

by the negligence of the defendants' servants in "leaving open the gate across the switch line leading to the plaintiffs' mill."

MACBETH, Co.C.J., dismissed the action, holding that the defendants were protected against any such liability for damage to animals of the plaintiffs by clause 10 of a special agreement between the parties: "The contractor (plaintiffs) shall protect the railway of the company from cattle and other animals escaping thereupon from such portion of the said siding as may be outside of the lands of the company . . ."

It appeared from the agreement that the defendants owned the siding, and that the plaintiffs asked the defendants to allow them to use it. The agreement embodied the terms upon which the user was permitted.

The plaintiffs appealed to a Divisional Court (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.)

J. C. Elliott, for the plaintiffs.

W. E. Foster, for the defendants.

RIDDELL, J., was of opinion that clause 10 meant that the plaintiffs should keep animals from escaping from that part of their land occupied by the siding to the property of the defendants. The object was plain; the defendants desired to be secured against animals coming upon their railway; that object could only be attained by keeping animals off the railway, which the plaintiffs agreed to do. The defendants owed no duty to the plaintiffs to keep their animals away from the line of the railway; and the placing of the gate by the defendants, their custom to have it closed from time to time, and the complaints of the plaintiffs that it had been found open after being used by some of the defendants' crews, could not create such a duty: *Coggs v. Bernard*, 1 Sm. L. C. (6th ed.) 177; *Skelton v. London and North Western R. W. Co.*, L. R. 2 C. P. 631, 636; *Soulsby v. City of Toronto*, 15 O. L. R. 13. The opening of the gate was necessary for the common business of the plaintiffs and defendants, and the non-closing was a neglect to perform a voluntary act. "There is no such thing as negligence in the abstract, negligence is simply neglect of some care which we are bound by law to exercise towards somebody:" *Daniels v. Noxon*, 17 A. R. 206, 211; *Thomas v. Quartermaine*, 18 Q. B. D. 685, 694; *Le Lievre v. Gould*, [1893] 1 Q. B. 491, 497. No duty existing on the part of the defendants towards the plaintiffs to keep any gate or fence at the point in question, and none to keep a gate closed or to close it if opened, there can be no negligence on the part of the