ion that the plaintiff is entitled to recover on his original contract. See Smith v. Tennant, 20 O.R. 180.

I find that the defendant, for valuable consideration, viz., the sale of the land, apart from the portion of loose gravel and sand in question, agreed to permit the plaintiff to remove the gravel and sand as mentioned, and it would be inequitable to permit the defendant to prevent such removal. The defendant, by his threats, prevented Mullin from removing what he paid for to the plaintiff.

The defendant cannot complain if taken at his own word. By his action gravel and sand of value are now on the lot, and in the defendant's possession, to which the plaintiff, or his vendee, is entitled. I do not here attempt to define or deal with the liability of the plaintiff to Mullin. The plaintiff has apparently stepped into the breach. Mullin has been made, by the defendant Royce, a party by counterclaim.

The wife can, with her consent, be made, if necessary, a party plaintiff.

I think the plaintiff is entitled to recover. There was no mistake of fact—no misrepresentation—there was a clear-cut intention to allow the plaintiff to have the gravel and sand, and the defendant should not be allowed on any technical objection to deprive the plaintiff of what, of right, was reserved.

The declaration of the 26th February, 1909, could operate only by way of estoppel, and it cannot now be invoked to vary the contract between the parties. As against an innocent purchaser for value, such a declaration might prevent the person making it from removing gravel. The defendant knew as much about the reservation as did the plaintiff. The declaration was not for any such purpose, but was only in reference to outstanding claims, not in any way arising in the bargain between the plaintiff and defendant.

The plaintiff is entitled to the value of the garvel and sand down to the level of Carlton street which he or his vendee could have removed had the defendant not prevented it, before the 1st August, 1909.

The level of Carlton street must be determined by the by-law of West Toronto. The plaintiff is bound by that.

The value of the loose gravel and sand on the lot and above the level of Carlton street is $400; and I assess the damages at that amount, and direct that judgment be entered for the plaintiff against the defendant for $400 with costs.

The counterclaim will be dismissed with costs, and the claim against Mullin will be dismissed with costs to be paid to Mullin