plaintiff, and that this, therefore, became a contract for the benefit of the plaintiff, upon which the plaintiff might sue the defendant, on the principle of National Bank v. Grand Lodge, 98 U. S. 123; Hendrick v. Lindsay, 93 U. S. 143, and other cases. This brings us to consider what the obligation of the defendant company was in respect of the payment of the $2,500 per year in monthly installments. The obligation, if it existed, arose in this wise: Its contract with the Union Company provided that the defendant should pay to the Union Company, or, at its own election, to the plaintiff, the Jackson Iron Company, 45 cents per ton for each and every ton of concentrated ore made, refined, separated, and produced by it, payable in cash on the 15th of each month for all such concentrated product for the previous month. The same contract provided that the defendant should not occasion or be guilty of any violation of the contract between the Union Company and the plaintiff, or suffer or permit, so far as its operations were concerned, any default therein or violation thereof, and that it would perform the same on the part and behalf of the said Union Company so far as it or its operation should make it proper so to do. The contract between the plaintiff and the Union Company provided, in effect, that the minimum payment by the Union Company each month on account of ore sold to the latter should be $208.33, or $2,500 per year, on failure to pay which the plaintiff might terminate the contract; and that, if the ore, actually taken by the Union Company in any month or year, did not equal in its contract price the minimum payment above required, the surplus should be credited on future deliveries. If the defendant became liable at all to pay the $2,500 a year as minimum royalty or purchase price of ore, it was by reason of its stipulation to perform the contract of the Union Company so far as its operation would make it proper to do so, taken in connection with its agreement to pay 45 cents a ton for ore taken by it. As the $2,500 was to be treated as a payment of the purchase price of ore taken or to be taken, and as in paying for the ore taken by it the defendant had the option to pay either the Union Company or the plaintiff, as it might elect, there was no absolute agreement by the defendant in its contract with the Union Company to pay the plaintiff this $2,500. It would fully comply with its contract by paying this sum to the Union Company. The necessary result is that no right of action to enforce such payment could accrue in favor of the plaintiff from the contract between the defendant and the Union Company.

The second count of the declaration proceeds on the theory of an independent promise made directly by the plaintiff to the defendant to pay the $2,500 per year in monthly installments mentioned in the contract between the Jackson Company and the Union Company in consideration of the forbearance by the plaintiff to terminate that contract, and thus to prevent the defendant from enjoying so much of the rights conferred by that contract as were assigned to it by the Union Company. The averment in the count is that the defendant has repeatedly promised to pay the amount due under the con-

tract, and has induced the plaintiff to rely thereon, and has by means thereof maintained possession of the plaintiff's premises, and has kept in force this contract. The evidence offered to support this count consisted of the oral declaration of the superintendent of the defendant company to an officer of the plaintiff company, that the defendant "would pay up as it had been doing; that the company had no funds to pay with until they could effect some changes in their stockholders, and perfected some machinery they wanted to put in place of old machinery that didn't work well; that the company intended to go on and fulfill its contract, and proposed to hold the land, and they would be greatly favored if the Jackson Company would wait on them, and not press for payment." The plaintiff company did not, as it had the right to do by reason of the default of the Union Company, terminate the contract. We are of opinion that if any contract can be said to have arisen from the conversation above stated, it was within the statute of frauds of Michigan, which renders unenforceable every agreement not in writing that by its terms is not to be performed within one year from the making thereof. How. Ann. St. § 6185. Giving the evidence the construction most favorable for the plaintiff, the contract was an agreement by the defendant to pay during the life of the contract at least $2,500 a year for the privilege of taking the iron ore and using it, in consideration of the plaintiff's agreement to forbear to forfeit the rights of the Union Company under the contract, and thereby to prevent the defendant company from continuing its operation under its contract with the Union Company. This was certainly an agreement on the part of the defendant to do something which, by its terms, could not be performed within a year, for both contracts had at least 10 years to run. Even if it can be said that the plaintiff could and did fully perform within a year on its part that which formed the consideration of the defendants promise, namely, the forbearance to terminate the contract for a reasonable time, this was not, in Michigan, such a part performance as would take the case out of the statute of frauds. Whipple v. Parker, 29 Mich. 369; Perkins v. Clay, 54 N. H. 518; Emery v. Smith, 46 N. H. 151; Frary v. Sterling, 99 Mass. 461; Reinheimer v. Carter, 31 Ohio St. 579; Pierce v. Payne's Estate, 28 Vt. 34; Lockwood v. Barnes, 3 Hill, 128; Broadwell v. Getman, 2 Denio, 87; 1 Smith, Lead. Cas. 45, etc.; Brown, St. Frauds, § 286. It fully appears, and was conceded by counsel in the court below, that after the alleged promise upon which the second count is based the defendant company took out no more ore, and therefore no recovery could be had against it in assumpsit as upon a quantum valebant.

The next claim of the plaintiff is that the defendant was in privity with the plaintiff as a tenant, and as such was directly liable to plaintiff to pay and discharge all the obligations necessary to maintain such leasehold interests. It appears that, while the defendant took no ore from the plaintiff's ore pile after the time up to which it had paid in full the monthly payment of $208.33 as minimum royalty or price for ore, its mill stood on plaintiff's ground, and its ma-

chinery lay there, in charge of a watchman, till just before the bringing of this suit. The land which was occupied by the defendant was rented by the Jackson Iron Company to the Union Company at a nominal rent of $1 per annum, and, even if there was privity established between plaintiff and defendant by defendant's continued occupancy of this land, it would not involve the payment by the defendant of more than that rent, and would certainly not create the liability sought here to be established on the agreement of the Union Company to pay $2,500 to the Jackson Company as a minimum payment of royalty or purchase price of the ore to be sold under the contract. The $2,500 was not to be paid as rent, and cannot be recovered against defendant as such, on any theory of privity of estate. The judgment of the circuit court is affirmed.

MILLER v. CHICAGO, B. & Q. RY. CO.

(Circuit Court, D. Colorado. December 29, 1894.)

No. 3,104.

NEGLIGENCE—STIPULATIONS AGAINST LIABILITY.

A railway company organized a relief department among its employés, for the purpose of giving pecuniary aid to those who might be injured or sick. The funds of said department were provided by contributions from the members, the company agreeing to make up any deficiency which might occur in any year. The rates of contribution by the members were such that a deficiency would seldom occur, and in fact was a very rare occurrence. In the application for membership in the relief department and in the contract of insurance a clause was inserted providing that, in consideration of the payments by the company, the acceptance of benefits by a member should operate as a release of all claims for damages against the company. Plaintiff, who was a member of the relief department, received injuries in consequence of the negligence of the railway company, and thereafter accepted benefits as a member of the relief department. *Held*, that plaintiff's right of action against the railway company to recover damages for such injury was not barred by the acceptance of such benefits.

This was an action by I. E. Miller against the Chicago, Burlington & Quincy Railway Company to recover damages for personal injuries. The defendant pleaded, among other things, an agreement by plaintiff to release in consideration of certain payments made on a contract of insurance. Plaintiff demurred to the answer.

O'Donnell & Decker, for plaintiff.
Wolcott & Vaile and H. F. May, for defendant.

HALLETT, District Judge. Action by a fireman to recover for an injury to his person received while in the service of the company. In the first and second defenses the defendant makes some specific and general denials of matters alleged in the complaint. The third answer is, in substance, that the defendant and its employés organized an association for the relief of employés of the company injured while in the service of the company, known as the Burlington Voluntary Relief Department. The nature and purpose of the organization are not very fully stated in the answer, but counsel has furnished