

C. L. Cham.]

GILMOUR v. STRICKLAND.—ISABEL v. HANNIBAL & R. R. Co.

[U.S. Rep.]

the appeal was heard before Hagarty, C.J. C.P.

J. K. Kerr, for appellant, cited *Harper v. Smith*, 8 C.L.J. N.S., 171, in which the venue was changed from Haldimand to Wentworth on defendants' affidavit stating that the cause of action arose in Wentworth, and that nearly all the witnesses to be examined resided there. This decision was based on *Levy et al. v. Rice*, L. R., 5 C. P. 119, where Willes, J., ordered the venue to be changed, on the ground that, other matters being equal, the place where the contract was made, the breach took place, and the defendant resided, should be the place of trial.

Osler, contra, contended that there was no preponderance of convenience as far as regards the witnesses, for the numbers were almost equal, and it was the plaintiff's right to lay the venue where he pleased. He cited *Church v. Barnett*, 40 L. J., N. S., 138, where Willes, J., in delivering his judgment, said: "The plaintiff has a right generally to lay his venue where he thinks proper; and, when he has not exercised a capricious choice, it is to be considered that he has exercised a right, and it lies on the defendant to shew that the preponderance of convenience is in favour of trying the case where the cause of action arose, rather than at the place where the plaintiff has laid the venue. Defendants have not done so here," and the rule was refused.

HAGARTY, C.J. C.P., following the rule as laid down in *Church v. Barnett*, dismissed the appeal; but at the same time he expressed his opinion that the question was one which could with propriety be brought before the full Court, so that some clear and definite rule might, if possible, be adopted.

*Appeal dismissed.**

* In a subsequent case which came before Mr. DALTON (*Gwatkin v. Evans*), the grounds upon which the venue was sought to be changed were very similar to those in *Gilmour v. Strickland*, the point as to the cause of action being mainly relied upon by the defendant in his application. In giving his decision Mr. DALTON said. "It appears that the number of witnesses to be called by either party is about equal. Prior to the Common Law Procedure Act, the place in which the cause of action arose was a very material matter in deciding upon a change of venue; but that Act specially extended the facilities of suitors by its provisions with respect to transitory actions. So that now, although the place where the cause of action arose is a circumstance in these applications, it is more a circumstance, and if allowed to have much weight would have the effect of making many actions local which the Act intended to be transitory." REP.

UNITED STATES REPORTS.

SUPREME COURT OF MISSOURI.

HEMAN ISABEL v. HANNIBAL AND SAINT JOSEPH RAILROAD COMPANY.

Liability of Railroad Companies for injuries to children on their track—Obligation to fence against children—Contributory negligence of parents.

1. *Railroads—Contributory Negligence—Duty towards Persons Wrongfully on Railroad Track.*—It is the duty of a railroad company to exercise ordinary care and watchfulness to avoid injuring persons wrongfully on its track.
2. *Use of Track—Presumption—Diligence.*—A railroad track is private property, and persons have no right to be upon it, except at the crossing of a high way. The company is entitled to a clear track, and it is not to be presumed that persons will go upon it, where they have no right to be; hence the same diligence is not required in running through the country that would be necessary in the streets of a town, or at the crossings of a public highway.
3. *Private Crossings—Infants—Persons on Railroad Track—Diligence.*—Where a railroad company constructs its road near a person's dwelling and its employes are aware that his family are accustomed to cross the railroad for water along a path leading from the house to his well, such employes ought, at this point, to exercise increased vigilance to avoid injuring children who have not arrived at the age of discretion; but, it seems, the rule would be otherwise as to adults, who should use their faculties and guard against danger.
4. *Contributory Negligence—Proximate Cause.*—If the plaintiff has been negligent, or is in fault, the defendant is only liable when the proximate cause of the injury was his omission, after becoming aware of the danger to which the plaintiff was exposed, to use the proper degree of care to avoid injuring him.
5. *Railroads—Infants—Diligence—Contributory Negligence of Parents.*—Where defendant's employes in charge of a train observe an object on the track which they might by close scrutiny perceive to be a child, in time to avoid injuring him, a failure to recognize the child and stop the train before running upon and injuring him, will make the defendant liable, even though those having the child in charge may have been negligent in permitting him to go upon the railroad.

[Cent. Law Jour., 591—May, 1875.]

Appeal from the Circuit Court of Caldwell county.

WAGNER, J., delivered the opinion of the Court.

Action by plaintiff to recover damages for the negligent killing of his infant son, by defendant, while running and managing a locomotive and train of cars on its railroad.

The evidence tended to show that the plaintiff's wife being dead, he had placed the child in care of its grandparents, who resided about seventy-five yards distant from the road. The