

there expressed, for the very purpose of avoiding any controversy or question respecting them. * * * An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made. * * * The doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing. The doctrine, carried to the extent for which the assured contends in this case, would subvert the salutary rule that the written contract must prevail over previous verbal arrangements, and open the door to all the evils which that rule was intended to prevent. *White v. Ashton*, 51 N. Y. 280; *Bigelow, Estop.* 437, 441; *White v. Walker*, 31 Ill. 422; *Faxton v. Faxon*, 28 Mich. 159."

I concur in the views expressed in these opinions of the supreme court. I think that they are applicable to this case, and that the judgment should be reversed.

ANDERSON et al. v. HOWARD.

(Circuit Court of Appeals, Fifth Circuit. May 21, 1895.)

No. 351.

PUBLIC LANDS—RAILROAD GRANTS—WHAT LANDS INCLUDED.

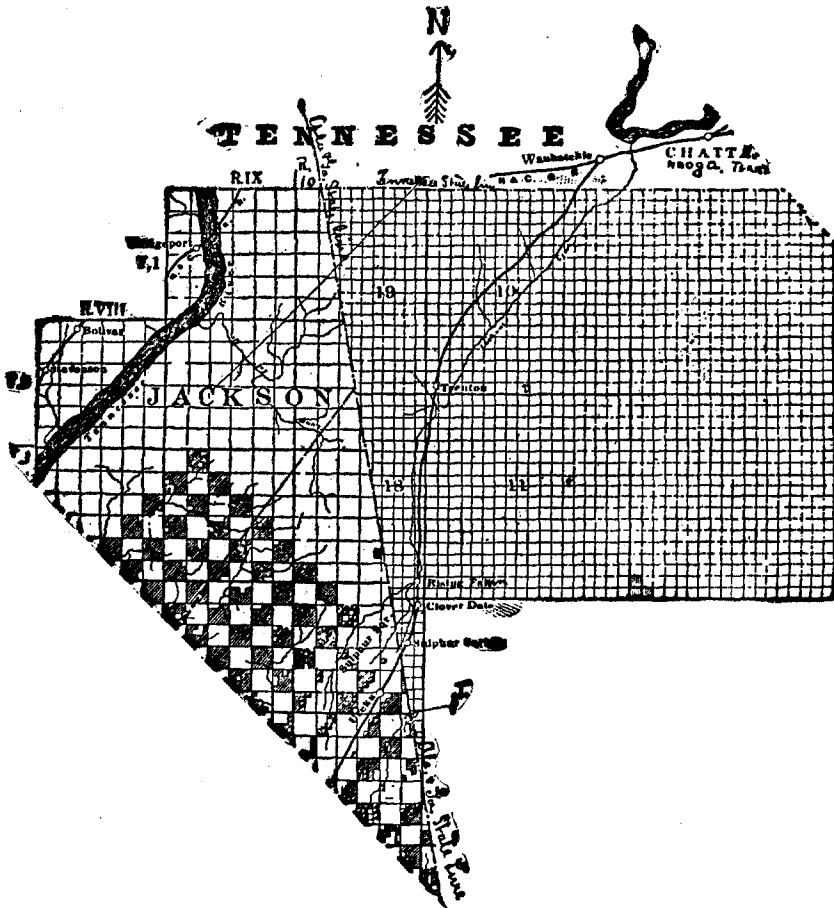
The act of June 3, 1856, granting to the state of Alabama, to aid in the construction "of certain railroads in said state," the odd sections of public land within six miles of each side of said roads, did not embrace lands within six miles of a part of the road which lay in the neighboring state of Georgia, and within six miles (but not in a perpendicular direction) of the road at the point where it crossed the state line. *Swann v. Jenkins*, 2 South. 136, 82 Ala. 478, approved and followed.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

This was an action at law by Frank Y. Anderson and William J. Cameron, trustees, successors to John Swann and John A. Billups, trustees, against John Howard, to recover possession of certain parts of section 27, township 3 S., of range 10 E., in De Kalb county, Ala. In the circuit court a verdict was directed for defendant, and judgment entered accordingly. Plaintiffs bring error.

The following is part of an agreed statement of facts filed in the case:

It is agreed, by and between the parties to the above cause, that the plaintiffs have succeeded to all the right and title of the state of Alabama, and of the Wills Valley Railroad Company, and of the Alabama & Chattanooga Railroad Company, to all the land included in the grant of lands by the congress of the United States by act approved June 3, 1856 (11 Stat. 17), and renewed by act approved April 10, 1869 (16 Stat. 45); that all the terms and conditions of said acts of congress were fully complied with by the completion of the Alabama & Chattanooga Railroad, on May 17, 1871, from Wauhatchie, Tenn., to Meridian, Miss., the said Alabama & Chattanooga Railroad being a consolidation of the Wills Valley and the Northeast & Southwest Alabama Railroad Companies. Said consolidation was made by authority of the legislature of Alabama, by act approved October 6, 1868.



"Exhibit A."

It is further agreed that the map hereto attached, and marked "Exhibit A," and which is made a part of this agreement, shows the relative position of the track of the Alabama & Chattanooga Railroad, as completed on May 17, 1871, and as it has ever since remained, to the land in dispute. That the land in dispute is within six miles of the line of the Alabama & Chattanooga Railroad (now the Alabama Great Southern Railroad) at the point where it crosses the line dividing the states of Alabama and Georgia, but is not at right angle with said railroad at any point of said line of railroad in Alabama; that said land is in Alabama, and within six miles of the track, and at right angle thereto, of the said Alabama & Chattanooga Railroad (now the Alabama Great Southern Railroad), at a point where said railroad is within the state of Georgia, between the Georgia and Alabama state line and Wauhatchie, Tenn.

J. A. W. Smith, for plaintiffs in error.

W. H. Wade, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges.

PER CURIAM. The question involved in this case is as to the proper construction of the act of congress approved June 3, 1856, entitled "An act granting public lands in alternate sections in the state of Alabama to aid in the construction of certain railroads in said state." 11 Stat. 17, 18. The circuit court followed the decision of the interior department (Decisions Department of the Interior Relating to Public Lands, vol. 3, p. 242) and the decision of the supreme court of Alabama in *Swann v. Jenkins*, 82 Ala. 478, 2 South. 136. We concur in this ruling. Judgment affirmed.

LYNCH v. NORTHERN PAC. R. CO.

(Circuit Court of Appeals, Ninth Circuit. June 24, 1895.)

No. 174.

CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Plaintiff was driving along a road, parallel with the track of defendant's railroad, in an open, prairie country, where an approaching train could be seen for a considerable distance. Upon turning a curve towards the point at which the road crossed the railroad, and being then about 36 feet from the track, traveling at a moderate trot, plaintiff discovered a freight train approaching at the rate of about 8 miles an hour from the same direction in which he had been traveling. He stopped his team close to a side track, 8 feet from that on which the train was running. Plaintiff testified that, as soon as he turned the curve, he looked for a train; that his horses were very gentle, were used to the railroad, and had frequently stood with their noses nearer a train than they were when he stopped; but that they were frightened by escaping steam, and dashed in front of the engine, which struck and injured plaintiff. *Held*, that it was error to instruct the jury that, if plaintiff had looked or listened for the train, he could have seen or heard it when he was anywhere within 200 feet of the crossing, and that he neither looked nor listened within a reasonable distance, and he was therefore guilty of contributory negligence, and could not recover; but that the question of plaintiff's contributory negligence should have been left to the jury.

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

This was an action by Neptune Lynch, Sr., against the Northern Pacific Railroad Company for personal injuries. Judgment was rendered for the defendant in the circuit court. Plaintiff brings error. Reversed.

McConnell, Clayberg & Gunn, for plaintiff in error.

Cullen & Toole and Jos. D. Redding, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and BELLINGER, District Judge.

BELLINGER, District Judge. This is an action for damages for injuries at a crossing of the defendant company's track in Montana. The plaintiff lived near the place of the accident. He had been "down the road" to a blacksmith's shop, and had crossed the track at a public road crossing in doing so. As he returned, he traveled along the public road, parallel to the railroad track, towards the town

of Horse Plains in a trot, going at the rate of 5 or 6 miles an hour. He had reached a point where the wagon road curves towards the railroad track to cross it, when he saw a freight train approaching upon the main track of the railroad. There was a side track on the side from which plaintiff was approaching, and distant 8 feet from the main track. Upon seeing the train, the plaintiff "pulled up" his horses. He was at this time 36 feet from the main track. He succeeded in getting the team stopped close by the side track, but the horses, frightened by the noise made by the escape of steam from the locomotive, dashed forward upon the track, and the wagon was struck by the engine, from which the injuries complained of resulted. The engine whistled at the whistling-post, which is distant 3,945 feet from the crossing where the accident occurred. There is conflict in the testimony as to whether the engine bell was rung. The country in the vicinity is a level, prairie country, and a train could have been seen by the plaintiff at any time when within 200 feet of the crossing for a distance of a mile. The train approached the crossing from the same direction traveled by plaintiff, so that it was in his rear until he turned at the curve to go upon the crossing. The speed of the train, according to the testimony of the conductor, was at the rate of about 8 miles per hour. The engine ran about 300 feet beyond the crossing where the accident occurred before it stopped. There was an irrigating ditch between the track and the public road, which was crossed by a culvert, distant from the crossing some 160 or 170 feet. This culvert made an elevation in the road at that point. The plaintiff testified as follows:

"When I got off the little culvert there, close by under the wagon road, it was descending down hill, then they (the horses) trotted right along up until I came to the curve where I saw the locomotive. As soon as I made the turn I looked to see whether the road was clear."

The crossing in question is at Horse Plains, a village having a population of about 100 persons. The plaintiff resided then within a short distance of the place of the accident. He had lived there many years. The team he was driving was a "very gentle" one. As to this he testifies as follows:

"The team I was driving was a very gentle team. I had known them a long time. They had been used right around the railroad. They were so gentle that a Chinaman I had working for me could drive them any place. We generally had to drive them up here to load in the wagon, and my horses have frequently stood, when the train went by, with their noses nearer the train than where I stopped them the day of the accident."

At the conclusion of the testimony on the trial, defendant's attorneys requested the court to instruct the jury to return a verdict for the defendant, "for the reason that it appeared from the undisputed testimony that the plaintiff, if he had looked for the train at any time when he was within 200 feet of the crossing, could have seen it approaching at a distance of more than a mile, and if he had listened he could have heard it approaching within such distance; that the plaintiff neither looked nor listened for the approach of said train within any reasonable distance from the crossing; and that he did not see the train until it was within 75 feet of the point where

the accident occurred." The court gave the instruction as requested, and there was accordingly a verdict for the defendant.

The instruction was erroneous. Every inference favorable to the plaintiff that can fairly be drawn from the testimony must be conceded to him in deciding the question presented in the case; and upon the testimony in the case the court cannot say, as a matter of law, that the plaintiff was negligent. If the plaintiff had failed to look or listen for an approaching train before driving upon the track, he would have omitted an unmistakable duty, and would not be entitled to recover. In such case there is no room for an inference of reasonable care. The omission makes a plain case of negligence. The experience and observation of all men are matters of which courts take notice, and these agree in pronouncing such an omission a negligent one. No circumstance connected with it can alter this estimate of it, or reconcile it with prudence. There is, therefore, in such a case nothing for the jury to consider.

In this case, the plaintiff did look to see if a train was approaching. He was then 36 feet from the track, at the point where the public road turned to cross it. It may be inferred that he was negligent in not looking sooner, but there is no such conclusion of law. The law enjoins a duty, but the conditions under which that duty may be performed are not capable of exact definition. They necessarily depend upon the circumstances of the particular case. The plaintiff lived in the immediate vicinity of the place of the accident. The horses driven by him were very gentle. They were not only accustomed to cars, but to cars at that station. They had frequently stood, when the train went by, with their noses nearer the train than where the plaintiff stopped them at the time of the accident. These facts bear upon the plaintiff's conduct in determining how near to the track he might prudently drive his horses before stopping them, and must be considered in deciding whether or not he was in fact acting with reasonable prudence.

The testimony tends to show that the horses became frightened and unmanageable in consequence of the escape of steam from the locomotive as it approached the crossing. To what extent this contributed to the accident, and how far such a danger might have been foreseen and guarded against, in the exercise of reasonable care, are matters to be considered with reference to the plaintiff's alleged negligence. These circumstances are more or less complicated, and render the question of ordinary care, depending upon them, peculiarly a question of fact for a jury. "In cases of this sort, where the facts, though admitted, are debatable, and necessarily create doubt and hesitation, it is safer for the interest of the parties, and more consistent with the ground upon which the right of trial by jury rests, to submit them to the jury to resolve such doubts, than the court to dispose of them upon its own responsibility." *Walsh v. Navigation Co.*, 10 Or. 261.

The question presented in this case is, whether the plaintiff looked and listened within a reasonable distance from the crossing. What, then, is such reasonable distance? Manifestly, this is to be inferred as a fact from the circumstances of the case. It is not a matter

of legal judgment, but one of general observation and practical experience. It may be said, without doubt, that it would have been more prudent in the plaintiff to have looked when he was much further from the crossing than he was at the time he did look, but it is not a question of greatest or relative care. It is a question of reasonable care. The facts give to the argument in favor of the contention that plaintiff was negligent much force, but it is argument after all. The question is a debatable one. The opinions of men will not at once agree concerning it. It is fairly open to doubt, to say the least, whether the plaintiff might not reasonably conclude that his team of gentle horses might be safely stopped at any distance from the track greater than that at which they had frequently stood while trains were passing, and in all such cases, as we have seen, the question of contributory negligence is for the jury.

The judgment of the lower court is reversed, and a new trial ordered.

UNITED STATES v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, E. D. Wisconsin. July 22, 1895.)

RAILROAD ACCOUNTS—ACT OF JUNE 19, 1878—TO WHAT ROADS APPLICABLE.

The act of June 19, 1878 (1 Supp. Rev. St. 194), requiring certain reports, prescribed by the auditor of railroad accounts, to be made by railroads to which the United States have granted any loan of credit or subsidy, in bonds or lands, or which have received from the United States lands, granted to them to aid in the construction of their roads, does not apply to the railroads which were incorporated by the several states, and received from them the grants of land made to such states to procure the construction of railroads.

This was an action by the United States against the Chicago, Milwaukee & St. Paul Railway Company to recover a penalty for failure to make reports called for by the auditor of railroad accounts under the act of June 19, 1878. The defendant demurred to the complaint. Demurrer sustained.

J. H. M. Wigman, U. S. Dist. Atty., for the United States.
John W. Cary and C. H. Van Alstine, for defendant.

SEAMAN, District Judge. The complaint is founded upon the alleged liability of the defendant to the terms of an act of congress entitled "An act to create an auditor of railroad accounts, and for other purposes," approved June 19, 1878 (chapter 316, 20 Stat. 169; 1 Supp. Rev. St. 194), and is for the recovery of the penalty imposed for neglect and refusal to make certain reports required by that act. The allegations are, in substance: That the defendant is a duly incorporated railroad company, and owns and operates railroad lines in several states, some of which are named, including Minnesota and Iowa. That in Minnesota it so owns and operates railroads which were constructed by companies incorporated by said state, and with the aid of lands which were granted by acts of congress to the territory and to the state of Minnesota, to be disposed of by