dled and sold by the plaintiff from the district named. All of the coal shipped bore a uniform freight rate, which indicated that it was mined at or near the same locality, and evidently upon the same branch of railroad, from which West Virginia Smokeless coal derives its name, as claimed by plaintiff. We think that the question was properly and fairly submitted by the trial judge to the jury; that the court did not err when it stated what the undisputed evidence in the case showed, and that the question of fact was properly left to the jury.

Referring to the seventh assignment of error, based upon the refusal to give defendant's second request, it should be borne in mind that there was no claim on the part of the defendant that, at the time of entering into the contract with the plaintiff, the latter had any knowledge of the subcontract, or any of the terms thereof, with Fleischmann & Co.

[2] In any event, had it proven plaintiff responsible for the breach, the measure of damages would have been the difference between the price at which plaintiff agreed to sell coal of this particular character, and the price at which it could have been secured in the open market at the time and place of delivery. There is no evidence that the defendant was not able to get coal of the same quality elsewhere, and that it did not have an opportunity to furnish a substitute. We recognize the rule contended for by the defendant, but do not think that either by its pleadings or proof it is in a position to invoke the rule. The rule is that the measure of damages for failure to deliver goods sold, where they can be obtained in the open market, is the additional cost of the goods; where they cannot be obtained in the market, the purchaser is entitled to recover the profits lost through the fault of the seller. F. W. Kavanaugh Mfg. Co. v. Rosen, 132 Mich. 44, 92 N. W. 788, 102 Am. St. Rep. 378; Den Bleyker v. Gaston, 97 Mich. 354, 56 N. W. 763; Thomas Iron Co. v. Jackson Iron Co., 131 Mich. 130, 91 N. W. 137. We think the charge of the court upon the subject of recoupment was as favorable to the defendant as it could have asked under this record. The jury found no occasion to apply any rule of damages on the subject of recoupment, as they found no breach of contract by plaintiff.

[3] We have examined the other assignments of error, both as to the examination of the witness Kain and the refusal of the court to grant a new trial, but we discover no error in the manner in which the questions involved were disposed of by the trial court. The right of the plaintiff to call the witness Kain for cross-examination under act No. 307, Public Acts of 1909 cannot be questioned, it appearing that said witness was "a person who at the time of the happening of the transaction out of which such suit or proceeding grew was an employé or agent of the opposite party."

The judgment below will be affirmed.

(166 Mich. 421)

NEWTON v. NEWTON.

In re LENT.

(Supreme Court of Michigan. July 5, 1911.)

1. JUDGMENT (§ 273*) — ENTRY NUNC PRO TUNC—EVIDENCE—WEIGHT.
   Evidence on a petition to enter a decree of divorce nunc pro tunc *held* to show that the decree was granted and signed.
   [Ed. Note.—For other cases, see Judgment, Cent. Dig. § 541; Dec. Dig. § 273.*]

2. JUDGMENT (§ 273*) — ENTRY NUNC PRO TUNC.
   It appearing that a divorce decree was granted and signed several years previously, it was error to deny the husband's administrator's petition to enter the decree nunc pro tunc.
   [Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 525–541; Dec. Dig. § 273.*]

Ostrander, C. J., and Brooke and Blair, JJ., dissenting in part.

Appeal from Circuit Court, Muskegon County, in Chancery; Frank D. M. Davis, Judge. Action by Evaline Newton against Lyman Newton. On petition by O. H. Lent to enter a decree nunc pro tunc. From an order, petitioner appeals. Reversed.

Argued before OSTRANDER, C. J., and BIRD, HOOKER, MOORE, McALVAY, BROOKE, BLAIR, and STONE, JJ.

Edward Waer, for appellant. Charles B. Cross, for appellee.

BIRD, J. [1, 2] The petition alleges that a decree of divorce was granted complainant in this cause in 1894; that the same was prepared and signed by the court, but by the neglect of some one it was neither filed nor entered, and he prays that it may now be filed and entered on the records of the court as of the date when it was rendered. The Chief Justice finds from the records and oral testimony that a decree was granted, prepared, and signed, and that the marriage was dissolved, as alleged by petitioner, but denies to him a nunc pro tunc order to complete the record. I concur with his finding that such a decree was granted, prepared, and signed, and that the marriage was dissolved; but I disapprove of his refusal to grant the relief prayed. If a decree was actually granted, prepared, and signed, but by the neglect of some one it was never filed or entered on the records, and we are convinced of these facts, as we are, I think the petitioner is entitled to the relief which litigants usually get when they prove their case.

It is safe to assume that the parties did not know of the defect in the record. They would not be supposed to know of it. Such

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

matters are usually attended to by counsel and other officers of the court. It required some such occasion as the present one to bring the defect to the light.

It is said that defendant had no opportunity to ask for a rehearing or a review of the proceeding. If defendant had desired a review of the proceeding and had taken steps to that end, the defect would have been discovered and corrected many years before this petition was filed, and from the fact that 15 years have elapsed without any such attempt being made, upon his part, we may safely conclude that he did not desire a review of the proceedings.

The order of the trial court is reversed, and an order will be entered therein agreeable to the prayer of the petition.

HOOKER, MOORE, McALVAY, and STONE, JJ., concurred with BIRD, J.

OSTRANDER, C. J. The complainant filed her bill against the defendant December 5, 1904, for a decree of absolute divorce on the ground of nonsupport. There was no personal service of process, but, upon an affidavit of nonresidence being filed, an order for the appearance of defendant was made and published. The bill was taken as confessed by the defendant June 17, 1895. The cause came on for hearing on June 21, 1895, and proofs were taken. No decree was ever filed or entered. The last entry on the chancery calendar in this cause, in the year 1895, is under date June 17th, when an affidavit of regularity was filed. The next entry in order is July 22, 1907, "Order dismissing suit filed." The next entry, March 22, 1909, "Copy of marriage certificate filed," and, on the same date, "Order permitting removal of marriage certificate from the files filed and entered." The paper writing upon which the entry of July 22, 1907, is based is entitled in the cause, and is as follows: "In this cause, on motion of Evaline Newton, the above complainant, it is ordered that the said cause be and the same is hereby dismissed. Evaline Newton, complainant."

On the 2d day of November, 1909, one O. H. Lent, of Riverside, Cal., filed a petition in said court and cause, setting up, upon information and belief, that after the proofs were taken in the divorce suit a decree of divorce was granted by the court to the complainant, and that such a decree was prepared and signed by the judge, but that the decree was never filed, is lost, and cannot be found; that after the decree was granted the defendant, who was a resident of the state of California, and had learned of the decree, married, on October 21, 1908, Nellie R. Cunningham, and, on January 9, 1909, died, the said Nellie surviving him; that on June 26, 1909, the said Nellie Cunningham Newton died in the state of California, and petitioner was appointed administrator of her estate; that as widow of Lyman Newton said Nellie was entitled to property of which Lyman Newton died seised, and that petitioner, as administrator of her estate, is entitled to it. The prayer of the petition is that an order be made for signing, filing, and entering a decree of divorce in the cause, to bear date prior to October 21, 1908, to take the place of the former decree.

This petition was answered by Evaline Newton, who denies that a decree of divorce was granted or signed, or that the court did anything more than to take the case under advisement. She admits that she caused the order, signed by herself, dismissing the said cause, to be entered; admits that Lyman Newton went through the form of a marriage ceremony in the state of California with Nellie R. Cunningham, but says that it was secretly performed, and that the said Lyman Newton knew that he was still the lawful husband of complainant. Further answering, she says that she is the widow of said Lyman Newton, entitled to, and that she has claimed an interest in, his property, and has been recognized as such widow by the courts of California, and is now acting as administratrix of Lyman Newton's estate. She further avers that subsequent to the taking of proofs in the original cause a reconciliation was effected between herself and her husband, who thereafter resumed marital relations, and at different intervals lived together as husband and wife.

Proofs were taken in open court. On the part of the respondent, Evaline Newton, the proofs tended to show that she never knew of any decree having been granted; never saw a decree; that she cohabited with Lyman Newton after July 22, 1907, and that in September, 1906, there was pending in the superior court, in the county of Los Angeles, state of California, a suit instituted by Lyman Newton, as plaintiff, against Evaline Newton, as defendant, the complaint in which set out that plaintiff and defendant intermarried on or about the 13th day of March, 1868, "and ever since have been and now are husband and wife," and further alleging that on or about the 25th of August, 1890, the defendant deserted and abandoned the plaintiff without cause, and against his will and without his consent. The prayer of the complaint is that the bonds of matrimony between plaintiff and defendant be dissolved.

The testimony relied upon by the petitioner, aside from the files and records in the cause, is the following: An entry on the printed calendar of the circuit court for the county of Muskegon, for the May term, 1895, kept by Judge Russell and in his handwriting, reading: "Evaline Newton v. Lyman Newton. Divorce. P. W. Kniskern. Decree;" the minutes of the stenographer on file with the clerk of the court, read by his successor, which show that upon the

hearing of the divorce case three witnesses were examined (two besides the complainant), and at the conclusion of the testimony the entry, "You may prepare a decree;" the testimony of Mr. Kniskern, who was one of the solicitors for complainant, who examined the witnesses at the hearing, who testified that a decree was prepared and signed by the court, and that afterwards he had the decree in his office and cannot tell the reason for not filing it; that it was in his table drawer for a long time; that his client soon after the hearing went to Chicago; that he had a number of talks with her about the decree, and as to what had become of it. In this respect the testimony of Evaline Newton contradicts that of Mr. Kniskern, as does also that of her daughter. The question is whether the court below, upon this record, should have made and entered a decree as of a date prior to the 21st of October, 1908, which was the date when it is claimed said Lyman Newton married Nellie Cunningham, in the state of California.

The statute (1 Comp. Laws, § 557) provides that any decree of a circuit court, in chancery, "that may have been duly passed and signed, * * * and which may have failed to be recorded or enrolled, may be directed by the court, * * * in its discretion, to be recorded and enrolled by the register of the court, nunc pro tunc; and when so recorded and enrolled the same shall be as effectual as if recorded and enrolled at the end of thirty days after its allowance."

The statute (3 Comp. Laws, §§ 10,276–10,280) is "An act to provide for the restoration of lost records, papers, or other proceedings in courts of record." The petition does not distinctly show that a statute is relied upon, and in the brief for petitioner and appellant, referring to the statute last mentioned, doubt is expressed whether it is applicable. The point is probably immaterial, since the statutes appear to provide for doing nothing which courts of record have not inherent power to do. See Drake v. Kinsell, 38 Mich. 232, 235. Both statutes expressly give to the courts discretion to restore or not to restore lost records. The exercise of discretion is involved in the exercise of the inherent power possessed by the courts.

The interest of the petitioner in fact is admitted, namely, that the ceremony of a marriage between Lyman Newton and Nellie R. Cuninngham was performed in California; that Lyman Newton died in California January 9, 1909; that said Nellie died in California June 26, 1909; and that petitioner is administrator of her estate. Inferentially, at least, it is admitted that the widow of a deceased person has, in California, some rights in the deceased husband's estate. We regard this as a sufficient showing of the right of petitioner to inquire about and to establish, if he can, the status of Lyman Newton, as a married or an unmarried man, at the time he contracted marriage with petitioner's decedent.

For all purposes of enforcement or of appeal, a decree of a court of chancery must at least come to the hands of the register of the court. Sellers v. Botsford, 9 Mich. 490; Newbould v. Stewart, 15 Mich. 155; Wolverine Land Co. v. Davis, 141 Mich. 187, 104 N. W. 648. A decree of divorce, which evidences no more than that a marriage is annulled, contains no provision for alimony, and imposes no obligation upon either party litigant, is not a decree which may be enforced, within the usual meaning of the term. It fixes the status of the parties; frees them from all obligations to each other; dissolves the relations theretofore existing between them growing out of the contract and ceremony of marriage. For the purposes of an appeal, the time would run from the entry of such a decree. So, undoubtedly, in ordinary cases the time within which, under the provisions of 1 Comp. Laws, §§ 496, 497, a defendant proceeded against as a nonresident may appear and be permitted to defend, after decree, would run from the date of filing and entry of the decree, unless notified in writing that the decree had passed. See Coffin v. Ontonagon Circuit Judge, 140 Mich. 420, 103 N. W. 835. This statute, however, expressly excepts decrees for divorce, and such decrees, and the proceedings in which they are entered, are in many respects exceptional, when compared with proceedings within the ordinary jurisdiction of courts of equity.

We are satisfied that in the divorce suit the court, upon a hearing, announced a conclusion in favor of complainant and later signed a decree of divorce. We are satisfied that the decree, which should have been at once handed to the register of the court, was handed to, and remained for some time in the possession of, complainant's solicitor and has been lost. We may assume, we think, that the decree followed the bill of complaint and did no more than dissolve the marriage. The judgment of the court had then, and not until then, been pronounced; the status of the parties had been determined. It would be intolerable if after such determination a party, or the solicitor of a party, could vacate or assert the judgment by filing or refusing to file the decree with the register of the court; could then determine, at pleasure or by inadvertence, whether the parties were or were not husband and wife. In the absence of a statute rule, we must hold that the marriage was dissolved when the decree was signed.

This conclusion does not necessarily dispose of the matter in appellant's favor. Fifteen years elapsed between the making of the decree and the application to restore it. During that period neither party to the divorce proceeding—and it appears

that the husband had knowledge that it was instituted—have been in a position to show, by the record of a court, that their relations were other than those of husband and wife; relations which, it is admitted, originally existed. The husband had no opportunity to appeal from the decree or to ask for a rehearing or review of the proceeding. Only after his death is it sought to secure record evidence of a changed relation and status. We are disposed to leave the parties, so far as the record of the court is concerned, where they left themselves.

The order of the circuit court, in chancery, for the county of Muskegon, should be affirmed, with costs to appellee.

BROOKE and BLAIR, JJ., concurred with OSTRANDER, C. J.

(166 Mich. 504)

GENERAL CONFERENCE ASS'N OF SEVENTH-DAY ADVENTISTS v. MICHIGAN SANITARIUM & BENEVOLENT ASS'N.

(Supreme Court of Michigan. July 5, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 519*)—ASSIGNMENTS BY FOREIGN ADMINISTRATOR—RIGHTS ACQUIRED—ACTIONS.

One may sue in the courts of Michigan on notes assigned to him by a foreign administrator of the nonresident payee.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2310–2322; Dec Dig. § 519.*]

2. WILLS (§ 434*)—FOREIGN JUDGMENTS—ADMISSIBILITY.

A certified copy of the proof of a will of a nonresident in a court of a foreign country, and of the due establishment in the court of the will, is admissible in evidence, under Comp. Laws, § 10,145, as amended by Pub. Acts 1909, No. 191, providing that the judicial proceedings of any court of any foreign country shall be admitted in evidence on proper authentication.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 937–945; Dec. Dig. § 434.*]

3. EVIDENCE (§ 517*)—LAWS OF FOREIGN COUNTRIES.

The testimony of a practicing attorney of a foreign country that he is familiar with the law and practice of the courts of such country as to wills and settlements of decedents' estates, and that in a specified case a widow was the universal legatee of her deceased husband and by law seised with the ownership of all his estate from the moment of his death, and the Civil Code of the foreign country, printed by authority, are sufficient proof of the law of the foreign country to show that the widow became the absolute owner of her husband's property, entitling her to assign notes payable to him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2327; Dec. Dig. § 517.*]

4. EVIDENCE (§ 347*)—FOREIGN JUDGMENTS.

Where the probate register of a sister state does not set forth a copy of the order of the court appointing an administrator certified by him, but merely certifies to what the court did, as appears by the records and files of the probate court, the proofs of the appointment of the administrator do not comply with Comp. Laws, § 10,145, as amended by Pub. Acts 1909, No. 191, providing that the judicial proceedings of any court of the several states shall be admitted in evidence when authenticated.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 347.*]

5. EVIDENCE (§ 158*)—JUDICIAL ACTS—PAROL EVIDENCE.

Parol evidence is inadmissible to prove the granting of letters of administration by a court, but the act must be proved by the record.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 476–491; Dec. Dig. § 158.*]

6. BILLS AND NOTES (§ 523*)—TITLE OF HOLDER—STATUTES.

Under Pub. Acts 1905, No. 265, §§ 18, 53, 61, providing that the delivery to a holder in due course is conclusively presumed, and that a holder of a negotiable instrument may sue thereon in his own name, and that every holder is deemed prima facie a holder in due course, a holder of a note who has received payments from the maker, who admits that the payments were made as indorsed, is prima facie entitled to sue in his own name on the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1822–1825; Dec. Dig. § 523.*]

7. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

The error, if any, in admitting testimony impeaching the prima facie right of the holder of a note to sue thereon in his own name is not prejudicial to the maker.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4054; Dec. Dig. § 1033.*]

Case-Made from Circuit Court, Calhoun County; Walter H. North, Judge.

Action by the General Conference Association of the Seventh-Day Adventists against the Michigan Sanitarium & Benevolent Association. There was a judgment for plaintiff, and the case was heard in the Supreme Court on case-made. Affirmed.

Argued before OSTRANDER, C. J., and BIRD, HOOKER, BLAIR, and STONE, JJ.

Jesse Arthur, for appellant. W. S. Powers, for appellee.

BLAIR, J. This action is founded upon seven promissory notes, all executed by defendant at Battle Creek, Mich.; one payable direct to plaintiff; three payable to Mrs. A. D. Hutchins and assigned to the plaintiff by T. H. Purdon, as the administrator of the estate of Mrs. A. D. Hutchins, deceased, purporting to have been appointed and qualified as such administrator by the probate court of Orleans district, state of Vermont, the residence of Mrs. Hutchins at the time of her death; and three others payable to Phillip E. Ruiter and assigned to plaintiff by Lucy M. Ruiter, as administratrix with the will annexed of the estate of Phillip E. Ruiter, deceased, purporting to have been appointed and qualified as such administratrix by the superior court of the province of Quebec, Canada, district of Bedford, the residence of said