

upon the carelessness of Miller, but upon the trial the drift of his testimony was quite different. The prominent fact which he then sought to have inferred was the defective character of the boiler. He said that it was originally half an inch thick, and that on the bottom, where the break occurred, it had worn down to an eighth of an inch, and that the bottom was worn out. The other testimony adverse to its safety, and which called upon the defendant for the exercise of care in its examination, and in the maintenance of its soundness, was in regard to the usual duration of the life of a boiler, and upon this point the defendant's witnesses alone testified. One said, "I have known some of them [the Hazelton boilers] to last eighteen or twenty years." Another said that they lasted from 20 to 22 years. Another said, "I have known them to last twenty years." The exploded boiler was 18 years old. The opinion of the defendant's experts who subsequently investigated the subject was that the crack and the resulting explosion were due to the unequal expansion of the bottom and the top of the boiler, caused by too sudden and hot a fire when the boiler was cold and the masonry was still damp, and there was not enough water in the boiler. Upon this state of the evidence, especially in regard to the time when a boiler must be expected to wear out, the question of an unsoundness which ought to have been ascertained by the defendant's agents or representatives could not be taken from the jury. But it is said that the defendant had discharged its duty by the purchase of a boiler of the best material, from manufacturers of the best reputation, by semi-annual careful inspection of it, and by its previous freedom from indications of leaks, for the defendant is not a warrantor of the absolute safety of its machinery, and is not liable for the consequences of unknown defects which reasonable and accurate investigation, made at the time when due care requires that such investigation should be made, failed to discover. That statement of the law is not objectionable, but the question of a defendant's liability for the defects of old machinery turns upon the continued exercise of due care, for its duty to its employes is only discharged when "its agents whose business it is to supply such instrumentalities exercise due care, as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employes." *Hough v. Railway Co.*, 100 U. S. 213. It was a question of moment in this case whether, if this boiler was defective, its condition, after 18 years of use, ought not to have been previously ascertained by the defendant. The difficulty which prevented the trial judge from taking the question of the defective condition of the boiler from the jury was also apparent in regard to the negligence of Miller. As the plaintiff presented Miller's conduct to the jury, he was apparently thoughtful, and not inattentive, but his conduct was heedless and willful, if the declaration of Kiszal before the coroner and in the hospital, and the inferences directly deducible from his story, were true. The question was one of the credibility to be given to the plaintiff as he appeared upon the stand, and the jury decided in his favor.

The defendant made divers requests to charge in regard to the

necessity that its negligence should be affirmatively shown, in regard to the infirmity of the plaintiff's case if the accident was due to Miller's negligence, and in regard to the extent of the obligation upon the defendant to furnish safe machinery. The various propositions upon these subjects, although they were technically correct, the trial judge did not charge in the form in which they were presented, but directed the attention of the jury in a less abstract way to the particular questions before them. He told the jury to return a verdict for the defendant if the boiler was a fairly safe one to be put at the work which it was called upon to do, but that if it was defective, and the persons in charge of the boilers knew it, then the plaintiff had made out his part of the case. The judge dwelt upon the importance of ascertaining whether the boiler was defective, by further charging that if it was a bad one, and was so understood by those in charge of it, and the defect injured the plaintiff, the fact that Miller was careless did not affect the case, because his negligence could not relieve the defendant's negligence. It is true that he did not charge in terms upon the question of their duty if they found the boiler to be sound, and that the accident occurred through Miller's negligence, because he had told them that, if the boiler was a fairly good one, to return a verdict for the defendant. Upon the subject of the plaintiff's conduct, the judge told the jury that if he, by his own carelessness, brought in any degree the injury upon himself, then he was not entitled to recover, and that if the injury was the result of the plaintiff's own fault, in whole or in part, to return a verdict for the defendant. The defendant requested the court to charge specifically that if the plaintiff discovered, before the accident, that the boiler was in an unsafe condition, and likely to explode unless the fire was withdrawn or the pressure reduced, it was contributory negligence to remain in the vicinity without making efforts to draw the fire and reduce the pressure. The trial judge did not make contributory negligence to depend entirely upon the fact of his remaining in attendance, and an absence of manual attempts to draw the fire, but he directed the attention of the jury to other facts in the case, an important one being that Kiszel was a mere subordinate, that Miller was in charge, and that the plaintiff was the one to obey, and not to dictate. It appears from the testimony that he was a common laborer, with some previous knowledge of a boiler and its appliances, and knew how to make, regulate, and check a fire, to watch the gauges, and to note the pressure of the steam. If his testimony upon the trial was worthy of credit, he had no occasion for alarm until about five minutes before 9, just before the explosion, when the three men, of apparent experience in steam boilers, came together to examine the leakage. If his statement in the hospital, and before the coroner, are to be relied upon, in whole or in part, he was in frequent controversy with Miller during the evening, in which he was expressing his apprehensions of danger, was remonstrating against Miller's course, and was steadily overruled. An instruction to the jury that, if he knew of the danger, it was contributory negligence to remain in the vicinity without making efforts to draw the fire or reduce the pressure,

would have been an instruction not pertinent to the facts, because, in connection with his assertions that he knew the danger, it was made manifest that he was unable to draw the fires or reduce the pressure against the will of Miller, who was, if the plaintiff's story immediately after the explosion was of material value, in actual oversight of the three boilers during the evening. Our study of the record leads to the conclusion that, if any mistakes were made upon the trial, they were not those of law, but were of fact, of which the jury were the judges. The judgment of the circuit court is affirmed, with costs.

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WROUGHT-IRON RANGE CO. v. GRAHAM.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1897.)

No. 164.

1. WRITTEN CONTRACTS—PAROL EVIDENCE.

Even after an oral contract of sale has been consummated by delivery of the article and the payment of the price, the parties may, if they choose, sign a writing expressing their contract, and parol evidence will then be inadmissible to show that the oral contract differed therefrom.

2. EVIDENCE—RES GESTÆ.

In an action by the purchaser of a range against the seller to recover for the burning of his house through the alleged negligence of the seller's agent in putting up the range, evidence that the agent, in answer to suggestions that some insulation should be used where the pipes passed through the woodwork, had said that insulation was not necessary, because the range was so constructed that there was no danger, is admissible as part of the *res gestæ*, and to show that it was put up in that manner by defendant's agents, and not by direction of plaintiff.

3. NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

The acquiescence of the purchaser of a range in the action of the seller's agent in running the pipes through woodwork, without insulation, on being assured by the latter that, owing to the peculiar construction of the range, there was no danger, is not contributory negligence which will preclude a recovery for damages caused by a resulting fire.

4. PRINCIPAL AND AGENT—SCOPE OF AUTHORITY—INFERENCE BY JURY.

Where the seller of a range, who has agreed to deliver it, with the necessary piping, and set it up ready for use, sends it by an agent, who sets it up in a defective and dangerous manner, the jury are authorized to infer that in so doing he was acting within the scope of his agency.

5. REVIEW ON ERROR—PLEADINGS AND PROOFS—DAMAGES.

Under a complaint claiming damages for the negligent destruction by fire of a dwelling house and outhouse it is not reversible error to allow for the destruction of shade trees surrounding the dwelling, though such damage is not specially pleaded.

In Error to the Circuit Court of the United States for the Western District of North Carolina.

This writ of error brings to us for examination the exceptions reserved by the defendant in the court below to the rulings in a jury trial, the facts of which are sufficiently set forth in the following statement, taken from the brief of the counsel for the plaintiff in error:

"This was a civil action, brought by W. A. Graham, the defendant in error, to recover of the Wrought-Iron Range Company, plaintiff in error, the sum of \$5,000 damages, caused from the burning of his dwelling house and contents

and one outhouse on the 5th day of June, 1894, by fire, which fire, the said Graham alleged, was communicated from the range and piping sold him by the Wrought-Iron Range Company, plaintiff in error. It appeared in evidence on the trial of the case in the court below that on the 16th day of May, 1894, one Goetchins, the agent of the plaintiff in error, contracted to sell to the said Graham a range and piping at the price of \$68, and the said Graham agreed to take a range, and on that day executed his note for \$68. On the 21st day of May one Bell, another agent of the plaintiff in error, came to Graham's house with a range and piping, and the said Bell procured two carpenters to erect and place said range in position in the house, the piping being run straight up through a room over the kitchen, and through the roof of the house, without placing around the piping any terra cotta or other nonconductor of heat. The same night that the range was placed in position, and after it had been so placed, the said Graham signed a paper writing known in this case as 'Exhibit A,' which is in words and figures as follows:

"This agreement, made and entered into this 21st day of May, 1894, between the Wrought-Iron Range Company, of St. Louis, Mo., of the first part, and Maj. W. A. Graham of the second part, witnesseth: That the Wrought-Iron Range Company has this day delivered in good order to the parties of the second part one Home Comfort Range and ware, same as sample ordered from, for which the party of the second part executed their promissory note on the 16th day May, 1894, for the sum of \$68, payable to the Wrought-Iron Range Company without discount or offset, and due on the 1st day of October after date, with eight per cent. interest from date, if not paid when due and presented. Now, be it understood, that the Wrought-Iron Range Company warrant said range to bake, boil, and do all kinds of cooking in a good, workman-like manner, and agree to furnish free of charge any parts that may, with ordinary usage, get out of repair sufficiently to injure the working of said range during the period of twelve months from the date of this writing: provided, that the above note is paid when due and presented, and that the parties of the second part furnish such fire and fuel as is necessary to its perfect operation. It is further agreed that the range is not transferable until paid for, and that no receipt, discounts, or offset will be accepted against the above-mentioned note. This is the only agreement or stipulation recognized in the purchase and sale of said range, and no alteration of the above conditions or erasures by salesmen is authorized or will be recognized by the said company.

"[Signed in duplicate]

The Wrought-Iron Range Company.

"W. A. Graham.

"County of Lincoln, State of North Carolina.

"Witness: J. D. Bell."

"When the agent, Goetchins, contracted to sell the range and piping on the 16th day of May, it appeared in evidence that he stated to the said Graham that the piping was made of sheet steel, and that the range was constructed in such a manner that the heat from the fire went around the oven before going up the pipe, and that there would be no danger to Graham's house from fire if the piping was placed in immediate contact with the woodwork of the house, and there was no need of terra cotta or other nonconductor of heat; that the pipe would not get heated enough to burn a cotton string in ten years. There were other statements of like nature by the agent as to the qualities of the range, and the safety from fire in using it. The plaintiff in error duly objected to the admission in evidence of all the declarations of the agent, Goetchins, and of all his statements, upon the ground that, the contract having been subsequently reduced to writing, all the prior negotiations were merged in the writing, and it was not permissible to prove by parol evidence any statements, representations, or contract of the agent not embraced in the writing. The question as to the admissibility of this parol testimony is one of the main points in the case. The plaintiff in error further objected to any evidence that Bell had had the range placed in position upon the ground that there was no evidence of any agency on the part of Bell to erect the range and piping; that neither his acts nor declarations in reference to erecting the range could be shown in evidence; nor could the plaintiff in error be chargeable if the range and piping were placed in position negligently under the direction of Bell.

The admissibility of this evidence raises another question in the case. The defendant in error was permitted to testify that he lost by the fire shade trees to the value of \$500. This evidence was duly objected to by plaintiff in error upon the ground that it was not such damage as was claimed in the complaint. The complaint set forth the damage in article 7 of the first cause of action on page 14 of the printed record in these words: 'That on or about the 5th day of June, 1894, a dwelling house and the greater part of its contents, consisting of furniture, library, silverware, jewelry, wearing apparel, and other personal property, and also an outhouse, were consumed by fire,' etc.

"The complaint in the action contains three causes of action: (1) The cause of action for deceit and false representation,—that the agent falsely and fraudulently represented that the range and piping would not communicate fire to the plaintiff's dwelling house if the piping was placed in immediate contact with the woodwork. (2) The second cause of action was upon a warranty that the agent warranted that fire would not be communicated to the plaintiff's dwelling house if the range and piping were placed in immediate contact with the woodwork of the house. (3) The third cause of action was for negligence in that the agent at the time of the sale agreed to place the range and piping in position in the house so that there would be no danger of fire therefrom, and that the agent negligently failed to erect the range and piping so that there would be no danger from fire, etc.

"The plaintiff in error contended that there could be no recovery as to any of these three causes of action, because, in the first place, the evidence should be restricted to the paper writing known as 'Exhibit A,' and this contained no representations or contracts of the nature alleged in the complaint, and the contract, 'Exhibit A,' expressly showed that the plaintiff in error had not authorized its agent to make any other contract than that contained in the writing, and had not authorized its agent to erect the range and place it in position, and was, therefore, not responsible for any negligence. Even if these points were against the plaintiff in error, and even if parol evidence were admissible, yet it appeared from the whole case and the testimony of the said Graham himself that the agent contracted to sell a range made of wrought iron, and piping made of sheet steel, both well-known articles, and therefore no statement or representation of the agent as to these well-known articles could be allowed in law to be a cause of action for deceit, or even warranty; and that, although the range and piping were negligently placed in position by the agent of the plaintiff in error, yet it was negligence on the part of the defendant in error to use the range erected as it was, and he cannot be heard to say that he did not know the qualities of wrought iron and steel, and he cannot be heard to say that he relied upon the representations of the agent; that the question as to whether the fire built in a range made of wrought iron, and used with piping made of sheet steel, would get heated enough to burn the woodwork in immediate contact with the piping was a fact which the said Graham ought to have known; and, if he did not know it already, it was a fact which he could so easily have ascertained that his failure to know the fact or to ascertain it will effectually bar any recovery on his part in this action. The plaintiff in error further contended that at the time the alleged fraudulent representations were made no particular range was referred to, and that there could not be any deceit in an executory contract to deliver a range and piping of a certain kind at some time in the future. There is no evidence that there was any representation as to the qualities of the particular range and piping which were sold and delivered to the said Graham. The plaintiff in error asked for special instructions in its favor upon the issues submitted, and in this way has raised the point that on the whole evidence the said Graham is not entitled to recover in this action, and the plaintiff in error earnestly insists that in no aspect of this case is the defendant in error entitled to recover.

"Issues were settled in accordance with the practice in North Carolina, and submitted to the jury under each of the three causes of action as follows:

**"Issues Tendered by Plaintiff. First Cause of Action.**

"(1) Did the defendant, as alleged in the complaint, through its agent, represent to the plaintiff, with the purpose of inducing him to purchase and use

one of its ranges and piping, that the range and piping were so made and constructed as not to require any insulation of the pipe by terra cotta or other nonconductor of heat, to prevent setting fire to the house of plaintiff; and that, if the range and pipe were put up and used without such nonconductor, it would not ignite the plaintiff's house, and there would be no danger from fire? Answer. Yes. (2) Was said representation knowingly false? Answer. Yes. (3) Was plaintiff induced by said representation to purchase from defendant and use one of its ranges and piping without insulating the pipe by terra cotta or other nonconductor of heat, as alleged in the complaint? Answer. Yes. (4) Was plaintiff injured by reason of said false representation, as alleged in the complaint? Answer. Yes. (5) What are the plaintiff's damages? Answer. \$3,600.'

"Second Cause of Action. Issues.

"(1) Did defendant agree with and warrant to the plaintiff, as alleged in the complaint, through its agent, that the range and piping to be used therewith, which defendant sold to plaintiff, were so made and constructed as not to require any insulation of the pipe by terra cotta or other nonconductor of heat to prevent setting fire to the house of plaintiff, and that, if the range and pipe were put up and used without such nonconductor, it would not ignite the plaintiff's house, and there would be no danger from fire? Answer. Yes. (2) Was there a breach of said agreement and warranty by the defendant? Answer. Yes. (3) Was the plaintiff injured by said breach? Answer. Yes. (4) What are plaintiff's damages? Answer. \$3,600.'

"Third Cause of Action. Issues.

"(1) Was the plaintiff injured by the defendant's negligence, as alleged in the complaint? Answer. Yes. (2) (Objected to by plaintiff. Objection overruled. Exception.) Did the plaintiff, by his own negligence, contribute to his injury? Answer. No. (3) If plaintiff, by his own negligence, contributed to his injury, could defendant, notwithstanding the negligence of plaintiff, have prevented the injury by the exercise of care on its part? Answer. Yes. (4) What are plaintiff's damages? Answer. \$3,600. (5) Did the defendant, as a part of the contract of sale of the said range, and for the consideration of the price contracted to be paid therefor, agree with the plaintiff to deliver the said range, and to place the same in position in the plaintiff's house in such manner that there would be no danger of the plaintiff's house catching fire from said piping, and so that the plaintiff could use the same with perfect safety? Answer. Yes.'

"The jury having answered all the questions submitted in favor of the plaintiff, and in such cause of action having assessed the damages at \$3,600, judgment was entered for that amount."

Charles W. Tillett, for plaintiff in error.

David W. Robinson and Platt D. Walker, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and MORRIS, District Judge.

MORRIS, District Judge. The defendant at the trial offered no evidence, but, when the plaintiff was asked to tell the jury under what circumstances he bought the cooking range and piping, and what was the contract made in reference thereto, the defendant's counsel produced the paper known in the case as "Exhibit A," which was signed by the plaintiff. The plaintiff then testified that he had signed the paper after he had bought the range and had given his note for it, and after the range had been delivered, put up, and a fire built in it. The plaintiff testified that Bell, who had brought the range, and put it up, had asked him to sign what he called a "receipt for the range," and, thinking it was a receipt, he signed it; that Bell professed to read it over, and gave plaintiff a duplicate of it, which he put away

among his papers without reading it. The defendant then objected to the plaintiff being allowed to testify as to the representations made by either Goetchins, who had first sold the range to the plaintiff, and obtained his note for it, or of Bell, who had brought the range and put it up, as to the range not heating the smoke pipe, and as to the absence of any risk of the pipe setting fire to any woodwork, although placed against it without any terra cotta or tin protection around it. The court overruled this objection, and in its instructions told the jury that the range had been purchased under a parol contract made between the plaintiff and Goetchins, the agent of the defendant; that the paper signed by the plaintiff did not supersede the previously executed parol contract of purchase; that it had only the force and effect of a receipt, and, having no contractual obligation, was capable of being explained by parol evidence; that it could not have relation back and be a substitute for the previously accepted parol contract. This instruction proceeded upon the ground that the plaintiff, at the first interview with Goetchins on the 15th, having agreed to purchase the range and piping, and having then given his promissory note, the sale was complete, and the terms of it settled, so that the paper signed by both the vendor and purchaser upon the delivery of the range and piping on the 21st could not change them. In this ruling we think there was error. The agreement of purchase on the 15th was made after inspecting a sample range which Goetchins had in one of the company's wagons. He was to send one like it, and have it put up. Until the range was put in place, it was not delivered, and the transaction was not complete. When such a transaction is complete, there is no rule of law which prevents the parties from both signing, if they choose to do so, a written paper which shall express the terms of the contract. It is true that neither is compelled to sign such a paper, and that neither may, without the consent of the other, impose any new terms; but, if they both do sign a paper with the intent that it shall express their contract, we are not aware of any rule of law which prevents such an agreement from having the same validity which it would have had if signed by both at some earlier stage of the transaction. *Worthington v. Bullitt*, 6 Md. 172; *Mills v. Matthews*, 7 Md. 315. When a written contract is so signed by both the parties to be bound, in the absence of clear and convincing proof of fraud or deception in procuring it to be signed it must be presumed to express the entire contract, and parol evidence of previous understandings of the parties is not admissible to vary its terms. It is to be borne in mind that the remedy which the plaintiff below was pursuing in his second cause of action was upon a supposed warranty in the contract of sale that the range and piping could be safely used without terra cotta or other nonconductor to separate the piping from the woodwork. To support this it was necessary to entirely ignore the written paper "Exhibit A," which does not contain any such warranty, and to rely entirely upon the parol statements given in evidence; and with regard to the first cause of action, which was for deceit in falsely representing that the range and piping was so constructed that it did not require any insulation for the smoke pipe, and thereby inducing the plaintiff to buy it to his damage, the false representations, like the

alleged warranty, the plaintiff was attempting to prove by parol testimony of what took place prior to the signing of the written agreement, so that, if the agreement was a valid contract, those representations were not admissible.

The third cause of action, however, rested upon matters not in any way covered by the written agreement, even assuming that it was signed under circumstances which made it the only binding contract. The third cause of action was for the alleged negligence of the defendant in so placing the range and piping in position that it set fire to the plaintiff's house, and caused the damage sued for. The plaintiff's testimony proved that Goetchins, after having induced the plaintiff to purchase one of defendant's ranges, and after obtaining plaintiff's note, payable to the order of the defendant, for the agreed price, went off, saying that he would send the promissory note to the defendant's superintendent at Lincolnton, and that a man would be sent to put the range up, and explained that because of the peculiar construction of defendant's make of range and piping no insulation would be required around the piping. On the 21st a man named Bell came with the range and the necessary piping, which was over 23 feet in length. He asked if he could get two carpenters to assist him in putting up the piping. He employed and paid them, and directed how the piping should be erected, and had it run up through the ceiling of the room over the kitchen and out through the roof, having the holes cut for the purpose. He assisted the carpenters, and furnished them the necessary tools from one of the company's wagons. Both the plaintiff and his son suggested to Bell that there should be some insulation around the pipe where it passed through the woodwork, but Bell insisted that the range and piping manufactured by the defendant were so constructed that insulation was not necessary, and that there was no danger. After the job was completed, Bell paid all of the attendant expenses, partly in money and part with scrip obligations of the defendant company, and obtained from the plaintiff the agreement produced by the defendant at the trial. To sustain this third cause of action it was necessary to prove that the defendant, through its agents, had undertaken to put the range in place with the necessary piping ready for use; that it had done so in its own way; and that the work was so negligently done that without any fault on plaintiff's part it had set fire to his house, and caused him damage. There was very full proof of all these facts, and, the jury having found in favor of the plaintiff on this third cause of action, we are required to consider whether any of the assignments of error applicable to it are sustainable.

First, as to the admission of the testimony of the statements by Goetchins and Bell with regard to the peculiar construction of the range manufactured by the defendant, which they were selling for the defendant, it appears to us there was no error, for the reason that as to this cause of action this evidence was not given to prove a warranty or deceitful representations different from those contained in the alleged agreement, but to show how and for what reason the defendant put up the range in the manner it did, and was admissible as part of the *res gestæ* connected with that act of the



defendant. The statements of defendant's agents that they were going to put up the range in a manner different from the ordinary manner, because that was the proper way to place a range of its peculiar construction, was pertinent, and admissible to prove, in connection with other facts, that it was put up in that peculiar manner by defendant's agent, and not by direction of the plaintiff; and it was left for the jury to say whether or not it was a dangerous and negligent manner, and whether the burning of the house resulted therefrom. We cannot see that any of the exceptions to the evidence are sustainable as applicable to the third cause of action and the issues framed in submitting it to the jury.

We next consider whether, as to this cause of action, any of the rulings in refusing the instructions asked by the defendant, which were excepted to, contain reversible error. It is to be noted that the appellant is not entitled to a reversal, because the court may not have fully instructed the jury on the subject of negligence. It can assign as error only the instructions which the court did give, or which, although requested by the defendant, it refused to give. The instructions requested by the defendant upon the issues raised by the third cause of action are contained in the 21st, 22d, 23d, 24th, 25th, 26th, 27th, and 33d assignments of error. All of these, except the 33d, are, in substance, that there was no evidence to support that cause of action; that the plaintiff was guilty of contributory negligence, and could not recover; that the danger from using the range and piping was an obvious one, and the plaintiff used it at his own risk; that the fact that the pipe became heated could have been ascertained by ordinary care; and that it was at plaintiff's own risk that he continued to use it, and his using it was the proximate cause of the loss. It does not appear to us that the court could have granted any of these instructions. The only evidence produced tended to show that the fire broke out in the roof adjoining the place where the defendant's agents had run the pipe through only about two weeks before. It does not appear from any testimony that the pipe was observably heated in any place where it could have been seen. There had been no pipe through the roof before, and the apprehension with which the plaintiff had at first regarded the proposal to put the pipe through the roof had been quieted by the statement of defendant's agent that the range and pipe were so constructed that a cotton string around the pipe would not burn in 10 years. The plaintiff testified that he knew nothing of the peculiar construction of defendant's range, and was not competent to judge of it. The defendant ought not to be heard to say that the plaintiff must be held guilty of contributory negligence merely because he used the range just as the defendant's agents put it up and assured him it was safe to use it. It was submitted to the jury to say whether the plaintiff, by his own negligence, contributed to his injury, and they answered that he did not. The defendant desired the court to go much further, and to instruct the jury that the danger was so obvious that the plaintiff, as a reasonably prudent man, ought not to have believed its agent's statements, and ought to have seen the danger. We see no ground for sus-

taining this contention. The range and piping were of defendant's own manufacture, and the plaintiff naturally enough was persuaded that defendant's agents knew its qualities best.

The thirty-third assignment of error is to the court's refusal to grant the sixteenth instruction asked by the defendant, viz.:

"That there is no evidence in this case that either Goetchins or Bell had authority to bind the defendant by a contract to erect and place the piping in position, nor is there any evidence that in erecting and placing the range and piping in position in plaintiff's dwelling the said Bell represented the defendant, and the said defendant is not, therefore, bound by the alleged contract to erect the range and piping, nor is the defendant responsible if the same was negligently erected by Bell, and under his direction."

The question is not whether Goetchins or Bell had authority to make a contract binding upon the defendant to erect and place the range and piping, but whether what they did do was within the scope of their authority and employment, and whether they did it while engaged in the defendant's business. The answer which the defendant filed admits that it offered to sell to the plaintiff one of its ranges to place in plaintiff's dwelling house, to be used for cooking purposes; and it admits that, through its agent, it delivered the range to the plaintiff at his dwelling house. It denies that any piping was placed in contact with the woodwork of said dwelling house by any agent of defendant. It admits that it was engaged in the manufacture and sale of cooking ranges, and that it sold one of its ranges for \$68 to the plaintiff. The answer is an admission that Goetchins was defendant's agent to sell the range and piping, and that Bell was its agent to deliver it with the piping. These agents unquestionably undertook to put it up in a manner suitable, as they claimed, to its peculiar construction; and there was evidence from which the jury was justified in finding that in so doing they were acting within the apparent scope of their employment. No evidence was introduced to contradict this, or in any way to affect the inferences which the jury might fairly make from the facts proved. The contention that when defendant's agents were making the sale and delivering the range and piping, and getting plaintiff's note and agreement, they were acting for the defendant, but that when they were placing the range and piping in position, and paying the carpenters, they were acting for themselves, is a contention that requires affirmative proof to support it, and is by no means a presumption of law. In *Mechem on Agency* (section 734), the law on this subject is well summarized:

"In determining the principal's liability for the agent's negligence, the important inquiry is not whether the agent was authorized to do, or to omit to do, the act, the doing or not doing of which constitutes the negligence complained of, or whether the act was done or omitted in violation of the principal's instructions, but whether the act was done or omitted by the agent while engaged in the business of his principal. As is well said by a learned judge: 'In most cases where the master has been held liable for the negligence of his servant, not only was there an absence of authority to commit the wrong, but it was committed in violation of the duty which the servant owed the master. The principal is bound by a contract made in his name by his agent only when the agent has actual or apparent authority to make it, but the liability of a master for the tort of his servant does not depend primarily upon the possession of an authority to commit it. The question is not solved by comparing