Q. B.] [March 26.

GAUTHIER v. THE WATERLOO MUTUAL INSURANCE COMPANY.

Insurance—Further insurance—Mistake.

The assured under a policy containing a condition "that the company is not liable . . . if any subsequent insurance is effected in any other company unless and until the company assent thereto by writing signed by a duly authorized agent," effected an insurance with the Mercantile Insurance Company, which was void at their option on account of a similar condition, the policy with the defendants not having expired as a matter of fact, though plaintiff was led to believe it had.

Held, affirming the judgment of the court below (44 U. C. R. 490) that the plaintiff could not recover, for in point of fact there was a further insurance which was voidable only and not void; and the defendant's liability was not dependant upon whether the Mercantile Insurance Company's policy was finally to be adjudged valid or not, the stipulation as to further insurance being designed to apply to all cases of policies subsequently existing in point of fact without reference to their validity or effect.

Crickmore, for appellant.

Bowlby, for respondent.

Q. B. and C. P.] [March 26.

HOWARD v. BICKFORD.

Principal and agent — Sale on commission—Right to commission.

The rule that the agent is entitled to his commission only upon a due and faithful performance of all the duties of his agency in regard to his principal, is not applicable to this case where the commission had been earned, and the relation of principal and agent had ceased, the alleged omission of duty being that the agent did not report to his principal a difference of opinion expressed by a party to the contract as to its construction.

The plaintiff as agent of the defendant bought from the G. W. R. Co. a quantity of rails for which he was to receive one dollar per ton commission, payable one half when the defendant should sell them, and the balance when he should receive payment for them. The defendant having failed to sell them, appropriated them by laying down some upon, and distributing the remainder along a road in which he had a controlling interest.

Held, that the plaintiff was entitled to his commission.

The defendant believing, and being led by the plaintiff, who was acting *bona fide* in so representing, to believe that the advantage which he would gain on a re-sale was extravagantly large, offered in addition to a commission on a purchase of the rails, the sum of $1,000, which was paid by draft drawn by the plaintiff upon, and accepted and paid by the defendant. The defendant believed that the $1,000 was to be illegally used by the plaintiff in effecting the purchase, and the plaintiff, knowing this, left him under that impression. The expected advantage was not obtained.

Held, that the defendant was not entitled to recover back the $1,000.

H. Cameron, Q.C., for the appellant.

E. Martin, Q.C., for the respondent.

C. P.] [March 26.

WALTON v. THE CORPORATION OF THE COUNTY OF YORK.

Negligence—Ways—Ditches—Obligation to fence or grade.

Action for negligence in not keeping in repair a county road. The plaintiff in driving along the road was carried into the ditch by his horse, which shied at some object. The travelled portion of the road, which was thirty feet wide, sloped gradually from the crown to the edge of the ditch, which was four feet wide —2½ at the bottom, 18 inches deep, measuring it from its edge. At the trial the plaintiff obtained a verdict for $400, and the Court below made absolute a rule for a non-suit, (30 C. P. 217), which also asked in the alternative for a new trial, holding that the having no guards or railings to the ditch was no evidence of neglect to keep the road in repair.

Held, that the question whether or not such a place required protecting guards, was a question of fact, and as there was some evidence of danger here, the case was not one that could properly have been withdrawn from the jury, and the appeal was therefore allowed.