

as against plaintiff in error, it was possible, by some ex post facto agreement between Forsyth, Hyde & Co. and defendant in error, of which plaintiff in error had no notice, for this defendant in error to become principal and vendor in the contract last named. The theory of ratification presupposes, as beyond question, that, within the intent of plaintiff in error, defendant in error was vendor in the contract of May 16th. But I do not so understand the record. If Forsyth, Hyde & Co. had been in fact authorized to make that contract, then the evidence, it may be contended, would not affirmatively and distinctly exclude a possible understanding by plaintiff in error that defendant in error was really vendor. But Forsyth, Hyde & Co. were not so authorized. There is no basis for the theory of ratification. I am not able to see that defendant in error sold to plaintiff in error the 300 tons. It ought not therefore to recover the price.

The court instructed the jury: "The only question before you is the question as to whether or not the plaintiff has proved that, through these agents, they did sell and deliver to the defendant the pig iron that is sued for. If so, you may find a verdict for the plaintiff for the value of the iron at the time and place of delivery," etc. The record shows that the counsel for defendant "excepted to so much of said charge as directed the jury that the only question was as to whether plaintiff shipped to defendant certain pig iron in suit, and its value." The counsel for defendant also requested the court to charge the jury that "if they believe from the evidence that exclusive credit was given by defendant to Forsyth, Hyde & Company, and it contracted with them exclusively in respect to the iron to recover the price for which suit was brought, then plaintiff could neither sue nor be sued upon such contract." This request the court refused, and exception was duly taken and allowed. In other words, upon the theory which prevailed in the circuit court, the relation of principal and agent, as between the defendant in error and Forsyth, Hyde & Co., was assumed as beyond question. I think this judgment is error, and that the same ought to be reversed.

---

POST et al. v. BURNHAM et al.

(Circuit Court of Appeals, Third Circuit. November 10, 1897.)

No. 9.

SALE—WARRANTY OF TITLE—EVIDENCE.

In an action to recover damages for alleged breach of warranty of title upon a sale of certain locomotives, *held*, on the evidence, consisting of certain correspondence between the parties, that the sale was not made by defendants to plaintiffs, but to a railroad company, from which plaintiffs subsequently purchased, and that defendants were therefore not liable because of a failure of title.

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

This was an action by Henry A. V. Post and Charles C. Pomeroy, as surviving partners of the firm of Post, Martin & Co., against George Burnham and others, trading as Burnham, Williams & Co., for breach of an implied warranty of title

arising upon an alleged sale of four locomotives by defendants to plaintiffs. In the circuit court the judge directed a verdict for defendants, and the plaintiffs have appealed.

The real question in issue between the parties was whether the plaintiffs in fact purchased the locomotives of the defendants; defendants claiming that the purchase was made by plaintiffs from the Toledo, Ann Arbor & North Michigan Railway Company, to which the defendants had previously sold the locomotives. There was no question that the original sale by defendants was made to the railway company, and that the locomotives were shipped to them in November, 1892, and put in use on its road. From that time, defendants were pressing the railroad company for payment. Thus, on February 28, 1893, they wrote to the railroad company's general manager as follows:

"Dear Sir: We hand you herewith statement of account, showing amount due on engines shipped to your company in November, say \$37,780, for which we shall be pleased to receive remittance, as we are not in funds. Trusting that we shall hear from you at an early date, we are," etc.

To this letter the general manager replied: "I have your letter of the 28th ult., with invoice. As soon as the engines are received, I will send this invoice to New York for payment."

On March 16, 1893, Post, Martin & Co., of New York, whose survivors are plaintiffs herein, addressed the following letter to the defendants:

"Gentlemen: We have arranged with Vice President Ashley, of the T. A. A. & N. M. Ry. Co., to pay for locomotives 37, 38, 39, and 40, which have been delivered his road from your works. Please, therefore, send us an invoice in our name of said locomotives,—such invoice to be in substitution for and cancellation of any previously rendered invoice of said company,—and we will remit the same in due course. Mr. Ashley will address you on the subject, in conformity with this letter."

On receipt of the foregoing letter the defendants addressed to Mr. Ashley, president of the railroad company, the following:

"Dear Sir: We are requested by Post, Martin & Co., of New York, to send them invoices for engines 37, 38, 39, and 40, recently delivered to your company, as they have arranged to make settlement. Kindly confirm this, and have invoices already rendered for these engines returned to us."

To this Mr. Ashley replied by telegram as follows:

"Post, Martin & Co. notification correct, and duly authorized."

Thereupon defendants wrote to Post, Martin & Co. as follows:

"Gentlemen: We duly received your favor of March 16th, advising us that you have arranged with Mr. Ashley, of the T. A. A. & N. M. Ry. Co., to pay for locomotives 37, 38, 39, and 40, recently delivered to them, and requesting invoices. We at once wrote for the return of the original invoices, but have not yet received them. In the meantime, however, we hand you invoices in your name, and will cancel the originals as soon as received from the Railroad Co."

Accompanying this letter were invoices made out to Post, Martin & Co. On March 28, 1893, the defendants again wrote to Post, Martin & Co. as follows:

"Gentlemen: We have your favor of March 27, and think we can explain the difference in the price of the engines as per invoices furnished by us, and the price named to you by the Railroad Co. The brakes for engines 37, 38, 39, and 40 were furnished by the Railroad Co., and simply attached by us. Our price for Nos. 37 and 38 is therefore made up as follows: For each engine, \$8,990.00, plus \$105.00 for attaching brakes. For Nos. 39 and 40, each engine \$9,690.00, plus \$105.00 for attaching brakes. Probably, in the price named to you by Mr. Ashley, he has included the brakes themselves. We have not yet received the original invoices from the Railroad Co. If you see Mr. Ashley, kindly ask him to expedite the return of these invoices."

On April 7, 1893, Post, Martin & Co. addressed the following to defendants:

"Gentlemen: We beg to inclose the Railroad Equipment Co.'s check No. 672, \$37,780, in payment of your invoice of Nov. 23rd, 1892, and Nov. 26th, 1892,

for four freight locomotives delivered under the series A/99 Car Trust, receipt of which please acknowledge. We return the original invoice of January 26th, 1893, made out to the Tol., A. A. & N. Mich. Ry., which invoice please cancel, and so record."

To which the defendants answered:

"Gentlemen: We have your favor of 7th inst., inclosing check to our order for \$37,780, in payment for locomotives Nos. 37 to 40, inclusive, shipped in November of last year, for which please accept our thanks. We inclose formal receipt for same. As you advise, we have canceled our invoice of January 26th for \$81,280, made against the Toledo, Ann Arbor & Northern Michigan R. R. Co."

On the same day the defendants wrote to Mr. Ashley as follows:

"Dear Sir: We have to-day received, through Messrs. Post, Martin & Co., remittance for \$37,780, in settlement for the four locomotives, Nos. 37 to 40, inclusive; and, in accordance with your instructions, we have made and forwarded bills to them. Kindly let us know whether similar settlement will be authorized for locomotives Nos. 41 and 42, shipped February 22nd, and 43, and 44, shipped March 7th."

J. S. Clark and Richard C. Dale, for plaintiffs in error.

John G. Johnson, for defendants in error.

Before SHIRAS, Circuit Justice, and ACHESON and DALLAS, Circuit Judges.

DALLAS, Circuit Judge. This was an action to recover for breach of an implied warranty of title arising upon a sale of chattels alleged to have been made by the defendants below to the plaintiffs below. The question was as to whether the contract of sale alleged had in fact been made, and this question being, as was agreed, for determination by the court, upon the documentary evidence adduced, the learned judge held that the sale alleged had not been established; and, inasmuch as without such sale the implied warranty of title relied on could not exist, he directed a verdict for the defendants. The subject-matter of the alleged sale was four locomotives. That the defendants had sold them to the Toledo, Ann Arbor & North Michigan Railway Company is beyond question, as is also the fact that delivery of them had been made by the defendants to that company. It is also unquestioned that after the sale and delivery just mentioned the plaintiffs did purchase the same locomotives. They assert that they bought them from the defendants, but the defendants insist that the plaintiffs did not buy from them (the defendants), but from the railroad company before mentioned. This difference between the parties is the gist of the present controversy; and its right decision depends upon the effect which should be given to certain correspondence and other writings which are set forth at length in the record, but to which it is not necessary to refer with particularity. After careful examination of them, we have all reached the conclusion that a sale by the defendants to the plaintiffs does not appear, but that, on the contrary, it is quite apparent that the only sale to the plaintiffs was made by the railroad company, and that, as was said by the learned judge in the court below, "the defendants did no more than carry out the arrangement between the railroad company and the plaintiffs." The judgment is affirmed.

## NORTHERN PAC. R. CO. v. FREEMAN et al.

(Circuit Court of Appeals, Ninth Circuit. November 1, 1897.)

No. 365.

## 1. RAILROADS—DEATH AT CROSSING—CONTRIBUTORY NEGLIGENCE.

The mere fact that one approaching a railroad crossing in a wagon was not seen by the witnesses of the accident to stop or turn his head to look and listen is not conclusive of contributory negligence, so as to require withdrawal of the case from the jury, where there were indications from the track of his wagon that he may have seen the train as soon as it was possible to do so from the conformation of the ground, and that he attempted to get out of its way; there being also evidence tending to show that no signal was given by the approaching train.

## 2. DEATH BY NEGLIGENCE—DAMAGES—INSTRUCTIONS.

The court charged that, in fixing the damages, the jury might take into consideration deceased's ability to earn money, to support, maintain, care for, and protect his wife and children, and to educate and train the latter, "and the loss to the wife and children because of being deprived of the use and comfort of his society, and the loss of his experience, knowledge, and judgment in managing his and their affairs," etc. *Held*, that this was not calculated to mislead the jury into the belief that they might give damages for a loss of society in the sentimental sense, it being clear that the court intended a loss of society in the material and pecuniary sense.

Ross, Circuit Judge, dissenting.

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

This was an action at law by Serette O. Freeman and others, being the widow and three minor children of T. A. Freeman, against the Northern Pacific Railroad Company, to recover damages on account of his death. In the circuit court there was a verdict and judgment for plaintiffs, and the defendant sued out this writ of error.

Crowley & Grosscup, for plaintiff in error.

J. B. Bridges, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The widow and the three minor children of T. A. Freeman, brought an action against the Northern Pacific Railroad Company to recover damages on account of his death. The decedent, just prior to the accident which caused his death, was in his wagon, driving a team at a slow trot along the county road towards a railroad crossing. He was a man of 30 years of age; his eyesight and hearing were good; and he was familiar with the crossing, having frequently driven the same team over it. The team was gentle, and was accustomed to the cars. The wagon road crossed the railroad track nearly at right angles. The track at this point was in an excavation 8 feet below the elevation of the surrounding country, and the wagon road approached it by a gradual incline, the length of which was from 130 to 150 feet. Along the greater portion of this distance the view of any train approaching, either from the north or the south, was shut off by the banks of the cut on either side of the wagon road; but, at a distance of about 40 feet before reaching the