Imputed Negligence

Ray Van Cott

Cornell Law School

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IMPUTED NEGLIGENCE.

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THESIS PRESENTED BY
RAY VAN COTT
FOR THE DEGREE OF BACHELOR OF LAWS.

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CORNELL UNIVERSITY
SCHOOL OF LAW
1895
IMPUTED NEGLIGENCE.

INTRODUCTION.

The principles which underlie and form the basis of the whole doctrine of imputed negligence are plain and simple. But upon investigating the subject, we are at once brought face to face with a great conflict of opinion in regard to its application. The great difficulty and perplexing questions that are constantly presenting themselves, and upon which the courts differ, spring not, as a rule, from a lack of knowledge of the underlying principles; but rather from the difficulty met with in their application to the particular questions in hand.

Before entering into a discussion of the subject it will be of advantage to ask and answer the following questions:

1. What legal relation must exist between the plaintiff and the third person in order that the contributory negligence of that person may be legally imputed to the plaintiff to bar his recovery for injuries suffered through the negligence of the defendant?

2. What must be shown in order to have the contributory negligence of the third person serve as a defense to an action
for a negligent injury to the plaintiff?

Now first as to the legal relation. There must be such a privity of relation as exists in law between master and servant and principal and agent. Or in other words, the one whom it is sought to impute with negligence must stand in such a relation of privity to the third person that the maxim qui facit per alium facit per se is directly applicable. If such relation does not exist there ought not to be any imputation of negligence.

In answer to our second inquiry, it must be made to appear: (1) that the third person was guilty of negligence; (2) that such negligence was the proximate cause of the plaintiff's injury; (3) that the plaintiff ought to be charged with such negligence as though it had been his own. These are the three necessary elements to constitute a defense of imputable contributory negligence, and if any one be lacking the defense cannot stand.

The purpose of this paper is to investigate somewhat in detail the law of a few specific jurisdictions, and in a more general way the law as it exists throughout the United States and England. There being different phases of the question we will consider them in the following order:
CHAPTER I.  INJURIES TO CHILDREN NON SUI JURIS

Section 1.  Unattended......................... 3-13
Section 2.  Attended..........................13-17

CHAPTER II.  INJURIES TO PASSENGERS IN PUBLIC CARRIAGES.

Section 1.  The early English rule of Thoroughgood v Bryan.................18-20
Section 3.  The present English rule........20-23
Section 5.  The general doctrine in the
            United States....................23-31

CHAPTER III.  INJURIES TO PASSENGERS IN PRIVATE CARRIAGES.

Section 1.  Where the plaintiff is injured
            while riding with a stranger...31-39
Section 2.  Where the plaintiff is injured
            while riding with her husband..39-44

CHAPTER IV.  CONCLUSIONS, AND WHAT THE LAW OF OTHER
            STATES MAY BE IN THE FUTURE.........45-47
CHAPTER I. INJURIES TO CHILDREN NON SUI JURIS.

Section 1. Unattended. The first or parent case invoking the doctrine of imputing the contributory negligence of a parent to an infant to prevent his recovery for an injury caused by the alleged negligence of the defendant, was that of Hartfield v Roper, decided in 1839 and reported in 21 Wend. 615. The report shows that an infant of two years had gone into the public street and while sitting there in the snow was run over by defendant's team. The question presented was whether the plaintiff ought to have been nonsuited in the court below.

Chief Justice Cowen was not content to decide the case by showing that the evidence revealed no negligence on the part of the defendant, but went on and discussed the effect of the parent's negligence on the right of the infant to recover. After deciding that the parents were negligent from the mere fact that the child was found in such a place, the learned Judge, to support his conclusion that their negligence would prevent a recovery by the infant, argued that an infant of that age was not sui juris and that as the protection of his person was exclusively confided to the parent, the parent
thereby became an agent for that purpose, and hence any negligence on his part in respect to third persons was to be deemed that of the infant's. This is plainly a pure dictum, yet in subsequent decisions it has been cited with approval. Some later cases, however, are often cited as following it in all its harshness, which, upon examination, are found to be foreign to this phase of our question. (a) It was said in Hartfield v Roper that it was negligence on the part of parents "to allow" a child of such tender years to go into the public highway unattended. No subsequent case has adhered to such a stringent rule. For Mangum v Railway Co. (b) qualifies the language further by saying that it is negligence "knowingly to allow" a child of tender years to go into a public street unattended. This case went to the Court of Appeals (c) and met a reversal of the nonsuit below on the ground that the court ought not to have held, as a matter of law, that the parents were guilty of negligence because the plaintiff, a child between three and four years of age, had escaped from the house through an open window coming within four feet of the ground, and forming his only means of egress.

(a) Kraig v Wells, 1 E.D.Smith 74.
Lehman v Brooklyn, 29 Barb. 234.
(b) 36 Barb. 230.
(c) 38 N.Y. 455.
It was held as a matter of law that such a child was not sui juris, and that his parents were only bound to exercise such care as persons of ordinary prudence exercise in such circumstances, and whether they had done so or not was a question for the jury.

In Fallon v Railway Co.\(^{(a)}\) a child of five years had been given some milk to drink and was instructed by his mother to go into the back yard after drinking it. His mother stepped into another room, and the front door being open, the plaintiff went into the street and was there injured through defendant's negligence. Only five minutes had elapsed since his mother left him. Two questions were submitted to the jury: one as to whether the mother was negligent, and the other as to whether the plaintiff was sui juris. The result was a verdict for the plaintiff. In Mc Garry v Loomis,\(^{(b)}\) Chief Justice Church said, "the child being in a lawful place, and exercising what would be regarded as ordinary care in an adult, is entitled to recover for an injury occasioned by the wrongful act of another, irrespective of the conduct of the parents".

\(^{(a)}\) 64 N.Y. 13.
\(^{(b)}\) 63 N.Y. 106.
\(^{(c)}\) 104 N.Y. 344.
years was seriously injured by the falling of a counter placed in a negligent condition in the street. The doctrine laid down by the court was that a defendant cannot defeat a recovery for an injury to a child not sui juris caused by defendant's negligence, by simply showing that the acts of the child were such as would be deemed a contributing cause in an adult; but he, in order to make his defense complete, must go further, and show that there was concurring negligence on the part of the parents or guardians. A very late case before the same court confirms this doctrine.(a)

We may say, therefore, that the principles to be drawn from all these cases are, that if the parent's negligence does not appear beyond rational controversy and reasonable men, might draw opposite inferences in regard to the fact of negligence from the evidence submitted, then there arises a question of fact for the jury; that the plaintiff makes out a prima facie case by showing that the parents were watchful of the child to a certain degree,—not an extraordinary, but a reasonable degree; that the child escaped from their control and was injured by the negligence of the defendant. The burden of proof then shifts to the defendant and he must show, (a) Huerzeler v Railway Co., 139 N.Y. 495.
(1) that the acts of the child were such as would bar an action if brought by an adult and (2), that the parents were negligent in allowing him to be in a place of danger. If the defendant fails to establish these two conditions, his defense falls. It seems that the cases will warrant the conclusion that, a child of four years or under is, as a matter of law, non sui juris, but when there is any doubt as to the capacity of a child over that age, and below the age where the courts would, as a matter of law, declare him sui juris, then the jury must determine the question.

Other States have substantially adopted the New York rule, among the most noted of which is Massachusetts. One of the earliest cases was Callahan v Bean (a), the facts being almost the same as those in a New York case of McGlinn v Van Zandt (b), and the rulings of the respective courts were essentially the same. The facts of the Massachusetts case were that the father having taken the plaintiff a child of two years of age across the street, bought him some candy, and after looking up and down the street and seeing no carriage or danger directed the child to return home, and the father then went back into the store. The street was only

(a) 9 Allen 401.
(b) 48 How. Pr. Rep. 80.
eighteen feet wide, and the child within two minutes was negligently run over by defendant's carriage. The court held that such a state of facts showed a want of due care on the part of the father, and therefore, that there was no question for the jury. While in the case of *Mo Geary v Ry.Co.* where a child of eighteen months was placed in a chair while the mother proceeded to wash the floor, and having her back turned for two minutes, the child escaped through the open door to defendant's railroad track thirty feet distant, and was there negligently injured, the lower court ruled that the evidence did not show sufficient care on the part of the mother, and having directed for the defendant reported the case to the Supreme Court where it was held, that whether the mother had exercised proper care or not was a question of fact for the jury.

We can, therefore, see from these cases that the New York and Massachusetts courts draw a distinction between those cases where the child escapes from the guardian's care, and those in which the guardian has directed the child to go alone or cannot excuse or justify his failure in not watching the child. In those cases coming under the first dis-
tinction any evidence showing that proper care was taken under
the circumstances, will justify the court in submitting the
question to the jury. But in those cases coming under our
second distinction, the court will refuse to submit the ques-
tion to the jury, and rule as a matter of law in favor of the
defendant. It seems also that a child non sui juris un-
attended in a public street, and there injured by defendant's
negligence is prima facie evidence of two things, (1) that
his guardians were negligent and, (2) that their negligence
contributed to his injury. But such facts being only prima
facie evidence, can be overcome by the plaintiff showing that
although the child was non sui juris, yet he neither omitted
nor committed any act which would be deemed negligent in an
adult. (a) Upon such a showing, the prior negligence of the
guardian, and its contributing cause immediately fade away.
A few other States follow the New York rule, (b) and a few more
rather favor it, yet it cannot be said that they are committed
to it entirely. (c)

(a) Gibbons v Williams 135 Mass. 333; Lynch v Smith, 104 Ib. 52.
(b) Railway Co. v Huffman, 28 Ind. 287; O'Brien v Mc Glinchy,
68 Me. 552; Fitzgerald v Railway Co., 20 Minn. 336.
(c) Meeks v Railway Co., 56 Cal. 513; Railway Co. v Smith, 25
Kan. 742; Mc Mahon v Railway Co., 39 Id. 439; Hoppe v
Railway Co., 61 Wis. 357.
But the great weight of authority, and it seems to me with better reason, repudiates the whole doctrine of imputing negligence to a child non sui juris. The parent case arrayed on this side is Robinsone v Cone (a). The plaintiff in the action was at the time of the injury only three years and nine months old. He had been attending school, and after its dismissal was amusing himself by sliding down a hill on his sled. While thus engaged, he was run over by defendant's team and injured. The jury found that the defendant could by proper care, have avoided the accident. Judge Redfield in deciding the case reviewed the doctrine of Davis v Mann with approval, and also placed this case within the principle of those where persons, although trespassing and are injured by concealed traps, guns etc. are allowed to recover damages from the owner. The Judge said, "and we are not satisfied, that although a child, or idiot, or lunatic, may, to some extent, have escaped into the highway through the fault or negligence of his keeper, and so be improperly there, yet if he is hurt by the negligence of the defendant, he is not precluded from his redress ". The reasoning of Hartfield v Repor was disapproved as being unsatis-

(a) 22 Vermont 213.
factory both in reason and justice.

The next and perhaps the best reasoned case on this side of the question is Railway Co. v Snyder. (a) The court refused to adopt the New York doctrine in any form, because the reasons which bar an action by an adult when his own negligence contributes, are, in the case of a child, wholly wanting. The court said, "can it be true, and is such as the law, that if only one party offends against the infant he has his action, but if two offend against him, these faults neutralize each other and he has no remedy?" His right is to have an action against both."

This, it seems to me, is unanswerable. An infant cannot be deprived of his property by any wrong committed by his parents. In our introduction we pointed out as one of the essential elements that, the third person's or guardian's negligence must be the proximate cause of the child's injury in order to prevent a recovery by the child. Clearly that is so, for how could the child sue the defendant for a wrong committed by another? Now, if a child being non sui juris is allowed to be in the street, and is there injured by a defendant who might, by the exercise of reasonable diligence (a) 18 Ohio State 400.
under the circumstances, have avoided the injury, why cannot
the child recover? Is the parent's negligence in allowing
him to be in the street the proximate cause of his injury?
Not at all. The most that we can say is that it was a re-
mote cause. Therefore, we see that one of the requisite
elements is entirely absent, and that the New York courts to-
gether with its converts, avoid this by a fiction of law. It
is not claimed that even though the parents are, or are not
negligent in allowing him to be in a place of danger and there
receive injury that he can recover. The defendant must have
been negligent, and to determine this, it is necessary to
look into all the circumstances, the age of the child; and the
power of the defendant to have prevented the injury. And
from the fact that the class of persons now under consider-
ation are incapable of judgment and discretion in the eyes
of the law, it is incumbent upon all persons to act with a
greater degree of care to avoid injuring them, than would
otherwise be required were such persons not under a disability.

The test in our introduction for imputing negligence re-
quires either the legal relation of master and servant, or of
principal and agent between the child and his parents. Is
the child his parent's master? He may be in fact, but
certainly not in law. Is he his parent's principal, and the parent his agent? Most assuredly not. The New York doctrine is, therefore, founded upon a dictum and supported by a fiction. The length of this paper will not permit a further discussion of the cases on this side, and it will therefore be sufficient to cite the additional authority supporting it. (a) It may be proper to state that some courts in determining the child's capacity have adopted the same rules as are applied in determining his criminal capacity under the common law. (b)

Section 2. Attended. Having discussed the phase of our question in which the child is unattended by any person of discretion, we will next turn our attention to another phase, to wit, where the child is attended, and see if the legal principles which govern are, in any respect, different.

(a) Daley v Railway Co., 26 Conn. 591; Wymore v Mohaska County 73 Iowa 396.; Railway Co. v Wilcox, 138 Ill. 370; Westervelt v Levi Bros., 43 La. 63; Westbrook v Railway Co., 66 Miss. 560; Shippy v Village, 35 Mich. 230; Winters v Railway Co., 93 Mo. 509; Huff v Any, 16 Neb. 139; Bottoms v Railway Co., 19 S.E. (S.C.) 730; Bisaillon v Blood, 64 N.H. 565; Railway Co. v Schuster, 113 Pa. St. 412; Whirley v White, 1 Head. (Tenn.) 610; Railway Co. v Moore, 59 Tex. 64; Railway Co. v Ormsby, 27 Gratton (Va.) 455; Moore v Railway Co., 2 Mackey (D.C.) 437.

(b) Coal Co. v Brawley, 33 Ala. 371, and cases cited.
The first case to which we will direct our consideration is Wymore v Mohaska County (a). This was a suit by an administrator in behalf of the estate of the decedent, a child of two years of age who, while riding with his father in a wagon was killed by the falling in of a bridge which they were attempting to cross. The defendant was negligent, but set up as a defense the imputable contributory negligence of the father. The court uses the following language, "some authorities seem to make a distinction between cases where the contributory negligence of the parent occurs while he has the child under his immediate control, and other cases which occur when the child is away from the parent; but we are of the opinion that there is no sufficient ground for the distinction claimed. The authority of the parent does not depend upon the proximity of the child."

Just what the Judge meant by saying that there can be no distinction will subsequently be considered. Two Missouri cases furnish, perhaps, the best illustration of the distinction. The first being Stillson v Railway Co. (b), where a child of eight years being in the immediate presence of her father was, by his direction, attempting to pass through an

(a) 78 Iowa 536.
(b) 67 Missouri 671.
aperture between two cars when the cars suddenly came together inflicting the injury. The court refused to allow the child a recovery, because the father being present and directing the child to attempt such a dangerous act was, in effect, the proximate cause of the plaintiff's injury. While in Winters v Railway Co.,(a) where the plaintiff was attended by a girl ten years old, the court refused to hold that a girl of such tender years could be such a guardian as was capable by her acts of being a proximate cause of the child's injury. In other words, the case was treated as though the child was unaccompanied by anyone.

The solution of the distinction brought out in these cases can best be determined by a resort to the test adopted in our introduction, one of the elements of which was, the third person or guardian's negligence must be the proximate cause in order to bar the plaintiff. Applying this test to the Missouri case first cited, the correctness of the court's ruling is at once made manifest. How could the child recover from the defendant for an injury brought on by the active negligent conduct of its father? His acts were the proximate cause of the child's injury. Reasonable care on his (a) 99 Missouri 509.
part would have prevented it. Therefore, it was impossible for the Missouri court to have decided otherwise. To determine in all cases whether the guardian's negligence or that of the defendant's is the proximate cause may become a very difficult question. But if the guardian being present is active, and not merely passive, or is passive when he ought to be active and injury results to the child, then even though the defendant has been negligent, a very strong case would have to be made out to warrant a recovery by the plaintiff. (a) The Iowa Judge in the case before him was undoubtedly correct in saying that there was no reason to justify the drawing of a distinction between the case where the parent is present, and one in which he is absent. Most assuredly the case under his consideration would warrant no such distinction. Nothing in the case showed that the father actively brought on the injury. The bridge was built for the express purpose for which the father was attempting to use it, and nothing was shown that he knew its defects, or ought to have been active in finding them out.

Holly v Gas Co. (supra) illustrates in a striking the point, where the parent being present remained passive when

(a) Holly v Gas Co., 3 Gray 123.
Waite v Railway Co., 90 Eng. C.L. 728.
ordinary prudence would have spurred him into action.

To summarize, therefore, it seems that if the parent or guardian is present he must neither do what ordinary prudence would forbid, nor neglect to do what a like prudence would dictate. If he fails in either, the child will have no remedy against the defendant, unless he is able to make so strong a case as to bring it within the realm of willful injury.
CHAPTER II. INJURIES TO PASSENGERS IN PUBLIC CARRIAGES.

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Section 1. The Early English Rule of Thorogood v Bryan.

If there is any rule or doctrine which is familiar to the legal profession it is that growing out of the case of Thorogood v Bryan. (a) The facts were, in brief as follows, the husband of the plaintiff (whose administratrix she was), was a passenger in an omnibus, and upon arriving at the point of destination, the decedent did not wait for the bus to draw up to the curb, but alighted while the bus was in motion, and at such a distance as to allow a carriage to come between it and the curb. The defendant driving up at this time with his bus ran over the decedent inflicting the injuries which resulted in his death.

The case was first tried before a jury, and the judge in charging them said, " if they should be of the opinion that the occurrence was purely accidental, or that the deceased, or the driver of the omnibus by which he was carried, had by any negligence or want of care on their part contributed to the accident they must find for the defendant ". The verdict was for the defendant, and when the case came before the Court (a) & Man. G. & S. 115.
of Common Pleas, the judges assumed that from the charge above given the jury must have found the driver negligent. The court in ruling against the plaintiff based its decision that, "the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased ".

Not a single authority was cited, but the court, after great effort, based the novel doctrine on a dictum found in Bridge v Railway Co. (a) That the passenger had no control over the driver was suggested in behalf of the plaintiff, but must not have been strenuously argued. The court, however considered it in the opinion but denied its force on the ground that the passenger selected the driver, and thereby entered into a contract with him, and that if there was a breach of the carriage contract, the passenger's remedy was against the driver. The court argued that as the driver could not have an action against the defendant, that it would be a monstrous doctrine which would place his passenger in any better position. The court, too was influenced, no doubt, by the fact that all such suits had been prosecuted against (a) 3 M. & W. 344.
the rival instead of against the carrier of the plaintiff, and therefore thought that the rule enunciated would be in better conformity to a sound and just policy of the law. Only one other English case is found approving this rule (a).

But whatever reasons the case was based upon, and whatever was sought to be achieved by its decision have alike, as will hereafter be seen, utterly failed, because in the first place the rule was wholly without reason, and in the second a sound policy could not possible grow out of anything so devoid of reason, but rather discord and confusion would be the logical result.

Section 2. The Present English Rule. Still the case of Thorogood v Bryan stood for nearly forty years recorded in the English reports as forming a part of 'law of the land', and as answering in the affirmative the great and important question, Is a passenger while riding in a public carriage, and there injured by the concurrent negligence of the driver and a third person, without a remedy against such third person? But during those four decades it did not by any means, escape the criticism which it so justly merited. Not only English judges of high authority were stoutly opposed to it,

(a) Armstrong v Railway Co., 10 Law R. Exch. 47.
but some of the leading text writers as well. (a) And in a case known as the Milan (b) which was tried in an Admiralty Court in 1831, Dr Lushington openly refused to be bound by it, 1st "because it was only a single case; 2nd because it was doubted by high authority; 3rd because it was impossible to reconcile it with the plain principles of the common law."

Thus it is seen that all along the line strong doubts were frequently cast upon it. Finally in 1887 the great case known as the Bermina (c) arose, the facts of which were that two British ships, Bernina and Bushire came into a collision through the concurrent negligence of the crews of both vessels. An engineer of the Bushire, but who was not then on duty, and a passenger of the same vessel were both drowned. Action was brought in their behalf. The case was tried in a Court of Admiralty but, under Lord Campbell's Act, was really a common law action. It resulted in a verdict for the defendant on the authority of Thorogood v Bryan. The plaintiff attacked the soundness of the doctrine which had been so unmercifully criticised both in England and America, and succeeded in carrying his case to the Court of Appeals where

(a) Remark of Vaughan Williams, Judge in Tuff v Warman, 2 C.B. (N.S.) 740; Smith's Loading Cases Vol. 1 page 220.
(b) Lush. 383.
after an exhaustive examination into Thorogood v Bryan, its reasoning; the authority or rather the lack of authority on which it was based; the cases which had attempted to follow and those which had condemned it, a unanimous court came to the just, reasonable, and long-looked-for conclusion that Thorogood v. Bryan was without reason or principle to back it, and that it was high time for the court to pronounce upon it the inevitable decree of being no longer the law. Lord Esher, M.R. who wrote the main opinion used the following language, "We cannot see any principle on which it can be supported and that the preponderence of judicial and professional opinion in England is against it, and that the weight of judicial opinion in America is also against it. We are of opinion that the proposition maintained in it is essentially unjust and inconsistent with other recognized propositions of law ".

By a resort to the test adopted in the introduction of this paper, to wit, that the legal relation between the plaintiff and a third person must be either that of master and servant, or of principal and agent in order that a defendant may effectually bar the plaintiff in such cases, it becomes at once apparent that neither the relation of master and servant nor of principal and agent existed between the passenger
and the driver of the bus. If the driver became his agent, the passenger would, as a natural result, be liable for all damages negligently done by such driver while the relation lasted. The argument that the relation of master and servant existed shows the fallacy of the rule. For where such relation exists the master can say to one "come" and he cometh, and to another "go and he goeth". Tested by this, the passenger was not master, for ten, twenty, thirty or any number of drivers could have been thrust upon him during the transit even against his express disapproval. No one can say that a master legally occupied such a subordinate position. To so contend would place the servant above his master which, in fact, is not the law.

Section 3. The General Doctrine in the United States.

In the two preceding divisions of this subject we have traced the rise and fall of the doctrine of Thorogood v Bryan in England,—the home of its origin. It is the province of this division to treat the doctrine as it exists in the United States. The courts of this country are, and always have been striving to keep abreast with the onward and upward movement of an enlightened jurisprudence. It is a remarkable fact and one which cannot but fail to enlist our admiration
that only the courts of one State ever adopted the doctrine as applied to this phase of the question. The courts were those of Pennsylvania, but in doing so they did not accept the reason of "identification" as given by the English Courts; but based their decision upon the ground that, to restrict the plaintiff to an action against his carrier only was more in accord with a sound policy of the law, in that by holding the carrier alone responsible a greater incentive to care and diligence would thus be brought to bear upon him. (a) This reason seems to be as illogical as the English rule was fallacious. No policy of the law is, or can be sound which will say to one of two joint tort feasors, 'I will protect you against your wrong doing in order to secure greater care and circumspection on the part of your fellow wrong doer'.

The courts properly refuse to enforce any contribution whatever between joint tort feasors. That being so, is there any sufficient reason in law or its policy which will warrant a court in saying to a plaintiff when injured by the concurrent negligence of his carrier and a third person, 'you are limited to your carrier only for the enforcement of your rights?' Certainly not. The law should, in this class of

(a) Lockhart v Lichtenthaler, 40 Pa. St. 151.
Railway Co. v Boyer, 97 Pa. St. 91.
cases as in others, allow the injured party to proceed at his election, against either or both of the wrong doers. (a)

Thanks to that noble characteristic of mind which is always open to conviction, and ever ready to learn the truth. This manifested itself in a case coming before the court of Pennsylvania in 1882, just two years after the overruling of Thorogood v Bryan in England. (b) The case arose out of an injury to the plaintiff while riding in a private carriage. The court had repeatedly refused to apply the Thorogood v Bryan rule in such cases, and therefore it is plain that the question now under consideration was not involved. Judge Clark, however, in writing the opinion and upon whose mind light had new dawned, could not withstand the temptation of shedding it forth. He accordingly fired strong shots of disapproval at the rule as laid down in the Lochhart and Boyer cases. This was, of course, only his private opinion, in other words a dictum. But the legal profession saw in it a greater significance. It was to them not only a ray of light looming above the clouded horizon of the past, but was a bright forerunner of a more perfect dawn. The next year a case arose which fully met the anticipations of the profession. (c)

(a) Pollock on Torts page 131.
(b) Dean v Railway Co., 129 Pa. St. 514.
(c) Bunting v Hogsett, 139 Pa. St. 363.
The plaintiff, while riding in a common carriage, was injured through the concurrent negligence of his carrier and the defendant. Judge Clark delivered the opinion of the court in which he reiterated his private opinion given in the Dean case to the effect that, "Where a person suffers injury from the joint negligence of two parties, they are liable jointly and severally, and it would seem in principle a matter of no consequence that one of them is a common carrier ". The opinion received the unanimous approval of the court. Thus it is seen that the Pennsylvania courts broke away from the rule of Thorogood v Bryan at the first opportunity.

It was stated at the opening of this division that no other courts in the United States ever adopted the rule, yet very many of them have been called upon to settle it in actual controversies. The New York courts, for instance as early as 1859 in the case of Chapman v Railway Co., were called upon to settle it.

(a) Webster v Railway Co., 33 N.Y. 260; Railway Co. v Hurrell (1894) 58 Ark. 454; Railway Co. v Hughes, 37 Ala. 610; Tompkins v Railway Co., 63 Cal. 163; Railway Co. v Markins 88 Ga. 60; Turnpike Co. v Stewart, 2 Met.(Ky.) 119; Flaherty v Railway Co., 39 Minn. 328; Beeke v Railway Co. 102 Mo. 544; Cuddy v Horn, 46 Mich. 596; Railway Co. v Shacklett, 104 Ill. 364; Randolph v Riorden, 155 Mass. 331; Transfer Co. v Kelly, 36 Ohio St. 83; Markham v Navigation Co. 11 S.W.(Tex.) 131. Railway Co v Administrator 9 S.E.(Va.) 321.

(B) 19 N.Y. 341.
upon to decide the question. The plaintiff in the action, while riding as a passenger on the Harlem Railway, was injured through a negligent collision of its train with one belonging to the defendant. Chief Justice Johnson delivered the opinion of the court, and the reasons given by him for deciding that the negligence of the carrier would not effect the plaintiff's right to recover, are so clear and cover all such cases so fully, that it seems not only justifiable but highly proper to quote them. "It is entirely plain," says he, "that the plaintiff had no control, no management, no advisory power over the train in which he was riding. To attribute to him, therefore the negligence of the agents of the company, and thus bar him of a right of recovery, is not applying any existing exception to the rule of law, but is forming a new exception which does not in fact rest upon the original exception, and is based on fiction, and inconsistent with justice."

The general rule of law is, of course, that a plaintiff has his action for injuries caused through the negligence of another. The plain exception to the above rule is that he cannot have an action if his negligence contributed to his injury. This is the exception meant by the learned Judge in
saying, "it is not applying any existing exception", but that the attempted one is new and resting wholly upon fictional grounds.

The constant struggle on the part of those wishing to adopt the rule was to bring it within the real exception above mentioned. This they sought to accomplish by making the carrier the plaintiff's agent or servant. But Judge Johnson sounded the key-note which at once revealed the lack of harmony in such reasoning by saying that, "the plaintiff had no control, no management nor advisory power over the train or its servants". Control or the right to do so are the powers we look for in a principal or master, and no just law can possibly see such powers vested in every person riding in a common carriage, unless it peers through a glass of fiction.

Baron Pollock took the fictional phrase, "identified with the carriage" to mean that, the plaintiff for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver " . But why put him in the same position as the owner of the bus? This question applies with equal relevancy to the passengers on the railway train or in any other public carriage. The answer to the question is that, it can only be done by consider-
ing the driver or owner of the bus, or the operators of the train as the servant or servants of the passenger. Another question at once presents itself. Upon what grounds can such relationship be based? Only by finding that the passenger controls or has the right to control the conduct of the driver or agents of the train. But by merely taking passage in a common carrier, and not directing its movements further than to point out the different places of destination, or the general route of travel, will not render a passenger the master and the operators of the carrier his servants. (a)

Not only have the numerous State courts decided against the adoption of the rule of Thorogood v Bryan, but the Supreme Court of the United States in a unanimous opinion refused to follow the rule. (b) Judge Field delivered the opinion of the court and, after saying that all the English as well as numerous cases in the United States show that the relation of master and servant does not exist said, "In the absence of this relation, the imputation of his negligence to the passenger where no fault of omission or commission is chargeable to him, is against all legal rules ".

(a) Bennett v Railway Co., 33 N.J.L. 225.
(b) Little v Hackett, 116 U.S. 366.
It may, therefore, be said without fear of contradiction that, so far as England and the United States are now concerned, the rule of Thorogood v. Bryan as applied to this phase of our question is nothing more than one of the sad mistakes of the past. And upon first thought, it may seem to some that too much time and space have been given to its consideration; but in this we cannot agree because although the rule has, in this connection, been swept away by the courts yet it has been transferred from the passenger in the public carriage to that of the passenger in the private carriage, and is there applied in all its harshness. To this phase we shall now turn our attention, and trust that we may proceed upon a safer footing by reason of having traversed more fully the background of this field of investigation.
CHAPTER III. INJURIES TO PASSENGERS IN PRIVATE CARRIAGES.

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Section 1. Where the Plaintiff is Injured while Riding with a Stranger. That the rule of Thorogood v Bryan ever found its way into our law is, indeed, very unfortunate for it has lead the courts into great confusion, and has in its operation, worked great injustice to complaining litigants. One would naturally expect that the courts of the United State having refused so strenuously to enforce the rule against a passenger in a public carriage would, for the same reason, refuse to enforce it against a voluntary passenger in a private carriage. But such uniformity is not to be found. Wisconsin is, perhaps, the pioneer in this direction, for in the case of Prideaux v City (a), where action was brought to recover damages for an injury sustained while riding by invitation with a friend in his private carriage, the driver and City both being negligent; but no personal negligence on the part of the plaintiff being shown, yet the court held that the driver's negligence was imputable to her, because she reposed a trust in him, and that from such trust reposed the law would raise an implied agency. "Voluntary entrance into a private conveyance ", says the court, " adopts (a). 45 Wisconsin 513.
the conveyance for the time being as one's own, and assumes
the risk of the skill and care of the person guiding it......
There is a personal trust in such case, which implies an
agency ".

The court draws the distinction between the rule
applied to passengers in public carriages and the one applied
to cases of this character by the fact that persons enter
common carriers more from moral necessity, while persons
enter a private carriage voluntarily and trust to its being
safe.

In order to see more fully the reasons upon which this
novel decision was based, a further quotation will be useful.
" It appears absurd, " says the court, " to hold that one
voluntarily choosing to ride in a private conveyance, trusts
to the sufficiency of the highway, to the care and skill ex-
ercised by all other vehicles upon it, to the care and skill
governing trains at railway crossings, to the care and skill
of everything except that which is most immediately important
to himself; and trusts nothing to the sufficiency of the very
vehicle in which he voluntarily travels, nothing to the care
and skill of the person in charge of it. His voluntary en-
trance is an act of faith in the driver; by implication of
law, accepts the driver as his agent to drive him ". 
The court, it seems to me, was correct in saying that it would be an absurdity to hold that the passenger trusted to the care and skill of all the enumerations given; and not to hold that he trusted to the care and skill of the driver with whom he chose to ride. But, (and here it seems to me the court failed), does it follow as a logical conclusion that by reason of the trust thus reposed, that the driver thereby became the passenger's agent? Not at all. The driver was no more her agent, than was the defendant City, or the flagman at the railway crossing. She reposed a trust in all of them, but only to the extent that they would use due care so as to avoid injuring her. This trust reposed that every individual will use proper care so as to avoid injuring his fellow men, is one which every person has a clear legal right to exercise without thus rendering the whole of mankind his agents, and thereby subjecting him to the effects of all their acts. But the court made the driver her agent, because of that mere trust which she reposed not only in him, but in the world at large, and that too without showing that she was aware of his lack or skill in driving, or that she herself was guilty of personal negligence.

(a) See Pollock on Torts page 275.
Wisconsin, however, does not stand alone, but has at least two followers. The Supreme Court of Montana, in 1894 in the case of Whitaker v Helema, (a) held on the rule of the Prideaux case that the plaintiff could not recover damages for injuries sustained by being thrown out of the private carriage of the driver with whom he had been invited to ride. Both the driver and defendant were negligent, but no personal negligence whatever was proven against the plaintiff.

That the courts of Montana should adopt such a rule is not so surprising, but to see the courts of Michigan do so, and that too on a misconceived ground is, to say the least, unreasonable. The case before the Michigan court was Mullen v Owosso, (b) and arose out of the following facts, a woman of discretion was riding by invitation in a private carriage, and while thus engaged was injured through the negligence of the defendant and the driver. She was entirely free from personal negligence, yet the court held upon the authority of Railway Co. v Miller (c) that the driver's negligence would, by imputation, prevent her recovery. The parties in the Miller case were similarly situated to those in the Mullen case; but the plaintiff was shown to have been guilty of even

(a) 35 Pac. Rep. 904.
(b) 25 L.R. Ann. (1894) 693.
(c) 25 Mich. 274.
gross negligence. Therefore, although the Prideaux case was referred to by way of argument, it is clear that it did not form the basis of the Miller decision. This fact was urgently pressed upon the court in the Mullin case by a dissenting opinion, in which, the Chief Justice concurred. The Mullin case was thus established by three judges for, and two judges against it, and if it is to stand it can only do so upon the ground of the Prideaux case.

This trio of courts stand alone, and opposed to the great weight. If, however, a blind person for example, enters a private carriage, and confides himself to the care and keeping of the driver, the relationship of principal and agent is at once established, and the rights and liabilities of such relationship at once arise.(a)

It was thought for a long time that the Iowa courts were committed to what may be called the "Wisconsin" rule, but the case supposed to be thus decided was to the effect that, if two or more persons are engaged in a common enterprise, and one be injured by the joint negligence of one of his associates and a third person, the negligence of such associate will be imputed to him and bar a recovery against the third

(a) Johnson v Railway Co., 21 S.W. (Tex.) 274.
This was placed upon the ground that as they were engaged in a common enterprise or purpose, each should be responsible in some degree for the acts of the others. But the Iowa courts have expressly considered the question that is now before us in the case of Nisbit v Garner (b).
The plaintiff was riding by invitation in the private carriage of a person, and there injured through the defendant's negligence. The lower court instructed that the negligence of the driver was imputable to the plaintiff. The Supreme Court upon a review of this instruction said, "The relation of principal and agent must exist in fact. The law will not create or presume the relation from the mere fact that he accepted the invitation of another to ride in his carriage. If he is but the guest of the other, and neither has nor assumes the right to direct or control the conduct of the driver, neither the driver nor owner can be regarded as his servant."

In Robinson v Railway Co.,(c) the New York court speaking by Chief Justice Church could see no reason of law which would impute the negligence of the driver in this class of cases unless the passenger was negligent; or was a master or principal; or unless they were engaged in a joint enterprise.

(a) Payne v Railway Co., 39 Iowa 525.
(b) 1 L.R.Ann. 152.
(c) 66 N.Y. 11.
in the sense of mutual responsibility for each other's acts.

It was said in a case coming before the court of Indiana that, "negligence could be imputed only in case the driver was unskilful and that the passenger knew of it". (a) The Indiana court, no doubt, decided the case in accordance with the great weight of authority but like many other courts, was somewhat careless in the use of the term 'imputed'. The case put by the Indiana court seems to me to be exactly the one in which imputed negligence does not arise. If the passenger rides with an unskilful driver, and does so knowing of his lack of skill, the question of imputed negligence does not enter into the case, because he by his very act and knowledge has barred himself from recovering from the negligent defendant, not by reason of the driver's negligence (which is, under certain circumstances imputed), but by reason of his own contributory negligence. (b)

It is unnecessary to discuss any further the cases which are opposed to the 'Wisconsin rule', and it will therefore suffice to simply cite the additional authority opposed to it. (c)

(a) Commissioners v Mutchler, 36 N.E. 534.
(b) Brickell v R.R. Co. 120 N.Y. 390; Pollock on Torts p. 584.
(c) R.R.Co. v Powell, 89 Ga. 601; Cashill v R.R. Co. 18 S.W. (Ky.) 2
Randolph v Riorden, 155 Mass. 331; R.R. Co. v Davis, 60 Miss. 444; Hollman v City, 35 Minn. 522; R.R. Co. v Hogeland, 38 Md. 149; Noyes v Boscawen, 84 N.H. 391; R.R. Co. v Endie, 43 Ohio St. 91; Carlisle v Brisbane, 113 Pa. St. 544.
Briefly summarizing, it seems to me that the 'Wisconsin rule' is essentially the Thorogood v Bryan doctrine in a modified form and, although the Wisconsin court chose to cloak it under the name of an "implied agency" rather than under "identification" yet it, no doubt, failed to breathe into it the soul of the law, and thereby render it a living principle. On the other hand it seems that the rule of the opposed authority will not imply an agency from the mere fact that the plaintiff rode in the private carriage, but will require either one of two things to be shown, (1) that the plaintiff controlled the driver or (2) that he had the right to control him. And when the courts speak of imputing the driver's negligence to the plaintiff when he has knowingly ridden with a careless or unskilful driver, they mean not, that the driver's negligence is to be imputed to the plaintiff; but that the plaintiff's own negligence bars his recovery. His negligence would consist, of course, in riding with such a driver, with a full knowledge of the dangers which are so likely to follow.

The cases which speak of imputing the negligence of the driver to his fellow associates when engaged in a common purpose etc., do not thereby raise an exceptional rule; but one
which falls logically within one of the two requirements set forth above. We now turn to a consideration of the last phase of our subject.

Section 2. Where the Plaintiff is Injured while Riding with her Husband. The question at once presents itself, what principle or reason exists in this phase of our subject which was not present in the one just considered? If nothing more can be found than that which the 'Wisconsin rule' requires, then in justice and reason there can be no foundation for saying that her husband's negligence, contributing with that of a third person's to her injury, is imputable to her so as to bar her action against such third person. Therefore, a search for the purpose of ascertaining the reason or principle upon which an imputation of negligence can thus be founded is of the greatest importance.

The Iowa courts, it will be remembered, stood out boldly against the 'Wisconsin rule'; but here they hold that if the wife is injured by the joint negligence of her husband (he from their relation being bound to care for and protect her), and a third person, his negligence will be imputed to her and bar her redress against the third person. (a) The reason (a) Yahn v Ottumwa, 60 Iowa 429.
for the holding was based not upon any agency; but upon the marital relation of the parties. The fact that she was under the husband's care and that he was bound to protect her seemed to form the gist of the reason.

The Vermont courts impute the husband's negligence to the wife in this class of cases, not on the ground of the marital relation, as they say; but place it upon the ground that the husband is her servant, he having the care and custody of her person and responsible for her safety.(a)

The difference in real substance between the two reasons given is not very plain. Both, it seems, make him her servant. The civil code of California makes the right to damages in favor of the wife during marriage as well as the money recovered, community property, and therefore, in cases of this character, the husband's negligence bars her recovery upon the plain principle of agency.(b)

The courts of Connecticut are often cited as supporting the rule which imputes the negligence of the husband to the wife; (c) but upon investigating the case, it is at once seen that what was said in that regard is nothing but a mere dictum, because the wife was guilty of negligence, and no negli-

(a) Carlisle v Sheldon, 38 Vt. 440; R.R.Co. v Crittenden, 42 Ill. App. 469.
(b) Me Fadden v R.R.Co., 37 Cal. 464.
(c) Peek v R.R.Co., 50 Conn. 379.
gence whatever was proven against the defendant.

The most interesting and instructive case on this side of the question is one which was tried in the courts of New Jersey. (a) The action was brought to recover damages for an injury to the wife caused by a collision between defendant's car and a carriage in which the wife and husband were riding. The case was before the Supreme Court for the purpose of reviewing the charge of the trial judge to the effect that, the negligence of the husband could not be imputed to the wife. The first thing which the court sought to accomplish was to determine the posture of the husband to the suit. In doing so, it established, (1) that the common law required the husband and wife to join in an action for her injury; and (2) that if the husband is interested in the subject matter of the suit, and through his negligence the action arose, he cannot recover; and (3) that if judgment is recovered, the husband has the right to receive the money.

From the three propositions thus established, the court reached the conclusion that the common law would give to the defendant a complete defense by his showing that the plaintiff's husband assisted to create the cause of action. But (a) Railway Co. v Goodenough, 22 L.R. Ann. 460
this did not necessarily determine the controversy for it was strenuously urged on the part of the plaintiff that the statute, giving to the wife her real and personal property absolutely, had changed the common law. The court, however, held that the common law, in this connection, remained untouched by the statute because "personal torts do not create rights of property", and that the husband having not a mere power to sue for the wife, but a power coupled with an interest in the suit, would thereby bar her recovery by reason of his contributory negligence.

A strong dissent was entered by Judge Dixon based upon two grounds, (1) that the husband at common law had no legal interest in the cause of action accruing to a married woman for a tort to her person, and (2) that when the action became merged in a judgment, such judgment was property within the meaning of the statute, and therefore belonged to her.

It seems that although the case involved the question of imputed negligence, yet the decision went off upon the theory that the common law remaining unchanged rendered it, in effect, the husband's action and ruled as a natural result that he could not recover for his own wrong.

While the greater number of states are on the side of the
question just considered, yet it seems that the better reason is opposed to imputing the negligence of the husband to the wife. The court of Indiana in two well reasoned cases (a) held that from the mere marital relation, or from the fact that she was under her husband’s control and protection would not render his negligence hers by imputation; but in order to do so, it was necessary to make it appear that he was her agent. "He", says the court, "should be subject to her control and direction."

In New York the statute regarding the property of married women is substantially the same as that of New Jersey, yet the court reached the conclusion that the husband’s negligence cannot be imputed to the wife in this class of cases. She is, however, like all other persons similarly situated, required to use ordinary care, and whether she has done so or not is a question of fact for the jury. (b) The Federal Courts are also in line with Indiana and New York on this question. (c)

There seems to be no justice or consistency in the reason that because the wife is entitled to the care and protection of her husband that he should thereby be made her agent. In other words, the solemn vow of care and protection taken by

(a) Railway Co. v Creek, 130 Ind. 139; RlRlCo. v Spilker, 134 Ind. 380.
(b) Hoag v Railway Co., 111 N.Y. 199.
(c) Shaw v Craft, (Ohio) 37 Fed. 317.
him on their wedding day is made the evidence of his agency, and if he in conjunction with another dare violate it, she, whom the law was so anxious to protect and defend, finds herself stripped not only of all protection, but that the sacred shield of her marriage morn has become, under the sanction of the law, a two-edged sword against her. Such is, in effect, the result of the reasoning of the New Jersey court.
CHAPTER IV. CONCLUSIONS, AND WHAT THE

LAw OF OTHER STATES MAY BE IN THE FUTURE.

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The courts which impute to a child not sui juris the negligence of its parents; those which impute to a mere passive guest, in a private carriage, the negligence of the driver; and those which impute to a wife the negligence of her husband while riding with him in his private carriage, have drifted away from the pure principles of agency, and have sought in the realms of speculation for some principle upon which to anchor their unfounded doctrines. While these courts have tried to bolster up their rules with the principles of agency; yet the real basis is found in that which the particular court deems to be expedient or in accord with a sound public policy.

This was, without doubt, the true ground upon which Hartfield v Roper proceeded, and the Pennsylvania courts, it will be remembered, frankly acknowledged such to be the ground for their early adoption of the rule of Thorogood v Bryan. The 'Wisconsin rule' growing out of the Prideaux case must also be rested upon the ground of expediency, for it was plainly seen that there existed neither an express nor implied
had these courts asked themselves the question, 'Did the
person whom it is endeavored to impute with negligence do the
negligent act through the person whose negligence is sought
to be imputed?, their answer could not consistently have been
anything else but "no"; and thus a sound public policy would
thereby have been subserved. For all parents, not only
throughout the lower strata of animal life, but in the higher
as well, have the divine instinct which prompts them to protect
and defend their offspring against danger and peril, and no
public policy will, in any degree, strengthen such instinct in
humanity by depriving an injured child of redress, because it
is thought that proper care was not taken by its parents for
its protection.

Just what true expediency resides in the 'Wisconsin rule;
which imputes to a passenger in a private carriage the negli-
gence of the driver, when the passenger neither controls, nor
has the right of control over the driver is, to say the least,
quite difficult to understand. If the person has knowingly
ridden with a careless and unskilful driver, his own contrib-
utory negligence bars him from redress, and imputed negligence
is entirely foreign to the case. But a rule which imputes
to a mere passive guest, in a private carriage, the negli-
gence of the driver does not, it seems, subserve any true public policy; but overrides the fundamental principles of law and wholly disregards the instinct of self-preservation.

Whether at the common law the negligence of the husband can be imputed to the wife, while she is riding with him in his private carriage so as to bar her action (she being the meritorious party) against a negligent defendant is, at this time, an unsettled question, unless it can be said that the New Jersey decision (supra) has determined it.

Quite a number of States courts have not yet passed upon these questions, but if the immediate past furnishes us any insight into the future, it is possible that some of them may follow the 'Wisconsin rule'; but on the other hand it is highly probable that if they are asked to apply the "New York Rule" to children not sui juris, their answer with one accord will be:—

We will not impute to those helpless ones the fault, if parents or guardians over them no protection raise;

But will stretch forth the law's strong arm,

Their precious rights to save.

---FINIS---