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Joint Enterprise in the Field of Automobile Accident Litigation

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NOTES

JOINT ENTERPRISE IN THE FIELD OF AUTOMOBILE ACCIDENT LITIGATION

The application of the joint enterprise doctrine to automobile accident litigation has proved a fertile source of discussion and argument. The doctrine stands today as a partial revival of the rule of imputed negligence, which was first enunciated in 1849 in the English case of *Thorogood v. Bryan*.[1] Although not the only field in which it is applied,[2] it is in this type of litigation that the doctrine has reached its fullest development. The joint enterprise relationship must not be confused with the co-existing doctrine of joint adventure. A definite distinction exists between the two concepts,[3] though the terms have been used interchangeably by most courts.[4]

The legal concept of joint enterprise is said to be founded in contract, express or implied.[5] In the ultimate analysis the relationship is one of mutual principal and agent, and it is largely governed by principles analogous to those applicable to partnership and agency.[6] Although the analogy is not complete, it is the rationale upon which most courts have relied.

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[1]8 C.B. 115, 137 Eng. Rep. 452 (1849). The court imputed the negligence of the driver of an omnibus to a passenger so as to bar the latter's recovery from a negligent third party. This broad rule of imputed negligence was subsequently rejected in The Bernina, 12 P.D. 58 (1887).

[2]Shook v. Beals, 96 Cal. App.2d 963, 217 P.2d 56 (1950) (airplane); Beck v. East River Ferry Co., 6 Rob. Sr. 82 (N.Y. 1868) (rowboat); Masterson v. Leonard, 116 Wash. 551, 200 Pac. 320 (1921) (bicycle).

[3]The concept of joint adventure is beyond the scope of this note. Briefly stated, a joint adventure is a business venture for profit, while a joint enterprise is a mutual undertaking for pleasure or profit. See State *ex rel.* McCrory v. Bland, 355 Mo. 706, 197 S.W.2d 669 (1946); Stogdon v. Charleston Transit Co., 127 W. Va. 286, 32 S.E.2d 276 (1944).

[4]*E.g.*, Shook v. Beals, *supra* note 2; Atlanta Metallic Casket Co. v. Southeastern Wholesale Furn. Co., 82 Ga. App. 353, 61 S.E.2d 196 (1950).

[5]Thompson v. Bell, 129 F.2d 211 (6th Cir. 1942); Potter v. Florida Motor Lines, 57 F.2d 313, 315 (S.D. Fla. 1932), "It is a voluntary relationship, the origin of which is wholly ex contractu"; Sanderson v. Hartford Eastern Ry., 159 Wash. 472, 294 Pac. 241 (1930).

[6]Potter v. Florida Motor Lines, *supra* note 5; Farthing v. Hepinstall, 243 Mich. 380, 220 N.W. 708 (1928); Straffus v. Barclay, 147 Tex. 600, 219 S.W.2d 65 (1949). It is interesting to note that agency is defined by the writers of the American Law Institute as resting upon a consensual rather than a contractual basis; see RESTATEMENT, AGENCY §1 (1933).

ELEMENTS OF A JOINT ENTERPRISE

To establish a joint enterprise courts customarily require two elements: (1) a mutual undertaking for a common purpose and (2) a joint right of direction and control of the means used to carry out the common purpose.[7] One of the best expressions of the joint enterprise concept is contained in the much cited case of *Cunningham v. Thief River Falls:*[8]

> "Parties cannot be said to be engaged in 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."

Judicial application of this concept to a variety of factual situations in the automobile accident field has been neither clear nor consistent. An analysis of its elements is therefore in order.

1. The Common Purpose

The first and perhaps the more elusive element in a joint enterprise is, as the name of the relationship implies, a common purpose for pleasure or profit. The participants must be acting with the intent of accomplishing or furthering this purpose when the relationship is sought to be established.[9] In determining the existence or nonexistence of a joint enterprise a number of early cases completely ignored the element of mutual right of control and looked merely for a common purpose.[10] An illustration of the extravagant consequences of this practice is *Campagna v. Lyles,*[11] in which the court imputed the negligence of a master to a servant whom the master was driving to work as part of the consideration of employment.[12] That so sweeping

[7]Murphy v. Keating, 204 Minn. 269, 283 N.W. 389 (1939).

[8]84 Minn. 21, 27, 86 N.W. 763, 765 (1901).

[9]Jernigan v. Jernigan, 207 N.C. 831, 178 S.E. 587 (1935); Long v. Carolina Baking Co., 190 S.C. 367, 3 S.E.2d 46 (1939).

[10]Wentworth v. Town of Waterbury, 90 Vt. 60, 96 Atl. 334 (1916); Washington & O.D. Ry. v. Zell's Adm'x, 118 Va. 755, 88 S.E. 309 (1916); Jensen v. Chicago, M. & St. P. Ry., 133 Wash. 208, 233 Pac. 635 (1925) (right of control expressly held immaterial).

[11]298 Pa. 352, 148 Atl. 527 (1929).

[12]It is indicative of the confusion prevailing in this field that both earlier and

a conception of a joint enterprise constitutes an unwarranted extension of the law of imputed negligence is evident. The "common purpose" test as a sole criterion was universally criticized[13] and has now been abandoned.[14]

The extent to which a common purpose must be shown, as well as the exact nature of the interest required, has been the subject of much litigation. The questions are not unrelated. The common purpose of the parties to the enterprise must extend to and include the use of the automobile as a necessary instrumentality.[15] A common destination is not, of itself, tantamount to a common purpose;[16] something more must be shown than that the parties were merely riding together.[17] As most courts express it, the parties must have a community of interest in the objects and purposes of the undertaking.[18] The community of interest concept has been held in some jurisdictions to be a factor distinct from the common purpose of the parties and necessary in addition thereto.[19] Although this may be true as an abstract proposition,[20] the expressions have been used interchangeably by most courts.[21] The import of both is that the purpose must be of mutual concern to the parties and not merely of separate and personal interest.

later Pennsylvania decisions clearly require the showing of a mutual right of control. See Alperdt v. Paige, 292 Pa. 1, 140 Atl. 555 (1928); Rodgers v. Saxton, 305 Pa. 479, 158 Atl. 166 (1931).

[13]*E.g.*, Bryant v. Pacific Elec. Ry., 174 Cal. 737, 164 Pac. 385 (1917); Coleman v. Brent, 100 Conn. 527, 124 Atl. 224 (1924).

[14]Landry v. Hubert, 100 Vt. 268, 137 Atl. 97 (1927); Director Gen'l of Railroads v. Pence's Adm'x, 135 Va. 329, 116 S.C. 351 (1923); Rosenstrom v. North Bend Stage Line, 154 Wash. 57, 280 Pac. 932 (1929). The reversal was accomplished, for the most part, sub silencio.

[15]Hare v. Southern Ry., 61 Ga. App. 159, 6 S.E.2d 65 (1939); Garrett v. Brock, 144 S.W.2d 408 (Tex. Civ. App. 1940).

[16]Carlson v. Erie R.R., 305 Pa. 431, 158 Atl. 163 (1931).

[17]Yost v. Nelson, 124 Neb. 33, 245 N.W. 9 (1932).

[18]*E.g.*, Potter v. Florida Motor Lines, 57 F.2d 313 (S.D. Fla. 1932); Berryman v. Dilworth, 178 Tenn. 566, 160 S.W.2d 899 (1942).

[19]Carboneau v. Peterson, 1 Wash.2d 347, 375, 95 P.2d 1043, 1055 (1939): ". . . there must be a community of interest in the performance of the purpose. While this element is usually connected, and often identified, with the purpose to be accomplished, it is nevertheless, a distinct factor."

[20]*E.g.*, when two persons are engaged in the performance of a purpose which is for the sole interest or advantage of one of them.

[21]See Campagna v. Market St. Ry., 24 Cal.2d 304, 149 P.2d 281 (1944); Clark v. Janss, 39 Cal. App.2d 523, 103 P.2d 175 (1940); Adams v. Hilton, 270 Ky. 818, 110 S.W.2d 1088 (1937).

Illustrative of the factual situations with which a court must concern itself in deciding the existence of a common purpose is *Kepler v. Chicago St. P., M. & O. Ry.*[22] A young man, as a matter of accommodation, undertook to drive his foster sister to mail a letter. An accident occurred, and in the ensuing litigation the defendant railway sought to impute the negligence of the driver to the plaintiff, on the ground that she was engaged in a joint enterprise. In holding this contention to be without merit the court stated:[23]

> ". . . it is hard to see that there was in any respect a community of interest or object between the parties on their drive to Herman. . . . [T]he object of [the driver] was to render an additional courtesy to the family guest. He was not interested in the mailing of the letters. His desire was simply to afford to his foster sister the opportunity of a pleasant drive. The case differs from those in the books where two persons induced by the same considerations drive together in a vehicle of one of them to accomplish an end of common interest."

To the same effect is *Stogden v. Charleston Transit Co.*,[24] in which five children, accompanied by a friend, were making a Saturday night excursion to town in their father's automobile. In holding inapplicable the defense of joint enterprise, the court reasoned as follows:[25]

> "Here, of course, the mutual purpose was to drive from their home . . . to the city of Charleston and return. Beyond that, their purpose and destinations varied. Three wanted to go immediately to a moving picture, two to shop and one to simply loaf. . . . We do not believe that here simply traveling together from one town to another is sufficient unity of purpose to constitute a joint enterprise."

The above decisions are indicative of the standard of mutuality to which most courts adhere. The point, however, at which the individual interests of the parties become so dominant that the court is precluded from finding a common purpose is not clear-cut. Decisions that go to extremes are not a rarity, and further cloud an attempt

[22] 111 Neb. 273, 196 N.W. 161 (1923).
[23] *Id.* at 278, 196 N.W. at 163.
[24] 127 W. Va. 286, 32 S.E.2d 276 (1944).
[25] *Id.* at 291, 32 S.E.2d at 279.

at definition. For instance, a joint enterprise has been found when not even the destination of the automobile was common to all of the parties.[26] At the other extreme is *Hilton v. Blose*,[27] in which the court reasoned:[28]

> ". . . both plaintiff and defendant were interested in the pastime of bowling, and on the evening in question, were going to a common destination to play this game; but they were not to engage in the same game nor were they on the same team. While they had a similar purpose in view in making the trip, — that is, to bowl, — yet their purpose was not a common one, since they were to play on different teams and bowl in different games."

Finally, the distinction between a person's motive, as opposed to his purpose or object, should be kept in mind. Two persons may well have a true common purpose even though their motives for having it are different.[29] The courts have wisely refrained from inquiry into the latter.

It is when the common purpose of the parties is of a social or pleasure-seeking nature that the joint enterprise doctrine is least susceptible to concise analysis. Whether the doctrine, which rests in theory upon principles of commercial law,[30] should have any application to nonbusiness undertakings is open to question.[31] Most jurisdictions, however, have shown little hesitation in applying the doctrine without regard to the nature of the interest involved. Joint enterprise has been found in the use of an automobile to go on a fishing trip,[32] to attend a dance,[33] to visit relatives,[34] to go on a

[26]Derrick v. Salt Lake & O. Ry., 50 Utah 573, 168 Pac. 335 (1917) (three traveling salesmen, each representing a different line and one of them having a different destination from the others, held to be engaged in a joint enterprise).

[27]297 Pa. 458, 147 Atl. 100 (1929).

[28]*Id.* at 460, 147 Atl. at 100.

[29]Straffus v. Barclay, 147 Tex. 600, 219 S.W.2d 65 (1949).

[30]Partnership and agency law; see Thompson v. Bell, 129 F.2d 211 (6th Cir. 1942); notes 5, 6 *supra*.

[31]*See* Carboneau v. Peterson, 1 Wash.2d 347, 375, 95 P.2d 1043, 1055 (1939); Sommerfield v. Flury, 198 Wis. 163, 165, 223 N.W. 408, 410 (1929).

[32]Johnson v. Fischer, 292 Mich. 78, 290 N.W. 334 (1940).

[33]Tampa & G.C.R.R. v. Lynch, 91 Fla. 375, 108 So. 560 (1926); Frisorger v. Shepse, 251 Mich. 121, 230 N.W. 926 (1930).

[34]Stockton v. Baker, 213 Ark. 918, 213 S.W.2d 896 (1948); Union Bus Co. v.

drinking spree,[35] and merely to go pleasure riding.[36] In finding a joint enterprise in these factual situations courts have relied strongly on the alleged mutual purpose, and, more often than not, the result is to reduce the accompanying element of joint right of control to a naked fiction.[37] In *Greenwell's Administrator v. Burba*[38] one of a party of seven boys borrowed an automobile from a friend in order that the group might attend a dance in a nearby town. On the return trip an accident occurred which resulted in the death of five of the boys. A defense of joint enterprise was successfully interposed to actions brought by the administrators of the deceased boys. The court seemingly based its findings of an equal right of control upon the fact that the car was borrowed in accordance with the mutual plan of the group, it being agreed that all would "chip in" for gas.[39]

The ill favor with which the joint enterprise doctrine has been regarded by many writers[40] doubtless stems from such decisions. Those courts indiscriminately applying the doctrine to nonbusiness ventures might well take note of the statement of Justice Sturtevant in *Rogers v. Goodrich:* "That the participants lent their presence to the social gathering did not in any way tend to change their property rights."[41]

2. *Joint Right of Control*

The foregoing discussion is indicative of the difficulties en-

Smith, 104 Fla. 569, 140 So. 631 (1932); Archer v. Chicago, M., St. P. & P. Ry., 215 Wis. 509, 255 N.W. 67 (1934) (despite earlier dictum that a financial or business purpose was necessary); see note 31 *supra.*

[35]Carroll v. Harrison, 49 F. Supp. 283 (W.D. Va. 1943); Missouri Pac. Trans. Co. v. Howard, 201 Ark. 6, 143 S.W.2d 538 (1940).

[36]Wiley v. Dobbins, 204 Iowa 174, 214 N.W. 529 (1927). *Contra:* Logwood v. Nelson, 35 Tenn. App. 639, 250 S.W.2d 582 (1952).

[37]Note, *e.g.,* the language of the Arizona court in Franco v. Vakares, 35 Ariz. 309, 315, 277 Pac. 812, 814 (1929): "For several persons to indulge in or put on a 'joy ride' . . . . [t]he common rather than the individual will of any of the party in such an engagement, we 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."

[38]298 Ky. 255, 182 S.W.2d 436 (1944).

[39]The position of the American Law Institute is: "The power of control in the majority of cases is a fiction, pure and simple." RESTATEMENT, TORTS §30 (Tent. Draft No. 1, 1932).

[40]See PROSSER, HANDBOOK OF THE LAW OF TORTS 497 (1941); Weintraub, *The Joint Enterprise Doctrine in Automobile Law,* 16 CORNELL L. Q. 320 (1931).

[41]131 Cal. App. 245, 249, 21 P.2d 122, 124 (1933).

countered by the courts in determining the existence or nonexistence of a common purpose among the parties. It must be reiterated, however, that the courts state that the mere presence of a mutual purpose or interest does not of itself furnish the basis for a joint enterprise.[42] In addition, an equal right to control and direct the means employed to achieve the common end must exist.[43] The degree of control necessary in a given factual situation cannot be closely defined. It has often been stated that, for a joint enterprise to exist, the occupants of a motor vehicle must be so related to the driver that the maxim *qui facit per alium facit per se* is applicable;[44] or, as other courts have expressed it, the circumstances must be such as to show that the occupants and the driver together have such control and direction over the automobile as to be substantially in joint possession thereof.[45] The determining factor, whatever the manner of expression, is such joint and equal control over the operation of the vehicle that the man at the wheel may be said to have been acting for the others as well as for himself.[46] Actual direction and control of the automobile by persons other than the driver are not contemplated.[47] The control required is the legal right to exercise control.[48] The fact that the occupant does not know how to drive,[49] or has no opportunity to exercise physical control, is therefore immaterial.[50]

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[42]Mayer v. Puryear, 115 F.2d 675 (4th Cir. 1940); Wessling v. Southern Pac. Co., 116 Cal. App. 455, 3 P.2d 25 (1931); Remmenga v. Selk, 150 Neb. 401, 34 N.W.2d 757 (1948).

[43]Clark v. Janss, 39 Cal. App.2d 523, 103 P.2d 175 (1940); Heiserman v. Aikman, 163 Kan. 700, 186 P.2d 252 (1947); Fay v. Thrasher, 77 Ohio App. 179, 66 N.E.2d 236 (1946). The distinction between what the courts do and what they say is frequently enormous, see page 74 *supra*.

[44]Arline v. Brown, 190 F.2d 180 (5th Cir. 1951); Bryant v. Pacific Elec. Ry., 174 Cal. 737, 164 Pac. 385 (1917); Outlaw v. Pearce, 176 Va. 458, 11 S.E.2d 600 (1940).

[45]Parker v. Ullom, 84 Colo. 433, 271 Pac. 187 (1928); Yokom v. Rodriguez, 41 So.2d 446 (Fla. 1949); James v. Atlantic & E.C.R.R., 233 N.C. 591, 65 S.E.2d 214 (1951); 5-6 HUDDY, ENCYCLOPEDIA OF AUTOMOBILE LAW 288 (9th ed. 1931).

[46]Crescent Motor Co. v. Stone, 211 Ala. 516, 101 So. 49 (1924); Landers v. Overaker, 141 S.W.2d 451 (Tex. Civ. App. 1940).

[47]Crescent Motor Co. v. Stone, *supra* note 46; Cope v. Goble, 39 Cal. App.2d 448, 103 P.2d 598 (1940).

[48]Murphy v. Keating, 204 Minn. 269, 283 N.W. 389 (1939); James v. Atlantic & E.C.R.R., *supra* note 45.

[49]Murphy v. Keating, *supra* note 48; *see* Miles v. Rose, 162 Va. 572, 585, 175 S.E. 230, 235 (1934).

[50]Heiserman v. Aikman, 163 Kan. 700, 186 P.2d 252 (1947); Howard v. Zim-

3. Evidentiary Factors

The determination of whether the occupants of an automobile are engaged in a joint enterprise is normally a question of fact for the jury.[51] The issue is whether the parties agreed, expressly or by implication, to an equal voice in the control and operation of the vehicle. In resolving this question all the circumstances of the case must be considered, and no one factor is necessarily controlling.

A primary factor is the nature of the enterprise in which the parties are engaged. Although the applicability of the joint enterprise doctrine to nonbusiness ventures is generally recognized,[52] the element of joint control seems more readily found when the purpose of the parties is of a business or financial nature.[53] Upon departure from the realm of business, however, determination of the character of the enterprise hinges upon factors which point less clearly to an agreement to share control. Evidence that the parties shared the expenses of the trip is a circumstance of considerable weight as pointing to a joint enterprise.[54] Of lesser importance but nonetheless of evidentiary value are such factors as sharing in the burden of driving[55] and having a voice in the determination of the route to be taken.[56] The fact that parties have a common property interest in the automobile is also a strong circumstance in establishing mutual right of control.[57] The

merman, 120 Kan. 77, 242 Pac. 131 (1926).

[51]Powers v. State, 178 Md. 23, 11 A.2d 909 (1940); Judge v. Wallen, 98 Neb. 154, 152 N.W. 318 (1915). It is necessary, of course, that there be sufficient evidence to warrant submission of the issue to the jury. Conversely, the facts of a particular case may be such as to give rise to a joint enterprise as a matter of law. See Tannehill v. Kansas City C. & S. Ry., 279 Mo. 158, 213 S.W. 818 (1919).

[52]See notes 32-36 *supra.*

[53]Hanser v. Youngs, 212 Mich. 508, 180 N.W. 409 (1920); Griffiths v. Lehigh Trans. Co., 292 Pa. 489, 141 Atl. 300 (1928); Lawrence v. Denver & R.G.R.R., 52 Utah 414, 174 Pac. 817 (1918).

[54]Coleman v. Bent, 100 Conn. 527, 124 Atl. 224 (1924); Grubb v. Illinois Terminal Co., 366 Ill. 330, 8 N.E.2d 934 (1937); Derrick v. Salt Lake & O. Ry., 50 Utah 573, 168 Pac. 335 (1917).

[55]Isaacson v. Boston, W. & N.W. St. Ry., 278 Mass. 378, 180 N.E. 118 (1932); Hollister v. Hines, 150 Minn. 185, 184 N.W. 856 (1921).

[56]Collins v. Graves, 17 Cal. App.2d 288, 61 P.2d 1198 (1936); Churchill v. Briggs, 225 Iowa 1187, 282 N.W. 280 (1938).

[57]Matheny v. Central Motor Lines, 233 N.C. 681, 65 S.E.2d 368 (1951); Emerich v. Bigsby, 231 Wis. 473, 286 N.W. 51 (1939). *But cf.* Painter v. Lingon, 193 Va. 840, 71 S.E.2d 355 (1952). See RESTATEMENT, TORTS §491, comment f (1934): "The fact that the driver and another riding with him are in joint possession of the vehicle

presumptions that may exist with regard to co-ownership of the automobile, the owner's presence therein, and the husband-wife relationship are of sufficient importance to warrant consideration in detail.

It has uniformly been held that the marital relation does not of itself make an undertaking a joint enterprise,[58] nor does such relation per se give rise to a presumption of agency.[59] It does not, however, prevent the existence of a joint enterprise when the component elements thereof are present.[60] In fine, it is but a neutral circumstance.

Of extreme relevance is the ownership of the car. When the car is jointly owned the negligence of one co-owner may be imputed to the other on the theory that co-owners present in an automobile have a joint right in the control and direction thereof.[61] The joint right of control is said to arise from the joint possession of the vehicle.[62] The same result, therefore, naturally follows from joint hiring[63] or joint theft of an automobile.[64]

The inferences arising when the sole owner is a passenger in his own car are conflicting. The majority view raises a rebuttable pre-

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is sufficient to make any journey taken by them therein a joint enterprise . . . ."

[58]*E.g.*, Bessett v. Hackett, 66 So.2d 694 (Fla. 1953); Seaboard A.L. Ry. v. Watson, 94 Fla. 571, 113 So. 716 (1927); Christensen v. Hennepin Trans. Co., 215 Minn. 394, 10 N.W.2d 406 (1943); Bartlett v. Mitchell, 113 W. Va. 465, 168 S.E. 662 (1933). In fact, it has been presumed that the husband, by custom, is master of the undertaking, thereby negating the existence of a mutual right of control, Reading Township v. Telfer, 57 Kan. 798, 48 Pac. 134 (1897).

[59]Rodgers v. Saxton, 305 Pa. 479, 158 Atl. 166 (1931); Fox v. Lavendar, 89 Utah 115, 56 P.2d 1049 (1936); Brubaker v. Iowa County, 174 Wis. 574, 183 N.W. 690 (1921).

[60]Lindquist v. Thierman, 216 Iowa 170, 248 N.W. 504 (1933); Paine v. Chicago & N.W. Ry., 217 Wis. 601, 258 N.W. 846 (1935).

[61]Claxton v. Claxton, 16 Tenn. App. 399, 64 S.W.2d 854 (1931) (joint owners present, one driving, plus a common purpose constitutes joint enterprise); Fox v. Lavendar, 89 Utah 115, 56 P.2d 1049 (1936) (presence of co-owners gives rise to rebuttable presumption of reciprocal agency); Archer v. Chicago, M., St. P. & P. Ry., 215 Wis. 509, 255 N.W. 67 (1934) (presence of co-owners gives rise to joint enterprise, citing RESTATEMENT, TORTS §491, comment f (1934)).

[62]Fox v. Lavendar, *supra* note 61; Tannehill v. Kansas City, C. & S. Ry., 279 Mo. 158, 213 S.W. 818 (1919).

[63]Christopherson v. Minneapolis, St. P. & S.S.M. Ry., 28 N.D. 128, 147 N.W. 791 (1914); *see* Coleman v. Bent, 100 Conn. 527, 530, 124 Atl. 224, 225 (1924): ". . . where two or more jointly hire a vehicle for their common purpose and agree that one of their number shall drive it. . . . [T]he possession of the vehicle is joint and each has an equal right to control its operation."

[64]Jones v. Kasper, 109 Ind. App. 465, 33 N.E.2d 816 (1941).

sumption that the owner has the right of control and that the driver is his agent.[65] On the theory that it is just as reasonable to infer that such a relation amounts to a bailment, a minority of courts have refused to invoke this presumption.[66] In a suit by a third person the former view would seem the more reasonable in that the passenger-owner is the one best able to show the true relationship existing between himself and the driver. Invoking the presumption compels him to testify as to any contrary relationship.

The foregoing discussion has been primarily concerned with an analysis of the two basic elements of the joint enterprise relation as they are commonly enunciated by the courts. It is important to remember, however, that, although the joint enterprise doctrine is grounded in agency concepts, liability may result from an agency relation which does not constitute joint enterprise.[67] Liability in automobile accident cases has been predicated upon a joint right of control alone.[68] As flatly stated in the much discussed case of *Fox v. Lavendar,* "If once joint control in the trip is proved, there is no need of proving a joint venture. . . . The mere determination that there was joint control results in the conclusion that there was joint responsibility for negligence."[69] Thus the search for a joint enterprise by a third party seeking to hold a passenger liable for his driver's negligence is necessary only when a joint or reciprocal agency cannot otherwise be found to exist.

The seeming anomaly of two "essential" elements when one is sufficient basis for liability softens upon a clear understanding not only of what is a joint enterprise but what is not. In those situations in which liability is predicated solely upon a right of control the

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[65]*E.g.,* Hammond v. Hazard, 40 Cal. App. 45, 180 Pac. 46 (1919); Foley v. Hurley, 288 Mass. 354, 193 N.E. 2 (1934); Smith v. Wells, 326 Mo. 525, 31 S.W.2d 1014 (1930); see RESTATEMENT, TORTS §491, comment h (1934).

[66]*E.g.,* Rodgers v. Saxton, 305 Pa. 479, 158 Atl. 166 (1931); Virginia Ry. & Power Co. v. Gorsuch, 120 Va. 655, 91 S.E. 632 (1917).

[67]Heiserman v. Aikman, 163 Kan. 700, 706, 186 P.2d 252, 256 (1947): "The basis of joint adventure is agency, but not every case of agency is joint adventure."

[68]Jones v. Kasper, 109 Ind. App. 465, 33 N.E.2d 816 (1941); Williams v. Seaboard A.L. Ry., 187 N.C. 348, 121 S.E. 608 (1924); see 7-8 HUDDY, ENCYCLOPEDIA OF AUTOMOBILE LAW 224 (9th ed. 1931); Mechem, *The Contributory Negligence of Automobile Passengers,* 78 U. OF PA. L. REV. 736 (1930).

[69]89 Utah 115, 136, 56 P.2d 1049, 1059 (1936).

joint enterprise doctrine is not applicable;[70] a fortiori, whether a common purpose exists is immaterial. In the true joint enterprise relation the basis of liability of one associate for the acts of another is the equal privilege to control the method or means of accomplishing the common design.[71] The joint right of control does not exist separately from the common purpose; it exists only with regard to the prosecution thereof.

Legal Consequences of a Joint Enterprise

Having once established the existence of a joint enterprise, the problem then becomes one of determining what effect such a relationship has upon the rights, duties, and liabilities of the parties involved. The factual situations in which the relationship may be relevant are three: (1) a passenger seeks to recover from a negligent third party who interposes a defense of joint enterprise; (2) an innocent third party seeks to hold liable a passenger on the theory of joint enterprise; and (3) a driver seeks to interpose the defense of joint enterprise when sued by his passenger.

The first and by far the most common situation is that in which the passenger in vehicle *A* seeks to recover from the driver of vehicle *B* for injuries received as a result of the concurrent negligence of the drivers of vehicles *A* and *B*. Upon a finding of joint enterprise the courts universally impute the contributory negligence of the driver of vehicle *A* to his passenger so as to bar the latter's recovery against the negligent driver of vehicle *B*.[72] When, however, the passenger himself is shown to be personally negligent, a finding of joint enterprise is not necessary. The individual negligence of the passenger will serve to bar his recovery.[73]

In the second situation an innocent third party, such as the driver of another vehicle, seeks to recover from the passenger of a negligently driven automobile. Here, as in the first situation, the passenger is

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[70]*E.g.*, in a true chauffeur relationship.

[71]Howard v. Zimmerman, 120 Kan. 77, 242 Pac. 131 (1926).

[72]*E.g.*, Collins v. Graves, 17 Cal. App.2d 288, 61 P.2d 1198 (1936); Union Bus Co. v. Smith, 104 Fla. 569, 140 So. 631 (1932); Lindquist v. Thierman, 216 Iowa 170, 248 N.W. 504 (1933); Greenwell's Adm'r v. Burba, 298 Ky. 255, 182 S.W.2d 436 (1944); Beaucage v. Mercer, 206 Mass. 492, 92 N.E. 774 (1910).

[73]Loftin v. Bryan, 63 So.2d 310 (Fla. 1953); Laudenberger v. Easton Transit Co., 261 Pa. 288, 104 Atl. 588 (1918); Restatement, Torts §495 (1934).

personally free from negligence. Upon a finding of joint enterprise the negligence of the driver will be imputed to his passenger so as to result in the latter's liability to the third party.[74]

The third category of cases involves the liability of the driver to his passenger. The principal questions in this situation are: (1) whether the driver may, through the medium of the joint enterprise relationship, impute his own negligence to his passenger, thereby barring the latter's recovery; and (2) whether the plaintiff-passenger may rely upon an admittedly existing joint enterprise relationship to overcome the requirements of guest statutes.

It is generally held that when the action is between the parties to a joint enterprise, as distinguished from those situations in which a third party is involved, the doctrine of imputed negligence has no application.[75] The driver may not, therefore, impute his negligence to a co-enterpriser in order to escape liability to the latter.[76] Although a minority of jurisdictions have inferred that the imputation might be made,[77] current authority fails to support such a proposition.[78] The basis for the distinction is succintly stated 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. To do so would be to permit one guilty of negligence to take refuge behind his own wrong."

The second question is whether, in an action among the parties

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[74]Howard v. Zimmerman, 120 Kan. 77, 242 Pac. 131 (1926); Lucey v. Hope & Sons Mfg. Co., 45 R.I. 103, 120 Atl. 62 (1923); Straffus v. Barclay, 147 Tex. 600, 219 S.W.2d 65 (1949).

[75]Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925); Thompson v. Farrand, 217 Iowa 160, 251 N.W. 44 (1933); O'Brien v. Woldson, 149 Wash. 192, 270 Pac. 304 (1928).

[76]Whiddon v. Malone, 220 Ala. 220, 124 So. 516 (1919); Perry v. Ryback, 302 Pa. 559, 153 Atl. 770 (1931); RESTATEMENT, TORTS §491, comment c (1934).

[77]*E.g.*, Barnett v. Levy, 213 Ill. App. 129 (1919) *semble; see* Fox v. Lavendar, 89 Utah 115, 135, 56 P.2d 1049, 1059 (1936).

[78]Michigan, the last jurisdiction expressly adhering to the minority rule, repudiated it in Bostrom v. Jennings, 326 Mich. 146, 40 N.W.2d 97 (1949).

[79]149 Wash. 192, 194, 270 Pac. 304, 305 (1928).

to a joint enterprise, the doctrine can be invoked as a means of vitiating the requirements of guest statutes.[80] An affirmative answer has been reached in the few jurisdictions in which the problem has arisen.[81] The result is apparently logical. When parties are engaged in a joint enterprise a fortiori there can exist no host-guest relationship.[82] The guest statutes are hence inapplicable, and an occupant can recover from his driver for ordinary negligence.[83] The result of the joint enterprise relationship, therefore, is to impose upon the driver a higher standard of care than would otherwise exist.

CONCLUSION

The well-nigh universal recognition currently accorded the joint enterprise doctrine belies the shaky foundation upon which it rests. Invocation of the rule of imputed negligence appears to be justifiable only when the relationship of the parties is analogous to that of principal and agent or master and servant. Such relationships are said by the courts to rest ultimately upon contract, express or implied. In the case of joint enterprise the requirement is normally met when the common interest of the parties is of a business or financial nature. When, however, the interests of the parties are of a social or pleasure-seeking nature, the contractual relation is not apparent. Persons engaging in ventures of this nature seldom intend to enter into binding covenants. In truth, they rarely have any realization that a legal relationship is being formed. To imply a contract under such circumstances, irrespective of the common purpose of the parties, is to indulge in the grossest of fictions.

Nor do the results achieved by the application of the doctrine justify the judicial resort to fiction. The doctrine is most often used

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[80]The various guest statutes generally provide that in a suit by the guest against his driver gross negligence or willful and wanton misconduct must be established before the guest can recover. See, *e.g.*, FLA. STAT. §320.59 (1953); N.M. STAT. ANN. c. 68, §1001 (Cum. Supp. 1951); TEX. REV. CIV. STAT. ANN. art. 6701b (Vernon Cum. Supp. 1953); VT. REV. STAT. §10,223 (1947); VA. CODE §8-646.1 (Cum. Supp. 1952).

[81]Pence v. Berry, 13 Wash.2d 564, 125 P.2d 645 (1942); O'Brien v. Woldson, 149 Wash. 192, 270 Pac. 304 (1928); Bradley v. Clarke, 118 Conn. 641, 174 Atl. 72 (1934) (by inference).

[82]The parties stand in the relationship of mutual agent and principal. Bostrom v. Jennings, 326 Mich. 146, 40 N.W.2d 97 (1949); Harber v. Graham, 105 N.J.L. 213, 143 Atl. 340 (1928); Straffus v. Barclay, 147 Tex. 600, 219 S.W.2d 65 (1949).

[83]See note 81 *supra*.