

it was clearly the duty of decedents to have exercised a degree of care commensurate with its dangerous character. If, with reasonable prudence, the decedents could have stopped where they could both look and listen for an approaching train, they were bound by every consideration of self-preservation to do so. If, however, they could not, with reasonable safety, stop at a place where they could both see and hear, it was all the more imperative that they should stop and listen at the most favorable point near the crossing, and a failure to so stop and listen, under the circumstances of this case, would be inexcusable negligence, and an instruction to this effect might have been properly given. There is nothing in the cases of *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, or *Railway Co. v. Farra*, 31 U. S. App. 306, 13 C. C. A. 602, and 66 Fed. 496, which, under the remarkable character of this crossing, would have made such an instruction improper. But no request for such an instruction was made. The requests which included the subject of stopping included either a stopping at a particular place, or a proposition as to the burden of proof in conflict with the well-settled doctrine of this court concerning contributory negligence.

The error assigned because of the refusal to instruct the jury to find for the plaintiff in error must be overruled, for the reasons already indicated in this opinion. There is no error, and the judgment must be affirmed.

GITTINGS et al. v. LOPER.

(Circuit Court, E. D. Pennsylvania. November 27, 1897.)

No. 5.

1. PLEADING—STATEMENT OF CLAIM—DENIAL OF ANTICIPATED DEFENSE.

It is not a legitimate function of a statement of claim to reply to an anticipated affirmative defense.

2. PLEADING—AFFIDAVIT OF DEFENSE—CONTENTS OF SAME.

Where, in a suit brought upon two drafts, the plaintiffs' statement of claim avers that the drafts were purchased by the plaintiffs "prior to the date of the payment thereof, and for a valuable consideration, without notice," it is not incumbent upon the defendant to reply to such irregular and premature matter in his affidavit of defense.

This is a suit to recover the sum of \$3,000 upon two drafts in the possession of the plaintiffs. The statement of claim alleged that the drafts had been purchased by the plaintiffs "prior to the date of payment thereof, and for a valuable consideration, without notice of any adverse claim or equity of the defendant." The affidavit of defense, after setting out that the acceptance by the defendant of the drafts had been procured by means of false and fraudulent representation, alleged that the defendant "is advised that the averment in the statement that the plaintiffs purchased the drafts for a valuable consideration, without notice, is an averment of a legal conclusion, and not a statement of fact requiring a denial, and, moreover, relates to matter of rebuttal, which need not be denied by the affidavit of defense." This was a rule upon the defendant to show cause why judgment

should not be entered in favor of the plaintiffs and against the defendant for want of a sufficient affidavit of defense.

Daniel J. Myers, for plaintiffs.

J. Howard Gendall, for defendant.

DALLAS, Circuit Judge. If this affidavit shall be supported by evidence, the burden will be shifted to the plaintiffs to establish that they took the paper in suit without notice of the fraud alleged, before maturity, and for value. *Investment Co. v. Russel*, 148 Pa. St. 496, 24 Atl. 59; *Simons v. Fisher*, 17 U. S. App. 1, 5 C. C. A. 311, and 55 Fed. 905. This burden cannot be evaded by the averment that the plaintiffs purchased the drafts "prior to the date of the payment thereof, and for a valuable consideration, without notice." It is not a legitimate function of a statement of claim to reply to an anticipated affirmative defense, and it is not incumbent upon a defendant to rejoin to any such irregular and premature replication. If this were not so, a plaintiff might defeat such a defense as is interposed here, by merely alleging the existence of the facts necessary to avoid it, and so escape from the requirement that he shall overcome it, if proved, by exculpatory evidence. If the plaintiffs are bona fide holders, they can readily show it; but the defendant may not have knowledge, or be informed, upon the subject, and to require him to make affidavit respecting it would be neither reasonable nor fair. The rule for judgment is discharged.

BELLEVILLE & ST. L. RY. CO. v. LEATHE.¹

(Circuit Court of Appeals, Seventh Circuit. January 3, 1898.)

No. 414.

1. RES JUDICATA—JUDGMENT OR DECREE FOR DEFENDANT.

A judgment or decree for the defendant does not necessarily establish the truth of all the defenses where several are pleaded.

2. SAME—DECREE DISMISSING BILL.

An action having been brought against a railroad company for a debt, it caused one L., who, it was claimed, had assumed payment of its debts, to be notified thereof, and authorized him to use its name in defending the suit. L. accordingly assumed the defense, without himself becoming a party, and also brought a suit in equity in the name of himself and the railroad company to enjoin the prosecution of the action at law. By the answer filed in the injunction suit issues were raised, both as to the liability of the company for the debt, and the assumption of the debt by L. The action at law resulted in a judgment against the company, and the injunction suit was dismissed on the merits. *Held*, that neither the judgment nor decree was conclusive of L.'s individual liability, and he was entitled to litigate that question in a subsequent suit against him personally.

In Error to the Circuit Court of the United States for the Southern Division of the Southern District of Illinois.

This action was brought by the Belleville & St. Louis Railway Company, the plaintiff in error, for the use of Edward L. Thomas, against Samuel H. Leathe, the defendant in error, upon an alleged promise of the latter to the railway company named to pay the company's indebtedness, including one of \$60,000 to Thomas. The first count of the declaration alleges the promise,

¹ Rehearing, denied March 5, 1898.