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Note and Comment

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NOTE AND COMMENT.

THE RIGHT OF JOINT ADVENTURERS, HOLDING ALL THE STOCK OF A CORPORATION, TO A DISSOLUTION AND ACCOUNTING IN EQUITY.—The case of *Jackson* v. *Hooper*, in the New Jersey Court of Errors and Appeals, decided February 28, 1910, by Judge DILL, (42 N. Y. Law Journal, March 8, 1910), overruling Vice Chancellor HOWELL, of the Court of Chancery (74 Atl. 130) presents interesting and unusual points in corporation and partnership law, and the jurisdiction of courts of equity over corporate affairs. J. and H. purchased all the shares of stock in an English corporation and an Illinois corporation, under an agreement between them that they should be equal owners of the stock, and "should be partners, having equal voice and equal control in the management and business of the company; that the corporation should be treated as a mere agency in carrying out the copartnership agreement; that the directors, other than the two parties, should be mere nominal directors; that corporate forms should be ignored and the business transacted and treated as a partnership business." The business was carried on all over the world, and with great profit for several years. The accounts were kept in a central office in London, England—the English business accounts being kept in the name of the English company, while the accounts of business in the other portions of the

world were kept in the name of the Illinois company. Cash received, however, from any source was deposited in the same banking accounts, and payments were made from these without regard to whether they were upon English or foreign business. These deposits were subject to draft by J. and H. individually, and each one drew indiscriminately for his private and personal use, and had drawn substantially equal amounts. No salaries were paid to either party, nor did either corporation declare dividends, nor hold shareholders' or directors' meetings for carrying on the business of either company, but all *"the business"* was carried on by consultation and agreement between J. and H. The dummy directors had little or no knowledge of, and no participation in the very large business done. Some contracts were made in the corporate names, and some otherwise. In 1908 J. and H. disagreed. The latter by the aid of the dummy directors took steps to exclude J. from participating in the business, in direct conflict with the agreement between them. J., alleging that the agreement between him and H. created a partnership, brought his bill to dissolve this, have an accounting of its affairs, restrain H. and the directors from withdrawing the assets for private use and from excluding him from participating in the conduct of the business. The Vice Chancellor held that though the agreement did not constitute a partnership in the strict sense, yet it created a "joint adventure" between J. and H. over which courts of equity had jurisdiction to compel an accounting as in the case of partnerships, and that this extended to all the property (accounts receivable, cash, or copyrights) whether the title to the same was in the name of the individuals, corporations, or various trade names used by them in their business.

Judge DILL, however, ruled that a court of equity has no power to take the corporate property into its control as upon a dissolution of a partnership; the rights of the parties must be administered as shareholders in a corporation, not as partners; the agreement that certain directors should act as dummies subservient to the will of the parties, was illegal and unenforceable in equity; an injunction against the members of a board of directors individually in respect to corporate affairs is an injunction against the corporation; and a court of equity has no jurisdiction to regulate the internal affairs of foreign corporations by such an injunction.

It, of course, is elementary that a corporation, in law, is a person distinct from its members,—as for example a corporation, all the members of which are colored persons, is not itself a colored person. *People's Pleasure Park Co.* v. *Rohleder* (1908), 109 Va. 439, 615 S. E. 794. See also 8 H. VI. 1, 14 (1430); *Queen* v. *Arnaud* (1846), 25 L. J. R., part II, 50; *Button* v. *Hoffman* (1884), 61 Wis. 20; *Foster and Sons* v. *Commrs.* (1894), 1 Q. B. D. 516; *Salomon* v. *Salomon,* [1897] L. R. App. Cas. 22; but compare *Montgomery* v. *Forbes* (1889), 148 Mass. 249. Yet in the management of the corporation, changes in the charter, protecting corporate rights when the corporate authorities will not do so, to prevent fraud, or to punish corporate wrong-doing caused by the concerted action of shareholders, the rights or acts of the individual members, in order to prevent a failure of justice, are considered instead

of those of a "fictitious person." *Haschard* v. *Somany* (1693), Freem. Rep. 504; *Dodge* v. *Woolsey* (1855), 59 U. S. 331; *Metcalf* v. *Arnold* (1895), 110 Ala. 180; *People* v. *North River Sug. Ref. Co.* (1890), 121 N. Y. 582.

Again, courts of equity have no special jurisdiction over corporations merely as such, either to enjoin or dissolve, unless there are other sufficient reasons for going into equity. *Attorney General* v. *Tudor Ice Co.* (1870), 104 Mass. 239; *Attorney-General* v. *Roller Skating Rink Co.* (1892), 143 Ill. 118, or to appoint receivers or take the corporate property out of corporate control, *Wallace* v. *Pierce-Wallace Co.* (1897), 101 Ia. 313.

The case of *Russell* v. *McLellan* (1833), 14 Pick. (Mass.) 63, cited and relied upon by the court, was strikingly similar to the facts of this case, and was decided the same way. This case should be compared with *In re Rieger,* 157 Fed. 609, referred to below. The cases of *Gallagher* v. *Germania Brewing Co.* (1893), 53 Minn. 214; *Sellers* v. *Greer* (1898), 172 Ill. 549;*Nat'l Brake Beam Co.* v. *Equipment Co.* (1907), 226 Ill. 28, 80 N. E. 556; *Reinecke* v. *Bailey* (1908), — Ky. —, 112 S. W. 569, while not the same in facts, involved the validity and effect of agreements among shareholders concerning the corporate property and rights, and all were decided upon the theory of the case in review, and in the same way.

On the other hand, courts of equity where there seemed to be no other way of doing justice have ignored the corporate personality, and given effect to agreements existing or made among shareholders relating to the corporate property, as in *Chater* v. *San Francisco Sugar Ref. Co.* (1861), 19 Cal. 219; *Bundy* v. *Ophir Iron Co.* (1882), 38 Oh. St. 300; *Home Insurance Co.* v. *Barber* (1903), 67 Neb. 644, 60 L. R. A. 927; *In re Rieger* (1907), 157 Fed. 609. This last case held that the property of a corporation used as an agency of a partnership which owned 99 per cent of its stock, would be treated in equity as assets of the bankrupt partnership, and administered accordingly for the protection of creditors. And where there is an abuse of trust, a court of equity may dissolve and compel an accounting as in *Miner* v. *Belle Isle Ice Co.* (1892), 93 Mich. 97, 53 N. W. 218; see note 93 Am. St. Rep. 33. It would seem that the facts of the case under review would almost have justified a bill for the dissolution not only of the partnership but of the corporations as well, under the decision of the *Miner* case just cited. This, however, was not called for apparently, and there is no discussion of it, and if it was only a difference of view in regard to the management, and there was no fraud in H. excluding J. from the management of the business of the corporations, and the business still continued prosperous, a court of equity would not interfere. *Wallace* v. *Pierce-Wallage Co.,* supra.; *Fougeray* v. *McCord* (1892), 50 N. J. Eq. 185, 756; *Sternberg* v. *Wolff* (1897-98), 56 N. J. Eq. 389, 555; *Stokes* v. *Knickerbocker Investment Co.* (1905), 70 N. J. Eq. 518.

The other points that corporations should be managed by their directors, and the courts of one state have no visitorial powers over the internal affairs of foreign corporations were decided according to the well settled rules of coroporation law.

H. L. W.

LIABILITY OF WATER COMPANIES FOR LOSSES BY FIRE IN ACTIONS OF TORT.—In *Fisher* v. *Greensboro Water Supply Company*, 128 N. C. 375, it was held that the defendant water company was liable in damages in an action of tort for negligent failure to furnish sufficient water pressure in the mains of the city, by reason of which negligence the plaintiff's house was burned. The only duty on the part of the defendant to furnish water grew out of a contract made by the company with the city and the fact that the defendant had entered upon the business of supplying water pursuant to such contract. In disposing of the case the supreme court said: "We think the plaintiff was entitled to judgment as prayed for. There was an express and legal obligation upon the part of the defendant to provide and furnish ample protection against fires, and a breach of that obligation and a consequential damage to the plaintiff. Although action may have been maintained upon a promise implied by law, yet an action founded in tort was the more proper form of action and the plaintiff *so declared*." Some time after the rendition of the judgment in this case a proceeding was instituted in the United States court for the foreclosure of a certain mortgage upon the property of the defendant above, which mortgage was prior in time to the lien of the above judgment. Under a statute of the state making judgments for torts prior liens upon the property and earnings of incorporated companies over mortgages which were prior in point of time, the judgment creditor under the judgment above referred to intervened claiming the benefit of the statute. The court held that the intervener was entitled to the preference claimed. On appeal the decision was affirmed by the circuit court of appeals and on certiorari the supreme court affirmed the ruling. *Guardian Trust and Deposit Co.* v. *Fisher*, 200 U. S. 57. It will be seen that the right of the judgment creditor to the preference was based upon the fact that his judgment was rendered in a tort action, and whether the ruling of the court below that the judgment was such was the question considered by the supreme court. Mr. Justice BREWER, in delivering the opinion of the court, said: "We shall assume, without deciding, that the nature of the causes of action upon which the state judgments were rendered is open for consideration in the Federal court in the foreclosure proceeding. The statute subordinates the mortgage to judgments for torts. Now what is the judgment? * * * From the conclusion thus reached (This follows the extract from the opinion of the North Carolina court above quoted) we are not inclined to dissent," etc. Apparently then in answer to the argument that the judgment under consideration could not have been rendered upon a tort liability because there was no tort involved, the learned justice examines the question on its merits and concludes that the acceptance of the contract with the city and the entering upon the business imposed upon the water company a public duty to furnish water for public and private purposes and for fire protection, and a negligent failure to perform the duty was actionable in tort by the party aggrieved. In *Mugge* v. *Tampa Waterworks Co.*, 52 Fla. 371, 42 South. 81, 6 L. R. A. (N. S.) 1171, 120 Am. St. Rep. 207, this question was presented to the supreme court of Florida, the conclusions of Mr. Justice BREWER in the *Fisher* case being approved and followed.

In a very recent decision, however, by the circuit court of appeals for the

fifth circuit, the doctrine of a tort liability under facts essentially the same as involved in the *Fisher* and *Mugge* cases was examined and denied. *German Alliance Insurance Co.* v. *Home Water Supply Co.* (Nov. 1909), 174 Fed. 764. The court considers the *Fisher* case and concludes that the observations of Mr. Justice BREWER were unnecessary to the decision of the matter then before the court, the only point in issue being the nature of the judgment of the North Carolina court, which being found to have been based on the tort any examination into the merits of the case presented to the state court was beyond the point and the conclusions of the court thereon dicta. On the matter of the water company being engaged in a "public calling" the court, after an examination of the authorities, concludes that it was not. The opinion of the court is not convincing, and it is to be hoped that the supreme court may consent to bring the case up on certiorari thus settling authoritatively, at least so far as the federal courts are concerned, this important and interesting question. For a further discussion of the matter see 5 MICH. L. REV. 362.

R. W. A.

JUDGMENTS AS CONTRACTS AND THE EFFECT OF MOTIVE IN CREATING A TORT.—Two unrelated but interesting questions were raised in a recent Wisconsin case. One of these is a question which for years has caused much confusion and difficulty in the law of torts, i. e., can a bad motive make an act tortious; the other, may a judgment be regarded as a contract, is an equally troublesome question in contract law. Defendant, the owner of certain real estate, made a land contract with plaintiff. A decree or judgment of strict foreclosure of this contract was entered, providing that the plaintiff might redeem by paying to defendant on or before a certain day the sum of $60,000. Prior to the day named in the decree, plaintiff repeatedly attempted to pay the said sum to the defendant but was unable to do so, because the defendant willfully avoided plaintiff with the intention of preventing plaintiff from saving his rights under the terms of the foreclosure, and the plaintiff's right of redemption was therefore forfeited. Plaintiff, having made an agreement with a third person for the sale of the said property for $70,000, was prevented by defendant's acts from fulfilling his part of the agreement and thereby lost the profits of said sale and suffered other damage, for all of which he brought suit against the defendant, attempting to state an action in tort. Defendant demurred to plaintiff's complaint. *Loehr* v. *Dickson* (1910), — Wis. —, 124 N. W. 293.

The court first addressed itself to the question in the law of torts and held that the complaint stated no cause of action in tort as defendant's acts were "entirely lawful in and of themselves" and the presence of a malicious motive for doing them did not make them actionable. The court undoubtedly reached a proper result here, but the statement of principle, as is true in so many cases of this kind, is misleading. In the course of his opinion Judge DODGE states the principle that the presence of mere malice or motive to injure does not impose liability for a lawful act. This principle would cause no difficulty if applied in cases only where the acts are done in exercise of an absolute right. Some few rights are of this sort, but the vast number are not absolute

and, where this is true and the exercise of such a right as is not absolute causes injury to another, the motive of the inflictor affects, indeed determines, the right to recover. If the motive for the exercise of the right is good, i. e., is reasonable, the defendant is not liable to the person damaged, but if the motive for the act is bad and hence unreasonable, as for example where the sole purpose of the act is to injure another, then the person injured may recover. In cases where the right, the exercise of which injured another, is not absolute, the principle stated in the case reviewed is certain to be misleading. *Tuttle* v. *Buck* (1909), 107 Minn. 145; *Plant* v. *Woods* (1900), 176 Mass. 492, 499; see article on *"The Influence of Social and Economical Ideals on the Law of Malicious Torts,"* 8 MICH. L. REV. 468. The principal case is in accord, however, with the other Wisconsin cases on the same subject. The Wisconsin court has gone farther than any other court in maintaining the principle stated, and has even held that the owner of land on which there is an artesian well may allow this well to flow continuously and the water to waste, even though the flow of his neighbor's well is thereby seriously diminished and though the defendant's intent was to injure his neighbor. In order to reach this result it was necessary for the court to declare unconstitutional a state statute making the owner of an artesian well liable to the owners of wells in the same district for the damage which they should sustain because of his allowing his well to discharge more water than was reasonably necessary for his use. *Huber* v. *Merkel* (1903), 117 Wis. 355. See also *Metzger* v. *Hochrein,* (1900), 107 Wis. 267. One can scarcely understand why the attorneys for the plaintiff in the principal case conceived their action to be in tort unless they allowed their desire to recover as damages the profits lost on the proposed sale of the property to obscure their judgment as to the sufficiency of such acts to constitute a cause of action in tort.

The court (Judges KERWIN and TIMLIN dissenting) decided that the plaintiff's complaint did state a cause of action in contract. In reaching this conclusion the court reasoned as follows: where one enters into a contract which invests a right in, or imposes a duty on, the other party, one of the implied terms of the contract is that the first party will do nothing to prevent the second party from enjoying that right or performing that duty; that a judgment is a contract; therefore, the judgment or decree of foreclosure, providing for a redemption by the payment of a certain sum, imposed a contractual duty on the defendant to do nothing to defeat plaintiff's payment of that sum; and defendant's willful avoidance of the plaintiff having caused a breach of this duty, plaintiff was entitled to recover proper damages from the defendant. In other words the court allowed the plaintiff to treat the decree or judgment as a contract and sue for damages for a breach of its terms.

It is a general rule of contract law that if one party to a contract by his conduct prevents another from performing his part, the party so hindered is excused from a strict performance, *United States* v. *Peck* (1880), 102 U. S. 64; *Williams* v. *United States Bank* (1829), 2 Pet. 96; *Eliot National Bank* v. *Beal et al.* (1886), 141 Mass. 566. But conceding this to be the law, should a judgment be regarded as a contract so that a suit for damages for

breach may be brought thereon? It is true that a judgment has been held to be a contract in some cases; *Johnson & Stevens* v. *Butler* (1856), 2 Ia. 535; *Childs* v. *Harris Mfg. Co.* (1887), 68 Wis. 231; *Sawyer* v. *Vilas* (1846), 19 Vt. 43; *Sprott* v. *Reid* (1852), 3 G. Greene (Ia.) 489; in the majority of these cases the question decided was whether a judgment was a contract within the meaning of statutes which manifestly intended to divide all causes of action into two broad classes, actions on "contract" and actions on "tort." It would be generally conceded that if the field of actions were to be so divided judgments would fall into the "contract" rather than the "tort" class; and one would ascribe no other idea than that to the legislators since judgments have generally been classified as one species of contracts of record. Nearly all of the cases have refused to recognize judgments as contracts where this broad division is not clearly intended, as for instance in cases where the question of the unconstitutionality of a law as impairing the obligation of contract is raised. *Morley* v. *Lake Shore & M. S. Ry. Co.* (1892), 146 U. S. 162; *O'Brien* v. *Young* (1884), 95 N. Y. 428; *Jordan* v. *Robinson* (1838), 15 Me. 167; *Masterson* v. *Gibson* (1876), 56 Ala. 56; *Wolffe* v. *Eberlein* (1883), 74 Ala. 99; *Larrabee* v. *Baldwin* (1868), 35 Cal. 155; *Wyoming National Bank* v. *Brown* (1898), 7 Wyo. 494; *Gaffney* v. *Jones* (1905), 39 Wash. 587, 81 Pac. 1058; *Sheehan & Loler Transp. Co.* v. *Sims* (1887), 28 Mo. App. 64. There seem to be no cases which have gone so far in regarding a judgment as a contract as to allow an action for damages for failure to satisfy it. In this respect the principal case is, at least, novel and likely erroneous. G. S.

INTERVENING AGENCY AS AN ELEMENT IN DETERMINING PROXIMATE CAUSE. —In the law of negligence, probably no sub-division is of greater importance than that of proximate cause and incidentally the elements affecting and constituting it.

The case of *Scott* v. *Shepherd*, 2 W. Bl. 892, famous as the "Squib Case" and often cited, is a very early case on the effect of an intervening act on proximate cause, having been decided in the reign of George III, but this case was decided on the theory of "natural and probable result" rather than on the point of intervening agency.

In the recent decision of the supreme court of Illinois in the case of *Seith* v. *Commonwealth Electric Co.* (1909), — Ill. —, 89 N. E. 425, there is an extensive discussion of the effect on proximate cause of an intervening agency, the facts of the case being that a live electric light wire broke and fell into the street where it lay between the sidewalk and the roadway; and as the plaintiff was passing, a policeman struck the wire with his club and threw it against the plaintiff, who received therefrom a severe shock which caused the injuries alleged. It was held, VICKERS and CARTER, JJ., dissenting, that the act of the policeman in striking the wire with his club was an independent act which the defendant was not bound to foresee and that this and not the original negligence was the proximate cause of the injury.

It is altogether probable that no two accidents ever happen in exactly the same way and the courts generally determine cases involving proximate cause

upon facts as they exist in the particular case, and especially do they do so in situations wherein it is alleged that facts constituting an intervening agency, such as would excuse the author of the original negligent act, are present. If we may admit that in the commission of the primal act there is actionable negligence, though a cause intervenes between it and the injury, the courts will not ordinarily look back of the last efficient cause. *Stone* v. *Boston etc. R. Co.*, 171 Mass, 536, 51 N. E. 1, 41 L. R. A. 794, particularly when that cause intervening, operated in the hands of some human being. *Malmberg* v. *Bartos*, 83 Ill. App. 481; *Glassey* v. *Worcester Consol. St. R. Co.*, 185 Mass. 315, 70 N. E. 199. But if the original act or omission supplied the condition by which the subsequent act or cause was rendered hurtful, he who committed that act is responsible. *Walters* v. *Denver Consol. Elec. Light Co.*, 12 Colo. App. 145; *Skinn* v. *Reutter*, 135 Mich. 57, 106 Am. St. Rep. 384. However, prior and remote causes cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury is made possible if there intervened between such prior and remote cause and the injury a distinct, unrelated and efficient cause of the injury. If no danger existed in the condition except because of the independent cause such condition was not the proximate cause. And if an independent negligent act or defective condition sets into operation the circumstances which because of the prior defective condition results in injury, such subsequent act or condition is the proximate cause, 29 CYC. 496 and cases there cited; *Reddick* v. *Gen. Chem. Co.*, 124 Ill. App. 31, but an existing condition contributing to the negligent act and making it more dangerous does not constitute proximate cause. *Hardt* v. *Chicago etc. R. Co.*, 130 Wis. 512, 110 N. W. 427; *Foley* v. *Pioneer Min. & Mfg. Co.*, 144 Ala. 178, 40 South. 273.

To be effective, however, in lifting the burden of liability from the author of the original negligent act, the intervening agency must also be an efficient cause. An intervening, efficient cause is a new and independent force which breaks the causal connection between the original wrong and the injury, *Pullman Palace Car Co.* v. *Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215, and such new force must be sufficient to itself stand as the cause of the injury. *Peoria* v. *Adams*, 72 Ill. App. 662. But if the new cause thus intervening merely accelerates an original cause which in itself was sufficient to produce the injury, the first act is still the proximate cause. *Thompson* v. *Louisville etc. R. Co.*, 91 Ala. 496, 8 South 406, 11 L. R. A. 146. If the intervening act may be considered as the sole and only cause of the alleged injury, then the author of the earlier negligent act is released from responsibility for his wrong. *Quill* v. *N. Y. Cent. etc. R. Co.*, 16 Daly (N. Y.) 313; *Smith* v. *Naushon Co.*, 26 R. I. 578.

On the other hand it has been repeatedly held that the mere fact that there have been intervening causes between the original act of negligence and the injuries alleged to have resulted therefrom, is not sufficient in law to release him from liability who committed the primal wrong. 21 AM. & ENG. ENCYC. (2nd Ed.) 490 and cases there cited. But where an injury might

reasonably have been anticipated, though it is not necessary that the injury in its precise form be foreseen, (*Hill* v. *Winsor,* 118 Mass. 251, 259,) notwithstanding the intervention of an independent agency, the causal connection is not broken and the original wrongdoer is liable for the injuries resulting from his wrong. *Southern R. Co.* v. *Webb,* 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109; *O'Connor* v. *Andrews,* 81 Tex. 28, 16 S. W. 628.

The theory upon which the decision in the principal case (*Seith* v. *Commonwealth Elec. Co.,* supra) is based may be stated thus: if the intervening act be one such as might not reasonably be anticipated, then the causal connection between the act and the injury is broken and the original wrongdoer is released from liability for his wrongful act. This principle is stated conversely in the cases of *Lane* v. *Atlantic Works,* 111 Mass. 136; *Williams* v. *Koehler,* 41 N. Y. App. Div. 426, 58 N. Y. Supp. 863 and others. The argument of the majority opinion, rendered by CARTWRIGHT, C. J., consists of an attempt to show that the act of the policeman in trying to remove the wire from its position and probably relieve a dangerous situation, was one not to be anticipated and therefore applying the rule as above stated, no liability attaches to the owner of the wire. However, adopting the logic of the dissenting opinion of VICKERS, J., this position is untenable for as stated above, the precise form of the act is not what is to be foreseen, but rather the probability of any act occurring which would in some manner cause injury to a third party. H. L. P.

APPLICATION OF MICHIGAN STATUTE FOR THE BENEFIT OF LABORERS AND MATERIALMEN ON PUBLIC WORKS AND THE RIGHT OF THIRD PARTIES TO SUE.— As mechanics' liens do not attach to public works in Michigan (*Knapp* v. *Swaney,* 56 Mich. 345) by statute a bond is required of the contractor to pay for all labor and materials furnished in public works. The recent decision of the supreme court of Michigan in the case of the *City of Alpena for the Use and Benefit of Isaac Zess* v. *Title Guaranty & Surety Company,* decided December 10, 1909, 16 Det. L. N. 783, 123 N. W. 536, shows the apparent desire of the Michigan courts to give unpaid laborers and materialmen of public works, the protection of this statute. The cases cited in the opinion, however, hardly sustain the propositions made by the court to the full extent for which they are given, and the correctness of the conclusion of the court in this case, it would seem, might be questioned.

The facts in the case were, briefly, that the Murray Company made a contract with the city of Alpena to construct a water-works system. A bond was given by the contractor to the city, with the Title Guaranty Surety Company as surety. Labor and materials on this work were furnished which have never been paid for. The unpaid laborers and materialmen, claiming that the bond given comes within the statute requiring a bond for their protection, bring suit against the surety.

By a comparison of the language of the bond given with the language of the statute, it is plainly evident that the purpose of this bond was not to protect the laborers and materialmen. The statute in the consecutive sections

10,743, 10,744, and 10,745 of the Michigan Compiled Laws of 1897 provides in plain and unequivocal terms that the purpose of such bond is that the contractor "shall pay all parties performing labor or furnishing material" on such work. This bond provides for the faithful performance of the contract and that the obligors "shall indemnify and save harmless the city of Alpena, the city council and officers and the people of the state of Michigan against all claims which may accrue." As the wording of the rest of the bond closely resembles the wording of the statute the above departure shows a manifest intention not to follow the statute, but to give a bond for another purpose than there provided for.

The exact theory upon which the bond was drawn is not apparent. But as members of the board or municipal body who fail to require the statutory bond in question, may be liable in their individual capacity, to injured parties in whose interest it should have been given (*Wells* v. *Board of Education*, 78 Mich. 260, *Plummer* v. *Kennedy*, 72 Mich. 295) the conclusion of the court that, "the purpose of this bond to protect the officers against such action is clear" seems natural. But the inference of the court that the bond given is within the statute from its further statement that, "This purpose is not defeated by the fact that the bond is not in the precise form required by §10,744," is not warranted by the case cited, *Board of Education* v. *Grant*, 107 Mich. 161, 64 N. W. 1050, nor, it seems, by general authority.

In *Board of Education* v. *Grant*, supra., the bond provided in express terms that the contractor should pay for all labor and materials furnished. There was a further condition, "to pay all judgments and decrees rendered for such labor and materials, and to save the board harmless from all liability incurred in connection with the defense of such claims." But this latter condition was rejected as surplusage, so that it left the bond to exactly comply with the statute. This rejected condition closely resembles the condition given in the principal bond in question and this case cited would seem to be authority for the opinion that a bond for the purpose of protecting such officers does not come within the statute. This bond is not in the form required by the statute and should be construed as a common law obligation. The terms of the statute requiring an official bond cannot be read into a form of bond differing from the form prescribed by the statute; such a bond must be construed, according to its terms, as a common law obligation. In construing a voluntary common law bond, the intention of the statute becomes wholly immaterial and the liability of the surety will not be extended by implication beyond the precise terms of his undertaking, which is to be strictly construed. 1 BRANDT SURETYSHIP, p. 80, *Mayor of Brunswick* v. *Harvey*, 114 Ga. 733, *Abrahams* v. *Jones*, 20 Bradwell (Ill. App.) 83.

The bond in question would seem to have been intended for an indemnity bond merely, if the words used, "indemnify," and "save harmless," were given their customary meaning. 7 WORDS AND PHRASES, p .6337; *Foster* v. *Atwater*, 42 Conn. 244; *Nugent* v. *Boston C. & M. R. R.*, 80 Me. 62. But the court has construed the purpose to have been to protect the city from having to defend any suit at the hands of unpaid materialmen or laborers, rather than to

indemnify the city if it should become liable at the hands of the injured parties. In *Commonwealth* v. *O'Connell Construction Co.* (1909), 39 Pa. Sup. Ct. 105, the bond was conditioned for the due performance of the contract and to indemnify the state against liability for material furnished to the contractor. In construing that bond the court said, "Breach of the bond arising from that source (breach of its conditions) can occur only in case the commonwealth becomes liable for the materials furnished."

By the contract in the principal case, the Murray Company was to furnish the labor and material at its own proper cost and expense. As the bond was conditioned for the faithful performance of the contract and to indemnify and save harmless the city of Alpena, etc., or, according to the interpretation of the court, to save the city from any action, the court imply into the terms of the contract the condition, that the Murray Company was to pay for all labor and materials furnished. *Stoddard* v. *Hibbler,* 16 Det. L. N. 114, 120 N. W. 787, was cited as authority. In that case such a condition was implied in the contract, but there the obligee had paid for the labor and material as mechanics' liens had attached, and the bond was really an indemnity bond. If such condition be implied in the contract, it must be solely for the benefit of the intended obligees in this bond, the city. To imply this condition in the bond of this case, so as to turn this bond into the bond that was required by the Michigan statute would change the contract as intended and entered into by the surety. In *Smith* v. *Bowman,* 32 Utah 33, the contractor was to furnish all labor and materials on buildings for the State Agricultural College, and to deliver them free from all liens. A bond was furnished to secure the faithful performance of the contract, and was made expressly to the Agricultural College and all persons entitled to liens under the contract. By statute liens do not attach to public buildings. Unpaid materialmen, as in this case, sought to recover on the bond. The court said, "The parties having thus expressed themselves unambiguously, we can see no reason why this court should strain after reasons for thwarting their obvious purpose in an endeavor to read someone into the bond not intended to be benefited by it. Though a promise had been made to pay for materials, yet if, from the whole bond, such promise was only made for the purpose of saving the Agricultural College harmless and to indemnify it against loss or damage, and not for the the benefit of parties who might furnish material, and that such was the ruling intention of the parties, then the sureties cannot be made liable to parties who furnished material, for the reason that the ruling intention of the parties must govern."

The court in this case does not say in express words that this bond comes within the statute. If the general inference that such bond is within the statute is not correct, to allow these laborers and materialmen, parties in interest only, to recover on this common law obligation, would be contrary to the long line of decisions as laid down by this court. *Pipp* v. *Reynolds,* 20 Mich. 88; *Turner* v. *McCarty,* 22 Mich. 265; *Halsted* v. *Francis,* 31 Mich. 113; *Hicks* v. *McGarry,* 38 Mich. 667; *Booth* v. *Connecticut Mutual Life Ins. Co.,* 43 Mich. 299; *Hidden* v. *Chappel,* 48 Mich. 527; *Wheeler* v. *Stewart,* 94 Mich. 445, etc. F. A.

MARKETABLE TITLE.—The appearance of three cases in the advance sheets of the Pacific and Atlantic Reporters for the month of October calls attention to the fact that the question of marketable title is still a mooted one with no immediate prospect of a settled law in regard to real estate titles unless the "Torens System" can be said to fulfill that purpose. The reports are full of cases wherein specific performance of a contract of sale has been sought to compel some vendee to take a title, or where the vendee seeks to recover money which he has paid on the strength of the vendor's promise to deliver good title, "one in which there is no doubt involved either as to matter of fact or law." 19 AM. & ENG. OF LAW, p. 1138.

The expressions as to what is a "marketable title" are nearly as numerous as the cases. "To be marketable a title must not only be good but indubitable" is the strong rule laid down in *Swayne* v. *Lyon*, 67 Pa. St. 436, while, "if the title is one which ought to satisfy a person of ordinary prudence, it is sufficient," the Ohio court says in *Rife* v. *Lybarger*, 49 Oh. St. 422, p. 429. The California court of appeals, in the case of *Walters* v. *Mitchell*, 92 Pac. 315, says that a person is entitled to a title fairly deducible of record and free from reasonable doubt or litigation and is not required to accept a title depending on matters resting in parol. The Massachusetts court holds that "a vendor, in the absence of an agreement to the contrary, is bound to convey a good title, free from incumbrances." *Smith* v. *McMahon*, 197 Mass. 16, 83 N. E. 9. In the case of *Walters* v. *Mitchell*, supra, the court lays down the rule that the purchaser is not bound to take title to property where the eaves of an adjoining house extend over the property a few inches, even though the owner had stated that he would remove the projection at any time. But the New York court in the case of *VanHorn* v. *Stuyvesant*, 100 N. Y. Supp. 547, 50 Misc. Rep. 432, held the fact the stoop of a house encroached a few inches on the building line established by the city ordinance, in the absence of complaint by the city, though the conditions had existed for twenty years, made the possibility of hostile action so remote as not to affect the marketability of the title. Adverse possession for the statutory period is usually held to be a good title for anything and will, in most cases, support a marketable title. In the case of the *Ocean City Ass'n* v. *Creswell*, 71 N. J. Eq. 292, 65 Atl. 545, the rule is laid down that adverse possession for more than twenty years under a mortgage is sufficient, in the absence of evidence to the contrary to give a good title, and in *Dickerson* v. *Trustees of Franklin Street Presbyterian Church*, 105 Md. 638, 66 Atl. 494, where trustees of a church went into possession under a void conveyance and held adversely for forty-three years, the case holds they have a "merchantable title," which a vendee is bound to accept. In *Clody* v. *Southard*, 109 N. Y. Supp. 411, 57 Misc. Rep. 242, the holding is to the effect that a right of way reserved more than fifty years before the sale in question, which had fallen into disuse twenty-one years before, fenced up and held intact and adversely for more than twenty-one years and against which no claim of right had been asserted, would not support a valid objection to the title. However, a purchaser of real estate, entitled to an abstract showing good title, may decline to accept an abstract containing no other proof of title by limitation than an affidavit of a vendor. *Moore* v. *Price*, — Tex. Civ.

App. —, 103 S. W. 234, and where the contract of sale provides that the vendor should furnish an abstract showing satisfactory title to the property, the vendee is the party to be satisfied, and it is immaterial that the title is good if the vendee's objections are in good faith. *Hollingsworth* v. *Colthurst,* 78 Kan. 455, 96 Pac. 851. Names misspelled in the acknowledgment when the law requires the acknowledging officer to know the persons, *Veit* v. *Schwob,* 127 App. Div. (N. Y.) 171, 111 N. Y. Supp. 286, or leaving out a letter in a given name in a deed forming a link in the chain of title, *Kane* v. *Borthwick,* 50 Wash, 8, 96 Pac. 516, are held not to be valid objections.

Among the latest reported cases are *Zelman* v. *Kaufherr* (1909), — N. J. Eq. —, 73 Atl. 1048; *Reed* v. *Sefton,* — Cal. App. —, 103 Pac. 1095; *Watson, et ux,* v. *Boyle,* — Wash. —, 104 Pac. 147. The case of *Zelman* v. *Kaufherr,* supra, is a suit for specific performance, vendee defending on the ground that the building restriction imposed by the original owner and platter of the land had been violated. The court found that if there had ever been such a restriction it had been ignored for a number of years to the knowledge of the party imposing it and to all other interested parties and they were now estopped to object to this particular offense, and held that the possibility of injury on that ground was so remote that it would not afford any just ground for refusing to perform the agreement and that the title was not such a one as would "expose the purchaser to the hazards of a litigation in regard to it.

Reed v. *Sefton,* supra, held that an agreement to convey, made twenty-eight years before, in regard to which nothing had been done save a small payment made thereon, the property having changed hands several times since, owing to the bar of the Statute of Limitations did not furnish grounds upon which vendee could recover money paid in advance because there was not a "reasonably decent probability of litigation." MAUPIN, MARKETABLE TITLES, §284.

In *Watson, et ux.,* v. *Boyle,* supra, the deal was an exchange of property. The suit being for specific performance, was defended on the ground that vendor's immediate grantor had no title from the patentee of the United States. The evidence showed that the vendor's grantor was the son of the patentee and that the land had been in the open, notorious and adverse possession of the grantor and his predecessors in interest for many times the statutory period, but the court, applying the rule that the purchaser is "entitled to a merchantable title * * * one deducible of record, reasonably clear from defects that affect its salability; one that does not require him to inquire outside of the record," decides for the defendant.

The case of *Wadick* v. *Mace,* 118 App. Div. (N. Y.) 777, pretty well sums up the matter as follows: "A vendor is entitled to a title that will enable him to hold the land in peace and to sell it and be sure that no fault or doubt will disturb its market value, and is not compelled to accept a deed that he will be compelled to defend by litigation." C. R. M.