the original act, its title, and the recitals in the first section thereof, in the nature of a preamble—that the legislature did not intend to make any change of the common law, other than that relating to the compensation to the owners of the stock killed or injured on the tracks of railroads, not fenced as required by said statute; and, to hold otherwise, we must give to the words used a meaning quite different from that usually accorded them. It is evident that the railroad company is only required to fence along its line when the same passes through inclosed land, dividing it, and leaving part of such land of one owner on both sides of the roadbed. In such cases, the owner having already inclosed his land by lawful fences around its exterior limits, and finding his property, by virtue of the roadbed, virtually thrown open to the commons, his stock liable to stray away or be injured, or the stock of others to enter upon his premises and do him damage, the legislature says to him that the railroad company shall erect and keep in repair lawful fences along its line through his land, except that it shall not be required so to do along that part of its road located within the corporate limits of a city or town, nor within an unincorporated town for the distance of one-quarter of a mile either way from the company's depot, nor at a place where there is a cut or embankment with sides sufficiently steep to prevent the passage of stock, nor at any place if the company has compensated the owner of the adjoining inclosed land, through which the railroad runs, for making and keeping in repair said fencing. And so it follows, as we understand the said statute, that a railroad company can fully comply with the law, and yet, in fact, not construct a single panel of fence along its entire line. Surely, this could not be if the legislative intent was to protect the public, the passenger, and employé, as well as to guard the stock and property on the inclosed land through which the road passes. If the public and those on the trains—passengers and others—were to have additional safety provided for it and them by the enactment, why was it that the fencing was not required along the entire line? Why was one mile of the line to be fenced, provided the owner of the land through which it passed did not contract to dispense with it, and the next 10 miles permitted to be without a fence, for the reason that the land through which such part of the line passed was not inclosed? The inference is quite irresistible that the legislative mind was not considering the general public, and that it did not contemplate greater safety for passengers and employés. If the legislative intent was to change the common law in the manner referred to, as claimed by the plaintiff in error, the language employed was extremely unfortunate, and the actual result attained the most lamentable failure that has come to our attention in the history of legislative effort.

The decisions of other courts have been cited by counsel for plaintiff in error, which are seemingly in conflict with the conclusion we have reached, but, in fact, they are not, as a close examination of the same will demonstrate: Dickson v. Railway Co., 124 Mo. 140, 27 S. W. 476; Donnegan v. Erhardt, 119 N. Y. 468, 23 N. E. 1051; Briggs v. Railroad Co., 111 Mo. 173, 20 S. W. 32. The Missouri and

New York statutes are radically different from the Virginia law now under consideration, and the courts of last resort in those states have held that it is the absolute and unqualified duty of railroad companies under said acts to fence the entire line of their roads. The other cases cited by the plaintiff in error refer to local statutes containing provisions not found in the sections of the Virginia Code that we have just passed upon, and consequently they can have but little weight as authority in disposing of questions raised by this writ of error.

We conclude that the instruction complained of, so far as the interests of the plaintiff's intestate were concerned, as an employé of the defendants in error, correctly interpreted to the jury the legislation to which it referred, and that the court below did not err in giving it. The rights of the deceased employé were duly guarded, and all matters pertaining to the negligence of the defendants, on all other grounds than the failure to fence, were still left for the consideration and determination of the jury. The irrelevant matter in said instruction contained was in part eliminated by the instruction afterwards given (as No. 4), in giving which it follows as a matter of course from what we have said that the court below did not err.

Deciding the questions raised by the assignments of error so far considered as we have, it becomes unnecessary, and, as the case is not to go back to the court below for a retrial, also improper, for us to dispose of the other points discussed by counsel, referring to the question of boundary, inclosure, and contributory negligence. We should not pass upon the law relating to the risks assumed by the plaintiff in error's intestate when he accepted employment of the defendants below, for the reason that neither the case made by the declaration, nor the points suggested by the assignments in error, will justify us in doing so, although counsel deemed it proper to argue the same. We must confine ourselves to the case as made by the pleadings, and disclosed by the record. In any view of the case justified by the evidence (all of which we have carefully considered), in connection with the instructions given and refused, and with reference to the pleadings, we fail to see that the plaintiff below has been prejudiced in any manner by the judgment complained of. In our opinion, a peremptory instruction by the court, directing a verdict for the defendants below, would, at least, not have been improper. We find no error, and the judgment is affirmed.

BURNHAM et al. v. NORTH CHICAGO ST. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. January 18, 1897.)

No. 349.

TRIAL TO THE COURT—AGREED STATEMENT—JUDGMENT—REVIEW ON ERROR.

When a case is submitted upon a stipulation as to facts, which is mainly a statement of evidence, and not of the ultimate or issuable facts, and the court thereupon makes neither a general finding nor a special finding of facts, but merely finds that the facts are as set forth in the agreed statement, a judg-