**Marquette Law Review**

Volume 3
Issue 4 *Volume 3, Issue 4 (1919)*

Article 5

# Imputed Negligence as Applied Against a Guest in a Private Conveyance

Walter D. Corrigan

sideration, but that the best interests of all of the stockholders are promoted by it.

I cannot refrain from expressing the opinion, however, that it is more a question for the legislature to use judgment in protecting stockholders by surrounding these agreements with proper limitations, rather than for courts to set them aside as against public policy.

---

# IMPUTED NEGLIGENCE AS APPLIED AGAINST A GUEST IN A PRIVATE CONVEYANCE

(A CRITICISM OF THE WISCONSIN RULE.)

BY WALTER D. CORRIGAN, OF THE MILWAUKEE BAR.

The Wisconsin cases hold that the negligence of a driver of a private conveyance is imputable to the occupant.

The rule is founded on an implied relation of Principal and Agent.

This doctrine, now generally repudiated or greatly qualified, first found expression in Wisconsin in *Prideaux vs. Mineral Point,* 43 Wis. 513-526-531, where it was held that:

> "The driver of a private conveyance is the agent of the person in such conveyance, so that his negligence contributing to the injury complained of by such person will defeat the action."

While such had substantially been assumed to be the law in *Houfe vs. Fulton,* 29 Wis. 296, the principle had not received deliberate sanction. *Prideaux Case, Supra,* 530.

The court apparently hesitated to take this position and was in *large part led so to do by the English case of Thorogood vs. Bryan,* 8 *C. B.* 115, *and the case of L. S. and M. S. Ry. Co. vs. Miller,* 25 *Mich.* 274, *and the New York case of Beck vs. Ferry Company,* 6 *Roberts* 82. This becomes important because of the later decisions of those courts hereinafter considered.

In the *Prideaux* case, Mrs. P., with another lady, was in the back seat of a carriage, and through the negligence of the driver the carriage went over an embankment.

In *Otis vs. Janesville,* 47 Wis. 442, plaintiff and several other persons were riding along a highway in a private conveyance,

driven by one of the party. A defect in the highway was struck and the injury followed. Held, that the driver's negligence, if it existed, would defeat recovery.

This rule has been persistently adhered to.

*Ritger vs. City,* 99 Wis. 197.
*Olson vs. Town,* 103 Wis. 35.
*Lightfoot vs. W. T. Co.,* 123 Wis. 479.
*Lanson vs. Town,* 141 Wis. 57; 25 L. R. A. (N.S.) 40.
*Kuchler vs. M. E. R. & L. Co.,* 157 Wis. 111.

*An examination of briefs in these cases discloses, however, that the question has not been exhaustively presented to our court since the decision of the Prideaux case, where the court followed one line of then existing precedents, all of which have since been overruled, repudiated or so qualified as to destroy their force and value.*

We will see whether this rule of the *Prideaux* case should stand in the light of reason and modern authority, and especially in the face of the repudiation of all rules like or akin to it, by all courts first announcing that or a similar doctrine.

There is but one state in the Union which stands with Wisconsin. The MONTANA court followed *Otis vs. Janesville* (Wis.), *Supra,* and *L. S. and M. S. vs. Miller* (Mich.), *Supra,* the case with which the Wisconsin court was first led astray. This was in the case of *Whittaker vs. City,* 14 Mont. 124; 35 Pac. 904-905; 43 A. S. R. 621.

The weight of authority to the contrary was not considered or analyzed, and the decision is palpably entitled to little weight. Besides, the Montana court has since repudiated the doctrine as to children, holding, as do some of the other courts retaining a remnant of the doctrine, that the contract of agency cannot be implied as against a child because of his incapacity to contract. *Flaherty vs. Butte E. R. Co.,* 107 Pac. 416.

We will first call the roll of the English courts and the courts of this country, which established, or in part established this doctrine, and have since overruled and repudiated it, or materially qualified it.

The courts, and text-writers, seem agreed that the rule is based on the English decision of *Thorogood vs. Bryan,* decided in 1849 and reported in 8 C. B. 115; 18 L. J. C. P. N. 8336.

See *Duval vs. Atlantic, etc.,* 65 L. R. A. 722.
*Prideaux Case, Supra,* 526.

*Sherman vs. Redfield* on Negligence, No. 66.
*Hampel vs. Detroit, etc.,* 100 N. W. 1002-1003.
*Shultz vs. Old Colony, etc.,* 79 N. E. 873; 8 L.R.A. (N.S.) 597, and many other cases herein cited.

*Thorogood vs. Bryan, Supra,* was really a case of Public Conveyance, the accident having been caused by the joint negligence of the drivers of two omnibuses, one of which the plaintiff had just alighted from, but whether or not the rule could properly be understood to extend to private conveyances and to invited guests therein, as in the *Prideaux* case, it was seriously criticized for a time, *and then completely overruled by the English courts.*

See *Duval vs. Atlantic, etc.,* 65 L. R. A. 722.
*The Bernia L. R.,* 13 App. Cas. 1, 57 L. J. Prob. N. S. 65; 58 L. T. N. S. 423; 36 Week. Rep. 870; 6 Asp. Mar. L. Cas. 257; 52 J. P. 212.

This is discussed at length, and the opinions quoted in *Duval vs. Atlantic, etc., Supra,* and in the note in 8 L. R. A. (N.S.) 597. The English court came to this country for its authority, citing and relying upon the reasoning of *Little vs. Hackett,* 116 U. S. 366.

The Michigan court declared the rule without profound discussion in the opinion in *L. S. and M. S. vs. Miller,* 25 Mich. 298. It has been claimed by some that *Apsey vs. R. R. Co.,* 47 N. W. 319-513, follows it, and it may inferentially, as to cases where the negligence of a parent, who is driving a conveyance, contributes to produce the death of the child being conveyed in the rig at the time. But as to cases of infants, the rule is wholly rejected.

*Hampel vs. Detroit, etc.,* 100 N. W. 1002-1003, where it is said:

> "The deceased was an infant 13 years of age, in a carriage by invitation of its driver, through whose negligence and without her fault, she was killed. Had she been an adult, his negligence would have been imputable to her, upon the *fiction* that he was her agent, under the doctrine of *Thorogood vs. Bryan,* 8 C. B. 114, which is recognized as authority in this state. See *Mullen vs. Owosso,* 100 Mich. 103, 58 N. W. 663, 23 L. R. A. 693, 43 Am. St. Rep. 436. *But this infant lacked the capacity to make him her agent, while there is not the least substance of a claim that either party supposed that such relation existed as a matter of fact.* Here no question of the parents' negligence is raised, as in the *Apsey case;* but,

> if a child is chargeable with its parents' negligence, does it follow that he should be held responsible for that of strangers at whose invitation he rides? The doctrine is at variance with the overwhelming weight of authority here and in England. If the case of *Apsey vs. R. R. Co., Supra,* must be considered an authority for the proposition that the negligence of a driver is imputable to an infant, it should be overruled."

The reasoning of this case as to infants is well illustrated and supported in the PENNSYLVANIA case of *Faust vs. P. & R. Ry. Co.,* 43 Atl. 329, and the NORTH CAROLINA case of *Bottoms vs. S. & R. R. Co.,* 25 L. R. A. 784.

*Beck vs. Ferry Company, Supra,* (New York), relied upon by the WISCONSIN court in the *Prideaux* case, was never in point, for *it was held to be a joint expedition* in which boys were engaged, where no one had individual control of the management. But whatever claim has ever been made that such a rule ever prevailed in New York, it does not exist now.

*Weldon vs. Third Ave., etc.,* 38 N. Y. S. 206.
*Robinson vs. Ry. Co.,* 66 N. Y. 11 (a leading case).
*Dyer vs. Ry. Co.,* 71 N. Y. 228.
*Fisher vs. City,* 58 N. Y. S. 499.
*Kleiner vs. Third Ave., etc.,* 55 N. Y. S. 394.
*Robinson vs. Ry. Co.,* 86 N. Y. S. 442; affirmed in 72 N. E. 1150.
*Morris vs. Ry. Co.,* 71 N. Y. S. 321.
*Phillips vs. Ry. Co.,* 27 N. E. 978.
*Brennan vs. Ry. Co.,* 69 N. Y. S. 1025.
*Bailey vs. Jourdan,* 46 N. Y. S. 399.

In this last case the court discussed *Beck vs. Ferry* and other cases as follows:

> "The appellant cited various cases, among them *Beck vs. Ferry Co.,* 6 Rob. (N.Y.) 87, where the deceased was held chargeable with the neglect of his comrades, as well as his own. The plaintiffs, in that case, were evidently boys who had gone out together in a rowboat for amusement. They were engaged in a joint expedition, and no one of them had absolute individual control of the management of the boat. In the case of *Donnelly vs. Railroad Co.,* 109 N. Y. 16, 15 N. E. 733, the negligence of a comrade was imputed to the plaintiff, on the ground that they were engaged in a common employment, and the opinion shows that they were both engaged in the

management and directing control of the wagon. It was assumed in the opinion that they were thereby comrades engaged in a common employment. In the case of *Harris vs. Uebelhoer,* 75 N. Y. 169-177, the deceased was in a skiff propelled by her husband, and was run down by a tug. The husband was blind, and the deceased was giving directions as to the management of the boat, while the husband was sculling, and both were participating in the management of the boat."

The following are also distinguishable:

*Zimmerman vs. Union Ry. Co., etc.,* 51 N. Y. S. 1, where plaintiff gave some directions.

*Bergold vs. Nassau, etc.,* 52 N. Y. S. 11, where plaintiff gave some warning.

*Scaraagello vs. Interurban, etc.,* 90 N. Y. S. 430, (case of driver and owner).

*Mack vs. Town,* 90 N. Y. S. 760.

*Penna vs. Ry. Co.,* 96 N. Y. S. 208.

*McCaffrey vs. Presidential, etc.,* 16 N. Y. S. 495.

*Bennett vs. Ry. Co.,* 16 N. Y. S. 765.

*Van Vraken vs. Village,* 33 N. Y. S. 329.

*Kessler vs. Brooklyn, etc.,* 38 N. Y. S. 799.

*Strauss vs. Newburgh, etc.,* 39 N. Y. S. 998.

Iowa announced the Wisconsin doctrine in *Slater vs. Ry. Co.,* 32 N. W. 264. But the doctrine was wholly repudiated by that court later in *Nisbet vs. Town of Garner,* 1 L. R. A. 152.

See also *Withey vs. Fowler Co.,* 145 N. W. 923.

In *Omaha, etc., vs. Tallibott,* 67 N. W. 599, the doctrine was invoked by the Nebraska court. The decision might have safely been placed on plaintiff's own contributory negligence, but it was not; *but whatever was adopted by Nebraska of this phase of the doctrine of imputed negligence, was wholly repudiated and overruled in a very elaborate, exhaustive and able opinion in Loso vs. Lancaster Co., 109 N. W. 752-755-765; 8 L. R. A. (N. S.) 618, and note.*

Whatever vestige of the principle ever existed in Massachusetts, as evidenced by cases like *Allyn vs. Boston, etc.,* 105 Mass. 77, has been wiped out. In receding from this doctrine, that court explained that the *Allyn* case was decided upon the theory that the plaintiff, as well as the driver, was negligent.

*Randolph vs. O'Riorden et al,* 29 N. E. 583-584.

*Murray vs. Boston Ice Co.,* 61 N. W. 1001.

In the latter case, the *Allyn* case is expressly limited to its own facts, as those facts are thus later interpreted by the court.

The whole doctrine is crushed out of the jurisprudence of the state in one of the ablest opinions in the books.

*Shultz vs. Old Colony, etc.,* 79 N. E. 873; 8 L. R. A. (N.S.) 597, and note.

In PENNSYLVANIA the rule of *Thorogood vs. Bryan* was at first adopted.

*Lockhart vs. Litchenthaler,* 46 Pa. 151.

*Phila., etc., Ry. Co. vs. Boyer,* 97 Pa. 91.

But these earlier cases have been overruled.

*Dean vs. Pa. Ry. Co.,* 129 Pa. 514-544; 18 Atl. 718; 6 L. R. A. 143; 15 Am. St. Rep. 733.

*Bunting vs. Hogsett,* 139 Pa. 363, 376; 21 Atl. 31, 33, 34; 12 L. R. A. 268; 23 Am. St. Rep. 192.

*Little vs. Cent. District & Printing Telegraph Co.,* 213 Pa. 228; 62 Atl. 848.

The rule of the *Prideaux* case has never been applied in that state.

*Carlisle vs. Brisbane,* 113 Pa. 544; 6 Atl. 372; 57 Am. Rep. 483.

*Carr vs. Easton,* 142 Pa. 139; 21 Atl. 822.

*Crescent vs. Anderson,* 8 Atl. 379.

See also *Philadelphia, etc., vs. Hogsland,* 7 Atl. 105, and discussion of *Dean* case, *Supra,* in *Duval vs. Atlantic, etc.,* 65 L. R. A. 727.

The doctrine is wholly rejected in all other jurisdictions.

No better discussion is to be found anywhere than in the opinion already referred to in *Shultz vs. Old Colony, etc.,* 79 N. E. 873-894; 8 L. R. A. (N.S.) 597, (Mass.), where that court says:

> "The unbroken line of authority in all the other states in the Union is opposed to this reasoning. With some modifications in its application to particular cases, the general rule is that where the injured and the driver do not occupy the position of master and servant, passenger and carrier, parent and child, and where the plaintiff is himself in the exercise of due care, having no reason to suspect carelessness or incompetency on the part of the driver, and is injured by the concurring negligence of the driver of the vehicle and some third person, the guest is

not precluded from recovery against the third person by reason of the negligence of the driver."

That court further said, *Supra,* 877:

"There is no abstract principle of law by which an innocent person in the full possession and exercise of his faculties and himself using due care should be prohibited from recovery against a wrongdoer whose tortious act contributes as a proximate cause to his injury. It is familiar law that an injured person may recover against one or both of two wrongdoers between whom there is no concert of action, whose concurring act produced the injury, even though the act of either alone might not have caused any harm, 'when no distinction can be drawn between their acts'."

* * *

"The innocent injured plaintiff ought not to go remediless against one, but for whose wrongful act the plaintiff would have been unharmed. Under the conditions existing in the case at bar, recovery by the plaintiff can only be prevented by judicially imposing upon the purely humane, social or benevolent act of hospitality *the fiction of assuming the contractual relation of principal and agent between the guest and host. Such relation in fact does not exist. The parties themselves would at once repudiate it, and indeed the association itself is repugnant to the thought of contract.* Such a fiction ought not to be resorted to, except under the imperative requirement of some technical legal rule or to accomplish a manifest justice. Its invocation in the present case is not made necessary by such rule and its application only serves to protect a wrongdoer from the natural consequences of his act, so that it fails of justification on both grounds."

And further said:

"Moreover, it is but a rational extension of the rule to hold the gratuitous passenger, if he is to be precluded from recovery against a wrongdoer by reason of the negligence of his driver on the theory that the latter is his agent, himself liable also in an action of tort to anyone injured by the negligence of this same driver. If he is prevented from availing himself of a right of action for the wrong of another on the ground of the negligence of his agent, the converse of this proposition necessarily holds true. He must be responsible to a child negligently run down in the street by his host, who is driver and assumed agent. The responsibility of the invited guest for the negligence of his host must be co-extensive with

the agency. The purpose of the agency is the driving of the vehicle, and hence it follows that the guest will be liable for any injury negligently occasioned in the driving. If the driver's want of care is imputed to the guest when injury is received by him, to the same extent must the imputation exist when harm is inflicted. *To thus press the doctrine of imputed negligence to its logical conclusion demonstrates its unsoundness. It is neither just nor reasonable nor consonant with any principle of jurisprudence to require the plaintiff to go remediless for a wrong committed against her by the defendant, which she neither contributed to, was responsible for, nor could have prevented. To send her out of court would be to punish the innocent and discharge the guilty.*

"The rule fairly deducible from our own case, and supported by the great weight of authority by courts of other jurisdictions, is that where an adult person, possessing all his faculties and personally in the exercise of that degree of care which common prudence requires under all the surrounding circumstances, is injured through the negligence of some third person and the concurring negligence of one with whom the plaintiff is riding as guest or companion, between whom and the plaintiff the relation of master and servant or principal and agent, or mutual responsibility in a common enterprise, does not in fact exist, the plaintiff being at the time in no position to exercise authority or control over the driver, then the negligence of the driver is not imputable to the injured person, but the latter is entitled to recover against the one but for whose wrong his injuries would not have been sustained. Disregarding the passenger's own due care, the test whether the negligence of the driver is to be imputed to the one riding depends upon the latter's control or right of control of the action of the driver, so as to constitute in fact the relation of principal and agent or master and servant, or his voluntary, unconstrained, non-contractual surrender of all care for himself to the caution of the driver."

We will now call the roll of the courts and text-writers which have always rejected the doctrine.

*UNITED STATES COURTS.*

*Pyle vs. Clark et al,* 75 Fed. 744; affirmed in 79 Fed. 794.

*Wright vs. Clarke et al,* 75 Fed. 644; affirmed in 79 Fed. 744.

*Ry. Co. vs. Lapsley,* 51 Fed. 174-178; same case, 16 L. R. A 800, and cases cited and noted.

*Little vs. Hackett,* 6 Sup. Ct. 391-394; 116 U. S. 374; 29 L. Ed. 652-655.
*Griffith vs. B. & O.,* 44 Fed. 574-580.
*Sheffield vs. Central, etc.,* 36 Fed. 164.
*Evans vs. Lake Erie, etc.,* 78 Fed. 783.
*Honey vs. Ry. Co.,* 59 Fed. 427.
*Delaware, etc., vs. Devore,* 114 Fed. 155, where certain important distinctions are noted.
*Denver, etc., vs. Norton,* 141 Fed. 599-609.
*Dale vs. Denver, etc.,* 173 Fed. 787; 19 Ann. C. 1223 and note.

*Little vs. Hackett, Supra,* is a profound and leading case, involving a collision at a crossing between a train and a private conveyance, in which plaintiff was riding with a driver alleged to have been guilty of contributory negligence. The trial court rejected the rule under consideration, and instructed that the negligence of the driver could not be imputed to the plaintiff, unless the plaintiff interfered with the driver and controlled the manner of his driving.

Justice Field, for a unanimous court, says, *Supra,* 394-374-655:

> "Cases cited from the English courts, as we have seen, and numerous others decided in the courts of this country, show that the relation of master and servant does not exist between the passenger and the driver, or between the passenger and the owner. In the absence of this relation, the imputation of their negligence to the passenger, where no fault of omission or commission is chargeable to him, is against all legal rules. If their negligence could be imputed to him, it would render him, equally with them, responsible to third parties thereby injured, and would also preclude him from maintaining an action against the owner for injuries received by reason of it. But neither of these conclusions can be maintained; *neither has the support of any adjudged cases entitled to consideration.* The truth is, the decision in *Thorogood vs. Bryan* rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position."

The rule is rejected in MAINE.

*State vs. Ry. Co.,* 15 Atl. 36.
*Neal vs. Rendall,* 56 Atl. 209; 63 L. R. A. 668.

An exception once made in case of municipalities as to highway cases claimed to be founded on Statutory grounds has been criticized.

*Barnes vs. Rumford,* 52 Atl. 844.
*Shultz vs. Old Colony, etc.,* 79 N. E. 875.

The rule is rejected in NEW HAMPSHIRE in a very able opinion.

*Noyes vs. Town,* 10 Atl. 690.

## *VERMONT COURTS.*

In the only case not distinguishable on the ground of some special relationship between parties, Vermont is in accord with the great weight of authority.

*Glidden vs. Town,* 38 Vt. 52-59.

## *NEW JERSEY COURTS.*

A number of well considered cases reject the rule in New Jersey.

*Noonan vs. Traction Co.,* 46 Atl. 770.
*Hoimark vs. Consolidated, etc.,* 38 Atl., 684.
*N. Y., etc., Ry. Co., vs. N. J., etc., Ry. Co.,* 38 Atl. 828, where *Thorogood vs. Bryan* is repudiated.
*N. Y., etc., Ry. Co. vs. Steinbrauner,* 47 N. Y. L. 161; same case, 54 Am. Rep. 126.

The MARYLAND courts stand opposed to the doctrine.

*United Rys. vs. Biedler,* 56 Atl. 813.
*P. W. & B. R. Co. vs. Hogeland,* 7 Atl. 105.
*B. & O., etc., vs. State,* 29 Atl. 518.
*Consolidated, etc., vs. Getty,* 54 Atl. 660.

It is also rejected in VIRGINIA.

*Atlantic, etc., vs. Ironmonger,* 29 S. E. 319.

## *NORTH CAROLINA COURTS.*

The reasoning of this court is of the highest order, and the labor put into its leading case is commendable.

*Duval vs. Ry. Co.,* 46 S. E. 750; 65 L. R. A. 722.

In the above case the Wisconsin, Montana and Nebraska courts are severely criticized.

The court finally says, quoting 1 Shearman and Redfield on Negligence, *"The notion that one is the agent of another who has not the smallest right to control or even advise him, is difficult to support by any sensible argument. This theory is universally*

*rejected except in the states mentioned and it must soon be abandoned even there."*

See also *Crampton vs. Ivic,* 36 S. E. 351.

*GEORGIA COURTS.*

Georgia joins with the general line-up.

*Roach vs. Ry. Co.,* 21 S. E. 67, (*a case of driver's and owner's negligence*).

*Ry. Co. vs. Powell,* 16 S. E. 118.

*Southern Ry. vs. King,* 128 Ga. 383; 11 L. R. A. (N.S.) 829.

In *Elyton Land Co. vs. Mingea,* 7 So. 666-667, the ALABAMA court states the rule as follows:

> "The rule must be regarded as now fully settled, both in England and America, and certainly in this state, that the negligence of the driver of a vehicle cannot be imputed to a passenger therein, when the passenger is free from personal negligence, and has no control over the driver, and has not been guilty of any want of care in the selection."

See also *Birmingham, etc., vs. Baker,* 31 So. 618.

MISSISSIPPI is also right.

*Ry. Co. vs. Davis,* 13 So. 693.

The TENNESSEE court affirmatively rejected the early Wisconsin case after thorough consideration.

*Hyde's Ferry, etc., vs. Yates,* 67 S. W. 69.

KENTUCKY is with the overwhelming weight of authority.

*Louisville, etc., vs. Anderson,* 76 S. W. 153.

*Bevis vs. Tel. Co.,* 89 S. W. 126.

*Cahill vs. Ry. Co.,* 18 S. W. 2.

OHIO has always followed the general rule.

*St. Clair, etc., vs. Eadie,* 1 N. E. 519.

*Covington T. Co. vs. Kelly,* 36 O. St. 86; 38 Am. Rep. 558.

*Cincinnati, etc., vs. Wright,* 43 N. E. 688; 32 L. R. A. 340.

INDIANA also stands with the rest.

*Town vs. Musgrove,* 18 N. E. 45-2, and cases cited.

*Lake Shore, etc., vs. Boyts,* 43 N. E. 667; same case, 45 N. E. 812-814, and cases cited at page 814.

*Albion vs. Hetrick,* 90 Ind. 545.

*Miller vs. Ry. Co.,* 27 N. E. 339, and cases cited.

*Boone Co. vs. Mutchler,* 36 N. E. 534.

*Ind. Ry. Co., etc., vs. Johnson,* 72 N. E. 571.

*Mich. City vs. Boeckling,* 23 N. E. 518.

The ILLINOIS court is on record repeatedly and apparently consistently against every vestige of the rule.

*Wabash, etc., vs. Shacklet,* 105 Ill. 364.
*Chicago, etc., vs. Leach,* 74 N. E. 119, and cases cited at p. 120. (The above is a livery rig case.)
*Christy vs. Elliot,* 1 L. R. A. (N.S.) 215-232.
*Eckles vs. Muttschall,* 230 Ill. 462; 82 N. E. 872.
*Peryman vs. Ry. Co.,* 242 Ill. 272; 89 N. E. 980.
*Chicago, etc., vs. Leach,* 215 Ill. 184; 74 N. E. 119.
*Richardson vs. Nelson,* 221 Ill. 254; 77 N. E. 583.

The MINNESOTA court never reasoned better on any proposition than on this one. Its cases are barriers against which *Thorogood vs. Bryan* and the *Prideaux* case must crumble and fall.

In *Cunningham vs. City,* 86 N. W. 763 (Minn.), plaintiff was invited by some friends to accompany them from their home to the city of Thief River Falls. The party was composed of four persons and was traveling in a two-seated spring wagon, drawn by a team of horses driven by one Alexander, a member of the party. After arriving at the said city, and when crossing a railway track which extended across the streets of the city, plaintiff was thrown from the wagon and injured on account of the defective condition of the street. It was claimed by the defense that the driver of the vehicle was also negligent. The court said, in the syllabus:

> "It does not follow that, because several persons are occupants of the same vehicle, they are engaged in a joint enterprise within the meaning of the law of negligence. In order to constitute a joint enterprise on the part of such persons, within the purview of such law, there should exist between them a joint, or community of, interest in the objects of the enterprise, and an equal right to direct and control the movements and conduct of each other with respect thereto. It is held in this case, that within this rule plaintiff was not engaged in a joint enterprise with the driver of the vehicle in which she was riding at the time of her injury, and the negligence of the driver was not imputable to her."

In the opinion the court emphasizes the fact that there was no evidence that plaintiff had control over, or was in any way responsible for the conduct of the driver.

In *Koplitz vs. City of St. Paul,* 90 N. W. (Minn.) 794; 58 L. R. A. 74, plaintiff was one of a party of twenty-six (26) young people who celebrated the Fourth of July by a picnic at a place 12 miles from St. Paul. The picnic was a mutual affair, in that the party consisted of about an even number of young men and women, each lady being invited and escorted by a gentleman for whom and herself she furnished lunch. At the meal, the several lunches were merged and became a common spread. The ladies had nothing to do with the transportation of the party to and from the lake, this being left to the gentlemen. The gentlemen selected Mr. Gibbons, one of their number, to manage the transportation of the party and he hired a covered bus, drawn by four horses, and a driver and assistant to drive the party to the lake and return. The ladies had nothing to do with the hiring of or the payment of said transportation and had no control thereof. On the return trip, on Dale Street, in the City of St. Paul, the bus was tipped over an embankment, partly on account of the negligence of Mr. Gibbons, one of the party aforesaid. The court, in discussing the question of joint enterprise and the doctrine of imputed negligence as applied thereto and the facts of the case, said as follows:

> "If, however, two or more persons unite in the joint prosecution of a common purpose under such circumstances that each has authority, expressed or implied, to act for all in respect to the control of the means or agencies employed to execute such common purpose, the negligence of one in the management thereof will be imputed to all of the others.
>
> * * *
>
> "It is too obvious to justify discussion that the plaintiff in this case neither expressly nor impliedly had any control over the drivers of the omnibus, or either of them, or of Mr. Gibbons, and that he and she were not engaged in a joint enterprise, in any such sense as made her so far responsible for his negligence in driving the horses that it must be imputed to her. The claim of the defendant to the contrary is unsupported by the facts as disclosed by the record. Judgment affirmed."

See also *Follman vs. City,* 29 N. W. 317.

*Teal vs. St. Paul, etc.,* 104 N. W. 945.

The general rule prevails in MISSOURI.

*Dickson vs. Mo. Pac. Ry. Co.,* 13 S. W. 381, and cases cited page 384.

*Johnson vs. St. Joseph,* 71 S. W. 106.
*Marsh vs. Kansas City, etc.,* 78 S. W. 284.
*Baxter vs. St. Louis, etc.,* 78 S. W. 70.

So it is with the ARKANSAS court.

*Hot Springs, etc., vs. Hildreth,* 82 S. W. 245.

TEXAS is with the rest.

*Galveston, etc., vs. Kutac, et al,* 11 S. W. 127.
*Missouri, etc., vs. Rogerts,* 40 S. W. 956.
*Bryant vs. Ry. Co.,* 46 S. W. 82.
*Central Tex., etc., vs. Gibson,* 83 S. W. 863.

The NORTH DAKOTA court refuses to follow the error of the early English and Wisconsin decisions.

*Onverson vs. City,* 65 N. W. 676.

And so has KANSAS.

*Reading vs. Telfer,* 48 Pac. 134.
*Corley vs. Ry. Co.,* 133 Pac. 555.
*City vs. Hatch,* 45 Pac. 65. (The above involved negligence of driver and owner.)

OKLAHOMA is also in line.

*St. Louis, etc., vs. Bell,* 159 Pac. 336; L. R. A. 1917A 543.

The general doctrine is followed in COLORADO.

*Colorado, etc., Ry. Co. vs. Thomas,* 81 Pac. 801; 70 L. R. A. 681.

So it is in CALIFORNIA.

*Bresee vs. Los Angeles, etc.,* 85 Pac. 152; 5 L. R. A. (N.S.) 1059.

The rule is settled in WASHINGTON the same way.

*Shearer vs. Town,* 72 Pac. 76.

Every text-writer I have been able to examine upholds this contention.

In 1 *Thompson on Negligence,* Sec. 502, the decisions are analyzed, and the author says:

> "While there are a few untenable decisions to the contrary, nearly all American courts are agreed that the rule under consideration extends so far as to hold that where a person, while riding on a private vehicle by the invitation of the driver or the owner or custodian of the vehicle, and having no authority or control over the driver, and being under no duty to control his conduct, and having no reason to suspect any want of care, skill, or sobriety on his part, is injured by the concurring negligence of the driver and a third person or corporation,

the negligence of the driver is not imputed to him, so as to prevent him from recovering damages from the other tort feasor."

See *White's Supplement,* Sec. 502.
*Shearman & Redfield on Negligence,* at Sec. 66.

"Doctrine of identification. As already stated, the fact that the injury was caused by the joint negligence of the defendant and a mere stranger is universally admitted to be no defense. But in the famous case of *Thorogood vs. Bryan,* an English court invented a new application of the old Roman doctrine of identification, and 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 as to be chargeable with any negligence on the part of its managers which contributed to an injury inflicted upon such passenger by the negligence of a stranger. In former editions we devoted much space to the refutation of this doctrine of 'identification'. But it is needless to do so any longer, since the entire doctrine has, since our first edition, been exploded in every court, beginning with New York and ending with Pennsylvania. It was finally overruled in England a few years ago. The only remnant of this doctrine which remains in sight anywhere is the theory that one who rides in a private conveyance thereby makes the driver his agent, and is thus responsible for the driver's negligence, even though he has absolutely no power or right to control the driver. This extraordinary theory, which did not even occur to the hairsplitting judges in *Thorogood vs. Bryan,* was invented in Wisconsin, and sustained by process of elaborate reasoning; and this Wisconsin decision in evident ignorance of all decisions to the contrary, was recently followed, with some similar reasoning, in Montana, and in Nebraska without any reasoning whatever; which last is certainly the best method of reaching a conclusion directly opposed to common sense and to the decisions of twenty other courts. The notion that one is the 'agent' of another, who has not the smallest right to control, or even advise him, is difficult to support by any sensible argument. This theory is universally rejected, except in the three states mentioned, and it must soon be abandoned even there."

The decisions which support the general rule are founded upon the reason that *the occupant of such a vehicle has no authority or control over the driver,* and in such cases the rule is absolute.

It is proper to note that there are authorities holding that the occupant of such a conveyance may himself, under certain circumstances, be guilty of contributory negligence and these are well grounded.

Regarding the rule of the *Prideaus Case,* all courts and students of the subject must conclude with the NORTH CAROLINA Supreme Court that,

> "The overwhelming weight of authority is against any such distinction, and in common with nearly all the courts of final jurisdiction, we are utterly unable to see any reasonable basis for such a conclusion."

*Duval vs. Atlantic, etc.,* 65 L. R. A. 723.

Our own court has held that there is no duty to protest against the danger where one is in a position where to protest would probably be of no avail, and where there is really no choice but to risk the impending danger, as in *Hackett vs. Wisconsin Central,* 141 Wis. 464, where the writer had urged that it was the duty of the Fireman to protest to the Engineer against running an engine backward with the tender in advance and bearing no coal or water, and bounding and swaying on the track, and running at a rate of 70 miles per hour.

The Wisconsin court has always upheld as a general principle the rule that a person wronged by the concurring negligent acts of two or more so-called joint tort feasors may pursue his remedy against either or both, or all, according to his desires. Why not in such cases as we are considering? Here, if he pursues his remedy against a particular one who may be even 99% to blame, he is defeated absolutely by the 1% blame of the other. It is the only situation, where there is no real relation of agency, to which the general rule above referred to is not applicable.

Our court has held recently that contribution may be enforced as between so-called joint tort feasors where the acts do not involve moral turpitude, and there is no wilful or conscious wrong.

*Ellis vs. Ry. Co. et al,* 167 Wis. 392.
*Bokula vs. Schwab,* 167 Wis. 546.

This means that ultimately, in all situations except the one being considered, joint wrongdoers whose wrongs are not wilful or conscious, must bear their fair share of the burden, but this rule is, by our decisions, made inapplicable to those joint tort

feasors involved in the subject before us. Why the exception to this "square deal" rule as to contribution? How can it be justified by reason? Certainly not by implying, as between a driver and a guest, a relation of agency which in truth and fact does not exist.

This assumed relation of principal and agent is a fiction. No such relation was contemplated by the parties in any of the decided Wisconsin cases. To imply such relation is to defeat justice, and let scott free the party whose negligence is the proximate cause of death or injury, and as to which the deceased or injured person in no way contributed. This would be true in any such case regardless of the age of the deceased or injured person, but it is still more strikingly true in a case where to imply such a relation is to set aside all legal principles which demonstrate the wise and tender regard which the law has for infants.

The defenders of the doctrine of the *Prideaux Case,* if there are such, may urge that it is *Stare Decisis.*

The rule of the *Prideaux Case should not stand in any case.* It was wrong when it was written and it is still wrong. The fiction assumed is false. It has not a virtue to commend it. The wise jurists of the country stand one hundred to one against it. *The child has been repudiated in the home of its father.* Like Banco's ghost, it will return often to trouble our court until it is repudiated here.

The ablest judges of England, New York, Massachusetts, Pennsylvania, Iowa, Nebraska and Michigan have confessed the error of their earlier brethren, and have courageously repudiated or qualified it, so that in large part its manifest likelihood of doing injustice is now at low ebb in this country.

We doubt if any proposition of law ever stood in such general disrepute, and was in the face of that permitted to stand when the opportunity was presented for safe retreat and with honor for it.

The rule *Stare Decisis* is entitled to little weight in a case like this. The primary question is whether the existing rule is right. If in the face of all reason it is wrong, it should be changed.

The rule *Stare Decisis* applies where to change the declared rule of law would disturb rights and interests which have become vested.

*Pratt vs. Brown,* 3 Wis. 603.
*In re Booth,* 3 Wis. 1.
*Hawks vs. Pritzlaff,* 51 Wis. 160.
*Baker vs. Madison,* 62 Wis. 137.
*Mallory vs. La Crosse, etc.,* 80 Wis. 170.
*Wright vs. Pohls,* 83 Wis. 560.
*Seymour vs. Cushway,* 100 Wis. 580.
*Case vs. Hoffman,* 100 Wis. 314.
*Lane vs. Frawley,* 102 Wis. 373.
*State vs. National, etc.,* 103 Wis. 208.
*Harrington vs. Pier,* 105 Wis. 485.

Where a change of decision would necessarily invalidate everything done in the modes which have been adjudged valid the maxim applies.

*Kneeland vs. Milwaukee,* 15 Wis. 691.

It also applies where vast pecuniary interests have become involved and dependent upon former decisions.

*Phillips vs. Albany,* 28 Wis. 340.

And where a *rule of property* has remained undisturbed for several years, it of course applies.

*Van Valkenburg vs. Milwaukee,* 43 Wis. 574.

For instance, where purchasers of bonds have acted on the faith of former decisions.

*Chase vs. Superior,* 134 Wis. 225.

But none of these reasons support the further life of this rule. No one will claim that persons or corporations negligently fail to perform duties upon the faith of the rule of the *Prideaux Case,* exempting them from liability for negligence. There is no rule of property involved. No good faith actions dependent on former decisions. No interests involved on the faith of court decisions. No invalidation of modes of doing business.

In *Pittelkow vs. City,* 94 Wis. 655, the rule was applied notwithstanding the Supreme Court regarded the established rule as wrong, but this was because the rule was a rule of property, and because it only had local application. The court intimated that but for those facts the rule would have been changed and made right.

The question is, therefore, whether the former decision is right. Whether it is just and fair and reasonable. The courts are constitutionally charged with the duty to administer justice.

If the courts unwittingly establish a rule, which does not establish justice and deal fairly and rightly with the citizen, the duty *immediately devolves upon the courts to change it, especially where it works no wrong on anyone to effect the change.* Trial courts should do this if convinced it is right to do it.

*Birker vs. State,* 118 Wis. 108.

The trial court there disregarded and refused to follow the former decisions.

*State vs. Yanta,* 71 Wis. 669.
*Kilkelly vs. State,* 43 Wis. 604.

The *Yanta* case had been decided by a divided court, which in itself signifies that it received careful thought, and *"served to insure exhaustive consideration of the questions,"* as stated in

*Chase vs. City,* 134 Wis. 225.

The Supreme Court commended this action of the trial court by affirming it and by unanimous vote expressly overruled the *Yanta* case and modified the other. If trial courts have not the courage to meet this situation, then the Supreme Court ought to at the first opportunity.

The courts are the common law — law-givers. The rules of the common law, as made or changed from time to time, are supposed to be rules of justice; they are made to do justice. The judges enunciate them to guide the course to justice.

This is the source of the large body of our law, and ever will be. The moment a rule of the common law becomes manifestly a cloak for injustice to parade in, it no longer is responsive, if it ever was, to the theories and purposes of the law-giver. If it becomes obsolete, or in practice is demonstrated to be a fallacy, or it fails at any time to answer longer the calls of justice, as understood by advancing civilization, it should no longer stand.

Bacon well said:

> "The wisdom of the law-giver consists not only in a platform of justice, but in the application thereof."