Hatty Higgins, Eliza Higgins vs. Hannibal + St. Joseph Railroad Company

Missouri Supreme Court
October 1865

Box 945
Folder 10

IN THE SUPREME COURT,

STATE OF MISSOURI.

HATTY HIGGINS, AN INFANT,
BY ELIZA HIGGINS, HER GUARDIAN,
Respondent,
vs.
THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Appellant.*

In the Supreme Court at St. Louis—October Term, 1865.
Appeal from Hannibal Court of Common Pleas.

Statement of the Case.

On the 14th day of April, 1862, respondent commenced suit in the Hannibal Court of Common Pleas, against the appellant, to recover the sum of $5,000, for the death of her father, Thomas G. Higgins, caused by the alleged negligence of appellant. There are two counts in the petition for the same cause of action. They are substantially the same. In the first count it is alleged that said Thomas G. Higgins was a passenger on appellant's railroad, on the 16th day of September, 1861, to be carried from the city of Hannibal to , for a certain hire or reward; that that part of appellant's railroad, at a point lying between Bear Creek and Barkley stations, was defective and insufficient; that the cars at said point were thrown from said railroad and down into a certain culvert thereon, whereby said Thomas G. Higgins was killed; that the respondent was his only child, and a minor of the age of about two years. There is no allegation in said count, or even in the petition, that Eliza Higgins is the guardian or next friend of the respondent, or even that she is any relation to her; nor is any authority shown in said petition or elsewhere, for said Eliza Higgins to institute this suit in the name of Hatty Higgins. The appellant, in

he cannot have judgment. (Williams *vs.* Hingham and Quincy Bridge and Turnpike Corporation, 4 Pick. R. 341; Bartlett *vs.* Crozier, 17 John. R. 439; Spieres *vs.* Parker, 1 Durnford and E. R. 141; Welton *vs.* Pacific R. R. Co. 34 Mo. R.) What says the Supreme Court of Massachusetts in Williams *vs.* Hingham etc., *supra?*

"The cases before cited sufficiently establish the rule that where an action is given by statute, and in another section or subsequent statute, exceptions are enacted, the plaintiff need not take notice of these exceptions in his count, but leave it to the defendant to set them up in his defense. But where *the exception or limitation is contained in the same section which gives the right of action, the plaintiff must negative* the application of them to *his ground of action.*"

Now, one very important fact, to entitle the respondent to recover in this case, is not alleged in said count, viz: that the defect or insufficiency complained of was a *negligent defect or insufficiency.* Then the respondent is not entitled to recover, although there may have been a defect or insufficiency in the appellant's road at the time and place alleged. This ingredient of *negligence* is an essential element in the respondent's cause of action. It is a *sine qua non* to her making out a legal cause of action. It is a limitation upon her right of action; and being in the *same section* which confers upon her a right of action in certain eases, she must negative the conclusion that the defect or insufficiency complained of was not simply a defect or insufficiency; for the appellant is not liable in damages for an injury resulting in death from a mere defect or insufficiency. There must be more. The death must result from a *negligent* defect or insufficiency. There are no facts alleged in this count showing in what the defect or insufficiency complained of consisted, so that the Court can see that the defect or insufficiency complained of was a *negligent* defect or insufficiency. The pleader has merely alleged a conclusion of law, without first stating *any facts* upon which to base said conclusion. This is in violation of all rules of pleading. It is the duty of the pleader to state the facts constituting the cause of action, and then it is the duty of the Court to declare the law arising on the *facts* stated, or in other words, to say what is the legal conclusion arising upon the facts stated. This fundamental principle of the law of pleading has been entirely ignored in this case. No facts or fact is alleged in said count, showing *any* negligent defect or insufficiency in the appellant's road, or from which any such defect or insufficiency may even be inferred. It even fails to show any

defect or insufficiency of any description whatever. This count, then, is so radically defective in this vital particular, that it totally fails to show that the appellant was guilty of such "negligence, unskillfulness or criminal intent" as to make it liable in damages for the death of Thomas G. Higgins.

Another objection to this count is, that it does not allege that by means of the premises or of the facts stated, that the appellant "forfeited" the sum of $5,000 to the respondent, whereby an action accrued to the respondent to recover the same, by virtue of the statute in such cases made and provided, or by referring to the statute by its title. This is a penal statute and an innovation upon the common law, and must be construed strictly. The respondent has no cause of action against the appellant according to the rules of the common law. Then, if she has any at all, it must be by virtue of this statute. She has not brought herself within the *letter* of the statute by her petition; and not having done so, she has failed to show any legal cause of action against the appellant. Hence the motion in arrest of judgment should have been sustained. (Safford *vs.* Drew, 3 Duer, R. 627, § 53, article VI, of Practice Act.)

III. The respondent's father, Thomas G. Higgins, was an employee at the time of the accident which resulted in his death, and hence the appellant is not liable in damages for his death.

The principle of the common law is old and well established, that an employee cannot recover damages off the employer for injuries sustained by the negligence of a co-employee. (Farwell *vs.* Boston and Worcester R. Corporation, American Railway Cases; Murray *vs.* South Car. R. R. Co., 1 McMullan R., 385; Russell *vs.* Hudson River R. R. Co., 17 N. Y. R. 134; Coon *vs.* Syracuse, R. R. Co., 1 Selden R., 492; Boldt *vs.* N. Y. C. R. R. Co., 18 N. Y. R., 432; Sherman *vs.* Rochester & Syracuse R. R. Co., 17 N. Y. R., 153; McDermott *vs.* Pacific R. R. Co., 30 Mo. R., 115; Gillshannon *vs.* Stony Brook R. R. Co., 10 Cush. R., 228; Degg *vs.* Midway Railway Co., Hurl. & Norm., Exchequer R., 773.)

Ah! but says the counsel for the respondent, Thomas G. Higgins was not an employee of the appellant at the time of the disaster, and if he was, he was not *on duty* at the time, and hence, the law applicable to the relation of master and servant is not applicable to this case. To this, it is answered that he had been in the employ of the appellant as a brakeman, for five or six months prior to the morning

of the accident which resulted in his death; and whilst it is true that he was not *on duty* at the time of the accident, still he had neither been discharged nor paid off by the appellant; the appellant was owing him wages for his services as brakeman, and there was no evidence showing that he had quit the employ of the appellant. On the contrary he acted, and was treated by the conductor, as an employee when he got upon the train that morning. The engineer, knowing him and the relation which he sustained to the appellant, slacked the speed of the train, then from a sixth to a quarter of a mile out from the regular starting point, so that he could get on, he having signaled to the engineer to do so; and then, instead of getting into one of the passenger coaches, where there was plenty of room, as a passenger would have done, and the proper place for a passenger, he got into the baggage car and rode in it until the accident occurred. The conductor knew him, and knew the relation he sustained to the appellant, and the custom of the appellant not to charge or exact any fare from its employees, hence he charged him *no fare*. He had been an engineer for a few months on appellant's road in 1858, and afterwards fireman. The rules and regulations of the appellant prohibited passengers and employees not connected with the train, from riding in the baggage car. He knew these rules. It was proved by Colonel Hayward, the General Superintendent of the road, and other experts, that the *baggage car* is one of the most dangerous places on the train in case of an accident. Higgins, from his experience in railroading, knew this fact, or he must have been a very stupid man if he did not. Still, he voluntarily placed himself in the baggage car. The facts all show that he voluntarily acted, and was accorded the privileges of an employee. But he was not *on duty* at the time of the accident, says the counsel for the respondent. This makes no difference. He acted as, and was accorded the privileges of an employee. He was simply off duty on account of the troubles along the line of the road. For aught that the evidence shows, he was then going out on the road to resume his vocation for the appellant. Besides, we have the case of Russell *vs.* the Hudson River R. R. Co., (17 N. Y. R. 134,) directly in point, that the fact that an employee not on duty, who gets injured in consequence of the negligence of a co-employee, is not entitled to recover damages therefor. The principle thus enunciated was entirely ignored by the 6th and 7th instructions given on behalf of the respondent, and on this principle the 1st, 2d and 5th instructions asked by the appellant ought to have been given.

IV. But, if it shall be held that said Higgins was a passenger at the time of the accident which resulted in his death, then the appellant is not liable in damages therefor, for the reason that as a passenger he had no right to ride in the *baggage car*.

"In case any *passenger* on any railroad shall be injured, while on the platform of a car, or *in any baggage*, wood or freight car, in violation of the printed regulations of the Company, posted up at the time in a conspicuous place inside of its passenger cars then in the train, such Company shall not be liable for the injury: Provided, said Company, at the time, furnished room inside its passenger cars sufficient for the proper accommodation of the passengers." (§ 54 R. S. p. 438.)

The evidence shows that there were two passenger coaches in the train the morning of the accident, and but few passengers; that there was not only room sufficient inside of said coaches for the respondent's father to ride, but there was ample room. The evidence offered by the appellant to prove that printed notices were posted up at the time in a conspicuous place inside of its passenger cars then in the train, and likewise in the baggage car, was relevant to the issue, and ought to have been received. These notices prohibited passengers from riding in the baggage car. The respondent's father was well aware of these regulations. Still he disregarded them. A baggage car is a very dangerous place in case of an accident. The statute requiring printed regulations prohibiting passengers from riding in the baggage car, is founded in wisdom. The appellant had complied with this rule strictly by having the printed regulations posted up, not only in a conspicuous place inside of the passenger cars in the train, but likewise in the baggage car. It even used more diligence than the law required it to use. Moreover, the respondent's father was fully aware of these printed regulations. Still he deliberately violated them. Notwithstanding all these facts, the Court below instructed the jury "that this fact, *i. e.*, traveling in the baggage car, will not preclude a recovery in this case, if the jury shall find from the evidence that said Higgins was in said baggage car with the knowledge of the Conductor, and without objection from him, even though the jury may find from the evidence, that said Higgins *might or would not have been injured if he had been in the passenger car, when the accident that resulted in his death occurred.*" (Fifth instruction given for respondent.) This instruction totally ignores this reasonable regulation prescribed by the statute, and observed by the appellant.

It furthermore entirely ignores that old and well established principle of common law, that when a party's own conduct contributes to the injury sustained, he cannot recover, although the other party may have been guilty of negligence. (Ernst *vs.* Hudson River R. R. Co. 24 Howard Pr. R. 97; Gahagan, admix., *vs.* Boston and Lowell R. R. Co., 1 Allen R. 187; Wilds *vs.* Hudson River R. R. Co., 24 N. Y. R. 430; Steves *vs.* Oswego and Syracuse R. R. Co., 18 N. Y. R. 422; Broks *vs.* Buffalo and Niagara Falls R. R. Co., 25 Barb. R. 600; Haring *vs.* N. Y. & E. R. R. Co., 13 Barb. 9.)

"The plaintiff must present a case of *unmixed* negligence; a case where the injury is the result, *exclusively*, of the defendant's negligence; where no negligence or fault of his own *contributed* in any degree in producing such injury. A party suing for negligence must come into Court faultless. He must not present a mere *balanced* case. The burden of proof is upon him, and he must satisfy the Court, by the greater weight of the testimony, that without any carelessness or blame on his part, he has suffered an injury from the wrongful act, default or negligence of the defendant. For such injury the law gives redress. This is the principle upon which the action for negligence at common law is based." Ernst *vs.* Hudson River R. R. Co., *supra.*

Again: "It is incumbent upon the plaintiff to show, by *affirmative evidence, that he was in the use of due care;* and upon this point he has the burden of proof. (Adams *vs.* Carlisle, 21 Pick. R. 146.) When, therefore, a plaintiff offers no evidence that he was in the exercise of care, but on the contrary, the whole evidence upon which his case rests shows that he *was careless*, we have held that the Court may rightfully instruct the jury as a matter of law that the action cannot be maintained. (Lucas *vs.* Taunton and New Bedford R. R. Co., 6 Gray 64; Gilmore *vs.* Deerfield, 16 Gray ; Gavett *vs.* Manchester and Lawrenceburg Railroad, 16 Gray." Cited from 1 Allen 187.)

"The law says to the defendant, if you have by simple negligence caused this injury, so far as you are concerned the ground of action is complete. At the same time it says to the plaintiff, although, so far as the defendant's acts are concerned, the case is made out, you cannot prevail, if you have, by your simple negligence, *helped to bring about the injury.*" (Wilds *vs.* Hudson River R. R. Co., 24 N. Y. R. on p. 432.)

Now, how does the conduct of Higgins correspond with the principle enunciated in the foregoing decisions? Was he *faultless* himself? What does the evidence show? That, in the first place, he voluntarily placed himself in one of the most dangerous places on the whole train in case of an accident, viz: the baggage car. In the second place, he either stood up in the baggage car, right opposite the door thereof, which was open; or he sat in a chair right opposite said door, with *his feet up* against one of the stanchions. This was the most dangerous position in which, as the sequel proved, that he could have possibly placed himself. The instant the baggage car commenced turning over it pitched him right through the door, and then the projection of the roof fell across his breast and killed him. This result was inevitable in case the baggage car turned over. There was nothing to catch, or prevent him from being thrown through it. Instead of being *faultless*, then, was he not guilty of gross carelessness?

It is against the rules of the appellant, and of all railroad companies, to allow passengers to ride, either on the platform of the cars, or in the baggage car. The accident in this case proves the wisdom and propriety of the rule. There were only two persons on the train that got hurt. The one was Higgins in the baggage car, and the other was a passenger, who, instead of remaining in his seat inside of the passenger car, was on the *platform* at the time of the accident. He got his ancle mashed. The Court below erred then in refusing the instructions asked by the appellant, in regard to *contributory* negligence.

The 12th instruction is based upon the principle that an employee cannot recover, unless the Company, prior to the accident, had *notice* of the defect or insufficiency in the culvert. This instruction enunciated a correct principle, and ought to have been given. (McMillan *vs.* Saratoga and Washington R. R. Co., 20 Barb. R. 449; Keegan *vs.* Western R. R. Corporation, 4 Seld. R. 180.)

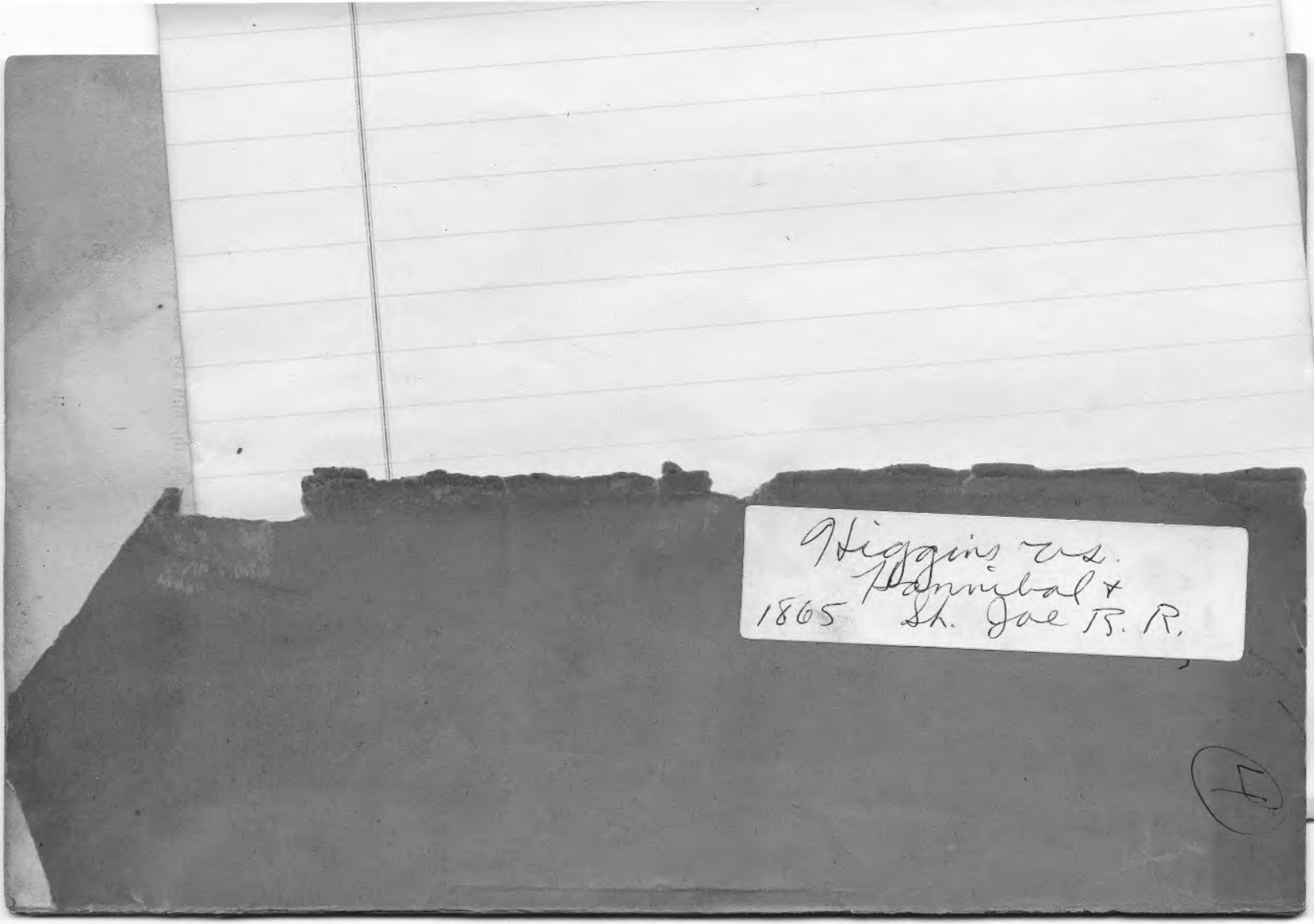
If the Court shall be of opinion that the first count in the petition (the jury having found for the appellant on the second count, it is practically out of the case as it is now presented,) is sufficient under the statute to support the verdict, then the case may be resolved into the following propositions: 1st—Higgins was an employee at the time of the accident, and if he had survived, he could not have recovered; 2d—If he was a passenger, being in the baggage car, when there was plenty of room inside of the passenger cars, he cannot recover; 3d—His own conduct contributed to his death, and for that reason, the

respondent as his minor child cannot recover. It is not deemed necessary to discuss the instructions given *seriatim.* Whenever they are tested by the foregoing principles, they will be found to be erroneous.

There are two exceptions to the liability of a common carrier according to the common law, viz: the act of God and of public enemies. The very great and unusual rain in the immediate vicinity of the culvert in question, by which the lower part of it was washed out, leaving the superstructure and earth over it standing apparently all right, certainly belongs to the former class; and the furious civil war that was then raging, not only in the immediate vicinity of said culvert, but all along the line of appellant's road, and the numerous acts of hostility by the public enemy to the road and the employees along it, certainly belong to the latter class. Instructions on both these points were refused. Now the evidence in the case certainly warranted the giving of the instructions asked on these points.

For the foregoing reasons it is respectfully submitted that the judgment of the Court below ought to be reversed.

CARR,
Attorney for Appellant.


Higgins vs.
Hannibal &
1865 St. Joe R. R.

its answer to said count, denied that said Thomas G. Higgins was received as, or was a *passenger* on its railroad as alleged; but on the contrary, he was at the time alleged, an employee of appellant, and received as such into the baggage car; that he was not traveling as a passenger for hire or reward to appellant, but free from charge. Appellant admitted that its road was, on the 16th day of September, 1861, defective at the culvert mentioned, but alleged that said defect was caused by a rain the night before, which left said culvert in such condition that the defect could not be discovered by the exercise of reasonable care and diligence. Appellant averred that it exercised proper care and diligence to have and to keep said road in safe and secure condition, and likewise in running said train on which said Thomas G. Higgins was, at the time of the accident referred to in respondent's petition.

Appellant further alleged that there was then war in Missouri, and its road and its employees along the same were frequently interrupted by armed bands of outlaws and marauders, and particularly in the neighborhood of said culvert, and in consequence thereof it was impossible to keep as strict watch over said road as in peaceful times. Wherefore appellant alleged that said defect was not a negligent defect, nor was the same the result of any neglect or want of care on the part of appellant.

At the December term, 1862, of said Court, the appellant filed the following motion to dismiss the suit:

Defendant moves the Court to dismiss the above entitled cause, for the following reasons.

Because the plaintiff is an infant, and has no capacity to sue only by a guardian properly appointed by some Court of competent jurisdiction, or by a next friend duly appointed by the Court in which the suit should be brought, or by a Judge or a Clerk thereof.

And because the plaintiff does not sue either by a guardian properly appointed by some Court of competent jurisdiction, or by a next friend duly appointed by this Court, before the institution of this suit or even since the institution of it.

Which motion the Court overruled. To the overruling of which, appellant at the time excepted. At the same term the respondent was allowed to sue as a poor person, and a motion made by appellant to

rule her to security for costs, overruled. To the overruling of which appellant at the time excepted.

The case was tried at the June term, 1864, of said Court. The evidence tended to show that said Thomas G. Higgins was the father of the respondent and she is his only child; that he, for five or six months prior to the 16th of September, 1861, had been in the employ of the appellant as brakeman; that about 7 o'clock on the morning of the 16th of September, 1861, appellant's passenger train left the depot in Hannibal, bound west, and when it had got out about from a sixth to a fourth of a mile, said Thomas G. Higgins signaled to the engineer (Mr. Burton,) to slacken the speed of the train, and the engineer knowing Higgins, did so, and he got into the baggage car and rode in it to the culvert where the accident occurred, which resulted in his death; that the conductor, knowing him to be an employee, according to the custom of appellant did not charge him any fare; that on the day of the accident he was not on duty; that a furious civil war had been raging at that time and for several months before, in that part of the State; the track of appellant's road had been torn up, culverts and bridges burned and destroyed, cars burnt and trains fired into almost daily, and appellant's employees driven off the road so they could not attend to their work on the track; that there had been a very great and unusual rain in the immediate vicinity of the culvert where the accident occurred, the night before the accident occurred, which had washed out the lower part of the culvert, leaving the superstructure and the earth over said culvert standing apparently all right; that when the locomotive drawing the train ran on the superstructure over the culvert it gave way on the lower side, and in consequence thereof, the baggage car in which said Thomas G. Higgins was riding was thrown down the embankment (about 12 or 15 feet high there,) on its side, and said Higgins (who was standing up at the time opposite the door of said car, the door being open,) was thrown through said door on the side of said embankment, on his back, and the projection of the roof of said car fell across his breast and killed him. The engineer was very careful and skillful, and he and the fireman both were at the time keeping the strictest watch possible, for defects and insufficiencies and obstructions on the track; that the defect in question could not be seen from the engine as they approached said culvert. There was evidence pro and con. as to whether said culvert had been properly constructed, and was in a safe condition at the time of the accident. There were two

passenger coaches in the train, and plenty of room for said Thomas G. Higgins to ride in them.

The appellant proved by J. T. K. Hayward, the General Superintendent for the Company, and his son, who is his clerk, that there had been notices put up inside the passenger coaches and on the baggage car of said train in 1859, and that they were up at the time of the accident; that said notices, through accidents, had all been destroyed or lost; that he and his clerk had made diligent search for copies of said notices in all places where they had been, or were likely to be found, but they had not succeeded in finding any copy of said notices. The appellant then offered to prove by secondary evidence the contents of these notices. But the respondent's attorney objected to the introduction of such evidence. The Court sustained such objection, and rejected such evidence as inadmissible, on the ground that it was improper, irrelevant, and had no bearing on the issue in this case. To which ruling of the Court the appellant at the time excepted.

Appellant's attorney then offered to prove by witnesses that, at the time of the accident, notices were posted up in the baggage car, and also in the passenger cars of the train, on which said Higgins was at the time of the accident, in words and figures following: "No passengers are allowed to stand or ride on the platform of the cars, or in any baggage, wood or freight car; and any one violating this rule will do so entirely at his own risk.

J. T. K. HAYWARD, *Gen'l Sup't.*"

But respondent's attorney objected to the introduction of such evidence. And thereupon the Court sustained the objection, and rejected such evidence as inadmissible, on the ground that it was improper, not relevant, and had no bearing on the issue in this case. To which ruling of the Court the appellant at the time excepted.

On the motion of the respondent, the following words in the deposition of A. W. Griswold, a witness for the appellant, and the conductor of the train at the time of the accident, were suppressed, viz: "Treating him as an employee of the Company." To which ruling of the Court the appellant at the time excepted.

At the request of the respondent the Court gave the following instructions to the jury:

1. By the answer in this case, defendant admits that it was on the 16th day of September, 1861, the owner of the railroad, cars, locomotive, &c., named in the plaintiff's petition; and admits that Thomas

G. Higgins, on the 16th day of September, 1861, was traveling on said railroad, and while so traveling on said railroad the said Thomas G. Higgins was killed, and did die from an injury received on the said railroad, and that his said injury and death was occasioned by a defect and insufficiency in said railroad. If the jury find from the evidence that the said Thomas G. Higgins, at the time of receiving said injury and death, was a passenger on said railroad, and that the plaintiff was and is the minor child of the said Thomas G. Higgins (and his only minor child), the jury will find for the plaintiff on the first count of plaintiff's petition, and assess the damages at five thousand dollars, unless the defendant has shown to the satisfaction of the jury that the defect or insufficiency in said railroad was not a negligent defect or insufficiency.

2. In order to constitute the said Thomas G. Higgins a passenger on said railroad under the law, it is not necessary that he should actually have paid any passage money or fare: the defendant had the right to demand from him the fare or passage money paid by other travelers on said railroad, and if the defendant declined or neglected to collect said fare or passage money from said Higgins, the fact does not constitute the said Higgins less a passenger on said railroad.

3. If the jury find from the evidence that the said Thomas G. Higgins was lawfully upon the railroad of the defendant, and while on the said railroad his death was caused by the wrongful act, neglect, or default of the defendant, in the not keeping in safe and secure condition the said railroad or any part thereof, and if the jury further find from the evidence that the plaintiff herein was, at the said date of said Thomas G. Higgin's death, and is his only minor child, then the defendant is liable to plaintiff in damages, and the jury will find for the plaintiff, and assess her damages at such sum as the jury may think proper, from all the evidence, not exceeding five thousand dollars.

4. If the defendant by its servants undertook to carry Thomas G. Higgins along the Hannibal & St. Joseph railroad, and while so conveying him along said railroad, the said Higgins was injured and killed by means of a defect or insufficiency in any part of said railroad, or of any culvert on said railroad, and if the jury believe from the evidence that the plaintiff is, and was, at the time of the said injury and death, the minor child of said Higgins, then the defendant is liable to the said plaintiff for the injury and death of said Higgins, caused or occasioned

by said defect or insufficiency, although no compensation was to be paid to the Company for conveying said Higgins.

5. Although the jury may find, from the evidence, that the said Thomas G. Higgins was, at the time of the injury and death aforesaid, traveling in the baggage car on said railroad, this fact will not preclude a recovery in this case, if the jury shall find from the evidence that said Higgins was in said baggage car with the knowledge of the Conductor, and without objection from him, even though the jury may find from the evidence, that said Higgins might or would not have been injured if he had been in the passenger car, when the accident that resulted in his death, occurred.

6. If the jury find from the evidence that the said Thomas G. Higgins was received into the cars of the defendant by the Conductor of the train, and the train was a passenger train running for the carrying of passengers for hire, the law presumes that the said Higgins was received as a passenger, and as such he was entitled to all the privilege and rights accruing to any other passenger, unless the evidence shows to the satisfaction of the jury that he was received on said train as a hand or employee on said train to assist in working and running the said train.

7. Unless the jury find, from the evidence, that said Higgins was in the employment of the defendant, and by virtue of said employment was bound to perform service, and entitled to wages from the defendant on the day and at the time he was killed, then said Higgins did not on said day stand in the attitude of a servant to defendant, nor of a co-servant with the employees, or co-servant conducting and managing the train on which the accident occurred.

To the giving of which instructions the appellant at the time excepted.

The defendant's attorney then asked the Court to give the following instructions to the jury:

1. If the jury believe from the evidence that Thomas G. Higgins was employed by the defendant to act as brakeman on one of its trains on its road, and on the morning of the 16th of September, 1861, he got into the baggage car of the defendant's passenger train bound west, and paid no fare, but acted and was treated as an employee by the Conductor of said train, and when said train got out to the culvert at or near the seven mile post on defendant's road, the baggage car in which said Higgins was riding was precipitated from the track and

down an embankment, and the said Higgins was thrown out of the car and killed, they will find for the defendant, notwithstanding they may believe from the evidence that said Higgins was not acting as such brakeman at the time of such accident, and notwithstanding the plaintiff was an infant, and only child of said Higgins.

2. If the jury believe from the evidence that Thomas G. Higgins was employed by the defendant to act as brakeman on one of its trains on its road, and on the morning of the 16th of September, 1861, he got into the baggage car of the defendant's passenger train bound west and paid no fare, and acted and was treated as an employee by the Conductor of said train, and when the said train got out to the culvert at the seven mile post on defendant's road, the baggage car was precipitated from the track and down an embankment, and said Higgins was thrown out of said car and killed, they will find for the defendant, notwithstanding they may believe from the evidence that said Higgins was not acting as such brakeman at the time of the accident.

3. If the jury believe from the evidence that Thomas G. Higgins was killed on the 16th of September, 1861, in consequence of a part of the culvert at the seven mile post on defendant's road being defective by reason of an unusually heavy rain the night before having washed out the lower part of said culvert, and said defect could not be seen by the engineer in charge of the locomotive attached to the train while in the discharge of his duty, and they further believe from the evidence that said engineer was a safe, skillful and prudent engineer, and that he exercised reasonable care and skill in running his locomotive that morning, and in watching for defects and obstructions upon the track, they will find for the defendant.

4. If the jury believe from the evidence that Thomas G. Higgins was a passenger on defendant's train in the baggage car, and shall further believe that passengers were by the rules and regulations of the Company prohibited from riding in the baggage car, and that said Higgins had notice of said prohibition at and before the time of accident, and they further believe from the evidence that the defendant furnished sufficient room inside its passenger cars for the proper accommodation of the passengers, they will find for the defendant.

5. If the jury shall believe from the evidence that Thomas G. Higgins was not, at the time of the accident which resulted in his death, in the employ of the defendant, and shall further believe that by the general

rules and regulations of the defendant, its engineers and conductors were prohibited from admitting persons not in its employ to ride in the baggage car, and that said Higgins was aware of said rules and regulations, and was permitted to ride in the baggage car by the Conductor, without paying fare, and was killed while so riding, he was a wrong-doer. The permission of the Conductor conferred no legal right, and the plaintiff cannot recover.

6. That if they shall find from the evidence that competent engineers were by the defendants employed to superintend and build that portion of the railroad at which the accident occurred, and they did superintend and direct the building of same, then the defendant was guilty of no neglect in the construction or building of the culvert in question.

7. If the jury believe from the evidence that there was neglect or want of care on the part of Thomas G. Higgins, which contributed to his death, the plaintiff cannot recover, and the verdict should be for the defendant.

8. If the jury believe from the evidence in the cause that Thomas G. Higgins, at the time of the accident, was in the baggage car, sitting in front of, or standing near the south door thereof, and that the position occupied by Higgins was more dangerous than a position in the passenger coaches, and that said Higgins had been previously employed on defendant's road as an engineer and brakeman, and knew these facts, then there was negligence on his part, which conduced to the injury resulting in his death, and the verdict should be for the defendant.

9. If the jury believe from the evidence that the proximate cause of the accident described in plaintiff's petition, which resulted in said Higgins' death, was occasioned by the act of God, in sending down an unusual rain in the immediate vicinity of the culvert where said accident occurred, they will find for the defendant.

10. If the jury believe from the evidence that said Higgins paid no fare, and was passing on the railroad free of charge, in order to entitle the plaintiff, as his minor child, to recover damages, *she must prove gross negligence*, which is the omission of that care which even the most thoughtless take of their own conduct.

11. That if the negligence of the deceased in any manner contributed to cause the injury which resulted in his death, the plaintiff cannot recover.

12. If Thomas G. Higgins was an employee of defendant at the time of the injury which resulted in his death, the plaintiff must show by evidence that, prior to the accident, defendant had notice of the defect or insufficiency in the culvert.

13. Notice to an employee or agent of defendant is not notice to the defendant, but plaintiff must show by proof that the President or Directors, or some one of them, were, prior to the accident, notified of the defect or insufficiency.

14. If the jury believe from the evidence, that the foreman of the section on which was the culvert at which the defect or insufficiency complained of, was competent, careful and skillful, and that he went or sent some of his men over his section every day, and examined the track and road carefully on the Saturday before the accident, and discovered no defect or insufficiency in said culvert, and they further believe from the evidence that trains ran safely over said culvert the evening preceding said accident, and that an unusually heavy rain fell in the immediate vicinity of said culvert the night before said accident, and that the rain was not heavy in the City of Hannibal and its vicinity, and that said section foreman resided in said City of Hannibal, and that the lower part of said culvert was washed out by said rain, leaving the top of the same and the superstructure standing, apparently all right, and that the said Thomas G. Higgins was in the baggage car of the train, and said baggage car was precipitated from the track in consequence of the washing out of said culvert, and said Higgins was killed thereby, that the defendant exercised reasonable care and diligence in keeping its road and track in good order, and they will find for the defendant.

15. If the jury believe from the evidence that the culvert at which the accident in question took place was properly constructed for the purpose for which it was designed, and that it was in a safe and proper condition up to the evening preceding said accident, that the accident resulting in said Higgins' death was caused by the washing out of the lower part of said culvert by an unusually heavy rain the night before, and that the defect occasioned thereby was not visible to the engineer on the locomotive of the train that met with the accident, by the exercise of care and skill while in the discharge of his duty, such defect was not a negligent defect for which the defendant is liable, and they will find for the defendant.

[B.] If the jury believe from the evidence that the culvert described in plaintiff's petition was in a safe and secure condition up to the night preceding the accident which resulted in said Higgins' death, and that the lower part of said culvert was washed out during said night by an unusually heavy rain which fell in the immediate vicinity of said culvert, then said washing out of said culvert was not a negligent defect or insufficiency so as to render the defendant liable therefor, and they will find for the defendant.

[A.] If the jury believe from the evidence that the defect in defendant's road which occasioned said Higgins' death, was not the result of negligence on the part of the defendant, and such defect was not a negligent defect or insufficiency, they will find for the defendant.

Those marked "A" the Court gave, but the balance of said instructions the Court refused to give. To which refusal of the Court to give said instructions the defendant at the time excepted.

Thereupon the Court, on its own motion, gave the following instructions in lieu of those marked "B":

If the jury believe from the evidence in the cause that the culvert described in plaintiff's petition was in a *safe* and *secure* condition, and *free from any defect or insufficiency* as a culvert *up to the night preceding the accident* in question, which resulted in the death of Thomas G. Higgins, and that the lower part of said culvert was washed out during said night, by an unusually rain which fell in the vicinity of said culvert, and which washing out did not result from any pre-existing defect or insufficiency of said culvert, which reasonable skill and care on the part of defendant could have prevented or remedied, then they will find for the defendant.

To the giving of said instruction the defendant at the time excepted.

The cause was then submitted to the jury, who found the following verdict for the plaintiff:

"We the jury find for the plaintiff, on the first count, the sum of five thousand dollars, and find for the defendant on the second count.

BENTON COONTZ, *Foreman.*"

The defendant then filed the following motion to set aside the verdict and grant a new trial, to-wit.

"Defendant moves the Court to set aside the verdict of the jury in the above entitled cause, and grant a new trial, for the following reasons:

"1. Because the Court admitted improper, irrelevant and illegal testimony, upon the trial of the said cause, on the part of the plaintiff.

"2. Because the Court excluded from the jury, on the trial of said cause, proper, relevant and legal testimony, on the part of the defendant.

"3. Because the Court, at the request of the plaintiff, gave to the jury improper and illegal instructions.

"4. Because the Court refused to give proper and legal instructions to jury on the part of the defendant.

"5. Because the Court, on its own motion, gave to the jury improper and illegal instructions.

"6. Because the jury found said verdict without evidence.

"7. Because the jury found said verdict against the weight of evidence.

"8. Because the jury found said verdict contrary to law.

"9. Because the jury found said verdict against both law and evidence.

"10. Because the jury found for the plaintiff, when they should have found for the defendant."

Which motion the Court overruled. To the overruling of which the defendant at the time excepted.

The defendant likewise filed the following motion in arrest of judgment:

Defendant moves the Court to arrest the judgment in the above entitled cause, for the following reasons:

1. Because the plaintiff has no legal capacity to sue, being a minor.

2. Because the plaintiff being a minor, can only sue, *first*, by a next friend, appointed by the Court in which the suit is instituted, or *second*, by a guardian duly appointed by some Court of competent jurisdiction, or *third*, by the mother of the plaintiff, if living, as the natural guardian, and then the money sued for not being derived from such natural guardian, said guardian is required to give security and account for the money so recovered as other guardians; and it is not averred in the first count in plaintiff's petition that said Eliza Higgins has been appointed to act either as the guardian or next friend in

any of the modes aforesaid, or that she is the mother of and natural guardian of plaintiff, and has given security according to the statute in such cases made and provided, so as to authorize her to institute and prosecute this suit on behalf of the plaintiff.

3. Because the plaintiff in said count does not allege facts sufficient to constitute a cause of action.

4. Because it is not averred in said count that the plaintiff was dependent on Thomas G. Higgins for her support.

5. Because it is not averred in said count that the plaintiff sustained damages by the death of said Thomas G. Higgins to the amount sued for.

6. Because it is not averred that the plaintiff, as the surviving minor child of said Thomas G. Higgins, suffered pecuniary loss or injury by his death to the amount sued for.

7. Because it is not averred that defendant was a common carrier of passengers for hire or reward between the places mentioned in said count, at the time of the alleged injury.

8. Because the defect or insufficiency complained of in said count is not specified.

9. Because it is not averred in said count that the defect or insufficiency complained of was caused by the neglect, unskillfulness, criminal intent, or any other improper act, or conduct on the part of defendant, its officers, agents or servants.

10. Because it is not averred in said count that the defendant had notice of the defect or insufficiency complained of prior to the death of said Thomas G. Higgins.

11. Because the facts alleged in said count do not show any legal cause of action according to the rules of common law, nor are they based upon any statute of this State authorizing a suit to be maintained for the injury complained of, nor do the facts therein alleged bring said count within the purview of an Act entitled "An Act for the better security of life, property and character," approved December 12th, 1855.

Which motion the Court overruled. To the overruling of which the defendant at the time excepted, and brings this case to the Supreme Court by appeal.

On this record the following points arise:

I. The respondent being an infant, has *no capacity to sue*, only in the mode prescribed by the Practice Act, viz: either, *first*, by the

guardian of such infant, or *second*, by a next *friend* appointed by the Court in which such suit is to be brought, or by a Judge or Clerk thereof.

II. There are not sufficient facts alleged in the first count of the respondent's petition, upon which the jury found their verdict, to support said verdict.

III. Thomas G. Higgins was an employee of the appellant at the time of the accident which resulted in his death, and hence the appellant is not liable in damages therefor.

IV. But if it shall be held that said Higgins was a passenger, then the appellant is not liable, for the reason that as a passenger he had no right to ride in the baggage car.

I. The respondent being an *infant*, *has no capacity to sue*, only in the mode prescribed in the Practice Act. Has she complied with the terms upon which her right to sue depends? The eighth section of the second article (R. S., p. 1218,) of said Act is as follows:

"Suits by infants *may* be commenced and prosecuted, either, *first*, by the guardian of such infant, or, *second*, by a next friend appointed for him in such suit."

There is no allegation in the first count in respondent's petition, (the jury having found their verdict on said count,) nor even in the other count in said petition, that Eliza Higgins had been appointed guardian of the respondent by any Court of competent jurisdiction, or even by any Court at all. It is not even alleged that she is the *natural* guardian of the respondent, so as to authorize her to institute suit in behalf of the respondent in that capacity. The fact whether she was guardian or not at the institution of this suit, was a material, *traversable* allegation, and ought to have been alleged. And it ought to have been alleged *how* and *when* she was appointed such guardian. Then the appellant could have joined issue on the fact whether she was such guardian or not, just as it saw proper. Eliza Higgins had no more authority, legally speaking, to "commence and prosecute" this suit in the name of the respondent, without first showing by what authority she did so, than a man would have to "commence and prosecute" a suit on the estate of some person who had died intestate, for some injury to the estate of such intestate, without alleging his appointment as administrator by some Court of competent jurisdiction and making profert of his letters of administration. Or of some man commencing

and prosecuting suit as executor of the last will of another, for some wrong done to the testator's estate, without first making probate of the will and obtaining letters testamentary, and alleging these facts and making profert of his letters testamentary. The letters of administration in the former case, and the letters testamentary in the latter case, constitute his authority for commencing and prosecuting the suit.

The other mode of commencing and prosecuting a suit by an infant is by a *next friend*. Has this suit been commenced and prosecuted by a next friend? Eliza Higgins does not style herself as the next friend of the respondent in the petition. It is not so alleged. It ought to be, in order to show legal authority to commence and prosecute this suit. The first section of the third article of the Practice Act (R. S. p. 1219,) says:

"The appointment of a next friend for an infant *shall* be made by the Court in which the suit is intended to be brought, or by a Judge or Clerk thereof."

Here the appointment of a next friend is a condition precedent, and a *sine qua non*, without which the suit can neither be commenced nor prosecuted. The several sections following point out the modus operandi of making the appointment.

This is a question of practice, regulated by the Practice Act. Its provisions are clear and plain, and easily understood. There never has been any case before this Court involving the right of an infant to sue in the way the respondent has in this case. The reason, doubtless, is because the mode prescribed is so plain and so easily understood that no lawyer ever before failed to pursue the mode prescribed. But we are not without light upon the subject. The point has been before the Supreme Court and other Courts of New York, frequently. They have held that an infant can only institute and prosecute a suit by a guardian appointed in conformity with their code; and a suit instituted in any other way, even by a *next friend*, is irregular, and the defendant may make his objection at any stage of the proceedings, and when made it is the duty of the Court to set aside the proceedings already had in the case. (Hurlbut, &c., *vs.* Young, 13 How., Pr. R., 413; Tyler *vs.* Smith, *id.*, 104; Hoftailing *vs.* Teal, 11 *id.*, 188; Burnham *vs.* De Bevoroe, 8 *id.*, 159.)

What say the Supreme Court of New York in the case of Burnham *vs.* De Bevoroe *supra:* "The defect in this complaint, if it is defective at all, is one that cannot *be cured*, and that, therefore, is not

waived by any pleading, but may be raised whenever the parties are before the Court, either at special term by motion, or on the trial by *motion in arrest* after verdict. The Court may regard it even on general demurrer."

Again, in Lyle *vs.* Smith, *supra*, in an action of partition instituted by the guardian of an infant, who had not been appointed in pursuance of the statute in such cases, the Court says: "There has been no application to the Court for authority to institute these proceedings. No next friend or guardian has been appointed by the Court, nor has any security been given, according to the requirements of the Revised Statutes. Harriet V. N. Lyle had *no more right or authority* to commence an action to partition the lands held in common, in the name of the infant Jacob V. N. Lyle, than she had in the name of the adult Leonard Maison. The County Judge had no authority or jurisdiction to make an order appointing her guardian *ad litem*, and consequently, *the proceedings are a nullity.*" And a motion to vacate and set aside the plaintiff's proceedings was sustained.

But it may be objected by the other side, that the appellant having failed to make a motion at the *return* term of the summons, to set aside or dismiss the suit, or to demur to the petition, the objection was thereby waived. The answer to this objection is obvious. No act or waiver of the appellant can confer upon the respondent the right to sue contrary to the statute in such cases. No Court, sitting to administer the law, will tolerate such a palpable infraction of one of its plainest provisions. The Court must have jurisdiction of both the parties and the subject matter of the suit. Consent cannot confer jurisdiction. And if it has not jurisdiction of both, the proceedings are *coram non judice* and void. (Purchase *vs.* Matteson, 25 N. Y. R. R. p. 214.)

It may be said by the respondent that the caption to the petition contains an allegation that Eliza Higgins is the guardian of the respondent, viz: "*Hatty Higgins, an infant, by Eliza Higgins, her guardian, plaintiff.*" This Court has decided that the allegations in a petition must be made in the body of the petition, and not in the caption.

This very point was before the Supreme Court of New York in the cause of Hulbert, &c., *vs.* Young, (13 Howard, Pr. R., 413.) In this case the complaint commenced as follows: "Nathaniel Hulbert, an infant under the age of twenty-one years, plaintiff, by Jesse Hulbert, his guardian, complains." To this complaint the defendant filed

a demurrer, and among other causes, he assigned "that the plaintiff had not legal capacity to sue or maintain said action." The demurrer was sustained, and the plaintiff appealed. In delivering the opinion of the Court, Justice Smith says:

"The necessity to show the *due appointment of the guardian* by the Court or a Judge remains as before, and for the same reason, that it is a *traversable* fact, and must be stated that it may be traversed.

"The case of Stanley *against* Chappell (8 Cowen 236), is precisely in point. The plaintiff described himself as guardian in the declaration, but a demurrer was sustained, because he did not show '*how he was guardian, or that he was specially appointed by the Court.*' These authorities, I think, show clearly that the allegation of the appointment of the guardian in this case is not sufficient."

There is a positive allegation in the petition that the respondent is an infant, and there is no allegation that Eliza Higgins is her guardian duly appointed by some Court of competent jurisdiction; and such being the case, she states herself out of Court. She does not bring herself within the provisions of the law authorizing her to commence and prosecute this suit; and failing to do so this suit ought to have been dismissed when the motion was made for that purpose. Or if this Court shall be of opinion that the motion to dismiss was not the proper way to reach the point, or it was not made in time, then, the motion in *arrest of judgment* did reach it, and ought to have been sustained.

II. There are not sufficient facts alleged in the first count of the respondent's petition, upon which the jury found their verdict, to support their verdict.

The principle of the common law was, that *actio personalis moritur cum persona*. The respondent's father having been killed, the cause of action for such killing did not survive. But the Legislature of this State, in its wisdom, saw fit to modify this principle of the common law, so as to make the cause of action *survive* to certain parties in certain cases. Said count is in the nature of a declaration at common law. It is not based upon the statute entitled "An Act for the better security of life, property and character," approved December 12th, 1855. (R. S. p. 647.) It does not purport to be based upon it. There is not even a reference made to said Act so as to show that the pleader intended to bottom said count on it. Testing said count, then,

by this principle of the common law, it totally fails to show any cause of action against the appellant. Unless it comes within the purview of said Act, there is no cause of action shown against the appellant.

This statute is a *penal* statute and must be construed strictly. It is an innovation upon the common law, and no intendments or presumptions will be indulged in its favor. If the respondent desires to invoke its aid so as to make out a legal cause of action against the appellant, she must bring herself within *its letter*. Has she done so? The second section of said Act says:

"Whenever any person shall die from any injury resulting from, or occasioned by, the negligence, unskillfulness or criminal intent, of any officer, agent, servant or employee, whilst running, conducting, or managing any locomotive, car, or train of cars; or of any master, pilot, engineer, agent or employee, whilst running, conducting, or managing any steamboat, or any of the machinery thereof; or of any driver of any stage coach, or other public conveyance, whilst in charge of the same as a driver; and when any passenger shall die from any injury resulting from, or occasioned by, any defect or insufficiency in any railroad, or any part thereof; or in any locomotive or car; or in any steamboat or conveyance, the corporation, individual or individuals, in whose employ any such officer, agent, servant, employee, master, pilot, engineer or driver, shall be at the time such injury is committed, or who owns any such railroad, locomotive, car, stage coach or other public conveyance, at the time any injury is received resulting from, or occasioned by, any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying, the sum of $5,000, which may be sued for and recovered: *First*, by the husband or wife of the deceased; or *second*, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or *third*, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor. In suits instituted under this section, it shall be competent for the defendant, for his defence, to show that the defect or insufficiency namedi n this section, was not of a *negligent defect*, or *insufficiency*."

It is a general rule of pleading, that he who would entitle himself to an action under a statute, must allege all the facts upon which the statute grounds the action; and if he fails to do this in his declaration,