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No 56

STATE OF MICHIGAN.

SUPREME COURT.

JAMES HUGHES,
By next Friend,
vs.
THE DETROIT, GRAND HAVEN & MILLWAUKEE RAILWAY,
Appellant.

BRIEF FOR PLAINTIFF.

Action on the case for negligence. On the 16th or 17th of July, 1884, the plaintiff was run over by defendant's engine, and one of his legs was completely severed, near the body, and one of his thumbs cut off. He was then 5 years old—in his 6th year. It was in broad day light, a few minutes past 6 o'clock P. M.; while he was standing on the front step of a pony engine, the engineer seeing him there, started up and run about two or three car lengths, and then stopped suddenly, throwing the boy to the

ground and running over him; managing the engine with great carelessness.

Plaintiff obtained a verdict for $8000, under a charge of the court that he could not recover at all, unless the engineer saw him on the engine before starting it, and not even then unless the engineer's conduct was grossly negligent.

Defendant moved for a new trial, which the court denied on condition that plaintiff would remit from the verdict three thousand dollars.

Plaintiff moved the court to modify the order, making it a condition also, that defendant pay it, which the court refused. Judgment being entered for $5000. Defendant brings error.

The first error assigned is that the court refused to direct a verdict for defendant.

The second. That the court intimated his belief that it was practically conceded that the boy was on the front step of the engine.

The third assignment, that "mortification and humiliation" if any, were to be considered in estimating damages.

The 4th, 5th, 6th, 8th and 9th, are one and the same thing, against the admission of proof, that defendant, for a long time that summer prior to the injury, had permitted children to make a play-ground of the premises, and to climb and ride on the freight cars and engines.

The 7th. Just before the injury the mother said to the plaintiff, "sit still while I draw your papa's tea," he sitting at the time with an older sister on the door-sill. This could have no bearing except on contributory negligence, and that question the court after-

wards withheld from the jury in his charge, and defendant took no exception to that part of the charge, so the admission of the evidence became inconsequential.

Tenth. That plaintiff was too young—of too limited understanding to testify.

His testimony is the best answer to this.

It was discretionary with the court below—the discretion not abused.

Eleventh and last. This testimony, (p. 77.) was proper to contradict Martin's. (pp. 57-8.)

Martin does not pretend to have been there more than once, and on that occasion it was Woodlyn he saw and talked with instead of Rosa Bushey.

I.

In considering the first assignment of error, we invite careful attention to the record.

It will be observed there is no objection to any testimony on plaintiff's part for insufficient averments in the declaration; nor was there any demurrer. No question is made on the pleadings. The plaintiff's theories, except one, were all excluded by the charge of the court.

The declaration alleges several matters of negligence contributing to the injury, as grounds for recovery, and evidence of them all was introduced, viz: the dangerous character of the premises is fully described; its location in a densely populated district, a constantly traveled high-way, Hastings st., at the west side, and crossing the two main tracks there; family dwellings along the north side; negligent

watchman stationed at the crossing; negligent brakemen and yard-men on the premises; duty to fence along north side and part of west side, and neglect to do it; duty of vigilance on part of watchmen at crossing, and neglect of it; that the boy went on the premises at the crossing between his house and the north track, a space of 6 or 8 feet; the fact that defendant had for a long time that summer previous, tolerated children playing on the track, cars and engines; that they constantly resorted there for a play-ground and the defendant knew it, and permitted and tolerated it; that this of itself was negligence tempting the plaintiff there to his injury, and that he had not been hitherto accustomed to resort there; that the fact that children had constantly resorted there to the knowledge, and with the tacit permission and toleration of the defendant, imposed the duty of greater care on the part of the defendant, and the duty *to anticipate the presence* of children and of the plaintiff, and to know he was there and to avoid injuring him.

That plaintiff resided in a dwelling within 6 or 8 feet of the track; and that defendant owned or controlled it, and collected the rents, and hence knew he was there and rightfully there, adjacent to the premises; and should have exercised care accordingly, but exercised none.

No error is assigned on the admission of testimony on any or either of these points, except as to the children being on the premises, negligence on the part of the yardmen, brakemen, switchmen, firemen and engineer, as well as on the part of the watchman, was alleged and proved, and that the plaintiff was in plain sight of them, and it was their duty to order him off before starting the engine.

But the court, in his charge, excluded every theory and every claim of negligence, except the conduct at that particular time of the engineer, and that too was to be excluded, unless the jury found he *actually saw* the boy before he started the engine; though Macomb, the forward switchman, admits he saw the boy on the engine when he gave the engineer the signal to go ahead, pp 62 and 65. The court excluded the matter of the dangerous character of the premises, of neglect to fence them, of permitting children to resort to the premises, of the fact that they actually had made it a place of daily resort, permitting plaintiff to go there; all evidence tending to show the duty of defendant to anticipate the presence of children and his presence, and to know he was there, and the negligence of the watchman, and brakeman, and others who admit they saw the boy and paid no attention to him. As the case was left to the jury, the question now presented by the 1st assignment of error, is substantially this:

"If a little child of tender years stroll upon railroad premises, has the company, through its agents, knowing he is there and seeing him in time to avoid injury, a right to kill the child, or dismember his body, merely because he may be in some sense technically a trespasser?"

As the case was submitted to the jury, they must have found that the defendant *knowingly and recklessly inflicted* the injury, for the charge was explicit, emphatic, and was reiterated and could not have been misunderstood

In the course of his charge, the judge said: "The question then will resolve itself entirely into

this: Did the engineer see that boy on the foot board. * * * you are to determine whether the engineer did see him or did not see him; *if you find that he did not see him, that ends the case and your verdict will be for the defendant;* but if you find that he did see him, your *next question will be, 'what was the engineer's conduct under the circumstances.'* Was he *guilty of gross negligence* under the circumstances; because in order to render the company liable the negligence of the engineer *must have been gross*; he must have done what was *patently imprudent* * * * *and dangerous* to the boy under the circumstances. * * * *If he did see the boy* when he got upon the board--*knew that he was there,* was it under the circumstances dangerous to start the engine with the boy in that position. *Was it patently, clearly, plainly dangerous.* * * * You are to determine the truth about that. Then after the engine was started the accident is said to have been occasioned by its sudden stoppage. You are to determine whether that stoppage under all the circumstances created the accident. *If the engineer saw the boy there.* and *if* it was a *place of danger under any and all circumstances,* for a lad of those years, the engineer before starting should have told him to get off. * * * That is all there is in this case. You are to determine that one point." The court had admonished the jury again and again emphatically, to dismiss all other matters from their minds entirely. (See pp. 80 and 81, Rec.) The court also said: "Now, he had no right to be there; he was a trespasser in being on the grounds at all. He had no right to be upon that foot board. Nor was there any

duty upon the part of the company, to look out for anyone being on that foot board who had no right to be there. In other words, the mere omission to see that anybody was on the foot board, would not of itself be sufficient ground for recovery in this case. Because, as I said before, there is no duty on the part of the company to look out for men on the foot boards of their locomotives, nor for children either. So that this is not one of those cases where, if something is not seen or noticed, the omission to see or notice would carry a liability with it, it not being the duty of the company through its engineers or officers, to see whether the boy was or was not on the foot board." (Rec., p. 81.)

So everything was rigorously excluded, except the *one question,* whether the defendant *knowingly and recklessly inflicted the injury.*

The jury found that it did.

Now, why should the case have been taken from the jury?

There was ample evidence to support this finding, and it is found as well in the testimony of the defence as in that of the claimant.

Let us look at this.

First. Was the boy on the foot board.

Second. Did the engineer or officers see him at the time or before starting the engine?

The court, in his charge, remarked: "I believe it is practically conceded he was on the foot board," and defendant has excepted to this. 2nd exception.

Defendant swore ten witnesses, and *not one* testified that the boy was *not* on the foot board; on the contrary, John Macomb, the forward switchman, says,

"At the time of this accident I was working as switchman in the Detroit yard—the part called the 'lip.' I was with this train in question. Where the accident occurred, I think, was two or three car lengths east of Hastings St. We stopped and 'cut' the crossing, *and this little boy was on the front of the engine.*" (Rec., pp. 61, 62.

When the train was "cut" or separated by Curran, he signaled Kenney, another switchman, and he signaled Macomb, the forward switchman—who says he saw the boy standing there—to go ahead, (p. 65;) and Flannigan, the fireman, says, "we started immediately after the crossing was 'cut.'"

John Landon, the engineer, says he saw him "*just in front of the driving wheel, in the point of* being run over by the engine." (Rec., p. 60.) "The driving wheels are ahead; they are the first wheels that would run over any person that was in front of the engine." (Rec., p. 61.) On same p. defendant's counsel ask him if he had ever seen the boy prior to that day. 'Q. State whether you had seen the boy before that day. A. I had not." A more important question would have been, *to ask if he saw the boy on the footboard before starting his engine.* But counsel carefully refrains from asking him that, and he nowhere denies, either that the boy was standing there, or that he saw him there; his testimony on p. 60, shows a *careful evasion* of that; he does not deny Jimmie Hughes' testimony, that the engineer "looked at him once," (p. 33,) just before starting the engine; he, does not deny Jimmie's testimony as to the *remark he, the engineer, made at the time* to the fireman, before starting, about his being on the footboard, (p.

33,) or about "ringing the bell;" neither does the fireman deny it. They had heard the testimony of all our witnesses on the subject, and by not one of their witnesses is there an attempt at denial.

Besides, Macomb admits further, that he saw the boy, a few minutes before the accident, *running towards the step or footboard*, about 20 feet from where he was afterwards hurt, but don't know how far he followed the engine; he says, "*I did not pay any attention*," and yet he admits his *duty was to pay attention*, for, in the same breath he adds, "I was riding on that front step, keeping a lookout; that is a part of my business." (Rec., pp. 63-4.)

Curran, the yardman, admits he was standing on the south side of the train, *doing nothing*, and did not see the accident. (Rec., p. 65.)

Alexander Forbes, the night watchman, admits he and Ross, the other night watchman, "chatted a little bit," and were oblivious of the accident, 'till ten minutes afterwards. They were *watchmen!!* They *watched* (?) at and about the crossing, a few feet distant from the place of the accident. (Rec., p. 66.)

Ross corroborates Forbes, and says, he was over there to "assist" him, though his duty was elsewhere. (Rec., p. 67.) On next page, he tells how well he assisted him. About *10 or 15 minutes before the accident*, he saw Jimmie *at home by the corner of the house*, next saw him running from the cattle pens *towards the front of the engine*, "I did not further keep watch of the boy than that I kept sight of him until I thought he reached the track, and *when he went in front of the engine*, I saw no more of him. *Next thing I saw of him, I met John Landon carry-*

ing him in his arms, or helping to carry him, to the house." He adds, coolly, "*I was paying very little attention to the thing at all*, only that I saw the boy reach the track, *and he disappeared in front of the engine.*" Don't pretend that he made any outcry or warning, or ordered the boy away from the front of the engine. (Rec., p. 68.) On p. 69, he repeats he "did not pay much attention." Then counsel in desperation puts the Q. "When you see children playing about the premises around there, what *do* you do? A. The best we can, to keep them off"!! Did he do the "best he could" to keep Jimmy off? What did he do? What did any of them do? This is proof of their known duty, and their utter neglect of it, and the proof is furnished by the defendant.

So far as the defendant's witnesses speak of it at all, they corroborate Rosa Bushey, Jimmie Hughes, Peter Tean, John Graney, all of whom swear positively that the boy was on the front step of the engine, at the south end, the engine fronting east.

No one denies it; all the circumstances go to show it. He was run over on the south rail. Ross and others saw him going towards the end where he says he got on. So the court was justified in his statement, that the fact of his being there, he believed, was practically concealed. Next, there was evidence that the engineer did see him there. In the first place his position was at the south end of the footboard, or at the right hand of the engine, as it stood fronting east. All plaintiff's 4 witnesses who saw it, swear to that. No one contradicts it.

This position would bring him right in front of the cab window on the engineer's side, *and in plain*

sight of the engineer. No one disputes that; there was some attempt at juggling with the witness Wohlhaupter, (p. 71,) to prove that a boy on the front step *could not be seen*, but it was a failure, and Mr. Russel finally says, on p. 72, "We will not raise the question but that if the boy stood on the end of the footboard, he could be seen."

And on p. 73, "It is not disputed, that he could see the engineer from certain portions of the front step." See also the testimony of Richardson and Berry, on p. 70, showing the boy was in plain sight of the engineer.

Now, it is an undisputed fact, that the engineer was there at his post in the cab; it was in daylight, a few minutes past 6 P. M., on the 16 or 17th of July.

The little boy swears not only that he saw the engineer, but that the engineer, just before starting, "*looked at him once*," not only that, but the engineer *remarked to the fireman* about his presence there.

How does the defendant meet this positive testimony that the engineer *did see him and did know he was there before the engine started*? If it were not true, how easy to put the direct question to the engineer. The engineer and fireman were on the stand. It was a vital point. *If* he *did not* see the boy, and *if* he *did not* know he was there on the foot board before the engine started, and if he did not speak to the fireman about it certainly he would have said so, and certainly counsel would have proved the fact by him directly. But instead, they call in a scientist, Mr. Wohlhaupter, and seek to show by theory, or magic, that even if the boy was there, he *could not be seen* by the engineer; they take great pains to show it;

they go into great detail of measurement and movement; their whole defense on this point is to establish theoretically the physical impossibility of the engineer's seeing the boy on the end of the foot board and then they give it up: the alleged obstruction to the view was the water tank, which extended over the boiler and down the sides like a saddle, but the extreme width of this was only 6 ft. 4 in., while the plank on which he stood was 18 in. longer, (p. 71,) which by their own showing would leave him, standing on the end of the board, in full view of the engineer: and furthermore, they do not show the exact height of the saddle at its widest part; besides, the measurement of the cab with its windows, it being both wider and higher than all these, is entirely omitted by the witness; but both he and Mr. Russell concede finally that the boy could be seen; if he could not have been seen, how easy to prove *that* by the engineer: why didn't he say so; but they do not attempt to show *by him* either that he *did not* or *could not* see the boy. The fact is, the boy could be seen from the cab window not only when standing up, but when *sitting down on the foot board or on the ground at the foot board in front of the drive wheel.* The engineer swears he saw him there. It was pretended the boy was not tall enough to be seen standing there, and Mr. Russell had his height measured, 3 ft. 10 in., (p. 45.) And he asked him, (p. 32,) if his head was not below the top of the cylinder, &c.: and the boy answers, he could see over it; but even when the boy was down on the ground right by the foot board, *in front* of the drive wheel, the engineer not only *could*, but *did* see him, for he testifies to "seeing a small

colored boy just in front of the driving wheel on the point of being run over by the engine." (Rec., p. 60.) "The driving wheels are ahead; they are the first wheels that would run over any person that was in front of the engine." (p. 61.)

So it is clear the finding of the jury is justified by the evidence—in fact it was in accordance with the undisputed testimony. They attempt to show not that the engineer *did not* see him, but merely that he *could not*, and in this they fail. What then is the inference. And it was patent that the engineer was quite willing to pass over in *silence* the point whether he *saw* the boy on the foot board, *before starting* the engine; he admits seeing the boy "just in front of the driving wheel, on the point of being run over by the engine." (p. 60.) He says, "it looked to me like a pair of large eyes and a dark face, as though a head and a pair of eyes with a dark face were on one side of the rail, and the remainder of the body on the other side of the rail," (p. 61.) If he could see him on the ground under the foot board he could see him standing on the top of it.

He admits that this vision of death impending made *some* impression on him. After he saw it he says his "attention was *attracted*" by it, (p. 60.) In speaking, on p. 61, of "the first position in which I saw the boy," he evidently refers merely to the first thing he saw *of the accident* at the instant of its occurrence, and not to what he saw before the instant of the accident—on that subject he is silent, does not contradict Hughes, Tean, Graney or Rosa Bushey.

But counsel wish to construe this to mean that it was the first time he had seen the boy about the prem-

ines on that occasion, that afternoon; and that he had not seen him just before that standing on the foot board. But the witness does not say so, though the whole case was a strong challenge for such a statement, if such were the fact. They would not have left it to rest on any such ambiguous answer.

The jury have found also, that it was *obviously a place of great danger* to a child of plaintiff's tender years.

They have found that the engineer was guilty of gross negligence. There was ample evidence for this finding.

It is not pretended that the engineer ordered him off, or made him get off. The plaintiff, Tean, Rosa Bushey, Graney all say the engine was started with him on the foot board, and that *he was thrown off by a sudden stoppage of the engine* "*with a jerk.*" It is well known those pony engines are intended for quick movements, and respond readily to the steam.

Their witness, Curran, says, "*the engineer reversed the engine very suddenly,*" &c. "I saw Macomb then picking the boy up from under the wheel," (p. 88.) The engineer admits he *reversed the engine*, (p. 90,) though he would leave the impression that he reversed it after the boy was already off the foot board, and across the rail on the point of being run over, yet he does not say so. The testimony of plaintiff's witnesses is explicit that it was the sudden stoppage *that threw the boy off*: if this be correct then the sudden stoppage was *not* made *after* the boy was off, and to prevent running over him, but it was made *because they were at the point where they intended to stop*, and this is just what the defendant's witnesses

testify. They say they were going a couple of car lengths or so, and then were going to stop, and they did so, and then and there the accident happened.

John London, the engineer, says, p. 68, we moved ahead "perhaps a car length or two," and then the accident occurred; and on p. 61, "we went ahead * * * * * when we cut the crossing; the remainder of the cars were left the other side of Hastings St."

John Macomb says, "we stopped and cut the crossing, and *this little boy was on the front of the engine.* I did not see him get on."

For letting out this bit of truth he is frightened by counsel, who jumps up and says, "State what you saw; don't state *where the boy was* when you did not see him." (p. 62.)

Purvis Kinney, says in his testimony in chief: "When we cut the crossing, Mr. Curran gave the signal to go ahead from the crossing. Of course, *I gave Mr. Macomb* the signal to go on, *he being the forward switchman.* * * *

Q. *How far had the engine to run before it got to the stop which you intended to make in case no accident occurred?*

A. *About two car lengths or a little over. The engine stopped very near where we intended to stop it.*

Q. *Why did you intend to stop there?*

A. *To cut the crossing.*" (p. 65.)

Flanigan, the fireman, says, p. 70, *they cut the crossing, and ran up about 60 ft.* and he "*saw the switchman, Mr. Macomb, give the signal at the second car,* A SIGNAL TO STOP." And he says he "saw the engineer reverse the engine."

So it appears quite clear that when the train was "cut" or uncoupled, the engine spurted up a couple of car lengths or so, to pull the cars out of the highway at the crossing, or as they say, so as to "cut the crossing;" and when they had pulled far enough Macomb gave the "*signal to stop.*" as Flanigan testifies, and the engineer reversed his engine, stopping it with a yank or "jerk," and this threw the boy headlong to the ground, and he was instantly run over.

They had to run a "couple of car lengths or a little over"—they did run a couple of car lengths—they stopped where they intended to, and *at Macomb's signal to stop given to the fireman.* The sudden stoppage was not to prevent the accident *but it caused it.*

Plaintiff's witnesses so testify, and defendant's witnesses do not conflict, but corroborate it. Rosa Bushey says, pp. 12 and 13, "The switch engine gave a jerk and he fell underneath, and the engine passed over him. * * * * Any one from the front cab windows could see him where he was standing on the end. He was standing on the end towards the south. The fireman and engineer were in the cab at the time of the accident," &c., and see plaintiff's testimony, bottom of p. 31, &c.

Teas, says on p. 42: "He was standing on the south side when I saw him; that was the time he got hurt; he was standing on the plank; there is a railing in front of the engine; he had his arms around it like that (illustrating). They were pulling the cars out from the freight shed. *The switchman gave his signal for the engineer to stop.* I guess he wanted to cut the cars. *He hollered and put his hand up, to*

stop, and when it stopped, it stopped with a jerk and jerked the boy off. The boy got under the wheel. *When he fell the wheel caught him. When the engineer gave the engine the jerk, it threw the boy off, but it didn't stop the engine quite still; it kept going and caught the boy.*" To the same effect in his cross-examination on p. 45. Says "he was on the south end of the foot board." "I was looking right at him when he fell off." "He fell over like that (illustrating). He was looking east when he fell, with his back to the engineer," &c.

Graney saw the boy on the engine when it started up, and called attention to it, and heard the watchman exclaim, "My God! that boy *fell off.*" p. 48.

Upon this testimony it was proper for the court to say he "believed." it was practically conceded that the boy was on the foot board. *Both sides* testified to it positively; all the circumstances corroborate it; no one denies it.

Upon such testimony the jury could well find the engineer *saw the boy on the foot board, and started the engine, knowing he was there*, and that it was a *place of great danger*, and that the *sudden stopping threw him off*, and that the engineer's conduct was *grossly negligent.*

We do not well see how they could find the contrary, for the evidence is all one way. It was proved the boy was on the step; that the engineer *was in the cab; that he could see the boy; that he did actually look at him* while there; that he *made a remark to the fireman* about his being there; that Macomb, the forward switchman, saw him there; that Graney called attention to his being there. None of these

things are denied, by either the engineer or fireman. It was met only by a futile attempt to show that the boy could not be seen, and even this attempt was abandoned. As long as there is *some* testimony to support the finding, and the theory on which a case is submitted, it is sufficient, even though it may be weak and directly contradicted.

Upon the foregoing testimony in this case, the court certainly could not direct a verdict for defendant. If the company *knowingly and recklessly injured* the boy, it is liable.

(a.) Not only does the *evidence* make a case, but it makes the case set up in the declaration, and the declaration is sufficient.

Besides other matters of negligence before mentioned, it avers the plaintiff was on the premises and on the engine in *plain sight of the engineer* and other agents, and that it was their *duty to order him off and make him get off*, before starting the engine, but they did not, &c.

They try to evade this duty by urging they did not see him. We tried that question; both sides adduced their testimony, and it was received without objection, and no error is assigned upon its reception; and the jury found the engineer did see him.

Though the declaration does not in set terms say the engineer did see him, it clearly imports that, and that is sufficient. *Ipsissima verba* are not necessary.

No point on the declaration was made or suggested below, and none may be made here. None is directly made by the record; it could not be raised

here; the first assignment is too general, and there is no other to raise it. But no such reason was suggested below. The only reason there urged was that the boy was a trespasser.

We will show further on that that does not relieve defendant.

If any question be made here on the declaration we answer:

(1.) The point was not made below, and it cannot be raised for the first time here.

Granger vs. Wright School Dist. No. 9, 28 N. W. R., 794-6.
Lane vs. Pere Marquette Boom Co., 28 N. W. R. 796-8.
Haynes vs. Champlin, 32 Mich., 37.
Brown vs. R. Co., 30 No., 466.

(2.) If the declaration was deemed defective in this respect, there should have been a special demurrer.

How. § 7258.
Vanmiddlesworth vs. Same, 32 Mich., 387 b.
Shrouba vs. Feht, 32 Wis., 337, 341-2.

(3.) Nor did defendant object to the evidence on this point when offered, as not within the allegations—a poor practice, though sometimes attempted.

(4.) Had the declaration been deemed defective in this particular, on objection in the court below, an amendment would have been allowed at once.

Wallace vs. Detroit City Ry., 24 N. W. R., 879 (Mich.)
Kean vs. Mitchell, 18 Mich., 210-14.
Dickinson vs. Dustin, 21 Mich., 566.

Statute of Amendments, How., Chap. 264, and cases cited.

Roberts vs. Taylor, 22 N. W. R. 69.

(5.) Were it deemed defective, it is cured by the verdict.

Ibid., § 7635, subs. 7, 8 and 13.
Stange vs. Clemens, 17 Mich., 408-9.
Delashmun vs. Berry, 21 Mich., 516-523.

And even this court would supply the defect by amendment, or treating it as amended. Such amendment would only include matter which had been actually presented to the jury for their determination.

Monaghan vs. Ins. Co., 53 Mich., 239.
Ib., § 7636.
Forey vs. Leonard, 24 N. W. R., 81 (Wis.), and cases cited.
Evarts vs. Smucker, 26 N. W. R., 597, (Neb.)

(6.) Defendant treated the point, and tried it, as properly within the allegations; this waived any supposed variance or defect

McHardy vs. Wadsworth, 8 Mich., 351.
Stone vs. Covell, 29 Mich., 362-3.
McCoy vs. Brennan, 28 N. W. R., 130.
Wallace vs. Det. City Ry., 24 N. W. R., 870.

(7.) It *was* covered by the allegations, and was within the issue; an averment that the boy was right there, in plain sight, before his eyes, in daylight, and it was his duty to order him off, is equivalent to an averment that he saw him, and includes it; especially after a full trial of the question and a verdict on it.

The averment of the *duty* was distinct, after stating the circumstances, the boy's presence there, in a place of danger, in plain sight, it is averred, the duty was to order the boy off and make him get off; the averment is clear, positive, and not mis-

leading or ambiguous; defendants understood it; they knew evidence of subordinate facts, out of which the duty grew, would be adduced, and they knew it involved the question whether they were aware of the boy's presence there—whether they saw him; and they were prepared to try this question, and did try it, adducing and receiving testimony without objection. It is not necessary to aver in detail subordinate or evidential facts.

(8.) From the facts alleged if the duty is clearly implied, it is sufficient.

Ekman vs. Minneapolis St. R'y, 24 N. W. R., 291, (Minn.)
Clark vs. R'y Co., 28 Minn., 69.
Stewart vs. Havens, 22 N. W., 430, b, (Neb.)
Watson vs. The Wabash, St. L. & P. R'y, 23 N. W. R., 281-2-3, [Iowa.]
Geveke vs. Gr. R. & Ind. R'y, 24 N. W. R., 676, [Mich.]
James vs. Emmet Mining Co., 21 N. W., 392, [Mich.,]
Lee vs. Minn. & St. P. R'y, 25 N. W. R., 899.
Romans vs. Longevic, 25 N. W., 688, (Minn.,)

But we have alleged both the duty, and the facts sufficiently from which it springs.

If, then, the allegations of defendant's negligence are sufficient, and if there was evidence on every material point, the case *could not* be taken from the jury.

II.

Because the little boy of tender years was technically a trespasser, will not excuse defendants for recklessly killing or maiming him.

To take it from the jury would involve an affirmance of such a proposition, which is not the law. Such a rule would be preposterous, cruel, outrageous.

Defendants below relied much and solely on the cases of:

Hargreaves vs. Deacon, 25 Mich., 1, and
C. & N. Railway vs. Smith, 46 Mich., 504.

But the cases are not parallel nor applicable to the facts in the case at bar.

In the Hargreaves case, the injury occurred on strictly *private property*, and "*not* immediately *adjoining a highway*," and in that case the injury occurred without *any positive act* of defendant, the child straying on *private premises distant from the highway*, where it had no right to be, and where children *were not accustomed to go*, and where its *presence was not to be anticipated*, and falling into an open cistern; the case marks the distinction as "to those who are directly injured by some positive act, involving *more than passive negligence*," and also as to those "cases where the nature of the business is such as to present *peculiar attraction to children*. Another important difference is, in that case defendant had *no knowledge of the child's presence*, but in the case at bar the defendant had such knowledge, and then a positive and grossly negligent act inflicted the injury.

In the Smith case, not only was the plaintiff of more mature years, but the evidence "*failed to show or tend to show*, that the engineer *knew or had reason to know*, that he was there at all." The boy had many times before been ordered off, or warned of the danger, and on the occasion of the accident he had been standing on the step at the rear of the tender, and the fireman *had ordered him off*, and *given him time to get off*, and *supposed he was off*, the boys position being in the rear of the tender *out of sight of the fireman* when in the cab, and there was no evidence as to "any of the defendant's servants" "indicating a degree of indifference on their part as to the safety of the boy," nor does it "tend to show that he (the fireman) had any reason to believe that the boy would not have ample time to clear the track, or that it was at all necessary for him to call the attention of the engineer to the fact that the boy was there."

"In other words, the injury resulted from an accidental fall of the boy, and without any carelessness or negligence of the company's servants." The boy was not thrown from the engine. The case does not report the facts proved nor the evidence, but from what is indicated by the opinion, it is evident the case was very different from the one at bar, but the case affirms that *had there been evidence of gross negligence*, such as *to indicate indifference as to the safety of the boy, the company would have been liable*.

Both Landon and Macomb, the engineer and switchman, in the case at bar, saw the boy in a place of great danger, and gave him no warning, but banged ahead with the engine, and stopped it by reversal with

such a jerk as to send the boy flying headlong to the ground; it was a sudden stoppage by reversal, such as the conductor of the train standing in the caboose, *Hoppe vs. Chicago, M. & St. P. R'y*, 21 N. W. R., 280, testified, "threw him head first—sent him to the other end of the car." Such conduct would be manslaughter had the boy been killed. Some of the defendant's servants swear they saw him running just before he got on the foot board, in that direction, toward the front of the engine, and actually in front of it, and that they said and did nothing; "paid no attention to the thing at all," and Graney called their attention to his being there. But they paid no attention. This was recklessness. It was the manifestation of the spirit pervading the utterance of the late R. R. King, when pronouncing his anathema on the public.

It seems hardly necessary to cite cases to support the charge of the court as to defendant's liability on this state of facts. We think the court might have gone much further in favor of plaintiff, and still been correct.

We refer briefly to some of the Michigan cases, and others:

Keyser vs. C. & G. T. R'y Co., 23 N. W. R., 218.

In this case a child had wandered on the track, some distance from his home, in a sparsely settled locality, where the presence of a person on the track was not to be anticipated, and it was held the child was not a trespasser in the sense of excusing the company from liability, in depriving the child of its health, life or limb, by reckless or negligent acts or omissions. They saw him in time to have saved him, but thought he was a dog.

In the Marcott case, 41 Mich., 441, the child was a trespasser on the track, but it was not claimed or pretended that that prevented a recovery, though judgment for plaintiff was reversed, because of variances, the allegations of duty and negligence relating only to the rate of speed, the giving of signals, and the proofs only established the omission to fence, to have air brakes, and that guests occupied the cab.

In the same case, 47 *Mich., 1*, under amended pleadings, it was held the case *should have been submitted to the jury*. On the third trial the jury, on the facts, found for the defendant, which was affirmed, no error being found in the rulings.

The recent case of *Powers vs. Harlow*, twice in this court, *53 Mich., 512*, and *23 N. W. R., 606*, is similar to this in principle; there the child had no more right to enter the shed and handle the dynamite than this one had to ride on the engine step, and in both cases the children were *rightfully on premises immediately adjacent to the exposed place of danger*.

In that case the boy *injured himself*, in this the defendant, by its *affirmative act inflicted the injury*.

In *Sheldon vs. Flint & P. M. R'y*, 26 N. W. R., 709, the boy killed had no business with the company, and was not going on the train, but come to the station merely to hear an excursion band play: held by Mr. Justice Sherwood, he was not a trespasser, so as to defeat the company's liability for negligence.

In *Burtnett vs. B. & M. R. R. Co.*, 20 N. W. R., 281-2, (Neb.,) a boy 11 years old on the track where he had no right, and the defendant's agents saw him in time to avert the injury, and while his foot was

caught between the guard and rail, but ran over him with the switch engine. "If therefore, defendant's agent, after being aware of the perilous condition of the plaintiff, did not exercise reasonable care to prevent the injury, defendant cannot rely on plaintiff's negligence to defeat recovery." See cases cited:

Morris vs. C. R. & Q. R. Co., 45 Iowa, 29, and cases there cited, that plaintiff's negligence is no excuse, where it is discovered by the defendant in time to avoid the injury by the exercise of ordinary care on its part, no matter if the plaintiff be a trespasser.

Brown vs. R. Co., 50 Mo., 465-7-8.
Hulsenkamp vs. R'y Co., 37 Mo. 537.
N. H. Steamboat etc., Co. vs. Vanderbilt, 16 Conn., 421.
Baltimore & Ohio R'y vs. Trainor, 33 Md., 554.
Norris vs. Litchfield, 35 N. H., 271.
State vs. Railroad, 32 N. H., 379, 553, 6-7.
Doering on Neg., § 14, and cases cited.
2 Thompson Neg., 1151.
Wharton, § 323.
Shr. and Redf. Neg., § 33.
Meeks vs. S. P. R. R., 56 Cal., 517.
Norris vs. Litchfield, 35 N. H., 271.

In *Musser vs. C. R. I. & P. R'y*, 27 N. W. R., 778, (Iowa,) where a child of discretion, 11 years old, was clearly a trespasser; it is said the defendant doubtless would have been liable, if the train could have been stopped in time after the discovery of the boy, for it was then defendant's duty to give warning, and stop the train as soon as possible.

Locke vs. R'y Co., 15 Minn., 350, (Gil. 281.)
Cleveke vs. Gr. R. and Ind. R'y Co., 24 N. W. R. 677, (Mich.)

The case of *Lynch vs. Nurdin*, is approved in

most of the States, including Michigan, and by the better reasoned cases in England, and by our federal supreme court.

(a.) The question of contributory negligence of the child plaintiff, or his parents, does not arise upon this record; it was eliminated by the charge of the court, and no exception is taken to it. But negligence could not, as matter of law, be asserted of a child of his years, and as to negligence of parents, there is no evidence of it.

Chicago etc. R'y Co. vs. Gregory, 58 Ill., 226.
2 Thomp. Neg., 1140, 1150, et seq.
Deering, § 21, (n. 3.)
Deering Neg., § 28 and n.
Balt. &c., R'y vs. McDonnell, 43 Md., 534.

It is not settled that parents', negligence could at all be imputed to the child.

Deering, § 29, note 8.
Wharton Neg., § 310, 321, etc.

We think, from what we have said, it is clear there is no error as alleged in the first and second assignments.

(b.) The second relates to a mere casual remark of the judge, which was fully borne out by the testimony; but even if it were not, it was not binding on the jury, nor intended to be so; they were at liberty to come to a different conclusion if there had been room for it upon the evidence, and upon such a passing remark of the court, no error is assignable anyway.

Sheahan vs. Barry, 27 Mich., 227, and citations.
Campau vs. Langley, 39 Mich., 452.
Hayes vs. Hosmer, 36 Mich., 324.

The court's attention should have been specially called to it at the time, if it was deemed material error.

Reeves vs. Kelley, 30 Mich., 135.

"There is no reason for requiring a court to throw doubt on a certainty in charging a jury."

Wisner, vs. Davenport, 5 Mich., 504.

III.

The 4th, 5th, 6th, 8th, and 9th assignments complain solely of the admission of testimony that the defendant had not prevented the premises, prior to the accident, being a constant play ground for children. It was claimed to be immaterial.

If its admission had been error, it was cured by rigorous exclusion in the charge of the court.

People vs. Pitcher, 15 Mich., 405.
Johnson vs. Ballou, 25 Mich., 460.
Kelly vs. Hendrie, 26 Mich., 256.
Ambrose vs. Robinson, 22 Mich., 24.
Clark vs. Cox, 32 Mich., 208.

They show by their own witnesses, and claim it as a fact, that children frequent the track. This would waive the error if there were any. Rec., pp. 21, 54, 67-8.

Kent vs. Bender, 25 Mich., 529.
Fowler vs. Gilbert, 38 Mich., 292.

But the error was not in admitting, but in afterwards excluding it; but as we obtained the verdict, we are not in position to complain; yet, as defendant complains, we contend the testimony was competent

and proper and there was no error in its admission.

It was limited to time prior to the injury, and the jury and all parties so understood it.

Rec., p. 11 bot.; p. 43 l., and 44; p. 48 near top and 49, 51-2-3, 53.

Independently of its bearing on the question of negligence it is competent as showing the sort of place it was—as descriptive of the *locus* of the accident—it pertained to the *res gestae*.

But it was competent and proper, as bearing on the question of negligence.

Plaintiff lived in one of the adjacent houses, within six feet of the track, and this house was owned or controlled by the defendant, and its officers collected the rents; that troops of children, with the toleration and knowledge of the company, had long been accustomed to resort to the locality to play; such neglect to fence, and such toleration of children there, under the circumstances, and the neglect of the watchman at the crossing, and other agents to keep them off is alleged as negligence, and the toleration of children resorting there, and the dangerous character of the premises, is alleged to impose upon the defendant the duty of greater care: and it was perfectly competent to show the fact, and that children *did habitually resort there*. Notwithstanding the more limited rule laid down in the court below, we insist that such a state of facts made it the duty of the defendant and its agents to *anticipate the presence of the children* there, especially on pleasant days in the summer, and to see to it that no one was in danger.

The children were *rightfully on the premises*

immediately adjacent to the defendant's premises, viz: at their own houses.

The defendant's business, the moving of cars and engines, would be very attractive to them; and they were constantly tempted into danger; and when some children were seen riding and gliding to and fro on the cars and engines, the temptation to others was increased and intensified

We insist that when troops of children *lived right by there*, and not only *might* resort there, but as matter of fact *did resort there habitually*, and the Company *knew it* and tolerated it or *did not prevent it*, then the company was bound to anticipate their presence, and to know before starting the engine forward or backward, whether children were in front of it, or behind it; it is true the jury found that defendants agents *did actually see the boy* in time to have easily averted all danger, and this other testimony then became *immaterial*; if they *did see* him, then it is no longer necessary to urge that it was their *duty to see him*, but the court could not assume in advance what the jury would find, and therefore his charge, excluding this evidence, was wrong, and his ruling admitting it was right.

The degree of care must be commensurate with the circumstances, and the place being one where children are likely to resort, and do resort, is an important circumstance.

R. R. Co. vs. Stout, 17 Wall., U. S., 660.
Boland vs Missouri &c., R. Co., 36 Mo., 484-90.
Randall vs. R. R. Co., 109 U. S., 478.
Hayes vs. M. C. R. Co., 111 U. S., 234-5, 240.
R. R. Co. vs. Gillman, 15 Wall., 401.
Lehey vs. H. R. Ry., 4 Rob., N. Y., 204

R. R. Co. vs. Mahony, 57 Pa. St., 188.
R. R. Co. vs. Kelley, 31 Pa. St., 372.
Watson vs. Wabash, St. L. & P. Ry., 23. N. W R., 380, (Iowa.)
Johnson vs. C. & N. W. Ry., 25 N. W., 224, (Wis.)
Townley vs. Ry. Co., 53 Wis., 626.
Mangham vs. Brooklyn &c. Ry., 36 Barb., 230.
" " " 38 N. Y., 455.
Hassinger vs. M. C. Ry., 47 Mich., 207.
Marcott vs. H. & O. Ry., { 47 " 1. / 49 " 97. / 41 " 433. }
Van Steinberg vs. M. C. Ry., 17 Mich., 99, 118.
Mullaney vs. Spence, 15 Abb., N. Y. Pr., N. S., 319.
Northern Ry. Co. vs. State, 29 Md., 420.
Baltimore &c., R. R. Co. vs. State, 36 Md., 366.
Conlin vs. Charleston, 15 Rich., (S. C.,) 201.
R. R. Co. vs. Adams, 26 Ind., 76.
Norris vs. Litchfield, 35 N. H., 271.
Berge vs. Gardiner, 19 Conn., 506.
Daley vs. N. & W. Ry., 26 Conn., 295-6.
Keyser vs. G. T. Ry., 23 N. W. R., 311.
Dahl vs. Milwaukee City Ry., 22 N. W. R., 755.
City Ry. vs. Foxley, Sup. Ct. P. Legal Inf., Aug. 21, 1885. Am. L. R., 19-5, 821.
Carver vs. Det. & Saline Plk. Ro., 25 N. W. R., 185.
Wilds vs. H. Riv. Ry., 33 Barb, 503.
Keffe vs. Milwaukee Ry., 21 Minn., 207.
Nagel vs. Ry. Co., 75 Mo., 653, S. C. 10, Am. & Eng. Ry. Cases, 702.
M. C. Ry. vs. Coleman, 28 Mich., 448-9.
Keating vs. N. Y. & H. R. R., 49 N. Y., 673.
Kerwhaker vs. Ry. Co., 3 O. St., 173.
Ihl. vs. Ry., 47 N. Y., 317.
Hoppe vs. C. M. & St. P. Ry., 21 N. W., 228 232.
East Saginaw Ry. Co. vs. Bohn, 27 Mich., 503.
Swoboda vs. Ward, 40 Mich., 420.
Van Steinberg vs. Case, 17 Mich., 118.

Beauchamp vs. Saginaw Mining Co., 50 Mich., 170.
Ferguson vs. Wis. Cent. Ry., 23 N. W. R., 128.
Powers vs. Harlow, 53 Mich., 512.

It was their duty to keep a sharp look out, where they knew children were likely to be, and the record furnishes a confession of this duty, and the neglect of it.

Rec., pp. 84, 88-9.

(3.) Evidence of neglect to fence was offered for the same reason as evidence that children constantly frequented the grounds, viz: to show that the circumstances were such and so dangerous as to demand great care on part of defendant, and it was received without objection.

It was shown that on the entire north side, there could have been a fence, and also on the east side of Hastings st., between the north track and plaintiff's dwelling, the very point where he got on the premises, and also along Hastings st., between it and the three-side tracks, south to the cattle pens.

The statute in relation to fencing, applies as well in cities and villages as in the country.

Greely vs. St. P. M. & M. Ry. Co., 22 N. W. R., 179. (Minn.)
Ry. Co. vs. Parker, 29 Ind., 471.

Inconvenience to the Co., is no excuse for not fencing.

Ibid; &. F. & P. M. Ry. vs. Lull, 28 Mich., 510.
Bradley vs. Ry. Co., 38 N. Y., 427.

Only where it interferes with the public, as at the station or depot grounds, need there be no fence.

McGrath vs. D. M. & M. Ry., 24 N. W., 854. (Mich.)

And undoubtedly in the case at bar, the want of a fence at the corner of plaintiff's house, contributed to the injury, which with a fence there, would not have happened, as in the case of

Schreier vs. Ry. Co., 27 N. W. Rep., 167-8. (Wis.)

The statutory duty to fence, may be invoked in favor of persons as well as in favor of domestic animals, at least as evidence of negligence.

Schmidt vs. Ry. Co., 23 Wis., 167.
See Hayes vs. R. R. Co., 111 U. S., 233.

See the Marrott cases and Stahl vs. G. & I. Ry., 23 N. W., 726-7, (Mich.)

But no error is assigned on the admission of this evidence, and the whole was afterwards eliminated by the charge.

(b.) So also was excluded evidence of negligence of the watchman, which was competent when offered, and their diligence would have prevented the injury.

Burns vs. North C. R. Mill Co., 27 N. W., 44.

It does not matter that the children had no right to resort there. Wherever the company is bound to anticipate the presence of persons, it is because it knows it is probable they *will resort there*; in some cases they may have the *right* to be there, and this may be the sole ground of the probability of their presence; in other cases, though they have no right, the probability of their presence may be equally great, or greater; and where such probability exists and is known to the company, the duty of care is fixed. In many of the cases last above cited, the plaintiffs were technically trespassers.

IV.

7th Assignment.

Evidence was introduced to show due care, according to his years, on the part of the plaintiff, and also that of his parents, and not objected to; that he was of tender years; that he stood still on the step, and held to the hand-rail, &c.; and that his mother left him for but a few minutes in the custody of an elder sister, sitting in the front door, and told him to sit still while she drew his papa's tea—he was hauling coal—poor—kept no servant.

These circumstances bear on the question of contributory negligence.

Chicago &c., Ry. Co. vs. Gregory, 58 Ill., 226.
R. R. Co. vs. Huffman, 28 Ind., 287.
Ihl. vs. 42d St. Ry. Co., 47 N. Y., 317.
Schmidt vs. Ry. Co., 23 Wis., 186.
O'Flaherty vs. Ry. Co., 45 Mo., 70.
Bellefontaine &c. Ry. Co., vs. Snyder, 18 Ohio St., 399, 409.

Error is assigned on allowing her to say she told him to "sit still."

But the question of the parent's or plaintiff's negligence, was excluded by the charge, and so this item objected to became inconsequential. No exception is taken, or error assigned on this part of the charge. So, this 7th assignment falls to the ground. As the case resulted, the jury found the defendant's agents actually saw the boy, and knew he was there, and then without necessity or excuse, deliberately proceeded to injure him. In such a case, of course, it becomes of no consequence how he came to be there, and this

part of the charge was consistent with the other part, limiting the right of recovery to the fact that the defendant knew of the boy's presence before he started the engine, and in time to have prevented the accident.

In such case, negligence on the part of plaintiff or his parents is not the proximate cause of the injury, and is not material.

Morris vs. C. R. & Q. R. Co., 45 Iowa, 29.
Wright vs. Brown, 4 Ind., 98.
Kerwhaker vs. Ry. Co., 3 O., 34. 172.
Isbell vs. N. Y. & N. H. Ry., 27 Conn., 404. et seq.

But we claim, even though defendant had not been aware of his presence, it would be under the circumstances, bound to *anticipate* his presence, and to use due care in that regard, and that it used no care, and hence this was sufficient ground for recovery, unless the negligence of the parents contributed to the injury, and therefore the testimony when offered was admissible to negative contributory negligence; it could have no other effect adverse to defendant. But even this effect was averted by refusing to let the jury pass on the question of the negligence; if it was error, it became immaterial, harmless and was cured by the charges, which is not excepted to.

V.

3d Assignment.

Humiliation was a proper element in affecting the actual damages.

Powers vs. Harlow, 53 N. W. R., 698.

So far as the Batterson case, 49 Mich., 185, conflicts, it must be regarded as overruled.

Injury to the feelings is actual damages, and a legitimate subject for compensation. The damages were not excessive at first.

Schmidt vs. Ry. Co., 23 Wis., 187, $8000 for the loss of an arm.

In McSimans vs. City of Lancaster, 23 N. W. Rep., 689, Wis., where the plaintiff's leg was merely injured below the knee, the verdict was $8000, and the court only reduced it to $5000, although on former trials the verdict had been but $2000.

In Furguson vs. Wis. Cen. R. R., 25 N. W. 123, $8000 was held not excessive, for an injury causing the loss of one half of one foot.

Within the last year a $20,000 verdict was obtained in N. Y. for a less serious injury to a little girl by street railway; and in July last, the Supreme Court of Mass. affirmed a judgment for $13,000 in favor of Patsy Collins, four years old, for the loss of an arm by the St. Ry.

Berg vs. Ry. 50 Wis. 419.

Yet, the court in this case cut down three thousand, without any pretence of passion, prejudice, ignorance or corruption on the part of the jury. The defendant has not received injustice by the jury's taking mortification and humiliation into account.

VI.

10th Assignment.

The best answer to this, is the testimony of the boy himself.

It was a matter in the discretion of the court below, and he passed upon it. The discretion is not shown to have been abused.

McGuire vs. People, 44 286.
State vs. Mannel, 64 N. C. 601.
State vs. Edwards, 79 " " 649.
Davidson vs. State, 39 Tex. 129.
Johnson vs. State, 61 Ga., 35.
Draper vs. Draper, 68 Ill., 17.
Blackwell vs. State, 11 Ind., 196.
State vs. Whitler, 21 Me., 341.
Wade vs. State, 50 Ala., 164.

VII.

11 Assignment.

This testimony was competent to contradict Martin. He had sworn, that the next morning after the accident, about 9 o'clock, he went up the track to Hastings St., in front of Woodlyn's House, to investigate, and had an interview with Rosa Bushey, and that she had said to him she know nothing about the accident, and did not see it. He did not pretend to have been there, but that once.

Woodlyn's testimony was to show that he, himimself, had been there all that morning, and saw Martin when he came, and when he went away, and that Martin's conversation was with him alone, and that Rosa Bushey, and the others he named, were not there.

This disposes of all the assignments of error.

The case we submit may be summarised briefly as follows:

In a very dangerous locality, entirely unguarded, in a densely populated district, where children may and do daily resort, and immediately adjacent to oc-

cupied private dwellings, and also to a public highway constantly traveled, a dangerous business is carried on, and machinery used of a very dangerous character, and very attractive to young children.

Besides the highway of Hastings street crossing the two tracks and passing along the premises and the ends of the side tracks, defendant claims there is also another highway, viz: Gnoin, formerly Pine street, passing through the ground eastward, between the two main tracks on the north, and the three side tracks on the south, which it claims the public had a right to use, and did use, and that the children resorted there to pick up coal, &c. (R. pp. 54, 21, 67-8.)

In fact, the premises were so dangerous, and people, especially young children, so constantly resorted there, that the defendants, by their evidence, practically admit that it was necessary to keep a constant lookout to avoid injuring them; besides, the watchmen at the crossing, overlooking the whole premises, and who swear they, as a rule, "did their best to keep children off," and besides the engineer, fireman, yardmaster, &c., there were switchmen, whose duty it was to keep a sharp lookout in front of the engines, and there was a plank there for them to stand on for that purpose, and he swears he used it for that purpose, and that it was a "part of his business."

Yet on this occasion, the engineer and one switchman saw him, and others had their attention called to him, and the watchman saw him on the premises; yet no one paid him any attention, or did a single thing to obviate the danger; but on the contrary, in broad daylight, before their open eyes, proceeded deliber-

ately to put him in extreme peril, starting up with a spurt and stopping with a jerk, throwing him to the ground and mangling his body.

Even had they not seen the boy, we believe the defendant would still be liable, for we believe it was its duty to be on the lookout and to know if anyone was in danger, and that by defendant's evidence it appears this duty was recognized, and attempts were made, as a rule, to perform it, and the neglect of it this time, had they not seen him, would have been negligence; but the court did not go so far, but held the defendant liable only in case its agents saw the boy before proceeding to inflict the injury upon him. This is certainly as favorable to the company as it can rightfully ask.

There can be no question of liability on that basis. The boy was in no immediate danger standing there, as long as the locomotive remained motionless; the danger arose from moving and operating the locomotive, and especially the wretched manner in which it was done. This was the act of the defendant. It was the proximate cause of the injury.

Had the boy suddenly rushed upon the track from some hidden retreat, while the engine was in motion, it would have been its duty to *stop* it on discovering him, if possible by doing so, to avoid injury; much more was it defendant's duty not to *start*, knowing it would put him in danger, until he was removed from in front of the engine.

Knowing he was there, the duty at once arose to refrain from killing or mangling him, no matter how he came to be there—whether his parents were to blame, or his guardians, or any other persons, nor, if

they were to blame, was it proper to decide to kill or wound him on the spot. The nature of the defendant's negligence was such, that if liable at all under the charge of the court below, the liability was without excuse.

We submit the judgment should be affirmed.

S. E. Engle,
Att'y for P'lff.

No 56

56

STATE OF MICHIGAN

SUPREME COURT

JAMES HUGHES,
By his next friend, etc.,
Plaintiff and Appellee,

vs.

The Detroit, Grand Haven & Milwaukee Railway Company,
Defendant and Appellant.

RECORD.

S. E. ENGLE,
Attorney for Plaintiff.

GEO. JEROME,
Attorney for Defendant.

DETROIT:
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