Michigan Law Review

Volume 1 | Issue 2

1902

Note and Comment

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Recommended Citation
Floyd R. Mechem, *Note and Comment*, 1 MICH. L. REV. 127 (1902).
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MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE, $2.50 PER YEAR. . . . . . 35 CENTS PER NUMBER

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NOTE AND COMMENT

THE LAW REVIEW.—The reception accorded to MICHIGAN LAW REVIEW, both by the alumni of the Law Department and by the profession generally, has been so enthusiastic and generous as not only to justify its establishment but also to ensure its success and influence. For this hearty reception of the REVIEW, its founders wish to acknowledge their obligation, and to pledge their best endeavors that it shall continue to merit appreciation and support.

THE LAW SCHOOL.—The Law Department enters upon its forty-fourth year with most excellent prospects. The equipment for work was never before so good. The attendance promises to considerably exceed that of last year. Although registration is not yet closed, the entering class is already the largest in the history of the department. It is too early to give the final figures, but those of last year may be of interest:

Resident Graduates	3	
Third Year Students	276	
Second Year Students	246	
First Year Students	250	
Special Students	52	
Students also enrolled in the Department of Literature, Science, and the Arts	27	—854
Students enrolled in the Department in the Summer Session	56	
	910	
Deduct for names counted twice	27	
Total	883	

No vacancies have occurred in the Faculty list, while the new assistant-professorship recently established, has been filled by the appointment of Mr. Frank L. Sage, of Buffalo, N. Y., a graduate of the department and a teacher of established reputation. Mr. Sage has been engaged in successful practice at Buffalo, but a love of teaching and a fondness for the academic life have happily united to induce him to return to Ann Arbor. The regular teaching staff now numbers sixteen, fourteen of whom reside in Ann Arbor and give their entire time to the law school, while one other is on the bench and one engaged in general practice. In addition to the regular staff, fourteen special lecturers give regular courses upon the subjects embraced within their respective lines of work.

TRADE-MARK—INVENTED WORD—WORDS EXPRESSING CHARACTER OR QUALITY.—The English trade-mark statute denies protection as a trade-mark for words having "reference to the character or quality of an article" unless it be an "invented" word. The National Biscuit Company of the United States applied to the comptroller-general of Patents, Designs and Trade-marks of England for the registration of the word "Uneeda" as a trade-mark to be applied to certain goods of its manufacture. The registration was denied for the reasons, first, that the word was not an "invention" of the applicant, and for the further reason that the word had "reference to the character and quality" of the article. Motion was then made by the applicant for an order requiring the registration but it was denied by the supreme court of judicature. An appeal was then taken to the court of appeal and the conclusion of the lower court affirmed. The decisions follow the conclusion of the comptroller-general in determining that no combination of common English words though some of them be misspelled was "invention" as that word was to be interpreted in the statute. And found, in spite of the affidavit of President Crawford that "Uneeda" was the name of an Indian maiden, that it was a combination of the English words "You-need-a" with the first misspelled, and that no advantage came to the applicant by reason of the misspelling. It is easier to assent to the reasonableness of this conclusion than to the further conclusion of the court that "these words are, and are intended to be, commendatory and suitable to describe something which a purchaser would find comforting and advantageous to use as being of the quality and character which would be suitable for his wants." If as used the word or words amount to a declaration to all people who might have occasion to use an article like the thing to which they are applied that it will satisfy their need it is difficult to understand how they define the "character" of the thing. That might be as well said of a plow or a windmill as of a biscuit, and it speaks the same thing to every one, to the man with good digestion as to the dyspeptic who can't eat biscuits of any kind. Can it be said that the man who is offered for the first time a "Uneeda" biscuit, never having heard of it before, would get any information about the "character" of the biscuit offered from this trade name alone? So, too, as to "quality." If I tell the man to whom I offer a pair of boots, "You need them" (Uneedem" if you please) does that statement have any reference to their "quality?" As ordinarily understood is not the declaration one to the effect that what

the man needs is boots, without directing attention to the "quality" of the particular boots offered as being what he needs?

It is to be noted that this same word was before the circuit court for the southern district of New York in a proceeding to enjoin the use of the term "Iwanta" as an infringement of it. The term "Uneeda" was held a valid trade-mark and the claim of infringement sustained. This last case is reported as *National Biscuit Co.* v. *Baker*, 95 Fed. Rep. 135. The principal case is reported [1901] 1 Ch. 550 and on appeal [1902] 1 Ch. 783, and is cited *In re* Uneeda Trade-Mark.

STATE QUARANTINE LAWS AS AFFECTING INTER-STATE OR FOREIGN COMMERCE.—An interesting and important question involving the validity of a state quarantine law so far as it affects inter-state or foreign commerce was presented in the recent case of *Compagnie Francaise* v. *State Board of Health of Louisiana* decided by the supreme court of the United States in June, (22 Sup. Ct. Rep. 811). The law of Louisiana which was called in question provided for a board of health, and authorized the board to declare in quarantine any parish, town or city infected with any contagious or infectious disease. It also provided that the board might, "in its discretion, prohibit the introduction into any infected portion of the state, persons acclimated, unacclimated, or said to be immune, when in its judgment the introduction of such persons would add to or increase the prevalence of the disease." The board had declared several towns and parishes to be in quarantine and had also passed a resolution declaring that, in case of such quarantine, "no body or bodies of people, immigrants, soldiers or others shall be allowed to enter said town, city or parish, so long as said quarantine shall exist."

While these rules were in force, the French Company attempted to land certain Italian immigrants from one of its ships, at or near New Orleans. It averred that these immigrants were found upon inspection to be free from any infectious or contagious diseases, but that the president of the board of health forbade their landing in any one of a number of places because they were already in quarantine. It was also averred that the president further informed the company that if it attempted to land the immigrants in any place contiguous to New Orleans, not already in quarantine, that place would immediately be put in quarantine and the landing prevented. The company brought an action against the state board in the state courts praying for an injunction against the enforcement of the rules and damages against the members for enforcing them, contending that these rules were void as constituting an interference with commerce with foreign nations and as depriving the plaintiff of property and rights without due process of law, and as denying to it the equal protection of the laws. It was alleged that the law as a health measure was merely colorable, and that its true purpose was, not to promote the public health, but to arbitrarily prevent the landing of Italian immigrants. The trial court rendered judgment against the company, and this was affirmed by the supreme court of the state (51 La. Ann. 645, 25 So. Rep. 591) and the case was taken by writ of error to the supreme court of the United States. That court affirmed the judgments of the state courts, hold-

ing, in an opinion written by Mr. Justice White, that quarantine laws belong to that class of local regulations which may be enforced until superseded by Congress, although such enforcement may incidentally affect or interfere with inter-state or foreign commerce and not to that class in which the inaction of Congress amounts to a declaration that commerce in that respect shall be free from any regulation. *Louisiana* v. *Texas*, 176 U. S. 1, 21, 44 L. ed. 347, 355, 20 Sup. Ct. Rep. 251, 258, and *Morgan's Co.* v. *Louisiana Board of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114, were chiefly relied upon. As to the alleged covert purpose to prohibit immigration, the court held that it must pass upon the law as it appeared; that the possibility of abuse under it would not justify declaring it void, and that "it will be time enough to consider a case of such supposed abuse when it is presented for consideration." Justices Brown and Harlan dissented, in an opinion by the former. Their positition was that a statute which thus authorized the exclusion of any person, however healthy, and for an indefinite and possibly permanent period went beyond the legitimate scope of a health-regulation and amounted to a prohibition of commerce. *Hannibal, etc., R. Co.*, v. *Husen*, 95 U. S. 465, 24 L. ed. 527, was cited as directly in point, and *State* v. *The Constitution*, 42 Cal. 578, 10 Am. Rep. 303, and *Bangor* v. *Smith*, 83 Me. 422, 22 Atl. Rep. 379, 13 L. R. A. 686, were cited as analogous.

DRUGGIST—LIABILITY FOR NEGLIGENCE.—Cases involving the liability of druggists for alleged negligence in preparing or dispensing drugs continue to appear. [See 1 MICH. L. REV. 63.] In one of the most recent it was alleged that the plaintiff wrote to defendant "Will you please send me 50c worth of Phos Phorus By express to Colect on Delever and if it works as I Think it will Thare will Bee A Big Demand for it." He alleged also that in response, defendant sent him by express three sticks of phosphorus immersed in water in a glass bottle labeled "phosphorus," but without any other written directions or warning whatsoever accompanying it. He removed the phosphorus from the bottle, and while handling and examining it, it exploded or ignited and burned him badly. The action was to recover damages, the complaint being that defendant was aware of the danger while plaintiff was not, and that; under the circumstances, the defendant should have warned the plaintiff of the risk. It was also contended that plaintiff's letter was so illiterate that it ought to have apprised defendant that the plaintiff was not a suitable person to intrust with the drug without specific warning as to its dangerous qualities. A demurrer to the petition was sustained, the court holding that a druggist, who supplies a well-known article in pursuance of a request for it by a person of maturity and apparently in the possession of his faculties, is not bound to point out its dangerous character or the manner in which it can be safely used or handled, unless there be something in the circumstances indicating that the purchaser cannot be safely intrusted with it. With respect of the alleged illiteracy, the court said that it was not safe to declare that a man who could not spell or compose correctly was to be therefore deemed unfit to be intrusted with dangerous substances. *Gibson* v. *Torbert* (1901), — Iowa — , 88 N. W. Rep. 443, 56 L. R. A. 98.

On the other hand, if a druggist fills an order for calomel by supplying morphine in a box labeled calomel, there may be found to be such gross neg-

ligence as will justify exemplary damages. *Smith* v. *Middleton* (1902), — Ky. — , 66 S. W. Rep. 388 56 L. R. A. 484. And the druggist is not relieved of liability by the fact that the negligence was that of a registered pharmacist, employed by him, although such persons are alone permitted, by the statute, to fill prescriptions. *Burgess* v. *Sims Drug Co.* (1901), — Iowa — , 86 N. W. Rep. 307, 54 L. R. A. 364. To fail to label a bottle containing poison with the word "Poison" as required by the statute will make the druggist liable for an injury to one who is ignorant of its character, but such a statute, it is held, does not apply to medicines compounded upon a physician's prescription, even though they contain poison. *Wise* v. *Morgan* (1898), 101 Tenn. 273, 48 S. W. Rep. 971, 44 L. R. A. 548.

CONSTITUTIONAL LAW—INTER-STATE COMMERCE—CHARGING MORE FOR SHORTER THAN FOR LONGER HAUL.—The constitution of Kentucky forbids a common carrier to charge more for the transportation of passengers or freight of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but provides that the railroad commission may, upon investigation, for special reasons, relieve a carrier from the prohibitions. Two cases involving the validity and effect of this provision, in view of the Fourteenth Amendment, were recently before the supreme court of the United States. In the first of these cases (*Louisville Railroad Co.* v. *Kentucky*, 183 U. S. 503, 22 Sup. Ct. Rep. 95), it was held that, as to freight transported wholly within the State, the provision could not be impeached, either because it deprived the railroad company of its property without due process of law, or because it denied to the company the equal protection of the laws; and as to any interference with inter-state commerce resulting from its enforcement, it was held that this was too remote and indirect to be considered. In the second case however, (*Louisville, etc., Railroad Co* v. *Eubank*, 184 U. S. 27), it was held that, when applied to a long haul of goods from without the state, to a point within the state, and a short haul from one point to another within the state, over the same line and in the same direction the carrier would be obliged to fix his inter-state rate with some reference to the state rate, and that to this extent the provision operated as an attempted regulation of inter-state commerce, and was void. From the latter decision, Justices Brewer and Gray dissented. They contended that the effect of the provision was, not to compel the carrier to make his inter-state rate the same as the state rate, but merely to make the state rate the same as the inter-state rate, and that this was valid in the absence of any complaint that the inter-state rate was so unreasonably low as to interfere with the carrier's constitutional rights.

MALICIOUS PROSECUTION OF PURELY CIVIL ACTION WITHOUT ARREST OF PERSON OR SEIZURE OF PROPERTY.—The vexed question whether an action may be maintained for maliciously prosecuting a civil action where there was neither arrest of the person nor seizure of property, was elaborately discussed in the late case of *Luby* v. *Bennett*, (1901), 111 Wis. 613, 87. N. W.

Rep. 804, 56 L. A. 261, and the conclusion reached that the weight of English and American authority is opposed to the right of action. (The rule, however, was held not to apply to a case wherein the charge was that there had been a malicious and baseless prosecution of an action to dissolve a partnership on the ground of the misconduct of the defendant partner, and thereby to deprive him of his right to the possession and enjoyment of the partnership property. *Quartz Hill Consol. Gold Min. Co.* v. *Eyre*, L. R. 11 Q. B. Div. 674, was cited with approval.)

On the other hand, the supreme court of Nebraska, a month later, sustained the right of action, declaring that it is not only supported by the majority of the late decisions in this country, but rests upon the more weighty and satisfactory reasons. *McCormick Harv. Mach. Co* v. *Willan* (1901), — Neb. —, 88 N. W. Rep. 497, 56 L. R. A. 338. *Kolka* v. *Jones*, 6 N. Dak. 461, 71 N. W. Rep. 558, was cited with approval.

IS IT FRAUD FOR A PLAINTIFF TO CONCEAL DEFENSES TO HIS OWN ACTION? —In *Trveler's Protective Association* v. *Gilbert*, (1901) 111 Fed. Rep. 270, 49 C. C. A. 309, 55 L. R, A. 538, there was a bill in equity to set aside a judgment because, among other reasons, the plaintiff, as it was alleged, had fraudulently misstated and suppressed the real facts of the case in her complaint in the action in which the judgment was obtained *i. e.*, that she alleged death from an accidental over-dose of drugs when she knew that the drug was taken with suicidal intent. Speaking to this point the court said: "The contention is that the appellee should have pleaded herself out of court by alleging facts which disclosed no cause of action; in other words, that she should never have instituted her suit at all. This is high ground to occupy, and enters into the domain of morals and conscience; and into this, which in a large sense is in the proper domain of equity, we will follow it. Even if appellee knew (and for the purpose of this case, under the pleadings, we must assume she did know) that her husband intentionally committed suicide, had she not the right, under the highest dicates of equity as well as law, to submit her claim in the due and orderly course of legal procedure, first, to the consideration and deliberate judgment of the association, and then, if necessary, to that of the court? The association might, as a matter of policy, voluntarily have waived the defense of intentional suicide, or it might, by reason of its conduct before or after the death of the insured, have estopped itself from asserting any such defense. Waivers and estoppels of all kinds are frequently found in the pathway of insurance litigation. Not having the certificate of membership before us, we are unable to state the exact language creating the condition under which the association seeks to escape liability. But it sufficiently appears from the averments of the bill that the language employed created a condition subsequent. The bill charges that: 'It was expressly provided in said certificate that, if said David Baxter Gilbert came to his death in consequence of any narcotic, or by reason of any poison, whether taken accidently or designedly, there should be no recovery.' Language of this kind created a condition subsequent (*Western Assur. Co.* v. *Mohlman Co.*, 28 C. C. A. 157, 85 Fed. 811, 40 L. R. A. 561. *Anthony* v. *Association*, 162 Mass. 354, 38 N. E. 973, 26 L. R. A.

406, 44 Am. St. Rep. 367; *Coburn* v. *Insurance Co.*, 145 Mass. 226, 13 N. E. 604: *Van Valkenburgh* v. *Insurance Co.*, 70 N. Y. 605: *Murray* v. *Insurance Co.*, 85 N. Y. 236), and as such imposed the burden on the association of bringing the case within it (*Association* v. *Sargent*, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. ed. 1160, and cases cited, supra). Such conditions may be waived by the insurer either before or after they are broken (*Insurance Co.* v. *Wolff*, 95 U. S. 326, 24 C. ed. 387), or the insurer may be estopped from asserting any rights under such conditions by exacting from the assured, with full knowledge of the facts constituting the defense, technical compliance with the provisions of the policy relating to proofs of death, or by other facts imposing burdens or expense upon the assured (*Insurance Co.* v. *Baker*, 27 C. C. A. 658, 83 Fed. 647; *Titus* v. *Insurance Co.*, 81 N. Y. 410, and cases cited.) In the last-mentioned cases a large number of applicatory authorities are referred to, which fully support the proposition announced. It may be that in the case now under consideration there were facts known to appellee which would have entitled her to resist the forfeiture, provided the association saw fit to urge it in defense. If so, the allegations of her complaint in the action at law were not only true to an equitable, but to a strictly legal, intent, and the association was required to affirmatively plead the condition relied upon by it, and the breach of it. Appellee afterwards, and not till then, could appropriately, by her replication, allege waiver or estoppel, and thereby create an issue with reference to them. We may perhaps be, and probably are, justified in believing that facts entitling plaintiff to urge waiver or estoppel did exist, as defendant's counsel, learned in all the law governing waiver and estoppel, and its particular application to insurance contracts, and tenacious of the right of their client, have failed to negative them in their bill. From the foregoing, it appears that, even though the appellee did in point of fact know that her husband died as a result of taking poison with suicidal intent, she might nevertheless have had a meritorious cause of action against the association, and would have been fully warranted, both in law and morals, to institute her suit, and allege a cause of action under the general obligation of the certificate of membership, without alleging a defense which the appellant might either waive, or from the assertion of which it might well have been estopped.

"We have so far treated the case from the standpoint of appellant's counsel, and have endeavored to subject it to the highest moral and equitable tests; but, in our opinion, we are not required to go to that length. Judge Thayer said in the case of *United States* v. *Norsch*, supra, as follows: 'Whatever a person's own opinion may be touching his right to relief in a given case, he is entitled to take the judgment of a court having jurisdiction to hear and determine the cause, and in so doing he commits no fraud. A litigant in such case only crosses the line dividing legal frauds from conduct that is merely reprehensible from a moral standpoint when he resorts to false testimony, or to some trick or artifice, with a view of deceiving the court, and thereby obtaining a judgment to which he is not entitled.'

"To this proposition we fully agree. The courts of the land are open to all suitors to present their controversies and claims to the abitrament of a constituted magistracy. A litigant has the undoubted right to present his own

theory of a case, and, even though he may know facts which, in his opinion, would constitute a defense, he may confidently rely upon the defendant in the case—certainly when his interest dictates it—to perform his full duty, and is not required, under any recognized principle of law or equity, to anticipate him in so doing. He has a right to assume that the defendant will make all defenses available to him which he, in the exercise of his own judgment and discretion, deems wise and politic to make. We conclude from the foregoing that the fact that the plaintiff in the action at law failed to set forth facts which would have defeated her recovery, as hereinbefore detailed, affords no ground for a court of equity to vacate the judgment obtained by her in the action."

WILLS—WITNESSES SIGNING BEFORE TESTATOR, EFFECT.—There has been considerable difference of opinion among the courts as to whether a will is subscribed by witnesses, so as to satisfy the statute requiring wills to be attested and subscribed by witnesses, if the witnesses subscribe the paper before the testator has affixed his signature to it. On the one hand it is argued that there is no will to subscribe till the testator has signed it, and subscribing before the testator has signed is not subscribing the *will*. This view has been adopted in England, Georgia, Massachusetts, New York, and Wisconsin [*Byrd Goods of*, (1842), 3 Curteis Ecc; 117, 7 Eng. Ecc. 391; *Jackson* v. *Jackson* (1868), 39 N. Y. 153, 162; *Sisters of Charity* v. *Kelly*, (1876), 67 N. Y. 413; *Brooks* v. *Woodson* (1891), 87 Ga. 379, 13 S. E. 702, 14 L. R. A. 160; *Marshall* v. *Mason* (1900), 176 Mass. 216, 57 N. E. 340, 5 Pro. R. A. 613; and assumed in *Lewis's Will* (1881), 51 Wis. 101, 113, 7 N. W. 829]; and the Supreme Court of North Carolina has for a number of years been reckoned in the same list. But in *Cutler* v. *Cutler* (Feb. 1902), 130 N. Car. 1, 40 S. E. 689, that court held an exception on that ground not well taken, saying: "It seems singular that the witnesses should have signed before the testator, as there was nothing at that time for them to attest. It was certainly awkward and illogical for them to do so, and can only be sustained by its being all a part of one and the same transaction." This seems to be the more approved view. The witnesses are required to subscribe the paper in order that they may be able to identify it when presented for probate,—so that they can swear that it is the same paper which they saw the testator execute; and so that in case of their death or absence, their signatures will certify to the fact. In what possible way might the object of the statute be defeated by allowing a will which the witnesses subscribed before they saw the testator sign it? Most of the courts have held that wills so executed are valid. The reader will find the decisions adopting this view reviewed in the following: *Lacey* v. *Dobbs* (1900), 61 N. J. Eq. 575, 47 Atl. 481, 55 L. R. A. 580; *Gibson* v. *Nelson* (1899), 181 Ill. 122, 54 N. E. 901, 72 Am. St. Rep. 254, 5 Pro. R. A. 67; *Kaufman* v. *Coughman* (1897), 49 S. Car. 159, 27 S. E. 16, 61 Am. St. Rep. 808. The leading case on this side is *Swift* v. *Wiley* (1840), 1 B. Mon. (40 Ky.) 114.

IMPEACHMENT OF WITNESS—PRIVILEGED COMMUNICATION.—In the case of *Herman* v. *Schlesinger*, decided by the Supreme Court of Wisconsin, May 13, 1902, and reported in 90 N. W. Rep. 460, that court held, and quite cor-

rectly if the question were an abstract one, that the rule of privilege did not protect the client against disclosing the fact as to whether there was a communication between his attorney and himself as to particular subject matters and how it was made, but only against being compelled to disclose *what* such communication was. This doctrine was applied in this case under the following circumstances, viz.: A party on the stand as a witness, under cross-examination was asked whether, in the preparation of his case for trial, his attorney had not interrogated him as to the matters involved, and whether such interrogatories and his replies to them were reduced to writing. The trial court excluded the testimony, but the supreme court held the exclusion erroneous, determining, however, that the error in this particular case was without prejudice. The reason assigned for the conclusion of the court was that it went to the credibility of the witness.

It is recalled that while the late Judge Cooley, then a Justice of the supreme court of Michigan, was holding a term of the circuit court of Lenawee county upon the invitation of the bar of that county, and under the special appointment of the Governor, an attorney attempted to discredit a witness who was the opposing party, by asking him, upon cross-examination, whether he had not, before taking the witness stand, talked over the matter to which he had testified, with his attorney. Judge Cooley remarked that his attorney would have been derelict in his duty if he had not done so, unless circumstances made it impossible, and stopped the examination. Certainly there can be nothing discreditable in doing that which it is one's duty to do. Had the claim been that in such conversation the attorney was instructing the client as to his testimony, that he might testify, or refrain from testifying, to particular matters, or that the attorney was training the witness that he might be more certain to recollect particular matter, a different question would be presented. But nothing of the sort is suggested in the case presented. The court expressly states, and the point is decided with that fact assumed, that the object of this interrogation between the attorney and his client, was that of "making the attorney to know what his client might be expected to testify to." It would seem a dangerous precedent to establish, that a jury should be permitted to conclude that a party was not entitled to credit because he had talked with his attorney about his case, though such conversation was for the purpose of "enabling the attorney to know what his client might be expected to testify to," and even though such conversation was reduced to writing for the attorney's benefit on the trial.

EVIDENCE—DYING DECLARATION.—A case recently before the supreme court of Mississippi reviewing the trial of one Harper, charged with homicide, presents an interesting question of evidence. Upon the trial a declaration in writing by the victim of the homicide reciting the circumstances of the assault was rejected. The declaration was prepared by an attorney in anticipation of a possible or probable fatal termination of the injuries, "to be signed," as stated by the court, "whenever declarant came to think he would die." Some time later and when death was near, the statement was signed by declarant. The court concludes that it was not made to appear that it was signed "under a solemn sense of impending dissolution." After disposing of

the question by this ruling the court adds: "A declaration that is prepared when the declarant is in the full possession of his mental faculties and in confident hope of recovery, to be signed in the possible event of a subsequent conviction of a fatal termination" is not admissible as a dying declaration, though when signed the declarant had no hope of recovery. "Such an instrument cannot be said to be the free and voluntary act of the person, originated and executed under a solemn sense of impending death." It is this last statement of the court which gives this case its legal interest. Is it true that the declaration must have "originated" at a time when the declarant was under the conviction that death was imminent? May it not be true that a dying declaration need not have "originated" with the declarant at all, in the sense in which the court uses that term, and still it be admissible? If one when he does believe his death to be imminent as the result of the violence being investigated indorses in any clear way the declaration of any person as to the circumstances of the offense, is it not an admissible declaration? Is it not competent to show the declaration of that other person and its affirmance by the person since deceased? Upon principle it should be so though direct authority for just this proposition is not at hand. True, there may be circumstances in particular cases, and they may have existed in this case, stamping the offered declaration as unreliable so as to require its rejection as evidence. It is not the rejection of the evidence in this case we are disposed to criticise but rather the proposition of the court that the mental attitude of the declarant toward approaching death essential to a competent dying declaration must have existed at the time the declaration was conceived as well as when it is finally affirmed. In this we think the court fails to state correctly the rule upon authority. 1 GREENLEAF'S EVIDENCE, ed. 16, p. 249. In *Reg.* v *Steele*, 12 Cox Cr. Cas. 168, declarant made a statement to a witness orally. Subsequently when in a condition to make a competent dying declaration he affirmed the truth of the prior statement and the prior statement was admitted on the strength of the subsequent affirmation.

In *Johnson* v. *State*, 102 Ala. 1; *Mockabee* v. *Com.* 78 Ky. 380, and in *Snell* v. *State*, 29 Tex. App. 236, written statements were made when hope of recovery was present to defeat their competency as dying declarations. An affirmation of the truth of the written statement made subsequently and at a time when conditions were present which would make a declaration competent was held in each of the cases to render the previous written statement competent though not read by or to the declarant at the time of the affirmation. The supreme court of the United States in *Carver* v. *United States*, 160 U. S. 553 seems to approve this view. The principal case is *Harper* v. *State*, 79 Miss. 575.

PARTNERSHIP BY ESTOPPEL IN TORT CASES.—In *Stables* v. *Eley* (1824) 1 Car. & P. 614, 12 Eng. Com. L. 348, there was an action to recover damages for an injury caused through negligent driving by a person alleged to be defendant's servant. It appeared that defendant and one King had been in partnership, but that the partnership had been dissolved twenty days before the injury, and that the vehicle driven was the property of King and that the driver was his servant. It appeared, however, also, that defendant's name was still on the cart and over the door of the former place of business,

and Abbott, C. J., ruled that the defendant by permitting his name to remain in this way had held himself out to the world as the owner of the cart and the master of the driver of it, and was therefore responsible for the negligence of the driver. The learned judge, however, failed to point out how either of the facts mentioned could have misled the plaintiff into being injured. This case has often been criticised (See POLLOCK'S DIG. OF PARTN. 6th ed. 54; LINDLEY ON PARTNERSHIP, 214) as it is obvious that such facts afford no foundation for the application of the principle of estoppel, and in *Smith* v. *Bailey*, [1891] 2 Q. B. 403, where the same principle was sought to be applied, it was disapproved. BOWEN L. J. concurred in a suggestion that the case might be misreported but said also that "the sooner the case disappears from the text-books the better."

In *Sherrod* v. *Langdon* (1866), 21 Iowa 518, which was an action to recover damages for false representation on the sale of sheep, it was held that a defendant who had held himself out as a partner in the transaction was estopped to deny it as against the plaintiffs who had bought in reliance upon his being a partner. In *Maxwell* v. *Gibbs* (1871), 32 Iowa 32, which was an action against defendants as partners to recover damages for negligent and unreasonable driving of a team of horses hired, it was held "that if they held themselves out to the world as partners, and the team was hired under such circumstances as to lead plaintiffs to believe them such, they would be estopped from denying the partnership." In both of these cases, however, the cause of action arose out of contractual relations.

In *Shepard* v. *Hynes* (1900), 104 Fed. Rep. 449, 45 C. C. A. 271, 52 L.R.A. 675, where it was sought to hold one person liable as partner for the wilful tort of another, it was held that such a liability could only be based upon an actual partnership. The fact that there had once been a partnership, which was secretly dissolved, and that the business was still conducted in the old firm name, was immaterial. There was no attempt to establish a contractual liability to someone with whom the firm had formerly dealt, but to make the defendant responsible for the wilful tort of another. The doctrine of estoppel has no application to such a case. See EWART ON ESTOPPEL, 529.

COLOR DISTINCTIONS—SEPARATION OF PASSENGERS UPON STREET CARS.— A regulation of a street railway company that colored passengers should occupy the front seats of the car, and white passengers the rear seats,—the seats being in all other respects alike,—and leaving to the conductor of the car the power and duty of determining how many seats should be set apart for each race, in view of the number of passengers of each race applying for seats upon each trip, was held to be reasonable and valid in *Bowie* v. *Birmingham Railway Co.* 125 Ala. 397, 27 So. Rep. 1016, 82 Am. St. Rep. 246. The cases of *West Chester, etc., R. Co.* v. *Miles*, 55 Pa. 209, 93 Am. Dec. 744, and *Hall* v. *McCuir*, 95 U. S. 435, were cited and relied upon.

MORTGAGE OF FUTURE OFFSPRING OF ANIMALS OWNED BY MORTGAGOR.— The supreme court of Nebraska has recently decided against the efficacy of a mortgage upon the future offspring of animals owned by the mortgagor. *Battle Creek Valley Bank* v. *First National Bank of Madison*, (1901), — Neb. — , 88 N. W. Rep. 145, 56 L. R. A. 124. "The offspring of

domestic animals, it is true," said the court, "belong to the owner of the dam; but a chattel mortgage in this state does not transfer title to the mortgagee (*Musser* v. *King*, 40 Neb. 892. 59 N. W. Rep. 744, 42 Am. St. Rep. 700; *Bedford* v. *Van Cott*, 42 Neb. 229, 60 N. W. Rep, 572; *Randall* v. *Persons*, 42 Neb. 607, 60 N. W. Rep. 898); it only creates a lien, and consequently the young of mortgaged animals, when brought forth, belong to the mortgagor. The case of a mortgage given during gestation may, perhaps, constitute an exception, but this we do not decide. . . . This view of the matter is, we know, opposed to the rule laid down by Jones and Herman (JONES, CHAT. MORTG. § 149; HERMAN, CHAT. MORTG. § 44); but it is fully supported by a very lucid and logical opinion recently handed down by the supreme court of California (*Shoobert* v. *DeMolta*, 112 Cal. 215, 44 Pac. Rep. 487)."

ACTIONS FOR INJURIES TO UNBORN CHILDREN.—The list of cases involving the right to maintain an action by or on account of a child for injuries committed to it while still *en ventre sa mere*, has been augmented by the recent case of *Gorman* v. *Budlong* (1901), 23 R. I. —, 49 Atl. Rep. 704, 55 L. R. A. 118. These cases have quite uniformly held that such an action cannot be maintained by the child itself if it survives, [*Walker* v. *Great Northern R. Co.* (1891), Ir. L. R. 28 C. L. 69, 26 Am. L. Rev. 50; *Allaire* v. *St. Luke's Hospital* (1900), 184 Ill. 359, 56 N. E. Rep. 638, 48 L. R. A. 225, 75 Am. St. Rep. 176.] or by the next of kin or other survivors, where the cause of action presupposes or is based upon a right of action which the child would have had if it had survived. [*Dietrich* v. *Northampton* (1884), 138 Mass. 14, 52 Am Rep. 242; *Gorman* v. *Budlong*, *supra*.] The unborn child is, it is true, for some purposes regarded as *in esse*, but this, as the courts have declared, is purely by a fiction, originating in the civil law, adopted for some but not for all purposes by courts of equity, and having but a limited application in courts of law. This application the courts are evidently averse to so extending as to include actions of this class.

"ACCIDENT"—WHAT INCLUDED WITHIN THAT TERM.—In a recent case in Wisconsin, the court had occasion to determine the meaning to be given to the word "accident," as used in a bill of lading. It was contended on the one hand that the word was synonymous with "mere accident," or "purely accidental," but the court held that while, perhaps, strictly speaking, an accident is an occurrence to which human fault does not contribute, yet as commonly used by laymen, lawwriters and judges, the term includes the result of human fault, even though such fault constitutes actionable negligence. *Ullman* v. *Chicago, etc., Ry. Co.* (1901), — Wis. — , 88 N. W. Rep. 41, 56 L. R. A. 246.

IDEM SONANS—VARIANCE BETWEEN INDICTMENT AND PROOF.—Under an indictment for unlawful cohabitation with a woman named "May Hite," evidence of cohabitation with a woman whose name is "May Hyde" cannot be received. Though "d" and "t" are both dentals, said the court, they have not the same sound. While it has been held that Wadkins and Watkins may be *idem sonans*, "ride" and "rite" are not so, and Hyde and Hite are clearly distinguishable. *State* v. *Williams*, 68 Ark. 241, 57 S. W. Rep. 792, 82 Am. St. Rep. 288.