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## THE JOINT ENTERPRISE DOCTRINE IN AUTOMOBILE LAW

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With the growth of accident litigation, at least one of the old fundamentals of the law appears to be tottering and, unless something occurs to check the present tendency of the courts, may collapse in favor of new principles, peculiarly adapted to accident litigation. It has long been axiomatic that a man shall not be forced to bear the consequences of the actions of another. There is a notable exception of course, namely, the doctrine of *respondeat superior*, but in the absence of an agency relation, we are accustomed to the axiom in its unadulterated form. It is this principle of law which is questioned, perhaps unwittingly, by current judicial decisions.

A passenger in a vehicle is injured. His driver was negligent. So too was the driver of the other vehicle, whom we may call, for convenience sake, the third party. In an action by the passenger against the third party, will the plaintiff be barred by his driver's negligence? And assuming that the third party was innocent of blame, will the passenger, because of his driver's negligence, be compelled to compensate the injured third party? And in an action by the passenger against his driver, is there a status between the litigants which will absolve the negligent driver from liability? If the ancient bulwark remain firm, then, there being no agency relation, the passenger's position should be unaffected by his driver's conduct. Such indeed is the conclusion normally reached, but the harmony of result is disturbed by the application of the so-called "joint enterprise doctrine", a doctrine which is difficult to understand and therefore little understood.

It is the joint enterprise doctrine which is the subject of this article. The writer will attempt (1) to set forth the historical ancestor of the doctrine and the fate that befell it; (2) to relate the consequences which flow from the application of the joint enterprise doctrine; (3) to compare the several conceptions of the doctrine and the situations to which they have been applied; and (4) to analyze the legal basis of the doctrine.

It should be remembered that it is assumed throughout that the passenger is personally free of culpable conduct. Attention will not be paid to those cases which turn upon the passenger's active and

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negligent interference with the operation of the vehicle or which spell out the passenger's negligence from his failure to object to patent mismanagement by the driver.<sup>1</sup> Such cases do not conflict with the principle that one shall not answer for the conduct of another. Our problem is, when and why will the negligence of the driver be imputed to the passenger who is free of independent negligence and who is not in fact the principal of the driver?

#### THE DOCTRINE OF THOROGOOD V. BRYAN

The forerunner of the joint enterprise doctrine was the English case of *Thorogood v. Bryan*.<sup>2</sup> In that case, which was a suit by the representative of a passenger in an omnibus against a negligent third party, it was held for the first time that a passenger was so identified with the driver of the omnibus that the latter's contributory negligence would bar recovery.

So startling a doctrine could not survive judicial inquiry. In refusing to accept it, the New Jersey court wrote:

"But I have entirely failed to perceive how it is that the passenger in a public conveyance becomes identified, in any legal sense, with the driver of such conveyance. Such identification could result only in one way, that is, by considering such driver the servant of the passenger. I can see no ground upon which such a relationship is to be founded. In a practical point of view, it certainly does not exist... To hold that the conductor of a street car, or of a railroad train is the agent of the numerous passengers who may chance to be in it, would be a pure fiction. In reality there is no such agency, and if we impute it, and correctly apply legal principles, the passenger, on the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed would be without any remedy. It is obvious in a suit against the proprietor of the car in which he was a passenger, there could be no recovery if the driver or conductor of such car is to be regarded as the servant of the passenger. And so on the same ground each passenger would be liable to every person injured by the carelessness of such driver or conductor, because, if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to say that he is not to be affected by it for other purposes."<sup>3</sup>

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<sup>1</sup>The distinction between imputing the driver's negligence to the passenger and the passenger's independent negligence is well brought out in: *Franco v. Vakares*, 35 Ariz. 309, 277 Pac. 812 (1929); *Winston's Adm'r v. City of Henderson*, 179 Ky. 220, 200 S. W. 330 (1918); *Alperdt v. Paige*, 292 Pa. 1, 140 Atl. 555 (1928). For duty of occupant, see (1922) 18 A. L. R. 309; (1926) 41 A. L. R. 767; (1927) 47 A. L. R. 293.

<sup>2</sup>8 C. B. 115 (1849).

<sup>3</sup>*Bennett v. N. J. R. R. & Trans. Co.*, 36 N. J. L. 225, 227 (1873).

Within a half-century the doctrine of the *Thorogood* case was laid to rest as a fictitious extension of the principle of *respondeat superior*.<sup>4</sup> It became thoroughly settled both in England and in the United States that a passenger in a common carrier or a passenger in a private conveyance, being himself free of contributory negligence, could recover against a negligent third party in spite of the concurring negligence of the driver.<sup>4a</sup> The doctrine of the *Thorogood* case remains only in Michigan, and there in but a limited form.<sup>5</sup>

The joint enterprise doctrine represents a partial revival of the *Thorogood* case. Both doctrines impute the negligence of the driver to the passenger on some theory of agency<sup>6</sup>, although, of course, in all of these cases no actual agency exists, for if an actual agency did exist there would be no need to resort to a theory other than *respondeat superior* to obtain the desired result. But the joint enterprise doctrine is of more limited application than its predecessor in two respects: first, no attempt has been made to apply the new conception to the passenger for hire, and so long as the joint enterprise doctrine continues in its present form, no such attempt could succeed; and second, the passenger in a private conveyance is affected by the new doctrine only where certain elements are present, which elements will be detailed later.

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<sup>4</sup>Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391 (1886); Shultz v. Old Colony Street Ry., 193 Mass. 309, 79 N. E. 873 (1907); Bennett v. N. J. R. R. & Trans. Co., *supra* note 3; 1 SHEARMAN & REDFIELD, NEGLIGENCE (1913) § 66; (1924) II BRIT. RUL. CAS. 597. Wisconsin repudiated the doctrine in 1921. Reiter v. Grober, 173 Wis. 493, 181 N. W. 739 (1921).

<sup>4a</sup>Authorities cited *supra* note 4; Broussard v. La. W. R. R., 140 La. 517, 73 So. 606 (1917); BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW (1927) 1137; HUDDY, AUTOMOBILES (Curtis's 6th ed. 1922) §§ 679-80; Ann. Cas. 1916 E, 268, 685; 42 C. J. 1176.

<sup>5</sup>Skaug v. Knappins, 241 Mich. 57, 216 N. W. 403 (1927). The doctrine is not applied where the passenger is a passenger for hire, Galloway v. Detroit United Ry., 168 Mich. 343, 134 N. W. 10 (1912), or a minor, Michelsen v. Wabash Ry., 247 Mich. 383, 225 N. W. 481 (1929), or a servant of the driver, Robertson v. United Fuel & Supply Co., 218 Mich. 271, 187 N. W. 300 (1922), or a fellow servant of the driver, City of Grand Rapids v. Croker, 219 Mich. 178, 189 N. W. 221 (1922) (firemen). Nor has the doctrine ever been invoked to give the driver a defence to an action by his passenger against him. Roy v. Kirn, 208 Mich. 571, 175 N. W. 475 (1919).

<sup>6</sup>That the basis of *Thorogood v. Bryan* is some theory of agency, see authorities *supra* note 4. That the basis of the joint enterprise doctrine is some theory of mutual agency, see Farthing v. Hepinstall, 243 Mich. 380, 220 N. W. 708 (1928); Bloom v. Leech, 120 Ohio St. 239, 166 N. E. 137 (1929); Robison v. Oregon-Washington R. R. & Nav. Co., 90 Ore. 490, 176 Pac. 594 (1918); Hines v. Welch, 229 S. W. 681 (Tex. Civ. App. 1921); Director General v. Pénce's Adm'x, 135 Va. 329, 116 S. E. 351 (1923).

CONSEQUENCES FLOWING FROM THE APPLICATION OF THE JOINT  
ENTERPRISE DOCTRINE

As already indicated, it is assumed throughout that the passenger is personally free of culpable conduct and that his driver is negligent. If a joint enterprise exists, what effect has it upon (1) the rights of the passenger against a negligent third party, (2) the liability of a passenger to an innocent third party, and (3) the liability of the driver to his passenger?

The great majority of the joint enterprise cases involve the first problem, the right of the passenger against the negligent third party. It was this situation in which the doctrine was first invoked. It is universally conceded that if a joint enterprise exists the contributory negligence of the driver will be imputed to the passenger to prevent recovery against a negligent third party.<sup>7</sup>

The solution of the second problem, the liability of the passenger to the innocent third party, is not necessarily controlled by the answer to the first problem, for the joint enterprise doctrine, resting as it does upon a fictional basis of mutual agency, may, like any other fiction, be denied its logical growth where there is no policy to be served by extending it. The law might sensibly say that when the passenger entrusts his care to his fellow enterpriser he agrees to be bound by the latter's conduct in an action against a negligent third party, but does not contemplate that in addition he will be liable to those injured by the driver. It is true, as the quotation from the New Jersey case given above will indicate, that one of the compelling reasons for the overthrow of the *Thorogood* case was the fear that that case would logically make the passenger amenable to third parties; but on the other hand it has been denied that the *Thorogood* case, even at the most vigorous stage of its brief career, ever imposed an affirmative liability upon the passenger.<sup>8</sup> However, the joint enterprise doctrine has been so frequently expressed in terms of agency<sup>9</sup>, that the few courts which have been confronted with the second problem have, without any critical consideration, unanimously adopted the logical deduction from the agency relation and held the passenger responsible to the innocent third party.<sup>10</sup>

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<sup>7</sup>BLASHFIELD, *op. cit. supra* note 4a, at 1147; Mechem, *The Contributory Negligence of Automobile Passengers* (1930) 78 U. OF PA. L. REV. 736, 747; (1929) 38 YALE L. J. 810; (1907) 8 L. R. A. (N. S.) 597, 628; (1927) 48 A. L. R. 1055, 1077; (1929) 62 A. L. R. 440; (1924) 11 BRIT. RUL. CAS. 597, 620.

<sup>8</sup>Reiter v. Grober, *supra* note 4. See Gilmore, *Imputed Negligence* (1921) 1 WIS. L. REV. 193, *et seq.* <sup>9</sup>*Supra* note 6.

<sup>10</sup>Crescent Motor Co. v. Stone, 211 Ala. 516, 101 So. 49 (1924); Carpenter v. Campbell Automobile Co., 159 Iowa 52, 140 N. W. 225 (1913); Crawford v. McEl-

Less harmonious, however, are the decisions on the third issue, the liability of the driver to his passenger. There is at least an off-hand plausibility in the contention that what excuses the negligent third party should also excuse the negligent driver. This argument is particularly forceful in jurisdictions where contribution is allowed between joint tortfeasors, for there it is even more apparent that to release the negligent third party and at the same time to hold the negligent driver is to place the entire loss upon one whose conduct was but a concurring force. Perhaps influenced by this consideration, several courts have protected the driver,<sup>11</sup> and others have by inference entertained the same view.<sup>12</sup> On the other hand, it is argued that even the true partnership relation has never placed a "mantle of protection" over the tortious activities of one partner toward the other; and the present tendency and the weight of authority is decidedly to hold the negligent driver liable to his passenger.<sup>13</sup> In fact

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hinney, 171 Iowa 606, 154 N. W. 310 (1915); *Adams v. Swift*, 172 Mass. 521, 52 N. E. 1068 (1899) (driver was guest of enterprisers); *Lucey v. John Hope & Sons Engraving and Mfg. Co.*, 45 R. I. 103, 120 Atl. 62 (1923). In the following cases the inference is that if a joint enterprise existed, the passenger would be liable: *Adamson v. McEwen*, 12 Ga. App. 508, 77 S. E. 591 (1913); *Anthony v. Kiefner*, 96 Kan. 194, 150 Pac. 524 (1915); *cf. dissent in Langley v. So. Ry.*, 113 S. C. 45, 101 S. E. 286 (1919).

<sup>11</sup>*Barnett v. Levy*, 213 Ill. App. 129 (1919) (case may mean that some duty of care exists although different from the duty to one who is a guest); *Farthing v. Hepinstall*, *supra* note 6; *Frisorger v. Shepse*, 230 N. W. 926 (Mich. 1930); *see Jacobs v. Jacobs*, 141 La. 272, 286, 74 So. 992, 997 (1917). *But see Lawrason v. Richard*, 129 So. 250, 256 (La. 1930).

<sup>12</sup>In the following cases, the courts failed to find a joint enterprise, the inference being that if one existed it would be a defence: *Lasley v. Crawford*, 228 Ill. App. 590 (1923); *Fisher v. Johnson*, 238 Ill. App. 25 (1925); *Hemington v. Hemington*, 221 Mich. 206, 190 N. W. 683 (1922); *Jessup v. Davis*, 115 Neb. 1, 211 N. W. 190 (1926); *Bolton v. Wells*, 58 N. D. 286, 225 N. W. 791 (1929); *Schwartz v. Johnson*, 152 Tenn. 586, 280 S. W. 32 (1926); *Offer v. Swancoat*, 27 S. W. (2d) 899 (Tex. Civ. App. 1930); *Landry v. Hubert*, 100 Vt. 268, 137 Atl. 97 (1927); *Round v. Pike*, 148 Atl. 283 (Vt. 1930). The question is expressly left open in *Loftus v. Pelletier*, 223 Mass. 63, 111 N. E. 712 (1916); *Hilton v. Blose*, 297 Pa. 458, 147 Atl. 100 (1929).

In Connecticut, by statute, a gratuitous guest may not sue the driver. *See Silver v. Silver*, 280 U. S. 117, 50 Sup. Ct. 57 (1929).

<sup>13</sup>*Whiddon v. Malone*, 220 Ala. 220, 124 So. 516 (1929); *Bushnell v. Bushnell*, 103 Conn. 583, 131 Atl. 432 (1925); *Harber v. Graham*, 105 N. J. L. 213, 143 Atl. 340 (1928); *Wilmes v. Fournier*, 111 Misc. 9, 180 N. Y. Supp. 860 (Sup. Ct. 1920), *aff'd*, 194 App. Div. 950, 185 N. Y. Supp. 958 (4th Dept. 1920), leave to appeal denied, 195 App. Div. 919, 185 N. Y. Supp. 958 (4th Dept. 1921); *Bloom v. Leech*, *supra* note 6; *Bailey v. Parker*, 34 Ohio App. 207, 170 N. E. 607 (1930); *O'Brien v. Woldson*, 149 Wash. 192, 270 Pac. 304 (1928); *Collins v. Anderson*, 37 Wyo. 275, 260 Pac. 1089 (1927); *cf. Wren v. Suburban Motor Transfer Co.*,

two courts have suggested that the existence of the relation increases the driver's duty of care to his passenger.<sup>14</sup>

#### THE SEVERAL CONCEPTIONS OF A JOINT ENTERPRISE

More important, perhaps, than the consequences flowing from the existence of the joint enterprise, are the elements which, if they appear, will invoke the application of that doctrine, and the situations which have been held to be both within and outside it. The cases may be conveniently considered in three groups.

*A. The Orthodox View:* By the decided weight of authority two elements must appear in order to constitute a joint enterprise. There must be both (1) a community of interest in the object of the trip and (2) a mutual right in the occupants to direct each other in relation to the management of the vehicle.<sup>15</sup> The circumstances must be such that it can be said that the vehicle is in their common possession.<sup>16</sup> Normally it is for the jury to decide whether a joint enterprise exists.<sup>17</sup>

Under this conception of a joint enterprise, it is apparent that the existence of a common purpose is not sufficient to warrant the imputation of negligence. Thus, there is no joint enterprise where it simply appears that the parties were on a pleasure trip,<sup>18</sup> or a hunting or fishing expedition,<sup>19</sup> or were attending a picnic.<sup>20</sup> Nor is the doctrine

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241 S. W. 464 (1922), and the Louisiana cases cited *supra* note 11; see ROWLEY, PARTNERSHIP (1916) § 758. The effect of the Bushnell decision has been overruled by statute. See *supra* note 12. It should be noticed that in Michigan, where Thorogood v. Bryan still obtains, that doctrine is no defence in the hands of the driver, *supra* note 5, but the joint enterprise doctrine is. See *supra* note 11.

<sup>14</sup>The Whiddon and O'Brien cases, both *supra* note 13.

<sup>15</sup>Crescent Motor Co. v. Stone, *supra* note 10; Bryant v. Pac. Elec. Ry., 174 Cal. 737, 164 Pac. 385 (1917); Barry v. Harding, 244 Mass. 588, 139 N. E. 298 (1923); Jessup v. Davis, *supra* note 12; Bloom v. Leech, *supra* note 6; authorities cited *supra* note 7 and *infra* note 70.

<sup>16</sup>Pope v. Halpern, 193 Cal. 168, 223 Pac. 470 (1924); State v. Norfolk & W. Ry., 151 Md. 679, 135 Atl. 827 (1927); Farthing v. Hepinstall, *supra* note 6.

<sup>17</sup>Carpenter v. Campbell Automobile Co., *supra* note 10; Clark v. Mo. Pac. R. R., 115 Kan. 823, 224 Pac. 920 (1924); Farthing v. Hepinstall, *supra* note 6; Hollister v. Hines, 150 Minn. 185, 184 N. W. 856 (1921); Robison v. Oregon-Washington R. R. & Nav. Co., *supra* note 6.

<sup>18</sup>Carter v. Brown, 136 Ark. 23, 206 S. W. 71 (1918); Indianapolis & Cincinnati Traction Co. v. Thompson, 81 Ind. App. 498, 134 N. E. 514 (1922); Cram v. City of Des Moines, 185 Iowa 1292, 172 N. W. 23 (1919); Pusey v. Atl. Coast Line R. R., 181 N. C. 137, 106 S. E. 452 (1921); Landry v. Hubert, *supra* note 12; cf. Franko v. Vakares, *supra* note 1.

<sup>19</sup>Bradshaw v. Payne, 111 Kan. 475, 207 Pac. 802 (1922); Kokesh v. Price, 136 Minn. 304, 161 N. W. 715 (1917); Moore v. Almendinger, 32 Ohio C. A. 299 (1921); cf. Wilmes v. Fournier, *supra* note 13.

<sup>20</sup>Wagner v. Kloster, 188 Iowa 174, 175 N. W. 840 (1920); Koplitz v. City of St. Paul, 86 Minn. 373, 90 N. W. 794 (1902).

applicable where members of an orchestra accept the invitation of one of their number to ride with him to the place of performance,<sup>21</sup> or where the occupants of the vehicle are opposing parties to a commercial transaction riding together in connection therewith.<sup>22</sup> Nor does the fact that the parties were in the habit of taking such drives together show a joint enterprise.<sup>23</sup> In all of these instances the driver has not surrendered his exclusive right to control and hence it cannot be said that the driver and the passenger had a mutual right to direct each other in the management of the vehicle.

Attempts to impute the negligence of one member of a common law relation (other than master and servant, etc.) to his fellow member, simply because of the existence of that relation, have uniformly failed. Thus the negligence of a parent will not be imputed to his minor child who is riding with him.<sup>24</sup> Nor will other degrees of family kinship of themselves warrant the imputation of negligence.<sup>25</sup> The

<sup>21</sup>Bailey v. Parker, *supra* note 13; Round v. Pike, *supra* note 12 (perhaps case treats it as jury question whether mutual right of control exists).

<sup>22</sup>So. Pac. Co. v. Wright, 248 Fed. 261 (C. C. A. 9th, 1918) (demonstration of truck to prospective buyer, plus rental feature in interim); Wren v. Suburban Motor Transfer Co., *supra* note 13 (broker driving prospective purchaser to inspect house); Bloom v. Leech, *supra* note 6 (vendor driving prospective purchaser of live stock); Offer v. Swancoat, *supra* note 12 (purchaser riding with broker); Ryan v. Snyder, 29 Wyo. 146, 211 Pac. 482 (1923) (lessor driving lessee to premises); *cf.* Loftus v. Pelletier, *supra* note 12 (nurse employed by club, riding with doctor—not imputed); Jessup v. Davis, *supra* note 12 (bank cashier and collection agent on way to swear out criminal complaint—not imputed). See also the following cases where negligence was imputed, in which the relation of the parties is not made clear: Louisville & Nashville R. R. v. Armstrong, 127 Ky. 367, 105 S. W. 473 (1907) (two men carting fodder); Omaha & Republican Valley Ry. v. Talbot, 48 Neb. 627, 67 N. W. 599 (1896) (two mechanics returning from their work); Schron v. Staten Island Elec. R. R., 16 App. Div. 111, 45 N. Y. Supp. 124 (2d Dept. 1897) (father and son engaged in moving goods).

<sup>23</sup>Ward v. Meeds, 114 Minn. 517, 130 N. W. 2 (1911); *cf.* Hollister v. Hines, *supra* note 17. See also Fisher v. Johnson, *supra* note 12; Kessler v. Davis, *infra* note 51; Wash. & Old Dominion R. R. v. Zell's Adm'x, *infra* note 59.

<sup>24</sup>Gorman v. Maizer, 149 Atl. 122 (N. J. 1930). *Contra*: Morningstar v. North-east Pa. R. R., 290 Pa. 14, 137 Atl. 800 (1927); *cf.* Covington v. Sea Board Air Line Ry., 128 So. 426 (Fla. 1930). For authorities in support of the general view see BLASHFIELD, *op. cit.* *supra* note 4a, at 1001, 1156; Gilmore, *op. cit.* *supra* note 8, at 201; *cf.* (1927) 51 A. L. R. 209. It seems that in New York the negligence of a parent will be imputed to a child, *non sui juris*. O'Neill v. City of Port Jervis, 253 N. Y. 423, 171 N. E. 694 (1930); see Jacobs v. Koehler Sporting Goods Co., 208 N. Y. 416, 418, 102 N. E. 519 (1913).

<sup>25</sup>Bryant v. Pac. Elec. Ry., *supra* note 15 (father and son); Anthony v. Kiefner, *supra* note 10 (mother and son); Hollister v. Hines, *supra* note 17 (sisters); (1924) 11 BRIT. RUL. CAS. 597, 617.

negligence of a husband will not be imputed to his wife,<sup>26</sup> even though there be the common object of pleasure,<sup>27</sup> buying groceries,<sup>28</sup> taking the children for a ride,<sup>29</sup> or changing their place of abode.<sup>30</sup> But the existence of these family relations will not prevent the application of the joint enterprise doctrine where the necessary elements are present.<sup>31</sup> In other words, in deciding whether or not a joint enterprise exists, the kinship of the occupants of the vehicle is of no consequence.

In a few jurisdictions a spouse's recovery for personal injuries is community property. Where such is the law, the contributory negligence of one mate will be imputed to the other in an action against a negligent third party, not on the theory of a joint enterprise, but rather on the ground that a recovery in favor of the injured spouse would permit her mate to profit from his own wrong.<sup>32</sup> The policy here is the same one which, before the married woman's enabling acts, had been held by some courts to prevent recovery by the wife where the negligence of her husband contributed to her injury.<sup>33</sup> These cases are outside of the joint enterprise doctrine; they rest on the property law, and not the tort law of those jurisdictions.

Although, of course, the negligence of a servant is imputed to his

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<sup>26</sup>*So. Ry. v. Priestler*, 289 Fed. 945 (C. C. A. 4th, 1923); *Stevens v. Luther*, 105 Neb. 184, 180 N. W. 87 (1920); *Lucey v. Allen*, 44 R. I. 379, 117 Atl. 539 (1922); *BLASHFIELD, op. cit. supra* note 4a, at 1152; (1924) 11 BRIT. RUL. CAS. 597, 613.

<sup>27</sup>*Bowley v. Duca*, 80 N. H. 548, 120 Atl. 74 (1923); *Alperdt v. Paige, supra* note 1; *Virginia Ry. & Power Co. v. Gorsuch*, 120 Va. 655, 91 S. E. 632 (1917).

<sup>28</sup>*Bowley v. Duca, supra* note 27.

<sup>29</sup>*Fuller v. Mills*, 36 Ga. App. 357, 136 S. E. 807 (1927); *Bowley v. Duca, supra* note 27.

<sup>30</sup>*Brubaker v. Iowa County*, 174 Wis. 574, 183 N. W. 690 (1921).

<sup>31</sup>*Crawford v. McElhinney, supra* note 10 (husband and wife); *Farthing v. Hepinstall, supra* note 6 (brother and sister); *Tannehill v. Kansas City, etc. Ry.*, 279 Mo. 158, 213 S. W. 818 (1919) (brothers); *Perrin v. Wells*, 22 S. W. (2d) 863 (Mo. App. 1930) (husband and wife); *Schron v. Staten Island Elec. R. R., supra* note 22 (father and son).

<sup>32</sup>*Pac. Const. Co. v. Cochran*, 29 Ariz. 554, 243 Pac. 405 (1926) (not an automobile case); *Dunbar v. San Francisco-Oakland Terminal Rys.*, 54 Cal. App. 15, 201 Pac. 330 (1921); *Rapolla v. Goulart*, 287 Pac. 562 (Cal. 1930); *N. Texas Tractor Co. v. Hill*, 297 S. W. 778 (Tex. Civ. App. 1927); *Ostheller v. Spokane & Inland Empire R. R.*, 107 Wash. 678, 182 Pac. 630 (1919). In Louisiana, the recovery of a wife for personal injuries is not community property, LA. REV. CIV. CODE (Merrick's 3d ed. 1925) art. 2402, and there her husband's negligence will not be attributed to her. *Vitale v. Checker Cab Co.*, 7 La. App. 653 (1928).

<sup>33</sup>*Pa. R. R. v. Goodenough*, 55 N. J. L. 577, 28 Atl. 3 (1893); *BLACK, LAW AND PRACTICE IN ACCIDENT CASES* (1900) § 337. The New Jersey case is no longer law in that state. *Peskowitz v. Lawrence F. Kramer, Inc.*, 105 N. J. L. 415, 144 Atl. 604 (1928). See also discussion in (1929) 59 A. L. R. 153.

master, that relation does not warrant the imputing of the negligence of the master to the servant who is riding with him.<sup>34</sup> And by the great weight of authority fellow servants, whether public or private, do not bear the consequences of each other's negligence.<sup>35</sup> However, where both employees were charged with the duty of driving, a joint enterprise was found;<sup>36</sup> and the negligence of one employee has been imputed to his co-employee who was acquainting him with a milk route, because of the instructor's equal, if not superior right of control.<sup>37</sup> On the other hand, it has been held that a deputy fire chief was not responsible for the negligence of his chauffeur, even though, apparently, the deputy chief had the right of control.<sup>38</sup>

In most of the cases where a litigant has sought to rely on the joint enterprise doctrine the attempts have failed because, although a common purpose existed, the element of a mutual right of control was

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<sup>34</sup>*Peterson v. New Orleans Ry. & Light Co.*, 142 La. 835, 77 So. 647 (1918); *Robertson v. United Fuel & Supply Co.*, *supra* note 5; *Sylvester v. St. Paul City Ry.*, 153 Minn. 516, 191 N. W. 46 (1922); *Shipley v. Reid Ice Cream Corp.*, 8 N. J. Misc. 849, 152 Atl. 183 (1930); *Anastasio v. Hedges*, 207 App. Div. 406, 202 N. Y. Supp. 109 (1st Dept. 1923) (not an automobile case); *Hines v. Welch*, *supra* note 6; *Neagle v. City of Tacoma*, 127 Wash. 528, 221 Pac. 588 (1923); *cf. Loftus v. Pelletier*, *supra* note 12; *Dunlap v. Phila. Rapid Transit Co.*, *infra* note 55. But see the unfortunate case of *Lundergan v. N. Y. Cent. & Hudson River R. R.*, 203 Mass. 460, 89 N. E. 625 (1909), where it was held that a servant could not recover against a third party where the servant, at the master's direction, assisted in looking for an approaching train, even though the accident resulted entirely from the concurring negligences of the master and third party.

<sup>35</sup>*Public employees*: *Charleston & W. Carolina R. R. v. Alwang*, 258 Fed. 297 (C. C. A. 4th, 1919) (soldiers); *Birmingham Ry. & Elec. Co. v. Baker*, 132 Ala. 507, 31 So. 618 (1902) (firemen); *Hogan v. Fleming*, 218 Mo. App. 172, 265 S. W. 875 (1924) (policemen). *Private employees*: *Sichterman v. Hollingshead Co.*, 94 Cal. App. 486, 271 Pac. 372, 1111 (1928); *Mattes v. Brugner*, 88 Ind. App. 36, 159 N. E. 156 (1927); *McCormack v. Nassau Elec. R. R.*, 16 App. Div. 24, 44 N. Y. Supp. 684 (2d Dept. 1897); *Williams v. Atl. Coast Line R. R.*, 190 N. C. 366, 129 S. E. 816 (1925). See cases collected in *BLASHFIELD, op. cit. supra* note 4a, at 1145; *HUDDY, op. cit. supra* note 4a, at § 684; (1907) 8 L. R. A. (N. S.) 597, 632-4. In some of these cases the courts refer to the joint enterprise doctrine, while in the others the courts simply speak in terms of imputed negligence.

<sup>36</sup>*Crescent Motor Co. v. Stone*, *supra* note 10. *Accord*: *Ala. Great So. R. R. v. Hanbury*, 161 Ala. 358, 49 So. 467 (1909) (probably influenced by statute covering particular facts).

<sup>37</sup>*Kirkland v. Atchison, etc. Ry.*, 104 Kan. 388, 179 Pac. 362 (1919). *Accord*: *Chesapeake & O. Ry. v. Warnock's Adm'x*, 232 Ky. 340, 23 S. W. (2d) 558 (1930).

<sup>38</sup>*Shuster v. McDermit*, 104 N. J. L. 58, 140 Atl. 421 (1928). In some of the cases cited *supra* note 35, the courts point out that the passenger-servant has no authority over the driver. It is doubtful, however, that these courts, if confronted squarely with the problem, would adopt the inference from their decisions and impute the negligence of the driver to a fellow servant with superior authority.

lacking. To bring a case within the doctrine, it is not necessary to show that the occupant was in actual control of the vehicle, so long as there exists the right to control;<sup>39</sup> that is, it need not appear that the occupant exercised his right to control and in any way contributed to the injury. Indeed, if actual control is shown, the passenger would probably be independently negligent. On the other hand, actual control by the passenger over the places to be visited or the route to be taken is not enough to show a mutual right of control.<sup>40</sup> Nor does the fact that the passenger requested the driver to undertake the trip establish a joint enterprise,<sup>41</sup> although in Pennsylvania it was strangely held that, where the passenger requested his friend, the owner of the car, to drive him to a certain point as a friendly courtesy, the driver was the agent in fact of the passenger.<sup>42</sup>

The necessary mutual right of control is established upon proof that the occupants are joint owners<sup>43</sup> or joint bailees<sup>44</sup> of the vehicle.

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<sup>39</sup>*Crescent Motor Co. v. Stone*; *Carpenter v. Campbell Automobile Co.*, both *supra* note 10. There are some cases in which joint control in fact was treated as the equivalent of a joint right of control. This was true in *Langley v. So. Ry.*, *supra* note 10, where all occupants concurred in a desire to beat the train at the crossing. So, too, in *Franko v. Vakares*, *supra* note 1, where a group of men went off on a drinking party, the court said that, since in fact a common will prevailed, the joint enterprise doctrine might be applied. In *Kinnie v. Town of Morristown*, 184 App. Div. 408, 172 N. Y. Supp. 21 (3d Dept. 1918), on facts identical with the *Franco* case, the same result is reached, but the theory is not made clear. These cases are unquestionably justifiable on the grounds of the passenger's independent negligence, but it is misleading to use the joint enterprise doctrine, for on the theory of independent negligence a causal connection must be shown between the act of the passenger and the injury, but on the joint enterprise doctrine there need be no connection between the right to control and the damage done. On a proper set of facts, this difference would be decisive.

<sup>40</sup>*So. Pac. Co. v. Wright*, *supra* note 22; *Bryant v. Pac. Elec. Ry.*, *supra* note 15; *Cram v. City of Des Moines*, *supra* note 18; *Anthony v. Kiefner*, *supra* note 10; *Bloom v. Leech*, *supra* note 6.

<sup>41</sup>*So. Pac. Co. v. Wright*, *supra* note 22; *DeSoto v. Pac. Elec. Ry.*, 49 Cal. App. 285, 193 Pac. 270 (1920); *Tronto v. Reo Motor Co.*, 92 N. J. L. 595, 106 Atl. 383 (1919).

<sup>42</sup>*Hepps v. Bessemer & L. E. R. R.*, 284 Pa. 479, 131 Atl. 279 (1925); *cf. Schofield v. Director General*, 276 Pa. 508, 120 Atl. 449 (1923). For a discussion of the elements constituting the master-servant relation, see (1925) 11 CORNELL LAW QUARTERLY 104.

<sup>43</sup>*Wiley v. Dobbins*, 204 Iowa 174, 214 N. W. 529 (1927); *Tannehill v. Kansas City, etc. Ry.*; *Perrin v. Wells*, both *supra* note 31; *Clark v. Town of Hampton*, 83 N. H. 524, 145 Atl. 265 (1929); *cf. Carero v. Breslin*, 3 N. J. Misc. 507, 128 Atl. 883 (1925).

<sup>44</sup>*Farthing v. Hepinstall*, *supra* note 6; *Lucey v. John Hope & Sons Engraving and Mfg. Co.*, *supra* note 10; *cf. Hollister v. Hines*, *supra* note 17; *Hurley v. City of Spokane*, *infra* note 61. See also the joint hiring cases, *infra* note 47.

Thus, where a parent loaned her car to her children so that they might attend a church fair, it was held that there was a joint enterprise if the vehicle was intrusted to all of the children, but not if it were intrusted to the exclusive custody of the one who drove, for in that event there would be lacking the element of mutual right of control.<sup>45</sup> In this connection it might be noted again that where the doctrine of community property exists the husband's negligence is imputed to the wife, not on the theory that their joint interest in the vehicle gives each an equal right of management, but rather on the ground that a recovery would benefit the negligent spouse.<sup>46</sup>

Where a group of persons hire a vehicle to be driven by one of their number, it seems clear that a mutual right of control exists,<sup>47</sup> although the amount of litigation in this common situation is surprisingly small. And where three salesmen agreed to share all expenses (including the items of wear and tear) of operating a car owned and driven by one of them, it was held as a matter of law that the relation was the same as if they had jointly hired the car.<sup>48</sup> But normally it is a question for the jury whether the driver has, by virtue of the agreement to share expenses and the other circumstances, relinquished his exclusive right of control.<sup>49</sup> Nevertheless it has been held as a matter of law that there was no joint enterprise where the arrangements for a picnic imposed upon the women the expense of supplying food, and the men the expense of supplying transportation;<sup>50</sup> and likewise, where there was a scheme of mutual accommodation whereby two neighbors drove to work together, alternating

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<sup>45</sup>Farthing v. Hepinstall, *supra* note 6.

<sup>46</sup>*Supra* note 32.

<sup>47</sup>Christopherson v. Minneapolis, etc. Ry., 28 N. D. 128, 147 N. W. 791 (1914); Dixon v. Grand Trunk Ry., 47 Ont. L. R. 115, 51 Dom. L. R. 576 (1920); see Coleman v. Bent, 100 Conn. 527, 530, 124 Atl. 224, 225 (1924).

<sup>48</sup>Derrick v. Salt Lake & Ogden Ry., 50 Utah 573, 168 Pac. 335 (1917). *Accord*: Frisorger v. Shepse, *supra* note 11.

<sup>49</sup>Coleman v. Bent, *supra* note 47; Barnett v. Levy, *supra* note 11; Adams v. Swift, *supra* note 10; Beaucage v. Mercer, 206 Mass. 492, 92 N. E. 774 (1910); cf. Jenson v. Chicago, etc. Ry., *infra* note 62, and Offer v. Swancoat, *supra* note 12, where the court says that such evidence could not sustain a finding of joint control.

<sup>50</sup>Koplitz v. City of St. Paul, *supra* note 20. This case might have been rested on the fact that the parties contemplated being passengers for hire, since an omnibus and driver were hired, one of the party later taking control without the knowledge of the others. See also Adamson v. McEwen, *supra* note 10, where it was held that an agreement by the passenger to pay hotel expenses at the end of the trip did not affect his status as a guest.

in the use of their cars, but each driving and maintaining the expenses of his own.<sup>51</sup>

*B. The Common Purpose Test:* The second class of cases ignores the element of mutual right of control and looks merely for a common purpose. Some of the earlier cases in this group, rather than imputing the negligence of the driver to the passenger in so many words, merely held both to an equal duty of care. In the usual situation the difference is more one of expression than of result, for no appreciable effort is made to determine whether the circumstances of the case would have permitted a successful exercise of that duty by the passenger, or whether the attempt to exercise it, if an attempt was actually made, was a reasonable one under the facts of the case. In short, the substantial effect of imposing that duty upon the passenger has been to fasten the driver's negligence upon him. This modified terminology was used where two friends were riding together to see points of mutual interest,<sup>52</sup> where four men were returning from a ball game,<sup>53</sup> where fellow servants were riding together in the course of their employment,<sup>54</sup> where a deputy sheriff was the passenger of his superior,<sup>55</sup> where two employees were travelling together to collect their wages.<sup>56</sup>

The common purpose test of a joint enterprise, expressed in terms of imputed negligence rather than in the language of equal duty of care, was applied to a husband and wife on a fishing excursion;<sup>57</sup> to boys in a rowboat, apparently for pleasure;<sup>58</sup> to two friends who frequently made pleasure trips together in a car owned by one of them and who were on such a trip at the time of the accident;<sup>59</sup> to two men

<sup>51</sup>Fisher v. Johnson, *supra* note 12; cf. Kessler v. Davis, 111 Kan. 515, 207 Pac. 799 (1922), where on similar facts it was held to have been proper to submit the case to the jury which found that there was no joint enterprise.

<sup>52</sup>Davis v. Chicago, etc. Ry., 159 Fed. 10 (C. C. A. 8th, 1907).

<sup>53</sup>Martin v. Pa. R. R., 265 Pa. 282, 108 Atl. 631 (1919).

<sup>54</sup>Hoffman v. Pittsburgh, etc. R. R., 278 Pa. 246, 122 Atl. 274 (1923); cf. Siever v. Pittsburgh, etc. Ry., 252 Pa. 1, 97 Atl. 116 (1916) (unsuccessful effort to impute the passenger's negligence to the driver); Kelly v. Northampton Co. Ag. Soc., 286 Pa. 97, 132 Atl. 832 (1926).

<sup>55</sup>Dunlap v. Phila. Rapid Transit Co., 248 Pa. 130, 93 Atl. 873 (1915); cf. Laudenberger v. Easton Transit Co., 261 Pa. 288, 104 Atl. 588 (1918) (precise relation of parties not clear).

<sup>56</sup>Gersman v. Atcheson, etc. Ry., 229 S. W. 167 (Mo. 1921).

<sup>57</sup>Del. & Hudson Co. v. Boyden, 269 Fed. 881 (C. C. A. 3d, 1921) (apparently applying Pennsylvania law).

<sup>58</sup>Beck v. East River Ferry Co., 29 N. Y. Super. Ct. 82 (1868); cf. Schron v. Staten Island Elec. R. R., *supra* note 22.

<sup>59</sup>Wash. and Old Dominion R. R. v. Zell's Adm'x, 118 Va. 755, 88 S. E. 309 (1916). Although the court refers to the prior trips made by the parties, the basis seems to be the common purpose.

taking young ladies for a ride;<sup>60</sup> to a brother and sister going to church in their father's car;<sup>61</sup> to a group of men on their way to witness a prize fight;<sup>62</sup> to participants in a scheme to rescue a prisoner;<sup>63</sup> to friends who were bringing home their winter supply of potatoes;<sup>64</sup> to a prospective-purchaser riding with a piano salesman;<sup>65</sup> to fellow servants riding together in the course of their employment.<sup>66</sup>

Several courts have pointed out the danger inherent in so sweeping a conception of a joint enterprise.<sup>67</sup> To quote from an opinion of the California court:

"Such a case is *Wentworth v. Town of Waterbury (Vt.)*, 96 Atl. 334, where apparently the only basis for the imputation of the negligence of the driver of the automobile to the plaintiff was the circumstance that they were both engaged in the common purpose of taking two ladies for an afternoon's drive to view a lake.

"In our opinion, the doctrine of imputable negligence should not be so loosely applied. To do so leaves the law in an uncertain state. . . ."<sup>68</sup>

The best commentary upon the extravagant consequences of the common purpose test is a recent Pennsylvania case where the court imputed the negligence of a master to a servant whom the master was driving to work as part of the consideration of employment.<sup>69</sup> If this conception were faithfully applied, a joint enterprise would be found in most of the cases which have involved the rights of a pas-

<sup>60</sup>*Wentworth v. Town of Waterbury*, 90 Vt. 60, 96 Atl. 334 (1916).

<sup>61</sup>*Hurley v. City of Spokane*, 126 Wash. 213, 217 Pac. 1004 (1923).

<sup>62</sup>*Jensen v. Chicago, etc. Ry.*, 133 Wash. 208, 233 Pac. 635 (1925). The court points out that there was an agreement to share expenses but, since the court expressly denies the need for a mutual right to control, this agreement cannot be the basis of the decision.

<sup>63</sup>*Va. Ry. v. Underwood*, 152 Va. 264, 146 S. E. 277 (1929).

<sup>64</sup>*Hanser v. Youngs*, 212 Mich. 508, 180 N. W. 409 (1920).

<sup>65</sup>*Lawrence v. Denver & Rio Grande R. R.*, 52 Utah 414, 174 Pac. 817 (1918).

<sup>66</sup>*Otis v. Kolsky*, 94 Pa. Super. Ct. 548 (1928); *Martin v. Puget Sound Elec. Ry.*, 136 Wash. 663, 241 Pac. 360 (1925); *cf. Griffiths v. Lehigh Valley Transit Co.*, 292 Pa. 489, 141 Atl. 300 (1928) (salesmen; not clear whether employed by the same company; imputed).

<sup>67</sup>*Bryant v. Pac. Elec. Ry.*, *supra* note 15; *Pope v. Halpern*, *supra* note 16; *Coleman v. Bent*, *supra* note 47.

<sup>68</sup>*Bryant v. Pac. Elec. Ry.*, *supra* note 15, at 742, 164 Pac. at 387.

<sup>69</sup>*Campagna v. Lyles*, 293 Pa. 352, 148 Atl. 527 (1929). This case is adversely criticized in (1930) 30 COL. L. REV. 581. The Pennsylvania decisions will support almost any conception of the nature and consequences of the joint enterprise doctrine.

On the proposition that the ride was part of the servant's compensation, see an earlier case arising from the same facts: *Campagna v. Ziskind*, 287 Pa. 403, 135 Atl. 124 (1926).

senger. To reduce it to the absurd, two boys on a bicycle, wending their way to the neighborhood candy store, would be engaged in a joint enterprise.

These decisions seem to have arisen from a misunderstanding of the true joint enterprise doctrine. This is evidenced by the fact that in practically all of the jurisdictions where the common purpose test has been applied there are other decisions requiring both a common purpose and an equal right of control.<sup>70</sup> Hence it cannot safely be said that any one jurisdiction adheres definitely to the common purpose test. In all probability the above decisions will be explained away as sporadic misapplications of the joint enterprise doctrine.

*C. A Third Conception:* There are a few cases constituting another variation from the orthodox conception of a joint enterprise, which are of comparatively little consequence but nevertheless worthy of mention. In these cases, although there is a common object, the element of a mutual right of control is lacking, and instead there exists the actual control on the part of the driver and the right of control on the part of the passenger, either as owner,<sup>71</sup> bailee,<sup>72</sup> or co-employee of superior authority.<sup>73</sup> Since in these cases only the rights of the passenger were involved, the imputation of negligence was perhaps justifiable on the ground of an agency in fact or a superior right of control. But the theory of joint enterprise is objectionable here, because it inferentially suggests that the negligence of the passenger would be imputed to the driver, and further, that, if the position of the occupants were reversed, the negligence of the owner-driver would be imputable to his passenger. It is unlikely that any such conclusions are intended by these decisions.

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<sup>70</sup>*Farthing v. Hepinstall*, *supra* note 6; *Perrin v. Wells*, *supra* note 31; *Wilmes v. Fournier*, *supra* note 13 (inferentially); *Alperdt v. Paige*, *supra* note 1; *Hilton v. Blose*, *supra* note 12; *Derrick v. Salt Lake & Ogden Ry.*, *supra* note 48; *Landry v. Hubert*, *supra* note 12; *Director General v. Pence's Adm'x*, *supra* note 6; *Rosenstrom v. North Bend Stage Line*, 154 Wash. 57, 280 Pac. 932 (1929).

<sup>71</sup>*Carpenter v. Campbell Automobile Co.*; *Crawford v. McElhinney*, both *supra* note 10. This theory may be the basis of *Va. Ry. v. Underwood*, *supra* note 63. Compare *Franko v. Vakares and Langley v. So. Ry.*, discussed *supra* note 39.

<sup>72</sup>*Masterson v. Leonard*, 116 Wash. 551, 200 Pac. 320 (1921). A joint enterprise was here found to exist as a matter of law where the bailee of a bicycle was riding on the frame of the bicycle, propelled by a friend, the common object being to acquaint the friend with a newspaper route. In *Sharkey v. Herman Bros.*, 3 N. J. Misc. 126, 127 Atl. 525 (1925), *aff'd*, 102 N. J. L. 224, 130 Atl. 920 (1925), under almost identical facts, the question was held to have been properly submitted to a jury which found that no joint enterprise existed.

<sup>73</sup>*Kirkland v. Atchison, etc. Ry.*, *supra* note 37.

ANALYSIS OF THE LEGAL BASIS OF THE JOINT ENTERPRISE  
DOCTRINE

Although the joint enterprise doctrine has been either invoked or approved in about three-fourths of the American jurisdictions and repudiated in none, there is a remarkable dearth of discussion as to the policy behind the orthodox statement of the rule or as to why the doctrine should exist in any form at all. It will be noticed from the above discussion that the cardinal emphasis in the orthodox statement of the joint enterprise doctrine is upon the mutual right of control. It is true that the rule requires in addition that there be a common purpose, but in the usual situation that element is easily found. It is the control feature which, when it comes to applying the doctrine, is the turning point in the solution of the case.

Why the emphasis on the right of control? In view of the conditions of modern transportation it must be a rare mishap which the passenger in a joint enterprise could have averted by the exercise of his much-referred-to right of control. If anything, his intervention would add peril to the situation. The judicial observations upon the iniquities of the "back-seat driving" of a guest<sup>74</sup> are no less apt because the passenger interferes as a matter of right. What is even more significant is that the courts do not inquire as to whether the passenger could have avoided the accident by the exercise of his right of control. The cases, in passing upon the liability of the passenger, consider only the conduct of the driver. They do not speak in terms of the passenger's *duty* and *breach of duty*, but rather in terms of his *right of control* and *imputed negligence*.<sup>75</sup> If, then, the right of control bears no causal relation to the injury, why do the courts look for so impotent a right and make it the test of liability?

The writer hazards the following answer. The control feature seems to have been borrowed from the cases dealing with the liability of a master for the negligence of his servant. It is often said that a master is liable for the torts of his servant because the master has the right to control the actions of those whom he employs.<sup>76</sup> This, how-

<sup>74</sup>See *So. Pac. Co. v. Wright*, *supra* note 22, at 264; *Chambers v. Hawkins*, 233 Ky. 211, 214, 25 S. W. (2d) 363, 364 (1930); *Kilpatrick v. Phila. Rapid Transit*, 290 Pa. 288, 298, 138 Atl. 830, 834 (1927); *Brubaker v. Iowa County*, *supra* note 30, at 580, 183 N. W. at 693.

<sup>75</sup>An inconsistent suggestion appears in *Beck v. East River Ferry Co.*, *supra* note 58, where it is intimated that the passenger would be excused if it appeared that he did all in his power to overcome the negligence of his associate.

<sup>76</sup>*Little v. Hackett*, *supra* note 4, at 376, 6 Sup. Ct. at 395; *Bennett v. N. J. R. R. & Trans. Co.*, *supra* note 3, at 227; *Gilmore, op. cit. supra* note 8, at 194; (1924) 11 BRIT. RUL. CAS. 597, 629.

ever, cannot be the basis of the doctrine of *respondeat superior*, for if it were, it would excuse the master who was not present at the time of his servant's culpable conduct and could not therefore control it. Indeed, no court, in holding the master responsible for the negligence of his servant, stops to consider whether the master, by the exercise of his right of control, could have averted the injury. In the final analysis, the reason for the rule of *respondeat superior* must be some public policy in favor of burdening one who acts through another in pursuit of his own ends with the injuries incidental to his servant's activities.<sup>77</sup> The right of control is simply one of the tests whereby the courts determine whether the relation of master and servant exists; the liability attaching to that relation arises from considerations entirely foreign to the right of control.

It would seem to be an obvious fallacy to carry what is simply the test of the existence of the master-servant relation into a field where that relation admittedly does not exist and there use it as a test of liability. Yet this is precisely what has happened. In rejecting the early attempts to impute the negligence of a driver to his passenger, as for example in rejecting the *Thorogood* case, the courts quite uniformly pointed out that the passenger did not have the right to control the driver.<sup>78</sup> What those courts unquestionably meant was that, applying the test of the existence of the master-servant relation, the result was that the relation could not be found. The manner of stating that observation, however, left an inference that if a right of control did exist, then, even in the absence of the master-servant relation, the negligence of the driver would be imputable to his passenger.

This inference, by force of repetition, finally crystallized into a conception in the law, for which there is now considerable authority, that where there is a right of control in the occupant, then, without proof of more, the negligence of the driver will be fastened upon him.<sup>79</sup>

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<sup>77</sup>For discussions of the basis of the master's liability, see MECHEM, LAW OF AGENCY (2d ed. 1914) § 1856; POLLOCK, TORTS (13th ed. 1929) 80; 1 SHEARMAN & REDFIELD, *op. cit. supra* note 4, at § 142.

<sup>78</sup>See United States, Massachusetts, and New Jersey cases *supra* note 4.

<sup>79</sup>See, for example, cases cited *supra* note 37, which hold that the negligence of the driver will be imputed to his fellow servant who has a right of control.

The issue whether a right of control of itself warrants the imputation of negligence is squarely raised where the passenger is the owner or his bailee and the driver is not the agent of such owner or bailee. The following cases, in the writer's opinion, impute the negligence of the driver to the passenger under those facts: *Atcheson, etc. Ry. v. McNulty*, 285 Fed. 97 (C. C. A. 8th, 1923), certiorari denied, 262 U. S. 746, 43 Sup. Ct. 521 (1923); *Baker v. Maseeh*, 20 Ariz. 201, 179 Pac. 53 (1919); *Wis. & Ark. Lumber Co. v. Brady*, 157 Ark. 449, 248 S. W. 278 (1923); *McKerall v. St. Louis-San Francisco Ry.*, 257 S. W. 166 (Mo. App.

It was therefore natural enough, although equally unfortunate, that when the joint enterprise doctrine was formulated, the right of control feature was given a conspicuous role.

If we thus remove the magic from the nebulous right of control, it becomes difficult to understand why the juristic result should depend on whether both or only one of co-employees are charged with the duty of driving; on whether a parent entrusts his car to all or to only one of his children; or on whether, when a group of men agree to share expenses of operating a car owned by the driver, the driver has relinquished his exclusive right of control. In all of these situations the test must logically be, as in the analogous case of master and servant, whether, when there is an association for a common object, it is sound policy to apply the fictional doctrine of vicarious responsibility. It is immediately apparent that so broad a criterion is fraught with danger. In fact this test is none other than the common purpose test which, as we have already seen, has actually been utilized in some of the joint enterprise cases but which is condemned as unwholesomely wide in its application.

Furthermore, if the common object test is sound, there is no reason why the joint enterprise doctrine should be limited to cases where the fellow enterpriser is present in the vehicle. Granted the necessary

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1923); *Roland v. Anderson*, 282 S. W. 752 (Mo. App. 1926); *Robison v. Oregon-Washington R. R. & Nav. Co.*, *supra* note 6; *Bell v. Jacobs*, 261 Pa. 204, 104 Atl. 587 (1918); *cf. Watkins v. Brown*, 14 Ga. App. 99, 80 S. E. 212 (1913); *Chambers v. Hawkins*, 233 Ky. 211, 25 S. W. (2d) 363 (1930); *Kelly v. Thibodeau*, 120 Me. 402, 115 Atl. 162 (1921); *Lucey v. Allen*, *supra* note 26.

In *Zeeb v. Bahnmaier*, 103 Kan. 599, 602, 176 Pac. 326, 327 (1918), rehearing denied, 103 Kan. 895, 176 Pac. 643 (1918), the court refused to follow the above decisions, saying: "Why should the mere presence of the owner of the automobile, which was in the possession, control and exclusive management of another responsible adult at the time of the tort, subject the owner of the car to liability in damages? An automobile is a more safe and dependable chattel than a horse, and it is not an inherently dangerous instrument—certainly much less so than a shotgun." In accord with the proposition of this case that an owner may have the status of a guest in his own car are: *Hartley v. Miller*, 165 Mich. 115, 130 N. W. 336 (1911); *Potts v. Pardee*, 220 N. Y. 431, 116 N. E. 78 (1917); *Va. Ry. & Power Co. v. Gorsuch*, *supra* note 27; *Reiter v. Grober*, *supra* note 4; *Pratt v. Patrick*, [1924] 1 K. B. 488; *cf. So. Ry. v. Priester*, *supra* note 26. The line of demarcation suggested by the *Pratt* case is whether or not a technical bailment can be found.

For a somewhat different analysis of the cases on this point, see (1919) 2 A. L. R. 888.

Compare also, *Van Sciver v. Abbott's Alderney Dairies*, 6 N. J. Misc. 949, 143 Atl. 153 (1928) and *Round v. Pike*, *supra* note 12, where it was held that the negligence of a driver who was operating under a permit was not imputable to a licensed driver seated beside him in order to comply with the statutory requirement.

common purpose, the enterpriser who stays at home should be compelled to respond to innocent third parties injured by the negligent driver, and if the absent enterpriser has a property interest which has been invaded by the concurring negligence of the driver and third party, he should be without remedy against the third party,<sup>80</sup> and perhaps also against the driver.

We should go even further. Why limit the doctrine to the use of a vehicle? If it is sound, the negligence of one enterpriser in doing any act in furtherance of a common undertaking should also be imputed to his fellow enterpriser. Suppose, for example, that two boys decide to go on a drinking party. In furtherance of their object, one of them goes to a drug store to purchase the stimulant. The druggist is negligent in leaving an incompetent lad in charge. The purchaser too is negligent in that the incompetency of the clerk is evident. The liquid sold is poisonous, and the other party to the enterprise, ignorant of the circumstances of the purchase, drinks it and succumbs. In an action for wrongful death, will the contributory negligence of the purchaser be imputed to the deceased so as to absolve the negligent druggist?

Such were the facts in *Cullinan v. Tetrault*.<sup>81</sup> In this case, the Maine court, relying upon the joint enterprise cases in the automobile field, denied recovery. This case is the *reductio ad absurdum* of the joint enterprise doctrine.

The application of a doctrine of imputed negligence to the true master and servant, agency, and partnership relations seems reasonable, for usually such relations are connected with a commercial venture and the business man may well be deemed to calculate this risk with the expenses of his activities and perhaps insure against it.<sup>82</sup> At any rate we are accustomed to it in those situations. But when the doctrine is extended beyond such associations for profit to what are usually matters of friendly accommodation, it is out of harmony with the expectations of the average man. In such cases, a doctrine which relieves a negligent third party and perhaps the negligent driver too, and not only denies relief to the innocent passenger, but

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<sup>80</sup>The writer is not aware of any case making the suggested extension. Generally, the negligence of a bailee will not be imputed to the bailor. (1923) 8 CORNELL LAW QUARTERLY 284. It is likewise held that the negligence of a conditional vendee is not imputable to the vendor. *Commercial Credit Corp. v. Satterthwaite*, 150 Atl. 235 (N. J. 1930). See criticism, (1930) 40 YALE L. J. 135.

<sup>81</sup>123 Me. 302, 122 Atl. 770 (1923).

<sup>82</sup>A few cases perhaps require a joint financial interest in the joint enterprise. *Fisher v. Johnson*; *Jessup v. Davis*, both *supra* note 12; *Robison v. Oregon-Washington R. R. & Nav. Co.*, *supra* note 6; *Brubaker v. Iowa County*, *supra* note 30. But this requirement is not usually made.

also imposes an affirmative liability upon him, comes as a gratuity to the beneficiaries of the doctrine and as a distinct shock to the defeated passenger and his attorney as well. Perhaps there are borderline cases which come so close to the true agency relation that some such doctrine seems just as applied to them, but they do not warrant the existence of so dangerous a conception. Moreover, as a practical matter, it is the driver of the vehicle, rather than the passenger, who is likely to be insured against loss, so that to hold that only the negligent parties are affected by their own conduct would be more consistent with the current philosophy in favor of spreading those losses which, in a complicated society, are well-nigh inevitable. The joint enterprise doctrine, the mischievous limits of which are as yet undefined, may well go the way of its predecessor, the doctrine of *Thorgood v. Bryan*.