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Imputed Negligence

Herbert Blakely Royce
Cornell Law School

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IMPUTED NEGLIGENCE.

A Thesis Presented to the School of Law, Cornell University for the DEGREE OF BACHELOR OF LAWS.

by

Herbert Blakely Royce.

Ithaca, N.Y.

1896.
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The branch of law about which this paper will treat is known as imputed or vicarious negligence. The question presents itself when the plaintiff, although not chargeable with personal negligence is not allowed to recover because of the negligence of the person in privity with him, which negligence is imputed to him as though it were his own. There must be some relation between the plaintiff and the third person which the law recognizes and from which a legal responsibility may arise.

The whole subject may be reduced to the three following rules:

I. There must be a third person and such person must be guilty of negligence.

II. This negligence must be approximate cause of the harm suffered.

III. The plaintiff is to be charged with this negligence as though it were his own.
As mere legal doctrines these rules are clear and concise but as soon as you attempt to apply them, you are surrounded by difficulties as perplexing and as hard to master as were ever presented to a court for its consideration.
PART I.

Where the plaintiff involuntarily places himself under the control of another.

The principle question to be taken up in this chapter is the discussion of the imputability of a parent's negligence to the child. In order to give a comprehensive idea of the subject, it will be necessary to divide it into the following sub-divisions.

(1). At what age is a child sui juris?

(2). The imputability of a parent's or guardian's negligence to a child, when parent or guardian sues in behalf of the child.

(3). The imputability of a parent's or guardian's negligence to a child when parent or guardian brings the action in his own name for his own benefit.

(1). At what age is a child sui juris?

The courts in this country evidently entertain a
quite varied and widely different opinion of the mental ability of their youths. One court holding as a matter of law an infant of one year and five months old to be sui juris and the court of estate, not very far distant, saying an infant of seven was non sui juris.

In 38 N.Y. 455 the court said: "An infant in its first years is non sui juris. It belongs to another to whom discretion in the care of its person is exclusively confined." 155 Mass. 53 says it is a question for the jury to say whether a child not quite seven is sui juris and capable of negligence. 114 N.C. 699 held in the case of an infant twenty-two months old: "It is admitted by the pleadings that the plaintiff at the time was an infant of tender years. From the language of the admission we would, if necessary for a decision, be well warranted in holding that prima facie the infant was of such tender age as to be incapable of negligence or non sui juris."

Thus the age fixed in 41 Iowa 71 within which a child was non sui juris was two years. In 58 Ill. 226 the age was five and in 38 Wisconsin 614 the court said the child must be eight to pass beyond the age of non sui juris.
But while a few of the courts have decided the matter as one of capacity and law, still many of the courts say it is a question of capacity and fact and require the jury to determine the matter. The cases cited in the next sub-division furnish ample authority for this last proposition.

2. Imputability of a parent's or custodian's negligence to a child when parent or custodian sues in behalf of a child.

The leading case which establishes the rule of imputing the negligence of the parent to the child and the one upon which most, if not all the courts adopting the doctrine have relied, is Hartfield vs. Roper reported in 21 Wend. 615. The facts are thus. The plaintiff, a child then of about two years of age was standing or sitting in a beaten track of a public highway and no person near him. The defendant, Roper, was driving a sleigh and horses and before the child was perceived, the horses passed over him. The child was seriously injured and suffered greatly for about two months and considerable expense was incurred in medical attendance. The
jury brought in a verdict for five hundred dollars for the plaintiff. On the argument for a new trial the much quoted decision of Judge Cowen made its appearance. He held that the plaintiff should have been non-suited and in part said: "To allow small children to resort to the highway is criminal negligence. An infant is non sui juris. He belongs to another to whom discretion in the care of his person is exclusively confided." The person is keeper and agent for this purpose and in respect to third persons, his acts must be assumed that of the infants, his neglect the infant's neglect. "In the present case the infant has neglected to fulfill the conditions on which he could sue or his guardian has done so which amounts to the same thing."

The first departure in this state from the doctrine is in 47 N.Y. 317. In this case the court said, if the conduct of the child would not have amounted to negligence in an adult and the injury was caused wholly by the defendant's negligence, the negligence of the parent would be too remote.

Thus the doctrine remained until the court in 63 N.Y. 104, although sustaining the former case broadened
it a trifle by holding that the negligence of a parent can not as a matter of law defeat an action brought by the child. It is a question solely for the jury to say whether the negligence is such as would defeat the action. The combination of these two cases seemed to quite satisfactorily settle the question for a long time and it was given a well deserved rest. But recently a doubt arose in the minds of some, as to whether the court still favored such a holding and in 139 N.Y. 490, which is the last reported case on the subject, the question again presented itself. The court simply reaffirmed the two former decisions by the following language. "The contributory negligence of a child will not shield a defendant from liability unless the jury determine the parent was actually guilty of negligence in exposing it."

The rule established in New York has been followed to a greater or less degree in many states. Some of the courts base their decisions upon the ground that the parent must be deemed the agent of the child, while in other states the courts refused to consider the question of agency and based their decisions upon the ground that the child is identified with his parent or guardian.
Mass. seems to have followed the Hartfield vs. Roper rule about as closely as any of the states where the question has been agitated. In 135 Mass. 333, the court said in the case of a child eight and one half year's of age: "His injury was the natural consequence of his carelessness. If he was too young to appreciate the danger of his act, he was too young to engage in that sport - catching on sleighs - and if too young, his parents were negligent in permitting it. Thus, whether the defendant was negligent or not, the plaintiff should not recover."

This case was sustained in 142 Mass. 313 and in this latter case the court, like the New York courts, held if the child, without being able to exercise any judgment in regard to a matter, does no act which prudence would forbid or which would not be careless in a prudent person of mature years and intelligence, then there is no negligence that would bar recovery.

Illinois furnishes us with the "comparative" negligence doctrine. In 48 Ill. 221 the court said, that if the parent was guilty of gross negligence in exposing a
child and the defendant's negligence was only slight or ordinary, the child could not recover, but should seek his remedy against the parent. Thus if the facts had been vice versa and the defendant had been the one guilty of gross negligence, the child could have maintained his action.

The following states in addition to those already cited have for the reasons above set forth or for no reason whatever, followed the early New York doctrine.

68 Maine 552.
51 Cal. 513.
29 Minne. 336.
31 Maryland 439. Limited slightly by
43 Maryland 539.
46 Indiana 25.
97 Illinois 66.
28 Kansas 541.
9 Bush (Ky.) 522.

Although it is not the object of this paper to undertake to refute any rules or lines of decisions which have been established, still I shall endeavor to cite the leading cases in opposition and advance any reasonable
arguments that appear to dispute such a ruling.

The leading and probably the most important of all cases, repudiating the rule of Hartfield vs. Roper, is Robinson vs. Cone, reported in 22 Vermont 213 and decided in the Supreme Court of Vermont in 1850. In this case, the plaintiff, a boy less than four years of age, amused himself by sliding down hill on his sled, and while engaged in this sport was run down by a two horse sleigh of the defendant's, who drove down the hill on a "smart trot".

The court denied all former doctrines of imputed negligence and held that although a child of tender years may be in the highway through the fault or negligence of his parents and so be improperly there, yet if he be injured through the negligence of the defendant, he is not precluded from his action. They hold that all that is required of an infant plaintiff in such a case, is that he should exercise care and prudence equal to his capacity.

In those states where the New York doctrine of imputed negligence has been established, the arguments have resulted largely from dicta of preceding cases and based
on a very superficial view of the subject. The courts have reasoned from the usual and pecuniary responsibilities of parents for the support and education of their offspring, and in doing this, they have entirely overlooked the other relations of parent and child. They never mention the irresponsibility of the former for the torts and unnecessary debts of the latter and also the fact that the child is never liable for the debts of the father. They appear to have reached their conclusions through some vague sense of a just identification of the two under all circumstances. Penna. immediately favored the Vermont idea and a late case reported in 113 Pa. St. 162, and also one which clearly illustrates the position which this state has always taken, says: "A child of the age of eight years will not be held to be guilty of contributory negligence and the negligence of the parent will not be imputed to him." Besides the states already mentioned, the following states sustain and in most of the cases cited, directly refer to and affirm the rule laid down in Robinson vs. Cone.

27 Gratt. (Vir.) 455

53 Ala. 70
The federal courts take a very decided stand. In 17 Wall. 657 in the celebrated "turn-table" case, the court said the care and caution required of a child is determined by its maturity and capacity and in each case is regulated by the circumstances of that case. It directly concurs with the Vermont rule and squarely rejects the principles of the Hartfield vs. Roper case.

The court in a New York case already cited says: "The infant is non sui juris. He belongs to another to whom discretion in the care of his person is exclusively
confided. His acts must be deemed those of the infant; his neglect the infant's neglect." It will be observed that the substance of the quotation is the statement of a fact and a deduction from it. The premises being that the child is in the care of the parent and from these premises they draw the inference that the neglect of the parent is the neglect of the child. But does this follow? How does the custody of the infant in the parent justify the imputation of his fault to him? The law puts the custody of an infant in the parent but this does not give the parent the right to waver or forfeit any of the legal rights of the infant. When the law gives the power to protect, it seems quite inconsistent to construe it into a power to harm either by omission or commission.

The child, though often inevitably visited with the imperfection of the father and remote ancestors through a physical and moral connection should not, in law or justice, be bound by the conduct and actions of his parents over whom he has had no sort of control. As was said in a Tenn. case (1 Head 610) "It would literally be to visit the transgressions of the parent upon the infant."

The essence of justice was very wisely expressed by the
poet when he said: "Where the offence is let the great axe fall."

3. **Imputability of a parent's negligence to the child when the parent sues in his own name and in his own behalf.**

In an action of this nature it is very justly and almost uniformly held that the contributory negligence of a parent may be shown to bar a recovery. It seems almost impossible to come to any different conclusion, as such a condition of affairs quite clearly puts the subject under the general rule of contributory negligence. Parents of young children must exercise care with reference to their tender years and to dangers that are known or might have been known by the use of ordinary care. If they fail to do this they are negligent and should not be allowed to recover.

The earliest case on this subject is found in 24 Ohio St. 670 (Bellefontaine Railway Co. vs. Snyder). This was an action by the father for damages for an injury to his daughter. The care and custody of the infant had been entrusted to a custodian. The child was in-
jured through the combined negligence of the custodian and railroad company. The court said the custodian of the child was agent for the parent and his negligence was the negligence of the principal or parent. The case very clearly distinguishes between suing in behalf of the child and suing in parent's name for loss of services of the child.

There is a case in 18 Ohio St. 399 where the child brought an action through his guardian for negligence of a defendant and was allowed to recover. Probably the father, elated over the success of the child saw no reason why he should not share some of the benefits, and accordingly he brought an action which is reported in 24 Ohio St. 670. The court in this latter case after very concisely telling the parent that "he ought to have let well enough alone", denied a recovery.

As I have said, the courts in this country are for once entirely of one opinion. In some states, it holds as a sort of refinement or limitation to the rule that it may be a matter to go to the jury, in case the parent is poor and destitute of means for safely restraining the child, whether or not care in proportion to the circum-
stances was displayed.

In a case reported in 75 Pa. St. 257 the court came very clearly and said: "To suffer the child to wander on the streets has a sense of permit. This is only the assertion of a principle. But whether the mother did suffer the child so to wander is a matter of fact. The care she must use depends entirely upon circumstances."

In the present case the mother gave her child a piece of bread to satisfy it, closed the door to keep it in and went to the next room to scrub. Before the labor was finished and in less than five minutes the mangled body of her little one was brought in and placed before her. Because the child managed to lift the latch and disappear can it be said that she was negligent per se and that she suffered her child to wander in the street? The cases which impute the negligence of a parent in such an instance ought to be and certainly is repulsive to all our natural instincts. The case seemed to have quite an influence upon the courts of this country, as at the present time the majority of them have taken similar positions. The following three cases are very clear and appear to be the leading cases on the modification of the general rule. 60 Missouri 475; 41 Iowa 171; 61
Wis. 357.

Very closely connected with this phase of the subject, is the case where the parent sues as administrator for the child and will inherit from the child either all or part of the amount recovered.

As usual the different courts conflict very severely with each other in their holdings. The more one studies the various questions on imputed negligence the more firmly he becomes convinced that the courts, instead of endeavoring to establish some principles for these cases, are afraid of the question and each is waiting for the other to make the start to establish some rule that will be satisfactory to all.

Iowa seems to have the honor of having the leading case on this last proposition. It is found in 78 Iowa 396. The court held that where a child was killed by the negligence of another, the parent, although contributing to the injury, may recover as administrator. Such a right does not seem to be affected by the fact that the negligent parent will inherit the child's estate and this same state holds that if the action had been in the parent's name under the circumstances, no recovery would be
possible.

Virginia in 13 S.E. 454 follows this holding and most of the Southern states seem to agree to a greater or less degree with these decisions. A few states hold that where the father is sole heir he can not recover and many states repudiate the whole idea, and say it presents a case exactly similar to a father suing in his own behalf. 60 Texas 205 emphatically denies the right of recovery in a suit brought by a father as administrator of a child and it will be remembered that this was one of the states which did not impute the parent's negligence to the child. 29 Barb. 234 holds that only nominal damages should be given. It says the interests the next of kin have in the life of a child negligently killed is only a pecuniary one. "The life of a small child however valuable in other respects to a parent has no pecuniary value."

Thus the states are divided. One holding one way for one reason and another a contrary way for the same or for perhaps a slightly different reason. In some states the child receives the same measure of justice to
which every one is entitled who brings an action in court; in other states it would have been far better for the child if he had been an animal or an oyster or anything you can imagine except a human being. For if he were any of the former objects or things in those very states where they deny a recovery to a child, he could have recovered and his owner who sued for his injury would have been allowed more than "mere nominal damages."

Custodian and Lunatic.

All that has been said concerning children is equally applicable to lunatics. There have been very few cases on this subject and very few writers even mention the subject. The decisions in the parent and child cases very fully determine and settle this question.

In 14. Barb. 585 a lunatic was traveling on a train in the custody of his father. The father left him in one car and took a seat in another. The lunatic refusing to pay his fare was put off and was run over by a train and killed. The court said the reasoning in the
Hartfield vs. Roper case is entirely applicable to the present circumstances. Thus it held that the father's negligence was imputed to the lunatic and the father as administrator of the lunatic could not recover. The court in the Hartfield vs. Roper case in a bit of dicta says: "Suppose a hopeless lunatic, suffered to stray by his guardian, is injured; shall the person who unfortunately strikes or injures him be made amenable in damages? Certainly the neglect of the guardian ought to be imputed to him.

It would almost follow that the states that impute the negligence of the parent to the child would make no distinction in the case of a lunatic. There is certainly no essential difference between them. Neither have sufficient capacity or discretion to understand danger and to use the proper means to guard against it. To be sure there might be a slight distinction in the obligation of others toward them. The sight of a child in peril ought to induce every mature person to use greater care than he ordinarily would use; whereas a lunatic does not necessarily manifest his infirmity by his appearance and one who is not aware of the fact could hardly be
as blamed as much in the case of an infant. But as this difference in obligation is not strong enough to persuade a court to hold one way in the case of an infant and contra in regard to the lunatic there is no other conclusion than that the obligations of the one are encumbered upon the other and such rights as are given to the infant must be bestowed on the lunatic.
PART II.

Where the plaintiff voluntarily places himself or his property in charge of another.

1. Where the plaintiff voluntarily places his person in charge of one who exercises control over a public vehicle.

It was for a long time a disputed question in England and also in this country, whether a passenger in a public vehicle, who had been injured by the negligence of a third person, to which injury the person managing the public conveyance had contributed, could recover against said third person or whether the very act of the passenger placing himself in charge of the manager of the public conveyance, did not establish such an intimate relation between them that in case of accident, the negligence of the manager was to be considered the negligence of the passenger and thus deny a recovery by the passenger.

The weight of authority in England seems to be that in such a case the negligence of the driver is as complete a
bar as if it were the negligence of the passenger himself. On this side of the Atlantic there now exists very little difference of opinion among the courts which have had occasion to take the subject under judicial consideration. Among the earliest cases and perhaps the one which is the leading authority on the doctrine of identification is the famous case of Thorogood vs. Bryan reported in 8 C.B. 115. The facts are as follows: A passenger in an omnibus was injured in a collision caused by the combined negligence of the driver of a second omnibus and the driver of the omnibus in which the plaintiff was riding. The passenger brought an action against the driver of said second omnibus. The court, by a very skillful and entirely new application of the old Roman doctrine of identification held that a passenger in a public vehicle, though having no control over the driver, must be held to be so identified with the vehicle or driver as to be chargeable with any negligence on the part of the driver which contributed to the injury inflicted upon the passenger.

The American courts at once recognized the indefensible grounds upon which the opinion was based and gener-
ally repudiated the doctrine.

Upon reflection it does seem a trifle hard and strange to identify a passenger with a negligent driver of a vehicle in which he is riding. The only possible way in which the identification could be founded is by treating the driver as a servant of the passenger. But even this we could not do as our daily experience in the world shows us that the passenger exercises no control whatever over the driver or engineer of a public vehicle; and it is this right to control the conduct of a servant, that is the foundation of the doctrine that the master is affected by the acts of the servant.

The principle which may be properly denominated the American rule is set forth by Mr. Justice Field in the case of Little vs. Hackett reported in 116 U.S. 366. In this case the plaintiff hired a carriage and a pair of horses from a livery stable. The driver was an employee of the proprietor of the stables and the plaintiff exercised no further control over him than to direct the extent of the drive. While crossing a railroad track, by the joint negligence of the driver in going on the track without carefully looking up and down the line, and of
the defendant in not sounding the bell or whistle, the

that

carriage was struck and plaintiff seriously injured.
The defendant set up the negligence of the driver was im-

putable to the plaintiff and that the relation of master

and servant existed between them.

It was held that the passenger was not responsible

for the acts or negligence of the driver and was not

prevented from recovering for the injuries he received.
The case of Thoroughgood vs. Bryan was very sharply criti-

cised and thoroughly disapproved.

As will be shown, the courts appear to draw no dis-
tinction in principle whether the passenger be on a pub-

lic conveyance like a railroad train or an omnibus, or be

in a hack hired from a public stand in the streets.

These in the hack do not become responsible for the neg-
ligence of the driver if they exercise no further con-
trol over him than to indicate the route they wish to

travel or the places to which they wish to go. If by

any fiction the driver is to be considered the agent, so

that his negligence can be imputed to the passenger and

so prevent the passenger's recovery against a third per-

son, the driver will be the agent in all other respects,
so far as the management of the vehicle is concerned; and thus responsibility will attach to passengers for any injury caused by the driver in the course of his employment. But according to any recognized principles of law can such a responsibility be fastened upon one who has in no way controlled or interfered with the object causing the injury? Clearly not. To be held responsible a person must exercise some authority over the subject or thing causing the injury. This proposition is too obvious to require authorities to be cited to sustain it.

The following cases each one representing the doctrine of its respective state sustain the principles set forth by the U. S. court in Little vs. Hackett.

40 State Reporter 948. Same case affirmed without an opinion in 133 N.Y. 563.

155 Mass. 331.

36 N.J.L. 225.

105 Ill. 364.

66 Cal. 163.

90 Ind. 545.

7 At. Rep. 105. (Maryland).

87 Ala. 610.
There are numerous other decisions to the same effect. In fact it is a unanimous conclusion of the courts in this country that the passenger may sue the stranger and that the negligence of the driver is not imputed to the passenger. The following states make up the exception that proves the rule. In Penna. the courts, although the negligence of the driver is not imputed to the passenger, say that the passenger should be confined to a remedy against the carrier having charge of him. This is only adopted where the vehicle is managed by a common carrier and the courts admit that it is a mere arbitrary rule and only for the sake of convenience.

46 Pa. St. 151.
97 Pa. St. 91.

In 38 Vermont 440 in some dicta is found the rule of this state. They base their decision upon the assumed theory that the driver is the agent of the passenger and
his negligence is attended by the same consequences which would result from the passenger's own neglect.

On an examination of the cases cited one may easily see how thoroughly the English rule has been controverted. In scarcely a single case has an opinion been written without directly referring to it and giving it a hard rub. It seems almost incredible that any fair minded and reasonable man could arrive at any different conclusion. The passenger is a perfectly innocent party, having no control over either of the wrong doers. What reason is there to prevent him from recovering from either of the negligent parties? Surely, according to the usual rules of justice there is none and hence an action should lie in his behalf.

2. Where a shipper places his property under one in charge of a public vehicle or common carrier.

At the first glance, this proposition seems quite similar to the last one treated. But upon a closer examination of the question, one readily finds that they are built from different foundations. In this latter case the doctrine of principal and agent is invoked.
The shipper by his very act of trusting the goods to the
care of a carrier constitutes that carrier his agent.
Such being the case he should recover only when his agent
is free from fault. Although, it is a question that
has received very little attention by the text book
writers and the cases in point are very few, still the
cases that have been found are almost uniform in holding
that the shipper is imputed with the negligence of his
carrier so as to prevent a recovery.

The first case where the precise question was before
the court was in 6 Wharton 311. The court held that the
rule that in case of loss for mutual negligence, neither
party could recover, governed the case of shippers of
goods on public vehicles which have come into collision
to the injury of the goods, as well as the owners of such
vehicles themselves. In its opinion the court says:
"There is at least a privity contract betwixt the mer-
chant and his carrier; and the former when he commits the
management and direction of his goods to the latter, giv-
ing him, as he does, authority to labor and travail about
the transportation of them he necessarily constitutes the
carrier to a great extent his agent."
The courts that have arrived at a similar conclusion and in fact the following constitute about all the states that have had the question presented, are:

15 Ark. 188.
69 N.Y. 470.
45 Am. Dec. 47 (Ken.)
2 Pick. 621.
1 M. N. 169.

Each one of the above cases cites with approval the Penna. case in 6 Wharton 311 and all are entirely uniform in their holding.

3. Where the plaintiff places himself under one in charge of a private vehicle.

The question that presents itself to us in this proposition has been decided in many and various ways. The courts that impute the negligence of the driver to the plaintiff base their decisions either upon the "unexplained identity" of position between the plaintiff and the person by whose contributory negligence his right of action is effected, or else upon the ground that such a person has been accepted as his agent, so that the neg-
ligence of the plaintiff. This latter reason has at least some justification, as one voluntarily in a private carriage, trusts his personal safety to the person in control of it. By the voluntary entrance into the conveyance the plaintiff adopts, for the time being, the vehicle as his own and he jointly assumes the risk with the person guiding it. It must be admitted there is a personal trust in such cases, which implies an agency.

On the other hand, let us look at the other side of the question. Can the doctrine of agency be applied to affect the plaintiff's right of action, if in fact there is no agency existing in law either actual or implied. Agency must always involve authority, actual or assumed, over the conduct of the person and in that business where he was negligent. In the case under consideration the plaintiff simply rides along as a guest. He is invited to take a drive and he accepts. In such a case does he authorize the driver to act negligently? Does he have any moral or legal right or power to control the actions of his host? To be clear, imagine you were driving, for example, and invited a friend to go with you. Do you think he would immediately begin to tell you that
you should not drive here or it would be negligent to go there and that you must drive somewhere else? Certainly such is not our every day experience and it would be very hard to accede to the proposition that the driver of a private carriage becomes the agent of the person riding with him in any such a way as to make the negligence of the former the negligence of the latter.

Of course, it is no less the duty of the plaintiff, where he has an opportunity to do so, than of the driver to learn of the danger and to avoid it, if possible. If he has a better chance to discover danger or he is already aware of some hidden danger, it is his moral duty to inform the driver and in case of his failure so to do, his recovery should be barred. But the rule that the driver's negligence will or will not be imputed to the plaintiff should not be applied to this case. It is an entirely different question and one so obvious that it needs no further attention.

The weight of authority in this country seems to be opposed to imputing the negligence of the driver to the plaintiff. In 66 N.Y. 11 in a very learned and well written opinion the court very thoroughly discussed the
subject and held that a passenger in a buggy of another person was not affected by the negligence of the latter. In the course of his opinion Judge Church says: "The acceptance of an invitation to ride creates no more responsibility for the acts of the driver, than the riding in a stage coach or even in a train of cars, providing there is no negligence on account of the character or condition of the driver, or the safety of the vehicle or otherwise. It is no excuse for the negligence of the defendant that another person's negligence contributed to the injury for whose act the plaintiff was not responsible."

129 Pa. St 543 fully sustains the New York rule but says when a person riding by invitation in a private vehicle in charge of another, remains in it with knowledge that he is approaching a hidden danger and without any request to the driver to stop, such an one is guilty of contributory negligence.

The New York doctrine has been followed very closely by almost every court in the United States. Among the leading cases are:

115 Ind. 115.

89 Ala. 521
Wisconsin seems to stand alone in opposing the rule. In 43 Wis. 513 the court comes out very strongly against it and invokes the principles of Thorogood vs. Bryan. The same rule was asserted in 47 Wis. 422. In this latter case the court failed to give any reason of its own but says it believes in the maxim "stare decisis" and refers directly to the other Wisconsin case.

Upon what principles of justice Wisconsin bases her decision it is difficult to understand. To say that the plaintiff must bear all the loss when he neither caused, was responsible for, nor could have prevented it, is certainly opposed to common sense and good judgment.
cuit Judge Sanborn in one of the cases cited, well said:

"If there exists in the realms of jurisprudence any sound principles on which so unrighteous a punishment of the in- nocent and the discharge of the guilty may be based, I have failed to discover it."
The cases coming under this rule most often arise where the husband and wife are riding together in a carriage and the wife is injured through the joint negligence of a third person and her husband. The conflict in the decisions is caused chiefly by the great changes which have been made in the common law as to the relations of husband and wife. Under the old common law rule which considers the husband and wife as one person and which denies to the wife the right to bring an action separately from her husband, it is properly and necessarily held that the negligence of the one is imputed to the other. But, under the modern theory and especially where there has been a very radical change in the common law, the decisions are quite uniform.
In 38 Vermont 440 the question came up under the modern theory. It was an action against a town for damages for an injury caused by the joint negligence of the husband and of the town in not keeping the highway in repair. The court held that the wife was under the care and custody of her husband, and any want of ordinary care on his part was attributable to her in the same degree as if she were acting wholly for herself. The learned judge says: "There is nothing in the marital relation which would change the situation of the wife in respect to her husband." He then continues and attempts to prove that the true reason for imputing the negligence is because the husband is agent for the wife. This is really the reason upon which the whole opinion is based. Vermont has always entertained some very strange ideas upon questions where one voluntarily places himself in charge of another and her decisions are decidedly against the weight of authority. It will be remembered that it was in this same case that the rule as to public vehicles was established in this state.

There is a case in 50 Conn. 379, that holds that the negligence of the husband is imputed to the wife. Also
in 60 Iowa 429 there is a similar holding. But both these cases came up when the common law rule as to husband and wife had been but very slightly modified. At that time these decisions were in accord with the weight of authority and, as was said before, they were based almost upon necessity by reason of the then existing relations of husband and wife. In the states which have made radical changes in the common law, the fact that the parties are husband and wife makes no difference. 3 Mo. appeals 231 distinctly declares that the contributory negligence of the husband will not bar the action of the wife, she being the injured party. His negligence can not be imputed to her. Again, 111 N.Y. 199 is not only authority in its own state but is cited in almost every state where a similar case has arisen. This case very plainly states that if the husband was negligent his negligence would not be imputed to the wife; that while she had no right, because her husband was driving to omit to use reasonable and prudent care to see for herself that there was no danger, she was not bound to suspect a purpose on the part of her husband not to protect himself, until she saw such a dangerous act was being executed.
And as in this case when she saw she was about to make the attempt to cross in front of the train, she was not bound to jump from the wagon, seize the reins or interfere with the driver. "Even if she did not entreat him to stop, but sat silent, it does not follow as a matter of law, that she was negligent."

In a recent Indiana case (1894) reported in 38 N.E. 476, the New York doctrine is fully affirmed. The court in this case makes a thorough review of all the cases pro and con and after a very elaborate discussion arrives at the aforesaid conclusion. There is a very peculiar and exceptional case on this subject reported in 45 Ohio St. 470. The facts in brief are thus. The wife of the plaintiff being ill sent her husband for a harmless medicine. Plaintiff called at the drug store and asked for the drug. The druggist negligently sold and delivered to the plaintiff a poisonous drug which the plaintiff gave to his wife. She died immediately after taking it and the plaintiff sues as administrator of his wife. The defendant set up the contributory negligence of the husband. The court said: "The doctrine of contributory negligence which is invoked by the defendant is founded
upon considerations which find no application in logic or justice. The law having severed the relations of husband and wife, what reason can there be for imputing to her the contributory negligence of the husband?" The United States Supreme Court also follows this doctrine in 37 Federal Reporter 317.

It is rather difficult to see upon what principle the husband's negligence is imputable to the wife. Would she be liable if his negligence had injured a third party? Certainly she is not responsible for his acts and had no right or power to control them. To be sure she always consents to ride or whatever the case may be, but as the husband is supposed to be a competent and reasonable man, she is not negligent in so doing. Ought a wife to be held, by consenting to ride with her husband, to guarantee his perfect care and diligence? She is injured by the negligence of a third party and it seems unjust and unreasonable to impute her husband's negligence to her.

In all these cases where the doctrine of imputed negligence may be applied, the relation of principal and agent or master and servant properly exists and the doc-
trine rests upon the old maxim, qui facit per alium facit per se. If these relations do not really exist, the negligence should not be imputed. It is to be sincerely and earnestly hoped that the day is not far distant when all the courts will refuse to allow him to escape, whose wrongful act or omission caused the unjury and damage and who upon consideration of justice and reason ought to make compensation for it.