

U. S. Rep.]

ISABEL V. HANNIBAL AND ST. JOSEPH R. R. Co.

[Missouri.]

The third instruction was rightly refused. It told the jury the defendant was not liable, if the person who had the child in charge, by carelessness materially contributed to the child's death. This was incomplete; it did not make the negligence the proximate cause, nor did it say anything about the requirement of care and caution on the part of the defendant.

It is alleged as error, that plaintiff on the trial was permitted to introduce evidence to show that there was no fence along the road where the child was killed. It is argued that our statute in relation to fencing was intended to prevent cattle from straying from the track, but not to guard against children coming thereon. This same question arose in Wisconsin, in *Schmidt v. Milwaukee & St. Paul Railway*, 23 Wis. 186, and the case turned and decided upon the fact that the company had omitted to comply with the statute requiring it to fence. That case was like this: The company had built its road, cutting the man's farm in two; only the house there was further from the road than in this case. There was a path leading from the house across the road to the other portions of the premises, on which the child was injured, the same as there was here leading from the house to the well, near which this child was killed. In answer to the argument that the statute was not intended to apply to such a case, the Court said that it must in the first place be remembered that the statute imposed upon all railroad companies the positive duties of erecting and maintaining good and sufficient fences on both sides of their roads, with gates or bars therein, and farm-crossings for the use of the proprietors of the adjoining lands. That was a clear, distinct and precise duty imposed by the Legislature; and the failure to perform it in the case was the sole cause of the injury,—for it was found that a fence would have prevented the accident. The facts in the case showed that for more than a year the company had run its trains over the road, neglecting all the while to build a fence at the place—omitting to do not only what the law required but common prudence demanded should be done, as well for the protection of persons travelling on the road as for the security of the domestic animals of those residing along the track, and the safety of children exposed to its dangers who were incapable of taking care of themselves. When the company neglected to perform its duty, did it not necessarily assume responsibility for all damages which might result from that cause. Could the Court make an exception to this general liability, when an infant was injured solely in consequence

of the want of a fence? Would it not be an unwarrantable restriction of the statute to hold the duty imposed upon the company of maintaining a fence along its road, had no reference to children?

The Court said that if the mere verbiage of the statute was looked to, it might be concluded that the obligation of the law was solely for the protection of domestic animals, and yet it had been held that the law had a broader application, and was intended as a police regulation to secure the safety of passengers. It had been extended to cases which, if not clearly within the letter, were certainly within the spirit of the law, and the conclusion was arrived at, that it was in direct harmony with the principle and reasoning of the cases, to say that the statute embraced the protection of children.

The same doctrine seems to prevail in England. In *Singleton v. Eastern Counties Railway Co.*, 7 C. B., N.S., 287, it is assumed by the judges, that if the children had strayed upon the railroad track through the fence, at a place where a rail was off, which fence the company was bound to keep in repair, this would be such an act of negligence as would render the company liable. WILLIAMS, J., in his opinion, said: "There was nothing to show how the children got on the railway. All was mere conjecture and surmise." The plain inference from the case, however, is, that if it had appeared that the child passed on the track through a defective fence which the company was bound to keep up, then the action might have been maintained.

It is unnecessary to go the length of the Wisconsin case in this decision, or to hold that the statute imperatively requires that a fence should be constructed for the protection and safety of children. Unquestionably when the law enjoins a duty, and commands a company to build a fence along the line of its road, where it runs through a man's farm, the omission to build is a breach of that duty which it owes to those for whose protection the fence was designed. While it may be primarily intended to secure one object, it may incidentally have an effect on others. All must go together in determining the measure of the obligation. But under certain exigencies, prudence would demand what was not positively enjoined by the strict letter of the law. Thus, exposing dangerous machinery where children are liable to play with it and get hurt by it, might render the owner liable, though the children had no right to touch or interfere with it. So, running a railroad close to a man's house where the family and children resided, would