

## UNION SWITCH &amp; SIGNAL CO. v. JOHNSON.

## JOHNSON v. UNION SWITCH &amp; SIGNAL CO.

(Circuit Court of Appeals, Third Circuit. February 4, 1896.)

Nos. 36 and 37.

## 1. RES JUDICATA—CONTRACTS—INDEPENDENT STIPULATIONS.

An inventor and owner of patents made a contract with a corporation, containing, in separate clauses, the following provisions, among others: That he should be appointed general manager of the company at a fixed salary; that he should grant to it the exclusive use of his inventions, for which he was to be paid license fees of \$3,000 a year; that, in case the contract were terminated, the company should have a license to use all of the inventions theretofore used, on paying therefor \$6,500 a year. The contract was to continue ten years, subject to termination by either party, by giving one year's notice in writing. After operating under the contract for something more than a year, until the latter part of 1887. it was then mutually agreed (as evidenced by letters in writing) that "the present contract" should be terminated on July 1, 1888. But, on March 1, 1888, the company peremptorily discharged the inventor from its service. *Held*, that the several clauses of the contract contained independent agreements, and that a recovery of damages for breach of the contract of service was no bar to a subsequent action for license fees at the rate of \$3,000 per annum up to July 1, 1888.

## 2. TERMINATION OF CONTRACT.

The agreement to terminate the contract on July 1, 1888, embraced the whole contract, so that, even if the company continued to use the inventions after that time, it was not liable for license fees at the rate of \$6,500; but the only remedy against it was a suit for infringement.

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

S. Schoyer, Jr., for Union Switch & Signal Co.

George W. Miller, for Georgina M. Johnson.

Before DALLAS, Circuit Judge, and BUTLER and WALES, District Judges

WALES, District Judge. This was an action brought by Charles R. Johnson, in his lifetime, against the Union Switch & Signal Company to recover the amount of certain moneys alleged to be due to him under the terms of a written contract which had been executed by the parties on the 20th of September, 1886. The action was begun on the 19th of April, 1893. On November 13, 1893, on suggestion of the death of the plaintiff, Georgina M. Johnson, the executrix of his last will and testament, was substituted as plaintiff on the record and the cause continued. The clauses of the contract which are involved in the present controversy are as follows:

"First. Said Charles R. Johnson is hereby appointed general manager of the said company. He shall have an equal voice with the vice president in all matters relating to the details of the company's business; and, in case of disagreement between him and the vice president, the matter in dispute shall be submitted to the president or board of directors for final and conclusive decision.

"Second. As general manager of said company, said Johnson shall receive pay at the rate of five thousand dollars per year, exclusive of traveling expenses, which are (as in the case of other officials) to be considered as a part of the expenses of the operation of the company.

"Third. Said Charles R. Johnson hereby grants, sells, and conveys to the said company the exclusive right, except as hereinafter provided, to the use of all the inventions that he (the said Johnson) now has relating to the signal business, or that he may hereafter make or acquire, and also the right to use the present inventions of Mr. Henry Johnson relating to signals and switches, and any other which he may hereafter make, or may hereafter so acquire.

"Fourth. Said company hereby covenants and agrees to pay, for the use of said inventions, the sum of three thousand dollars per annum, settlements to be made quarterly."

"Sixth. Said company further hereby agrees to pay to said Charles R. Johnson, in addition to the aforesaid compensation for patents and salary, a sum equal to ten per cent. of the net profits of the company, after having provided for all the expenses of the operation of the company; but, in reckoning these expenses, it is understood that the interest charge for the company's bonded and present floating debt shall not in any case exceed nine thousand dollars per year, nor shall the salaries of the other officers be increased without the consent of the said party of the second part.

"Seventh. It is mutually agreed that this contract shall continue for a period of ten years, subject to termination by either party, however, by one year's notice, in writing, to the other party at any time after the second year, or by the death of Charles R. Johnson, or his permanent inability to perform his duties as general manager.

"Eighth. It is further mutually covenanted and agreed that, in the event of the termination of this agreement, the said company, by reason of the expenditures that shall have been made during the continuance of this agreement, shall have a license, not exclusive, to use all the inventions that may have been used in carrying on the business of the company, on the payment of sixty-five hundred dollars per year, said sum to be paid quarterly, and shall be entitled to purchase from the said Charles R. Johnson, or his executors, the exclusive right to use all the inventions upon as favorable terms as he or his executors may be willing to grant to any other parties."

Charles R. Johnson had been in the employment of the defendant company prior to the 20th of September, 1886, and it was stipulated in the contract that the payments under it should date from July 1, 1886. No change was made in the terms of the contract, and both parties continued to act under it until on or about the 1st of January, 1888, when, after several letters had passed between Charles R. Johnson and the president of the defendant company in reference to some new arrangement, it was finally agreed by them that the contract should cease and determine on July 1, 1888. This action on the part of the president was ratified by the directors of the company, and notice of the fact given to Mr. Johnson. On the 1st of March, 1888, the defendant peremptorily dismissed the plaintiff's decedent from its service, on the ground of his alleged unfaithfulness to its interests.

In his statement of demand, the plaintiff's decedent claimed—First, that under the fourth clause of the contract there was due to him, on the 1st day of July, 1888, the sum of \$1,500 for license fees for the six months ending June 30, 1888, being two quarters' dues, at the rate of \$3,000 per year; and, secondly, that by virtue of the eighth clause of the contract, the defendant, having continued, after the 1st day of July, 1888, to exercise the license to use the inventions mentioned in the contract, and to make, use, and sell

appliances thereunder, there were justly due to him 19 quarterly payments of royalties or license fees, of \$1,625 each, from the 1st day of July, 1888, to April 1, 1893, with interest on each payment from the time it fell due.

The circuit court directed the jury to render a verdict for the first, and to disallow the second, claim of the plaintiff. Both parties have filed exceptions to the charge of the court.

1. At the trial below the defendant company produced an exemplified copy of the record of the proceedings had in an action in the superior court of the city of New York, brought by Charles R. Johnson against the Union Switch & Signal Company, and which terminated in a judgment for the plaintiff in the action for the sum of \$4,155.67, which was fully paid and satisfied by the defendant. This judgment having been obtained for a breach of the contract of September 20, 1886, the defendant's counsel requested the circuit court to instruct the jury that it was a bar to the recovery by the plaintiff in the present action, of any sum of money now claimed under the fourth clause of the agreement; and the refusal of the court to so charge is assigned for error. The position of the defendant company is that the judgment obtained in the New York court was in full satisfaction and discharge of all claims and demands growing out of the fourth clause. An inspection of the record shows that the complaint in the New York action originally embraced two causes of action,—the first one being for royalties or license fees alleged to be due under the fourth clause of the contract, from the 1st of January to the 1st of March, 1888; and the second one being for damage for a breach of the contract by the wrongful discharge of Johnson. At the trial of the New York case the plaintiff was compelled by the court, on motion of the defendant's counsel, to elect which cause of action he would prosecute, and he chose to proceed with the second one. These royalties were not claimed or recovered in that action, and they have never been paid. The contract of September 20, 1886, contained several independent agreements, and the breach of one of them did not constitute a breach of all. The discharge of Mr. Johnson from the service of the company did not necessarily constitute a breach of the stipulation to pay royalties mentioned in the fourth clause, which remained in force until July 1, 1888, when the whole contract was to terminate by the agreement of the parties. Whether Mr. Johnson had or had not remained in the service of the defendant until July 1, 1888, he would still have been entitled to receive payment of the royalties until that date. The royalties were analogous to rent accruing and falling due at the end of a fixed term, and it is not denied that the company continued to use the patented inventions during the two quarters sued for. The services of Mr. Johnson had been dispensed with on March 1, 1888, but the contract in other respects remained in force until the 1st of July, 1888. The judgment in the New York case was for damages sustained by the wrongful discharge of Mr. Johnson from the employment of the company, and in no manner affected the payment of the royalties mentioned in the fourth clause, which, at the date of his discharge, were not due.

On this point the learned judge of the circuit court, in his charge to the jury, said:

"From an examination of the record in the New York case, I am of opinion that these royalties were not claimed or recoverable in that suit under the second cause of action, upon which the verdict and judgment were based."

And in this instruction there was no error.

2. The other cause of action in the present suit relates to the license dues which are claimed under the eighth clause of the contract of September 20, 1886. In the statement of claim it is alleged:

"That, prior to said 1st of March, 1888, and in about the month of January, 1888, it had been agreed by and between the plaintiff and the defendant that the contract hereinbefore set forth should be and become and be considered as duly terminated on the 30th day of June, 1888, without any written notice or other notice, and that plaintiff's connection with defendant's business should cease at that time the same as if a notice of one year had been given under and according to the provisions of the seventh clause of said contract, and that from and after said 1st of July, 1888, the license to use the inventions specified should continue as provided in the eighth clause of said contract, and defendant should thereafter pay said license dues, as provided in the eighth clause of said contract, quarterly, at the rate of six thousand five hundred dollars (\$6,500.00) per year."

No evidence was produced at the trial to establish this averment, and no such expressed agreement was proved, nor was any evidence offered from which it could be implied. The proof that the parties agreed to terminate the contract was furnished by the correspondence between Mr. Johnson and the president of the company. Under date of November 25, 1887, Mr. Johnson wrote to the president:

"Dear Sir: Replying to your favor of the 24th inst., you are right in supposing that I should prefer to have the present contract terminate not later than the 1st day of July next, and we will have it so mutually understood unless other arrangements are made."

To this Mr. Westinghouse, the president, replied, on the 29th of November, 1887:

"Dear Sir: I am in receipt of your letters of the 24th and 25th. According to the letter of the 25th, we are agreed that your present contract with the company shall terminate the 1st of July next."

In January, 1888, as already stated, the board of directors of the company ratified the action of its president in consenting to the termination of the contract, and Mr. Johnson was notified of the fact. The circuit court held that this correspondence, together with the subsequent ratification by the board of directors, rescinded the contract, in toto, from and after the 1st of July, 1888, and further, that the eighth clause of the contract—

"Did not impose a liability upon the defendant company on the termination of that contract, but merely gave the defendant the right to secure a license to use the Johnson patents, if it elected to take a license. \* \* \* The agreement of the parties, as embodied in their correspondence, is simply that the agreement of September, 1886, should terminate on the 1st of July, 1888. No license was ever taken by the defendant company from Johnson."

Further on in the charge the court said:

"There is evidence in this case tending to show that, after the 1st of July, 1888, and running through the balance of that year, some use was made by

the defendant company of some of the Johnson patented devices. There is no evidence, however, that any of the devices were manufactured by the defendant after the 1st of March, 1888, and such user as was made by the defendant, after that date, of any of these Johnson devices was of articles that had been manufactured while Charles K. Johnson was manager of the concern, and had gone into the stock of the company. In certain instances, some minor parts were made by the defendant company to put the old manufactured devices into complete and operative working order; but substantially all the Johnson devices which the company used after March 1, 1888, were taken out of the old stock of the concern. The company claims that it had a right so to use these articles. Whether the company had such a right it is not necessary for us now to decide. If that use was not rightful, the defendant company is answerable to the plaintiff in an action for the infringement of the patents; but damages for such infringement are not recoverable in this action."

The several assignments of error which have been filed by the plaintiff below may be found in the following objections to the charge of the court: Finding (1) that there was a rescission of the contract, in toto, on the 30th of June, 1888; (2) that clause 8 gave to the defendant merely an option to have a license upon the termination of the contract; (3) that the question of fact whether the defendant had exercised the option should have been left to the jury; (4) that the intention of the parties in agreeing to terminate the contract on the 30th of June, 1888, should have been left to the jury. It is claimed on the part of the plaintiff that the agreement to terminate the contract was intended to be, and was, in legal effect, the same as if the written notice had been given, as provided for in the seventh clause, and that, consequently, under the provisions of the eighth clause, the defendant was bound to pay the license fee from and after the 30th of June, 1888, at the rate of \$6,500 per year. It is also contended by the plaintiff that the original contract provided for just the case shown, and that, upon a total or absolute termination, without any further agreement, the eighth clause would come into operation.

The intention of the parties and the meaning of the agreement to put an end to their former contract are to be gathered from the correspondence which was had between the plaintiff's decedent and the president of the defendant company; and from this it is plainly evident that their purpose was to annul the contract entirely. That they had the power to do this cannot be disputed. It would be a novel doctrine to hold that the parties to a contract, where the interests of third persons are not concerned, are incompetent to alter or rescind it. It was in reply to Mr. Johnson's proposal that Mr. Westinghouse wrote: "We are agreed that your present contract with the company shall terminate not later than 1st of July next,"—thus making a new agreement, which would repeal the old contract on a future day, and release both parties from the terms of the latter. This was the only evidence before the court in reference to this particular matter, and there was no error in the refusal to leave the question of intention to the jury.

The construction which was given to the eighth clause was that it did not impose upon the defendant company the burden of the specified royalties unless it elected to take a license. The same interpre-

tation had been placed upon this clause by the court of appeals of the state of New York, in *Johnson v. Signal Co.*, 129 N. Y. 653, 29 N. E. 964. If this construction be the true one, and we see no reason to doubt its correctness, the termination of the contract according to the manner provided for in the seventh section could have made no difference in the liability of the defendant. The right to take a license would have remained an optional one in any event.

It was insisted upon that the jury should have been permitted to determine whether the defendant had exercised the option of using any of the Johnson inventions after the 30th of June, 1888. The circuit court very properly refused this request. The voluntary agreement to terminate the contract of September 20, 1886, wiped out the whole of it, including the optional clause; and, if the defendant company had, after the date fixed for the termination, used the inventions, it would not have been liable under the terms of a contract which no longer existed, but perhaps might be subjected to suits for infringement.

We have found no errors in the record, and the judgment of the circuit court is therefore affirmed.

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TEXAS & P. RY. CO. v. SPRADLING.

(Circuit Court of Appeals, Fifth Circuit. January 21, 1896.)

1. NEGLIGENCE—PLEADING AND PROOF.

Upon the trial of an action against a railroad company for personal injuries caused by collision of a train with plaintiff at a crossing, the negligence alleged being a failure to give the signals required by law, together with general allegations of careless and rapid approach to the crossing, it is not error to admit evidence, developed on the trial from defendant's witnesses, and showing that the engineer and fireman saw plaintiff approaching the crossing in time to have avoided the injury, such facts having been previously unknown to the plaintiff, nor to charge the jury that if they believed that the defendant's employes saw the plaintiff in time to avoid the injury, and did not avoid it, the defendant was guilty of negligence; the charge having elsewhere fairly submitted the question of negligence resulting from failure to give the signals.

2. RAILROADS—SIGNALS AT CROSSINGS.

The statute relating to signals at railway crossings provided that every locomotive should have a bell or a whistle; that the whistle should be blown or the bell rung at least 80 rods from a crossing; and that such bell should be kept ringing until the engine crossed the public road or stopped. The court charged the jury that the statute provided that the whistle should be blown or the bell rung at least 80 rods from a crossing, and be kept ringing or blowing until the engine crossed the road or stopped. *Held* no error.

3. SAME—RECIPROCAL DUTIES.

The court instructed the jury that a person attempting to cross a railroad track has a right to expect that the railroad will give the signals required by law, and if he is without fault, and the neglect of the railroad results in his injury, he can recover, and declined to instruct the jury that neither plaintiff nor defendant had a right to rely upon the other's exercising the care required by law, but it was the duty of each to use the care which a person of ordinary prudence would use. *Held* no error.

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

Mrs. Clara Spradling brought an action in the judicial district court of Dallas county, Tex., against the Texas & Pacific Railway Company, for personal injuries sustained by the alleged negligence of the employes of the defendant company. The cause was removed to the circuit court of the United States for the Northern district of Texas; whereupon the plaintiff filed an amended petition, with the following features: She claimed damages in the amount of \$15,000. She alleged that she was a citizen of Texas; that the railroad of the defendant intersected the public highway from Dallas to Kaufman, about five miles east of Dallas, at a public crossing maintained and recognized by the defendant. On the 15th day of November, 1892, the plaintiff, with "Dock" Brock and a child named Jessie Rogers, was going along the Dallas and Kaufman Road in a two-horse wagon. They were going from Dallas to the home of the plaintiff. It is alleged that the plaintiff, with proper caution, attempted to cross the railway track of the defendant at the crossing above named; but, before she could do so, a westward-bound passenger train of the defendant struck the vehicle. This was totally demolished, and the plaintiff was thrown violently to the ground, and greatly bruised, injured, and shocked. This crossing, on account of the topography of the surrounding country and the conditions and grades of the public road and railroad, is described as dangerous and unsafe. This was well known, the petition states, to the defendant, for often theretofore at that crossing the trains had collided with and injured divers and numerous vehicles and persons. On the occasion when the plaintiff was injured, it is further stated that the employes in charge of the train rang no bell, and blew no whistle, but negligently and carelessly and at a very rapid rate approached the crossing, without giving a warning signal of any kind whatever, to apprise the plaintiff of its approach and her danger. The plaintiff describes her injuries as consisting of two ribs crushed and broken on her left side, two ribs crushed and broken on her right side, her left arm broken below the elbow, her nose broken and crushed, and serious injuries, cuts, and bruises on her head and face, side, and hip, and serious and painful internal injuries in her side and chest. She suffered much pain, and was compelled to take medicine costing \$25. Her medical attendance cost her \$50, and the hire of a nurse \$150. She is a widow, and was 40 years old at the time the petition was filed; and she states that prior to her injuries she was a remarkably strong and healthy woman, attended to her household duties, managed and superintended her farm and stock, earned, by such attention and management, \$500 per annum, and her attention and services were well worth that sum. Since her injuries, she has been an invalid, confined to her bed most of the time, and is wholly unable to attend either to her household duties, or to her farm and stock. She is dependent upon her own exertions for support. All of her injuries are in their nature permanent, and for the rest of her life she will be unable to do any work of any kind for her support, because of said injuries. She will be an invalid, and will require the constant attention of a nurse. She avers that she was guilty of no negligence or want of care herself, but that the negligence and carelessness of the defendant was wanton, gross, regardless of duty to the public and to the plaintiff, and she therefore asks exemplary damages. These are the material averments. For answer, the defendant denies the allegations in the plaintiff's petition, and, by special plea, contends that the plaintiff's own negligent conduct, concurring with the negligence of her companion, one Dock Brock, was the immediate occasion of the accident, which otherwise would not have occurred, and she would not have been injured.

The following evidence was introduced: The plaintiff testified: "I did not hear the passenger train that struck the wagon I was in. In approaching the railway crossing, I heard a whistle. We were then about forty or fifty yards from the railroad crossing when I heard the whistle, and I had the wagon stopped until the train passed, thinking that was the only train that was to pass. The dirt road there is below the grade of the railroad, and

runs parallel with the railroad track to the crossing. After that train passed, we immediately drove onto the crossing, and, just as the wagon got on the railroad crossing, I looked around, and the train struck the hind wheels of the wagon. I did not have time to speak or think. They did not ring a bell or blow a whistle. I had no knowledge of the approach of the train, and thought the train that had just passed was the only train to pass. \* \* \* We had to go up hill to get to the crossing. The crossing is almost right at the end or mouth of that cut. You cannot see an approaching train from the side of the track we were on, coming from the east out of that cut, until you get right on the crossing. The train that had just passed made noise, but this one I did not hear at all. \* \* \* I heard the whistle of the train that passed, and I had the wagon stopped before we went on the crossing, and we waited until it passed. I did not dream of another train, and could not see and did not hear the train that hit the wagon until it was just on us." Dock Brock was driving. He testified that, when he and the plaintiff were about 200 yards from the crossing, they heard a train coming from the east, going to Dallas. They stopped within 75 yards of the crossing for about a minute, and waited for that train to pass. As soon as it passed, they at once drove upon the crossing, going at an ordinary rate of speed, when they happened to turn their heads to the left, and saw an engine of another train coming from the east, and within about 4 or 5 yards of the wagon. The witness stated that when he first saw the engine, the front wheels were just at the south rail of the track; that he struck the horse, and got the front wheels off the track. The train struck the hind wheels, tore them up, turned the wagon over, threw them out, and injured the plaintiff. The first train, which consisted of an engine and caboose, was about two minutes ahead of the passenger train which struck them. "I heard no noise of an approaching train," he states, "until it struck the wagon. I could not possibly have gotten out of the way after I saw it. I used every effort to get the team and wagon off the track. I was crossing said track somewhat slowly until I saw said train. I then made the horses move as rapidly as I could." William Wilcox, the locomotive engineer, a witness for the defendant, testified that it was in violation of the rules of the railway company to run one train after another over the railroad in less than 10 minutes apart. He also stated that the train that struck the plaintiff's wagon gave the usual signal for crossings. He was the engineer in charge of the train. He stated that the train was running 20 or 25 miles an hour, down grade, and it was about dark. He says: "We were about one hundred and fifty feet from the crossing when we first observed the parties on the crossing. I was on the right side of the engine, on the side the parties approached the crossing, and did everything I could to stop the train as soon as I saw them approach the crossing, not only for their safety, but my own. I suppose the cut is about eight hundred feet long." The fireman testified that he saw a two-horse wagon coming up on the track about 1,000 feet from the crossing; that, when they came by the front of the engine, he could see the people; that they did not stop, but that the driver was whipping the horses. Bohannon, Tom Davis, and E. Davis, witnesses for the plaintiff, testified that the view of the train east from the cut is obscured by the cut; that a traveler on the highway cannot see it until he gets directly on the track at the crossing.

The jury found damages for the plaintiff in the sum of \$2,250. The circuit court overruled a motion made by the defendant for a new trial; whereupon the defendant filed its bill of exceptions, with the following assignments of errors: (1) The court admitted, over objection of defendant, evidence tending to show that the engineer and fireman in charge of the engine and train which struck the wagon in which plaintiff was riding saw the plaintiff and the wagon approach the crossing, and that the employes might have stopped the train thereafter in time to have avoided the injury, to all of which defendant excepted, for the reason that there were no allegations in the petition to authorize such evidence, and then and there preserved its bill of exceptions. (2) The court, after instructing the jury correctly, as conceived by defendant, on the issues raised by the pleadings, gave the following charges hereinafter complained of by the defendant, and refused special charges

hereinafter complained of, which were tendered by defendant, as follows: The court charged as follows: "The statute of Texas provides that each locomotive engine shall have on it a bell or steam whistle, and the bell shall be rung or the whistle blown at a distance of at least eighty rods from the place where a railroad shall cross any road or street, and be kept ringing or blowing until it shall have crossed said road or stopped." Defendant excepted to the same, on the ground that the statute provides as follows: "A bell of at least thirty pounds' weight or a steam whistle shall be placed on each locomotive engine, and the whistle shall be blown or the bell rung at a distance of at least eighty rods from the place where the railroad shall cross any public road or street, and that such bell shall be kept ringing until it shall have crossed such public road or stopped." (3) The court charged as follows: "A person attempting to cross a railroad track has the right to expect that the railroad will give the signals required by law, and if he is without fault, and such neglect on the part of the railroad results in his injury, then he can recover;" and thereby committed error, to which defendant excepted, because the use of the expression "has the right to expect" in connection with the words quoted, was a clear error of law, and was most likely misleading to the jury, in that the rights of the parties and their obligations as to the use of a crossing are reciprocal, and call for the exercise of care on the part of each, in no way predicated upon the expectation that the other will not be negligent. (4) The court refused to give defendant's special charge No. 4, as follows: "You are instructed that neither the plaintiff nor the defendant had the right to rely upon each other exercising the care exacted by law of both in the use of the crossing, but it was the duty of each in the use of the crossing to use that care that a person of ordinary prudence would have used under similar circumstances."—to the refusal to give which charge the defendant excepted, and says the same was material error, in view of the charge hereinafter complained of. (5) The court gave the following charge, requested by the plaintiff: "If the jury believe from the evidence that the agents, employes or servants of the defendant did see the plaintiff at a distance sufficiently remote from the place of the accident; that, by the use of the means and appliances in their hands, they could have stopped the engine they were running before reaching the crossing where the accident occurred, so as to have avoided injuring plaintiff; and further find that they failed to so stop said train,—then and in that event you are instructed that defendant is guilty of negligence, and you should find for the plaintiff."—to which defendant excepted, because the same tendered an issue nowhere raised by the pleadings or justified by the evidence, and submitted an incorrect proposition of law, in this: those in charge of the engine were, if the issue had been properly tendered, under no obligation to stop the train or engine until the danger of collision was apparent, and the charge contained no such qualification. (6) The court refused defendant's special charge No. 5, as follows: "You are instructed that, in the consideration of whether or not defendant was guilty of negligence, you should confine your deliberations to the issues presented, namely, whether or not defendant failed to give the signals required by law and presented in the general charge of the court, and whether such failure was the proximate cause of the injury. If you conclude that the proximate cause of the injury is to be attributed to any other cause than the failure to ring the bell or blow the whistle, or that plaintiff's negligence contributed thereto, you will find for the defendant."—to which refusal the defendant excepted, as the said request to charge properly limited the consideration of the jury to the issues presented by the pleadings.

Alexander, Clark & Hall and T. J. Freeman, for plaintiff in error.  
Kearby, McCoy & Hudson, for defendant in error.

Before McCORMICK, Circuit Judge, and BOARMAN and SPEER,  
District Judges.

SPEER, District Judge (after stating the facts as above). The statute of Texas by which it was intended to avoid casualties at

crossings where the roads of the country intersect railways provides as follows:

"A bell of at least thirty pounds weight, or a steam whistle shall be placed on each locomotive engine, and the bell shall be rung or whistle blown at the distance of at least eighty rods from the place where the railroad shall cross any road or street, and to be kept ringing or blowing until it shall have crossed such road or street, or stopped." Rev. St. Tex. art. 4232.

There was no dispute as to the fact of the accident or the extent of the injuries sustained by the plaintiff, and the controverted issues were: First. Did the defendant disregard its duty as defined by the statute above quoted, and, indeed, the common law? And, secondly, did the plaintiff fail to exercise the ordinary care which might have avoided the accident? The jury determined both of these issues in favor of the plaintiff, and, unless there were, in the conduct of the trial, such errors on the part of the court as will necessarily compel a resubmission of the cause to a jury, the verdict must be sustained. The law relating generally to both of these issues has been recently discussed and defined by the supreme court of the United States in a valuable decision,—*Railroad Co. v. Griffith* (decided November 18, 1895) 16 Sup. Ct. 105; Mr. Chief Justice Fuller delivering the opinion. The statute alleged to have been disregarded, the averments of negligence, and the grounds of defense were in that case substantially the same as in this. There the finding of the lower court in favor of the plaintiff was sustained. It is superfluous to do more than refer to the reasoning of the chief justice and the conclusions of the court in that case.

The exception of the plaintiff in error, to the effect that the court erred in admitting evidence to show that the engineer and fireman saw the plaintiff with the wagon approaching the crossing, and that these employes of the defendant might then have stopped the train in time to have avoided the injury, is not, in our opinion, well taken. It is true that there were no averments in the petition charging the defendant with negligence on that account, but the evidence objected to was given by the defendant's witnesses. From its nature it could not have been known to the plaintiff. The facts were a part of the *res gestæ*, and were therefore admissible, and were otherwise admissible under the several general allegations of negligent, careless, and rapid approach to the crossing.

Nor is the criticism of the charge of the court in the second assignment of error important. The court instructed the jury that the statute provided that the bell shall be rung, or whistle blown, at a distance of at least 80 rods from the place where a railroad shall cross any road or street, and be kept ringing or blowing until it shall have crossed. The plaintiff in error points out that the true language is that the whistle shall be blown or the bell rung at a distance of at least 80 rods from the place where a railroad shall cross any public road or street, and that such bell shall be kept ringing until it shall have crossed. The court merely added the words "or blowing" after "ringing." This inadvertence, if it be such, was favorable to the defendant, for it afforded the railway the choice of two signals where the statute only permitted one;

namely, the continued ringing of the bell. The jury, it seems, found that the defendant did neither.

Exception is also taken to the instruction of the court expressed as follows:

"A person attempting to cross a railroad track has a right to expect that the railroad will give the signals required by law, and if he is without fault, and such neglect on the part of the railroad results in his injury, then he can recover."

This is unobjectionable. It is indeed, stated with more careful regard to the rights of the defendant than seems to have been thought necessary by the supreme court of Texas. In the case of *Railway Co. v. Graves*, 59 Tex. 332, that court declared:

"A person, in approaching a railway crossing, has the right to expect that the railway company will give such signals of an approaching train as prudence and the law require; and if, relying upon this, he attempts to cross the track without knowledge or means of knowledge of the approach of the train, and is injured by reason of the failure of the employés of the railway to perform a duty prescribed by law, then he is entitled to recover."

This is substantially the charge as complained of, save that the instruction of the presiding judge in this case required that the plaintiff herself be without fault. That was a clear indication of the reciprocal duty of ordinary care on the part of the plaintiff.

The plaintiff in error further insists that the court should have given the jury the following request to charge:

"You are instructed that neither the plaintiff nor defendant had the right to rely upon the other exercising the care exacted by law of both in the use of the crossing, but it was the duty of each, in the use of the crossing, to use that care that a person of ordinary prudence would have used under similar circumstances."

This is the converse of the instruction of which complaint is made in the assignment of error last discussed. Since we think the instruction there complained of was proper, it follows that this request was erroneous. Since both parties are charged, we think, with the mutual duty of keeping a careful lookout for danger, and since the degree of diligence to be exerted on either side is such as a prudent person would exercise under the circumstances of the case endeavoring fairly to perform his duty, each has the right to expect that the other will do his duty. This language does not import that either is absolved from the duty of ordinary care. To illustrate, an engineer may perceive a person driving a wagon approaching a crossing. His train, let us say, is running at a high speed, to conform to the requirements of the schedule for trains as prescribed by the company. When he gives the appropriate signal for the crossing, he has the right to expect that the person in control of the team will not drive on the track, but will stop. The engineer surely need not stop every time he sees an approaching team. And if, without fault on his part, collision results, the railway company will not be liable for the damage. It follows that one driving the wagon has the right to expect that the engineer will give the signal. If care is taken to listen to the signal, and none is heard, and, not aware of the approaching train, the wagon is driven on the track,

and the collision results, the railway company will be liable. Besides, in this case the duty of each party was elsewhere distinctly set forth, in the general charge of the court.

In the fifth assignment of error, complaint is made that the court charged the jury:

"If the jury believe from the evidence that the agents, employes, or servants of the defendant did see the plaintiff at a distance sufficiently remote from the place of accident that, by the use of the means and appliances in their hands, they could have stopped the engine they were running before reaching the crossing where the accident occurred, so as to have avoided injuring the plaintiff, and further find that they failed to so stop said train, then and in that event you are instructed that the defendant is guilty of negligence, and you should find for the plaintiff."

It must be observed that this instruction is to be construed in connection with other portions of the charge, which, in our opinion, fairly submitted to the jury the question of negligence resulting from the failure, to give the signals for the crossing, required by law. In the absence of specific allegations of negligence based upon the failure to stop the train after the wagon of the plaintiff was seen, the defendant might with more propriety complain of this charge, were it not for the fact, that the plaintiff's case is primarily based on the failure to give the signals as the proximate cause of the injury. It is to be observed that the facts upon which this charge was based were brought out in the defendant's testimony, namely, in the evidence of the engineer and the fireman. The plaintiff could by no possibility have foreseen that this feature of the case would be presented, and therefore should not be deprived of its legal effect on the minds of the jury because she omitted to refer to it in her petition. This feature was an unforeseen contingency of the trial. If the defendant having failed to give the signals at the time and place required, and its employes, at a distance of 1,000 feet from the crossing, perceived the plaintiff going on the track, a double duty devolved upon the employes to do all in their power to stop the train. If, then, they could stop the train, and did not, it was negligence of the gravest character. They were obliged to conclude that the danger was apparent, because they must have concluded that, in the absence of the danger signals, the persons in the wagon were satisfied of their own safety. If, then, the engineer neglected this duty, it was an incident of negligence which the jury might consider in view of the general averment as to the very rapid, reckless, and careless manner in which the crossing was approached.

For the same reason, we have concluded that the sixth assignment of error is not of sufficient importance to reverse the action of the court below, which, in its entirety, sufficiently conserved the rights of the defendant, and accorded only moderate compensation for the painful and permanent injuries sustained by the plaintiff. For these reasons, the judgment of the court below is affirmed.

## UNITED STATES v. McCORD et al.

(District Court, W. D. Wisconsin. November 26, 1895.)

## 1. CONSPIRACY UNDER FEDERAL STATUTES.

The statutes of the United States do not define what a conspiracy is, or create any new offense. They merely recognize the crime of conspiracy as known to the common law, and the courts must go to the common law to determine what it is. The statutes, however, impose one limitation upon the common-law crime, namely, that there must be some overt act.

## 2. SAME—STATUTE OF LIMITATIONS.

A conspiracy to defraud the United States by making unlawful entries of public lands cannot, for the purpose of avoiding the statute of limitations, be split up into different conspiracies for each section of land entered or for each overt act done; nor can it be held that there is a new conspiracy by the parties to the original conspiracy, whenever a new party is brought into the scheme, so as to make the statute of limitations begin to run from that time.

This was an indictment against Warren E. McCord, Arthur R. Osborn, Harry J. Box, Robert C. Heydlauff, Gussie L. Andrews, and James B. Murray, charging that, on the 23d day of October, 1891, the said defendants unlawfully conspired together, and with divers other persons, to defraud the United States of its title and possession and dominion over certain unappropriated lands belonging to the United States, which are fully described in the indictment. There was also joined in this indictment a count for a conspiracy to commit perjury, but this count was nolle by the prosecution. The indictment was filed October 13, 1894. At the trial, after the evidence for the government was completed, the defendants moved the court to direct a verdict for the defendants, mainly upon the ground that the prosecution was barred by the three-years statute of limitations, prior to the filing of the indictment.

The proof introduced by the government showed that in December, 1890, or January, 1891, the defendant McCord had an interview with the witness Day, to the effect that the latter should obtain homestead settlers to go to the land office at Ashland, in April, 1891, when the lands were to be offered for homestead entry, and have them make applications for homestead entries, and that McCord would furnish the money to pay their expenses, cost of living, cost of necessary homestead improvements, and for land-office fees, and necessary fees in case of contest, and for these sums was to have security upon the land when obtained by the homesteader.

In the latter part of March, 1891, defendant McCord wrote a letter to Mr. Day, as follows:

"I am interested in the lands that are coming in at Ashland April 17th, and can get you a homestead in this way: You go there Tuesday, April 7th, and I will get you a place in the line, and then I will pay half of all the expenses, and you pay half, and let your family go and live on it, and when you prove up you have half the profits and I half. We will allow the family so much a month to live on while they are there, and charge so much to get the estimates,—about \$25, I think,—then the expense of making out papers and your expenses while filing, and then divide in the end."

In the early part of April, 1891, the defendant Box went to the house of the witness Hobbs, and represented to Mrs. Hobbs that if her husband would take up a homestead when the lands should be offered at Ashland, in April, 1891, McCord would pay the expenses, and would expect to have one-half