The sixth instruction is liable to some criticism, and is not as definite as it should be. It declares that if those in charge of defendant's train, by the exercise of ordinary skill and caution, might have observed the child upon the railroad track and recognised him as an infant, in time to stop the train before it reached and ran over him, then the verdict should be for the plaintiff. As an abstract proposition of law, this declaration in all cases would not be strictly correct. It might seem to cast upon the company a greater degree of diligence than is in all instances required; but when examined in the light of the evidence, we think the objection disappears. The track is private property; and, except in the case of crossing highways, persons have no right to be on it. The company is entitled to a clear track, and it is not to be presumed that persons will be on it when they have no right to be there. The same diligence will not be necessary in running trains through the country that would be required in the streets of a town or the crossing of a public highway.

In order to make a defendant liable for an injury where the plaintiff has also been negligent or in fault, it should appear that the proximate cause of the injury was the omission of the defendant, after becoming aware of the danger to which the plaintiff was exposed, to use a proper degree of care to avoid injuring him.

Diligence and negligence are relative terms and depend on varying circumstances. An act may be negligent at a particular place, which would not be so at another place, and under different circumstances.

In the present case the house was built before the road was constructed. The company had run its road in close proximity to the house and had left the well, where the family got their water, on the other side of the track. Of this the employes were well aware. They knew that the track ran close to the house and that the family were accustomed to cross it to obtain water. This ought to have increased their vigilance. All these facts, perhaps, would not amount to much in the case of an adult who should exercise his faculties and guard against danger, but in the case of an infant who has no discretion the rule would be otherwise. Moreover, it clearly shown that the engineer and fireman discovered the infant, and had abundance of time to have stopped the train and saved its life; but they debated as to what it really was till it was too late. Might they not, by a close scrutiny and a proper observance, which it was their duty to make when they discovered an object on the track, have discovered that it was a child? The testimony is conclusive that the child was dressed in red, and that would have very easily distinguished it from a hog or a dog. The instruction, if it was intended to convey the idea that the employes by using ordinary skill and caution after they observed an object on the track, could have distinguished that it was a child, was entirely proper. It is surely susceptible of this construction, and we are not justified in supposing that it was given with any other intent, or that it was differently interpreted by the jury. When the facts of the case are applied to it, this conclusion follows.

The case presented, then, is, that the persons running the train saw something on the track in time to avoid collision or doing injury, and if, after they observed it, they could, by the exercise of that care and caution which the law imposes upon them, have perceived that it was a child in time to stop the train, and they were negligent, the company is liable. Whilst some negligence might have been attributable to those who had charge of the child, if it was not the proximate cause, a recovery is not barred.

People in the situation in life of those who had the custody of the child cannot always attend to it strictly; and if it escapes from them unawares, it must not be injured simply because it escapes.

The ninth instruction given for the defendant, after laying down the law very fairly as to the right of the defendant to the exclusive and uninterrupted enjoyment of its track, goes even further than plaintiff's instruction just commented on in reference to defendant's liability. That instruction declares that defendant is not responsible if its employes before and at the time they first saw the child were in the exercise of ordinary care and diligence. Plaintiff's instruction only required care and caution in recognising the child after some object was observed on the track; whilst the defendant's instruction made it obligatory that care and caution should have been exercised before the infant was seen. As this was defendant's own instruction, it cannot complain; it was a much better one for the plaintiff than the one he got.

The sixth instruction needs no particular comment. It lays down the duties of parents, or those having infants in custody, in affording them protection and shielding them from danger.

It is complained that the seventh instruction was refused; but everything that was contained in it was given in a more full and satisfactory form in the ninth instruction.