

U. S. Rep.]

ISABEL V. HANNIBAL AND ST. JOSEPH R. R. CO.

[Missouri.]

more humane rule was recognised. Two boys, one three and a half and the other nine years old, were sent a short distance to a wood-yard to procure some wood, and as they were returning with the wood in their arms, the younger boy was run over and injured by a milk-cart, driven by the defendant. Held, that a non-suit on the ground of contributory negligence was improperly directed. The Court said, "It is undoubtedly true that more care might have prevented the accident. But little children have a right to go in the street of a city for air and exercise, and if reasonable provision is made for their safety, are under the protection of the law against wrong-doers who disregard their rights." It was accordingly held that it was for the jury to say whether reasonable provisions had been made for the safety of the child, and whether due care was taken of him.

And in *Lynch v. Smith*, 104 Mass. 52, the supreme court of that state drifted still further away from the harsh doctrine of *Callahan v. Bean*. This was an action against a hackman, for negligently driving over a child four and a half years old, who was crossing the street on his way home from school at the time of the accident. It was held that it was a question for the jury to determine whether his parents were guilty of negligence in permitting the child to go unattended on the street, and it being determined that he was properly on the street, he was only bound to use such reasonable care as school children of his age and capacity can; and that even though his parents were negligent in permitting him to go unattended on the street, yet if the child without being able to exercise any judgment in regard to the matter, does no act which prudence would forbid, and omits no act which prudence would dictate, the negligence of the parents would be too remote. "But," it was said, "if the child has not acted as reasonable care adapted to the circumstances would dictate, and the parent has also negligently suffered him to be there, both these facts concurring, constitute negligence which directly and immediately contributes to the injury, for which the defendant ought not to be required to make compensation."

The authority of *Hartfield v. Roper*, is still recognised to a certain extent in New York, in a liberalised form. In *Cosgrove v. Ogden*, 49 N. Y. 255, it was held that it was not negligence *per se* for a parent living on a quiet street where few vehicles pass, to permit a child six years old to go unattended on such streets, and that when a child of that age, so on such street, was injured by falling lumber, negligently piled in the

street, it was for the jury to determine whether his parents had been guilty of negligence contributing to the injury.

And in *Ihl v. The Rail Co.*, 47 N. Y. 317, a case very similar to *Lynch v. Smith*, *supra*, the doctrine of the latter case was affirmed. The Court held that it was not negligence *per se* for its parents to send a child two years and three months old across an avenue, through which a street railroad ran, in charge of a sister nine and a half years old. In crossing the railroad track the younger child fell; the horses attached to the car struck him, and the wheels of the car passed over and killed him. The driver was not looking, and both the front and rear wheels of the car passed over the child. A motion for a non-suit was denied. It was held that it was for the jury to say whether the parent was negligent under the circumstances, and that in order to bar a recovery the jury must find that both parent and the injured child were guilty of negligence, which contributed to the injury. If the child exercised proper care, and the driver of the car did not, no amount of negligence on the part of the parent would relieve the defendant from liability; and although the child did not exercise proper care, unless the jury found that its parent was negligent in permitting it to be on the street, the defendant would, if negligent, be liable. And see *McMahon v. The Mayor*, 33 N. Y. 647; *Drew v. Sixth Avenue R. R. Co.*, 24 N. Y. 42. Where an infant between three and four years old escaped through an open window, coming to within four feet of the floor, that being his only means of egress, and was run over and injured in consequence of the negligence of the defendant's car driver, it was left to the jury to say whether the parents of the child were negligent in permitting the child to escape, and it was held, as matter of law, that a child of that age was incapable of forfeiting his remedy against a wrong-doer by reason of his own personal negligence. *Mangum v. Brooklyn R. R. Co.*, 38 N. Y. 455. And to same effect see *Pittsburgh, &c., R. R. Co. v. Pearson*, 72 Penn. St. 169; *Glassey v. Hestonville, &c., R. R. Co.*, 57 Penn. St. 172; *Kay v. Penna. Railw. Co.*, 65 Penn. St. 269.

The courts of Pennsylvania make a distinction between actions brought by the injured child and those brought by its parents. Where the infant sues it is held that the negligence of its parents cannot be imputed to him; but where the parent sues, his negligence contributing to the injury bars the action. *Rail. Co. v. Mahoney*, 57 Penn. St.; *Rail. Co. v. Pearson*, 72 Penn. St. 169.