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COURT OF APPEAL.

JULY 13TH, 1911.

*SOVEREIGN BANK OF CANADA v. PARSONS.

Set-off—Business of Manufacturing Company Carried on by Receiver under Order of Court—Goods Manufactured by Receiver for Customer—Assignment by Receiver to Bank of Moneys Due for Price of Goods—Right of Customer to Set off Damages for Breach of Contract Made with Company.

Appeal by the defendants from the judgment of BRITTON, J., 1 O.W.N. 1079.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

I. F. Hellmuth, K.C., and G. Larratt Smith, for the defendants.

J. Bicknell, K.C., and J. F. Boland, for the plaintiffs.

GARROW, J.A.:— . . . The Imperial Paper Mills of Canada Limited carried on the business of manufacturing paper at Sturgeon Falls, in this Province, John Craig being manager. The defendants reside and carry on business in the city of New York as extensive dealers in paper, acting therein both as ordinary merchants and as brokers. They were also shareholders and bondholders in the paper company for a considerable sum. At the date of the order appointing John Craig receiver and manager, there were outstanding several contracts between the paper company and the defendants for paper to be manufactured and supplied from time to time, which had not been fully performed, but no default, prior to the date of Mr. Craig's appointment, had taken place, or at least is complained of; and indeed the contrary is alleged in the 3rd para-

*To be reported in the Ontario Law Reports.

graph of the statement of defence. By the terms of the order Mr. Craig was not to act as manager beyond the 27th November, 1906, without the leave of the Court. The reason for this limitation doubtless was because all parties were looking forward to a speedy re-organisation of the company with an increase of capital, and the application for a receiver was in the nature of a protective step while such reorganisation was going on. The reorganisation, however, appears to have finally either failed or been postponed, because the receivership and managership were both continued by the subsequent orders referred to by Britton, J.

So far as appears, the first intimation given to the defendants by the receiver and manager of his appointment is that contained in Mr. Craig's letter dated the 3rd November, 1906, in answer to the defendants' letter dated the 31st October, 1906, in which they say they had seen in the newspapers an intimation that a receiver had been appointed. In that letter they also say: "What does this mean? Will you let us hear from you about it? I suppose there is no likelihood of the mill being shut down, as that would seem the last thing to do. When we last discussed the matter, I think you were hopeful of getting a considerable amount of money from London, on which you would have to pay interest? Has that materialised?" In his reply, Mr. Craig said the appointment was made on a friendly application, for the purpose of carrying out the reorganisation, and that there was "not only no likelihood of the mills being shut down, but in this appointment every assurance that the mill will be run."

The defendants were, therefore, plainly aware, almost from the first day, that the paper company affairs had passed into the control of a receiver. And, on the other hand, Mr. Craig was also, from his position as former manager for the paper company, fully aware of the outstanding and unfinished contracts which, it is now contended, he afterwards adopted and undertook to perform.

At what time the hope that Mr. Craig's appointment as receiver and manager was only to be for a short time was dispelled does not appear, but it would probably be some time before Mr. Edwards was appointed on the 9th January, 1907, joint receiver and manager, and may indeed have been as early as Mr. Craig's letter to the defendants of the 27th November, 1906, signed by him as receiver and manager, in which he reminds the defendants that the company is now in the receiver's hands—a reminder which was repeated over and over again in

subsequent correspondence—but which information the defendants, on their side, for some time refused to take seriously or to act upon, and indeed more than once combatted the idea that the receivers were not bound by the contracts entered into before the 27th October, 1906.

The respective positions taken by the parties is very distinctly expressed in two letters, one from the receiver to the defendants dated the 10th January, 1907, and the defendants' reply dated the 19th January, 1907. In the former Mr. Craig, after discussing one of the old contracts which for the time he was declining to carry out, says: "This opens up at the same time a larger question. As you are aware, the mills are now running under myself as receiver and manager, and I am not bound to accept or fulfill contracts entered into by the Imperial Papers Mills as a company. In other words, as receiver I am not only entitled to but obligated to cut out of the order book any contracts the acceptance of which would not seem suitable to-day. I quite recognise the hardship that this action would inflict upon your company, and I am unwilling, if this course can be avoided, to take this action, but the receiver has to consider the interests of the bondholders rather than of the company." To which the defendants replied: "On the subject of the larger question, we have to say that we cannot agree with you, and we expect that the contracts we have with your mills, which were accepted by you when you were manager at the mills and have been continued by you as receiver, shall be filled as they stand, and we must hold you responsible for any loss which may come to us from failure on your part to make deliveries, or to keep up the contract quality, or in other respects."

It would serve no purpose to quote at length from the subsequent correspondence, for from the position thus defined the receivers and managers never afterwards varied or departed. On the contrary, they extended, or at all events elaborated, it in their subsequent letters of the 1st April and the 6th April, 1907; while the defendants moderated their tone very much in their letters of the 3rd and 4th April, and in the latter even condescended to admit that the receivers "are perhaps legally right in certain of the positions you have taken," and further say, "we have felt that your making shipments as heretofore was a tacit, if not an actual, acceptance of the contracts, and this we still feel is morally if not legally so."

In the letter of the 6th April, 1907, the receivers defined their position with reference to the future to be as follows:

"Each specification as it comes in will be accepted or rejected as if it were a new order independent of any contract. Further than this we cannot go."

This seems to bear upon both classes of contracts, the old as well as the new, and shews very clearly, when the whole letter is read, that the receivers and managers absolutely refused not only to perform the old contracts, but to be committed by any kind of contract, new or old, to a continuous supply of paper at a fixed or agreed-upon price.

At the same time it is to be remembered, in explanation of equivocal circumstances, that all parties were looking forward to a resumption of business by the paper company. In that business the defendants were interested, not merely as customers but as proprietors; and it was a perfectly natural as well as proper thing that the supply of paper to which the defendants had been accustomed, and upon the faith of which they had entered into contracts, the breach of which would entail loss, first upon them, and afterwards upon the paper company, should, as far as was consistent with their duty, be kept up by the receivers and managers, and the ultimate damages thereby minimised. But, bearing all that in mind, and having regard to all the other facts and circumtances, there being no express adoption of the paper company's contracts by the receivers and managers, and assuming that they had power to do so, it would, in my opinion, be absolutely impossible to imply such an adoption from anything which appears in the evidence. Nor is it shewn that the receivers and managers themselves, as such officials, entered into contracts, after their appointment, for a continuous supply of paper of which the defendants have shewn breaches either before or after the plaintiffs acquired title.

The proper, and, in my opinion, the only reasonable, inference upon the whole evidence, is that the merchandise, the proceeds of which were assigned to the plaintiffs in May and June, 1907, was supplied to the defendants upon the terms contained and set forth in the letter of the previous 6th April from the receivers to the defendants, not upon any earlier contract, but as entirely new orders.

But, if I am mistaken in this view of the facts, I would still, upon the law, be unable to see how the defendants can succeed. Their claim is distinctly one of set-off and not of counterclaim. That question was disposed of when the case was in this Court before, upon the question of pleadings: see 18 O.L.R. 665. The receivers and managers were not dealing with their own goods,

as the defendants well knew. Nor were they acting, in what they did, as agents for the paper company, but for the mortgagees, at whose instance they had been appointed, and for whom they were carrying on the business, as the defendants also well knew. In so carrying on the business, the receivers and managers could, of course, contract obligations for which they would become personally liable, but they could not impose an obligation such as that arising under the old contracts, upon the mortgagees, without the leave of the Court: Whinney v. Moss Steamship Co., [1910] 2 K.B. 813. And as to contracts entered into by themselves, the creditors' right to damages would be directly against them, and only indirectly against any indemnity to which the receivers and managers might be entitled, but the latter right would not justify setting off such a claim against a claim owing to the receivers and managers in their official capacity: see Nelson v. Roberts, 69 L.T.R. 352. In that case the defendant, a receiver and manager, sought to set off, against a claim for which he had become personally liable in carrying on the business, a claim to which he was entitled against the plaintiff as executor of an estate, which the Divisional Court held could not be done, because the claims did not accrue in the same right—a well-known principle of the law of set-off.

The right which is given by sub-sec. 5 of sec. 58 of the Judicature Act, which enacts that the assignee of a chose in action takes it subject to the equities which would have been entitled to priority over the right of the assignee if that section had not been passed, is a right of equitable set-off. The equities chargeable against the assignee and which fall within that term are those only which arise out of the same transaction as the debt, such as payment, or satisfaction made on account of the debt, failure of the consideration, defective execution of the consideration, such as defects in the quality of the goods sold or work done, or a lien, or the right to avoid the transaction for fraud, or other sufficient grounds. But it does not include mere cross-claims arising from transactions independent of the debt assigned: see Leake on Contracts, 5th ed. (1906), p. 836, and the cases there cited, to which may be added Rawson v. Samuel, 1 Cr. & Ph. 161, where, at p. 178 et seq., the subject is discussed at some length by the then Lord Chancellor (Cottenham): see also Watson v. Mid Wales R.W. Co., L.R. 2 C.P. 593; Christie v. Taunton Delmard Lane & Co. Limited, 41 W.R. 475.

For these reasons, I agree with the judgment of Britton J., and think the appeal should be dismissed with costs.

Moss, C.J.O., was of the same opinion, for reasons stated in writing. He referred to Whinney v. Moss Steamship Co., [1910] 2 K.B. 813, affirmed by the House of Lords (Moss Steamship Co. v. Whinney, 131 L.T.J. 193), and said that that case was helpful only in so far as it defined the position and powers of a receiver and manager appointed by the Court in an action on behalf of debenture-holders.

Maclaren and Magee, JJ.A., also concurred.

Meredith, J.A., dissented, for reasons stated in writing.

July 13th, 1911.

*CARTER v. CANADIAN NORTHERN R.W. CO.

Contract—Extrinsic Oral Evidence to Vary—Inadmissibility—Specific Clause in Contract Dealing with Variation—Construction—Action for Return of Money Paid—Commission Evidence—Unsatisfactory Nature of.

Appeal by the defendants from the judgment of a Divisional Court, 23 O.L.R. 140, ante 639, affirming (Meredith, C.J.C.P., dissenting), the judgment of Latchford, J., 23 O.L.R. 140, 1 O.W.N. 892, awarding payment by the defendants to the plaintiff of $507.55, with costs.

The appeal was heard by Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A.

I. F. Hellmuth, K.C., and G. F. Macdonnell, for the defendants.

W. J. Elliott, for the plaintiff.

Moss, C.J.O.:—On or about the 18th April, 1908, the plaintiff gave to the defendants his cheque upon the Buckeye National Bank, payable to the defendants' order, for $480, "for land." The amount was paid to and received by the defendants, and the plaintiff's claim in this action is for repayment by the defendants to him. . . .

[Reference to the pleadings and evidence.]

The testimony in support of the plaintiff's case was taken under commission. This may have been unavoidable, but it is

*To be reported in the Ontario Law Reports.

a matter of regret that, in a case of this description, where alleged representations, conditions, and stipulations are set up and sought to be supported by verbal testimony as against an instrument in writing, the plaintiff and some of his witnesses—and in particular, Mr. Doty, the attorney, who, having first conducted the examination on behalf of the plaintiff, proceeded to add his own testimony to that already taken—were not present to testify before the trial Judge. It is too frequently the case that the taking of evidence under commission leads to loose, unsatisfactory testimony. Questions of the most leading and suggestive kind are allowed to be put "subject to objection," and very rarely is any question or answer excluded. . . .

The onus was on the plaintiff to rid himself of the effect of an instrument in writing, signed by him, which he admits he had an opportunity of reading, and which he does not venture to say he did not read. . . .

The learned trial Judge . . . gave judgment for the plaintiff, on the ground that it was agreed between the plaintiff and one F. J. Webster, an employee or sub-agent of Messrs. Davidson & McRae—who, as appears from the agreement produced at the trial, were the exclusive agents of the defendants in respect of the selling of their unsold land grant, and to procure purchasers and collect all payments maturing for agreements for sale of the lands—that, if the plaintiff would subscribe for 960 acres and pay a deposit of 50 cents per acre, and it should turn out that 10,000 acres were not subscribed for, the money would be returned. . . . The agreement lends no support to this view. On the contrary, it appears to be directly opposed to it. The whole scope of the instrument evidences an intention to enable desiring purchasers, by forming a body, to obtain lands for a less price than if they each purchased separately. In no part do the defendants, either directly or by inference, give any pledge or undertaking as to the number of persons to subscribe or the aggregate of acreage to be subscribed for. As far as the defendants are concerned, each purchaser signs and contracts for himself alone—each is to select his own land, and, when he has done so and made certain specified payments, the defendants and he are to enter into a separate contract.

As regards the price, the agreement states that "the price of $10 per acre and survey fee has been made for the reason only that the syndicate hereinbefore referred to as the purchaser have agreed to purchase an acreage of land amounting in the aggregate to not less than . . . acres of land, and, if the total lands purchased by the purchasers from the company under this

agreement on or before the day of A.D. 19 does not equal or exceed in the aggregate acres of land, and if the cash payment of 50 cents per acre has not been made as hereinbefore provided on at least . . . acres of land on or before the day of A.D. 19 , then and in that event, at the option of the company, all moneys paid by each purchaser under this agreement may be returned to him, and this agreement will then and there be at an end."

It is plain that this agreement is intended for the protection of the defendants, and does not operate and was not intended to operate as a release of the purchaser, save at the option of the defendants. They are reducing the price of their land, or at all events fixing it with reference to the purchase of a considerable acreage by a number of persons forming themselves into a company or syndicate for that purpose, but they provide that, if a sufficient acreage is subscribed for, they are not to be obliged, unless they choose, to sell at the price fixed, to the few persons who have subscribed. As regards the parties who have signed the agreement, it is complete with each purchaser as soon as he subscribes. It is not contingent in any respect upon the aggregate number of acres being subscribed for.

The oral evidence upon which it is sought to establish a verbal agreement, preceding or contemporaneous with the signing of the agreement, is not at all satisfactory, and seems to fall far short of what is necessary in order to prove terms or conditions materially affecting the very substance of the agreement which the plaintiff signed. If the plaintiff's first statements are to be accepted, they go to sustain the theory of the defence of a personal dealing with Webster, and no assumption on his part of authority to represent or promise anything on behalf of the defendants. . . .

The danger of acting upon such evidence, as against an instrument in writing, must be apparent, and especially so as an examination and comparison of other parts of the plaintiff's testimony and that of the other witnesses in support of his case discloses how self-contradictory and unsatisfactory it all is in many respects.

But it is not necessary to pursue this inquiry further, for accepting, as the trial Judge and the majority of the Divisional Court did, the plaintiff's later version (which was that "the conditions were that if the syndicate failed to fill, we should get our money back at once"), it becomes apparent that the evidence is inadmissible. Its effect is to contradict or vary a distinct term of the written instrument. As already pointed out, the ag-

reement was a complete one as against the plaintiff from the time he signed it. In it provision is made for what may be done in case—to use the plaintiff's own words—"the syndicate failed to fill;" and by that provision the plaintiff is bound. To permit him to shew by parol that it was agreed that something else was to be done would be to introduce into the writing a term inconsistent with and contrary to it. And it is not possible to give effect to the plaintiff's claim without depriving the defendants of the right which the agreement gives them, and them only, of saying whether they will adhere to the sale which they agreed to make to the plaintiff, upon the terms set forth in the agreement, or whether they will withdraw from it.

The result is, that the appeal should be allowed and the plaintiff's action dismissed, with costs throughout.

MEREDITH, J.A., was of the same opinion, for reasons stated in writing.

GARROW, MACLAREN, and MAGEE, JJ.A., also concurred.

JULY 19TH, 1911.

SHAW v. ST. THOMAS BOARD OF EDUCATION.

Negligence—Unguarded Hole in Floor of Furnace-room in School Building—Injury to Person Having Business in Building—Contributory Negligence.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., ante 510.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

W. K. Cameron, for the defendants.

C. St. Clair Leitch, for the plaintiff.

The judgment of the Court was delivered by MACLAREN, J.A.:—The plaintiff was Sanitary Inspector for the city of St. Thomas under R.S.O. 1897 ch. 248, and was awarded $1,200 by the Chief Justice of the King's Bench, in an action tried without a jury, as damages for injuries sustained by him from a fall in the furnace-room of one of the city public schools.

On account of an epidemic of diphtheria among the children

of the city, he was instructed by the Chairman of the Board of Health to inspect the city schools as to ventilation and sanitation, and he had made an appointment with the Medical Health Officer to visit the school in question on the forenoon of the 22nd February, 1910. Having arrived before the Health Officer, he sought the janitor to shew them over the premises, but did not find him, as he was outside shovelling snow from the sidewalk. He did not seek the Principal, who, he knew, was engaged with a class on the main floor, but went down to the basement, into the lavatory. Not finding the janitor there, but hearing a noise in another room, he pushed open the door, which was slightly ajar, and found that it led into a dark room, where there was only a faint streak of light. When about two steps inside, a man whom he could not see saluted him. He returned the salutation and changed his direction towards the speaker, thinking it was the janitor, but stepped into a depression in the floor, which he calls a pit, and fell and received the injuries complained of. It turned out that the room was the furnace-room; that the pit was the not unusual depression to allow of the opening of the furnace-doors; and that the person who had spoken to him was a friend of the janitor, who was using the room as a warm shelter from the snow-storm outside.

The plaintiff alleged that he was lawfully on the premises in the performance of his duties under the statute and the city by-law, and the express orders of the Chairman of the Board of Health; that the pit in question was unguarded and in the nature of a trap; that the defendants were aware of its dangerous condition, and had promised to protect and guard it, but neglected to do so; and that the plaintiff had reasonable grounds for looking there for the janitor, as no other place had been assigned to him.

The trial Judge held that the plaintiff was properly in the building in pursuit of his duty, and that it was right for him to enter the furnace-room in search of the janitor; also that it was negligence for the defendants to leave the place unguarded and unlit; and that the plaintiff was not guilty of contributory negligence.

With great respect, I find myself unable to adopt the view of the trial Judge. So far as disclosed, it was not necessary for any of the persons mentioned in the evidence to enter or visit the furnace-room; and I cannot find that the defendants owed any duty to them in the premises. The present janitor and his predecessor wanted a light, not for the purpose of greater safety, but for the purpose of reading the gauge, etc. The depression in

front of the furnace was the usual one where a furnace is placed in a basement with a low ceiling, such as that in the railway station in the town. The plaintiff says he was not even aware that the room in question was the furnace-room, so that he had no more reason to expect the janitor to be there than in any other room in the building, the use or occupancy of which was unknown to him. It is said that he was on the premises in the course of his official duties. That is true; and his rights were the same, no higher and no lower, than those of any other person having lawful business with the occupier. He was bound to act in a reasonable way. If he did not see fit to make an appointment as to the time of his visit, he should take reasonable steps to find those whom he required to see in connection with it. I do not think we are called upon to say whether the Principal or the janitor was the proper person for him to see. He might require to see both. He thought he should see the janitor; and we have to find whether, according to the evidence, he was guilty of any negligence in the steps he took to this end.

When he pushed open the furnace-room door and saw that the room was so dark that he could not distinguish any of the objects in it, I think his clear duty was to go no farther until satisfied that there was no danger. He did not even knock at the door, and, if he had done so, and Frost, the teamster, who was the person inside, had told him to enter, I do not think the defendants, even then, could have been held liable for the act of Frost. But the plaintiff had not even this excuse. Of course, each of such cases as the present must depend on its own particular facts; but I find the present case very much like that of Wilkinson v. Fairrie, 1 H. & C. 633, in which Kelly, C.B., says, at p. 635: "In general, it is the duty of every person to take care of his own safety, and not to walk along a dark passage without a light to disclose to him any danger. As there was no contract or any public or private duty on the part of the defendants that their premises should be in a different condition from that in which they were, it seems to us that the nonsuit was perfectly right." In that case the plaintiff was directed to the passage in question by a gatekeeper of the defendant, who was in charge of the premises, so that the plaintiff's case in that respect was much stronger than in the present instance.

On the whole, I am of opinion that the plaintiff's injury in this case was the result of his own negligence, and that the appeal should be allowed and the action dismissed.

JULY 19TH, 1911.

MORTON v. ANGLO-AMERICAN INSURANCE CO.

Fire Insurance—Proofs of Loss—Sufficiency—Provision for Arbitration — Condition — Transfer of Property Insured — Waiver—Gasoline Kept or Stored on Premises—Change in Occupation of Premises—Materiality—Absence of Evidence.

Appeal by the plaintiffs from the judgment of SUTHERLAND, J., ante 237.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A.

H. Cassels, K.C., for the plaintiffs.

D. W. Saunders, K.C., for the defendants.

The judgment of the Court was delivered by MACLAREN, J.A.: —This is an appeal by the plaintiffs from a judgment in a fire insurance case tried by Sutherland, J., without a jury, in which he dismissed the plaintiffs' action, on the ground that a change material to the risk was made when a portion of the building containing the insured property (some billiard and pool tables and a bowling alley) was leased as a restaurant without notice having been given to the insurance company.

The company had also set up as defences to the action: (1) that they had not received proper proofs of loss; and (2) that under the conditions of the policy the matter should have been referred to arbitration; but the learned trial Judge held that neither of these defences was well founded; and I am of opinion that, with respect to them, his decision was right and should be affirmed.

Another ground of defence was that the plaintiffs had sold the billiard and pool tables, etc., covered by the first policy of insurance, to one Terry, without the written permission of the company, and that the policy was thereby voided under the fourth statutory condition. It is true that such a sale was made, but it was stipulated in the instrument of sale that the property was not to pass until the full payment of the purchase-money and interest; and, no part of this having been paid, the condition does not apply. This condition has been construed in many cases in our own Courts, and the result of the cases is summed up by the Chief Justice of this Court in the recent case of Wade v. Rochester German Fire Insurance Co., ante 1076, as

follows: "The meaning and effect of the condition has been considered and dealt with in a number of cases. The broad principle deducible from the decisions is that, unless the property is assigned so as absolutely to divest the assignor of all right, title, and interest thereto and therein, the condition does not take effect, and that quite irrespective of the form of the instrument of assignment. Thus a mortgage created, or a transfer to a bare trustee for the transferror, are outside of the condition, and other cases can readily be supposed to which unquestionably the condition would have no application." In that very case it was held that an assignment under the Assignments and Preferences Act did not come under the condition. A fortiori, such an assignment as that here made would not be affected.

Objection was also taken to the plaintiffs' right to recover under the second policy for $300, which was issued to Terry on a new pool table, etc., purchased and placed by him in the premises; but, by the terms of the policy, the loss was made payable to the plaintiffs, so that this objection should not be allowed to prevail.

The main ground, however, on which the claim was contested was, that a portion of the building in which the insured chattels were situate, and which, at the time of the application for the second policy, was occupied by the proprietor, John Morton, a brother of one of the plaintiffs, as a real estate and insurance office, and was so indicated on the plan accompanying the application, had been subsequently leased as a restaurant, and was so used at the time of the fire. Gasoline was used in the cooking, and this was kept in a five-gallon can, two or three gallons being purchased at a time. One of the assistants had spilt some gasoline on the floor, and, in mopping it up, the mop came into contact with a heater, and the fire and loss resulted. Some time previously there had been a fire in the restaurant, which was extinguished without damage. The evidence is conflicting as to whether this was caused by the burning of some grease which was being heated, or whether it arose from escaping gasoline.

At the trial the whole case for the defendant was made to bring it within the authority of Equity Fire Insurance Co. v. Thompson, 41 S.C.R. 491, which had been decided shortly before in the Supreme Court, and in which it was held that keeping gasoline on insured premises, under circumstances not very dissimilar to those of the present case, was a violation of the tenth statutory condition and rendered the policy void. Before judgment was rendered by the trial Judge, this case was reversed by the Privy Council: Thompson v. Equity Fire Insurance Co., [1910] A.C.

592. This led him to change the grounds of his judgment; but he was of opinion, as above stated, that the plaintiffs must still fail, on the ground of there having been a change material to the risk in converting the real estate and insurance office of John Morton into a restaurant.

The learned trial Judge says that he "thinks and finds" that this was a change material to the risk. With all respect, I must say that it is a finding without any evidence to support it. It may well be that it was material, but the defendants, upon whom was the onus of proving this, gave absolutely no evidence on the point. That part of the building would appear not to have been partitioned off from the billiard and pool room, when the first policy was placed upon the tables and appurtenances. Whether a restaurant is a more hazardous risk than a billiard and pool room, I have no means of knowing. I might guess that the former is the more hazardous of the two, but it is something upon which I cannot form an intelligent opinion without evidence. As the defendants have not seen fit to furnish us with any, their evidence having been directed, as I have stated, to bring it under the authority of the Thompson case in the Supreme Court, I do not think they are entitled to a dismissal of the action on this ground.

In my opinion, the appeal should be allowed and judgment entered for the plaintiffs for $1,025, being the amount of the two policies, $1,400, less the salvage, $375.

HIGH COURT OF JUSTICE.

BRITTON, J. JULY 13TH, 1911.

FARQUHAR v. ROYCE.

Vendor and Purchaser—Contract for Sale of Land—Reservation of Gravel—License to Enter and Take—Consideration—Principal and Agent—Estoppel.

Action for damages which the plaintiff alleged that he had sustained by reason of the defendant preventing the plaintiff and his servants and assigns from entering upon certain land and removing sand and gravel therefrom.

W. C. MacKay, for the plaintiff.
R. B. Henderson, for the defendant.

BRITTON, J.:—The facts, as I find them, upon the evidence, are as follows. The plaintiff's wife on the 8th February, 1909, was the owner of certain land in the then town of West Toronto, being parts of lots 41, 42, 43, and 47 laid down on plan 141. Upon this land was a quantity of gravel and sand of considerable value, of which the plaintiff, with the consent and under arrangement with his wife, had from time to time sold part. One Gilbert, whom the witness George Faulkner spoke of as a relative or client of the defendant, asked Faulkner to get a price or option for the purchase of this land. Faulkner was a very unsatisfactory witness. Either his memory is poor, or he was not anxious to tell all he knew about the transaction, but the real part he took in it can easily be gathered from the evidence. After Faulkner's talk with Gilbert, he, Faulkner, had an interview with the plaintiff. The plaintiff assumed that he had the right to negotiate in his own name for sale of the land, as he knew that his wife would ratify whatever he might do. The plaintiff said that his wife allowed him to sell for his own benefit the loose gravel and sand upon the property. As this fact was practically undisputed, it is not material that the wife was not called as a witness. In the conversation between Faulkner and the plaintiff, the plaintiff made it perfectly clear that he wished to reserve the gravel and sand. On the 14th January, 1909, the plaintiff, at Faulkner's request, gave to Faulkner's wife an option, at a price, to purchase the land, and this option or agreement contained the following reservation—"reserving the right until the 31st August next (1909) to remove sand and gravel from the same." Faulkner, having obtained this option, consulted Gilbert, and was by Gilbert referred to the defendant. Faulkner then saw the defendant, who was not satisfied with either price or reservation; and so that option was not accepted. Faulkner then obtained another option, at a different price, but with a similar reservation as to gravel and sand. This was not accepted, and the paper itself was not produced at the trial. Then the defendant discussed with Faulkner the terms of the reservation, and suggested a form that he would be willing to accept. Faulkner again saw the plaintiff, and obtained the third option, which he took to the defendant, and the defendant initialled it "O.K.—R. & H." This is the one relied upon. Exhibit 2 and exhibit 19 are alike as to reservation. Rose alone signed exhibit 2, but both the plaintiff and Rose signed exhibit 19. Exhibit 2 is the one initialled and approved by the defendant. With the approval by the defendant, Faulkner took it to the plaintiff, and he, Faulkner, this time used Mr. Rose and

the name of Mr. Rose. Rose was not a buyer—not intended by Faulkner or the defendant to be a buyer. His name was used to keep the name of the defendant in camera. This option, dated the 8th February, 1909, was then sent to the office of Johnston, McKay, Dods, and Grant, to have the sale of the property carried through. It was sent at the instance of the defendant. Rose, by indorsement, assigned the option in blank. The conveyance from the plaintiff's wife was drawn in favour of one A. T. Tucker, and A. T. Tucker, on the same day (the 27th February, 1909), conveyed to the defendant. The assignment by Rose in blank is dated the 1st March, 1909. The plaintiff's wife conveyed without question, and apparently the gravel and sand were left as in the original contract between the plaintiff and defendant. The reservation, as agreed on between the plaintiff and defendant, was in these words: "The vendor reserves the right to enter upon the said lands for the purpose of removing sand and gravel therefrom until the 1st day of August, 1909, but the vendor shall not excavate any gravel or sand below the level of Carlton street."

I find that Faulkner was acting for the defendant in making the purchase and in arranging the terms in favour of the plaintiff of the reservation of the gravel and sand. Rose was not acting for himself, but simply at the request of Faulkner. Neither Gilbert nor Tucker was called, and it does not appear that either was in any way personally interested.

Whatever the defendant may intend to do with the land he purchased, he was, as between him and the plaintiff, and as to the gravel and sand, a principal in the transaction.

No question can arise as to the unfulfilled part of this agreement by reason of its not being under seal. It was not an agreement by the defendant to convey anything. The loose gravel and sand down to the depth mentioned, and so far as the same were removed before the 1st August, 1909, were never to be the property of the defendant. In so far as the reservation can be called a license on the part of the defendant, it was not revocable—as it was not a license to permit something to be done in regard to the defendant's own property, but, on the contrary, it was an agreement that such gravel and sand, if any, above the level of Carlton street as should be removed before the 1st August, 1909, should not become the defendant's property.

This contract, that the plaintiff should be permitted to move something off, is a contract to be performed after the time for the performance of the contract for sale of the land as a parcel, and is not inconsistent with the land contract, and I am of opin-

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

by the defendant Royce. All costs will be on the High Court scale, and no set-off of costs unless such, if any, as has been ordered.

DIVISIONAL COURT. JULY 19TH, 1911.

*BONDY v. SANDWICH WINDSOR AND AMHERSTBURG R.W. CO.

Street Railway—Operation upon Township Highway—Animal Killed by Car—Township By-law Forbidding Running at Large—Negligence—Duty of Railway Company—Findings of Jury.

Appeal by the defendants from the judgment of the Judge of the County Court of the County of Essex, upon the findings of a jury, in favour of the plaintiff, for the recovery of $200 damages.

The plaintiff alleged that his horse was lawfully upon a certain highway, and that the defendants' servants so negligently operated one of their electric cars that it ran into and killed the horse.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

C. A. Moss, for the defendants.

J. H. Rodd, for the plaintiff.

RIDDELL, J.:—The jury found, in answer to questions, as follows:—

1. Was the plaintiff's horse, at the time of the accident, wrongfully upon the defendants' right of way? A. It was.

2. Even if the plaintiff's horse was wrongfully upon the defendants' right of way, could the defendants, by the exercise of reasonable care, have avoided the accident? A. They could by exercising proper precaution.

This answer was explained by the jury as follows (in answer to the learned Judge): "The jury considered that the motorman should have seen the horse on the track in time to enable him to stop the car." The plaintiff had asserted at the trial and urged on the jury that the "car was running at an excessive rate of speed and that the defendants' servants, had they exercised rea-

*To be reported in the Ontario Law Reports.

sonable care, should have seen this horse in time to enable them to stop the car so as to prevent a collision.'' See the charge, p. 3. The motorman swore that he used all means to stop the car as soon as he caught sight of the horse, and that was not further disputed.

By the well-known rule established by cases in the Supreme Court and the Court of Appeal, all allegations of negligence must be taken to have been negatived by the jury except that specifically found by them. The result is, that the only negligence proved or which can be considered is that the motorman should have seen the horse sooner.

The line of railway runs along to the east of the Front or River road, with a curve at the locality of the accident. The plaintiff resides to the east of this road, and had sold to the defendant company a strip of land off his property immediately east of the Front or River road, some 8 or 10 feet in width, for their right of way. So far as can be gathered from the evidence at the trial, the railway company had part of their road-bed upon this strip and part upon the allowance for road. It seems clear from the evidence that the horse must have been upon the land bought from the plaintiff at the time of and before the accident. This, I think, must have been conceded at the trial, from what the learned trial Judge says in his charge—but, if the case should be considered to turn upon this point, it might be proper to grant a new trial (upon proper terms) to determine this point; although, as at present advised, I think the jury intended to find, and were quite justified in finding, that the horse was not upon the highway, but had got off the highway upon the private property of the defendants.

It was proved that a by-law of the township was in force prohibiting the running at large of horses under sec. 546 of the Municipal Act—and it is with reference to this by-law, counsel for the plaintiff informs us, that he admitted at the trial and admitted before us that the horse in question was trespassing upon the property of the defendants, and it is to this illegality that he seeks to confine the finding of the jury in answer to the first question.

I do not think that, even so, the plaintiff's case is advanced.

We have more than once pointed out that ''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:'' Woodburn Milling Co. v. Grand Trunk R.W. Co., 19 O.L.R. 276, at p. 281, citing Daniels v. Noxon, 17 A.R. 206, 211, and Thomas v. Quartermaine, 18 Q.B.D. 685, especially

at p. 694, per Bowen, L.J.; Le Lievre v. Gould, [1893] 1 Q.B. 491, per Lord Esher, at p. 497: "The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence."

What duty then did the defendants owe to the plaintiff in respect of his straying horse?

That the defendants were rightly upon the locus in quo is beyond question. They owned some of the land at least, and had obtained the legal right to use the remainder, if any; it was, therefore, in that respect, in law the same as if they were upon their own land.

The plaintiff could not complain against the owners of the highway—the township—for (say) want of repair. It is only to those who are rightly upon the highway that the township owes the duty to keep in repair. This right may depend upon a variety of causes, but the right to be upon the highway must be found to exist in the person complaining, or no liability will be placed upon the corporation for want of repair.

There have been many cases upon this: it will be sufficient to cite two in our own Courts. In Ricketts v. Village of Markdale, my Lord the Chief Justice held that a child upon the highway playing had no right to complain of nonrepair. The Divisional Court reversed this decision, but solely upon the ground that the child had a right to be upon the highway playing: 31 O.R. 180, 610. If this were conclusive of the present case against the defendants, it would become necessary to consider how far we should hold it well-decided. As at present advised, I should, being untrammelled by authority, hold that the judgment of the trial Judge was the better view. But I do not think we need attack here the question, as in either view the result would be the same.

In Breen v. City of Toronto my brother Latchford held the plaintiff not entitled to recover for want of repair of a boulevard, as a by-law of the city forbade any one going upon a boulevard: the Divisional Court reversed this, solely upon the ground that the path upon which the plaintiff was walking was habitually used by the public to the knowledge of the defendants—and that with this knowledge, without notice, they made it dangerous for the public to continue to use the path, thereby creating a trap: ante 87, 690. No doubt was cast or intended to be cast upon the law as laid down in Dean v. Clayton, 7 Taunt. 489, cited by Mr. Justice Latchford: "We must ask in each case whether the man or animal which suffered had or had not a right to be where he

received the hurt. If he had not, then, unless the element of intention to injure, as in Bird v. Holbrook, 4 Bing. 628, or of nuisance, as in Barnes v. Ward, 9 C.B. at p. 392, is present, no action is maintainable.''

Lowery v. Walker, 27 Times L.R. 83 (Dom. Proc.), was decided upon its own particular circumstances; and the very great caution of the Lord Chancellor in so stating is noticeable. It does not modify the law as previously laid down.

Nor is the duty of the railway company properly on the highway greater mutatis mutandis than that of the municipality. I adopt the following from Cyc., vol. 36, p. 1487, as a correct statement of the law: ''As a general rule a street railroad company is under no duty to keep a look-out for trespassers on its track . . at points at which it has a right to assume that the track is clear . . . but its only duty is to use all proper precautions to avoid injuring such a trespasser after discovering his peril as by . . . taking proper precautions to stop the car when necessary. . . .''

The horse was admittedly a trespasser upon the property of the defendants, whether it be the property owned in fee or the property on which the defendants had an easement—and I think the sole duty to the plaintiff arose when the horse was discovered. The case would, or might, of course, be different had it been proved that the township was in the habit (as in Breen's case) of permitting a violation of the by-law so that horses might be expected upon the highway, or if, for any other reason, horses running at large were to be expected to be on the road, and therefore on the track—but nothing of the kind is suggested.

I think the appeal should be allowed with costs and the action dismissed with costs.

Since writing the above, the case of Grand Trunk R.W. Co. v. Barnett, 31 C.L.T. 385, in the Judicial Committee, has been reported. In that case the duty owed to a trespasser is fully discussed. At p. 390: ''The railway company were undoubtedly under a duty to the plaintiff not wilfully to injure him: they were not entitled unnecessarily and knowingly to increase the normal risk by deliberately putting unexpected dangers in his way, but to say that they were liable to a trespasser for the negligence of their servants is to place them under a duty to him of the same character as that which they undertake to those whom they carry for reward. The authorities do not justify the imposition of any such obligation.'' At p. 391: ''The general rule . . . is that a man trespasses at his own risk.'' At p. 390: ''In order to make good a cause of actionable negligence, he

must shew some breach of duty on their part to himself." The head-note is wholly justified: "The respondent was a trespasser; and, although the appellants were under a duty to the respondent not wilfully to injure him, they were not liable to him for mere negligence; and as the accident was due to the negligence of the appellants' servants, and not to any wilful act, the respondent was not entitled to recover." This is conclusive of the present case.

FALCONBRIDGE, C.J., was of the same opinion, for reasons stated in writing.

BRITTON, J., dissented, for reasons stated in writing.

TEETZEL, J. JULY 20TH, 1911.

O'GORMAN v. FITZMAURICE.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance — Written Offer—Oral Acceptance — Statute of Frauds—Speculative Property—Time of Essence—Delay in Completion.

Action for specific performance.

George Ross, for the plaintiffs.
A. G. Slaght, for the defendant.

TEETZEL, J.:—The only writing is a letter from the defendant to the plaintiffs, dated the 7th October, 1910, which, I find, was orally accepted by the plaintiffs on the 10th October, and which, I think, was a sufficient writing within the Statute of Frauds to bind the defendant.

When the plaintiffs accepted the offer, they agreed to pay the purchase-money on the 1st November, but did not do so; afterwards, on the 23rd November, the defendant called upon the plaintiffs and again urged them to secure the property by carrying out the agreement, and the plaintiff Coyne then promised that the money would be sent to the defendant during the first of the following week. This was not done, and the defendant, not hearing from the plaintiffs, sold the property to another person.

The lot in question was in a town-site adjoining Porcupine Lake, and was admittedly of a speculative value.

The plaintiffs, having failed to complete the purchase within the time specified in their oral acceptance, are not, I think, as of right, entitled to specific performance, on the ground that from the nature of the property time should be held to be of the essence of the contract, within the principle of the cases referred to in pars. 1079 to 1083 of Fry on Specific Performance, 4th ed.

I also think that, apart from the question of time being implied as of the essence of the contract from the very nature of the property, the plaintiffs should not be granted specific performance, because the writing bound only the defendant, and the plaintiffs knew that he was anxious to sell the lot, with others, and had other purchasers in sight, and, after their oral acceptance, the plaintiffs unreasonably delayed the completion; and I find that the defendant acted in good faith in selling the property to another purchaser, honestly believing that the plaintiffs did not intend to carry out their agreement.

In Fry, 4th ed., para. 1103, it is said: "Where the contract is in any sense unilateral, as, for instance, in the case of an option to purchase . . . any delay on the part of the party in whose favour the contract is binding, is looked at with special strictness."

In Earl of Darnley v. London Chatham and Dover R.W. Co., 1 DeG. J. & S. 204, it was held that, where a railway company agreed to make such crossings as the land-owner's survey should, within one month, direct and notify in writing to the company or their engineer, and the surveyor did not give any such direction or notification until after the expiration of the stipulated time, the land-owner's right under the contract to have the crossings made was lost. So I think here that, after the time which the defendant voluntarily extended to the plaintiffs for completion of the contract elapsed, the plaintiffs' right to enforce the same was lost.

The action will, therefore, be dismissed with costs.

NEAL V. ROGERS—DIVISIONAL COURT—JULY 20.

Conversion of Goods—Seizure under Chattel Mortgage—Method of Realising Property Seized—Damages—Forgery — Report of Master Varied on Appeal—Further Appeal.]—The order of MIDDLETON, J., ante 1107, upon appeal from the report of an Official Referee, was affirmed by a Divisional Court (FALCONBRIDGE, C.J. K.B., TEETZEL and RIDDELL, JJ.) Reasons were given by RIDDELL, J., upon an examination of the evidence, for the conclusion of the Court, that it could not be found that MIDDLETON, J., had misapprehended the evidence or failed to give full effect to all of it, or that his order was in any respect wrong. The appeal was dismissed with costs. R. S. Robertson, for the plaintiff. C. A. Moss, for the defendants.