

U. S. Rep.]

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

[Missouri.]

house was built before the railroad was constructed ; but there was no fence intervening between it and the railroad. The grandmother, who had the care and custody of the child, which was only about twenty-one months old, testified that it was not permitted to go upon the railroad track, but sometimes played about the yard with the other children ; that she prevented it from going out of the house as much as she could ; that she kept it pretty close, and never allowed it to go away. That it never had gone away before, and that on the morning on which it was killed, while she was temporarily absent, it slipped out of the house and went upon the track. It there sat down between the rails. The morning was bright and clear, and for eighty rods in the direction in which the cars were running, the track was straight and almost level.

The evidence of the plaintiff tended to show that the child might have been seen at least eight hundred feet from where it was run over and killed ; and the testimony of the defendant's witnesses was that it was seen in time to have stopped the train, but that it was mistaken for another object ; and it was not discovered that it was a human being till the cars had approached too near to avoid the catastrophe.

Under the instructions of the court the jury found a verdict for the plaintiff.

The fifth and sixth instructions given for the plaintiff are the material ones, and they alone will be noticed. The fifth instruction declared that though Isabel had no right to be on the track of the defendant's railroad, yet the fact that he was upon their property did not discharge them from the observance of due and proper care towards him ; nor did it give defendants or their employes any right to run over him, if that could have been avoided by the exercise of ordinary care and watchfulness.

The sixth instruction told the jury that if they believed from the evidence that George A. Isabel, at the time he was killed, was a minor, under two years of age, that his mother was dead, that the plaintiff was his father, and that those in charge of defendant's train, by the exercise of ordinary skill and caution, might have observed the child on the railroad track, and recognised him as an infant, in time to stop the train before it reached and ran upon him, they would find for the plaintiff, — though they might believe from the evidence that plaintiff, or those having the child in charge, were guilty of negligence in not preventing the child from going upon the railroad track.

For the defendant the Court gave four instruc-

tions, and those numbered six, eight and nine are the only important ones. The sixth asserted that it was the duty of the parent or person having the custody of a child, at all times to shield the child from danger, and that duty was the greater where the danger and risk were imminent ; and the degree of protection should be in proportion to the helplessness and indiscretion of the child, and the imminence of the danger.

The eighth declared that it devolved upon the plaintiff to show by the evidence that the death of the child was occasioned by the negligence of the employes of defendant, in charge of the train ; and the fact that the child was killed at a point on defendant's railroad, shown in evidence, raised no legal presumption of negligence on the part of defendant or its employes.

The ninth told the jury that the use of a railroad track, except where a highway crosses it, is exclusively the right of the railroad company which owns it, and the company and its employes are under no obligation to anticipate that children will be sitting or playing on the track, but they have a right to presume that no one will be on the track, except where a highway crosses it ; and if the jury should find from the evidence that the employes of the defendant on the train, as soon as they saw the child, did all in their power to stop the train, and that the child was killed on the road at a point where it was not crossed by a highway, and that the employes before and at the time they first saw the child were in the exercise of ordinary care and diligence, then the verdict should be for the defendant.

The instructions refused by the Court which the defendant asked for were objectionable ; but the third may be noticed : That was, that if the jury believed from the evidence that the child was killed by reason of the negligence of the person in charge of it and had it in custody, and that the carelessness of such person materially contributed to the death of the child, then the finding should be for the defendant.

There can be no objection urged against the plaintiff's fifth instruction. No question is better established in this state than the principle it enunciates. Our decisions have been uniform, that although a person may be improperly or unlawfully on the track of a railroad, still that fact will not discharge the company or its employes from the observance of due care, and they have no right to run over and kill him, if they could have avoided the accident by the exercise of ordinary caution or watchfulness.