wellens, 19 Pa. Super. Ct. 379.

Limitations as to proceeding: To collect investment of fund see *supra*, VIII, D. To compel restitution of fund see *supra*, VIII, C.

64. Lewis *v.* Cockrell, 31 Ill. App. 476; Uhl *v.* Kohlmann, 52 N. Y. App. Div. 455, 65 N. Y. Suppl. 197.

Notice to depositor.— Where the final decree does not provide for distribution of a fund in court, the depositor is entitled to notice of a subsequent motion for distribution. Hammer *v.* Kaufman, 39 Ill. 87.

Notice to assignor of fund.— On a petition by an assignee for the payment out of court of a fund standing to the credit of the assignor, the assignor or his personal representative must be served with notice of the petition. Hurd *v.* Davenport, 13 Price 735. And see Briant *v.* Dennett, 4 Drew. 550, 5 Jur. N. S. 563. And where a stakeholder has deposited the sum in court in a suit in which one of two parties, each of whom claims the fund under a person residing abroad, is plaintiff, and the other a defendant, an order will not be made it seems for payment of the fund out of court until the absentee has been served. Ward *v.* Booth, L. R. 14 Eq. 195, 41 L. J. Ch. 729, 27 L. T. Rep. N. S. 364, 20 Wkly. Rep. 880.

An order directing a return of the deposit to the depositor should be made only upon notice to persons claiming a right to it. Hafker *v.* Henry, 5 N. Y. App. Div. 258, 39 N. Y. Suppl. 134.

Waiver of process.— Failure to issue or serve process on the filing of a petition of intervention by a claimant of a fund in court is waived by appearing and pleading to the petition. Phillips *v.* Blatchford, 26 Ill. App. 606.

65. Cowles *v.* Andrews, 39 Ala. 125.

Persons without interest.— Where a person having a contingent interest in a fund in court mortgages it and subsequently dies before his interest attaches, the mortgagees are not necessary parties to an application for distribution of the fund. Vernon *v.* Croft, 58 L. T. Rep. N. S. 919, 36 Wkly. Rep. 778.

66. State *v.* Alexander, 106 La. 460, 31 So. 60, holding that the parties may without pleading urge all objections they may have to each other's claims, whether founded on fact or on law.

67. Uhl *v.* Kohlmann, 52 N. Y. App. Div. 455, 65 N. Y. Suppl. 197.

68. Hornish *v.* Ringen Stove Co., 116 Iowa 1, 89 N. W. 95.

8. CONCLUSIVENESS OF ORDER OF DISTRIBUTION. The order of distribution is conclusive on the parties in subsequent proceedings.[69]

DEPOSIT SLIP. As used in banking, a note to help the memory.[1] (See DEPOSIT; DEPOSITOR; and, generally, BANKS AND BANKING.)

DEPOSITUM. A bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor;[2] where goods are to be kept for the bailor, and returned upon demand without recompense.[3] (See DEPOSIT; and, generally, BAILMENTS; DEPOSITARIES.)

DEPOT. In a broad sense, a place of deposit for storing goods; a warehouse; a storehouse;[4] a place where any kind of goods is deposited; a storehouse; a warehouse.[5] In railroad law, a railroad station;[6] a railway station;[7] a station;[8] a passenger station;[9] a place where passengers get on and off the cars, and where goods are loaded and unloaded;[10] the building for the accommodation and protection of railway passengers or freight;[11] a building for goods at the terminus

69. State *v.* Alexander, 106 La. 460, 31 So. 60, holding that a judgment on a rule to distribute a fund may serve as a basis for the plea of *res adjudicata*, although not signed. However, a decree of distribution will not preclude a claimant not embraced in its provisions, and having rights similar to those of other claimants who are thus embraced, from asserting by bill or petition his right to share in the fund. *Ex p.* Howard, 9 Wall. (U. S.) 175, 19 L. ed. 634.

Reversal of decree of distribution as affecting depositor's liability to appellant see APPEAL AND ERROR, 3 Cyc. 461 note 53.

1. Morse Banking, § 290 [*quoted* in Sharon First Nat. Bank *v.* City Nat. Bank, 102 Mo. App. 357, 76 S. W. 489].

2. Per Holt, C. J., in Coggs *v.* Bernard, 2 Ld. Raym. 909, 912.

3. Com. *v.* Cart, 2 Pittsb. (Pa.) 495, 496 [*citing* 2 Kent Comm. 558]. See also Foster *v.* Essex Bank, 17 Mass. 479, 498, 9 Am. Dec. 168; 5 Cyc. 162.

4. Webster Dict. [*quoted* in State *v.* Edwards, 109 Mo. 315, 321, 19 S. W. 91].

"A warehouse or other building" may include a depot. State *v.* Edwards, 109 Mo. 315, 321, 19 S. W. 91 [*cited* in Bigham *v.* State, 31 Tex. Cr. 244, 20 S. W. 577].

5. Worcester Dict. [*quoted* in State *v.* Edwards, 109 Mo. 315, 321, 19 S. W. 91].

6. Patton *v.* Cox, (Tex. Civ. App. 1903) 75 S. W. 871, 876.

7. Webster Dict. [*quoted* in Karnes *v.* Drake, 103 Ky. 134, 136, 44 S. W. 444, 19 Ky. L. Rep. 1794; Galveston, etc., R. Co. *v.* Thornsberry, (Tex. Sup. 1891) 17 S. W. 521, 523].

8. Goyeau *v.* Great Western R. Co., 25 Grant Ch. (U. C.) 62, 64, where it is said: "The word depot is used in the United States and is used also in Canada as synonymous with station; it may be inaccurately."

9. Louisville, etc., R. Co. *v.* Com., 33 S. W. 939, 17 Ky. L. Rep. 1136. But *compare* Goyeau *v.* Great Western R. Co., 25 Grant Ch. (U. C.) 62, 63, where it is said: "The word 'depot' does not mean necessarily or primarily a railway passenger station, but looking at the context the question is, could it mean anything else."

"Flag station" distinguished from "passenger depot" see St. Louis, etc., R. Co. *v.* State, 61 Ark. 9, 12, 31 S. W. 570. But see Schneekloth *v.* Chicago, etc., R. Co., 108 Mich. 1, 2, 65 N. W. 663, where under a Michigan statute exempting railway station grounds from the provisions requiring the right of way to be fenced, a flag station was considered within the exemption.

10. Fowler *v.* Farmers' L. & T. Co., 21 Wis. 77, 79. And see State *v.* New Haven, etc., Co., 37 Conn. 153, 163, where it is said: "The words of the statute are 'depot and station.' A mere station falls within the letter of the law, but to come within its spirit the station must be one at which trains stop not merely for wood and water but for the transaction of the ordinary business of the company, the receiving and delivering of freight and passengers."

11. Webster Int. Dict. [*quoted* in Karnes *v.* Drake, 103 Ky. 134, 136, 44 S. W. 444, 19 Ky. L. Rep. 1794].

"A 'regular' depot or station of a railroad company, as contemplated by the statute, is a certain place situate alongside of or near to its railroad, fitted up by it with suitable buildings, erections, appliances and conveniences for carrying on generally and continuously, in an orderly manner, the business of transporting freights, as is usually done by such companies. Such buildings, and other things necessary for a regular depot or station, may be greater or smaller in number and extent, or more or less elaborate, than others of like kind and for like purposes; but whether they be sufficient, or good, or indifferent, or are well or ill adapted to, and intended for, the purpose of prosecuting the business of transporting freights and passengers, receiving from shippers generally, and at all seasonable times, such freights as the railroad company is required to transport over its road, such depots or stations imply, ordinarily, such suitable and sufficient buildings, erections and appliances as may be necessary in receiving and delivering freights, and for the temporary protection of the same until they shall be transported or delivered to the persons entitled to have them, and that the company has a business office there, and suit-

or station of a railway, canal, etc.;[12] the entire grounds used by the company for its business purposes with the public at that station.[13] In military law, a place where military stores or supplies are kept, or troops assembled.[14] (See Depot Grounds; and, generally, Carriers; Railroads.)

DEPOT COMPANIES. See Railroads.

DEPOT GROUNDS. The place where passengers get on and off trains, and where goods are loaded and unloaded, and all grounds necessary and convenient and actually used for such purposes by the public and by the railroad company;[15] yard limits.[16] (See Depot; and, generally, Carriers; Railroads.)

DEPRECIATE. To fall in value; to become of less worth; to sink in estimation.[17]

able agents and employees to receive and deliver freights, to give receipts, bills of lading for the same, and to do the like and similar service." Land *v.* Wilmington, etc., R. Co., 104 N. C. 48, 55, 10 S. E. 80.

12. Goyeau *v.* Great Western R. Co., 25 Grant Ch. (U. C.) 62, 64 [*quoting* Imperial Dict. Suppl.].

13. Pittsburg, etc., R. Co. *v.* Rose, 24 Ohio St. 219, 229.

"**The term 'depot' in the mortgage** is not necessarily limited to a place provided for the convenience of passengers while waiting for the arrival or departure of trains. It applies also to buildings used for the receipt and storage of freight, which, when received, is to be safely kept until forwarded by the cars of the company or delivered to the owner or consignee." Humphreys *v.* McKissock, 140 U. S. 304, 313, 11 S. Ct. 779, 35 L. ed. 473.

"**The term 'depot' is sufficiently broad** to embrace within its meaning a 'pass-way' used for the convenient and safe egress and ingress of passengers. It is not restricted in its signification to the 'house' or structure used also for their convenience in this respect." Galveston, etc., R. Co. *v.* Thornsberry, (Tex. Sup. 1891) 17 S. W. 521, 523 [*quoting* Webster Dict.].

"'**Warehouses or depots,' in the connection** in which . . . [these words are used in Tex. Rev. St. art. 4537 were] intended to embrace the entire station of the railroad, including platforms used for handling cotton." Patton *v.* Cox, (Tex. Civ. App. 1903) 75 S. W. 871, 876.

14. U. S. *v.* Caldwell, 19 Wall. (U. S.) 264, 268, 22 L. ed. 114.

15. Grosse *v.* Chicago, etc., R. Co., 91 Wis. 482, 484, 65 N. W. 185; Plunkett *v.* Minneapolis, etc., R. Co., 79 Wis. 222, 224, 48 N. W. 519; Fowler *v.* Farmers' L. & T. Co., 21 Wis. 77, 79.

"**The existence or extent of these grounds** is not to be determined by the continued actual use of any part thereof. When station grounds are laid out, their contemplated future use is not unfrequently of more consideration than the actual demands at the time in determining their shape and extent. The construction and operation of new lines of railroad always tend to the development of the resources of the section through which it passes, and is followed by increased population and business. This is a matter of such common observation that ordinary prudence and foresight determines such an appropriation for station purposes as shall be commensurate with such reasonably anticipated growth. When these grounds are appropriated and set apart by the company it would be neither safe nor wise to allow their limits to be curtailed or extended by a jury in a proceeding where they collaterally come in question, as in this case, upon the mere showing that any part of the same was not in actual use at any particular time." McGrath *v.* Detroit, etc., R. Co., 57 Mich. 555, 559, 24 N. W. 854 [*followed* in Schneekloth *v.* Chicago, etc., R. Co., 108 Mich. 1, 65 N. W. 663; Grondin *v.* Duluth, etc., R. Co., 100 Mich. 598, 59 N. W. 229; Rinear *v.* Grand Rapids, etc., R. Co., 70 Mich. 620, 38 N. W. 599; Wilder *v.* Chicago, etc., R. Co., 70 Mich. 382; 38 N. W. 289]. But *compare* Blair *v.* Milwaukee, etc., R. Co., 20 Wis. 254, 261, where it is said: "As to the place of the accident being within the depot grounds of the company at Stoughton, it seems to us, after a careful consideration of the testimony, that there is no ground for saying that it was. It was out upon the main line of the road, where there is but a single track, several hundred feet beyond the switch, and beyond where the cattle guard now is. It is an admitted fact that the same was fenced by the company as part of the main line shortly after the accident in question, and that it has so remained ever since. And although long trains, in switching, sometimes run out to the place of the accident, still it is clearly shown that there is and was no practical objection to its being fenced. We do not think, under the circumstances, that it can be considered as part of the depot grounds."

16. Rabidon *v.* Chicago, etc., R. Co., 115 Mich. 390, 393, 73 N. W. 386, 39 L. R. A. 405.

"**Distance from depots is not the controlling consideration** in determining 'depot grounds' or 'yard limits,' which are synonymous terms. It is well known that in large cities these grounds extend for several miles. Neither does the question of frequent or infrequent use for switching purposes control. The question is, Are they reasonably necessary for that purpose, or liable to become so?" Rabidon *v.* Chicago, etc., R. Co., 115 Mich. 390, 393, 73 N. W. 386, 39 L. R. A. 405.

17. Webster Dict. [*quoted* in State Nat. Bank *v.* Baker, 27 Ill. App. 356, 359].

Depreciable property see 4 Cyc. 710.

DEPRIVE. To take away; end, injure or destroy;[18] to take something from; to keep from acquiring, using or enjoying something.[19]

DEPUTY.[20] One appointed as the substitute of another, and empowered to act for him in his name or on his behalf;[21] one who is appointed, designated, or deputed, to act for another;[22] one who occupieth in right of another, and for him regularly his superior will answer;[23] one authorized by an officer to exercise the office or right which the officer possesses, for and in place of the latter;[24] one who by appointment exercises an office in another's right;[25] one who exercises an office, etc., in another's right, having no interest therein, but doing all things in his principal's name, and for whose misconduct the principal is answerable.[26] (Deputy: Acknowledgment Taken by, see ACKNOWLEDGMENT. Affidavit Taken by, see AFFIDAVITS. Of Attorney-General, see ATTORNEY-GENERAL. Of City Officer, see MUNICIPAL CORPORATIONS. Of Clerk of Court, see CLERKS OF COURTS. Of Collector — Of Customs, see CUSTOMS DUTIES; Of Internal Revenue, see INTERNAL REVENUE. Of Coroner, see CORONERS. Of County Officer, see COUNTIES. Of District or Prosecuting Attorney, see PROSECUTING ATTORNEYS. Of Notary, see NOTARIES. Of Officer in General, see OFFICERS. Of Sheriff, see SHERIFFS AND CONSTABLES. Of State Officer, see STATES. Of United States Marshal, see UNITED STATES MARSHALS.)

DE QUARANTINA HABENDA. At common law, a writ which a widow, entitled to quarantine, or, to continue in the capital, messuage, or mansion-house, or some other house whereof she was dowable forty days after her husband's death, might sue out in case the heir or some other persons ejected her therefrom.[27] (See, generally, DOWER.)

Depreciated currency see 4 Cyc. 966 note 10.

Depreciated money see 4 Cyc. 947 note 91.

Depreciation in value see 7 Cyc. 1046 note 48.

18. Century Dict. [*quoted* in State *v.* Associated Press, 159 Mo. 410, 442, 60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151].

19. Standard Dict. [*quoted* in State *v.* Associated Press, 159 Mo. 410, 442, 60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151].

"The word 'deprive' 'conveys the idea of either taking away that which one has or withholding that which one may have.'" State *v.* Associated Press, 159 Mo. 410, 442, 60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151 [*citing* Crabb Synonymes]. See also Staples' Appeal, 52 Conn. 421, 423.

For significance of the word "deprived" in the constitutional provision that "no person shall be deprived of life, liberty or property without due process of law" see Wynehamer *v.* People, 13 N. Y. 378, 467. See also Grant *v.* Courter, 24 Barb. (N. Y.) 232, 238; Sharpless *v.* Philadelphia, 21 Pa. St. 147, 167, 59 Am. Dec. 759 note; 8 Cyc. 1086 *et seq.*; 2 Cyc. 305.

"Defraud" used instead of "deprive" in an indictment see Shubert *v.* State, 20 Tex. App. 320, 330.

20. **Distinguished from "agent"** see Herring *v.* Lee, 22 W. Va. 661, 667 [*citing* Story Agency, § 149 note].

"Deputy to congress," as used in a treaty with certain Indians, "may be as a person having a right to sit in that body, as, at that time, it was composed of delegates or deputies from the states, not as at present, representatives of the people of the states; or it may be as an agent or minister." The Cherokee Nation *v.* Georgia, 5 Pet. (U. S.) 1, 39, 8 L. ed. 25.

May be included within the meaning of the words "officers," "sheriffs," etc. People *v.* Wells, 86 N. Y. App. Div. 270, 275, 83 N. Y. Suppl. 789; Utah Rev. St. (1898) § 2498, subs. 17.

"The word 'deputies' as used in [Cal. Const. art. 11, § 8½] . . . should be liberally construed, so as to include all the subordinates of a county officer." Garnett *v.* Brooks, 136 Cal. 585, 586, 69 Pac. 298, per McFarland, J.

21. Webster Dict. [*quoted* in People *v.* Barker, 14 Misc. (N. Y.) 360, 363, 35 N. Y. Suppl. 727 (where it is said: "Deputy is used in composition with the names of various executive officers to denote an assistant empowered to act in their name, as deputy collector, deputy marshal, deputy sheriff"); Herring *v.* Lee, 22 W. Va. 661, 667].

22. Willis *v.* Melvin, 53 N. C. 62, 63.

23. Matter of Tilyou, 57 N. Y. App. Div. 101, 110, 67 N. Y. Suppl. 1097 [*citing* Shrewsbury's Case, 9 Coke 46*b*, 49]; Erwin *v.* U. S., 37 Fed. 470, 475, 2 L. R. A. 229.

24. Bouvier L. Dict. [*quoted* in Herring *v.* Lee, 22 W. Va. 661, 667].

25. Piland *v.* Taylor, 113 N. C. 1, 2, 18 S. E. 70 [*citing* Willis *v.* Melvin, 53 N. C. 62, 63], where it is said that he is regarded as an agent or servant of his principal, who must, as a general rule, do all things in his principal's name, and for whose misconduct the principal is responsible.

26. Tomlin L. Dict. [*quoted* in Willis *v.* Melvin, 53 N. C. 62, 63].

27. Aiken *v.* Aiken, 12 Oreg. 203, 206, 6 Pac. 682 [*citing* Jacob L. Dict. tit. "Quarantine;" Scribner Dower, c. 3, § 19].

DERANGED. As defined by statute, a term which embraces under the head of insane persons all except the natural born idiot.[28] (See, generally, INSANE PERSONS.)

DERELICT. Abandoned; deserted; east away.[29] Applied to shipping, boats or other vessels forsaken or found on the seas without any person in them;[30] danger of total loss — danger in a high degree, in consequence of abandonment.[31] Also goods which have been voluntarily abandoned and given up as worthless, the mind of the owner being alive to the circumstances at the time.[32] The term also signifies dry land.[33] (Dereliet: Land, see NAVIGABLE WATERS; WATERS. Personal Property in General, see ABANDONMENT; FINDING LOST GOODS. Vessels and Cargoes — In General, see ABANDONMENT; SHIPPING; Marine Insurance, see MARINE INSURANCE; Salvage, see SALVAGE.)

DERELICTION. At eommon law, a reeession of the waters of the sea, a navigable river, or other stream, by whieh land that was before eovered with water is left dry;[34] when the sea shrank baek below the usual water mark and remained there;[35] land added to a front traet by the permanent uneovering of the waters; the laying bare of the bottom by the retirement of the waters, as eontradistinguished from the building up of the bottom by deposits eausing the waters to recede.[36] In the eivil law, the voluntary abandonment of goods by the owner without the hope or the purpose of returning to the possession.[37] (See DERELICT.)

DE REPARATIONE FACIENDA. The name of a writ whieh lies by one tenant in eommon against the other, to eause him to aid in repairing the eommon property.[38] (See, generally, TENANCY IN COMMON.)

28. W. Va. Code (1891) p. 124 (4) [*quoted* in Hiett *v.* Shull, 36 W. Va. 563, 565, 15 S. E. 146].

29. Bouvier L. Dict.

30. 1 Sir Leoline Jenkins Works 89 [*quoted* in The Fairfield, 30 Fed. 700, 701; The Aquila, 1 C. Rob. 37, 41]. "Sir Leoline Jenkins has given a true definition in its most broad and aecurate sense." Per Story, J., in Rowe *v.* The Brig, 20 Fed. Cas. No. 12,093, 1 Mason 372, 374.

An intention to return to a ship will defeat dereliction. The Coromandel, Swab. 205 [*quoted* in Noreross *v.* The Laura, 14 Wall. (U. S.) 336, 344, 20 L. ed. 813; The Fairfield, 30 Fed. 700, 701; The Hyderabad, 11 Fed. 749, 754, 1 Biss. 112]. See also Cromwell *v.* The City Island, 6 Fed. Cas. No. 3,410, 1 Cliff. 221 [*citing* The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328; The Emulous, 8 Fed. Cas. No. 4,480, 1 Sumn. 207; The Beaver, 3 C. Rob. 292, 293; The Barefoot, 14 Jur. 841, 1 Eng. L. & Eq. 661].

The abandonment must have been final, without hope of recovery, or intention to return. Cromwell *v.* The Island City, 6 Fed. Cas. No. 3,410, 1 Cliff. 221 [*citing* The Aquila, 1 C. Rob. 37, 41]; Rowe *v.* The Brig, 20 Fed. Cas. No. 12,093, 1 Mason 372, 373 [*quoted* in The Hyderabad, 11 Fed. 749, 1 Biss. 112]. See also Tyson *v.* Prior, 24 Fed. Cas. No. 14,319, 1 Gall. 133; Warder *v.* La Belle Creole, 29 Fed. Cas. No. 17,165, 1 Pet. Adm. 31, 38.

31. The Canterbury, Young Adm. Nova Scotia 57, 60.

"There is no magic in the word 'derelict;' but the term imports a certain state of things containing elements which tend, on the general principles of salvage, to raise the amount of salvage award, for there are three conditions which a derelict generally fulfils." The Janet Court, [1897] P. 59, 62, 8 Aspin. 223, 66 L. J. Adm. 34, 76 L. T. Rep. N. S. 172.

32. Legge *v.* Boyd, 1 C. B. 92, 112, 9 Jur. 307, 14 L. J. C. P. 138, 50 E. C. L. 92. See also U. S. *v.* Stone, 8 Fed. 232, 244 [*citing* Abbott L. Dict.]; Lewis *v.* The Elizabeth & Jane, 15 Fed. Cas. No. 8,321, 1 Ware 33. See also Huntley's Case, Dyer 326*a*, 326*b*.

Until the spes recuperandi is gone and the animus revertendi is finally given up, property is not, in the sense of the law, dereliet and the possession left vaeant for the finder. The Bee, 3 Fed. Cas. No. 1,219, 1 Ware 336, 340 [*citing* The Aquila, 1 C. Rob. 37, 41, and *cited* in The Hyderabad, 11 Fed. 749, 754, 1 Biss. 112].

33. Warren *v.* Chambers, 25 Ark. 120, 121, 4 Am. Rep. 23, 91 Am. Dec. 538.

34. Warren *v.* Chambers, 25 Ark. 120, 121, 4 Am. Rep. 23, 91 Am. Dec. 538.

35. Sapp *v.* Frazier, 51 La. Ann. 1718, 1723, 26 So. 378, 72 Am. St. Rep. 493. See also 2 Blackstone Comm. 26 [*quoted* in Linthieum *v.* Coan, 64 Md. 439, 450, 2 Atl. 826, 54 Am. Rep. 775; Giraud *v.* Hughes, 1 Gill & J. (Md.) 249, 264].

36. Sapp *v.* Frazier, 51 La. Ann. 1718, 1723, 26 So. 378, 72 Am. St. Rep. 493.

37. Jones *v.* Nunn, 12 Ga. 469, 473.

"Dereliction or renunciation properly requires both the intention to abandon and external action. Thus the casting overboard of artieles in a tempest to lighten the ship, is not dereliction as there is no intention of abandoning the property in the ease of salvage." Livermore *v.* White, 74 Me. 452, 455, 43 Am. Rep. 600.

38. Bouvier L. Dict. [*citing* Cubitt *v.* Porter, 8 B. & C. 257, 268, 6 L. J. K. B. O. S. 306, 2 M. & R. 267, 15 E. C. L. 135].

DE REPLEGIARE or **DE REPLEGIARI.** Writ of replevin.[39]

DE RETORNO HABENDO. The name of a writ issued after a judgment has been given in replevin that the defendant should have a return of the goods replevied.[40] (See, generally, REPLEVIN.)

DE RIGORE JURIS. In strictness of law.[41]

DERIVATIA POTESTAS NON POTEST ESSE MAJOR, PRIMITIVA. A maxim meaning "The derivative power cannot be greater than the primitive."[42]

DERIVATIVE. Coming from another; taken from something preceding; secondary.[43] (Derivative: Conveyance, see DEEDS. Estate, see ESTATES. Settlement, see POOR PERSONS. Title, see TAXATION.)

DERIVE. To draw or receive, as from a source or origin, or by regular transmission.[44]

DEROGATION. The act of annulling or breaking a law, or some part of it.[45] (See, generally, STATUTES.)

DESCEND.[46] The word ordinarily denotes the vesting of the estate by operation of law in the heirs immediately upon the death of the ancestor.[47] But applying the general rules for the interpretation of words and phrases,[48] having especial reference to the context and to the intention of the parties,[49] the term, as used

39. Burrill L. Dict.

40. Bouvier L. Dict. See also Meyers *v.* Maybee, 10 U. C. Q. B. 200, 202.

41. Burrill L. Dict.

42. Black L. Dict. [*citing* Noy Max].

43. Bouvier L. Dict.

"Derivative title" see Atty.-Gen. *v.* Littledale, L. R. 5 Exch. 275, 282.

44. Century Dict. See also Gallagher *v.* Gallagher, 89 Wis. 461, 465, 61 N. W. 1104.

45. Webster Dict. [*quoted* in Sharon *v.* Sharon, 75 Cal. 1, 56, 16 Pac. 345]. See also Barber Asphalt Pav. Co. *v.* Watt, 51 La. Ann. 1345, 1350, 26 So. 70.

46. **Distinguished from "distribute"** see Grider *v.* McClay, 11 Serg. & R. (Pa.) 224, 232.

47. Wood *v.* Bullard, 151 Mass. 324, 25 N. E. 67, 7 L. R. A. 304; Dove *v.* Torr, 128 Mass. 38, 40; Potts *v.* Kline, 174 Pa. St. 513, 514, 34 Atl. 191, where it is said: "And its use is referred to in Haldeman *v.* Haldeman, 40 Pa. St. 29, as indicative of the character in which the remaindermen are to take, viz.: by inheritance from the first taker and not as a new stock."

48. See, generally, CONSTRUCTION, 8 Cyc. 1141.

Construction of words and phrases in contracts see CONTRACTS.

Construction of words and phrases in deeds see DEEDS.

Construction of words and phrases in statutes see STATUTES.

Construction of words and phrases in wills see WILLS.

"**The word 'descends' as used in V. S. § 2613,** is to be construed in accordance with the canon of construction, that, if words taken in their technical sense will make a statute inoperative in whole or in part, they will be taken in their popular sense." "Applying this rule, we construe the word . . . to include cases in which the use passes by will as well as cases in which it passes by operation of law." Mitchell *v.* Blanchard, 72 Vt. 85, 87, 47 Atl. 98.

49. **Context and intention of parties.**— See Wedekind *v.* Hallenberg, 88 Ky. 114, 123, 10 S. W. 368, 10 Ky. L. Rep. 696 (where it is said: "The clause last cited tends to show that the expression 'descend to her heirs,' used in the one in question was not employed by way of words of purchase or to express a devise, but merely that the testator expected and intended his bounty would, upon Mary's death, pass by descent to her heirs"); Spangenberg *v.* Guiney, 3 Ohio S. & C. Pl. Dec. 163, 165, 2 Ohio N. P. 39 (where it is said: "When the statute declares that in case the adopted child dies without issue the property shall descend not to his next of kin, but to that of the adopting parent, it means that in case the adopted child dies intestate, it shall so descend, for otherwise it would pass by devise and could not descend. And, furthermore, it means that in case he is the owner of the property at the time of his death, it shall so descend. Because no property can descend except that which the intestate owns at the time of his death. In other words, this statute is merely a branch of the general statutes governing descents, all of which imply, of course, that the deceased dies intestate, and that he owns the property at the time of his death"); Browning's Petition, 16 R. I. 441, 443, 16 Atl. 717, 3 L. R. A. 209 (where it is said: "The clause declares 'one half of said estates is to descend to said Edward's heirs and assigns, and the other half to descend to said George's heirs and assigns.' If the first takers take simply life estates, there will be nothing to descend from them to their heirs. The implication is that a fee was intended to be given to Edward and George. There are cases in which the word 'descend' has been taken in this sense. Criswell's Appeal, 41 Pa. St. 288; Eaton *v.* Tillinghast, 4 R. I. 276, 280").

Use of word cannot regulate course of descent.— "The words, to descend, in the expression 'to descend to the youngest son of his body lawfully begotten, and from him to the oldest heir male of said youngest son of his body begotten,' cannot have effect to

sometimes in a statutory provision and at other times in a will or other instrument in writing, has been variously construed as meaning: To belong to;[50] to go;[51] to go to;[52] to go down;[53] to go down, to pass down from the elder, to be derived by the younger;[54] to go over to;[55] to pass;[56] to pass or be transferred;[57] to pass by descent or inheritance; or be inherited by;[58] to pass

regulate the course of descent, since that is controlled by the statutes . . . and cannot be changed by the private will of any testator." Dennett *v.* Dennett, 40 N. H. 498, 501 [*quoted* in Halstead *v.* Hall, 60 Md. 209, 213]. And *compare* Harrington *v.* Gibson, 109 Ky. 752, 756, 60 S. W. 915, 22 Ky. L. Rep. 1486 (where it is said: "The word 'descend,' in the expression 'at her death the same to deseend to such of her children as may then be living,' would seem to refer to the course the property would take by descent").

50. Tate *v.* Townsend, 61 Miss. 316, 319; Johnson *v.* Morton, 10 Pa. St. 245, 248.

51. Borgner *v.* Brown, 133 Ind. 391, 396, 33 N. E. 92; Halstead *v.* Hall, 60 Md. 209, 211; Tate *v.* Townsend, 61 Miss. 316, 319. In Borgner *v.* Brown, 133 Ind. 391, 396, 33 N. E. 92, *supra*, the court said: "There could be no reason for construction here if instead of the word descend the testator had used the word go, and we are unable to believe that the word used was intended to provide for the contingency of James surviving him, and of Sarah A. surviving James, without issue, when, as widow, she should be limited to one-third of the land. To hold that the word descend was used in the sense of a limitation upon the fee so clearly devised to James would not only be in denial of the presumptions we have cited, but would reduce the fee in James to an estate for life, with two-thirds over to the children of Isaac and one-third, under the law, to the widow of James."

52. Doren *v.* Gillum, 136 Ind. 134, 139, 35 N. E. 1101 [*citing* Jones *v.* Crawley, 68 Ga. 175; Borgner *v.* Brown, 133 Ind. 391, 33 N. E. 92; Halstead *v.* Hall, 60 Md. 209; Moore *v.* Weaver, 16 Gray (Mass.) 305; Tate *v.* Townsend, 61 Miss. 316; 2 Sharswood & Budd Lead. Cas. 273]; Brooks *v.* Kip, 54 N. J. Eq. 462, 468, 35 Atl. 658 [*citing* Den *v.* Blackwell, 15 N. J. L. 386, 389; Ballentine *v.* Wood, 42 N. J. Eq. 552, 9 Atl. 582; Aydlett *v.* Swope, (Tenn. Sup. 1875) 17 S. W. 208, 209; Stratton *v.* McKinnie, (Tenn. Ch. App. 1900) 62 S. W. 636, 640 [*citing* Halstead *v.* Hall, 60 Md. 209]. And *compare* Keim's Appeal, 125 Pa. St. 480, 487, 17 Atl. 463, where it is said: "It is suggested that the use of the word 'descend' by the testatrix, indicates an intention that the children should take directly from their respective parents, and not under her will, by way of remainder, but we think an examination of the whole will discloses no such intention. In the next preceding clause, after giving a life estate to other two of her nephews, she directs that immediately after the death of either life tenant, 'the undivided half of the one so dying shall go to and be enjoyed in equal shares to his children or to their heirs.' In this, she evidently intended that the remainder thus disposed of should go to the children under the provisions of her will, and not that they should take as heirs of their deceased parent." But see Spangenberg *v.* Guiney, 3 Ohio S. & C. Pl. Dec. 163, 165, 3 Ohio N. P. 39, where it is said: "The fallacy in plaintiff's contention arises from a misinterpretation of the words 'shall descend to.' It gives them the force of 'shall go to,' and this without regard to whether the adopted ehild owns the property at his death or dies testate or intestate. But the word 'descend' has a well defined meaning in the law, as the [aecepted] definitions of the word 'deseent' will show."

53. Rountree *v.* Pursell, 11 Ind. App. 522, 39 N. E. 747, 749 (where it is said: "In the law relating to the devolution of property rights, 'descend' may mean 'ascend' as 'descending in the ascending line'; and a son may be the ancestor of his father"); Ballentine *v.* Wood, 42 N. J. Eq. 552, 558, 9 Atl. 582 (where it is said: "The word 'deseend' was used, not to express descent in the legal sense, but devolution by force of the devise, and the use of it was probably due to the fact that while the gift for life was to parents, the gift in remainder was to children. It is as if the testator had said 'go down' to the ehildren").

54. Borgner *v.* Brown, 133 Ind. 391, 398, 33 N. E. 92.

55. Perrin *v.* Geddes, 9 East 170, 182, where it is said: "The word descend cannot be taken here in its strict sense, because it is applied to personalty as well as realty. The testator only meant that the estate should go over to the *hæres factus* in the event which he provided for."

56. Timberlake *v.* Parish, 5 Dana (Ky.) 345, 347 (where it is said: "He must have used the word 'descend' synonymously with pass, or other word of purchase from himself"); Halstead *v.* Hall, 60 Md. 209, 214 (where it is said: "In a popular sense [it is a word] of no higher import than to 'pass' or to 'go'"]; Childs *v.* Russell, 11 Mete. (Mass.) 16, 21.

57. Childs *v.* Russell, 11 Metc. (Mass.) 16, 22.

58. Baker *v.* Baker, 8 Gray (Mass.) 101, 119, where it is said: "The verb 'descend' is sometimes used in the sense of 'pass by descent or inheritance,' or 'be inherited by.' It is so used in our statute of descents, apparently to express by a single term, what might otherwise require a circumlocution. . . . But when so used, it is usually accompanied by other words, which prevent all ambiguity. These phrases are, 'shall descend to his father,' 'to his mother,' to 'his next of kin,' which may be in the aseending or

from;[59] to vest in;[60] to be vested in.[61] (See Descendant; Descendible; and, generally, Descent and Distribution; Wills.)

DESCENDANT.[62] One who descends, as offspring, however remotely;[63] correlative to ancestor or an ascendant;[64] one who has issued from an individual, including children, grandchildren and their children to the remotest degree;[65] issue;[66]

collateral line, as well as the descending; but in these cases these terms so qualify the word 'descend,' as to give the effect of 'pass by inheritance' to the person named or described."

59. Taney *v.* Fahnley, 126 Ind. 88, 91, 25 N. E. 882, where it is said: "The word 'descend,' as used in the deed, means to pass from the grantee to her heirs, and is to the same effect as if it read to her during her natural life and to her heirs."

60. Johnson *v.* Morton, 10 Pa. St. 245, 248, where it is said: "It is well remarked that the word descend is inapplicable to any estate less than a fee; that the testator uses it as synonymous with 'belong to,' or 'vest in,' which would carry a fee."

61. Aydlett *v.* Swope, (Tenn. Sup. 1875) 17 S. W. 208, 209, where it is said: "The word 'descend' is not here used in its technical sense, but means 'shall go to' or 'be vested in.'"

62. Not a word of inheritance.— In Van Beuren *v.* Dash, 30 N. Y. 393, 422, Denio, C. J., said: "The word descendants has reference to genealogy, or the succession of persons in the family relation, and has no necessary connection with the laws of inheritance. Land descends, in certain cases, from a son to his father, and from a man to his brothers, but this does not prove that the father is the descendant of his son, or the brother of his brother, in any possible sense. It is correctly said, that the law-books and other writings commonly speak of lineal descendants; and it is argued, that this would be improper, if there were not another species of descendants; from which it is inferred, that there are collateral descendants. But we rarely meet with this latter expression. The truth is, that the word lineal in that connection is a pleonasm employed to emphasize the expression, and not, in general, to distinguish it from any other species of descendants; and so, where collateral descendants are spoken of, an ellipsis is made use of — the phrase meaning the descendants of collaterals."

"Issue or descendants" as words of purchase see Barry's Appeal, (Pa. 1887) 10 Atl. 126, 127.

63. Webster Dict. [*quoted* in Tichenor *v.* Brewer, 98 Ky. 349, 352, 33 S. W. 86, 17 Ky. L. Rep. 936; Brawford *v.* Wolfe, 103 Mo. 391, 395, 15 S. W. 426]; Page Wills, § 527 [*quoted* in Waldron *v.* Taylor, 52 W. Va. 284, 289, 45 S. E. 336].

64. Bates *v.* Gillett, 132 Ill. 287, 297, 24 N. E. 611; Hillen *v.* Iselin, 144 N. Y. 365, 374, 39 N. E. 368; Webster Dict. [*quoted* in Tichenor *v.* Brewer, 98 Ky. 349, 352, 33 S. W. 86, 17 Ky. L. Rep. 936; Brawford *v.* Wolfe, 103 Mo. 391, 395, 15 S. W. 426]; Page Wills, § 527 [*quoted* in Waldron *v.* Taylor, 52 W. Va. 284, 289, 45 S. E. 336].

65. Bryan *v.* Walton, 20 Ga. 480, 512 [*quoting* Bouvier L. Dict., and *citing* Butler *v.* Stratton, 3 Bro. Ch. 367, 370, 29 Eng. Reprint 587; Pierson *v.* Garnet, 2 Bro. Ch. 38, 47, 226, 230, 29 Eng. Reprint 20, 126]; Huston *v.* Read, 32 N. J. Eq. 591, 599; Bouvier L. Dict. [*quoted* in Jewell *v.* Jewell, 28 Cal. 232, 236; Tichenor *v.* Brewer, 98 Ky. 349, 352, 33 S. W. 86, 17 Ky. L. Rep. 936; Waldron *v.* Taylor, 52 W. Va. 284, 289, 45 S. E. 336].

Does not include brothers and sisters.— In Hamlin *v.* Osgood, 1 Redf. Surr. (N. Y.) 409, 411 [*cited* in Tompkins *v.* Verplanck, 10 N. Y. App. Div. 572, 577, 42 N. Y. Suppl. 412; Waldron *v.* Taylor, 52 W. Va. 284, 290, 45 S. E. 336], the court said: "Neither her brother nor sister can take under the term 'descendants.' 'Descendants' does not mean next of kin or heirs at law generally, as these terms comprehend those as well in the ascending as in the descending line, and collaterals." See also West *v.* West, 89 Ind. 529, 531, where the court, in construing a statute relative to devises, said: "We are of opinion, however, that the word 'descendant,' as used in the statute above, does not apply to a brother of a testator. It refers, we think, exclusively to a lineal descendant, as a child or a grandchild."

66. Bates *v.* Gillett, 132 Ill. 287, 297, 24 N. E. 611; Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq. 475, 486 [*quoting* 2 Jarman Wills 33, where it is said: "The word issue, . . . when not restrained by the context, is co-extensive and synonymous with descendants, comprehending objects of every degree"]; Van Beuren *v.* Dash, 30 N. Y. 393, 414 [*quoting* Webster Dict.] (where it is said: "The use of the word descendants in a devise, has received the limited construction which confines it to issue"); Barstow *v.* Goodwin, 2 Bradf. Surr. (N. Y.) 413, 416; *In re* Waln, 189 Pa. St. 631, 633, 42 Atl. 299; Waldron *v.* Taylor, 52 W. Va. 284, 289, 45 S. E. 336 [*quoting* Page Wills, § 527, where it is said: "The term includes the most remote lineal offspring, and is practically synonymous with 'issue' in its legal meaning; hence it excludes collateral relations; nor does it include relatives in the ascending line"]. See also Soper *v.* Brown, 136 N. Y. 244, 249, 32 N. E. 768, 32 Am. St. Rep. 731 [*citing* 2 Jarman Wills 101; 2 Williams Ex. 1112; 2 Washburn Real Prop. 561] (where the court, in speaking of the word "issue" said "that while the meaning of the word 'issue' is not inflexible, and may in some cases designate 'children' only, depending upon the intention as disclosed upon the whole instrument, nevertheless where its meaning is not restrained by the context, it is to be interpreted as synonymous with 'descendants,' and as comprehending objects of every degree"); Armstrong *v.* Moran, 1

issue of the body of the person named of every degree;[67] issue of any degree;[68] the issue of a deceased person;[69] any person proceeding from an ancestor, in any degree;[70] offspring in the line of generation;[71] offspring;[72] a person who is descended from another,—that is, who proceeds from the body of another, however remotely;[73] all those who proceeded from the body of the person named;[74] children and grandchildren;[75] children and their children and their children to any degree;[76] an heir in the direct descending line.[77] The term does not mean

Bradf. Surr. (N. Y.) 314, 320; Gormley's Estate, 154 Pa. St. 378, 380, 25 Atl. 814, 816.

A term less broad than "issue."— In Hillen *v.* Iselin, 144 N. Y. 365, 374, 39 N. E. 368, the court said: "The learned counsel for the appellant has shown that the word 'descendant,' according to its accurate lexicographical and legal meaning, designates the issue of a deceased person, and does not describe the child of a parent who is still living. The word is the correlative of ancestor. The word issue is a word of broader import and may include the children of a living parent as well as the children or descendants of one who is dead. But in an accurate sense one cannot have a living ancestor, nor can a living person, although he may have children, have descendants."

67. Tichenor *v.* Brewer, 98 Ky. 349, 352, 33 S. W. 86, 17 Ky. L. Rep. 936 [*quoting* Rapalje & L. L. Dict.] (where it is said: "Again they say 'it does not mean collateral relations'"); Bates *v.* Gillett, 132 Ill. 287, 297, 24 N. E. 611 (where it is said: "Such as children, grandchildren and great-grandchildren, and all others in the direct descending line"); Tompkins *v.* Verplanck, 10 N. Y. App. Div. 572, 577, 42 N. Y. Suppl. 412; Hamlin *v.* Osgood, 1 Redf. (N. Y.) 409, 411 [*citing* Crossly *v.* Clare, Ambl. 397, 27 Eng. Reprint 264; Legard *v.* Haworth, 1 East 120].

An apt term in a will.— In Bates *v.* Gillett, 132 Ill. 287, 297, 24 N. E. 611 [*citing* Crossly *v.* Clare, Ambl. 397, 27 Eng. Reprint 264], it is said: "And so it has been held that 'descendants' is a good term of description in a will, and includes all who proceed from the body of the person named, to the remotest degree." See also Waldron *v.* Taylor, 52 W. Va. 284, 290, 45 S. E. 336.

68. Huston *v.* Read, 32 N. J. Eq. 591, 599; 2 Jarman Wills 632 [*quoted* in Levering *v.* Orrick, 97 Md. 139, 145, 54 Atl. 620].

69. Hillen *v.* Iselin, 144 N. Y. 365, 374, 39 N. E. 368.

Under this description is comprised every individual proceeding from the stock or family referred to by the testator. 2 Williams Ex. (7th Am. ed.), p. 976 [*quoted* in Levering *v.* Orrick, 97 Md. 139, 54 Atl. 620].

70. Stormouth Dict. [*quoted* in Tichenor *v.* Brewer, 98 Ky. 349, 352, 33 S. W. 86, 17 Ky. L. Rep. 936]; Webster Dict. [*quoted* in Van Beuren *v.* Dash, 30 N. Y. 393, 414, per Ingraham, J.].

71. Webster Dict. [*quoted* in Van Beuren *v.* Dash, 30 N. Y. 393, 414, per Ingraham, J.].

72. Stormouth Dict. [*quoted* in Tichenor *v.* Brewer, 98 Ky. 349, 352, 33 S. W. 86, 17 Ky. L. Rep. 936].

73. Bates *v.* Gillett, 132 Ill. 287, 297, 24 N. E. 611 [*cited* in Waldron *v.* Taylor, 52 W. Va. 284, 290, 45 S. E. 336].

"Nephews and nieces of a testator are not his descendants." Van Gieson *v.* Howard, 7 N. J. Eq. 462, 463. And "A legacy to a sister's child is not a legacy to a descendant of the testator." Armstrong *v.* Moran, 1 Bradf. Surr. (N. Y.) 314 [*cited* in Waldron *v.* Taylor, 52 W. Va. 284, 290, 45 S. E. 336].

74. Crossly *v.* Clare, Ambl. 397, 27 Eng. Reprint 264 [*quoted* in Van Beuren *v.* Dash, 30 N. Y. 393, 422 (per Denio, C. J.); Armstrong *v.* Moran, 1 Bradf. Surr. (N. Y.) 314, 320].

75. Walker *v.* Walker, 25 Ga. 420, 428.

"The words, 'children' and 'descendants' are not synonymous as is argued, but the word 'descendants' includes children; comprises issue of every degree." Neilson *v.* Brett, 99 Va. 673, 677, 40 S. E. 32 [*citing* 2 Jarman Wills 98]. See also Lagard *v.* Haworth, 1 East 120, 130, per Lawrence, J. [*cited* in Van Beuren *v.* Dash, 30 N. Y. 393, 415, per Ingraham, J.] (where it is said: "The word 'descendants' cannot, as contended for, be taken in exclusion of children and grand-children"); Bates *v.* Gillett, 132 Ill. 287, 297, 24 N. E. 611 (where it is said: "Now, children are, *eo nomine*, descendants; but it by no means follows that descendants are necessarily children").

That "descendants" will not be embraced within the term "children," "grandchildren" or more remote descendants, unless such interpretation is imperative see 7 Cyc. 126.

76. Ralph *v.* Carrick, 11 Ch. D. 873, 883, 48 L. J. Ch. 801, 40 L. T. Rep. N. S. 505, per James, L. J., where it is said: "In this case there is what appears to me to be perfectly unambiguous word — 'descendants' — a word which I venture to say no layman or lawyer would use to designate children only. . . . And it is difficult to conceive any context by which the word 'descendants' could be limited to mean children only."

In ordinary parlance the word means all descendants, and not only children. Ralph *v.* Carrick, 11 Ch. D. 873, 883, 48 L. J. Ch. 801, 40 L. T. Rep. N. S. 505, per Brett, L. J.

77. West *v.* West, 89 Ind. 529, 531.

"Descendants does not mean next of kin, or heirs at law generally, as these terms comprehend those as well in the ascending as in the descending line, and collaterals." Hamlin *v.* Osgood, 1 Redf. Surr. (N. Y.) 409, 411 [*citing* Crossly *v.* Clare, Ambl. 397, 27 Eng. Reprint 264; Legard *v.* Haworth, 1 East 120, and *cited* in Bates *v.* Gillett, 132 Ill. 287, 297, 24 N. E. 611]. But see Walker *v.* Walker, 25 Ga. 420, 428.

any relative to whom in some possible contingency property might descend, but lineal descendants — issue of the body;[78] and as used in its natural and ordinary sense, as a definite description of all those persons living at a particular time, it means those who can trace their origin, immediately or remotely, to a given person, as an ancestor.[79] As used in a statute, the term may mean those who descend in a direct line from the husband,— children, grandchildren, etc.;[80] in statutes disposing of real and personal estate in cases of intestacy, one sprung from the body of the person spoken of — a lineal descendant.[81] Again, when used either in written or spoken language, when unconnected with any qualifying word, the term is used to describe the children, grandchildren, etc., of the person named, and where that person is dead, it embraces his posterity, however remote, but it is confined to them.[82] (See CHILDREN; HEIRS; ISSUE; OFFSPRING; and, generally, DESCENT AND DISTRIBUTION; WILLS.)

DESCENDIBLE. Devisable.[83] (See DESCEND; DESCENDANTS; DEVISE; and, generally, DESCENT AND DISTRIBUTION.)

Distinguished from "heirs of the body."— In Schmaunz *v.* Goss, 132 Mass. 141, 144, the court said: "The word 'descendants' has not the same precise technical signification as the words 'heirs of the body.'"

Sometimes synonymous with "heirs."— In Huston *v.* Read, 32 N. J. Eq. 591, 599, the court said: "The legacies given to her [a devisee under a will] by the first and fourth sections also lapsed. The substitutionary words in the first are the same — 'descendants'— and though, in the fourth, they are 'heirs and descendants,' the meaning of the testator was the same; the words 'heirs' and 'descendants' were used synonymously, and he meant lineal descendants."

"The descendants from what is called the direct descending line. The term is opposed to that of ascendants." Bouvier L. Dict. [*quoted* in Jewell *v.* Jewell, 28 Cal. 232, 236; Bryan *v.* Walton, 20 Ga. 480, 512; Armstrong *v.* Moran, 1 Bradf. Surr. (N. Y.) 314, 320].

"The term descendants does not include the ascending line." Jewell *v.* Jewell, 28 Cal. 232, 236.

"When the term 'descendant' is used in a will, it means only lineal heirs,— those in the direct descending line from the person named,— unless there is a clear indication of intention on the part of the testator to enlarge its meaning." Bates *v.* Gillett, 132 Ill. 287, 297, 24 N. E. 611 [*citing* Walker *v.* Walker, 25 Ga. 420; Baker *v.* Baker, 8 Gray (Mass.) 101; Barstow *v.* Goodwin, 2 Bradf. Surr. (N. Y.) 413, and *quoted* in Waldron *v.* Taylor, 52 W. Va. 284, 290, 45 S. E. 336].

78. Waldron *v.* Taylor, 52 W. Va. 284, 290, 45 S. E. 336 [*citing* Armstrong *v.* Moran, 1 Bradf. Surr. (N. Y.) 314, 319].

79. Baker *v.* Baker, 8 Gray (Mass.) 101, 120 [*cited* in Levering *v.* Orrick, 97 Md. 139, 146, 54 Atl. 620; Waldron *v.* Taylor, 52 W. Va. 284, 289, 45 S. E. 336].

Includes only mediate or immediate issue.— In Van Beuren *v.* Dash, 30 N. Y. 393, 419, 422 [*citing* 2 Blackstone Comm. 223, 224], Denio, C. J., said: "It cannot for a moment be maintained, that, according to the common use of the word descendants, it is not limited to such persons as proceed mediately or immediately from the body of the person of whom it is predicated, in the course of generation. . . . If we turn to the chapter of Blackstone's Commentaries, in which he treats of title by descent, we shall find the word descendant constantly used to denote the issue, mediate or immediate, of the person of whom those descendants are predicated, and never in a sense which would include collateral relatives." See also Tichenor *v.* Brewer, 98 Ky. 349, 352, 33 S. W. 86, 17 Ky. L. Rep. 936 [*citing* Bouvier L. Dict.; Rapalje & L. L. Dict.]; Waldron *v.* Taylor, 52 W. Va. 284, 290, 45 S. E. 336.

80. Brawford *v.* Wolfe, 103 Mo. 391, 395, 15 S. W. 426, where it is said: "It does not apply to collateral or ancestral kinship."

81. "And is never used as synonymous with, or comprehensive of, any other class of relatives." Armstrong *v.* Moran, 1 Bradf. Surr. (N. Y.) 314, 319.

82. Van Beuren *v.* Dash, 30 N. Y. 393, 419, per Denio, C. J., where it is said: "Thus, we speak of the descendants of Abraham, of William the Conqueror, of George the Third, and of the first and second President Adams, of Jefferson and Alexander Hamilton; while we say of Queen Elizabeth, of William of Orange, of Washington and Madison, that they left no descendants, or, in the words of the statute, that they respectively died, leaving no child or other descendant. These are common forms of speech, and the meaning is perfectly definite, and it is such as I have mentioned. The word is invariably employed in that sense, in books of history, in memoirs, in biographies, in works on genealogy, and in almost every book which treats of men and their affairs."

83. Per Lord Mansfield, C. J., in Roe *v.* Griffiths, 1 W. Bl. 605, 606 [*quoted* in Collins *v.* Smith, 105 Ga. 525, 530, 31 S. E. 449; Varick *v.* Jackson, 2 Wend. (N. Y.) 166, 183, 19 Am. Dec. 571].