

plaintiff. In the view we take of this case that question need not be considered. Assuming as most favorable for the plaintiff that he was vice-principal, there was no evidence of negligence on his part competent to be considered by the jury. No question is made of the competency of the fellow-servants, and there is no allegation of defective machinery or appliances, nor of lack of instruction of the plaintiff as an inexperienced employé. The only negligence claimed is the harsh and loud tone of voice in which the direction to the engineer was given.

The direction to the engineer was not a command to hoist the scale-board improperly, nor more quickly than usual. He could not reasonably understand he was to act in such manner as to endanger the safety of others. He was not commanded to do an unlawful act, nor a lawful act in an improper manner. There was nothing in the fact that a team was waiting that required undue haste in hoisting the board. That was the only reason given by Perry to the engineer to attend to the duty assigned to him. There was no danger of injury to the team nor from it, by collision or otherwise. The negligent manner of hoisting the board was the act of the engineer, and not of Perry.

The motion for a nonsuit should have been granted.

Exceptions sustained.

CHASE, J., did not sit: the others concurred.

HOWES *v.* FISK & *a.*

A person not in fact a partner with another, is not estopped to deny it, in a suit by a third person against both for the breach of a written contract between the plaintiff and the other defendant, if the plaintiff was not induced by the defendant who denies the partnership to enter into the contract relying upon him as a principal.

ASSUMPSIT, to recover damages for the breach of a written contract executed December 2, 1889, between the defendant Fisk and the plaintiff, whereby Fisk agreed to haul 200 cords of bobbin-wood into the mill-yard of the Groveton Wood Manufacturing Company for the sum of \$1.25 per cord; and the plaintiff agreed to pay that price, one half as the wood was hauled, and the balance April 15, 1890. Facts found by a referee. About three weeks after the execution of the contract, the defendant Hanson went to the plaintiff and objected to that part of the contract which postponed payment of one half the price for hauling until April. Thereupon the plaintiff and both defendants went to-

gether to one McNally who held the written contract, and it was read to them. McNally assured Hanson that the company would hold the last half of the price for hauling, and would see it paid. Hanson expressed himself satisfied, and began hauling the wood with Fisk under the contract. They subsequently abandoned the job without sufficient cause. The plaintiff understood that Fisk and Hanson began work as partners, and reasonably understood that they were jointly interested in the contract. The referee finds that there was no actual partnership between them, and that Hanson is not liable for the breach unless it shall be held upon the foregoing facts that he was in law a partner. The contract was not changed, unless as above stated, by Hanson's commencing to haul the wood.

Judgment was ordered upon the report against both defendants, and the defendant Hanson excepted.

Drew & Jordan and *William P. Buckley*, for Hanson.

Jacob Benton, *Everett Fletcher*, and *Fletcher Ladd*, for the plaintiff.

SMITH, J. The written contract was with Fisk alone. Fisk and Hanson not being partners *inter sese*, Fisk in entering into the contract acted for himself, and not for himself and Hanson jointly. They were not partners as to third persons, unless Hanson is estopped to deny that he was a principal. *Eastman v. Clarke*, 53 N. H. 276. But there is nothing to show that the plaintiff was induced to enter into the contract relying upon Hanson as a principal.

It does not appear that he knew Hanson was to be interested with Fisk in drawing the wood until three weeks after the contract was entered into, and then, as the report finds, it "was not changed, unless, as above stated, by Hanson's commencing to haul the wood." Neither the price, the number of cords, nor the time of payment was changed. As Hanson was not in fact a principal, his interest in the contract must have been that of a sub-contractor or employé, and his objection to the provision relating to the final payment for the hauling (made, it would seem, from his uncertainty as to when or by whom he would be paid) was removed by McNally's assurance that the company would withhold one half the price until the hauling should be completed, and would see it paid. If the finding of the referee that the plaintiff reasonably understood that they were jointly interested in the contract means that he might understand they were partners, still, as the terms of the contract entered into three weeks prior to that interview were not changed, it is difficult to see how the defendant is estopped to deny that he was a partner. The finding that the plaintiff reasonably understood that the defendants

were jointly interested in the contract relates to the interview between the parties three weeks later.

Exception sustained.

BLODGETT, J., did not sit: the others concurred.

PERRY v. DWELLING-HOUSE INSURANCE CO.

On the question whether one person was at a certain time the agent of another, evidence of the previous course of dealing between them is competent.

A proposition does not become a contract until the maker or his agent has been notified of its acceptance.

If an application for a policy of insurance is made in this state to an agent of the insurers, and is sent by the agent to their office in another state, and the policy is there made and sent to the agent for delivery and by him delivered to the insured in this state, the latter having no previous notice of the acceptance of his application, the contract of insurance is to be regarded as made in this state, and is subject to the provisions of the statutes of this state.

The statute (G. L., c. 172, s. 3) providing that "If any company shall issue any policy, upon an application prepared by a third person assuming to act as their agent or otherwise, they shall be affected by his knowledge of any facts relating to the property insured as if they were stated in the application," is, in its application to one who is actually an agent, merely declaratory of the common law.

Although a policy of insurance provides that no act or omission of the insurers, or of their officers or agents, shall be a waiver of strict compliance with the terms and conditions of the policy or an extension of time for compliance, unless in express terms and in writing signed by the president or secretary, the insurers may nevertheless be estopped from taking the objection that the insured had not furnished proofs of a loss in the form and within the time prescribed by the policy if an officer of the insurers, though not their president or secretary, has received informal proofs of the loss within the time prescribed, and informed the insured that he would be notified if they were not sufficient, and the insured furnished formal proofs after the expiration of the time stipulated in the policy, but immediately after learning that the insurers objected to the proofs previously furnished.

The addressing of proofs of a loss to another insurance company, instead of to the insurers, is immaterial, if the insurers received the proofs and understood that they were intended as proofs of a loss under their policy.

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