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THE LAW OF IMPUTED NEGLIGENCE, - PARENT TO CHILD.

THESIS

PRESENTED

FOR

T H E D E G R E E

OF

M A S T E R O F L A W

BY

W I L L I A M J . S C H U L T Z

CORNELL UNIVERSITY,

ITHACA, N. Y., JUNE, 1897.

T A B L E   O F   C O N T E N T S .

I N T R O D U C T I O N

C H A P T E R   I .

I. STATUS OF A CHILD NON SUI JURIS.

(A) Opinions of Text Writers.

II. WHAT IS REASONABLE CARE ?

(A) In an Infant Non Sui Juris.

(B) A Question for the Jury.

(C) Reasonable Care of Parent a Question for the Jury.

III. THE DOCTRINE OF IMPUTING NEGLIGENCE OF PARENT TO THE CHILD.

(A) Hartfield v. Roper.

IV. THE DOCTRINE AGAINST IMPUTING SUCH NEGLIGENCE.

(A) Generally.

(B) As Critiicising Hartfield v. Roper.

V. SPECIAL DOCTRINES INTRODUCED.

(A) Effect of Presence of the Parent at the Injury.

(B) Comparative Degrees of Negligence.

(C) Poor Parent Doctrine.

(D) Parent's Negligence the Proximate Cause.

(E) Introduction of the Doctrine of Davies v. Mann.

C H A P T E R I I.

I. INFANT'S SUIT FOR DAMAGES.

II. PARENT'S S UIT FOR DAMAGES.

C O N C L U S I O N.

TABLE OF CASES.

Baltimore & Ohio R. R. Co. v. Schwindling, 5 Outerbridge (Pa), 258.
Barry v. R. R. Co., 92 N. Y., 289.
Berry v. R. R. Co., 70 Fed. Rep., 679.
Bisaillon v. Blood, 64 N. H., 565.
Butterfield v. Forrester, 11 East, 60.

Cauley v. R. R. Co., 14 Norris, (Pa.), 398.
Central Trust Co. of New York v. R. R. Co., 31 Fed. Rep., 246.
Chicage & Alton R. R. Co. v. Gregory, 58 Ill. 226.
Chicago City Ry. Co. v. Wilcox, 138 Ill., 370.
City of Pekin v. McMahon, 154 Ill., 141.

Davies v. Mann, 10 M. & W., 545.

Erie City Passenger Ry. Co. v. Schuster, 3 Amerman (Pa.), 412.

Frick v. The Ry. Co., 75 Mo., 542.

Glassey v. R. R. Co., 7 Smith (Pa.), 172.

Hartfield v. Roper, 21 Wend., 615.
Huerzeller v. The St. R. R. Co., 139 N. Y., 490.
Holly v. Gas Light Co., 8 Gray, 123.

Ihl v. Street R. R. Co., 47 N. Y., 317.

Jamison v. Ill. Cent. R. R. Co., 63 Miss., 33.

Kay v. R. R. Co., 65 Pa. St., 269.
Keffe v. R. R. Co., 21 Minn., 207.
Kuntz v. The City of Troy, 104 N. Y., 344.

Lynch v. Murdin, 1 Q. B., 47.
Lynch v. Smith, 104 Mass., 53.

Mangan v. R. R. Co., 36 Barb., 230.
Mauly v. R. R. Co., 74 N. C., 655.

McGarry v. Loomis, et al., 63 N. Y., 104.
McGovern v. R. R. Co., 67 N. Y., 417.
McGuire v. R. R. Co., 37 Fed. Rep., 54.
Meeks v. R. R. Co., 56 Cal., 513.
Metcalf v. The Ry. Co., 42 N. Y. Supp., 620.
Mulligan v. Curtis, 100 Mass., 512.
Munn v. Reed, 4 Allen, 431.

Newman v. Horse car Co., 52 N. J. Law, 446.

Payne v. Ry. Co., 70 Iowa, 548.
Phila., Balt. & Wilm. R. R. Co. v. Layer, 2 Amermann (Pa.) 414.
Phila. & Reading R. R. v. Long, 75 Pa. St., 257.
Plumley v. Birge, 124 Mass., 57.

Rauch v. Lloyd & Hill, 31 Pa. St., 218.
Robinson v. Cone, 22 Vt., 213.

Smith v. O'Connor, 48 Pa. St., 218.
Stillson v. Hannibal v. R. R. Co., 67 Mo., 671.

The Baltimore City Pas. Ry. Co. v. McDonnell, 43 Md., 534.
The Chicago, St. Louis & Pittsburgh R. R. Co. v. Welsh, 118 Ill., 572.
The Kansas Pac. Ry. Co. v. Whipple, 39 Kas., 531.
The Pittsburgh, Alleghaney & Man. Ry. Co. v. Pearson and wife, 22 Smith, 169.
The T. & P. R. R. Co. v. O'Connell, 58 Texas, 27.
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Thurber v. R. R. Co., 92 N. Y., 289.

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Western & A. R. R. R. Co. v. Young, 7 S. E. Rep. (Ga.), 912.
Wymore v. Mahaska County, 78 Iowa, 396.

TEXT BOOKS.

Beach on Contributory Negligence, Sec., 117, 122, 124, 128, 129, 132, 135.
Bishop on Non-Contract Law, Sec. 580, 582, 586.
Sherman and Redfield, Sec. 73, 79.

2 Central Law Journal, page 593, (Note).

I N T R O D U C T I O N.

In this examination of the law of imputed negligence, the writer has confined himself to the relation of "parent and child" and appeals only to the laws underlying such relations and the state of the law on this one subject. Imputed negligence, especially from the parent to the infant child, is a branch of the law of contributory negligence which sprung up, as it were, with a startling suddenness and from which there seems to have been no settled recovery in the minds of the courts and the law writers. Proclaimed, as it was, by mere dictum, and bound together only by fictions of the law, it easily became an object of assault, and a most fruitful source of discussion. While applied and followed by some high jurisdictions, it is discouraged by other jurisdictions of equal prominence. But the effect of the diversity seems to be to lean towards a certain goal and this will be one of the important elements to make up this paper. Looking first at the persons with whom the subject deals, we will then attempt to apply those principles of law which have given us cause to present this subject.

C H A P T E R I.

I. Status of a Child Non Sui Juris.

<u>(A) Opinions of Text Writers.</u>:- Who are non sui juris has been answered at length by all of the leading text writers on the subject of contributory negligence. A person of sufficient age and capacity is bound to use reasonable care to prevent injuries to others from his own acts or injuries to himself from the acts of others. What amounts to such reasonable care, depends upon the circumstances in each particular case. Lord Ellenborough, in Butterfield v. Forrester (11 East 60) puts it, "a person is not to throw himself upon an obstruction and get damages or make it the fault of another; and if he doesn't use common and ordinary caution to be in the right, he can only have himself to blame. One person being in fault doesn't dispense with anothers using ordinary care with himself." But a person non sui juris is not supposed to have the capacity of such a reasonable[1] man and hence an exception is made as to him, and he is not required to show the judgment and discretion of more developed beings. "Idiots and lunatics are of this class. Infants may be said, in general, to belong to this class also, but very evidently not all infants. it is a question of capacity and has been found a difficult question in many courts, besides a very fruitful source of con-

troversy as to what age is sufficient to constitute an infant sui juris. This is usually a question for the jury, but in certain cases where there can be no doubt, the court decides as a matter of law to avoid danger." (a) The New York Court of Appeals says, "an infant in its first years is not sui juris. It belongs to another to whom discretion in the care of its person is exclusively confided. The custody of the infant of tender years is confided by the law in its parents, or to those standing in loco parentis, and not having that discretion necessary for personal protection, the parent is held in law to exercise it for him." (b) This statement is denied by Mr. Beach, and he says, "it is not true that an infant is not sui juris. In the sense of maintaining an action in his own name, he is sui juris. As far as his right of action is concerned, he is in no respect the chattel of his father. At common law he was required to sue by a guardian appointed by the court. So they are at all times subject to the court. The judgment if recovered is the sole property of the minor and it is recovered for his sole use." (c). Following this denial, the learned writer takes exception to the further con-

(a) Beach on Con. Neg., Par. 117.
(b) Hartfield v. Roper, 21 Wend, 615.
(c) Beach on Con. Neg, Par. 128.

tention that the parent is the agent of the child. He says: "Agency is founded on contract either express or implied, by which one of the parties confides to the other the management of some business to be transacted in his name,on his account, and by which the other assumes to do the business and render an account of it." (a) "Nor is the relation analogous to agency. He does not appoint him, he has no action against him; every element of agency is wanting." By common law the child couldn't appoint an agent, so the power of the parent is derived from the law. The term "non sui juris" is almost universally applied by the courts in speaking of very young children who are incapable of using discretion, and we will apply it in the same form here.. The law stands in a position of parent to all minor children which may place a restriction on the acts of the real parents. The health and welfare of children may be protected and warrented by legal acts when it is apparent that they are being subjected to injurious acts on the part of their parents or guardians. The law says a parent shall perform certain unspecified duties towards his child, and such duties are not merely voluntary on the part of the parent, but, on the contrary, have a compulsory process of the law behind them. In return the child is duty bound to accept

(a) Beach on Con. Neg., Par. 129.

the care and services of the parent and submit to his control. But it is a relation distinct from any other relation between parties known to the law. There is no such unity in them that the act of one must necessarily cause co-operation in the other. Nor is there any contract relation between them; it is simply a good parent and obedient son, bound together by those mysterious ~~of~~ ties, parental love and affection. "In early infancy and onward to a period not made definite by adjudications, but depending upon the particular case, with its circumstances and the intelligence of the individual child, the child is , in law, incapable of contributory negligence." (a) Holding to our rule that a person must use reasonable care as to himself and in what he does, it becomes necessary to ascertain when a child of tender years is to be held to the same rules as adult persons or what is to be required of them before they reach that age. We will, then, consider as clearly as possible what the holdings of the various courts justify as a conclusion of care in a child non sui juris and those in parental relations to him.

(a) Bishop on Non-contract Law, Par. 586.

II. WHAT IS REASONABLE CARE ?

(A) In an Infant Non Sui Juris:- The question has been much discussed whether a child non sui juris could be held to use reasonable care, or rather whether such a child can be negligent at all so as to materially affect his cause of action for injuries caused by the negligence of another. Surely none of us could imagine a new born babe being held responsible for any degree of care with a duty imposed upon it to use such care under circumstances. There must be a time when no care is required. When does he reach the age when he is required to use care ? There is no certain time when we can say that children of such an age must use so much care and other children a different degree of care. What then would be reasonable care in one, would not amount to reasonable care in another. Some children of a certain age know more and have a greater mental capacity than other children of that age. On the other hand, the care due an infant becomes greater as his years are less. The care due this class of persons is greater than the law exacts in dealing with any other class of persons. (a) "As to neglect or dereliction of the parent or guardian being a reason why a child should be misused with impunity by third persons, it has been held that such wrong doing causing injury is an offence of an aggravated nature.

(a) Beach on Con. Neg., Par. 124.

The most reasonable rule seems to be that a child is bound only to use such care as may reasonably be expected from one of his age and capacity under similar circumstances. Therefore, we conclude that the younger the child, the less degree of care is required of him, and at some age there is a vanishing point where no care is required. That age we cannot determine. The courts have almost unanimously decided that the above rule is the test, and each case depends upon the circumstances surrounding it. A most important case is that of Lynch v. Murdin (a) where defendant's servant left a wagon on the street with no one to guard it and the plaintiff, while playing around the wagon, was injured. The court there held that the child used only such care as one of his tender years and discretion could be expected to use and that the defendant's agent, by leaving the cart alone, held out a temptation to such children, which he could not be heard to deny, nor excuse himself from injuries to those who had fallen into his trap. This has been followed by the United States courts, and most state courts. Briefly stated, "the minor, of whatever age, is required to exercise the care, which, under the circumstances, is reasonably to be expected of one of his particular years and capacity, a lack whereof is, if contributory

(a) 1 Q. B. 47.

to the injury he complains of, the barring contributory negligence." (a) In analogy to the rule that under seven years children cannot commit a crime, some courts have held them also incapable of negligence, but that is not to be conclusively presumed. It has never found favor among many courts and is not given any weight. The failure of the child to use greater capacity is no fault of the child nor the parent, and in no case, I think, will the bare act of a child of tender years and capacity be considered negligence per se, but a question for the jury.

(B) A Question for the Jury. "Unless a child is exceedingly young, it is usually left to the jury to determine the measure of care required of the particular child in the actual circumstances of the case." (b) "There would be no need of sending the question to the jury as to the negligence of a very small child, because not a matter of doubt or on which reasonable men would differ. Those cases where the parent has permitted a small child to place itself in a position of danger and it is injured through the fault of another, as a

(a) Bishop on Non-contract Law, Sec. 586.
(b) Beach, Par. 117.

rule, present complicated or uncertain facts, or evidence required to be weighed, or perhaps other reasons, which renders it necessary to be sent to the jury." (a) After an age, and under circumstances not definable by rule, the court can see that the infant is capable of contributory negligence and it will not suffer the jury to ignore the fact. In a New York case, (b) where a boy nine years old was knocked down by defendant's street car, the defendants contended that the plaintiff's age was immaterial and no excuse for negligence, and must show a compliance on which his right of action rests. But the court held "that it was a question for the jury and depended upon the circumstances of the case. The result of an act does not necessarily condemn the act as rash or even negligent. It may have been an error of judgment and in such a case it is a question for the jury to decide whether a person of ordinary prudence and discretion might not, under the circumstances, have formed and acted upon the same judgment." "In each case, the measure and degree of care, the omission of which would constitute negligence , is to be graduated by the age and capacity of the individual". (c) The most sensible rule seems to be not only to put the question of the child's reasonable

(a) Bishop on Non-contract Law, Sec. 580.
(b) Thurber v. Harlem Bridge, Morrisaina v. Fordham R. R. Co., 60 N. Y., 326. (c) Barry v. N. Y. Cent., 92 N. Y., 289. Robinson v. Cone, 22 Vt., 213.

care to the jury, but also what is reasonable care in a parent or person in charge of an infant.

(C) The Reasonable Care of a Parent is a Question for the Jury. This is the inevitable re sult to be drawn from the cases, that the negligence of the parent which contributes to the injury of the child is not per se, but rather a question for the jury, (a) and even though the parents were negligent, their negligence would br remote if the child did no act which would be negligence in an adult. (b) It is not negligence per se to send a child of tender years out on the street on an errand. This is a question for the jury, being a matter of judgment. But where the parent is in the immediate direction and control of the child, his negligence may amount to such as to be unnecessary to go to the jury. If the child exercised proper care and the defendant or his agent was negligent and caused the injury, the defendant is liable without regard to the question whether it was negligent in the parents to let the child go out as they did. The negligence of the parent then, if it existed, would be too remote. But again, if the parents or attendant were not negligent and the defendant was, mere want of care or personal negligence on the

(a) Kuntz v. The City of Troy, 104 N. Y., 344.
(b) Lynch v. Smith, 104 Mass, 53.

part of the child would not, under the circumstances of the case, absolve the defendant from liability. (a) But even under these circumstances it must not be lost sight of that wanton or willful negligence alters the case materially. Should the parent exhibit such wanton or willful misconduct as to denote an intent to harm the child, it may absolve the defendant and throw the consequences on the parent.

Having, perhaps, only lightly observed the position of the infant in law and the requirements as to his safety by himself and his parents, we may come to the principal subject with which we have to deal, and observe their duties and relations in a more definite form.

(a) Ihl v. The 42nd Street & Grand St. R. R. Co., 47 N. Y. 317. Payne v. The Humeston & Shenandoah Ry. Co., 70 Ia. 548.

III. THE DOCTRINE WHEN THE NEGLIGENCE OF THE PARENT IS IMPUTED.

(A) Hartfield v. Roper. This doctrine was created when the famous case of Hartfield V. Roper (a) was decided, (1839) , and is perhaps better known by the name of that case than by any other name. The circumstances of the case, briefly, are, "that a young child went out in the road and was sitting in a snow path, and defendant was driving along in a cutter at a moderate gait. He did not see the child and ran over it, injuring it, for which injuries the child seeks to recover on the grounds of the defendant's negligence." The court held, "that the plaintiff was wrongfully in the road and the negligence of those in charge of him amounted to criminal neglect. It was their duty to take charge of a child of such tender years and their negligence must be imputed to the child, because a person in the charge of others, who himself is helpless, cannot take advantage of and impose a penalty on defendant because of the neglect of the one looking after him. He must stand it himself, if anybody, and although it may be harsh, small children are not freed from the legal effects of the law." This doctrine, although unsupported by any other decision upon which it was based, has been followed in several

(a) 21 Wendell, 615.

other states to an uncertain extent, among which, without an attempt to enumerate, are Massachusetts, Maine, California, Maryland, and Kansas.

The harshness of the rule, however, has called for many modifications, and it is now strictly confined and not in any way extended. (a) The rule must only be applied where the child itself has failed to use that degree of care which would be required of an adult. If it has been free from negligence, as an adult, then no amount of negligence on the part of the parent, or guardian, can effect the right to recover, except, of course, as their acts, in breaking the sequence of events, might effect any other person. The whole theory of imputed negligence rests upon the assumption that the child has acted in a manner which would be negligence if it had been of age. (b) The New York rule now is a modification of this old rule, and, in fact, the courts rather exhibit a desire to avoid it. (c) It is no longer per se negligent to let children of perhaps six or seven years go on the street alone. The negligence of the parent or guardian, is imputed only when the guardian, by an act or omission, <u>in the capacity</u>

(a) Beach, Par. 122.
(b) Sherman and Redfield, Sec. 79.
(c) Mangan v. The Brooklyn City R. R. Co., 36 Barb., 230.

of the guardian. "The fact that the child has been found in an injured condition is not proof of negligence in the guardian. It is merely prima facie evidence of want of care. So we may say, in most all of these cases, "the personal conduct of the infant does not constitute the bar." It may have an important bearing on the question of defendant's negligence, but when the defendant is clearly negligent, the contributory personal negligence of the infant, obviously non sui juris, cannot be alleged, unless the negligence of the parent has brought about the situation and in some way contributed to the injury." (a) In McGovern v. The N. Y. C & H. R. R. R., (b), the New York courts went farther and said, "that a child need only use such care as a child of his age and capacity would be likely to use under those circumstances, and was a question for the jury." The case has been followed by the later case of Kuntz v. The City of Troy (c), and Huerzeller v. The Central Cross Town R. R. Co. (d). A distinction was also made between the proximate and remote act of the parent, and it was held that where a parent permitted a child to go out with a young man of suitable age to care for it, and the young man

(a) Ihl v. R. R. Co., 47 N. Y., 317. McGarry v. Loomis, et al. 63 N. Y., 104.
(b) McGovern v. N. Y. C. & H. R. R. R., 67 N. Y., 417.
(c) 104 N. Y., 344.
(d) 139 N. Y., 490.

was negligent, that the act of the parent was too remote, but that the negligence of the young man would be imputed to the child directly and not to the parent. (a)

Massachusetts has followed New York closely in the application of the doctrine, but there too, the strict rule has been relaxed. What appears to be a most revolting application of this rule was in a case where a young girl was made ill by the escape of gas from the defendant's pipes. (b) She was in her own house and did nothing herself to bring about the result. The gas penetrated and pervaded the house where she was. The loophole of escape from liability afforded the defendants was "that the father did not use proper precautions to inform the defendants of the escaping of the gas when he first discovered it." Therefore, his omission was such negligence as would be imputed to her and prevent her recovery of damages. The grounds for this decision were that she was under the care of her father, who has the custody of her person and was responsible for her safety. It was his duty to watch over her, guard her from danger and provide for her wellfare, and it was hers to submit to his government and control. Being

(a) Metcalf v. Rochester Ry. Co., 42 N. Y. Supp., 620.
(b) Holly v. The Boston Gas Light Co., 8 Gray, 123.

(a) 4 n, 431.

entitled to the benefits of his superintendence, she must also be subject to any disadvantages resulting from the exercise of that parental authority which it is his right and duty to exert. Anyone of ordinary care, therefore, on his part, is attributable to her in the same degree as if she were wholly acting for herself." How the honorable court could conceive of the proximity of the parent's negligence to such an injury is not easily explained. Surely if the plaintiff had been an adult, there would have been no connection between the action of the parent and the plaintiff. The effect here is that the defendant makes the home of the plaintiff a dangerous place and, because she doesn't receive the protection which that home should afford her, she is to be injured with impunity. The case is by no means authority for the prevailing doctrine in Massachusetts, but merely tends to show the application sometimes made of the rule of Hartfield v. Roper. What is in fact a modification of this harsh rule is shown in the case of Munn v. Reed (a) which held that it was not negligence per se for a mother to permit a small child to play with a strange dog, and that it was a question for the jury to decide from the circumstances what would be reasonable care in the plaintiff, taking into consideration his age and capacity.

(a) 4 Allen, 431.

The parent's negligence was also a question for the jury, but if it was found to contribute would be imputed to the child.

The present rule seems to drift away from the repulsive elements of the old one and, besides holding the parent's negligence a question for the jury, (a) it requires a child to use only such care as may reasonably be expected from one of his age and capacity under the same circumstances. And even if the parents were negligent, such negligence would be remote if the child has done no act which would be negligent in an adult. (b) So while we see this rule followed in a way, it is with a tendency to draw away and escape its application. A strong example of its change in Massachusetts is shown by comparison of the holdings in Lynch v. Smith (c) and Plumley v. Birge. (d)

Some states have gone so far as to change their holdings to an entirely opposite view, and have repudiated altogether the doctrine of Hartfield v. Roper. (e)

(a) Mulligan v. Curtis, 100 Mass., 512.
(b) Lynch v. Smith, 104 Mass, 53.
(c) 104 Mass., 53.
(d) 124 Mass., 57.
(e) Illinois and Iowa.

IV. THE DOCTRINE AGAINST IMPUTING SUCH NEGLIGENCE.

(A) Generally. "Vermont has always repudiated the doctrine imputing negligence to a child and says the child is only bound to use the care and prudence equal to his capacity. The Supreme Court of Pennsylvania shows no toleration for the doctrine and New Hampshire gives it a contemptuous kick and says, "a man's property would be protected; so a child should be under no less protection of the law than his chattel."(a)

The Vermont rule is stated clearly in Robinson v. Cone,(b) which case holds, that although a child is negligently permitted by its parents to go into the highway and, while improperly there, is injured through the negligence of the defendant, he is not precluded from his redress. "If the defendant knows that such a person is in the road, he is bound to a proportionate degree of watchfulness - to the extent of circumspection - or, what would be reasonable care to a person whom he supposed of full capacity would be gross negligence as to a child or one incapable of escaping danger". Both plaintiff and defendant must use reasonable care and the negligence of the defendant makes him liable, while the negligence of the plaintiff bars his recovery; but the care of the plaintiff

(a) Beach on Cont. Neg., Par. 132.
(b) 22 Vt., 213.

must be measured by his age and capacity. Judge Redfield compares the escaped animal to the child, as follows: "If the animal had been injured when the defendant, by the use of ordinary care, could have avoided it, he is liable; and that even though the animal was improperly there. A person is bound not to use his own to do harm and if a person knows that such other person is in the highway or on a railroad , he is bound to a proportionate degree of care. Ordinary care means that degree of care which may reasonably be expected of a person in plaintiff's condition and this would evidently be very small indeed in so young a child." The court seems to base its decision on the age and capacity of the plaintiff, and there is no reason to doubt the soundness of the decision.

In criticising the case of Hartfield v. Roper, the court said: "The case is old and a variance with Lynch v. Nurdin (a) and far less sound in its principles and infininitely less satisfacory to the instinctive sense of reason and justice."

The case of Lynch v. Nurdin is cited most favorably by the cases holding this side of the question and is considered as the English authority. In that case the defendant's agent negligently left a horse and cart on a street with no one in charge of it while he went into a place nearby. The

plaintiff and some other children began playing around the cart, and while plaintiff was climbing upon the wheel, one of his friends started the horse whereby the plaintiff was thrown to the ground and injured by the cart passing over him. It was held: "That the plaintiff being a child could only be expected to use the care that his age and capacity would warrant." And further, "that even though the plaintiff was a trespasser, yet the defendant was deemed to have anticipated such trespass. It was a temptation held out to young children to come and play there, which the defendant cannot be heard to deny." The court considered it gross negligence and not much distinguished from willful negligence. "The law runs the two into each other considering such a degree of negligence some proof of malice." This case is familarly cited in connection with those cases where the infant plaintiff is a trespasser on a railroad and in the railroad turn-table cases.

The United States federal courts have settled to the rule that a child's care must be in proportion to his age and capacity. (a) But it has been held that no negligence could be imputed to a boy six years old, so the question of contributory negligence did not enter the cause. (b) Perhaps the

(a) McGuire v. Chicago, M. & St. P. Ry. Co., 37 Fed. Rep., 54.
(b) Cent Trust Co. of N. Y. v. The Wabash, St. L. & P. Ry. Co. 31 Fed. Rep., 246.

rule is most truly stated in Berry v. The Lake Erie & W. R. R..(a) Here the child was returning from school and while crossing defendant's track was struck by an engine making a flying switch. The court said: "Many courts hold if the parent sues for the injury of a child, and the parent has been negligent, he cannot recover. Also if a parent is in charge and present at the time of the injury the parent's negligence may be imputed to the child. But I cannot see why a parent's negligence should be imputed when the parent is not present and the negligence of the defendant is the cause of the injury. Property negligently placed on ones own premises so that sparks may come and burn it up the owner may nevertheless recover. So if a parent negligently lets a child get hurt the child may recover, notwithstanding the negligence of the parent. Surely the law ought to regard human life and limb as well as his property. It is said that the child is under the care of the parents but the child has no choice in the matter. The child ought not to suffer irreparable injury without redress, because the parent, from the want of care, has failed to protect it from harm. It seems a harsh, if not a cruel, rule to make it answerable in its maimed limbs or ruined health for the negligence of its parent. The parent's care ought to be

a shield to protect the child, but the want of it ought not to be used as a sword to injure or impair the right of the infant to recover for injuries received through the negligence of another. The act of the parent is passive and that of the wrong doer active and the injury would not have happened but for the active wrong of the wrong doer. A wife with her husband does not become negligent because her husband is and yet she may recover and a child cannot merely because he has no choice in who shall guard him. The modern text writers repudiate the doctrine of imputed negligence in cases of infants of such tender years and immature judgment as to be incapable of exercising care for their own safety."

The courts of Pennsylvania also repudiate the doctrine of imputed negligence and if the infant has not the ability to foresee and avoid danger, negligence will not be imputed to him. (a) The courts hold that the railroad company owes no duty to the trespasser and so is not liable for injuries received by a trespasser; the right of the company being exclusive. This bars both the action of a child, and of a parent, because the parent owed a duty and the company did not (b); and this holding is affirmed in a later case (c) which holds that

(a) Rauch v. Lloyd and Hill, 31 Pa. St. 358. Smith v. O'Connor, 48 Pa. St., 218. Phila. Balt. & W. R.R. Co., v. Layer, 2 Amerman, 414. (b) Cauley v. P. C. & St. L. R.R. Co., 14 Noris, 398. (c) B. & O. Ry. v. Schwingling, 5 Outerbridge, 258

as to trespassers the railroad company is liable only for wanton or intentional injury. The question is simply whether there was a duty to the plaintiff which was violated by the defendant. If not then there is no legal liability. The age or capacity of the trespasser is evidently immaterial and there being no negligence there is no liability.

It is held to be settled law that when the parent brings the action for the loss of services or expenses incurred because of the injury to the child, any negligence on his part contributing to the injury will bar his action. His duty toward the child becomes greater the more helpless and indiscreet the child is. "If, by his own carelessness, he contributes to his own loss of the child's services he may be said to be in pari delicto with the negligent defendant". (a) The negligence of the parent however is a question for the jury.

Any number of cases hold that the negligence of the parent will not be imputed to bar an action by the child and it is not doubted as a rule in this state. (b)

Although the courts in Illinois have seemingly heretofore imputed the negligence of the parent to a limited degree it may now be considered as settled that the negligence of the parent is not to be imputed to the child. The court in

(a) Glassey v. Hestonville, Mantua & Fairmount Ry. Co., Smith, 172.
(b) Erie City Pas. Ry. Co. v. Schuster, 3 Amerman, 412.

the case of The Chicage City Ry. Co. V. Wilcox (a) speaks of this and says, "It seems to be assumed by several of the writers on the subject that this court is comitted to the doctrine that in a suit by a child to recover damages, caused by the negligence of the plaintiff's parents and custodians may be imputed to the plaintiff in support of the defence of contributory negligence. While there is, in some of the cases, some foundation for this assumption, yet in our opinion the question has never been so considered or determined by this court as to make it the settled rule of this state." The rule is then given: "That the negligence of the parent or others standing in loco parentis cannot be imputed to him so as to support a defence of contributory negligence in a suit for damages."

The cases are divided into two classes by the learned judge, being first, "where it is decided as a matter of law up to a certain age, the precise limit of which is not and cannot be well defined, a child is incapable of such conduct as will constitute contributory negligence." The other class is "that young children are bound to use only such care as may reasonably be expected of children of the same age and degree of intelligence and it is always, therefore, a question of fact for the jury to decide from all the circumstances of the par-

(a) 138 Ill., 370. City of Pekin v. McMahon, 154 Ill., 141.

ticular case. "Doubtless a child may possess, to a considerable extent, what may be termed instinct of self preservation and in consequence be capable of using considerable care for his own safety; but when moved by that instinct, he acts only in view of what he sees or what is actually present to his senses. To guard against unforeseen danger, or that which has not come within the sphere of his observation, and requires an exercise of reason and reflection, of which so young a child is seldom capable, and for which the law, administered on humane principles, will scarcely hold him responsible."

The above opinion is one of the most admirable and sound discussions in support of this doctrine that I have found in any of the numerous cases or text books and is a good statement of the doctrine in question.

New Jersey forcibly scores the doctrine imputing negligence to the child and follows Pennsylvania and other states repudiating Hartfield v. Roper.

The most sweeping changes in the holdings of the courts have been made by the courts in Iowa. The early cases held that the parents negligence was imputed to the child, but in Wymore v. Mahaska County (a), where the administrator of a child two years old sues, the old doctrine was entirely

(a) 78 Iowa, 396.

broken down. The court said: "Although the parent's negligence may bar an action by themselves, it cannot bar an action by the child. The child cannot be negligent and it cannot authorize another to be such; therefore, it is unreasonable to make him liable for the negligence of theparent." And it was further held that there was no ground for distinction between cases where the parent has the child under his immediate control and where the parent is absent. As the administrator was seeking to recover for the child and not the parent he was entitled to recover.

(B) As Criticising Hartfield v. Roper. The criticisms of Hartfield v. Roper are many and uniformly severe. Mr. Beach , in his book on Contributory Negligence (a), argues very strongly against any soundness in the principle. He denies in the first place, "that the infant is not sui juris for the purpose of maintaining an action of his own. Nor is there a relation of principal and agent or any analogous relation: every element of agency is wanting. By common law the child could not appoint an agent so the parent gets his authority from the law." The parent's authority is given for the protection of the child, but the rule of Hartfield v. Roper turns the shield into the sword and uses it to deprive the child of

(a) Beach on Con. Neg, Sec. 128-129.

the very protection arising from the parental relation." "The doctrine being based upon authority, must be judged by the reasoning by which it can be supported. That reasoning is founded upon the false assumption that there are varying degrees of negligence and corresponding degrees of liability; that the judgment belongs not to the child, but to the parent; that there is no duty upon the court to protect the child; that the parent is the child's agent, and that the child has an adequate remedy against his parent, and that such negligence is contributory negligence".

And the courts in Pennsylvania (a) say,"it is repulsive to our natural instincts and repugnant to the condition of that class of persons who have to maintain life by daily toil, introducing incidentally to poor parent doctrine".

It is most forcibly criticized in New Jersey in the case of Newman v. The Phillipsburgh Horse Car R. R. Co., (b) where the court says: "I can't see how in Hartfield v. Roper the custody of the infant leads to or justifies the imputation of another fault in him. The law, natural and civil, put the child in the care of adult, but how can this right to care for

(a) Kays v. The Pa. R. R. Co., 65 Pa. St., 269.
Phila & Reading R. R. Co. v. Long, 75 Pa. St., 257.
(b) 52 N. J. L., 446.
Bishop on Non-contract Law, Sec., 582.

him be construed into a right to waive or forfeit any of the legal rights of the infant ? The capacity to make such waiver or forfeiture is not a necessary or even convenient incident to this office of the adult, but on the contrary is quite inconsistent with it, for the power to protect is the opposite to the power to harm by act or omission. The rule in "Wendell" must be on the theory of the custodian of the infant being the agent of the infant; but it is mere assumption without legal basis, for such custodian is the agent, not of the infant, but of the law. A mother could not contract away the liability of a railroad company for injuries to her babe caused by the railroad's negligence - first, because the contract is contra bonus mores, and second, because the mother is not the agent of the child authorized to enter into the agreement. The imputability of negligence is a mere pure interpolation of law, and, until 21 Wendell, was not known of in the law. The law of agency is supposed to be a voluntary act of the principle, and not have his agents forced upon him. The conversion of an infant, who is entirely free from fault, into a wrong doer, by imputation, is wholly a logical contrivance incongenial with the spirit of jurisprudence. The sensible doctrine is that a child of tender years can't be negligent, nor have it imputed

to him; for he is incapable of appointing an agent, the consequence being that he can in no way be considered to be the blamable cause, either in the whole or in part , of his own injury. It would make an infant in the nurse's arms liable for the negligence of the nurse. If persons are injured by the negligence of the nurse, they have an action against the infant and he would be liable for neglects of his parents. But no such doctrine has ever prevailed."

V. SPECIAL DOCTRINES INTRODUCED.

Having discussed in a general way, the holdings of the courts on both sides of the question of imputing negligence of the parents it is probably well to observe the special doctrines introduced which may have materially influenced the decisions in these cases.

(A) Effect of Presence of the Parent at the Injury. This is a turning point upon which the cause of an injured child may rest. The effect is that if the parent is present at the injury or has the child under his immediate control or direction, the parent's negligence will be imputed to the child and if the parent is not present, no negligence will be imputed. "The parent has a certain duty to perform towards the child and the child is duty bound to submit to the parent"s government and control. The child would be entitled to any advantages arising from the relations, and so is subject to any disadvantages resulting from the exercise of that parental authority. If not present, then the child is only to use the care to be expected from one of his age and capacity." (a) If the parent

(a) Stillson and Hannibal v. St. Joseph R. R. Co., 67 Mo., 671.

is not present, and has not been negligent as to permitting the child to go out alone; if child is injured, the acts of the parent would not be the proximate cause and will be no defence to an action. An example of such a case would be where the parent has put the child in charge of a person reasonably competent to care for him, and injury results from some negligence of the custodian. Here the parent's act was not proximately connected. The presence of the parent is merely a limited application of the rule in Hartfield v. Roper, and should not be applied even under such an exceptional circumstance. I can see no distinction between the cases where the parent is present and has the child under his immediate control and where he is absent. The authority of the parent does not depend upon the proximity of the child. (a) If the negligence were to be imputed, the relation of parent and child would exist as much when separated as when they are together.

(B) Comparative Degrees of Negligence. This rule was applied in negligence cases in Illinois and some other jurisdictions, but never has attained popular favor. By it, one

(a) Wymore v. Mahacka County, 78 Iowa, 396.

who is guilty of any slight negligence may recover, nevertheless, of a person who has been grossly negligent, even though the negligence of both concur in point of time and place with that of the other. (a) This is followed in Georgia and forms a part of the Code of that state.#.But the courts now generally say that it would be useless to state the doctrine of comparative negligence as applicable to a plaintiff incapable of exercising ordinary care for personal security. (b) The comparative degrees, extraordinary, ordinary, and slight cannot be fitly applied to children in reference to measures to be observed by them for their own security. (c)

(C) Poor Parent Doctrine. By this doctrine the position in life held by the parents is made a circumstance for the jury to consider in connection with the other circumstances in weighing the care used by the parent. Mr. Beach, in his work on Contributory Negligence (d) commends the doctrine and says: "Most people in large cities are poor and unable to employ assistance in taking care of their children. Often both parents have to work from home to procure food. Children crowd-

(a) Toledo Wab. & West. R. R. Co. v. Grable, 88 Ill., 441.
(#) Georgia Code, Sec. 2972.
(b) Chicago St. L. & Pittsburgh R. R. Co. v. Welsh, 118 Ill.572
(c) Western & A. R. R. Co. v. Young, 7 S. E. Rep. (Ga.), 912.
(d) Beach on Con. Neg., Sec. 135.

ed in ill aired tenements must have air, and there is no resort but the streets. If one is injured in its helplessness, it does not follow that it or its parents were negligent. When it is all an accident, it is to be pitied; but when it is injured through the negligence of another, then it should be permitted to bring an action the same as anyone else and its poverty taken into consideration. The poverty and destitution of the parent is not a license for the child to act recklessly, yet it should not be a license for others to act negligently towards it, but rather, should be a circumstance to be considered." Poor parents can't keep their eyes on their children all of the time.

The question seems to be whether the parent used the care for the child's safety as ordinary prudent persons in his situation deem proper and sufficient under like circumstances (a)

Illinois has adopted with favor this doctrine and says the same rule should not be applied to persons depending upon their labor for support and to those whose means enable the mother of the family to give a constant personal attention to the care of the children, or employ a nurse for that pur-

(a) Frick v. The St. L., Kas., & Northern Ry. Co., 75 Mo., 542.

pose. (a) This is similarly adopted in Pennsylvania (b), and other states. Its increasing popularity is evinced by the manner in which it is being taken up and I think rightly, because the law as a rule of civil conduct, should apply to all positions to effect all its subjects.

(D) Parent's Negligence the Proximate Cause. It is held necessary in some jurisdictions, that in order to be a defence the parent's negligence must be proximate, and it will then be imputed to the child. It is a fundamental rule of the law of contributory negligence that a person is liable for only such damages as his negligent acts are the proximate cause of, and plaintiff's negligent act which contributed to it, is a defence. But what amounts to such proximate cause in a parent is a question to be decided by the rule of each particular jurisdiction. The negligence of the parent is held per se in some courts, and so a defence, but in the majority of the cases the parent's negligence is a question for the jury. Others make it a good defence if the parent was present at the injury, and that it must be a proximate cause, which is also to be decided by the jury. It is not enough

(a) Chicago & Alton R. R. Co., v. Gregory, 58 Ill., 226.
(b) Phila. & Reading R. R. Co. v. Long, 75 Pa. St., 257.

that somebody's child was injured, but there must be negligence on the part of defendant which was the proximate cause of the injury. If the parents' negligence was the proximate cause, then defendant's evidently was not, unless they were joint wrong-doers.

The California courts lay the error of the New York court, in Hartfield v. Roper, to the fact "that they ignore all distinctions between cases where the plaintiff's negligence was the proximate cause and where it was remote", and in not limiting the rule which they announce, to the former. (a) A remote fault in one person, however, does not dispense with care on the part of another, but may in fact make it more necessary to avoid calamitous injury or to mitigate an unavoidable calamity. The application of the rule as to proximate cause here is the same as in the case of an adult, but it is a question which varies greatly as to what will be considered proximate cause in the child or his parent. In other jurisdictions where negligence is not imputed, the parent's negligence bars his recovery, and then it must be proximate under a general rule of law.

(a) Meeks v. The S. Pac. R. R. Co., 56 Cal. 513.

(E) Introduction of the Doctrine of Davies v. Mann. (a) This doctrine has been cited frequently to disprove the doctrine imputing negligence of parent to the child and makes a strong negative argument. Under Davies v. Mann, the defendant is liable for negligence to plaintiff's animal if, by the use of ordinary care, he might have avoided the injury, after knowing that plaintiff had been negligent in leaving it where it was. The ruling created a change in the whole law of contributory negligence. In applying it to these cases, it is argued that an infant of such tender years, as to be incapable of exercising care , is not less under the protection of the law than a chattel. "The previous negligence of the parents is immaterial and the only question for the jury is whether the defendant, by the use of ordinary care, could have avoided the injury. If she could not, she is without fault and is not liable, but if she could she is liable whether plaintiff was in the street by reason of, or without his parent's negligence. (b) And this is so even as to a trespasser or one wrongfully on the road or highway. There is as a rule, no, or a very small, duty due a trespasser; but when the defendant

(a) 10 M. & W., 545.
(b) Bisaillon v. Blood, 64 N. H., 565. Robinson v. Cone, 22 Vt., 213. Jamison v. Ill. Cent. R.R. Co., 63 Miss., 33. D. & P. R. R. Co. v. O'Connell, 58 Tex., 27. Balt. City Pas. Co. v. McDonnell, 43 Md., 534.

discovers him, he is bound not to wantonly injure him, but must use care to avoid the injury. (a) A person is bound to use his own with such reasonable care so as not to injure others. This rule has been so favorably received in the United States as regards adults and property that the wonder is why it is not oftener applied to the cases of children. Is not a child entitled to as much care as a drunken man ? I think it is.

(a) The Kas. Pac. Ry. Co. v. Whipple, 39 Kas. 531.

C H A P T E R I I .

I. INFANTS SUIT FOR DAMAGES.

These suits are generally brought by the infant through his next friend. The action is based almost entirely upon fact, and the burden is upon the plaintiff to show that he is not sui juris, and by such evidence as will, when considered by the jury, merit a verdict. This, the court thinks, is but a fair rule. No fixed rules of liability of defendant can be offered as general in all the states, because of the varied opinion among the courts. In some states, where the parent's negligence is not imputed and the child non sui juris is incapable of being negligent, it would seem that the plaintiff had only to show the status of himself and the negligence of the defendant, to confirm his suit. But outside of those states, it may happen that the child is negligent so as to bar his action. So in cases where parents negligence is not imputed, but the child must nevertheless use care according to his age and capacity, if he doesn't use that care, he must be negligent. So it must there be shown that such care was used. In those states where the parent's negligence is imputed, there must usually be a concurring act on the part of

the child which would be negligence in an adult. If the child uses proper care, he may recover notwithstanding the want of care in the parent, because that would then be too remote. Evidence to substantiate these must be given in each case according to jurisdiction. A defendant who is guilty of wanton or willful negligence, if shown, will be liable, notwithstanding the negligence of the infant or his parent..

II. PARENT'S SUIT FOR DAMAGES.

Besides the suit for damages by the infant, the parent may also have a cause for loss of services of the child and for incidental expenses to the injury such as doctors' bills, and the like. As a rule he may recover such, but according to the rule in most states he cannot recover if he has been negligent so as to contribute in any way. This applies in states where the parent's negligence is imputed to the child; and in states where it is not, and the child is permitted to recover. Pennsylvania holds this way, and although no negligence can be imputed to the child and he may recover; yet if the parent is negligent he cannot recover damages. (a) The right of the parent to recover when he has been negligent, they say, would permit him to recover damages for his own wrong. (b) In most all cases the question here is for the jury to decide, although some jurisdictions make certain acts towards children negligence per se . The beneficiaries may get pecuniary damages for the death of the child and in a majority of the cases the negligence of the beneficiary will not bar his

(a) Erie City Pas. Ry. Co., v. Schuster, 3 Ammerman (Pa), 412. City of Pekin v. McMahon, 154 Ill., 141. Camberger v. Cit. St. Ry. Co., 95 Tenn., 18. Berry v. Lake Erie & W. R. R. Co. 70 Fed. Rep., 679. (b) 75 Mo., 542. Frick v. St. L/, Kas, City & N. Ry. Co.. Pitts., Alle. & M. Ry. v. Pearson , 22 Smith, 169

recovery as beneficiary because the action is for the child's benefit and not the parents. But an exception would be where the negligent parent would be the only beneficiary. Mr. Beach says: "That a parent can only recover under the same circumstances of prudence as would be required if the action were on behalf of the child. So a parent's action may be defeated by the negligence of the injured child, because where a plaintiff derives his cause of action from an injury done to a third person, such person is justly chargable with the negligence of the third person." (a) "To say that the parent might recover notwithstanding the degree of negligence on the part of the child, is a statement which has no foundation in reason, and would be disasterous to commercial life." (b) The rule as to parents' actions is little varied in the different states.

(a) Beach on Cont. Neg., Sec. 132.
(b) Manly v. The Wilmington & Welden R. R. Co., 74 N. C., 655.

CONCLUSION.

Having gone over the numerous findings of law in general, it now necessitates a solution of the queries presented to us and a general summary of what prevails.

The general idea of a child non sui juris as inferred from the cases, is such a child as is incapable of caring for himself in a proper manner. The term is applied, perhaps, without discretion, but it has become a general term in the law. To be considered non sui juris, it is not necessary to be an infant, but any person who is an idiot or insane may, upon examination, be found non sui juris. As applicable to a child, it is only because of the child's inability and want of judgment and capacity to use proper care. The want of such care gave rise to this doctrine in the law of contributory negligence. It is generally taken for granted that a small child cannot use the care of an adult nor can the same rules of contributory negligence be applied to him, and this , with perhaps the one exception, in Ohio, is settled. The doctrine of Hartfield v. Roper admitted this when the doctrine of imputed negligence was instituted, but there it was considered immaterial, as the negligent act of the parent was what

constituted the bar to the infant's action for injury caused by the negligence of defendant. Even there the child must have done some act which would amount to negligence in an adult. (No adult would go out and sit in a traveled road.) The negligent act of the parent in permitting the child to get in such a dangerous position was a co-existing element. Although the child of itself could do no wrong, it was made negligent by this fiction of law. Its principles have been denied on all sides and, even in those states where it owed its creation, it has been avoided to a certain extent. New York and Massachusetts now say that it is a question for the jury, to be decided from the circumstances of the case, but still impute the negligence. The contrary cases were inclined to hold as a matter of law that such small children as to be non sui juris could not be guilty of negligence, nor could they be charged with it through another. A person incapable of delegating his negligence was held incapable of having it imputed to him to satisfy a fiction.

The doctrine of Davies v. Mann was cited and is now an effective weapon in destroying the old doctrine. Why should a child, who is negligently placed in a dangerous position, be denied the protection of the law that is afforded

his parent's horse or other chattel; or when, in the case of an adult person lying in a state of intoxication in the road, the defendant is bound to use all reasonable care to prevent any injury to him, notwithstanding the negligence which caused him to be there. And in such a case it is not necessary that the defendant shall see the object, but if he might have seen it if he had seen proper care, he is liable. But in the case of a child, who is incapable of helping himself, he is to be an object of willful or reckless injury without a redress, simply because he is not afforded the proper care and protection due him from those nearest to him.

This, they attempt to circumvent by claiming him a trespasser to whom the defendant owed no diligence; and this, too, in cases which show on their face the infirm support behind them. It is safe to say that the majority of the states repudiate the doctrine imputing negligence and make defendant's liability a matter for the jury to decide under the circumstances. No age can be said to be a time certain under which the child shall be incapable of all negligence or care, and after which an ordinary amount of care can be required, although in analogy to the rule of criminal law that a child cannot be guilty of a crime who is under seven years of age,

some courts have attempted to apply such a rule as to infant's negligence.. Children of all ages up to seven years have been held non sui juris and incapable of using care, but it is not possible to definitely determine just when they become capable.

A distinction is made between cases where the parent is present at the injury and where he is not. If he is present, it has been held that his negligence will be imputed, but not if he is absent. This is on the ground of exercising immediate control of the infant's movements, and the infant is bound to subject itself to his government and care. Being entitled to any benefits resulting from the relation, he is also liable to any disadvantages arising from it. But sensibly, I can see no reason why such position of the parent should be material. His parental authority is not dependant upon immediate presence, but exists as forcibly when at work in his office as when at home in the presence of his family.

Probably no doctrine has been so warmly received as the doctrine which takes the parent's postion in life into consideration in determining the negligence of such parent. The poor have to work for a living and do not have a chance to keep a close watch over the shildren around them. Such chil-

dren are liable to escape from them at some time, even though great care is used by the parent to prevent it. Nurses are a luxury not enjoyed by children of poor people and when the children go out to get the much needed air and exercise, it is with the most available person. This sometimes is a young person, but such young children are often possessed of unusual discretion. Their situation in life educates them in many ways that become much older people. The children should not be denied fresh air because there is no one to take them out, and it should be a question determinable under such circumstances. I think that the doctrine is admirable in so far as it is to be applied without discrimination, but a fault may arise in that it will discriminate between classes by being too rigid. It should be an elastic rule, applicable to all people in their particular situation in life. And although this has not been accepted by any means in a general way, it is a rule bound to find favor.

The question, therefore, should be put to the jury in all cases to determine what is negligence in the parent and the child. The most general rule and the almost universal one is that a child should be required to use the care which may reasonably be expected from one of his age and cap-

acity under the particular circumstances. This is fair. It says that a small child must only use what may reasonably be expected , and is considerate enough to infer that that is not much; but as his age increases, so does his care. This is so even in the cases which impute the parent's negligence. If the child uses such care, it is not negligent; and if it is not negligent, and the defendant is, the child may recover . What becomes of the parent's negligence then ? I should say that it was only remote because the absence of want of care in the child shows that all the care under the circumstances was used and that alone will deny any contributory negligence to defeat the action. But if the parent is not negligent in letting the child get away, and the child escapes notwithstanding the parent's care, and is injured ? Then, under the universal rule, I think that it all lies with the plaintiff. If he has used the care that a child of his age and capacity would ordinarily use, the defendant is liable; but if he has not used that care, he is guilty of contributory negligence, notwithstanding his age. This, we see, dispels the idea of putting an age under which a child is non sui juris in fact and law. The rule is self operating. If he is young, the rule is the same, but it shows that, even then, a small a-