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

the act with the authority. It is sufficient to make the master responsible civiliter if the wrongful act of the servant was committed in the business of the master, and within the scope of his employment; and this although the servant, in doing it, departed from the instructions of his master. The rule is founded upon public policy and convenience. Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed. The omission of such care is the omission of the principal, and for the injury resulting therefrom to others the principal is justly held liable. If he employs incompetent or untrustworthy servants, it is his fault; and whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim respondeat superior applies, provided only that the agent was acting at the time for the principal, and within the scope of the business intrusted to him.' Higgins v. Turnpike Co., 46 N. Y. 23. So, too, it is immaterial that the act was committed without the principal's knowledge, or that it was the result of the agent's misapprehension or misapplication of his principal's instructions, and was an act which the principal never intended should be done; if, in fact, it was done by the agent in the course of his employment, and not in the willful departure from it, the principal is liable."

In Mackay v. Bank, L. R. 5 P. C. 394, it was declared to be settled law that the principal is liable for a fraud as well as for other wrongs committed by an agent without express command in the course of the agent's service, and for the principal's benefit.

It is urged on behalf of the range company that, although the court may have been right in refusing the instructions it asked with respect to the issues under the third cause of action, it was error for the court not to have charged the jury for their guidance in considering that issue. To justify a recovery for the plaintiff on the issue of negligence, the only facts necessary to be found were the negligence, the fact that it was committed by the agent in the business of the range company and within the scope of his employment, and the fact that injury had resulted to the plaintiff from the negligence, unmixed with any fault on the part of the plaintiff. As to these facts, the evidence was all one way. The undisputed testimony may almost be said to have required the jury to find for the plaintiff, and, in our judgment, no injury resulted to the defendant from the omission to more specifically charge the jury on these points.

It is also urged that there was error in admitting evidence to be given of the value of the trees shading the house, and which added to its beauty, value, and comfort, and in the court's instruction to the jury that they might allow for such as were destroyed by the fire. The plaintiff, in his complaint, claimed damages for the loss of his dwelling house and contents and an outhouse near by. It does not seem to us that the destruction of the shade trees surrounding a dwelling house in the country is an item of damage so distinct from the burning of the house itself that it is reversible error to allow such an item to be proved without alleging it as a special damage. It would rather appear to be a damage which naturally and reasonably results from the burning of the house itself under such circumstances.

Upon consideration, we are satisfied that, although there was error in the rulings upon the questions whether or not the printed contract contained the whole contract of sale, so as to exclude parol

proof of a warranty or of false representations, yet that there was evidence to support the plaintiff's right to recover upon the ground of negligence, and that question was rightly submitted to the jury. It was an independent issue put to the jury in accordance with the North Carolina practice. The finding was fully justified by the evidence, and was sufficient to support the verdict. The judgment of the court below is affirmed.

KNICKERBOCKER ICE CO. v. FINN.

(Circuit Court of Appeals, Second Circuit. May 3, 1897.)

1. MASTER AND SERVANT—NEGLIGENCE—VICIOUS HORSE.
   That a horse by whose kicking an employé was injured had, on two previous occasions, of which the employer's superintendent was informed, kicked viciously and dangerously without provocation, is sufficient to require submission to the jury of the question whether the horse had a propensity to kick, rendering him unsafe.
2. SAME—CONTRIBUTORY NEGLIGENCE—VIOLATION OF OBSOLETE RULES.
   An employer cannot set up, as a valid defense against the consequences of his own negligence, the employé's violation of a rule which the employer had knowingly permitted to be practically abandoned.

Error to the Circuit Court of the United States for the Southern District of New York.

William Finn, the plaintiff in the court below, an employé of the Knickerbocker Ice Company, recovered in the circuit court for the Southern district of New York a verdict for $7,500, in an action against said company for damages caused by the kick of a horse of the defendant, which inflicted so severe an injury as to compel the amputation of the plaintiff's leg.

John M. Gardner, for plaintiff.
Charles C. Nadal, for defendant.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. The defendant, at the close of the entire testimony, moved for a direction of a verdict in its favor, upon the ground that there was no proof of negligence on the part of the defendant; that there was no evidence that the horse was a vicious animal, or that it had any propensity to kick, of which the plaintiff should have been notified; and that the plaintiff was guilty of contributory negligence. The court denied the motion, to which the defendant excepted. The plaintiff was "a helper" in the employment of the ice company; that is, he helped or assisted the driver of one of the ice wagons in the delivery of ice upon his route. He also drove while the driver was delivering ice. On the occasion of the accident, he was driving and occupied the usual seat, which placed his legs very near to the heels of the horses. The horse which broke Finn's leg was an "extra" horse, and was occasionally used. There was no question in the case in regard to the liability of the company if it had furnished one of its drivers, without warning, a vicious horse, which the company knew or ought

to have known was vicious, while the driver did not know and was under no obligation to know the animal's evil habit. The points upon which the defendant principally relies are: First, that there was no proof that the horse had a propensity to kick without provocation; and, second, that there was no proof that the defendant's foreman had knowledge of such a propensity, or that he had any knowledge which he should have communicated to Finn.

The testimony on the part of the plaintiff was to the effect that on two separate occasions, shortly before the accident, this horse, viciously and without provocation, kicked in a very dangerous manner; that on one occasion, after having repeatedly kicked, he was returned to the stable, and the superintendent, upon being informed of the reason for the return, furnished another horse; and that on the other occasion an employé told the superintendent of the horse's bad conduct. The testimony in regard to the horse's vicious propensity and the company's knowledge of it is confined to these two instances, but, if the testimony for the plaintiff is to be believed, the kicking was very willful, and without adequate cause. The company assigned a cause which is consistent with his good character. The court charged the jury that there was no substantial evidence that the horse was a generally vicious horse, and that the question was whether he had the propensity, rendering him unsafe, sometimes to kick, without cause or provocation, and whether the superintendent had reasonable cause to believe that the horse was an unsafe horse to be sent out with the plaintiff and his driver. There was sufficient evidence to compel a submission of these questions to the jury.

The defendant's remaining point is that the plaintiff was, in driving the horse, disobeying a rule of the defendant, and was therefore guilty of contributory negligence. The defendant had a rule, on paper, which Finn knew, and which prohibited any employé, except the drivers themselves, from driving the horses. There was ample evidence that this rule was, and was known by the company to be, a dead letter. The defendant insisted that the plaintiff ought not to recover, because, at the time he was hurt, he was acting in violation of this rule.

The court charged as follows:

"If there was a rule of that character in force, and the plaintiff was violating it at the time he received this injury, he is not entitled to recover; but if you come to the conclusion that, although there was such a printed regulation, it was not enforced, it was a dead letter, that everybody connected with the company knew that the helpers were expected on occasions to drive the defendant's horses, and that the plaintiff was injured while driving upon one of these occasions, then the rule is no defense."

To the correctness of this charge, both in morals and in law, there can be no valid objection. An employer cannot be permitted to set up, as a valid defense against the consequences of his own negligence, the employé's violation of a rule which the employer had knowingly permitted to be practically abandoned. Railroad Co. v. Nickels, 1 C. C. A. 625, 50 Fed. 718. The judgment of the circuit court is affirmed, with costs.

HENRY v. PITTSBURGH CLAY MANUF'G CO.

(Circuit Court of Appeals, Third Circuit. April 14, 1897.)

No. 10, March Term, 1897.

1. WILLS—CONSTRUCTION—LIFE ESTATE.
Testator devised lands to his son, "to have and to hold * * * during the life of my son, * * * and the lifetime of his wife, * * * to have and to hold the same and enjoy all the benefits or profits in any wise accruing from said land during their natural lives," and, at the death of his son and his wife, the land to be sold, and the proceeds equally divided among their children. *Held*, that the son took only a life estate, notwithstanding that a small charge was made upon the land in favor of his mother.

2. FEDERAL COURTS—EFFECT OF STATE DECISIONS.
A decision by a state supreme court that, under a state statute, a sheriff's sale of certain land passed no title, is binding on the federal courts.

3. STATUTE OF FRAUDS—PAROL CONTRACT FOR LAND—PART PERFORMANCE.
An alleged parol contract, whereby a father authorized his son to go upon a certain tract of land, and occupy and improve the same, with the understanding that it would be his "sometime," is so indefinite as not to be taken out of the statute by a part performance on the part of the son by living upon the land and making improvements.

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

Ellis N. Bigger, for plaintiff in error.
William B. Cuthbertson, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BUTLER, District Judge.

BUTLER, District Judge. The parties having dispensed with a jury, the court found the following facts:

"(1) William McClellan, the common source of title, was seised in fee of the land in question at the time of his death, and by his will, which was duly probated, devised the land in question as follows:

" 'I give and bequeath unto my son Francis McClellan a lot or piece of land situated on the west of my farm and bounded by a partition fence between the farm that I now live upon, on the east, and by lands of Wm. Kennedy and Jas. A. Barrett, be the same more or less, being the same piece of land occupied by him, and upon which he had made improvements upon buildings, etc., to have and to hold the said piece or tract of land so situated and described during the life of my son Francis and the lifetime of his wife, Jane, to have and to hold the same and enjoy all the benefits or profits in any wise accruing from said land during their natural lives, and at the death of my son Francis and his wife, Jane, the said piece or parcel of said land is to be sold, and the amount it is to be sold for, be the same more or less, to be equally divided amongst all the children of my son Francis and his wife, Jane, share and share alike.'

"(2) In November, 1882, the said Francis McClellan and Jane, his wife, with seven of their nine children, joined in a bond and mortgage upon said premises to the Beaver Valley Building & Loan Association for $1,200. Two of the children executing said instruments were minors. Default having been made on May 16, 1887, judgment was entered on said bond by virtue of a warrant of attorney, a writ of fieri facias issued thereon, the property levied upon and on June 4, 1887, sold to J. A. Barrett for $1,230, and a sheriff's deed thereafter was duly acknowledged and delivered to him, and the purchase money paid.

"(3) That subsequently thereto, T. M. Henry, the vendor of the present plain-

tiff, and the vendee of said Barrett, brought an action of ejectment in the court of common pleas of Beaver county against Frank McClellan and Jane McClellan his wife, to recover possession of said premises. That said case resulted in a compulsory nonsuit being entered against said T. M. Henry, which nonsuit the court refused to take off, and upon appeal by the said Henry to the supreme court of Pennsylvania, the judgment of the lower court was affirmed. That in said case the question raised was the same as in the present case, viz., the effect of the sheriff's sale to divest the life estate, and was passed upon.

"(4) That subsequently thereto the holder of the life estate and those in remainder uniting in praying a sale, the land in question was sold by a trustee acting under the order of the orphans' court of Beaver county. The said T. M. Henry appeared in said court as claimant for part of the proceeds of the sale of said lands by virtue of his ownership of the title or right alleged to have passed by said sheriff's sale. That the orphans' court decided against the validity of said sheriff's sale and against the alleged right of Mr. Henry to participate in the proceeds of the orphans' court sale, and upon appeal by him to the supreme court of Pennsylvania, the decree of the orphans' court was affirmed.

"(5) That subsequently thereto the rights of J. A. Barrett and T. M. Henry under the said sheriff's deed passed by assignment to Francis Henry, a citizen of Minnesota, who brought the present suit."

On this finding of facts, the court entered judgment for the defendant; whereupon the plaintiff brought the case here, and filed the following assignment of errors:

"First. The court erred in opinion in this case in finding for the defendants and in ordering judgment to be entered in their favor.

"Second. The court erred in not finding for the plaintiff and giving judgment in his favor.

"Third. The court erred in finding that in the ejectment in the court of common pleas of Beaver county, brought by T. M. Henry against Francis McClellan and wife, the question raised was the same as in the present case, viz.: the effect of the sheriff's sale to divest the life estate, and was passed upon. In that action it was assumed for the purpose of getting possession of the land, that the title of the defendants was a life estate, the question of the nature of the defendants' title was not raised and was not a question at issue; all of which appears by the plaintiff's paper book on appeal to the supreme court of Pennsylvania, in that case, which is in evidence by agreement in the present case; the question here raised is the nature of Francis McClellan's title, whether by gift, parol, contract, or devise, which if a fee simple, has passed to the present plaintiff, and also the question of the validity of the plaintiff's tax title derived from H. S. McConnel.

"Fourth. The court erred in finding that the orphans' court of Beaver county, in distributing the proceeds of the trustee's sale among the supposed remainder-men under Wm. McClellan's will, or their assigns, decided against the validity of the sheriff's sale. The question of the nature of T. M. Henry's title was not at issue in that distribution proceeding, nor on appeal thereof, where it was assumed, for the purpose of attempting that method of relief, that the land was converted under the will, and that the remainder interests were personalty; as appeared by appellant's paper book in that case now in evidence by agreement. The scope of the orphans' court decision, and that of the supreme court affirming, was merely as to the invalidity of the sheriff's sale to pass the supposed equitable interests in remainder, and was not an adjudication of the matters now in question, and the court erred in not so finding.

"Fifth. The court erred in finding that the question involved in this case has already been passed upon by the supreme court of Pennsylvania.

"Sixth. The court erred in not finding that the statement of the supreme court of Pennsylvania, that the will created a life estate is not decisive of that fact or of this case as the construction of the will was not distinctly before the said court, and as there was no evidence of a parol, gift, or contract, or of a title by tax sale as there is in the present case.

"Seventh. The court erred in not finding that the plaintiff in this action is not