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THE "JOINT ENTERPRISE" IN THE LAW OF IMPUTED NEGLIGENCE

Suppose that while A is driving his vehicle with B as a passenger, or that while A is driving D's vehicle with B as a passenger, he collides with a vehicle owned and operated by C; and that B is injured as a result of the collision. Suppose further that both A and C are driving without the exercise of due care at the time of the collision. There are several factual situations any one of which might exist with respect to the liability of C to B:

I. A and B are strangers
II. A is B's master
III. A is B's servant
IV. A is B's husband
V. A is B's wife
VI. A is B's parent
VII. A is B's child
VIII. A sues as B's administrator, B having been killed in the collision
IX. B sues as A's administrator, A having been killed in the collision
X. A and B are engaged in a so-called "joint enterprise."

This discussion is concerned primarily with the last possibility. A review of the more important decisions upon this question will be made for the purpose of exhibiting the facts and the reasoning of the same, in order to arrive at the basis for the "joint enterprise" doctrine in the law of imputed negligence and to indicate the trend of authority. It is not the purpose of the writer to discuss the law of imputed negligence generally but only the phase involved in
the so-called "joint enterprise" doctrine. The expression "imputed negligence" will be used only in this limited sense.

As a general rule, the contributory negligence of the driver of a private conveyance (this discussion is limited to cases involving the use of such vehicles) is not imputed to the passenger therein who has no right of control over the operation of the vehicle, in an action by the passenger against a third person whose negligence concurred with that of the driver to cause the passenger's injury. There is said to be an exception to this general rule where the passenger and the driver are engaged in a so-called "joint enterprise." Questions concerned with this doctrine have caused an immense amount of litigation in recent years. The inquiry arises as to why the courts have turned their attention to this doctrine in recent times. Perhaps the history of the doctrine, which forms a bit of interesting information, will assist in answering this question. If we digress we will notice that there has been a tendency in the Anglo-American law to explain the rights and duties growing out of an apparently new situation in terms of a relation. There has been the idea of relation as a staple juristic conception. Consequently, we have the attempt of the courts to explain the rights and duties connected with situation X in terms of a "joint enterprise" relation. They have developed a relational conception of the doctrine of imputed negligence.

The doctrine of imputed negligence seems to have had its origin in the famous case of *Thorogood v. Bryan.* In

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1 See Pound, *Interpretations of Legal History* (1923) 56, 57.

2 The word "imputed" has acquired a judicial significance in the law of negligence. It is used to mean that the lack of due care on the part of the driver of the vehicle in which the plaintiff is riding when injured is attributed vicariously to the passenger in an action by the latter against a third person whose lack of due care concurred with that of the driver to produce the injury complained of. The driver is under a disability to recover, not because he is personally at fault, but because the driver is, over whom he has a right of control. See Note 42 A. L. R. 719. It is doubtful that the courts will abandon the use of this term.

3 8 C. B. 115 (1849).
this case "the action was for wrongfully causing death; the deceased was a passenger in X's omnibus and had just alighted from it when he was knocked down and killed by an omnibus belonging to the defendant. In holding as correct a charge that the plaintiff would be barred by the contributory negligence of X's driver the court said: 'The deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and the negligence of the driver was the negligence of the deceased.' Thus, the doctrine had its inception in the fiction of identification in interest. The rule was subsequently rejected in The Berninia on the ground that there was no such identification of the interest of the driver with that of the passengers. "A few American jurisdictions blindly followed Thorogood v. Bryan, but in the majority it was never recognized as law; and, of the former, all except Michigan finally abandoned the insidious doctrine, although in Iowa, Montana, Nebraska, Wisconsin, and Vermont it was so well founded in precedent that some serious difficulties were encountered in disposing of it."

As we have already observed, the "joint enterprise" doctrine has only recently received any extensive consideration by the courts. This is probably due to the fact that, in the United States, the fiction of "identification" in interest made it practically unnecessary to rely upon another theory in order to reach what seemed to be a desirable result in certain cases. Also, the growing importance of the motor vehicle as a means of travel is an important factor in the development of the doctrine in the United States. There is a close correlation between the development of the "joint enterprise" doctrine and the increasing use of this method of transportation.

4 CLARK, THE LAW OF TORTS 234 (1922).
THE "JOINT ENTERPRISE"

In England the only decision that the writer has found which is based on the doctrine is not concerned with motor vehicles at all. In *Brooke v. Bool* the facts were as follows: The defendant had let a shop to the plaintiff. The plaintiff did not reside on the premises, but the defendant resided in adjoining premises, between which, and the shop there was internal communication by means of a door. It was arranged between the parties that the defendant should have a right to enter the shop at night after the plaintiff had gone, in order to see that it was secure, and it was his practice to do so. One night a Mr. Morris, who lodged on the premises in which the defendant resided, told the defendant that he thought he smelled gas coming from the shop, and the defendant thereupon entered the shop followed by Morris. In the shop a gas pipe passed down a wall and terminated in a burner, the burner and the lower part of the pipe being accessible from the floor. The defendant examined the lower part of the pipe with a naked light, lit the burner, and, finding that nothing happened, turned the burner out. Morris, who was younger than the defendant, then got on the counter and examined the upper part of the pipe, by means of a naked light. A violent explosion followed, which, besides injuring Morris, did considerable damage to the shop and its contents. The defendant's evidence, which was accepted as true by the county court judge, was that, in consequence of what Morris had said, he went into the shop followed by Morris; that Morris got on the counter but that he did not lend Morris any matches or tell him to get on the counter; and that Morris had not struck any matches before getting thereon. He told Morris that perhaps there was an escape higher up, and that in order to see if there was such an escape some one should get on a chair or the counter. The county court judge gave judgment for the de-

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7 2 K. B. 578 (1928).
fendant, stating that "he had very grave doubts whether his opinion was correct," and would draw any inference which the Divisional Court would say was correct.

Salter, J., found three distinct grounds on which the county court judge should have found the defendant responsible, one of which was that "the enterprise in which he and Morris were engaged was the joint enterprise of both, and that the act which was the immediate cause of the explosion was their joint act done in performance of a concerted purpose." Another ground was that the act was done in the course of proceedings of which the defendant had the control. So the power of control and the fact that the two were engaged in a "joint enterprise" were regarded by Salter, J., as two distinct reasons why the defendant should be liable for the act of Morris. His theory was that a "joint enterprise" existed because there was concerted action to a common end, and what Morris did was done "in concert with the defendant in pursuance of their common enterprise." There was enough evidence in the case to warrant the inference that had the defendant exercised the control, which the court held him to have, he could have prevented Morris from using the dangerous means which he employed; but, according to the reasoning of Salter, J., this power of control did not exist by virtue of the "joint enterprise." So it is not clear whether the English court would take the position that the "joint enterprise" is material only in so far as it is a ground for holding that a power of control exists. But this is a case of liability rather than disability, therefore beyond the scope of this discussion. The case is interesting, however, as showing the English view with respect to the nature of the "joint enterprise" and the application thereof.

In Canada there is at least one decision in which the principle of the "joint enterprise" doctrine was applied, viz., the
The action was brought "to recover damages for personal injuries which were sustained by the respondent owing to a collision between the motor-car in which he was and a train of the appellant." The respondent and four other young men, being desirous of taking a drive in a motor-car, arranged that one of their number, a Mr. Scott, should procure the car, which he did by hiring it. Scott was the only one of the party who could drive, and he drove the car. In holding that the respondent was under a disability to recover if the driver failed to take the proper precautions before crossing the appellant’s tracks, the Supreme Court of Ontario said that a judgment for the plaintiff should be reversed. Meredith, C. J. O., described the situation thus:

"My view is that the five men had the control of the motor-car. It was hired by them, although Scott was the one who acted for his companions as for himself in hiring it. It was they who entrusted the driving to Scott. In my opinion the Berninia case has no application if Scott in driving the motor car was acting as the agent or servant of his companions. That he was acting as their agent is clear, I think, because it is also clear that he was entrusted by them with the duty of driving the car. . . ."

Probably all courts would agree with the result reached in this decision. The case presents the simplest situation involving the application of what the courts have called a "joint enterprise." But it is to be noted that the result was based upon the factual element of control. In the language of the Brooke case there was concerted action towards a common end; yet that did not seem to be material. The entrusting of the driving to Scott involved only the principles of agency.

Probably the first recognition anywhere of the "joint enterprise" doctrine was by Chief Justice Robertson in Beck v. East River Ferry Co., 9 decided in 1868. In this case

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8 51 D. L. R. 576 (1920).
9 6 Robt. 82 (N. Y. 1868).
the deceased and some friends were in a row boat in East River in New York City, when the boat was struck by the defendant's steam ferry-boat, and the deceased was drowned. In discussing the question of the deceased's negligence, the Chief Justice said:

"The deceased was undoubtedly chargeable with any neglect of his comrades, as well as his own, to do every act to avoid the danger and insure safety, at least unless he did all he could to repair the deficiency. None of them stood in the light of either employer or employed to the other; it was a joint expedition, in which each was liable for the acts and omissions of the other, unless he took some separate step to repair or prevent the result of the negligence of the others."

This reasoning distinguishes between contributory negligence of the deceased on the one hand and imputed contributory negligence of his comrades on the other. If the deceased had used due care to prevent the collision, by active assistance, the implication is that he would not have been chargeable with the neglect of his associates. On the other hand, a "joint expedition" was said to exist, and this was enough to prevent a recovery. Logically, the deceased would not be under a disability to recover unless there was a negligent failure to exercise the power of control which exists in the "joint enterprise" relation.

The later New York cases do at least a lip service to the doctrine. In Robinson v. N. Y. C. & H. R. R. Co.¹⁰ a female had accepted an invitation to ride in a buggy with a person who was entirely competent to manage a horse, and it was held that a charge that if the defendant was negligent, and the plaintiff free from negligence herself, she was entitled to recover, although the driver might be guilty of negligence which contributed to the injury, was proper. In discussing the validity of this charge, Church, C. J., said:

¹⁰ 66 N. Y. 11 (1876).
"It is very clear, and was found by the jury, that the relation of master and servant did not exist. Nor was Conlon (the driver), in any sense, the agent of the plaintiff. He had invited the plaintiff to ride to a certain place. . . . It is therefore the case of a gratuitous ride by a female upon the invitation of the owner of a horse and carriage. The plaintiff had no control of the vehicle, nor of the driver in its management. . . . Nor were they engaged in a joint enterprise in the sense of mutual responsibility for each other's acts, as in Beck v. East River Ferry Co. . . ." 11

From the reasoning in the Beck and Robinson cases, it is not clear as to whether the New York courts regard the "joint enterprise" as material only in so far as it gives to the plaintiff the right to control the actions of his co-enterprisor. In the latter case the court was careful to make a distinction between the relation of master and servant or that of principal and agent and the "joint enterprise" relation. The dictum of Miller, J., in Dyer v. Erie Railway Co. 12 reflects the attitude of the New York Court of Appeals towards the question of control:

"The plaintiff rode with Stimson (the driver and owner of the vehicle) at his invitation, gratuitously, in Stimson's wagon. The latter

11 It is interesting to observe the criticism of these two New York decisions by Ryan, C. J., in Prideaux and Wife v. The City of Mineral Point, 43 Wis. 513, 529 (1878): " . . . the two cases appear . . . to conflict in principle. Robinson v. Railroad Co. turned upon liability for injury by a railroad train to a female, voluntarily riding with a male friend on his invitation. The court holds that the action was not defeated by the man's contributory negligence. The court remarks that the man and woman were not engaged in a joint enterprise, in the sense of mutual responsibility for each others acts, as in Beck v. Ferry Co. These were, in contemplation of law, as much in the same boat as those. A woman may and should refuse to ride with a man, if she dislike or distrust the man, or his horse, or his carriage. But if she voluntarily accept his invitation to ride, the man may, indeed, become liable to her for gross negligence; but as to third persons, the man is her agent to drive her—she takes man and horse and carriage for the jaunt, for better, for worse." As will be pointed out in a subsequent part of this discussion, this criticism is not sound in principle and the view of Chief Justice Ryan is not supported by the weight of authority. On the other hand, so much of the opinion in this case "is overruled as imputes the negligence of the driver, to an occupant in a private conveyance, who has no control over the driver, is not engaged in a joint undertaking with him, is guilty of no negligence himself, and stands in no other relation to him requiring his negligence to be imputed to the occupant." Reiter v. Grober, 181 N. W. 739, 741 (Wis. 1921).

12 71 N. Y. 228 (1877).
driving the team exercised entire control over it, and was traveling entirely on business of his own. Stimson was not hired by the plaintiff, or in his employ, or in any sense his agent, nor had the plaintiff any control, or direction of the team or its management, or over Stimson himself."

In *Payne v. The C. R. & P. R. Co.*, an early Iowa case, there is a set of facts similar to those in connection with which the doctrine has frequently been applied, but no mention was made of "joint enterprise," and there was no discussion of the imputation of contributory negligence. The plaintiff and three of his neighbors were returning from a trip to an adjoining village, in a wagon owned by none of them and driven by another member of the party. The parties took turns driving on the way home; but at the time the wagon was struck by the defendant's train the plaintiff was reclining in the front end of the wagon, with his back towards the team, and was in a state of intoxication. In discussing the disability of the plaintiff to recover, Day, J., said:

"We need not determine whether he (the plaintiff) could abandon himself to the care and watchfulness of the driver, Lemon, for it seems to us to be clearly established that Lemon did not exercise ordinary care and watchfulness in looking out for the train. . . . The negligence of Lemon, upon whose diligence alone plaintiff can rely for a recovery, is so great as to defeat plaintiff's right."

There is no suggestion or implication that the plaintiff would be under a disability to recover only if there had been a negligent failure to exercise a power of control over the driver. The contributory negligence of the associate was held to be sufficient to preclude a recovery. In *Nesbit v. The Town of Garner* the Supreme Court of Iowa, in referring to the *Payne* case, said:

"The holding in that case is not based on the idea that the relation of principal and agent existed between the plaintiff and the person who

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18 39 Iowa 523 (1874).
14 75 Iowa 314 (1888).
was driving the team at the time, but rests upon the fact that the parties were engaged in a common enterprise or purpose, in which each, to some extent, was responsible for the acts and conduct of the others."

The doctrine is said to have a firm foothold in that state. But whether the authorities support this conclusion is another matter. In Wiley v. Dobbins the plaintiff brought an action for damages arising out of a collision between two automobiles. The defendant filed a counter claim "charging the plaintiff with contributory negligence in the operation of the automobile, and also asking damages." The plaintiff's car was occupied by his wife, son, and daughter, and one Hazelwood, to whom the daughter was subsequently married. Hazelwood was driving the plaintiff's car at the time of the collision. The occupants of the car were injured and they assigned their claims for damages for personal injuries to the plaintiff. The lower court instructed the jury that the negligence of the driver of the plaintiff's car, if any, was imputed to the other occupants of the car. In holding that this instruction was not erroneous, Stevens, J., said:

"The testimony of appellant all tended to show that Hazelwood, the driver, who subsequently married appellant's daughter, who was sitting on the front seat of the automobile with him, was selected by the mother and son to drive the car. He was an automobile mechanic, the car was new, and he appears, for this reason in part, to have been designated as the driver. The witnesses all testified that the party was made up for the purpose of going riding; that no one had any particular right to control or direct the operations of the automobile, but they were all engaged in the common purpose of taking a ride together. Hazelwood had no interest in the automobile and was the guest of the other occupants thereof. According to their testimony, they each had an interest therein, and might have directed the movement or operation thereof. They were engaged in a common purpose or design, and, under the repeated decisions of this court, the negligence of the driver, if any, was imputed to them. (Citing Iowa decisions.) The rule of a common purpose or design is a somewhat narrow one, but would seem to be applicable to the facts of this case."

15 See comment (1929) 38 Yale L. J. 810, 811.
16 214 N. W. 529 (Iowa 1927).
While it is clear that a right of control existed in this case, it is not certain as to whether the Iowa court would require that a right of control be established or whether it is sufficient merely that a concerted action to a common end be shown. The Payne case was not referred to, and certainly that decision does not go so far as to require that a right of control be shown in order to impute the negligence of the driver to the associate. Therefore, the present status of the law is unsatisfactory in this jurisdiction.

The doctrine has not found favor at the hands of the courts in a few jurisdictions. The Supreme Court of Errors of Connecticut in 1925 referred to it as follows:

"The so-called doctrine of joint enterprise, recognized by us to a certain extent in Colement v. Bent, 100 Conn. 527. . . ." 17

As late as 1916, Chief Justice Harper, of the Court of Civil Appeals of Texas, in holding that it was not error for the trial court to refuse "to submit to the jury the issue as to whether plaintiff and one Greber, who was also in the car at the time of the accident, were engaged in a joint enterprise," said:

"We know of no authority for such a proposition of law, and appellant has cited none." 18

Again, in 1927 we notice that the Supreme Court of Colorado expressed some doubt as to the existence of the doctrine. Observe the words of Chief Justice Burke in Boyd v. Close: 19

"If there is such a thing as a joint enterprise in relation to the use of an automobile we think this is it. These two boys, in conformity to the desire of each, took a particular car for a particular trip and shared between them the duty of driver." (Italics mine.)

While most of the cases in which the "joint enterprise" doctrine has been applied have been decided since the gen-

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19 257 Pac. 1079, 1081 (1927).
eral repudiation of the doctrine of *Thorogood v. Bryan*, it is not believed that there is any necessary connection between the repudiation of the doctrine of that case and the acceptance of the former doctrine. In Iowa, for instance, the doctrine of "identification" seems to have been sanctioned at the time of the decision in the *Payne* case; at least, it was not expressly rejected until the decision in the *Nesbit* case fourteen years later, and the earlier cases in this jurisdiction appear to have approved of the doctrine. The Supreme Court of Indiana seems never to have approved of the rule of *Thorogood v. Bryan*. Yet the decisions in this court support the view that in case of a person injured by the negligence of a defendant and the contributory negligence of one with whom the injured person is riding in a private or public conveyance, the negligence of the driver is imputable to the injured person if he was in a position to exercise control or authority over the driver. The rule is expressed in *The Town of Knightstown v. Musgrove* as follows:

20 See Note 8 L. R. A. (N. S.) 597, 604, 605 (1907).
22 116 Ind. 121, 123, 124 (1888). In Indianapolis & Cincinnati Traction Co. v. Thompson, 134 N. E. 514, 516 (Ind. 1922), McMahan, J., said: "It is also contended that the special facts as found by the jury show that the decedent was guilty of contributory negligence, that the driver of the automobile was her agent, and that his negligence was her negligence. True, there was no compulsion or absolute necessity for the decedent to have taken the trio in the automobile, but the fact that she accepted an invitation to go along with the other passengers in the automobile as a matter of pleasure on her part does not necessarily make the driver of the automobile her agent in driving the car, and prevent a recovery. Neither the complaint nor the answers to the interrogatories support the contention that the decedent and no other occupants of the automobile were on any joint enterprise." In City of Jasonville v. Griggs, 144 N. E. 560, 561 (Ind. 1924), in holding that there was no error in the instruction, given to the jury by the trial court, that if it should find from the evidence that the appellee was injured by riding in a buggy with another woman and the latter was driving at the time of the injury, appellee could not be charged with the negligence of the driver, the court said: "It is undisputed by the evidence that appellee was merely the guest of her daughter-in-law in the buggy, and that she exercised no control whatever over the driver of the horse."
"The general principle deducible from the decisions is, that one who sustains an injury without any fault or negligence of his own, or of one subject to his control or direction, or with whom he is so identified in a common enterprise as to become responsible for the consequences of his negligent conduct, may look to any other person for compensation whose neglect of duty occasioned the injury, even though the negligence of some third person with whom the injured person was not identified as above may have contributed thereto. . . . Before the concurrent negligence of a third person can be interposed to shield another whose neglect of duty has occasioned an injury to one who was without personal fault, it must appear that the person injured and the one whose negligence contributed to the injury sustained such a relation to each other, in respect to the matter then in progress, as that in contemplation of law the negligent act of the third person was, upon the principles of agency, or co-operation in a common or joint enterprise, the act of the person injured."

While the court accepts the doctrine, we have no elucidation of the court's views on what constitutes a "joint enterprise." We do not know as to whether it is material only in so far as it gives the plaintiff the right to control the actions of his co-enterprisor. If so, it seems to be something less than the control that exists in the agency relation.

In Shearer v. Town of Buckley the Supreme Court of Washington rejected the doctrine of Thorogood v. Bryan. The plaintiff was riding in a wagon by invitation with a lady who had asked him to show her the way to his house. The lady was driving. During the journey the vehicle dropped into a hole in the defendant's street and the plaintiff was injured. In holding that there was no error in an instruction to the jury that if the plaintiff was riding as a guest or companion of the driver and if he neither exercised nor assumed any authority or control over the driver or the movements of the team any negligence on the part of the driver could not be imputed to the plaintiff, the court expressed its view as follows:

"Where one is simply an invited guest of a voluntary driver, we do not believe the latter should be held to be such an agent of the former

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23 72 Pac. 76 (1903).
that the driver's negligence should be imputed to the passenger, when
the passenger is without fault, and has no control over the driver or
his team."

The "joint enterprise" doctrine has, perhaps, the strongest
foothold in this jurisdiction.

II

The authorities, as a general rule, have not developed
any very certain rules from which it can be determined
whether the given acts or conduct of two or more persons
will or will not constitute a "joint enterprise," but have
rather contented themselves with a consideration of the par-
ticular facts of the cases before them. It is the factual sit-
ations that are emphasized rather than the matter of a
relational conception. The principles that are applied, how-
ever, are analogous to legal standards; and the courts have
really employed a system of individualization. It is not the
general features of the cases, for which mechanically applied
rules would be appropriate, but the special circumstances,
calling for the application of general principles, that are
significant.

To frame a definition of any legal precept which shall be
both positively and negatively accurate is possible only to
those who can adapt the law to their own definition, such as
legislatures. A few definitions and descriptions have been
attempted. Two ways of expressing what is really the same
thought, which are in general use, are the following:

"If ... 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 the
others." 24

"Parties cannot be said to be engaged in a joint enterprise, within
the meaning of the law of negligence, unless there be a community of
interests in the objects or purposes of the undertaking, and an equal

24 Koplitz v. City of St. Paul, 90 N. W. 794, 795 (Minn. 1902).
right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control or management." 25

These definitions involve two ideas: (1) A common purpose, or a community of interests in the objects or purposes of the undertaking; and (2) That each one of the associates have some voice and right to be heard in respect to the execution of the common purpose. They exclude the idea of conducting a business or a single enterprise for profit. They exclude the idea of employment of one by the other, either as agent or as servant. They exclude the driver (host) and guest relation.

Some courts have contented themselves with descriptions rather than definitions. The Supreme Court of Washington expresses its idea of a "joint enterprise" in this manner:

"The relation, as a legal concept cognizable by the courts, must have its origin in contract. There must be an agreement to enter into an undertaking in the objects or purposes of which the parties to the agreement have a community of interest and a common purpose in its performance. Necessarily the agreement presupposes that each of the parties has an equal right to a voice in the manner of its performance, and an equal right of control over the agencies used in its performance. One or more of the parties may, of course, intrust performance to another or others, but this involves only the law of agency; his rights in the ultimate result and his liabilities for the negligent or wrongful performance remain the same." 26

The Supreme Court of Kansas discusses the doctrine thus:

"The term 'joint enterprise' is not helpfully elucidated by definition. An enterprise is simply a project or undertaking, and a joint enterprise is simply one participated in by associates acting together. The basis of liability of one associate in a joint enterprise for the tort of another is equal privilege to control the method or means of accomplishing the common design. If the means employed be an instrumentality negligent use of which inflicts injury, the associate whom the law regards as participating in the conduct of the actor must have had equal control over its use. The control, however, need not have extended to actual manipulation at the time injury was inflicted. It is sufficient

25 4 Words & Phrases (3d Ser.) 593.
26 Rosenstrom v. North Bend Stage Line, 280 Pac. 932, 934 (Wash. 1929).
that, at the beginning of the enterprise, or as it progressed, or at any
time before the tortuous event he possessed equal authority to pre-
scribe conditions of use. In this instance, the enterprise was a joint one.
The two boys together borrowed an automobile to take two girls riding.
The girls were guests, but neither boy was guest of the other, or a mere
passenger while the other was driving. Each one had equal authority to
say whether they should go southeast to Hutchinson or northwest to
Ellenwood, and whether one should drive to Hutchinson, and the other
from Hutchinson back to Sterling, or to alternate more frequently at
the wheel. Each one had equal authority to decide how much time
should be spent at Hutchinson and when they should get back to
Sterling. Each one had equal authority over the manipulation of the
instrumentality by which the undertaking was to be accomplished, and,
as a matter necessarily involved, had equal authority with respect to
speed." 27

This is the clearest exposition that any court which has
adopted the doctrine has given to it. The relation existing
between the boys in this instance was something more than
that involved in the driver (host) and guest relationship.
Also, the authority is something less than that existing in
the agency or master and servant relationship. The "joint
enterprise" doctrine must necessarily come in between, if
it is to have a separate recognition.

While the results reached in the cases may be correlated
and conclusions arrived at, it is impossible to reconcile the
language used by the courts. Some excuse may be offered
for the confusion since the doctrine is in a formative state
and the courts are endeavoring to work out practical so-
lutions with some degree of predictability, some especially
by a process of trial and error. In some jurisdictions there
is an apparent use of old principles without any overhauling
and refitting them to this type of situation. The term
"joint enterprise" is used interchangeably and as being
synonymous with "joint adventure," 28 and as being synony-

28 "... joint enterprise or adventure." Masterton v. Leonard, 116 Wash.
551, 556 (1921); "... joint venture or common enterprise." Wagner v. Kloster,
175 N. W. 840, 841 (Iowa 1920); "The better considered cases hold that such
common possession, and common right of control, resulting in common respon-
mous with "common purpose." Some courts are very careful to distinguish the relations of employer and employee, principal and agent, and master and servant on the one hand from the "joint enterprise" on the other.

Practically all of the cases in which the doctrine has been applied are cases where an injury resulted from careless driving of a private conveyance. A few attempts have been made to extend the application of the doctrine to other situations. In two Iowa cases attempts were made to have the negligence of the plaintiff's associate in each instance imputed to the plaintiff where the two were walking together. In *Barnes v. Town of Marcus* the plaintiff, while passing over the defendant's sidewalk in company with another person, was tripped by a loose plank, one end of which was stepped upon by his companion, while the other flew up in front of the plaintiff, thus causing him to fall. The sidewalk was "out of repair." The defendant, *inter alia*, pleaded, in its answer, that the accident was due to the negligence of the plaintiff's companion, who carelessly stepped upon the plank. The plaintiff moved to strike from the answer all allegations with reference to the negligence of the person with whom he was walking. This motion was sustained, and error was assigned on this ruling. In holding that the court was right in sustaining the motion, Deemer, J., said:

"We find in the record absolutely nothing, except the statement that the parties were walking down the street together. The only common purpose they were engaged in was in passing along the street in the same direction. Surely, this is not enough to identify the one with the other in such manner as to hold either responsible for the negligence of..."

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sibility for negligent failure to control, are the earmarks of the legal relation of a joint adventure in the operation of the vehicle." Beach, J., in *Coleman v. Bent*, 124 Atl. 224, 225 (Conn. 1924).


30 "... the relation of master and servant or principal and agent must exist,—or else that they were engaged in a joint enterprise, whereby mutual responsibility for each other's acts existed." Lewis, J., in *Cahill v. Cincinnati, N. O. & T. P. Ry. Co.*, 18 S. W. 2 (Ct. of App. of Ky. 1891).

31 65 N. W. 984, 985 (Iowa 1896).
the other. . . . So far as disclosed by the pleading, these persons were not engaged in a common purpose. They were, it is true, doing the same thing,—that is, passing over the walk at the same time; but this is no reason for imputing the negligence of the one to the other."

In Bailey v. City of Centerville 32 the plaintiff and her husband were returning home from church; and, while passing over the defendant's sidewalk, he stepped upon the end of a loose board, which flew up and tripped her. The defendant asked instructions to the effect that, if the husband was negligent, the plaintiff could not recover. After discussing the right of the wife to sue alone for her injuries, Sherwin, J., said:

"Nor can it be said that they were engaged in a common enterprise simply because they were returning from church together. They were strangers, so far as this transaction was concerned. Barnes v. Town of Marcus . . . ."

The English case of Brooke v. Bool is not to be overlooked in this connection. There the question was one of liability rather than disability, but there was enough evidence to sustain the conclusion that the defendant, Bool, had a power of control over Morris, the "associate." In each of the two Iowa cases the companion had complete control over his own locomotion.

### III

While the "joint enterprise" doctrine is sustained by the weight of judicial authority, unfortunately there is not a similar unanimity as to its application. Varying bases for the doctrine have been advanced. The "common purpose" test is relied on by the Supreme Court of Vermont, and the case of Wentworth v. Town of Waterbury 33 is the leading exponent thereof. In this case the plaintiff and one Gibson were taking the former's wife and a friend of Gibson on a sight-seeing trip in a car procured by Gibson and under his control, when the car was precipitated down an embank-

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32 88 N. W. 379, 380 (Iowa 1901).
33 96 Atl. 334 (Vt. 1916).
ment in the town of Waterbury. Gibson testified that they took the trip for the purpose of showing Lake Champlain to the ladies. The court held that the plaintiff and Gibson were engaged in carrying out a common purpose, and that the latter's negligence was to be imputed to the plaintiff. As authority for this the court cited the case of Boyden v. Fitchburg R. Co. In this case the plaintiff's decedent and three companions were riding together "in a double team driven by one of the party, other than the decedent" when the team was struck by the defendant's train and the decedent and his three companions were killed. The object of the trip does not appear. The defendant moved for a verdict upon the grounds (in part) "that the evidence showed the driver of the carriage and the deceased guilty of contributory negligence," and "that the plaintiff had not shown the deceased free from contributory negligence." In holding that there was no error in submitting the case to the jury on the question of the deceased's negligence and that of his companions, the court said:

"The record shows the plaintiff's decedent and his companions engaged in the joint prosecution of a common purpose, and therein each was the agent of the others, and each was responsible for the consequences resulting from the acts of the others, or any of them; and if the driver was not in the exercise of that care and prudence required by law, and thereby contributed to the accident, his negligence was imputable to the decedent." (Italics mine.)

These decisions make the conception of the Vermont court clear. It regards the "joint enterprise" as an association of two or more persons in the use of a vehicle for the accomplishment of a common purpose, whether the ride be purely a social affair or a business trip. The court purposes to rest the doctrine upon an agency basis, but the agency relation must be used in a very broad sense. It is not the usual sig-

34 47 Atl. 409 (Vt. 1899).
35 At page 410.
nification of that relation. But it does imply a right of control over the driver similar to that described by the Supreme Court of Kansas in the case of Howard v. Zimmerman.\(^{36}\)

As we have observed, in the preceding part of this discussion, the Supreme Court of Iowa, in Wiley v. Dobbins, purported to adopt the common purpose test; but in that case there was an admission by the other occupants of the car that they had a power of control over the driver. Furthermore, the car was owned by them and the driver, in this instance, would naturally be respectful of their wishes.

In some decisions the common purpose test is applied and it seems to be regarded as immaterial that the passenger had in fact no right of control over the driver. In Jensen v. Chicago, M. & St. P. Ry. Co.\(^{37}\) the plaintiff's decedent (Jensen), one Sonnabend, and five other occupants were returning, after attending a prize fight, in a car owned and driven by Sonnabend. It seemed that before they started on the trip Jensen and the other members of the party aside from Sonnabend had agreed to share the expenses. The lower court instructed the jury that they might find that the parties were engaged in a "joint enterprise" without regard to the element of control. The instruction was objected to on the ground that it did not embody the latter thought. In holding that it was immaterial that Jensen had in fact no right of control over Sonnabend, the court said that this element is material when "the question of the relationship is master and servant or principal and agent, but it is not the rule with reference to a joint enterprise or a community of inter-

\(^{36}\) *Supra* note 27.
See remarks of Miles, J., in Lee v. Donnelly, 113 Atl. 542, 545 (Vt. 1921): "The theory of the law which makes each person engaged in a common purpose at the time of an injury resulting from some outside person responsible for the neglect of any of his associates contributing to the injury is that each was the agent of the other, and so responsible for the consequences resulting from the acts of the others, or any of them. . . . Wentworth v. Waterbury . . . ."

\(^{37}\) 233 Pac. 635 (Wash. 1925).
est." In *Hurley v. City of Spokane*\(^{38}\) a brother and sister were going to church in an automobile owned by their father. The brother was driving at the time the accident occurred which injured the sister, and the court held that the trip was a "joint enterprise" and the negligence of the driver was imputed to the sister. Nothing was said in reference to the sister having a right of control over the driver. Neither does her age appear from the facts. As authority for its holding the court merely cited 20 R. C. L. 149, and either failed to notice or have its attention called to its earlier decision in *Masterson v. Leonard.*\(^{39}\) In that case two boys riding on a bicycle collided with an automobile. Frank, whose father owned the bicycle, was riding on the handlebars, and Edward was sitting in the seat of the bicycle, controlling its movement. Edward was a newsboy, and at the time of the accident he was on his way to get his papers. Frank, who frequently helped Edward on his paper route, was going along to substitute for Edward in case he became ill. The court held that Edward's negligence was imputable to Frank. The court seemed to rationalize its decision upon a control basis; yet, its reasoning is not consistent. Parker, C. J., in distinguishing the case of *Allen v. Walla Walla Valley R. Co.*,\(^{40}\) said that that case

"... involved an injury to a guest or companion riding in a buggy, who apparently had no control whatever over the driving of the buggy; nor did it appear that the driver and the injured person were engaged in any common enterprise. Judge Webster, speaking for the court, said in part: "The basic thought upon which the doctrine or principle of imputed negligence rests is that the relationship of master and servant or principal and agent must exist between the driver and the

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\(^{38}\) 217 Pac. 1004 (Wash. 1923). Cf. New York, C. & St. L. R. Co. v. Kistler, 64 N. E. 130 (Ohio 1902). (Deaf father took daughter with him on buggy ride to warn him of approach of trains. The court explained that there might be a "joint enterprise" in "listening," and, if so, the daughter was under a disability to recover.)

\(^{39}\) 200 Pac. 320 (Wash. 1921).

\(^{40}\) 165 Pac. 99 (Wash. 1917).
occupant at the time of the injury. In the absence of such a relationship, the negligence of the one will not be attributed to the other." 41

Referring to the instant case, the court went on to say:

"We are of the opinion, in view of the ownership of the bicycle, the general possession of and control over it by Frank, the acquiescing by him in the temporary control over it by Edward for the purpose of conveying them both on this hazardous journey, which we think was their common enterprise or adventure, that the trial court did not err in telling the jury, in effect, that whatever negligence Edward was guilty of, in carrying out this their joint enterprise or adventure, was attributable to Frank, and became in law his negligence." 42

If the criterion of "joint enterprise" is one of control, why make the distinction that is made in the first part of the quotation? The facts certainly supported the conclusion that Frank had a power of control in the instant case. The Hurley case is opposed to the weight and trend of authority, which refuses to impute the negligence of the male driver and associate to the female passenger—a proposition that will be discussed in a subsequent part of this article.

In Franco v. Vakares 43 the defendant and another, while riding in the former's automobile, invited the deceased and one Escarcia to go with them. The members of the party became inebriated from drinking corn whiskey, apparently supplied by the deceased. The car was owned and driven by the defendant. After holding that the deceased was not only negligent in confiding his safety to a drunken driver, but was "grossly negligent when he induced or caused the driver's inebriety," the court went on to say:

"The same legal exemptions and responsibilities are incurred by all engaged in a common or joint enterprise. In the law of negligence, all having a community of interest in the objects or purposes of an undertaking and an equal right to govern the movements and conduct of each other fall in that classification. Cunningham v. City of Thief River Falls, 84 Minn. 21, 86 N. W. 763. In such case, upon the principle of agency the negligence of one is that of all. For several persons

41 Supra note 39, at 322.
42 Supra note 39, at 322.
43 277 Pac. 812 (Ariz. 1929).
to engage in or put on a 'joy ride' in a populous community may not bring the participants strictly or technically within the rule governing those engaged in a common or joint enterprise, but such a party certainly does have in view a common object or purpose, to wit, to extract from the passing moments diversion and entertainment. The common rather than the individual will of any of the party in such an engagement, we may imagine, usually controls and directs the movements of the 'joy riders.' We think the relationship is so near to that of a common enterprise that the rule of negligence therein may be invoked. Cases so holding are Wentworth v. Town of Waterbury . . . . Jensen v. Chicago, etc., R. Co. . . . ."

While the court seemed to be in doubt as to whether a right of control existed, it emphasized the fact that there was a common purpose. It regarded the situation as one wherein recovery was desirable. It should be observed, also, that ownership of the car was regarded as immaterial in this connection.

Another case that turned partly on the question of "joint enterprise" is Lawrence v. Denver & R. G. R. Co. The plaintiff, his wife, and daughter were returning with a salesman from a trip to see a piano. The automobile, in which they were riding, was owned by the employer of the salesman and driven by the latter. The lower court instructed the jury that if they found that the plaintiff "had no control over the driving of the automobile, and that no relation of master and servant or principal or agent existed between the plaintiff" and the driver, then the plaintiff was entitled to a verdict, even though they found "it to be a fact that Mr. Bird (the driver) was negligent in the driving and operation of the automobile at the time of the accident," unless they found that the plaintiff was guilty of contributory negligence in not exercising care for his own safety. In holding that the giving of the italicized part of this instruction was error, the court said:

"Bird and Mr. and Mrs. Lawrence, as shown by the undisputed evidence, made the trip in question from Spanish Fork to Provo and re-

44 174 Pac. 817 (Utah 1918).
turn in furtherance of a common object or enterprise, in which they were in a business sense equally interested. In other words, the trip was a business matter and in no sense a social affair. The case, therefore, falls within the rule announced in the case of Derrick v. Salt Lake & O. Ry. Co. (recently decided by this court) 168 Pac. 335. The negligence of Bird, if he were negligent in the management of the automobile just prior to and at the time of the accident, was imputable to plaintiff."

The Derrick case seems to be little authority for so wide a proposition as that two or more persons who take a trip in a car owned and operated by one of their number, in which trip they are in a business sense equally interested, by that fact, make themselves liable for anything done in furtherance of this common object. The facts of that case were that the plaintiff and two companions, who were traveling salesmen, were traveling in an automobile owned and operated by one of the companions. They were on a business trip, each representing a different line. It was understood between them that the expenses of the trip would be prorated and paid jointly by them. The driver testified that they had agreed "to take lots of time and not drive fast." The court's position is stated as follows:

"The contractual relations of plaintiff and his traveling companions were substantially the same as they would have been if they had jointly hired an automobile with which to make the trip, with the understanding that they would jointly pay the expenses and mutually and concurrently direct the journey and the details thereof. The trip was therefore a joint enterprise in which these parties had a community of interest and in which they all had a voice and a right to be heard respecting the details of the journey."

The financial interest involved in this case would certainly distinguish it from the Lawrence case on the facts. Furthermore, the instructions given by the lower court in the latter case clearly emphasize the element of control in the doctrine of imputed negligence. The inquiry also arises as to why should the fact that the parties are taking a business trip be a more forceful reason for applying the doctrine of imputed negligence than where the trip is merely a "social affair"?
The undertaking was not a joint adventure or a partnership in the *Lawrence* case. Neither was there an agency or a master and servant relation existing between the driver and the plaintiff. Would the court have made this distinction in the *Lawrence* case if the trip had been a “joy ride” on the part of two boys—in other words, would this court have reached the same result as that in the case of *Franco v. Vakares* on a similar set of facts?

In *Washington & O.D. Ry. v. Zell’s Adm’x.*, the deceased (one Zell) and one Peck took an automobile trip in a car which the deceased, according to his custom, put in readiness for the trip, and both participated in running it. The car was owned by Peck. Both were killed in a collision with one of the defendant’s trains. It was claimed that the negligence of Peck, the driver, could not be imputed to Zell. The court said that inasmuch as Peck was “at the wheel” when they began the trip, it was a fair inference that he was still driving at the time of the accident, but regarded this question as immaterial since Zell’s situation did not bring him within the rule applicable to invited guests. Continuing, the court said:

“... Zell’s situation ... brought him within the reason and the terms of the rule that where two persons are engaged in a joint enterprise or adventure in the use of an automobile, even though the enterprise or adventure be only a pleasure trip, the contributory negligence of either, within the scope of the enterprise, will bar a recovery by the other. In this case Zell had taken the lead that morning in the joint project in which they were engaged, and can, by no reasonable intendment, be classed as an invited guest or passenger ...”

It is not clear as to whether the court intended to regard the element of control as essential in the doctrine. While Zell “had taken the lead,” this factor should not be decisive; it merely shows that there was concerted action. The question does not resolve itself into one of fact as to which one of the travelers solicited the other—the one the favor of

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45 88 S. E. 309 (Va. 1916).
the journey, or the other the pleasure of company. The fact that the two had alternated in driving, even on the particular occasion, is not necessarily decisive on the question of control as an element. A guest may drive as a matter of accommodation to his host to whom the driving is later yielded. A passenger may give directions as to the desired destination; or the passenger may have accepted the invitation of the driver to ride as a matter of "simple pleasure or outing." A right of control cannot be conclusively inferred from such facts. A lady passenger may drive for a time and still not be considered as having any control over her gentleman escort to whom she later yields the driving. The courts have been less reluctant in applying the doctrine of imputed negligence to a situation like that presented in the instant case than to any other.

The majority of cases in which the doctrine is applied or approved proceed upon a different theory. The fact that the associates are induced by the same considerations to use a vehicle, owned by one of their number or by a third person, to accomplish a common purpose is not decisive. The question of whether "the trip was a business matter, and in no sense a social affair" is not regarded as important. According to this theory, the most essential element of a "joint enterprise" is the right of the passenger to control the driver in the operation of the vehicle. In *Bolton v. Wells* 46 the plaintiff and defendant were members of the same service club, and they were driving "to Fargo to attend a meeting of another club of the same order." The plaintiff alleged that he had been invited to go along as a guest of the defendant. The court held that they were not engaged in a "joint enterprise." There was no discussion of the doctrine and no citation of authorities. In *Whiddon v. Malone* 47 the plaintiff and defendant were riding "to Montgomery" in an

46 225 N. W. 791 (N. D. 1929).
47 124 So. 516 (Ala. 1929).
automobile owned and operated by the latter. They had common business interests in this city and were on a trip relating to such business. In holding that they were not engaged in a "joint enterprise," the court said:

"The doctrine rests upon the present and common right to direct and control the movement of the car, thus imposing a duty on the co-adventurer to see that it is driven by the man at the wheel with due regard to the rights of others on the highway. Crescent Motor Co. v. Stone, 211 Ala. 516, 101 So. 49 . . . ."

This reasoning is confusing. But the court was careful to point out in a subsequent part of its opinion that the question was one of liability rather than disability. Where the passenger brings an action against the driver it is generally held that the doctrine of imputed negligence has no application. The driver can defend only on the ground that the passenger failed to use due care for his own safety. Whereas the Supreme Court of Alabama made this distinction, it was either not called to the attention of the Supreme Court of North Dakota, in Bolton v. Wells, or else it was overlooked. In Morgan Hill Paving Co. v. Fonville the Supreme Court of Alabama was not so careful to point out this distinction. In this case the plaintiff was riding in an automobile which was owned and driven by one of his friends; they were en route on a hunting and fishing expedition when the automobile was driven upon an obstruction placed in the highway by the defendants. Thomas, J., expressed the view of the court as follows:

"... it will be noted that in plea 4 it is sought to plead a joint enterprise, in which plaintiff and Dye, the driver, are charged with the same right of control over the car in which they were riding at the time of the jury. . . . In Crescent Motor Co. v. Stone . . . under which plea 4 was drawn, two men were engaged in one effort to deliver the car being driven by them. The decision rested upon the basic fact of joint and equal control of the operation of the car, and that the driver 'was acting for the other as well as himself.' In the instant issue of fact, it was that of respective individual pleasure, not

48 119 So. 610 (Ala. 1928).
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joint effort of the men in the car—Dye, the owner and operator; plaintiff and another, as guests. The fact that each was going to hunt at Letohatchie, without more, constituted no common enterprise or adventure, as affecting the joint operation and control of the car as driven by Dye."

The problem in the Crescent Motor Co. case was one of liability. It is little authority for the question involved in the Morgan Hill Paving Co. case where the action was by the passenger against third persons. In the former instance the action was brought against the Crescent Motor Co. and the associates for causing the death of the plaintiff's son while the associates were driving an automobile from one city to another. The two associates had been employed for this purpose by the Motor Co. They were vested with a joint control over the operation of the car by virtue of their employment. It seems clear, however, that in this jurisdiction the fact that a common purpose exists is not a sufficient basis for imputing the negligence of the driver to the passenger.

There are two rules of law each of which is said to have a field of operation in regard to the question of control. One was stated by the Supreme Court of Minnesota in 1901 as follows:

"Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management."

40 Cunningham v. City of Thief River Falls, 86 N. W. 763, 765 (Minn. 1901). (In this case the plaintiff was invited by some friends to accompany them to the defendant city; the party was composed of four persons, and proceeded to this city in a two-seated spring wagon drawn by a team of horses driven by one Alexander, a member of the party. The court said: "The plaintiff in this action was in no way connected or interested in the affairs of Alexander, or in the purposes of his visit to Thief River Falls. She did not own the team or wagon in which they were riding, nor have any control over the driver. She was a member of the party by invitation only, and for purposes purely personal to herself." According to this language, control could be based upon ownership of the vehicle or upon the fact that a concerted action towards a common end existed. But it should be observed that this is a case where the passenger was
The other was stated by the Supreme Court of Alabama, in *Crescent Motor Co. v. Stone*,\(^5\) to be:

"It is a well-defined rule that the negligence of the driver cannot be visited upon a passenger therein, whether for reward or not, unless the person so riding has charge or control of the vehicle, or over the person who is driving or operating the same."

In either of these views it is the element of control that is regarded as important. The former is merely an extension of the latter rather than an independent principle. If we adopt a descriptive method of approach to a solution of the question no distinction should be made here and the latter view would suffice. The main problem is what is the basis of control.

The simplest case is where two or more persons jointly hire a vehicle in order to accomplish a common purpose and agree that one of their number shall drive it, or where they alternate in driving it. All jurisdictions would probably hold that the negligence of the one who is driving would bar a recovery by any of the associates in an action brought against a third person. In *Christopherson v. Minneapolis, St. P. & S. S. M. Ry. Co.*,\(^5\) the plaintiff and his brother jointly hired a vehicle for the purpose of visiting their father's home. The former drove the vehicle going out and his brother drove on the return trip and at the time of the acci-

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\(^5\) 101 So. 49, 51 (Ala. 1924).

dent. The Supreme Court of North Dakota, in holding that the negligence of the driver should be imputed to the plain-
tiff, expressed its attitude as follows:

"The undisputed proof discloses that these brothers were at the time engaged in a joint enterprise; they having hired the rig and agreed to share equally the expense of such hiring. Each, therefore, had as much authority and control over the manner of driving as the other had."

Analogous situations are presented where one of the associ-ates owns the vehicle but the others, who are being con-
veyed, have agreed to share either all or a part of the ex-
penses of the trip. There was such an agreement or under-
standing in the Derrick case. In the Jensen case there was such an agreement between the associates other than the driver-owner of the car. This case, upon its facts, cannot be regarded as authority for the principle but must turn on the fact that there was a common purpose. While the in-
struction to the jury emphasized the agreement, the court made the distinction just pointed out.

In Adams v. Swift a mother and her minor daughter were invited for a drive. The daughter accepted uncondi-
tionally; the mother on condition that she pay half of the expense. The daughter drove the team. An accident occurred, and the mother, Mrs. Swift, was made a party defendant. The question was whether the trip was a "joint undertak-
ing." It was there said:

"The evidence justified a finding that the excursion was a joint un-
dertaking, of which Caroline F. Swift, the mother of the young woman who was driving when the accident happened, was an equal promoter and manager, and not a mere guest; and that, under her control and direction, her daughter, so inexperienced a whip that it might be negli-
gence to allow her to drive upon such an occasion, was driving, and driving carelessly."

While the problem was one of liability rather than disability, the case is interesting as showing the test applied even where this distinction is not made by the court. There was a suffi-

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52 52 N. E. 1068 (Mass. 1899).
cient basis for a finding that a right of control existed in this case apart from the fact that the mother had a financial interest in the undertaking. In *Beaucage v. Mercer* it seemed, from the meager report of the evidence, that the associates were riding together in an automobile, that belonged to one of them, and that they had agreed to share equally the expenses of the trip. The car became disabled and the defendant was employed to "tow" it to his garage, where the car was being kept. The Supreme Judicial Court of Massachusetts approved of the theory of the lower court that the parties were engaged in a "common enterprise" and that it was in force at the time of the accident. This jurisdiction purposes to reject the common purpose test, in and of itself, of disability. It seems to adopt the conception of a "joint enterprise" set forth by the Supreme Court of Minnesota.

In *Judge v. Wallen* the two defendants were traveling salesmen and were, at the time of the accident which injured the plaintiff's engaged in transporting themselves over the territory which they were canvassing in an automobile owned and driven by one of them; the other "paid sums about equal to the cost of the gasoline and oil consumed." In holding that the trial court was correct in permitting the jury to find that the defendants were jointly liable, the Supreme Court of Nebraska said:

"For their mutual benefit they were engaged in the joint enterprise of transporting themselves over the territory canvassed by both . . . . The dangers and liabilities incident to the joint enterprise, the instinct of self-preservation, the demands of business in canvassing territory for a wholesale merchant, safety and comfort in traveling, the furnishing of gasoline, the joint occupancy of the seat in the conveyance, and

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54 See Barry v. Harding, 139 N. E. 298 (Mass. 1923). (Plaintiff was picked up on way to work by employee of garage who was testing a repaired car. Held, not a "joint enterprise.")
55 See *supra* note 49.
56 152 N. W. 318 (Neb. 1915).
the obvious rights growing out of the mutual undertaking may imply that Binger had joint authority to control the means of transportation and the right to demand ordinary care and observance of the law in operating the automobile."

The court lumps together two principles in this reasoning. The "joint occupancy of the seat" and "the instinct of self-preservation" are not material in determining whether the legal right of control exists. Necessarily, the driving will be intrusted to one of the associates. This fact may be material in answering the question of whether there has been a negligent failure to exercise the right of control which exists or the question of whether there has been a negligent failure to exercise a power of control. The problem was one of liability. Binger should not be liable unless the plaintiffs' injuries were caused by his failure to exercise reasonable diligence to control his associate's acts which were dangerous to himself and the plaintiffs.

In Hanser v. Youngs the plaintiff and others were using a truck, owned by one of the parties, "for the purpose of getting their winter's supply of potatoes." The Supreme Court of Michigan held that the parties were "engaged in a common enterprise, that of purchasing and bringing home their winter's supply of potatoes." In this case there is, in a sense, common financial interest. The associates are enjoying something more than the mere favor of transportation from the driver-owner of the truck. There seems to be a sufficient basis for the application of the doctrine of imputed negligence. In Frisorger v. Shepse the plaintiff's decedent and "several other young men invited the defendant to go with them to a dance, and they started out in an automobile owned by the defendant's father with defendant driving." Each contributed an equal share to the expense. On the return trip an accident occurred in which the "plaintiff's decedent and others were killed." The same court held that

57 180 N. W. 409 (Mich. 1920).
58 230 N. W. 926 (Mich. 1930).
the occupants were engaged in a "joint enterprise" so that the negligence of the driver was imputable to the other members of the party, reasoning as follows:

"They had agreed on a joint pleasure trip. Every member of the party had to do with the management and control of the enterprise. They shared equally in the expense. The fact that the defendant was driving the car is material but not controlling of the question. As driver, he was acting as agent for the other members of the party. They had as much right to direct its movements and speed as he had. Each had a right to be heard in carrying out the details of the trip. This equal right of control is a very important matter to be considered in determining whether it was a joint enterprise . . . . 'The rule of joint enterprise in negligence cases is founded on the law of principal and agent. On no other theory could the negligence of the driver be imputable to a passenger.'"

This was an action between the associates, and the weight of authority supports the rule that the "joint enterprise" doctrine has no application to such a situation. Also, it is the law of Michigan that where a person of years of discretion voluntarily enters the private conveyance of another, and is injured by the lack of due care of the person in charge of the conveyance concurring with the lack of due care of a third person, the plaintiff is precluded from recovery against such third person. This rule has been limited so as to apply only to adults on the theory that it is based upon the relation of principal and agent. So it is interesting to compare this rule with the attitude of the Michigan court towards the "joint enterprise" doctrine. The one purports to require a right of control as a matter of fact; the other rests upon a fiction that the driver is the agent of the plaintiff.

In *Barnett v. Levy* the declaration alleged, *inter alia*, that the plaintiff was riding in an automobile driven by the defendant "as a guest" of the latter. The evidence tended to

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61 213 Ill. App. 129 (1919).
show that the plaintiff, defendant, and two others were taking an "automobile trip to New York"; and that they had agreed to prorate the expenses of the trip. The lower court instructed the jury "that if the persons riding in the automobile were engaged at the time of the accident in a joint enterprise, and that each of them had agreed to pay one-fourth of the expenses of the trip, then the allegation that the plaintiff was a guest by the invitation of defendant was not sustained and plaintiff could not recover." The Illinois Appellate Court for the First District held that this instruction was not erroneous, there being "ample evidence in support of the defendant's position that the parties were engaged in a joint enterprise, and that the defendant on the facts of the case did not owe to the plaintiff the duty which plaintiff alleged was violated." The court appeared to point out that this was an action between the associates but limited its decision to the problem of variance between the allegation and proof, stating that a different rule of responsibility would apply to a "joint enterprise" relation from that which would apply to the driver and guest relation. Six years later the same court handed down the decision of Fisher v. Johnson, which it appears to be difficult to reconcile with the Barnett case. In the Fisher case two friends, Fisher and MacNutt, who were accustomed to ride daily to their place of business in the automobile of the one or the other, as they usually determined the night before, were driving to their place of business in the car owned and driven by MacNutt when the car collided with that of a third person. Fisher was severely injured; he brought an action against the third person and MacNutt to recover damages for the injuries sustained in the collision. The court held that Fisher and MacNutt were not engaged in a "joint enterprise," stating that:

"To be sure it (the arrangement) was one for their mutual accommodation, a day to day affair, but it involved no common financial interest, no partnership, no relation of master and servant, or principal and agent, and no right of either to direct or control the other in the management of his car. The parties being neighbors and social friends, engaged at the same place of business, evidently regarded it unnecessary because of such relations to drive two automobiles to their place of business and leave them there all day unused, when one would suffice, and the other could be left for the use of the owner's family. Such a scheme of mutual accommodation did not clothe the arrangement with any characteristics of a joint enterprise, to which the doctrine of imputable negligence may be applied."

There was no reference to the earlier decision of the same court. Neither was it pointed out that this was an action by one "associate" against the other. If a "joint enterprise" had been found to exist it would not have constituted a bar to a recovery by Fisher against MacNutt. And then one might well differ with the court's views on whether a common financial interest existed in this case so as to give the requisite control in the doctrine of imputed negligence.

The case of Coleman v. Bent,63 decided by the Supreme Court of Errors of Connecticut in 1924, goes a step further than the Fisher case and the reasoning is of more doubtful validity. The plaintiffs' two decedents, one W and the defendant were returning from a fishing trip, when a collision occurred, alleged to be due to the negligence of W, who was driving at the time. The defendant drove the car out and part of the way home, when he asked to be relieved, and W "took the wheel." It was understood that one of the decedents was to drive during the latter part of the trip. It was agreed at the destination that "all current expenses of the trip, including gasoline, oil, and garage bills, should be shared equally." It was held that there was not a "joint adventure," as a matter of law. In distinguishing the Derrick case, the court said:

63 124 Atl. 224 (Conn. 1924).
"The undisputed evidence (in that case) was that all had agreed to share the expenses of the trip, including gasoline, oil, tires, and wear and tear on the car.... the entire cost of transportation was shared, to the same extent as if they had jointly hired the car. Here, only the cost of gasoline, oil, and garage bills, if any, were agreed to be shared. It is still true that the defendant bore the cost of transportation to the extent of furnishing the automobile, and that fact was significant in its bearing upon the question whether the defendant reserved his possession and right to control operation of his car, and upon his correlative responsibility for damage done by its negligent operation. It is not clear that, under the agreement to share current expenses, a majority of the party could have compelled the defendant to intrust the operation of his car to a driver of their own selection; or that, if the collision had resulted in nothing more serious than damage to the defendant's automobile, either of the two decedents could have been compelled to contribute towards the cost of repairing it. The fact that the defendant drove his car himself, until he felt that it was no longer prudent to do so, is suggestive. Also the fact.... that he offered his car for the trip because it was new and he desired to try it out. There was evidence from which the jury might have found that he invited the decedents to travel as his guests, and that the agreement for sharing current expense was an afterthought. Finally, the common purpose of these gentlemen was social rather than economic, and was not necessarily inconsistent with the retention by the defendant of his rights and obligations as owner of his car."

Here again the controversy was between the associates and the "joint enterprise" doctrine does not necessarily have any application to such a situation. It was not necessarily material that this question should have been submitted to the jury. As far as the legal right of control is concerned, it may arise at any time during the trip. Alternating in driving has been looked upon by some courts as a material factor in the solution of the problem, and an understanding to that effect should stand on the same basis. It seems to the writer that the court has failed to distinguish the Derrick case in a substantial manner.

Ownership or a part ownership of the vehicle is generally considered to be a sufficient basis for the right of control
over the driver, whether he is or is not an "associate." 64
This seems to be unobjectionable. There are only a few cases
that involve this factual element. In Tannehill v. Kansas
City, C. & S. Ry. Co.65 the decedent and his brother, who

64 In Wisconsin & Arkansas Lumber Co. v. Brady, 248 S.W. 278 (Ark.
1923), a husband was riding in his automobile driven by his wife. The court said
that lack of due care of the wife in driving, if any, was imputable to him and
should have "been taken into account" in determining "whether there was
liability on the part of appellants for damage to the car." The court said that
since he owned the car he had control, together with his wife, over the operation
thereof. In Rose v. Wells, 266 S.W. 1015 (Mo. 1924), the wife was acting as her
husband's chauffeur in taking him in his automobile to keep a business engage-
ment. She was held to be his "servant, and her negligence" was "chargeable" to
him. In Standard Oil Co. of Kentucky v. Thompson, 226 S.W. 368 (Ky. 1920),
plaintiff was riding in his automobile with his wife who was driving. Held, he
was "chargeable with the negligence of his wife, who was his agent in the oper-
ation of his automobile at the time of the collision."

Proof of ownership makes a prima facie case in the doctrine of imputed negli-
gence. West v. Kern, 171 Pac. 413 (Or. 1918), and cases cited therein.

Pac. 385 (Cal. 1917), wherein the plaintiff was riding in an automobile driven
by his son. The automobile was the property of a corporation of which the
plaintiff was the principal stockholder and president, and the son was the sec-
tary and manager. The car was used "by the corporation" in delivering goods.
It was kept at a barn at the residence of the plaintiff. On the day of the acci-
dent it was necessary to make a delivery at a place that was not in a direct
line with the plaintiff's residence. The plaintiff's wife was at the place of business
and the three made the delivery, the son driving. On the trial of the case, the
jury was in effect instructed that if the driver was guilty of contributory negli-
gence, such negligence was imputable to the plaintiff. The jury returned a ver-
dict for the defendant, and a new trial was granted on the ground that the
court had committed error in giving such instruction. The opinion of the Supreme
Court of California as to what constitutes a "joint enterprise" is expressed as
follows: "... in order that there be such a joint undertaking it is not sufficient
merely that the passenger or occupant of the machine indicate to the driver or
chauffeur the route he may wish to travel, or the places to which he wishes to
go, even though in this respect there exists between them a common enterprise
of riding together. The circumstances must be such as to show that the occupant
and the driver had such control and direction over the automobile as to be prac-
tically in the joint or common possession of it." The court expressed its ap-
proval of the decision in case of Washington & C. O. Ry. v. Zell, while it criti-
cised that in Wentworth v. Town of Waterbury. In the former of these two
cases there was the additional fact that the passenger and the owner alternated
in the driving, but this is not necessarily conclusive in respect to the question of
control. It may be a matter of courtesy or as a matter of accommodation that
the passenger drive for a part of the distance on the trip. On principle, it would
seem that if the decision in one of these cases is approved, the result reached in
the other would be approved. The right of control would seem to be present in
either one. And, under a more liberal view, the right of control would seem to be
present in the Bryant case. The fact that the associates have certain plans in
was driving at the time of the accident, were returning in an automobile from a trip the purpose of which did not appear. They, with another brother, were joint owners of the car. It was held that they were engaged in a "joint enterprise," the court saying:

"... whether decedent and his brother were in their journey to Clinton upon either pleasure or business bent, they were neither master and servant, employee and employer, guest nor passenger of the other. They owned the car jointly, they were upon a joint enterprise, either of business or pleasure, and neither had any more, or any less, control of the car at the time than the other. In such case, it seems clear that the negligence of one part owner of the car, when engaged in a joint enterprise, is imputable to the other."

In *Langley v. Southern Ry. Co.* the plaintiff, her husband, one W, and two young ladies were *en route* to a railway station where the latter were "to board a train." W, a nephew of the plaintiff and her husband, was driving at the time of the collision with the defendant's train, which injured the plaintiff. The answer alleged that the plaintiff was engaged in a "joint enterprise" with the other occupants of the car. In his concurring opinion, Gage, J., said:

"If that is true, then the plaintiff's right is barred. ... The car inferentially belonged to the Langleys, though the testimony is not specific on that point. The driver was nephew to the plaintiff, and he was plainly and properly heedful of the direction of the Langleys. The husband sat by the driver. The relationship of the three was so close that their action was common ... ."

In *Robison v. Oregon-Washington R. & Nav. Co.* Robison, the plaintiff in one of the actions, and one Weygandt, Robison's father-in-law and the plaintiff's decedent in the other action, were riding in an automobile driven by Weygandt. The answer to the complaint of Robison set forth in common, such as a "joy ride," is not conclusive on the question of control in this jurisdiction. The common purpose is only evidence of the right of control. Likewise, the fact that the passenger indicates the route is not conclusive. Pope *v.* Halpern, 223 Cal. 470 (Cal. 1924); Meyers *v.* Southern Pac. Co., 218 Pac. 284 (Dist. Ct. of App., Second Dist., Cal. 1923).

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66 101 S. E. 286 (S. C. 1919).
67 176 Pac. 594 (Or. 1918).
substance that he and Weygandt were engaged in a "joint enterprise," and that the car was under their joint control. As to the right to control the movement of the automobile, the defendant relied "upon the fact appearing in the evidence that at the time, and for some months previously, Robison held the bill of sale of the car from Weygandt, that the machine had been registered in his name in Idaho, and even that he had presented a claim to the defendant for damages to it before bringing this action." But Robison testified that "he himself had not a dollar invested in the car, and that his father-in-law had given him a bill of sale of it, so that he could sell it for the account of Weygandt and give good title, without having to consult the latter personally." While the court properly held that this evidence presented a question for the jury to decide, the attitude of the court was stated thus:

"Robison's doings about the car, already noted, if unexplained, would authorize the jury to find that he was its owner with the right to direct its movements, which, if true, would impute to him the negligence of the man to whom he had entrusted the driving of it. . . . On the other hand, if the jury found that the car was Weygandt's, entailing his right of control, his negligence would not be imputable to Robison on that ground."

The problem of whether the negligence of the driver should be imputed to the owner when the latter is not personally present is beyond the scope of this inquiry. But there are certain factual situations that have been presented to the courts for their consideration that involve related questions. For instance, in Bullard v. Boston Elevated Ry. Co. the wife of the plaintiff-owner, her daughter, two guests, and one Kaulback were riding in an automobile, which Kaulback, the chauffeur, was driving. The chauffeur was in the plaintiff's employ. The trial court instructed the jury in substance that if the wife exercised authority or control over the chauffeur, then whatever negligence there was on his

68 115 N. E. 294 (Mass. 1917).
part was imputable to her; and further that, as bearing upon the question whether Kaulback was in the control of the wife in such sense as to warrant the imputation of his negligence to her, the jury might "consider the position she occupied in the car and whether she was in a situation to give orders to him at the time." In holding that these instructions were not erroneous, the court said:

"If in truth Mrs. Curtis had authority to exercise control over Kaulback, then her physical position in the automobile was of no consequence. . . . But as bearing upon the point whether she had the authority of an employer with respect to him, the indications and influences from her conduct could not be said to be irrelevant. No such question could arise where confessedly the relation of master and servant existed."

While the husband owned the car, it would seem to be a reasonable inference in this case that the wife, Mrs. Curtis, was in a position to direct the movements of the vehicle. The chauffeur was probably not the one who selected the route to be traveled. Even though he was in the employ of the husband, the right of control in the doctrine of imputed negligence should not be based upon a technical employment or a delegation of authority from the employer to control. Of course, where the doctrine of community property prevails a different principle would be applicable in such cases.

Another analagous situation is presented in Zandras v. Moffett.69 In this case the plaintiff, who was the "regular driver" of a truck in which he was riding at the time of the collision which injured him, had entrusted the driving to another person. The court held that the lack of due care of the driver of the truck barred the plaintiff's recovery. Whether the plaintiff was the owner or merely an employee who was using the truck in the performance of his duties the result would be and should be the same. Control would be vested in the plaintiff in either instance.

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69 133 Atl. 817 (Pa. 1926).
According to the better view, before the husband's lack of due care, in the operation of an automobile or other vehicle in which he is riding with his wife, is imputable to her, she must have a right of control over the driving of the vehicle. In most cases the right of control, if it was found to exist, is based on a proprietary interest in the vehicle which the husband was driving. And, on the other hand, if the control element has been found to be lacking it was primarily on account of lack of ownership, or of part ownership, of the vehicle. In *Corn v. Kansas City, C. C. & St. J. Ry. Co.* the plaintiff, her husband, and her daughter had gone to a depot to meet another daughter. The automobile "belonged to the husband," and he was driving at the time of the collision with the defendant's car. The court held that the argument that she and her husband were engaged in a "joint enterprise" in going "to get their daughter at the Union Station, and therefore his negligence in driving the car, if any, was attributable to her" was untenable, saying:

"If this were the law, every time a man took his family out driving in his car, he doing the driving, for their mutual pleasure, there would be such a joint enterprise as to make the husband the agent of every member of the family, and make his negligence imputable to them."

The fact that a common purpose exists may be relied on in addition to the proprietary interest in the vehicle as the basis for a right of control. In *Lucey v. Allen* the plaintiff Helen M. Prendergast, the plaintiff John J. Prendergast, and the plaintiff Frances Lucey were returning from a pleasure trip. "The automobile operated by John J. Prendergast was owned by the plaintiff Helen M., wife of the said John J." In holding that the lack of due care of the husband-driver should be imputed to the wife the court gave the following reasons:

"If in this case the negligence of Mr. Prendergast is imputed to his wife, such determination would not be made because of the marital re-

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70 228 S. W. 78 (Mo. 1921).
71 117 Atl. 539 (R. I. 1922).
lation, but because she was the owner of the automobile; *that it was being operated by the husband for the wife in furtherance of a purpose in which she was an interested party*, and because from those circumstances the relation of principal and agent would arise between Mrs. Prendergast and her husband. It appears that at the time of the collision the Prendergasts were returning from a day's outing at Pearl Lake . . . . that for the purpose of carrying out this day of pleasure in which she was interested and took part she had furnished her automobile, and, being unable to operate it herself, she had procured her husband to run it. In accordance with the rule of agency applicable with reference to a so-called 'family automobile,' the owner is undoubtedly chargeable with the negligence of another member of the family who is driving, if the owner is a passenger, and it is being used for a purpose in the accomplishment of which the owner is interested.” (Italics mine.)

This decision could have been based upon the fact that the wife was owner of the automobile. That was sufficient to give her the right to control its operation in the law of imputed negligence. Would the court have reached the same conclusion if the husband had owned the car? There would still have been the common purpose. But the better view is opposed to an affirmative answer, even in jurisdictions that purport to adopt the common purpose as a basis for the application of the rule of imputed negligence. In *Reading Tp. v. Telfer* the plaintiff and her husband were driving in a “spring wagon” to visit the former’s mother. The husband was driving at the time of injury to the plaintiff, but it did not appear as to who owned the vehicle. The Superior

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72 *Cf. Smith v. Wells, 31 S. W. (2d) 1014 (Mo. 1930)*, where the plaintiff and his wife were returning from a visit with the latter’s mother, in an automobile owned by the plaintiff. The plaintiff drove going out but his wife drove on the return trip and was driving at the time of the accident. It was held that the plaintiff was “guilty of contributory negligence as a matter of law.” But the court continued: “The evidence herein is uncontroverted that the plaintiff was the owner of the Ford automobile . . . . It also conclusively appears . . . that plaintiff and his wife were returning to their home after a visit with plaintiff’s mother-in-law; in other words, plaintiff and his wife were engaged at the time of the collision in a joint trip or enterprise . . . . It is . . . the preponderance of juristic authority that the negligence of the driver of an automobile is imputable to the owner of the automobile, especially where, as in the instant case, the owner is personally present in the automobile, and where the owner and the driver are engaged in a joint journey or enterprise, either of business or pleasure.”

73 48 Pac. 134 (Kan. 1897).
Court of Kansas held that the contributory negligence of the husband was not imputable to the wife, expressing its attitude as follows:

"It may be conceded that persons of mutual purpose and equal privileges of direction and control, who travel in the same vehicle, in pursuit of a common object, are the agents of each other in such a sense that the negligent act of one in furtherance of the common scheme is imputable to all; but such mutuality or equality of direction and control does not exist in the case of a journey taken by husband and wife. Say what we may in advocacy of the civil and political equality of the sexes, there are conditions of inequality between the same in other respects which the law recognizes, and out of which grow differing rights and liabilities. One of these is instanced in the case of a journey by husband and wife, such as was undertaken by the parties in question. By the universal sense of mankind, a privilege of management, a superiority of control, a right of mastery on such occasions is accorded to the husband, which forbids the idea of a co-ordinate authority, much less a supremacy of command in the wife. His physical strength and dexterity are greater; his knowledge, judgment, and discretion assumed to be greater; all sentiments and instincts of manhood and chivalry impose upon him the obligation to care for and protect his weaker and confiding companion; and all these justify the assumption by him of the labors and responsibilities of the journey, with their accompanying rights of direction and control."

The Court continued:

"The special facts of cases may show the wife to be the controlling spirit, the active and responsible party, and the husband an agent, or even a mere passenger; but in cases where such facts are not shown the court must presume, in accordance with the ordinary—almost universal—experience of mankind, that the husband assumed and was allowed the responsible management of the journey."

In 
Holsaple v. Superintendents of Poor 
the plaintiff was riding with her husband in their automobile; he was driving. The Supreme Court of Michigan held that the wife was "chargeable with any negligence committed by him which contributed to the accident resulting in her injury." But this decision was based upon the rule, prevailing in Michigan, which imputes to the passenger as a matter of law the contributory negligence of a driver of a private vehicle. The

74 206 N. W. 529 (Mich. 1925).
court refused to overrule its long line of decisions sustaining this doctrine.

Where it is sought to impute the contributory negligence of a "male driver" to a "female passenger" there is a hesitancy on the part of the courts to find a sufficient control basis, especially if she has no joint financial interest in the trip or does not have a proprietary interest in the vehicle \(^7\) which he is driving or if she does not take an active part in the operation or direction of the vehicle. The fact that the two are pleasure driving, or that the speed of the vehicle is increased at her request, or that a particular direction is taken at her behest,\(^6\) or the fact that she plans or suggests the trip does not materially alter the situation. She may even alternate with him in driving the vehicle and still not be considered as having any control over its operation, in so far as the doctrine of imputed negligence is concerned. In at least one decision the argument has been made that there should be no difference in principle between this class of cases and those wherein the passenger is a male. In *Prideaux and Wife v. The City of Mineral Point*\(^7\) Mrs. Prideaux was returning from making a social call with Mr. Ternes and Mr. and Mrs. May. Ternes and May had hired a two-seated carriage for the purpose, and the former was driving on the return trip. Ryan, C. J., who delivered the opinion of the court, said:

"A woman may and should refuse to ride with a man, if she dislike or distrust the man, or his horse, or his carriage. But if she voluntarily

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\(^7\) Nicora v. Ververi, 244 Pac. 897 (Nev. 1926). (Mrs. Ververi, one of the plaintiffs was pleasure riding with defendant and his wife. Held not a "joint enterprise." The court said: "Mrs. Ververi had no proprietary interest in" the automobile, "and consequently no right of control over the driver who owned it . . . . But, conceding that she did, as claimed, direct the driver to drive faster, said action would not show that she was engaged in a joint enterprise with appellant.")

\(^6\) Ronan v. J. G. Turnbull Co., 131 Atl. 788 (Vt. 1926). (Two brothers "borrowed their father's" car to take two young ladies to football game; the car was "slowed down" at request of plaintiff, one of the young ladies, so that she could see a golf course. Held not a "joint enterprise.")

\(^7\) 43 Wisc. 513 (1878).
accept his invitation to ride, the man may, indeed, become liable to her for gross negligence; but as to third persons, the man is her agent to drive her—she takes the man and horse and carriage for the jaunt, for better, for worse."

Where co-employees are engaged in performing their respective duties and are using instrumentalities furnished by their common employer for that purpose, the contributory negligence of one may be imputed to another in an action by that other against a third person, depending upon the question of control. One of the employees may be vested with complete control, by virtue of his employment, over the use or operation of the instrumentality that gave rise to the contributory negligence. If their duties are entirely distinct as respects the particular conduct, or if they are not actually co-operating therein at the time, then the contributory negligence of the one is not imputed to the other on the theory that they were engaged in a "joint enterprise." If, however, the employment is such as to vest the employees with a joint control, there is the requisite control for the application of the doctrine of imputed negligence.

In rounding out this discussion of the "joint enterprise" doctrine attention is called to a class of cases where the action is by the passenger against the driver of the vehicle in which he is riding. In most of the cases in which the doctrine has been applied the action was by the passenger against a third person whose negligence combined with that of the driver to cause the injury. This is probably due to the fact that in the majority of cases there existed the negligence of a third person, who could be sued without any remorse of conscience. It seems that the first decision upon this question is Wilmes v. Fournier, wherein we find the following discussion by Ross, J.:

"No case has been cited by counsel in which one person, concededly engaged in a joint enterprise, has sought to maintain an action against one of his associates. The fact whether there is a joint enterprise is one

78 180 N. Y. S. 860 (1920).
of importance in the class of cases cited, when the action is against a third person; but, as between themselves, I know of no rule of law that throws a mantle of protection over the tortuous acts of an associate in a joint enterprise or in a partnership. Suppose one person assaults his copartner; is the wrongdoer immune from liability because they were engaged at the time of the assault in the partnership business? Suppose that, while engaged in the partnership business, one partner conducts himself so carelessly as, except for the partnership relations, would give a right of action; is the wrongdoer not liable to the injured partner? True, they are in a sense each acting as agent for the other; but does not an agent owe the duty of care towards his principal, and a principal towards his agent?" (Citing cases.)

A similar attitude was expressed by Main, J., in O'Brien v. Woldson.79

"When the action is against a third person each member of the joint enterprise is a representative of the other, and the acts of one are the acts of all if they be within the scope of the enterprise. When the action is brought by one member of the enterprise against another, there is no place to apply the doctrine of imputed negligence.80 To do so would be to admit one guilty of negligence to take refuge behind his own wrong. .... For present purposes it is sufficiently accurate to say that the relations of joint adventurers as between themselves are governed practically by the same rules that govern partners."

The reasoning and results reached in other decisions lead to the inference that if a "joint enterprise" had existed it would have constituted a bar to a recovery by the passenger against the driver. In Hilton v. Blose81 the action was brought by a female plaintiff, who was a passenger in a private automobile, against the driver. The Supreme Court of Pennsylvania held, inter alia, that an instruction in ref-

79 270 Pac. 304 (Wash. 1928).

80 Accord: Harber v. Graham, 143 Atl. 340, 61 A. L. R. 1232 (N. J. 1928). (Plaintiff and her brother were "touring among the Massachusetts hills in his car driven by himself, she accompanying him on his invitation." The court said: "Taking up the 'common enterprise' point, we think the learned trial judge lost sight of the fact that this principle, resting as it does upon the relation of agency existing inter se among persons engaged in a joint or common enterprise, is applicable only as regards third persons not parties in such enterprise."); Bushnell v. Bushnell, 131 Atl. 432, 44 A. L. R. 785 (Conn. 1925). (Plaintiff and her husband, the defendant, were returning home in an automobile, which he was driving, "after taking their son to Brown College." Held, doctrine of "joint enterprise" did not apply.)

81 147 Atl. 100 (Pa. 1929).
erence to the "joint enterprise" doctrine was unnecessary since it appeared that, while the parties were going to a common destination to bowl, "they were not to engage in the same game, nor were they on the same team." The obvious inference is that had they been going to bowl together, a recovery might have been denied. It would have been more desirable for the court to have denied the nonapplicability of the doctrine on the ground that the action was one between the passenger and driver. A case in which the court clearly adopted such a view is Offer v. Swancoat.82 There the plaintiff and defendant "were en route home from Kansas City, Mo., where they had gone to inspect an apartment house with the view and purpose of exchanging" the plaintiff's farm for the same. The trip to Kansas City was made under and by virtue of an agreement between the plaintiff and defendant, and the expenses of the trip were to be prorated between these parties and one Dr. Dunlap, who was making the trip to Kansas City for the purpose of making an exchange of certain property. Dr. Dunlap did not make the return trip. Upon a rehearing, the Court of Civil Appeals of Texas said that:

"The negligence of the driver cannot be imputed to the passenger, in a controversy between themselves, unless it be shown, not only that they were at the time in pursuit of a joint undertaking, but that the passenger had equal control and management, with the driver, over the operation of the vehicle. . . . So, this defense (that the parties were engaged in a 'joint enterprise') was destroyed in this case by the finding of no joint enterprise, and besides was unavailable in the absence of a finding of a common control of the operation of the vehicle."

The Court went on to say:

"We gravely doubt if the evidence was sufficient to raise the latter issue, or authorize its submission."

It seems as if the entire expenses of the trip were prorated, and, regardless of who owned the car or operated it, the

82 27 S. W. (2d) 899 (Tex. 1930).
requisite control in the doctrine of imputed negligence appears. But there seems to be no other jurisdiction that has gone so far as this.

IV.

In the language of the decisions, there are three conceptions of the doctrine of imputed negligence, in regard to the question under discussion, each of which have a field of operation:

I. The lack of due care on the part of a driver of a private vehicle is not imputable to a passenger therein who has no right of control over the operation of the vehicle.

II. The lack of due care on the part of the driver of a private vehicle is not imputable to the passenger therein unless there is a community of interests in the object or purposes of the undertaking, and the passenger has a right of control over the operation of the vehicle.

III. Where there is concerted action, directed towards a common end, regardless of the element of control, the lack of due care on the part of the driver is imputable to the passenger.

In Pennsylvania a rather anomalous doctrine exists. If the passenger and driver "join in testing danger incident to the operation of" the vehicle, this constitutes a bar to a recovery by the passenger in cases where the lack of due care of the driver concurs with that of the defendant. A description of this principle is given by Frazer, J., in Nutt v. Pennsylvania R. Co.: 83

"The phrase 'testing danger,' as used in many of our decisions, is not accurate as applied to a passenger who rides as an invited guest. It implies active participation in a reckless disregard of danger on the part of the driver, while, as a matter of fact, this does not usually occur. The passenger may be merely passive, and yet be held responsible for resulting injury to himself. In such case, he does not join in testing danger, he does, however, take the risk incident to the situation. Where two persons are engaged in a joint enterprise for their mutual benefit

\[83\) 126 Atl. 803 (Pa. 1924).\]
or pleasure, and are in equal control or ownership of the means of transportation, it may be said they join in testing danger incident to the operation of the machine. An illustration of this is found in Dunlap v. Philadelphia Rapid Transit Co.\textsuperscript{84} where a constable and his deputy were using an automobile for their mutual business, and had an equal opportunity to observe dangers in the roadway."

In the \textit{Dunlap} case the Court said:

"Beckman (the constable) and plaintiff's husband (the deputy) were engaged in a common purpose, and had a common object in view, that of transacting business in which both were interested. While Beckman's negligence should not be imputed to plaintiff's husband, the latter, was not relieved from all responsibility. It was incumbent on him to exercise proper care and not sit quietly by and fail to see danger that was plainly imminent."

It seems that, from this reasoning, the Pennsylvania court is using the expression "joining in testing a common danger" as a judicial label for personal contributory negligence. "Active participation" in the "reckless disregard of danger" certainly implies personal fault. On the other hand, disability to recover, under the imputed negligence doctrine, is based, and should be, upon the right of control over the operation of the vehicle, without regard to the question of whether there has been a negligent failure to exercise the control, the right of which the passenger has.

The third conception of the doctrine of imputed negligence as such should have no place in a rational system of jurisprudence. In the \textit{Jensen} case the Supreme Court of Washington said that the rule requiring the element of control as a basis for imputing the contributory negligence of the driver to the passenger, in an action by the latter against a third person, was not applicable "with reference to a joint enterprise or a community of interest." This view is inconsistent with that taken in the later decisions of the same court where the fact that there is a community of interests in the objects or purposes of the undertaking necessarily would give rise to the inference, in an instance like the

\textsuperscript{84} 93 Atl. 873 (Pa. 1915).
Jensen case, that each of the parties has an equal right to a voice in the manner of its performance. There was a sufficient factual basis for the legal right of control in the Jensen case and in the authorities relied upon in that decision. In the Hurley case, while the reported facts are not so clear in respect to the right of control, the authority relied upon in that decision states that the element of control is a basis for the application of the doctrine of imputed negligence.

The Washington court seems to require that there be a common purpose before the doctrine will apply. If we adopt a relational conception of the doctrine, as this court seems to do, even then it would seem that the relation could arise at any time during the use of the vehicle to accomplish a given purpose. On such a theory, the "joint enterprise" would be given a definite status in the law. Of course, that would supply a possible want of predictability in the application of the doctrine. Yet there are difficulties attached to such a view. There may be a right of control and still not be a common purpose as where the passenger owns the vehicle. Again, there may be a single object to the trip but not a common one so far as the driver and passenger are concerned. This distinction would be very important in determining whether the relation existed as between co-employees. For instance, suppose that a common employer of A and B directs A to go to the grocery store to get some groceries and at the same time directs B to take her car and take B on this errand. B would have nothing to do with the purchasing of the groceries; A would have nothing to do with the driving of the car. In addition to these difficulties, the relational conception would have to be supple-

88 Such were the facts in Loomis v. Abelson, 144 Atl. 378 (Vt. 1929).
mented by a principle like the first rule, in order to reach a desirable decision in some instances.

There has always been a tendency in the Anglo-American law, as was pointed out in the preceding part of this discussion, to explain the rights and duties growing out of an apparently new situation in terms of a relation. The Legislature of Oregon has even gone so far as to put this idea in the form of a statute providing:

"The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them."  

According to this act, it is only by virtue of some relation that the doctrine of imputed negligence can apply. The relation, _inter alia_, might be a "joint enterprise," wherein the common purpose would be material. But apart from such a requirement, to adopt a _relational_ conception only adds to the difficulties in the administration of justice. The effort to meet the objection of want of predictability can be but an infinitesimal justification for existence of such a conception. The factual basis for the doctrine of imputed negligence should be one of a right of control by the passenger over the operation of the vehicle. Where, however, the question is one of liability on the part of the passenger to a third person, liability should be based on a negligent failure to exercise the right of control, unless one is prepared to adopt the principle of vicarious liability. Liability only for a negligent failure to exercise the right of control is hinted at by Bouldin, J., in the _Crescent Motor Co._ case. But there is nothing unusual today in the vicarious liability doctrine. Reference might be made to the principal and agent and to the master and servant cases. In a general sense, the driver is said to be an agent of the passenger. Immediate control over the operation of the vehicle is delegated to the driver.

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89 _Supra_ note 1.
This only involves the principles of agency, in so far as the right of control is involved. While many of the cases that involved a decision of the question of whether the "joint enterprise" relation existed could have been rested upon the basis of personal contributory negligence on the part of the passenger, in some instances there was no personal fault on the part of the latter. In such cases we have a vicarious responsibility.

The ultimate result in the class of cases which form the principal part of this discussion has depended upon the factual basis of control. Some jurisdictions have been more liberal than others in the formulation of the principles governing the existence of that right. Some courts have refused to extend the doctrine of imputed negligence to cases where the object of the trip involving the use of the vehicle was merely social. But whether the object of the undertaking be one of business or of pleasure, the determination of the question of control should depend upon the mutuality of the interests of the parties, except, of course, the cases involving a female passenger and a male driver. In the latter class of cases ownership of the vehicle would give the passenger the right of control; or, the special facts of the case may show that she is "the active and responsible party, the controlling spirit." The common purpose should be regarded as material only in so far as it gives a right of control. There is less doubt in regard to the existence of the right of control in those cases where the passenger owns the vehicle and the cases where there is an agreement or understanding to prorate the expenses. The reasoning in the case of Howard v. Zimmerman91 suggests the extent to which we should go in the other direction, and, it seems to the writer, that that is the extent to which it is desirable to go.

There may be difficulty in distinguishing between the driver (host) and guest (passenger) cases on the one hand

91 Supra note 27.
and the cases wherein it is sought to impute the lack of due care on the part of the driver to the passenger because of a right of control which the former has over the latter on the other hand. The line of distinction may be and has been difficult to draw, but it seems that the test adopted in the case of *Howard v. Zimmerman* is reasonably satisfactory.

It is hoped that the *relational* conception will be abandoned and that the ultimate result, in the application of the doctrine, will be made to depend upon the existence or non-existence of the right of control. Notwithstanding the objection of want of predictability, the value of the principle lies in its flexibility and must necessarily do so.

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