DUNCAN v. DUNN.

Case No. 4,134.

Circuit Court, E. D. Pennsylvania. April 29, 1879.

NEGLIGENCE—CONTRACT—MERCANTILE AGENCY—ERRONEOUS INFORMATION—GROSS NEGLIGENCE.

1. A mercantile agency is not liable for a loss to a subscriber acting upon information communicated to him by the agency under a written contract, wherein it is expressly agreed that the agency shall not be responsible for any loss caused by the neglect of those collecting such information.

2. Under such a contract, the agency would not be liable even for the gross negligence of those who collected the information for it.

[1] {Motion to take off nonsuit. Case, by Duncan, Hale & Co. against Dun, Barlow & Co., proprietors of the "Mercantile Agency," to recover damages for the loss suffered by the plaintiffs by reason of selling goods on credit to one James Hill upon information obtained from the mercantile agency as to his mercantile standing and credit. The narr alleged a contract whereby the defendants undertook to communicate to the plaintiffs, who were subscribers to the agency, information by means of which they might be enabled to know the standing, responsibility, means, and

credit of persons with whom they should be connected in business. That the plaintiffs, to determine the propriety and safety of selling goods to one James Hill, applied to the defendants at their offices in Williamsport and in Philadelphia for information concerning the pecuniary responsibility of the said James Hill, and were informed that he had in his business a capital of $4,000, and was the owner of real estate worth $10,000 clear of incumbrances, whereupon the plaintiffs, believing and relying upon said information, and that due care and diligence had been exercised in ascertaining the same, sold and delivered to the said Hill goods to the value of $5,110.30. That the defendants were grossly negligent in ascertaining the financial responsibility, standing, and credit of the said Hill, and that on the day on which the defendants communicated the information to the plaintiffs the said Hill was not the owner of real estate clear of incumbrances and worth $10,000, but, on the contrary, was the owner of real estate, all of which had mortgages thereon which were duly recorded in the county wherein the said real estate was situated, and that the said Hill was at the date of the sale and delivery of the goods insolvent, and did not pay for the goods, whereby the plaintiffs, by reason of the gross negligence of the defendants, wholly lost the value thereof. The defendants pleaded "not guilty," and also a special plea, averring that the information was given the plaintiff in pursuance of a written contract, whereby it was agreed that such information as might be communicated by the defendants to the plaintiffs had mainly been and should mainly be obtained and communicated by servants, clerks, attorneys, and employees appointed as sub-agents of the plaintiffs, and that the defendants should not be responsible for any loss caused by the neglect of any of the said servants, attorneys, clerks and employees in procuring, collecting and communicating the said information.

{Upon the trial, before McKennan and Butler, JJ., the plaintiffs offered in evidence the written contract between the parties, which contained, inter alia, the following clauses: "The said Proprietors are to communicate to us, on request, for our use in our business, as an aid to us in determining the propriety of giving credit, such information as they may possess concerning the mercantile standing and credit of merchants, traders, manufacturers, etc., throughout the United States and in the dominion of Canada. It is agreed that such information has mainly been, and shall mainly be obtained and communicated by servants, clerks, attorneys and employees, appointed as our sub-agents, in our behalf, by the said R. G. Dun & Co. The said information to be communicated by the said R. G. Dun & Co. in accordance with the following rules and stipulations, with which we, subscribers to the agency as aforesaid, agree to comply faithfully, to wit: The said R. G. Dun & Co. shall not be responsible for any loss caused by the neglect of any of the said servants, attorneys, clerks and employees in procuring, collecting, and communicating the said information, and the actual verity or correctness of the said information is in no manner guaranteed by the said R. G. Dun & Co." The plaintiffs also offered the following

report of James Hill, communicated by the defendants by then agents at Williamsport and Philadelphia: "James Hill, Comm. Merchant, Pittston, Pa., July 20,1876, character, etc., good; capital in business $4,000, owns real estate worth $10,000, and clear. Credit good." Plaintiffs then offered the records of unsatisfied mortgages given by James Hill, amounting to $8,250, and judgments against him amounting to $4,000, and rested. Defendants asked for a nonsuit, which was granted. Plaintiffs now moved to take it off. Upon the hearing of the motion, the court requested counsel to confine the argument solely to the question of liability for gross negligence under the contract.

{David W. Sellers, for the motion. The interpretation given to the contract upon the trial as a release of all liability, even from gross negligence, is contrary to public policy. Pennsylvania R. Co. v. Henderson, 1 P. F. Smith {51 Pa. St} 316; New York Cent R. Co. v. Lockwood, 17 Wall. {84 U. S.} 368. The clause in the contract relied on by the defense cannot be construed to protect them from the consequences of the gross negligence of its employees; it should be construed as covering ordinary negligence only, and as merely expressive of what the law would have been without it, viz., freedom from liability for ordinary negligence. Pasley v. Freeman, 2 Smith, Lead. Cas. Eq. *55, American note. The law frequently exempts from liability for ordinary negligence where it would not if the negligence was gross, thus recognizing a distinction which defendants claim does not exist. De Haven v. Kensington Nat. Bank, 31, P. F. Smith {81 Pa. St} 95; First Nat Bank v. Graham, 4 Norris {85 Pa. St} 91.

{W. W. Montgomery, Samuel Wagner and Wm. Henry Rawle, contra. There is no difference in kind between ordinary and gross negligence. Though a man may not protect himself by contract against his own negligence, he may do so against that of his servants. Austin v. Manchester S. & L. R. Co., 10 C. B. 454; Perkins v. New York Cent R. Co., 24 N. Y. 196; Wells v. New York Cent R. Co., Id. 181. The cases of Pennsylvania Railroad v. Henderson and New York Cent R. Co. v. Lockwood (cited on the other side), hold that a common carrier cannot exempt himself by contract from liability for the negligence of his employees; but this is not the law as to private persons or those on whom there is no common law liability in regard to the work to be done. See Bullitt v. Baird, 27 Leg. Int 171, and comments thereon in Bradstreet v. Everson, 72 Pa. St. 124; also

the telegraph cases in the different states. Passmore v. W. U. Tel. Co., 78 Pa, St. 238. When the employment of sub-agents or substitutes is expressly provided for in the contract, the original agent will not be liable, unless negligence in the choice of the agent be proven. Story, Ag. § 201; Commercial Bank v. Martin, 1 La. Ann. 346; Darling Stanwood, 14 Allen, 504. Here the mercantile agency by its contract has particularly warned the plaintiff of the danger of mistakes which arise from the necessity of employing a multitude of subagents, and has bargained for liberty to employ them, without responsibility for their neglect Plaintiffs being so warned, entered into the contract with their eyes open, and ipso facto make the employees of defendants their own agents. Moreover, they do so in terms, and thereby show clearly their intention of taking the risk of the mistakes of such employees.][2]

BUTLER, District Judge. At the close of the plaintiffs' case a judgment of nonsuit was entered by direction of the court. A motion having been made to take it off, we have again looked into the testimony to ascertain whether it contains anything to support a verdict in the plaintiffs' favor; and the impression we entertained on the trial has now deepened to conviction. The declaration charges "gross negligence in ascertaining the financial standing and responsibility of James Hill." Mr. Hill resided at Pittston, Luzerne county. The evidence shows an application by the plaintiffs to the defendants' agent at Williamsport for information respecting the financial standing of this gentleman; that they received an answer saying he had a business capital of $4,000, and real estate worth $10,000, clear of incumbrances; that the inquiry was repeated at the defendants' Philadelphia office, and a similar answer received; that the plaintiffs, relying on this information, sold goods to Hill, to a large amount, on account of which a balance of over $3,000 remains unpaid and cannot be collected, Hill having failed; that the information furnished was incorrect the real estate owned by Hill being incumbered at the time beyond its value. Upon this statement (which is sufficiently accurate and particular for the purpose in hand) it may be admitted that the plaintiffs would be entitled to recover but for the provisions contained in the second and fourth paragraphs of the contract; the former of which stipulates that the agents, in gathering information, shall be regarded as the plaintiffs' representatives; and the latter, that the defendants "shall not be responsible for any loss caused by the neglect of said agents, attorneys, clerks, or employees in procuring, collecting, and communicating the said information." The language in this latter paragraph of itself is broad enough to exempt the defendants from liability for all negligence of such agents. The plaintiffs think it should apply only to ordinary negligence, and be read as if gross negligence was expressly excepted. For this we can find no warrant. The defendants' business required the employment of numerous agents; and it was foreseen that they might in some instances, prove negligent and unfaithful. The defendants were particular in calling attention to this, and in guarding themselves against the danger of loss therefrom; and no reason can be

seen why they should be less anxious for protection against gross than against common negligence from this source. The danger from the former was as great as from the latter. By the contract the plaintiffs expressly agreed to take the risk of such loss on themselves. The authorities to which we have been referred have, in our judgment no application to the case. Common carriers, innkeepers, and others engaged in the exercise of a public calling cannot thus protect themselves against the consequences of gross negligence in the agents whom they employ. This limitation of the right to contract as parties may choose is an exception from the general rule, and confined to the class of cases named, where the public interests are supposed to demand its application. It has no place here. The contract which these parties entered into must be enforced as they made it. It may have been unwise, but with that we have nothing to do. One or the other must bear the risk involved in depending upon agents scattered over the country, of whom neither could know much. The plaintiffs agreed to bear it and they must take the consequences. That the negligence here complained of, whether gross or otherwise, is the negligence or the agents and not of the defendants personally, is undisputed and clear. Motion refused.

[1] {Reprinted from the Reporter and Central Law Journal by permission. The syllabus and opinion are from the Reporter, and the statement from the Central Law Journal.}

[2] {From 9 Cent. Law J. 151.}